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(subject to editorial corrections)\**

**Delivered: 24/10/2016**

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

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**QUEEN'S BENCH DIVISION**

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**ON APPEAL FROM THE DECISION OF THE COUNTY COURT FOR THE  
DIVISION OF CRAIGAVON IN THE MATTER OF AN APPLICATION FOR  
THE PROVISIONAL GRANT OF AN OFF LICENCE PURSUANT TO  
ARTICLE 5(1)(B) OF THE LICENSING (NORTHERN IRELAND) ORDER 1996**

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**BETWEEN:**

**WINEMARK (THE WINE MERCHANTS LIMITED)**

**Respondent/Applicant**

**and**

**JAMES AIDAN HAGAN, MARY BRIDGET HAGAN**

**and**

**THE TUNNEL BAR LIMITED**

**Appellants/Objectors**

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**KEEGAN J**

**Introduction**

[1] This is an appeal from a decision of His Honour Judge Kinney, who granted the respondent/applicant's application for an Intoxicating Liquor Licence pursuant to Article 5(1)(b) of the Licensing (Northern Ireland) Order 1996 ("the 1996 Order") for the sale of intoxicating liquor by retail for consumption off the premises. This provisional grant is appealed by two sets of appellants/objectors namely Mr James Aidan Hagan and Mrs Mary Bridget Hagan who represented premises called the Parkside Inn and Mr Sean Hamill who represented The Tunnel Bar Limited. These are commercial objectors and it was agreed that their premises lie within the vicinity of the application.

[2] Mr McCollum QC and Mr John O'Hare BL appeared on behalf the appellants/objectors. Mr Beattie QC and Mr O'Connor BL appeared on behalf of the respondent/applicant. I am grateful to all counsel for their oral and written submissions.

### **Statutory Proofs**

[3] No objection was taken to the statutory proofs in this case. Requisite notice was served, posted and published. There was no police objection and a valid licence from the respondent's premises in Banbridge was to be surrendered. It was accepted that the premises were suitable for the sale of alcoholic liquor. The applicant company was a suitable person under the Order. It was accepted that the premises could establish the relevant planning permission.

[4] There was an issue originally raised at the County Court as to whether or not the application would offend Article 6(1)(b) of the 1996 Order. This reads as follows:

“6(1) The premises in which the sale of intoxicating liquor shall not be authorised by a licence shall be -

(b) premises in which the principal business carried on is the business of a garage or premises which form part of such premises...

6(2) In this Article-

'garage' in relation to a business means-

(a) the retailing of petrol or derv or

(b) the sale or maintenance of motor vehicles.”

[5] This matter was not pursued on appeal and as such the learned judge's decision was not challenged namely that the proposed premises for the licence are separately owned by the applicant. There is no business connection between the applicant and the owners of the supermarket and the fuel pumps. The unit is a distinct unit with separate facilities, entrance and car parking spaces. Also, it was accepted that the fuel sales comprise 15% of transactions and whilst accounting for a significant percentage of turnover the profit margins are very low.

### **The Issues on Appeal**

[6] The applicant is a large independent wine merchant in Northern Ireland. The company has 78 stores in major locations throughout the province with over 500 staff. The company serves millions of customers per year and has a reputation for

providing a wide range of products including beers and an extensive variety of wine of over 400 in number.

[7] The first named objectors represent the Parkside Inn. It has an off-sales facility operating in the area since the mid-1970s. It was granted an off-sales licence in 1984. The Parkside Inn is situated at 137 Garvaghy Road, 1.6 kilometres from the proposed site. The second objector, the Tunnel Inn has a dedicated off-sales created in 2005 which is a stand-alone facility. That premises is located at 66-70 Obins Street and is 1.4 kilometres from the proposed site.

[8] The proposed site is at 24 Dungannon Road, Portadown. This is a site on the edge of Portadown town, approximately 2.4 kilometres away from the centre. There is a long established petrol filling station at the site. There is also a Spar supermarket with hot food, sandwich counter and a seating area for customers. The proposed off-licence area would be 884 square feet. The petrol side offers 6 petrol/diesel pumps, gas fill, two separate filling points for kerosene, red and white diesel, car wash and tyre service, national lottery, ATM, solid fuel and post box. There are trolley facilities for customers and 26 marked car parking spaces. The opening hours are Monday-Saturday 6am-11pm and Sunday 7am-11pm.

[9] Given that there was no issue taken with the statutory proofs this case was really concerned with Article 7(4)(e)(i) of the 1996 Order. The core argument revolved around the issue of adequacy under the legislation. The relevant statutory provision reads as follows:

“7(1) An application for the grant of a licence shall be made to a county court.

...

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

...

(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, and 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.”

## **Vicinity**

[10] It is significant that the issue of vicinity was not in dispute. This flows from a preliminary ruling of Her Honour Judge McReynolds in a related case of B&C Litter Ltd v Hamill trading as the Tunnel Bar and Hagan trading as the Parkside Inn. Evidence was heard in that case over a period in 2010 and 2011 including expert evidence in relation to the issue of vicinity. The expert witness on behalf of the applicant company, Mr Ian Foster, gave evidence suggesting the appropriate vicinity for the purposes of the application was one extending on the east to Corcraun Road, on the south to the line between Drumcree College and its playing fields, with the north west boundary intersecting the Ballyoran/Garvaghy housing estate to the east of Ballyoran Primary School at the point where the two differing house finishes (brick/rendered) meet. Mr Foster’s vicinity consisted of just over 1,000 housing units.

[11] Ms Diana Thompson gave expert evidence on behalf of the objector at that hearing. She argued that the vicinity comprised a greater area. Ms Thompson’s interpretation of vicinity encapsulated everything north west of the Corcraun Road and north east of the Northway dipping to a V at the intersection of the two roads in front of the Denny bacon factory. Her vicinity consisted of some 3,000 housing units. The judge in this case decided in favour of the objector’s vicinity. Of course the argument made by the applicant in that case would have resulted in the objectors falling outside the vicinity proposed by them.

[12] The learned judge in her assessment stated as follows:

“In that analysis, I take account of geography, the sense of community, the sharing of services, shops, of infrastructure and the topography. The topography was ultimately conceded as amounting to a relatively gentle hill, most properly described by Mr McKeever as a drumlin. In geographical terms the distance is around a mile. The sense of community may well be weakening as the town sprawls further into what was previously green belt. Mr Hamill could identify only one regular on-sales customer from Selshion but there is ample evidence of movement throughout the wider area. Having considered all of the evidence, I am satisfied to the requisite standard that the Tunnel Inn premises meet the *Donnelly v Regency* Test of being within neighbourhood viz a viz the subject premises and so I find they fall within the vicinity.

In respect of the Parkside Inn, an equally rigorous scrutiny of the evidence is appropriate and proportionate. Taking account of the evidence that this off-licence is positioned at a comparable distance to that of the Tunnel Inn and of the use of services, perceived shared identity, sense of community, movements of inhabitants, level of population, lack of topographical restriction of access, I am satisfied that these premises also fall within the vicinity of the subject premises.”

[13] This decision was not appealed and the vicinity was uncontroversial in the current case. The agreed vicinity was broadly that which was argued by the objectors in the Litter case. It is summarised at paragraph 2.2 of the expert report of Dr Murray filed on behalf of the applicant as follows:

- (i) to the north by the edge of the urban footprint that extends from the Moy Road, across Dungannon Road and Drumcree Road to Ashgrove Road;
- (ii) to the east by the edge of the urban footprint that extends along Ashgrove Road, Churchill Park and the rear of Ulster Carpet Mills to the River Bann;
- (iii) to the west by the outer edge of the urban footprint itself Shane Hall and Drumcree High School and the alignment of Charles Street and Corcraun Road as far as the railway line;
- (iv) to the south by the line of the railway that extends from Obins Street along the rear of Park Road and Water Road.

This sector of Portadown is denoted by signifiers of territoriality and is associated with a nationalist identity which is culturally separate from other areas of the town.

### **The decision of the County Court Judge**

[14] In determining this case the learned judge referred to the decision of Gillen J in the case of Philip Russell Ltd v DW Retail [2013] NIQB 56. Having set out principles from that case and summarised the evidence, the judge articulated his conclusions at paragraph 14 of his judgment in the following terms:

“Taking into account the general principles set out by Mr Justice Gillen I am satisfied on the evidence of the following matters:

- Demand in this vicinity is generated both from inside and outside. It is clear there is considerable traffic

coming down the Dungannon Road. Mr Bradley's survey indicated 7,489 vehicles in a 12 hour period. A large proportion of the vehicular traffic will travel along the Dungannon Road and down Obins Road and Corcraun Road. Less than 20% of the traffic using the roundabout also used the Garvaghy Road. There was a much higher incidence of road usage further down the Garvaghy Road - indicating a more localised, repetitive use availing of local facilities. The nature of the Garvaghy Road and the Corcraun Road were different and the patterns of movement different. The total traffic movements measured at the roundabout over a 12 hour period was 14,397 vehicles.

- I accept Mr Stacey's evidence that the vast majority of those accessing the retail premises at the applicant site and at Laverys are car borne. Bearing in mind the statistical information regarding the incidence of car owners in the vicinity and the number of individuals in the vicinity it is an inescapable conclusion that much of this traffic comes from outside the vicinity.
- It would seem that arriving at the roundabout from the Dungannon Road those travelling in the vicinity make a choice to travel either down the Garvaghy Road or down Obins Road. Similarly, those choosing either route going countrywards will eventually converge at that roundabout. Looking then at the habits and movement of people and the character of the area I consider that there are a substantial number of persons who are not residing in the vicinity but who resort to the vicinity for any of a variety of reasons. Those who frequent the vicinity but not the Garvaghy Road, taking into account the topography of the area and the character of the area mean that for a large number members of the public there is no attraction to the location of the Parkside Inn. Evidence has been given relating to the Tunnel Inn, one major disadvantage is lack of car parking facilities at this venue to facilitate a large number of car users."

[15] The judge goes on at paragraph 15 to state as follows:

"Whilst convenience is not the statutory test convenience is a facet of inadequacy. I consider that the level of trade

at the applicant's site together with the nature of the trade, being largely car based leads to the conclusion that there is demand generated from both inside and outside the vicinity which is not being met by the current provision of off-licenced premises. There is a considerable transient population evidenced by the volume of road traffic at the roundabout and on the Dungannon Road. I have considered the transactional evidence relating to the various outlets. I consider it unlikely that those currently using the applicant's site or Laverys are utilising the Parkside Inn as most of the traffic is not using the Garvaghy Road. I consider that the Garvaghy Road and the Parkside Inn mainly cater for a localised and more pedestrian population. The transient population of the vicinity is not adequately served by the existing provision."

### **The Evidence**

[16] On behalf of the applicant I heard evidence from Mr Maneely a Chartered Architect. I also heard from Mr Bradley in relation to an analysis of road movement, Dr Murray, Planning Consultant and Mr Stacey representing Winemark. On behalf of the objectors I heard evidence from an expert planning consultant, Ms Diana Thompson. I heard evidence from Mr Sean Hamill, Mr Aidan Hagan and Mrs Mary Hagan on behalf of the other objectors and Mr Ronan David McVeigh in relation to survey evidence. In addition to the oral evidence I received very well structured and reasoned arguments in writing from both the applicant and the objectors.

[17] I also asked the parties at the outset whether or not they would consider sharing the expert evidence prior to hearing. I am grateful to both senior counsel for the practical approach they took in this matter. Counsel agreed to share expert reports and an expert meeting took place prior to the hearing. This approach accords with the sentiments expressed by Gillen J in the matter of an application by Sainsbury's [2012] NIQB 45 and it led to a more efficient use of court time.

[18] The expert meeting took place on 20 April 2016 and an agreed note of the meeting sets out the following under a number of headings:

#### **"The Proposed Site**

- (i) Most customers attending the supermarket premises would seem to be vehicle orientated.
- (ii) The supermarket will have repeat customers.

- (iii) Customers to the supermarket will be passing trade and also from within the vicinity.

### **The Vicinity**

- (iv) The broad boundaries are agreed as set out in the County Court judgment and any departures by the parties are de minimis in terms of their significance.
- (v) The vicinity includes the Parkside Off Licence and the Tunnel Bar Off-sales.

### **The Demand**

- (vi) We have come at population estimates for the vicinity using different methodologies.
- (vii) Dr Murray's vicinity is 3,888 adults, the addition of Corcrair Gardens and Mews brings the adult population to 3,993.
- (viii) Ms Thompson's vicinity population 3,853 which includes Corcrair Gardens and Mews.
- (ix) The differences between the estimates are de minimis.

### **The Existing Facilities**

- (x) The distances between off licence facilities to the proposed site is 0.9 miles in both cases.
- (xi) The Parkside Inn Off Licence and the Spar supermarket site have off-street car parking.
- (xii) The Tunnel Bar Off-Sales has on-street parking.
- (xiii) There are a range of superstores in the wider Portadown, Craigavon and Lurgan area."

[19] This agreed minute was a useful template upon which the evidence progressed. As will be apparent from the above there was a large measure of agreement between the parties in relation to core issues. The difference between the two experts in terms of the population is not material to the determination of this case.



[20] The first witness on behalf of the applicant was Mr Maneely, a Chartered Architect of 25 years standing. Mr Maneely confirmed that he had prepared the plans for the application. He stated that the application involved off-sales with no internal connection with the supermarket. Mr Maneely confirmed the planning approval and building control in relation to this. He indicated that the premises were currently being used as a hot food bar but if the application were successful the hot food bench would be removed, a stud wall would be erected and there would be a new entrance and exit made. The off-sales would have exclusive toilet facilities, power and telephone and its own water. Mr Maneely stated that building control should be straightforward and that the issue of fire doors would not be problematic. Mr Maneely estimated that there would be 2-3 weeks work and then another 2 weeks for the fit-out. Mr Maneely confirmed in cross-examination that two previous applications for mixed trading had not been progressed. Other than that Mr Maneely's evidence was largely unchallenged.

[21] The second witness on behalf of the applicant was a Mr Bradley who gave evidence in relation to traffic patterns. He referred to a survey in September 2014 and one in September 2015 which produced broadly similar results. Table 5 from his report sets this out as follows:

	<b>September 2014 Results</b>	<b>September 2015 Results</b>
Total Number of vehicles approaching roundabout	14,397	14,543
2-way flow on A4 Dungannon Road	7,489	7,467
2-way flow on Garvaghy Road	6,580	6,848
2-way flow on A4 Corcrain Road	8,885	8,897
2-way flow on Moy Road	5,840	5,874
Turning left into Garvaghy Road from Dungannon Road	1,577	1,609
Turning Right from Garvaghy Road into Dungannon Road	1,182	1,255
Volume of traffic moving between the Dungannon Road and Garvaghy Road as a percentage of the two-way traffic flow on Dungannon Road	37%	38%
Volume of traffic moving between the Dungannon Road and Garvaghy Road as a percentage of the total traffic movements approaching the Roundabout	19%	20%

[22] Mr Bradley stated that the Dungannon Road is part of the trunk road network carrying an average daily flow of 6,840. He contrasted his data with Roads Service reports which were made available at the lower court. He pointed out that 'given the variety of residential, commercial and service facilities along Garvaghy Road, the Roads Service survey location in the middle of those facilities would include a

significant level of multiple counting of the same vehicles'. Mr Bradley also undertook some limited observations of cars exiting the car park adjacent to Judge's shop and found that only 1 out of 11 reached the Corcraun/Garvagh Road roundabout. This is a very small survey which cannot be definitive. I do not intend to recite his evidence at any further length because his reports were largely agreed by both sides. These are lengthy reports setting out statistical data. I will summarise the central tenets of his evidence as follows:

- (i) There is a significant difference between how the Garvagh Road and Corcraun Roads are used, the Garvagh Road facilitating a considerable proportion of local trips between local residential properties and local services and trips between various services and facilities along Garvagh Road.
- (ii) Garvagh road is not used predominately as a through route. The relative proportions of vehicular traffic turning on and off Garvagh Road, together with the significant pedestrian activity in the area has led to the installation of traffic signals and pedestrian crossings that in turn would further discourage through traffic from travelling along the Garvagh Road.
- (iii) There is a significant disconnect between the traffic observed at the Corcraun Road/Garvagh Road Roundabout and the traffic observed further along the Garvagh Road towards the town centre (i.e. a significant proportion of the traffic observed on the middle of the Garvagh Road does not reach the Roundabout at the other end of Garvagh Road and to a lesser extent, vice versa).
- (iv) A significant proportion of the traffic observed on the middle of Garvagh Road is travelling between local residences and local services and/or between various local services.

The real issue in this case was how both planning experts interpreted the report and I will come to that when dealing with their evidence.

[23] Dr Michael R Murray, a Chartered Town Planner, then gave evidence on behalf of the applicant. He referred to his report of January 2016 and stated that the applicant's application for an off licence is contiguous with premises operating as a Spar supermarket. He confirmed in oral evidence that the application was for premises beside but not part of the Spar supermarket. Dr Murray stated that the vicinity for the premises comprises a well-defined sector of Portadown in physical and cultural terms. He opined that there is a marked geographical diversity within the vicinity that distinguishes the area around the application site from other parts of the vicinity. He said there is a consistency of provision for grocery and petrol filling stations across the vicinity that relates to these different areas.

[24] Dr Murray stated that the Parkside Inn Off Licence fits well with the local clustering of three grocery shops on Garvagh Road and the Tunnel Bar Off-sales is

integral to the Obins Street corridor. Dr Murray also referred to the fact that there was complimentary petrol station provision on the Garvaghy Road and on Obins Street. He referred to the housing at Obins Street as terraced and he described the Garvaghy Road as a long open road with the lower part of the road having mainly rendered fronted houses moving to brick housing at the upper end and semi-detached and detached at the church roundabout. The housing that surrounds the SPAR supermarket is predominately private sector new build.

[25] Dr Murray said that the population of the vicinity has been growing over the period 2004-2014. He said that there are nearly 4,000 people within the vicinity and immediate countryside and there is new housing surrounding the application site. He said that the applicant premises are very well positioned to serve passing trade and command a very high level of locality. He said there is no off licence or off-sales provision within the area neighbouring the application site. Dr Murray made various criticisms of the survey evidence provided by Ms Thompson in particular that the questioning was not appropriate and the surveys contained reference to off licence premises well outside the vicinity. As such Dr Murray said that the surveys had an inherent bias.

[26] Mr Michael Stacey then gave evidence on behalf of the applicant. He stated that he was the commercial manager of Winemark and had been since 2005. He stated that he had begun in the retail trade in 1983. This witness described the Winemark company structure which started in Northern Ireland in 1997. Winemark and Russells merged in 2005 and whilst there are operations under each heading they are the same company. Mr Stacey referred to the fact that in making an application the company would look at the existing trade at the site, it would take into account traffic and movement and it would look at the vicinity before making an application. Mr Stacey referred to the fact that the Spar at Litters attracts 90% of its customers by car he said it had 4,000 individual lines. Mr Stacey referred to trading patterns at the store. He referred to the fact that from EPOS there were approximately 10,000 transactions per week at the Litters Spar to include footfall. He also made comment about the premises of the two objectors. In relation to the Parkside Off-sales he raised no substantial issue with the range of product. He said that the product was well presented and broadly similar to what Winemark had on offer.

[27] In relation to the Tunnel Bar, Mr Stacey indicated that there was some difficulty in accessing the bar off-sales due to a buzzer system. He said that observations were made by an employee who noted 120 wines in total, 60 spirits, 50 ciders and 15 other types of alcohol. In describing the Tunnel Bar, Mr Stacey did make a point that this appeared to be a very local and tailored facility and that there was nothing external to attract passers-by by way of promotional material. As regards the Parkside Inn Mr Stacey accepted that there was advertising on display and a TV screen on the window. However, he stated that nothing was displayed on it when he observed it although the premises were neat and tidy and the products were priced.

[28] This witness was cross-examined about the fact that there had been two previous applications on this site by B&C Litters which were withdrawn. When pressed by Mr McCollum, Mr Stacey had to accept that in both objector's premises there was a fairly good degree of choice. However, he did say that there was less range in the Tunnel Bar in relation to the products on display.

[29] The objectors then made their case. The first witness was Ms Diana Thompson, a Chartered Town Planner, who stated that she had been giving evidence for the past 10 years in licensing cases. She adopted her comprehensive report of January 2016. Ms Thompson then made some comment in relation to Mr Bradley's figures. Mr Beattie challenged Ms Thompson on her interpretation of Mr Bradley's evidence when she said that 45% of all traffic at the roundabout was interacting with the Garvaghy Road. Ms Thompson accepted that there was a double count in her assessment of the traffic evidence at the Garvaghy Road roundabout. I was not convinced by Ms Thompson's interpretation of the traffic figures.

[30] Ms Thompson then referred to surveys which she organised following the County Court judgment. Ms Thompson explained her methodology in the following terms. Firstly, she designed a householder's survey and secondly a survey at the Litters Spar. Ms Thompson made the case that both of these surveys indicated that the local residents felt that there were adequate off licence facilities in the area. Mr Beattie cross-examined Ms Thompson at length about the flaws that he said were prevalent in the surveys. In particular he referred to the skewed nature of the surveys in terms of their wording and the fact that various off licence supermarket facilities outside the vicinity were referred to.

[31] The objectors also gave evidence. Mr Sean Hamill said that he was the owner of the Tunnel Bar. He said that this had started out as public house only but an off licence was then obtained. He indicated that his son and daughter were going to take over the business and that they might extend. Mr Hamill very frankly referred to his turnover stating that bar to off sales was now two thirds/one third. He described the premises and in particular he stated that customers come from various areas including Ballyoran and Garvaghy Road. He also said that customers come from up around where the applicant's site is. He said there was passing trade as he was near a train station. He said that parking was alright apart from when the farmers came to town. Mr Hamill explained the buzzer system, he referred to pricing, he said that his son and daughter had undertaken courses in wine appreciation and they took responsibility for bringing in wines. Mr Hamill gave evidence about the connection between the various areas of Portadown. He stated that a lot of people's parents were from the Garvaghy Road/Obins Street part of town but moved to the newer houses near the applicant's site.

[32] Mr McVeigh gave uncontroversial evidence in terms of the process of taking surveys at the Parkside Inn.

[33] Mr Aidan Hagan was then called and he stated that his family owned the Parkside Inn and have done for 36 years. He had been involved in the daily running of the business for 10 years. He said there were 1,700 transactions a week. The adjacent Costcutters had a transaction figure of 12,000. Mr Hagan said that the range of products followed the same pattern as Winemark and he referred to the advertising and promotions that the premises had. He said there was no problem with queues or overcrowding, he referred to the fact that the premises was well stocked, well laid out and spacious and that there was a digital media screen which picked up advertisements for products. Mr Hagan confirmed that on two previous applications made by Mr Litter they objected. He made reference to the fact that he is aware that people do go to the supermarkets to buy off sales. He indicated that his customers came from a good spread of the population in this vicinity and that there is a good connection from the various areas. Mr Beattie initially challenged this witness in relation to a potential ulterior motive in applying for an off-licence licence. The witness became animated at the suggestion that there was an ulterior motive and ultimately he was proven right and Mr Beattie withdrew that line of questioning.

[34] Mrs Hagan also gave evidence as an objector. She reiterated the point that as the area has changed, people living near the application site still come to her premises to do shopping and similarly people from her area go up to the application site. Mrs Hagan had some local knowledge of that area as she was on the board of St John the Baptist Roman Catholic Church which is near the application site.

[35] Overall I found that the Hagans and Mr Hamill were truthful and sincere witnesses. However, I was also impressed by the evidence of Mr Stacey and his exposition of the case for an off licence. I was assisted by the expert evidence however in my view this type of case can become over burdened by statistical data and interpretations of such information. I have to stand back from all of that to determine the case within the legislative test. The burden is upon the applicant to prove that the off licence facilities in this vicinity are inadequate.

### **Submissions of the Parties**

[36] Mr Beattie QC on behalf of the applicant submitted impressive legal arguments to me. In summary, he submitted that the test of inadequacy under the statute can be refined into three key questions namely, what is the vicinity of the proposed premises, what is the demand within that vicinity and is that demand being met. Mr Beattie submitted that the factors that influenced this consideration do vary from case to case. He relied on the fact that demand may come from persons residing in the vicinity and from persons who resorted to the vicinity. Mr Beattie submitted that this was established in the licensing jurisprudence. He said that an attempt to cast the relevance of premises outside the vicinity was unsafe. He submitted that the evidence goes beyond convenience in this case. Mr Beattie referred to fact that vicinity was not in dispute. However, his core submission was

that the area around the application site and the objector's premises was different as illustrated by the connecting roads and road traffic.

[37] Mr Beattie disputed Ms Thompson's analysis of the road data and he took particular objection to the surveys upon which he said I should not rely. Mr Beattie placed emphasis on Sean Hamill's evidence that his children may expand his premises and he said that this was proof of inadequacy. Mr Beattie submitted that the existence of off licence facilities located at the lower end of the vicinity was correct. He went on to say that there is nothing at the upper end of the vicinity. This is in and around the application site. Mr Beattie said that inadequacy was clear from the large numbers stopping off to take advantage of grocery at the site of the Spar and hence inadequacy for the purposes of this application was established.

[38] Mr McCollum QC on behalf of the objectors made the case that the applicant's case to the court is legally and fundamentally flawed in three significant respects. Firstly, he said there is no legal authority to support the proposition that one considers demand relative to 'vicinity within a vicinity.' Mr McCollum submitted that this was what Dr Murray's report was effectively saying and he submitted that this was a mis-direction. Secondly, Mr McCollum said that inadequacy is not established by proving that large numbers of vehicles travel through a vicinity. Inadequacy is assessed by reference to the demand for licenced goods from people who live in the vicinity and people who resort to the vicinity from outside. Traffic passing through a vicinity does not on its own create demand. Thirdly, Mr McCollum said that demand/inadequacy cannot be established without identifying a catchment area and the nature of the potential customers coming from the catchment area. He said that the exception was where there is an inadequacy of facilities for the residents of a vicinity which was not the position in this case. Mr McCollum said the court had no way of assessing demand or inadequacy without information about the catchment area and the needs of the people who resort to the vicinity for work, shopping and recreation.

[39] In his argument Mr McCollum accepted that the vicinity was agreed between the experts and he made no further submissions in relation to it. Mr McCollum also made submissions about the issue of demand and adequacy. He said that this case bore great similarity to a case decided by Gillen J known as the Portaferry case. In summary Mr McCollum stated that applicant had failed to provide inadequacy in relation to the existing facilities in the vicinity because there was no evidence that there is an unmet demand either from the residents of the vicinity or those resorting to the vicinity from outside. In relation to the surveys Mr McCollum pointed out that the surveys were criticised however there was no onus on the objector to prove issues of inadequacy. The onus is on the applicant. Mr McCollum defended the surveys and said that there was not a challenge to the actual results as being in any way unusual or surprising. In conclusion Mr McCollum essentially said that the applicant's case was based on convenience alone and that that was not enough to establish inadequacy.

## Legal Context

[40] I was referred to many legal authorities in this area some of which are of limited application. I do consider that these cases are fact sensitive and I was not particularly impressed by attempts by both parties to relate previous decisions to the facts of this case. However, the authorities do set out some principles which are obviously important. The jurisprudence is well trammelled and I do not intend to repeat all of it at length. Save to say I have considered the various authorities in detail.

[41] In particular I have been assisted by the analysis of Morgan J in a case of Lidl v Winemark [2008] NIQB 146. This case sets out the history of adequacy as a legal test at paragraphs 29-38 of the judgment. Gillen J in the case of Philip Russell Ltd v DW Retail [2013] NIQB 56 also sets out general principles in this area and I gratefully borrow from his exposition at paragraph 25 under the following headings:

- The restrictive effect of the concept of inadequacy is a key component in licensing legislation. The legal curb is thus the obligation placed on the applicant to prove inadequacy.
- Demand can be generated from both inside and outside the vicinity. I can take into account the demand not only from persons residing in the vicinity but also from persons who work there, who resort to the vicinity for the purpose of recreation or shopping etc.
- The statutory test is inadequacy of numbers, not suitability or convenience. The fact that the public would find the presence of an off licence in a particular location convenient is not proof of such inadequacy.
- That is not to say that convenience conceptually cannot be a facet of adequacy. Thus in the context of accessibility it is relevant. If other premises in the vicinity are difficult to reach because of distance or the topography, car parking around them is poor, the character of the area where they are found is not conducive to all members of the public, or they are well off the beaten track etc a court can take these into account. In particular, in the context of this case, distance between off licences is fact sensitive. There is no maximum or minimum set distance which will determine whether or not there is an inadequate

supply in the vicinity. The nature of the accessibility together with the general topography and character of the area will all influence the impact that distance between premises will have on any case. In short, convenience in terms of accessibility and location are proper considerations and may have a particular bearing where members of the public are attracted into a particular location from outside the vicinity.

- Similarly, issues of appearance, range of goods, pricing, competition, service and choice are all proper components of the judicial probe of the concept of inadequacy in each case.
- The need for a proper competitive supply and range, choice and service does not, of course, mean that every village must have more than one off licence. To so conclude would drive a coach and horses through the concept of inadequacy. As in this case, each application must be judged on its merits.
- The advantages of integration in a mixed trading shop cannot by itself be a factor pointing towards the grant of an application for an integrated off-sales facility.
- A significant level of trade and large numbers of customers at particular premises do not necessarily lead to a conclusion that inadequacy of off licence provision has been proven. The court must go back to the legislation and recognise that the test is inadequacy in the vicinity. Demand for an off licence cannot be created simply by illustrating that large numbers of people come to a particular store. If this was to be the case, virtually every large filling station or supermarket with evidence of increasing sales could successfully apply for an off licence.”

[42] I bear these principles in mind when determining this case.

### **Consideration**

[43] I begin by examining the policy underlying this legislation. In doing so I must accept the restrictive effect of the legislation. However, I bear in mind the dicta of Girvan J in FA Wellworth v Philip Russell and others [1997] NI 175 where he said:



“The policy of the legislation appears to be to prevent the opening of excessive numbers of off licence premises which are in excess of the requirements of the market but there is nothing in the legislation to suggest that the legislature intended to otherwise distort the natural development of the market. However, the issue of inadequacy must be proven by the applicant.”

[44] I was referred to a number of legal authorities in this area. As I have said, there is a danger in using the outcome in a particular case as supportive evidence. These cases are all fact sensitive. I do not accept that any other case replicates the facts of this case. In particular, I cannot see how an exact analogy can be drawn between the circumstances of off licence provision in Portaferry and Portadown given the very different characteristics between the two locations.

[45] The legislative test is adequacy within the vicinity. In this case the vicinity is agreed. Adequacy is relative to that. The word adequate in ordinary English usage means sufficient or enough. The determination of that involves a contextual analysis in each particular case. The determination of adequacy is essentially a question of fact.

[46] In this case the objectors’ premises are about one mile from the application site and the area around the objector’s premises has particular features in terms of housing, services, and road networks. The application site is situated close to the edge of town at the boundary between town and country.

[47] There are two off licences within the agreed vicinity which comprises nearly 4,000 people. The number of off licences is not conclusive however. The issue of adequacy has many strands as Gillen J observed in the Philip Russell case recited above. The other concepts which have been developed in the jurisprudence assist a court in determining that central question. However, I do not consider that there is a rigid checklist.

[48] I then turn to the question of demand within the vicinity. There is no objective touchstone for this. The court must reach a conclusion on this issue having considered the evidence of the facts of each particular case. The issue of demand in this case has been presented by use of the traffic information and supporting evidence including footfall evidence. The traffic information is significant because it shows that there is a difference in terms of the traffic coming to the application site because of the road which passes it and the traffic going to the objector site which I will describe as more local traffic. This case also focussed on demand coming from outside the vicinity. I accept that demand may come from persons residing in the vicinity of the premises but also from persons who work there who resort to the premises for the purpose of recreation or shopping. In this regard I bear in mind the dicta of Lowry LCJ in Crazy Prices v RUC [1977] NI 123.

[49] It is stated that the application site has 90% usage by traffic whereas the objectors' sites are in more pedestrianised areas. The traffic survey in 2015 also shows only 20% (19% in the 2014 survey) of those using the roundabout to the north moved between the Dungannon Road and Garvagh Road. This type of evidence is material in establishing a case. There is a question whether or not traffic is passing traffic or it is actually traffic which is coming to this area of the application site for the purpose of using the facilities in that area. The fact that there is a substantial amount of passing traffic does not of itself establish inadequacy. The road in question is intended to be a fast and free flowing corridor which includes a route to the motorway. I take this into account. However, the Spar trade is predominately car bound. It is reasonable to conclude that this includes local and passing traffic. I do not consider that a catchment area has to be rigidly defined as it is also reasonable to conclude that people will come to that road from a number of different areas.

[50] In relation to adequacy, evidence was given as to the footfall in the various locations. I was referred to the evidence of footfall in relation to the Litter store as against other stores in the vicinity. The Litters SPAR has a high number of transactions per week and a high number of lines of goods. I accept that the pattern of a convenience store does not automatically reflect the pattern of an off licence. There is the issue of opening hours and who uses the convenience store. However, it is reasonable to conclude that some of the footfall would avail of off licence facilities at the application site. I therefore accept that there is demand in this vicinity on the basis of a combination of the traffic and footfall evidence. The question is then whether the demand is being adequately met within the vicinity.

[51] In looking at this issue the objectors have raised some survey evidence in support of their case. It seems to me that various criticisms have correctly been made of these surveys. Firstly, I consider that the surveys were so small in number that it would be hard to reach definitive conclusions from them. In my view the wording of the surveys was also problematic. The surveys did not inform interviewees that the survey was about an off licence application beside the Spar on the Dungannon Road. A further problem in relation to the data which has come from the surveys relates to the question of whether or not there were adequate off licence facilities in the vicinity. This question was rooted in a consideration and a choice of many different off licence facilities including not just the objectors' premises but supermarket stores outside of the facility. In my mind this approach skews the information and I do not consider that it can be seen as reliable at all. So the surveys have not helped me in my consideration.

[52] I do take into account Mr Beattie's point about the expansion which may be taken forth in the Tunnel Bar by the children of the family however I do not consider that in itself is sufficient to establish a case of inadequacy. It seems to me that the children of the family want to improve the premises and that is their prerogative. I am not convinced that this definitively establishes the issue of inadequacy for the applicants as it is simply related to the improvement of particular premises.

[53] I note that car parking seemed to be raised as a point in the lower court however it was not a substantial argument in the appeal. There is on-site parking at the Parkside Inn and street parking at the Tunnel Bar. There was an argument made about the pricing range and choice at the objectors' premises. I viewed some photographs in relation to these matters. I did not think this was a particularly strong argument in relation to the Parkside Inn and Mr Stacey accepted the range there was as good as that in Winemark. There was a difference in the evidence in relation to the Tunnel Bar and it was suggested that it did not have as good a range and that there might be difficulties with access due to a buzzer system on the door. I accept these points. In truth it seems to me that the Tunnel Bar has a greater emphasis upon on sales. There did not seem to be such an extensive pricing of goods in the Tunnel Bar as in the Parkside Inn. I also consider that the Tunnel Bar does have less of a range. The overriding impression I got was that both the objectors are distinctly localised off sale facilities.

[54] I understand that the objectors say that people from around the application site are second generation and they keep a connection with the objectors' area. It seems to me that this is probably true in terms of an emotional attachment but I do not consider that that translates into habitual usage of the facilities of that area. In my view the objectors' premises are remote for the people living near the application site.

[55] This leads to a consideration of accessibility and location which are factors to be taken into account in this case. The potency of any such arguments must depend upon the facts of each case. These considerations have traditionally been dealt with under the heading of convenience. Morgan J in the Lidl case refers to this issue at paragraph 38 wherein he says that:

“In my view these cases tend to suggest that issues of accessibility such as car parking, the road system and the character of the area will be material to the question as to whether the existing facilities are inadequate for the reasonable requirements of the public and indeed in some cases may decisively answer the question as to whether the number of off licence premises in the vicinity are inadequate.”

[56] In this case the road system clearly distinguishes the application site from the objectors' sites. The character of the areas is different. Taking into account the description of services throughout the vicinity it seems to me that there the existing facilities are not adequate for the reasonable requirements of the public throughout the vicinity. This extends beyond mere convenience. It does not involve the creation of a 'vicinity within a vicinity' rather it is viewing the vicinity as a whole. In my view it would be absurd if the court did not take such a holistic view.

[57] I understand that the objectors are sincere in their opposition to this application. However, I must consider the application within the statutory framework. The burden is upon the applicant to prove inadequacy. I bear in mind that a population of nearly 4,000 is served by two localised off licences. There was a convincing argument made to me in relation to passing trade from outside the vicinity. The objectors' facilities are about a mile from the application site. I note a strong trade at the application site Spar shop and a significant amount of passing traffic which is not destined for the area where the objectors' premises are. The most compelling factor for me in this case is the character of the area. The objectors' sites are in an area which attracts much more of a pedestrian and local trade. The application site is in a hinterland of Portadown near new housing and beside a busy supermarket/garage facility. On the facts of this case, I consider that there is an unmet need for off licence facilities in this vicinity. I consider that this relates to local demand and a strong element of demand from a transient population. The applicant has satisfied the burden of proving inadequacy in this vicinity.

### **Conclusion**

[58] Accordingly, I have come to the conclusion that this appeal must be dismissed.