

**Neutral Citation no [2004] NIQB 10**

Ref: **WEAC4082**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: **25/02/2004**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

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**LIDL (NORTHERN IRELAND) GmbH**

**(Applicant) Appellant;**

**and**

**WINE INNS LIMITED AND WINEMARK THE WINE  
MERCHANTS LIMITED**

**(Objectors) Respondents.**

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**WEATHERUP J**

**The appeal**

[1] Lidl (Northern Ireland) GmbH ("Lidl") applied under the Licensing (Northern Ireland) Order 1996 for the provisional grant of an off-licence at 261-263 Antrim Road, Glengormley, County Antrim. His Honour Judge Hart QC, Recorder of Belfast, dismissed the application and the applicant appeals against that decision. Objection to the application has been made by Wine Inns Limited and Winemark the Wine Merchants Limited who are the owners of two off-licences known as Winemark at Antrim Road, Glengormley and Carnmoney Road, Glengormley.

[2] Lidl is a long established German based food store retailer with over 5,000 stores and trades in 11 European countries. There are over 300 stores in Great Britain and in 1999 Lidl extended its operations to Northern Ireland where it now operates 26 stores.

[3] Lidl describes itself as a "discount retailer". The concept involves stocking a limited range of products at discounted prices across all product ranges to that Lidl stocks between 800 and 900 convenience lines rather than the 15,000 single and multiple lines stocked by superstore operators.

[4] Of the 26 Lidl stores in Northern Ireland 9 operate off-licences. The Lidl discount retailer approach also applies to the off-licences, which stock approximately 70 lines as opposed to the approximately 400 or 500 lines in other off-licences.

### The legislation

[5] The Licensing (Northern Ireland) Order 1996 provides for the general licensing system in Northern Ireland. Article 5(1) lists the premises in which the sale of intoxicating liquor is authorised by a licence as including –

“(b) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption off the premises.”

Article 7(4) provides that –

“A court shall refuse an application for the grant of a licence unless it is satisfied –

(a) subject to paragraph (5)(a) that the procedure relating to the application set out in part 1 of Schedule 1 has been complied with; and

(b) that the applicant is a fit person to hold a licence; and

(c) that the premises are of the kind specified in the application; and

(d) subject to paragraph 5(b) that the premises are suitable to be licensed for the sale of intoxicating liquor by retail; and

(e) where the premises are of a kind mentioned in Article 5(1)(a) or (b) –

(i) subject to paragraph 6, that the number of licensed premises of the kind specified in the application which are in the vicinity of the premises is, having regard to any licences provisionally granted under Article 9 or any sites approved under Article 10 will be, inadequate; and

(ii) subject to paragraph (7), that a subsisting licence for premises of either such kind, or a subsisting licence in respect of which the note and record mentioned in Article 5(5)(a) have been made, has been surrendered to the Clerk of the Court or will be so surrendered before the licence is issued; and

(iii) where, under any statutory provision, the applicant is or will be entitled to compensation for the loss of goodwill which attached or attaches to the business carried on under the licence proposed to be surrendered, and he has abandoned his claim to so much of that compensation as is equivalent to the value of any of that goodwill which is likely to be attracted to the business proposed to be carried on under the new licence; and

(f) either-

(i) that there is in force planning permission to use the premises as premises of the kind specified in the application for the period during which the licence would be in force; or

(ii) that the premises may be used as such premises for that period without such permission."

[6] No issue arises as to the matters on which the court must be satisfied other than Article 7(4)(e)(i) which requires that the court be satisfied that the number of off-license premises which are in the vicinity of the applicant's premises is inadequate. This requires consideration of two matters namely the extent of the "vicinity" and whether provision is "inadequate".

### Vicinity

[7] In the Recorders Court the parties proceeded on the basis that the vicinity included not only the area to the south and east of Glengormley centre but also extended to the north to Corr's Corner roundabout and to the west to Sandyknowes roundabout. Within that vicinity was the Winemark

off-licence at Antrim Road, the Winemark off-licence at Carnmoney Road, a Tesco off-licence at Ballymoney Road, a Wineflair off-licence at Richmond Gardens and an on/off-licence at the Bellevue Arms, Antrim Road. On this appeal the applicant propounded a new vicinity that was limited to the south and east of Glengormley centre. The new vicinity does not include any of the off-licences referred to above and the only licenced premises is the on/off licence at the Bellvue Arms.

[8] On the applicant's present approach to the vicinity the respondents do not operate premises within the vicinity and therefore do not have standing as objectors. In Hunt v Tohill [1976] NI 73 a preliminary point was taken that the objector was not a person carrying on business in premises in the vicinity of the premises for which the licence was sought. All the evidence was heard and it was found that the premises of the objector were not in the vicinity of the premises of the applicant and accordingly the objector was not entitled to be heard. McGonagle LJ stated that while it must be a matter of discretion in each individual case, the correct procedure was for the preliminary point to be determined before the merits of the case as a whole were considered. In the present case the respondent's premises are outside the applicant's proposed vicinity but the applicant indicated that no preliminary point was taken on standing.

[9] The issue of vicinity has been the subject of much discussion in the authorities. For the purposes of the present case the following propositions are relevant.

(a) Vicinity is not limited to premises immediately surrounding the applicant's premises but is limited to a physical proximity best indicated by the sense of neighbourhood. Magill v Bell [1972] NI 159. Hunt v Tohill [1976] NI 73.75.

(b) The approach to deciding vicinity might be either by defining with more or less precision the area which one determines to be the vicinity or by looking individually at each of the other licensed premises near to the applicant's premises and deciding if each counts as being in the vicinity of the applicant's premises. In Donnelly v Regency Hotels Limited [1985] 144.153B Carswell J preferred the latter approach as having more of the necessary flexibility and elasticity required of the concept of vicinity.

(c) It is important to consider both the physical features of an area and any natural boundaries and also the established dwelling patterns and geographical allegiances of those who live, work and shop in the area. It is necessary to determine the extent of the vicinity separately for every set of proposed premises for which a licence may be sought

by looking outwards from those premises. Donnelly v Regency Hotels Limited [1985] NI 144.153G-154A.

[10] In approximate terms the applicant's vicinity at first instance was a circle with its centre in Glengormley town centre, with the applicant's premises in the southern half and the existing off licences in the northern half. On this appeal the applicant's vicinity is a semicircle south of Glengormley town centre, which excludes the existing off licences. Just south of the shops in the centre of Glengormley, the Hightown Road runs southwest and the Carnmoney Road runs northeast. The applicant has redefined the vicinity of its premises with the diagonal line of the Hightown Road in the southwest and the Carnmoney Road in the northeast representing the northern boundary of the new vicinity. At first instance, evidence of the wider vicinity on behalf of the applicant was given by Eamon Loughrey of Michael Burrows Associates, Planning and Development Consultants, and on the hearing of the appeal the applicant's evidence was given by Michael Burrows of that firm. Mr Comerton QC on behalf of the objectors challenged Mr Burrows as to the timing and circumstances of the altered approach adopted by his firm in relation to the extent of the appropriate vicinity. I accept that the applicant and Mr Burrows were entitled to revisit the issue of vicinity and did so in good faith.

[11] Mr Burrows redefinition of vicinity took into account physical factors and social factors and survey information. There are physical factors to the south and east of the proposed vicinity that define its extent and such minor changes as have been made by the applicant in redrawing of the boundary to the south and east are not significant. The applicant's new vicinity excludes an area to the west along the Hightown Road which includes new housing development and a new link road to the north which it is said would draw away from Glengormley town centre those residents who would have travelled via the Hightown Road. In addition the new vicinity excludes the area to the north of the Hightown Road/Carnmoney Road on the basis that with a hilly area to the north and a division of the area by two major roads, namely Ballyclare Road and Antrim Road, the physical factors could not support the original northern boundary. Allied to these concerns was the contention that the original vicinity was too large both in terms of population and area. The population was about 17,000 with a walking time of 40 to 50 minutes across the vicinity. The proposed new vicinity has a population of 6,000 with a walking time of 20 minutes across the area. Population levels and the size of an area may influence but cannot determine vicinity.

[12] The applicant sought to establish the extent of the new vicinity by reference to social and community factors and survey information. In effect the social and community factors were said to establish a clear community boundary through Glengormley village along the Hightown Road and Carnmoney Road. Support for this clear community boundary was sought in

the first place from the judgment of Coghlin J in D's Application [2002] NIQB 51. The case involved an application by a resident of Glengormley for judicial review of decisions of the Chief Constable and the Department for Regional Development in relation to the erection of an Orange arch at Antrim Road, Glengormley in 2001, the site of which was adjacent to the proposed northern boundary of the new vicinity at Hightown Road/Carnmoney Road. The applicant relied on paragraph 9 of Coghlin J's judgment where he stated –

“The arch is located in the commercial and geographic centre of Glengormley village which is largely devoid of residential properties and it is generally accepted that this is a `neutral area'. It seems that the population to the south of Glengormley village is predominantly Nationalist while that on the north side is overwhelmingly Unionist.”

[13] I do not accept that Coghlin J's remarks establish the clear community boundary along Hightown Road and Carnmoney Road contended for by the applicant. Being an application for judicial review the Court proceeded by way of affidavit rather than the taking of evidence. The nationalist/unionist composition of the area was incidental to the public law issue to be decided in the application for judicial review. In any event the applicant's boundary does not represent a north/south divide but a diagonal division from southwest to northeast.

[14] Data from the Northern Ireland 2001 census are available and show the religious makeup of the residents of each district council ward in Glengormley. The district is approximately 20% Catholic and comprises 7 wards. Within the new vicinity Collinbridge and Glebe wards are predominantly Catholic but there is a significant Protestant population of 23% and 37% respectively. Partially within the new vicinity are Hightown and Glengormley wards with Catholic populations of 26% and 40% respectively although it is not possible to determine the religious breakdown of the parts of the wards within the vicinity. The other wards within the original vicinity of Mallusk, Burnthill and Ballyhenry have Catholic populations of 33%, 19% and 25% respectively. These figures show a significant religious mix within each of the wards and do not indicate sectarian boundaries.

[15] Further the applicant relied on a series of sectarian incidents in the Glengormley area from 1991. These incidents included a number of murders, attacks on Catholic families and attacks on St Bernard's Parish Church, St Mary's on the Hill and a GAA club. This involved 5 incidents within the new vicinity and 9 incidents just outside the new vicinity. That there have been sectarian incidents in Glengormley is undoubtedly the case. Immediately outside the eastern boundary of the new vicinity lies Carnmoney cemetery

which has been the scene of recent sectarian abuse. Again, while these events have undoubtedly occurred, they do not establish the existence of the community boundary that is contended for by the applicant.

[16] The applicant further relied on the presence of flags and street paintings of a Loyalist character to indicate a chill factor in the area to the north of Hightown Road/Carnmoney Road. In particular at Winemark Antrim Road there is a large hoarding with the words "Loyalist Harmin", there are flags beside Winemark Antrim Road and flags, bunting and painted kerbstones beside the Northcott Centre on the Ballyclare Road and a flag beside Winemark Carnmoney Road. To the north of the Hightown Road and behind Winemark Antrim Road lies the Harmin estate, which was described as a Loyalist estate. To the east of the Carnmoney Road lies the Queens estate, which is also described as a Loyalist estate. The applicant's Property Executive for Northern Ireland had lived adjacent to Carnmoney for 22 years and described an interface between the Catholic and Protestant communities in Glengormley. He had been the subject of a sectarian assault at Ballyclare Road/Antrim Road some years previously and described an incident some weeks earlier where a bus carrying supporters of Glasgow Celtic Football Club had been attacked on the Ballyclare Road.

[17] The manager of Winemark Antrim Road premises gave evidence that there were no sectarian problems in or around the off-licence and that the premises engaged mixed staff and enjoyed mixed custom without incident or complaint or police attention. The manager of Winemark Carnmoney Road also gave evidence of mixed staff and custom and the absence of any incidents or complaints or police involvement. I am satisfied that there are sectarian tensions and incidents in the Glengormley area and that there are particular pockets of loyalism in the Harmin estate and the Queens estate that would present a chill factor in those areas to Catholics, but that such chill factor as exists does not create a community boundary across Glengormley in the manner contended for by the applicant.

[18] Further the applicant sought to establish this community boundary through the centre of Glengormley by reliance on survey evidence. Millward Brown Ulster conducted surveys at the applicant's store and in Glengormley town centre in April 2001, September 2002 and March 2003. In each of the 6 surveys the interviewees were asked where they had last purchased alcohol. In each of the years the interviewees in the applicant's store indicated the last purchase of alcohol in Northcott as 37%, 27%, 13%, Antrim Road 10%, 6%, 6% and Carnmoney Road 7%, 5%, 1%. Thus for example in 2003 only 20% of Lidl shoppers last purchased alcohol in the off licences in the original vicinity north of Hightown Road/Carnmoney Road. The applicant relied on the surveys as evidence that there was insufficient linkage between the applicant's premises and the area north of Glengormley centre for them to be regarded as the same neighbourhood. As far as town shoppers were

concerned, in each of the 3 years the last purchases of alcohol in Northcott were 21%, 17%, 21%, Antrim Road 10%, 10%, 12% and Carnmoney Road 3%, 6%, 5%. While there was greater movement to the off-licences in the original vicinity from those surveyed in the town centre it is apparent from both surveys that the majority of respondents last purchased alcohol from premises outside the original vicinity.

[19] The applicant relied on this survey evidence as confirmation that the area to the north of Hightown Road/Carmmoney Road was not in the same vicinity as the applicant's premises. I am unable to accept that the survey establishes the proposed community boundary. The majority of survey respondents were from outside the area of the original vicinity and there was significant diversity of off-licence shopping. The survey evidence did not establish a community boundary as contended for by the applicant.

[20] Having considered all the circumstances I am satisfied that there are sectarian tensions in the Glengormley area and that there are Loyalist pockets in the Harmin estate and the Queens estate but this has not led to segregation between north and south Glengormley or to the establishment of any community boundary along the Hightown Road/Carmmoney Road. I am satisfied that the vicinity of the applicant's premises extends to the north of the Glengormley town centre so as to include Winemark Antrim Road and Tesco on the Ballyclare Road and Winemark Carnmoney Road. However I am satisfied that the Wineflair premises at Richmond Gardens is outside the vicinity of the applicant's premises.

### Adequacy

[21] Article 7(4) of the 1996 Order provides that a court shall refuse an application for the grant of a licence unless it is satisfied that the number of off-licence premises in the vicinity is inadequate. The onus is on the applicant to establish that existing provision is inadequate. The following propositions are relevant to the concept of "inadequacy" in the present case.

(a) In determining whether the number of off-licences in the vicinity is inadequate the court takes into account the number of on-licences in the vicinity. Hinds v McAlinden [1974] NI 166, Hunt v Magill [1974] NI 238.

(b) The court ought to consider the demand created by persons coming from outside the vicinity of the premises as well as those residing in the vicinity. Crazy Prices (Northern Ireland) Limited v RUC [1977] NI 123.

(c) "Inadequate" means in the context of the subsection inadequate to meet the requirements of the public, namely the reasonable



requirements of the public at large and not one particular section of the public. Belfast Cooperative Society Limited v Tohill [1975] 2 NIJB per McDermott J. However Hutton J in Stewarts Supermarkets Limited v Sterritt [1985] NI 159 considered that the primary duty of the court is to apply the test stated in the statute which is whether the number of off-licences in the vicinity of the premises is inadequate and not to apply the test whether the proposed off-licence is reasonably required by the public.

(d) Whether expressed in terms of adequacy or reasonable requirements considerations of choice and price, service and situation are relevant. Belfast Cooperative Society v Tohill.

(e) The demand for an integrated off-sales facility in a supermarket based on the convenience of such a facility is not a factor to be taken into account in determining whether the number of off-licences in the vicinity is inadequate, per Pringle J in Crazy Prices v Wine Inns Limited (Unreported) 4 February 1999.

#### The existing facilities

[22] Winemark Antrim Road is close to the centre of Glengormley. Winemark's average store size is 750 square feet and the Antrim Road premises are considered a small store at 523 square feet. It is located in a row of retail units with limited car parking on the premises by driving off the road in front of the shop. This requires vehicles to reverse back onto the roadway. There are additional parking places at the adjacent public house and on the roadway and in the premises of the centre on the opposite side of the road. The store employs a manager a full-time sales advisor and five part-time sales advisors The off license stocks a wide range of beers and spirits and 400 varieties of wine.

[23] Winemark Carnmoney Road is north of Glengormley centre and is based in a neighbour shopping centre served by an adjoining car park. The store is larger than Winemark's average off licence, being 1041 square feet. There is a step at the entrance that inhibits wheelchair access. The store employs a manager and full-time sales advisor and four part-time sale advisors. There is a wide range of beers and spirits and over 400 varieties of wine.

[24] Tesco's off-licence at Northcott Shopping Centre is north of Glengormley centre and part of the Tesco supermarket. The store size is similar to Winemark Carnmoney and there is extensive car parking at the shopping centre. There is also an extensive range of beers, spirits and wines on sale.

[25] The Bellevue Arms is at the southern boundary of the vicinity and has been a public house since 1971. There is a small off-sales area of 325 square feet and car parking adjacent to the public house. There is a limited range of beers, spirits and wines.

[26] The applicant's supermarket is south of Glengormley centre with 85 adjacent car parking spaces. When the store opened in 1999 it achieved 15,000 customer transactions per month and that figure has now increased to 24,000 customer transactions per month. The proposed off-licence within the store would be 689 square feet.

[27] There are factors that might reduce the appeal of the location of some of the off licence premises. Although I have not found the sectarian trappings in the vicinity to be such as to create a boundary along the Hightown Road and Carnmoney Road I am satisfied that some people could find some premises unattractive for that reason. The hoarding and flags around Winemark Antrim Road dampen the appeal of that location. The flags and kerb painting around the Ballyclare Road entrance to the Northcott shopping centre dampen the appeal of that location. There is an alternative entrance to Northcott Shopping Centre from Antrim Road. The position of the supermarket away from the road and the scale of the premises render the dampening effect at Northcott less than that which applies at Winemark Antrim Road. While there are some flags on Carnmoney Road I am not satisfied that this would create any damping on the appeal of Winemark Carnmoney Road. Nor am I satisfied that the incidents that have occurred in the Glengormley area would have an adverse impact on any of the premises to any greater extent than would apply to the applicant's premises.

[28] The applicant contends that the reasonable requirements of the public in modern times include in-store off-licences serving customers who travel to supermarkets by car and make bulk purchases of weekly shopping. The applicant recognises that it is not appropriate to rely merely on the convenience of an integrated off-sales facility in a supermarket and emphasises the nature of modern requirements that it is said are not met by the existing facilities. Modern trends and developments are matters to be taken into account in assessing the reasonable demands of the public but that does not mean that in-store facilities are a requirement in every vicinity. However, within the vicinity is the integrated off-sales facility at Tesco Northcott, and of a different character, the independent off-sales facility in the neighbourhood shopping centre on Carnmoney Road. The issue concerns the adequacy of the existing facilities and I take into account the developments there have been in recent times in the character of off licence facilities.

### Service and training

[29] On the issue of service and staff training I am satisfied that Winemark staff receive sufficient training to provide appropriate advice to customers. Part-time staff do not receive the training to the same standard as full-time staff and managers and while part-time staff may be unable to deal with individual queries I am satisfied that Winemark staffing arrangements are such that there would be a member of staff available to deal with reasonable enquiries. I have no evidence that the service and staff training at Tesco's off-licence is deficient. In earlier applications for off-licences made by the applicant there have been criticisms of the absence of staff training and the correspondingly limited service that could be provided by staff to customers. I am satisfied that the applicant has now addressed that issue and that any proposed off-licence would provide adequate staff training and service.

### Choice and price

[30] The reasonable requirements of the public extend to considerations of choice and price. There is an extensive range of products available from the premises within the vicinity. Winemark stock 55 varieties of beer, around 70 spirits and over 400 wines. Tesco have an even wider range of products. By contrast the applicant's range of products in their existing off-licences are limited. While figures vary the applicant's company profile listed 6 German beers and 1 cider, 20 spirits, 8 fortified wines and some 40 wines. The applicant applies the discount retailer approach to off-licences and contends that they offer a cheaper product for equal quality within their range of products. Accordingly the applicant contends that the existing provision within the vicinity is inadequate in that it fails to offer competitive prices for products in the lower price range. By way of example the prices of 393 wines stocked at Winemark Carnmoney Road include 13 priced up to £3.89, 89 priced up to £4.09, 115 priced up to £5.09, 70 priced up to £5.99 and 106 priced above £5.99. All but two of the applicant's wines are priced under £4.

### Quality

[31] Evidence was given on behalf of the applicant and the respondent in relation to the quality of wines available from the applicant and the respondents. Sampling of the applicant's wines was undertaken on behalf of the respondent. Wines were purchased from an existing off-licence operated by the applicant and tasting took place in March 2003 and September 2003. The first tasting involved 31 of the applicant's wines being 17 white and 14 red. The second tasting involved 33 of the applicant's wines being 16 white, 15 red and 2 rose. In the tasting the majority of wines were considered faulty as they had become oxidised. The circumstances in which this had occurred were not established. It was not otherwise known to have been a problem with the applicant's wines. I accept the evidence that the majority of the

applicant's wines were faulty at the tastings undertaken on behalf of the respondents but I am not satisfied as to the times at which the wines had become oxidised. I am satisfied that the condition of the wines at the tastings was not representative of the applicant's products.

#### Lower prices

[32] Peter Morris Wilson is an independent wine consultant who gave evidence for the applicant. He sampled products from the applicant's range and compared them with products from the off-licences in the vicinity. He evaluated 22 such products and found them to be of good quality and extremely reasonably priced. He found that the products were priced 29% higher at Tesco and 51% higher at Winemark. If account is taken of rejects, comparable products at Tesco were found to be priced 24% higher and at Winemark 45% higher. The respondents question the reliability of a quality comparison. In any event the respondents evidence on the quality of the applicant's wines is unsatisfactory because the tastings were distorted by the unrepresentative faulty products. The respondents contend that their monthly promotional plan and monthly price reductions over a range of products are not fully reflected in the applicant's comparisons. I am satisfied that the products stocked by the applicant are on average cheaper than products of comparable quality in the other off-licences in the vicinity.

#### Limited range

[33] The make up of the respondents sales in Glengormley may be illustrated by the Winemark Antrim Road premises where beer accounts for 30%, spirits 20%, Wine 20%, cider and ready to drink (alco pops) 11%, cigarettes, crisps and mixers 19%. The respondents stock all the main brand of beer and spirits and the applicant stocks no brand names and no alco pops. Cigarettes, crisps and mixers are not available in the off-licences but in the applicant's main supermarkets. At Winemark Antrim Road the largest group of sales involves beer where the main brand names are in stock and the Winemark beer range comprises 17 standard lagers, 10 ales and stouts and 18 premium beers. The available evidence established that in 2002 Australia overtook France as the country with the largest volume share of the United Kingdom wine market, having secured 22% of the market. Australian wines represent 21% of the respondents stock and 6% of the applicant's stock, which amounts to two labels. I am satisfied that the existing off licences stock a wide range of products that provide reasonable choice to the public. The applicant's products are limited to the lower price range and include a limited number of lines within that price range.

## Surveys

[34] The applicant relies on survey evidence to establish inadequacy in the vicinity. Surveys were carried out at the applicant's store in April 2001, September 2002 and March 2003. A profile of the interviewees was obtained in terms of gender, age range and social class. Questions concerned the interviewee's starting point for the visit to the store; means of travel; journey time; whether the store was their main grocery shop; type of goods bought; whether interviewees purchase or drink alcohol; location of last off licence purchase; whether interviewees would purchase from an off licence in the store; adequacy of applicant's product list; whether there was a need for an off licence in the store; reasons for any such need; reasons for no such need.

[35] Among the figures produced for each years survey were - the numbers interviewed 300, 312, 372; travelled by car 261, 320, 339; undertaking main shopping at the store 142, 161, 220; last bought alcohol from an off-licence in the vicinity 72, 68, 57; need for an off-licence at the applicants store 196, 189, 248; irrelevant reasons for such need included - convenience 119, 128, 122 - one stop shopping 104, 82, 104 - off-licences in other supermarkets 23, 21, 33 - relevant reasons for such need included - competition on price 100, 89, 147 - choice 12, 27, 49 - parking and accessibility 14, 33, 45; product list very /fairly adequate 195, 205, 247.

[36] Surveys were carried out in Glengormley town centre in April 2001, September 2002 and March 2003. Among the figures for the respective years were - interviewees 320, 340, 363; last purchased from one of the three off-licences in the vicinity 140, 86, 96; need for an off-licence at the applicant's store 187, 141, 144; relevant reasons for such need included - price competition 126, 103, 113 - choice 61, 53, 32 - parking and accessibility 5, 14, 16; product list very/fairly satisfactory 142, 194.

[37] A survey was carried out at the applicant's Shore Road, Belfast off-licence in September 2002. Among the figures produced were - interviewees 287; travelled by car 274; last purchase of alcohol at the Shore Road premises 103; satisfaction with the product range 241.

[38] I am satisfied from the exit surveys and the town surveys that there are significant numbers of people who have stated a need for an off-licence at the applicant's premises by reason of competitive prices, choice and parking and accessibility. I do not doubt that those who resort to the applicant's Shore Road off-licence are satisfied with the products available. I do not doubt the applicant's assessment that the addition of an off-licence facility at the applicant's Glengormley premises would be a profitable development. The issue however concerns the adequacy of existing premises and the burden on

the applicant to establish that those premises are inadequate. The surveys do not directly address the adequacy of the existing facilities. The applicant seeks to address the issue indirectly by relying on the stated need for an off-licence at the applicant's premises and by reference to the limited resort to the existing facilities.

[39] Of the stated need in the latest exit survey of 372 respondents and 278 purchasers of alcohol, 147 gave competition on prices as a reason for the need for an off-licence in the Glengormley store and 49 gave increased choice. Respondents were free to choose more than one reason. In the latest town survey of 363 respondents and 249 purchasers of alcohol, 113 gave competition and prices and 32 increased choice as reasons for the need for an off-licence at the applicant's store. What is slightly surprising about the figures is that an operation which presents itself as a discount store with competitive pricing at the forefront of its marketing strategy should produce such a significant number of responses that did not place prices or value for money or competition in prices as the reason for an off-licence. The survey at the applicant's Shore Road premises asked 287 respondents for the aspects of the Lidl off-licence they particularly liked and 197 specified prices and 108 specified value for money. Again it is rather surprising that of "287 customers exiting the Lidl store after having browsed or purchased from the off-sales department", 90 people did not particularly like the prices and 179 did not consider that value for money was an aspect they particularly liked. Nevertheless a significant majority of interviewees did place choice and price as reasons for a new off licence or for favouring the applicant's off licence.

[40] On the limited resort to existing facilities the last exit survey indicated that only 57 respondents had last purchased alcohol from one of the three off-licences in the vicinity and in the last town survey only 96 had purchased from the one of the three off-licences. The exit survey does demonstrate that last purchases were made from more than 60 off-licences and in the case of the town survey from more than 40 locations. When one considers last purchases from those using the applicant's Shore Road off-licence it appears that 103 of the 287 respondents had last purchased from those premises and the remaining two thirds had last purchased from over 60 other locations. This would appear to demonstrate that those respondents to the various surveys were largely mobile members of society whose off-licence needs are addressed at many and varied locations.

[41] I accept the force of the respondents' criticism of the question based on the respondent's "last" purchase from an off-licence in reliance on an American text, Sudman and Bradburn's Asking Questions (Jossey-Bass Publishers, 1982) at page 40. Such a question is said to be generally less precise than that involving a specified time period because even if respondents could remember accurately, the form of question gives equal weight to those who do something often and those who do it rarely. The

comment is made that analysis and conclusions based on such data are likely to be confusing and misleading and in addition the memory task is more difficult for those who do it rarely so that their answers are subject to much greater memory errors.

[42] Most critically the surveys did not address directly the issue of the inadequacy of off-licence facilities in the vicinity. I do not regard the survey data on the need for an off-licence at the applicant's premises as establishing the inadequacy of the existing facilities, although it is a matter to be taken into account in assessing adequacy. I consider the survey data on the limited resort to the existing facilities to be of limited weight as evidence of the inadequacy of the existing facilities.

### Turnover

[43] The respondents produced evidence of significant resort to the Antrim Road Winemark and the Carnmoney Road Winemark by the use of the turnover figures for the two premises from the year ending 31 December 1997 to date. At the Antrim Road Winemark the turnover increased year by year except for the year ending 31 December 2002 but had increased again for the past year to date. For the Carnmoney premises turnover declined in the years ending 31 December 1998 and 31 December 1999 and again for the years 31 December 2001 and 31 December 2002. The figures are comparable between the two stores. The Abbey Centre development in 1997 was said to account for the first decline and the new Abbey development in 2002 for the second decline but there has been increased turnover in the past year. This evidence confirms that the premises concerned enjoy a substantial trade but I consider the evidence does not speak on the issue of the adequacy of the premises.

### Lower prices and limited range

[44] The issue before the court is whether the applicant has established that the existing facilities are inadequate. The applicant contends there is such an inadequacy in that area of the market where the applicant would compete. The totality of the evidence would suggest that the applicant's proposed off licence would provide competition on prices at the lower price range and this, the applicant contends, illustrates the inadequacy of existing facilities. I accept that the applicant offers more competitive prices in the products offered in the lower price range. Set against that position is the availability in the existing off licences of a wider list in the lower price range where they would directly compete with the applicant's proposed off licence, as well as the added list in the higher price range, and this the respondent contends illustrates inadequacy in the applicant's proposed facilities.

[45] Inadequacy ought not to be determined by reference to one aspect only of the existing facilities but by a consideration of the facilities as a whole. This

requires consideration of all aspects, including service and training and choice and price, taken as a package. If a proposed off licence could demonstrate that the existing facilities were deficient in terms of say, service, compared to the proposed service, that would not establish the inadequacy of the existing facilities. It would be necessary to consider the whole package of existing facilities and for the proposed off licence to establish the inadequacy of that package as a whole. Within the area of the market targeted by the applicant regard must be had not only to the advantages of lower prices but to the disadvantages of a limited product range. In addition adequacy of existing facilities is not to be determined by focussing on a particular section of the market that is being targeted but rather on the adequacy of provision as a whole. This is an overall assessment that is a matter of degree.

[46] In the present case I am not satisfied that the existing facilities are inadequate. I am not satisfied that the higher prices in the existing premises or the cheaper prices in the applicant's range of products, render inadequate the total package offered by the existing facilities when the totality of the facilities are considered. In off licence provision in this jurisdiction the public are entitled to expect competitive prices over a reasonably extensive list of products, which caters for the reasonable breadth of the market. That entitlement is not met by competitive prices over a limited list of products in a reduced area of the market. In this regard the discount retailer approach is not well placed to advance in the off licence trade in this jurisdiction where the legislation is designed to restrict the outlets for the sale of intoxicating liquor off the premises. In F A Wellworth & Co v Philip Russell [1997] NI 172 Girvan J considered the restrictions on competition arising from the licensing legislation did not breach European Community Law or amount to unlawful restraints of trade at common law.

[47] The respondent contended that the applicant's proposed premises would not amount to an "off licence" for the purposes of the legislation because of the limited range of products. The Licensing (Conditions for Mixed Trading) Regulations (Northern Ireland) 1997 came into operation on 25 July 1997. The Regulations prescribe conditions upon which an off-licence may be carried on from part of business premises. Conditions for mixed trading are set out to regulate an integral off-licence within a general store. The applicant contends that regard has not been had to this modern form of demand for off-licence premises or to the effect of the 1997 Regulations by those who would criticise the adequacy of the applicant's off-licence facility by reason of the limited range of products. A licence holder must be engaged in the business of selling intoxicating liquor and this does imply certain minimum trading requirements to amount to such a business. I would not accept that the proposed facilities are incapable of amounting to an "off licence" for the purposes of the legislation. However, where there are objections from existing premises to the grant of a licence to the applicant, the limited range of



products does render it difficult for the applicant to establish that its competitive pricing exposes the existing facilities as inadequate.

[48] As the applicant has not established on the balance of probabilities that the number of off license premises which are in the vicinity of the applicant's premises is inadequate, as required by Article 7(4)(e) of the Licensing (Northern Ireland) Order 1996, the Court must refuse the application.