

**IN THE HIGH COURT OF NIUE
(CIVIL DIVISION)**

APPLICATION NO: CV08/2020

IN THE MATTER OF Sections 12 and 24, Business License Act
1997

BETWEEN ROSS BRIAN ANDREW AND MICHELLE
FRANCIS HIGHT
Applicants

AND THE LICENSOR OF BUSINESS,
GOVERNMENT OF NIUE
Respondent

Judgment: 5 November 2020 (NZ)

JUDGMENT OF CHIEF JUSTICE C T COXHEAD

Introduction

[1] This is an appeal against a decision by the Licensor of Business declining to grant a license to the applicants for the purposes of establishing a business to operate bicycle tours, bicycle hire and bicycle repair to the general tourist market.

[2] The applicants submit that the decision declining the business license was not undertaken correctly, and they appeal the decision.

Background

[3] The applicants own and operate an accommodation business called Namukulu Cottages. On 9 March 2020, one of the applicants, Mr Andrew, filed an application for a business license on the prescribed form, with the business activities listed as “Bike hire, bike repairs, guiding, including E bikes, tours”.

[4] Following the application, a meeting was held at the Falefono on 14 May 2020 between the applicants and a representative from the Niue Chamber of Commerce, where it was agreed that the Chamber of Commerce would conduct a market analysis of bicycle and electric bicycle (“e-bike”) rentals.

[5] The Licensor of Business then responded to the application for a business license by letter of 18 May 2020, declining to grant the business license as follows:

Re: Application for an E-bike Business License

This letter serves to inform you that your application for a business license to operate an electronic bike (E-bike) hire to the general public was decline[d].

The former Licensor made this decision in pursuant to Section 12(1)(c)(i) of the Business License Act 1997. The decision was made after careful consideration and taking into account the objections received by the Licensor in accordance with Section 9(3) of the Act.

The Licensor was reasonably of the opinion on the following:

- Namukulu Cottage advertised its e-bike rental activity without prior approval by the Licensor
- The Namukulu Cottage is first and foremost is an accommodation business. The application for an E-bike hire has minimal direct relations to the nature of the Namukulu Cottage main business activity.

- The application of the E-bike hire to the public will have a harmful impact on the E-bike and bike hire businesses currently operated on the island, which is also a fairly new venture.
- The hiring of E-bikes and bikes should reserve for small local investors only.

The licensor was also reasonably of the opinion that Namukulu Cottage E-bikes should be hired out exclusively to Namukulu Cottage's customers only as value-added to its accommodation services.

[6] The letter is then signed by the Licensor of Business. For completeness, it should be noted that bicycle hire and bicycle tours are among the approved services currently available to Namukulu Cottages' guests.

[7] On or about 19 May 2020, the applicants emailed the Licensor and received a reply dated 20 May 2020.

[8] Between 20 May 2020 and 4 June 2020, the applicants wrote to the Licensor requesting a reconsideration of the decision declining to grant the business license. This was on the basis that a market analysis had not been undertaken when it should have, and that all areas of the application had not been addressed by the Licensor, as the focus of the refusal was on e-bikes. The applicants noted that, at the same time as their application had been declined, a license had been granted to someone else for an e-bike business and the applicants expressed the view that this was unfair.

[9] On 4 June 2020, the Licensor wrote in response and advised that it was not a requirement that a market analysis be undertaken before making a decision but acknowledged that a market analysis was being carried out by the Chamber of Commerce. While willing to review this data, the Licensor noted however that the data may not alter the decision. Further, the Licensor advised that the other e-bike business license application was granted on its own merits. The request to reconsider the decision was declined.

[10] Meanwhile on 28 May 2020, the applicants had also written to the Court appealing the decision on the basis that it was not reached correctly under s 12(1)(c) of the Business Licence Act 1997. The grounds for appeal were given as, in summary:

- (a) A market analysis was not conducted prior to making the decision;

- (b) One of the objections to their licence was from someone who has objected to previous business license requests by the applicants, in a pattern of objections described by the applicants as “vexatious”; and
- (c) The basis for the objections is incorrectly founded as the applicants seek to offer to the market non-motorised mountain bike-style e-bikes, while an objector offers motorised e-bike hire which it is argued is aimed at a different target market.

Submissions of the respondent

[11] On 11 June 2020, I directed that the respondent be served with the appeal and make submissions regarding disclosure of objections within 10 working days. The applicants would then have right of reply.

[12] On 17 June 2020, the respondent filed submissions which state in summary:

- (a) The decision was completed correctly under s 12(1)(c) of the Business Licence Act 1997;
- (b) Conducting market analysis before the Licensor makes a decision is not mandatory;
- (c) The obligations of disclosure have been met as the applicants have been provided with written reasons for the decision; and
- (d) It would not be in the public interest to disclose the objections.

Reply submissions of the applicants

[13] The applicants then made submissions in reply, annexing documents in support of their appeal. Their submissions state, in summary:

- (a) The applicants have initiated a market analysis for the bicycle tourism market in Niue, which has been completed by the Niue Chamber of Commerce;

- (b) The Licensor did not carry out a market analysis prior to making the decision, and acknowledges this to be the case in their letter of 4 June 2020;
- (c) The applicants were briefly permitted to view two of the objection letters but were not provided with copies;
- (d) The applicants have hired bicycles to their guests since 2014 and conducted bicycle tours for guests since 2018 and now wish to expand these services to the general tourist market, with the inclusion of non-motorised e-bikes;
- (e) There are currently six e-bikes in Niue available for hire, which, they assert, belong to an objector. The applicants have a further two, of a different type (non-motorised with off-road tyres);
- (f) Although the applicants are not from Niue, they state that they have made Niue their home and would consider themselves “small local investors”; and
- (g) A license was granted to Niue Blue at the same time for bike and e-bike hire.

[14] The supporting documents annexed to the submissions were:

- (a) A letter and excerpt from a report by Geoff Gabites for Tourism Niue regarding the status of, and potential for, cycle tourism in Niue. The report concluded that six e-bikes was not enough and that more availability would encourage sector growth. Electric bikes with mountain bike sized wheels were recommended for Niue’s roads;
- (b) A letter of support from Mathew Brettell, general manager of Scenic Matavai Resort, who would like tours that his guests can join, and supports the use of sustainable transport;
- (c) A letter regarding bike specifications from Delve DMD (supplier of e-bikes);
- (d) A character reference from Keith Vial, supporting the venture and noting the applicants’ community contributions in terms of involvement and sponsorship;

- (e) Niue Cycle Tourism report by Penny Spoelder of TRC Tourism, recommending an increase in cycling infrastructure and opportunities to cycle in Niue to provide more visitor experiences with minimal environmental impact; and
- (f) A report from the Niue Chamber of Commerce entitled *Market Analysis: Bicycle Rental Market on Niue*, which concludes that there are fewer than 20 bicycles and 10 e-bikes in Niue available for hire. The report notes that the borders are currently closed due to COVID-19 and that the current market is limited to the domestic market. Domestic demand is canvassed and identified as local use for cycle events and use by high school students as part of the physical education curriculum. Once the borders are re-opened, the international tourist market will become available again.

The Law

[15] Section 12 of the Business License Act 1997 (“the Act”) provides that:

12 Refusal of licence

- (1) The Licensor may refuse to grant, or renew a licence if he is reasonably of the opinion –
 - (a) The applicant is not a fit, or proper person to hold such a licence; or
 - (b) The issue of the licence would cause harm, or annoyance to the residents of any locality on Niue; or
 - (c) The issue of the licence would result in a serious imbalance in the particular market the applicant intends to operate having regard to–
 - (i) objections made under section 9(3);
 - (ii) any market analysis made, or required by the Licensor.
- (2) Upon refusal of a licence, the Licensor shall forthwith, by written notice inform the applicant of such refusal together with the grounds for refusal.
- (3) The Licensor shall deliver the written notice of refusal to the applicant.

[16] The process to appeal a decision by the Licensor is set out in s 24 of the Act:

24 Appeals to the Court

- (1) Any applicant for a licence may appeal to the High Court against the failure, or refusal of the Licensor to issue the licence sought by the applicant.
- (2) Any applicant for the renewal of a licence may appeal to the Court against a decision of the Licensor not to renew the licence.
- (3) Any applicant for a licence to whom a licence has been issued may appeal to the Court against any condition imposed by the Licensor in respect of the licence.
- (4) Where the Licensor has issued any licence (not being a renewal of a licence) any person aggrieved at the issue of the licence may appeal to the Court.

[17] The timeframe to appeal is set out in s 25:

25 Time for making appeals

- (1) Any such appeal under section 23 shall, subject to subsection (2) not be made after the expiration of 2 weeks after the effective date of the act, ruling, refusal, notice or decision which is the subject matter of the appeal.
- (2) Notwithstanding subsection (1), the Court may if it thinks it just and equitable to do so extend, or enlarge by not more than 2 months and either unconditionally, or subject to such conditions which, it may think fit to impose, the period of time within which any such appeal shall be made.

[18] On receiving an appeal within the timeframe set out in s 25, the Court has the following powers under s 26:

26 Powers of the Court

- (1) On the hearing of any appeal brought in accordance with sections 24 and 23, the Court may, by order –
 - (a) Dismiss the appeal; or
 - (b) Allow the appeal; or
 - (c) Dismiss the appeal in part and allow it in part; or,
 - (d) Modify, vary, or amend the act, ruling, refusal, notice, or decision which is the subject matter of the appeal in such manner and to such an extent which the Court thinks just.
- (2) Any such appeal shall be final.

Discussion

[19] Having considered the submissions of the applicants and the respondent, there are two issues of concern which arise. These are:

- (a) The fact the applicant has not been able to consider information put before the Licensor of Business; and
- (b) The lack of a market analysis report.

Information put before the Licensor of Business

[20] The first issue is that the applicants, while being aware that objections had been raised, were only permitted to view two of the objection letters, but were not provided with copies.

[21] The Licensor has submitted that it was not in the public interest to disclose the objections. However, why it was not in the public interest to disclose the objections is not clarified or explained.

[22] In my view the applicants should have been provided the details of the objections, so that they could adequately respond to those objections. This would then have allowed the Licensor the opportunity to consider the information in full.

[23] It is one of the basic tenants of natural justice that parties should know the information against them that is being put before a decision maker, unless there are very clear reasons why that information cannot be disclosed. This is necessary to ensure a transparent and fair process of decision making.

[24] This was not the case in this situation. In my view, it appears that this procedure has not occurred.

The lack of a market analysis report

[25] The Licensor has provided reasons for declining the application, including that “[t]he application of the E-bike hire to the public will have a harmful impact on the E-bike and bike hire businesses currently operated on the island, which is also a fairly new venture.”

[26] However, it is unclear how this conclusion could have been reached, when no market analysis of bike and e-bike rentals had been undertaken or provided to the Licensor. If a report was provided to the Licensor prior to the decision, or if other information was relied on, this was not made available to the applicant or the Court.

[27] It is therefore difficult to accept that the Licensor could properly conclude the proposed licence would have a harmful impact on the existing e-bike and bike hire businesses operations, without some analysis of those existing operations. A proper foundation was required for making such a statement and declining to grant the licence. In my view, some independent market analysis needed to be completed and weighed against the submissions of both the applicants and objectors, so that the Licensor had all the relevant information before coming to a decision on the proposed licence.

Decision

[28] In my view, the decision that has been made is unsound and the appeal is granted.

[29] This Court does have before it further information supporting the applicants’ application. This includes a report from the Niue Chambers of Commerce entitled *Market Analysis: Bicycle Rental Market on Niue*. Unfortunately, the Court does not have all the information, as the objectors’ letters have not been provided. If I did have all the information, I would be in a better position to make a final decision.

[30] Therefore, the proper way in which to deal with this application is to refer it back to the Licensor of Business for reconsideration.

[31] The objectors' letters should be provided to the applicants for comment and response. All new supporting documents that have been filed with this Court should also be provided to the Licensor of Business.

[32] The appeal is granted, and the matter is to be reheard before the Licensor of Business, Government of Niue, with full information being put before the Licensor.

Pronounced at 1.00pm in Rotorua, Aotearoa/New Zealand on this 5th day of November 2020.

C T Coxhead
CHIEF JUSTICE