

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Desi Brothers Pty Ltd
(represented by Mr Ian Curlewis and Mr Alec Weston of Lavan Legal)

Interveners: Commissioner of Police
(represented by Ms Stephanie Teoh of State Solicitor's Office)

Director of Liquor Licensing

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Ms Helen Cogan (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Delegate Director of Liquor Licensing to refuse an application for the grant of a small bar licence

Premises: Café Royal, Unit 1, 19 Junction Boulevard, Cockburn Central

Date of hearing: 26 July 2012

Date of Determination: 26 September 2012

Determination: The application is refused

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health and Others [2008] WASC 224*
- *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*
- *Busswater Pty Ltd v Mr KV House and Mrs L V Verhoog (LC 17/2010)*
- *Element WA Pty Ltd v Director of Liquor Licensing (LC 32/2010)*
- *Executive Director of Public Health v Lily Creek International Pty Ltd and Others [2000] WASCA 258;*
- *Re: Minster for Resources; Ex Parte Cazaly Iron Pty Ltd [2007] WACA 175*
- *McKinnon v Secretary, Dept. of Treasury [2005] FCAFC 142*

Background

- 1 On 17 October 2012, pursuant to sections 41 and 62 of the *Liquor Control Act 1988* ("the Act") the applicant lodged an application with the Department of Racing, Gaming and Liquor for the conditional grant of a small bar licence for the premises to be known as Cafe Royal, situated at Unit 1, 19 Junction Boulevard, Cockburn Central.
- 2 On 3 January 2012, a notice of intervention was lodged by the delegate of the Commissioner of Police ("the Police"). The notice of intervention was accompanied by submissions outlining the grounds of intervention.
- 3 On 6 February 2012, the applicant lodged a submission in response to the intervention by the Police.
- 4 On or about 6 March 2012, a "letter of support" for the application was lodged by Mr Giacomo and Ms Samantha Bevacqua.
- 5 During March 2012, an undated "letter of support" for the application was lodged by Ms Despina Johnstone.
- 6 On or about 19 March 2012, a "letter of support" for the application was lodged by Hon. Fran Logan MLA, member for Cockburn.
- 7 By decision A220245 dated 19 April 2012, the Delegate Director of Liquor Licensing ("the Director") refused the application, the matter having been determined on the papers.
- 8 On 18 May 2012, pursuant to section 25 of the Act, the applicant lodged an application with the Liquor Commission ("the Commission") for review of the Director's decision.
- 9 On 1 June 2012, the State Solicitor's Office advised that it was instructed to represent the Police in relation to the Police intervention and would rely on the representations made at first instance before the Director.
- 10 On 30 May 2012, the Director lodged a notice of intervention in relation to the review application.
- 11 On 26 July 2012, the Commission held a hearing of the application.
- 12 At the hearing before the Commission a number of preliminary matters were raised and with the consent of the parties it was determined:
 - (1) that a "letter of support" addressed to the City of Cockburn by Ms Susie Oates, dated 28 July 2011, should be considered as having been before the Director when he made his decision;
 - (2) that a letter dated 15 May 2012 from the applicant to the Director, referred to in the course of the hearing, would not be considered by the Commission as it was not before the Director when he was making his decision;

- (3) that a letter dated 7 May 2012 from Mr Joe Francis MLA, member for Jandakot, sent to the Chairperson of the Commission on 12 July 2012, would not be considered as it was not before the Director when he made his decision.

Submissions on behalf of the applicant

- 13 The applicant's written submissions included:
- (1) a public interest assessment ("PIA"), together with a management plan, code of conduct and a house management policy;
 - (2) a section 40 certificate from the City of Cockburn (local planning authority);
 - (3) acoustic reports in relation to the premises, prepared by Vipac Engineers and Scientists Ltd;
 - (4) letters of support from:
 - Mr Giacomo and Ms Samantha Bavacqua;
 - Ms Despina Johnstone (undated);
 - Hon. Fran Logan MLA.
- 14 The applicant seeks to open a small bar to be known as Café Royal, at Unit 1, 19 Junction Boulevard, Cockburn Central.
- 15 The PIA and its accompanying materials record a thorough and detailed application by the applicant complying with the provisions of the Director's PIA Policy and the PIA for a small bar licence is not required to be as detailed as a PIA for other types of licence, for example a hotel or liquor store licence.
- 16 Independent, objective evidence was lodged in support of the application, namely the letters referred to in paragraph 13 and the letter from Susie Oates referred to in paragraph 12, which purported to be on behalf of all the strata owners at 19 Junction Boulevard, Cockburn Central.
- 17 The letter from the Hon. Fran Logan MLA is not from a business person purporting to speak on behalf of consumers, but rather from an elected representative of the people residing within the locality of the premises and as support for the application in a personal capacity and as such should be taken into account and given due weight.
- 18 The letter from Susie Oates should be give weight, as it was written on behalf of the strata owners at 19 Junction Boulevard, Cockburn Central. There are approximately 20 residential units on the floors above the premises and the letter evidences unanimous support for the application from residents at the complex, which could amount to some 30 or 40 people living in the units. The premises has always been marketed as being a licensed venue and residents purchased their properties with the expectation that they would be able to access licensed premises within their building.
- 19 An adequate level of evidence from a representative sample of the public was provided to meet the public interest standard for an unopposed application of this nature.

- 20 The intervention by the Police is not an objection to the grant of the application and the intervention provided no evidence or any representations as to how the proposed premises would contribute to harm or ill health.
- 21 Even if the Commission is satisfied that the intervention by the Police satisfies section 69(6)(c)(ii) (which is denied) it should be attributed minimal weight. This is because the applicant accepted and still accepts all the proposed conditions suggested by the Police to be imposed on the licence, with the exception of the licensed crowd controller condition.
- 22 The applicant was granted a licence for a restaurant next door to the premises, on the basis of very similar papers lodged with this application, but in respect of which no intervention was lodged by the Police.
- 23 The application before the Director was in effect unopposed and uncontroversial and the Director found that:
- “.... I am satisfied that that grant of the application will not negatively impact on the community”*
- 24 The applicant's documents establish a compelling, logical and responsible case for the Commission to conclude that the grant of a small bar licence for the premises would be convenient and beneficial to the public in the locality.
- 25 The applicant's documents collectively satisfy the requirements under section 38 of the Act and that the grant of a small bar licence would thus be in the public interest.

Submission on behalf of the Commissioner of Police

- 26 If the application were to be granted, public disorder or disturbance would be likely to result.
- 27 There are concerns regarding the proposed manner of trade and the suitability of the licence applied for as the applicant's PIA states that:

“in any event, the operation of Café Royal will mean substantial high quality food will at all times be available to patrons when they consume liquor”

Thus there are concerns as to the applicant's actual intentions, namely:

- whether the focus of the premises is on high quality food to be served at all times or
- if the food is not served at all times, will the premises become a “tavern style” venue ?

These are questions not addressed by the applicant and as such cannot be assessed.

- 28 The applicant has sought a licence consistent with the Director's Policy in relation to “Small Bar Licences” and to ensure the premises are managed in accordance with the “small bar philosophy” the Police seek the following trading conditions in relation to the

service of food being the primary focus of the venue at all times the venue is open:

GENERAL CONDITIONS

- *all music is restricted to low level, non-amplified and ambient music only;*
- *food is to be available during trading hours;*
- *no promotions, advertising or incentives that encourage discounted liquor, or that encourage excessive consumption;*
- *the sale of packaged liquor is prohibited;*
- *liquor sold, supplied or consumed at these premises must only be supplied in unsealed containers;*
- *'shots', lay-backs, jelly shots, test tubes and any other shooter style drinks are prohibited;*
- *ready to drink (premix) beverages are prohibited;*
- *non standard measures prohibited (i.e. no more than 30 ml of spirits is permitted in any vessel);*
- *the sale of liquor mixed with energy drinks is prohibited;*
- *lockout – persons (other than an “authorized person”) are prohibited from entering or re-entering (passouts) the licensed premises after 10.00pm.*

DRESS STANDARDS

- *Smart and neat dress standards at all times.*
- *The licensee must refuse entry to the licensed area to any person wearing a jacket or other clothing bearing patches or insignia of the following Outlaw Motorcycle Gangs:*
 1. *Coffin Cheaters*
 2. *Club Deroes*
 3. *Gods Garbage*
 4. *Gypsy Jokers*
 5. *Outlaws*
 6. *Finks*
 7. *Rebels*
 8. *Comancheros*

9. *Hell's Angels*

10. *Rock Machine*

CLOSED CIRCUIT TELEVISION

- *System is to be in place and operational at all times covering the internal access /egress of each entrance and exit of the premises, including sufficient coverage for the bar service area;*
- *The system must comply with the Director's policy relating to CCTV and the footage must be made available at the time, on request by an authorized officer.*

CROWD CONTROLLERS

- *Crowd controllers licensed under the Security and Related Activities (Control) Act 1996 are to be employed from 8.00pm until the close of trading prescribed on the licence, on Friday and Saturday nights.*

Submissions on behalf of the Director of Liquor Licensing

- 29 The Director intervened in this matter to advise that a restaurant licence has been granted in respect of the same premises the subject of this review. Therefore, should the Commission determine to grant the application for the small bar licence, it must be subject to the applicant surrendering the restaurant licence.
- 30 The Commission has consistently and carefully enunciated its position, confirming that it is not sufficient for an applicant to merely express opinions and make assertions about the perceived benefits of an application. This applicant must submit an appropriate level of evidence to satisfy the Commission that there is a real and demonstrable consumer requirement to justify the granting of a licence.
- 31 The applicant submitted no analysis of requirements of consumers for liquor and related services to be provided by the proposed small bar in relation to tourism, residents of the apartments or of residents in the locality;
- 32 There are weaknesses in relation to the 3 "letters of support":
 - (1) the letter from the Hon. Fran Logan MLA is of the kind considered in *Busswater Pty Ltd [LC 17/2010]*;
 - (2) the letter from Ms Despina Johnstone does not include her address;
 - (3) the letter from Mr Giacomo and Ms Samantha Bevacqua does not include an address (although they state they are Aubin Grove residents – Aubin Grove is a suburb south of Atwell, south east of the proposed premises) and their statement that they are "*looking forward to dining out in a relaxing atmosphere with like minded people as pubs are not suitable for us to dine in as a family*" is not specific to a small bar licence and could equally be in support of a restaurant licence.

Responsive submissions in response to the applicant's submissions dated 20 February 2012

- 33 The public interest test applied by the licensing authority includes an assessment of the possibility of alcohol related harm of the category of licence being applied for and this is reflected in the processes adopted by the licensing authority in the determination of applications.
- 34 In relation to the letter from Ms Susie Oates (see paragraph 12), if the letter was in regard to obtaining the City of Cockburn approval the Commission's comments in *Woolworths Ltd [LC 34/2011]* are relevant;

“.... The letters of support submitted to the local government authority were quite general in nature, although it is noted that one or two persons did refer to the convenience of using the shopping centre and the proposed liquor store. The Commission finds that the limited nature of this evidence significantly diminishes the weight that should be accorded to it”.

The weight to be accorded to the letter from Ms Susie Oates is diminished as:

- (i) it is tendered for a purpose other than as probative evidence to support the applicant's case that in granting the application it will be catering for the requirements of consumers for liquor and related services;
 - (ii) the strata owners approval of the proposed small bar with respect of the potential impact on the amenity of the apartment complex does not equate to the owners having a requirement for liquor that translates into the owners patronizing a small bar;
 - (iii) it does not necessarily follow that the owners are or will be residents of the apartment complex and it is not unreasonable to expect some of the apartments will be occupied by tenants;
 - (iv) it is an over simplification to argue in a 'reverse manner' the circumstances of the 'Kapinkoff' case (*Kapinkoff Nominees v Director of Liquor Licensing, LC 18/2009*). The onus remains on the applicant to satisfy the licensing authority that the grant of the application is in the public interest, even though residents may have purchased property with an expectation regarding access to licensed premises and furthermore there was no objective evidence before the licensing authority when making the decision to refuse the application, regarding the marketing of apartments.
- 35 In relation to the letter from the Hon. Fran Logan MLA, while Mr Logan supports the granting of the application, he does not state that in granting the application it will be catering for his requirements for liquor and related services and therefore he will patronize a small bar.
- 36 As to the applicant's assertion that the evidence of Mr Logan as a Member of Parliament and not as a business person should be accorded "due credence and weight", this assertion is merely an opinion that is not corroborated with objective evidence.

- 37 It is a matter for the Commission to decide what weight to give to the competing interest(s) and other relevant considerations.
- 38 Not objecting to an application for a liquor licence cannot be construed as evidence to establish that, in granting the application for a small bar licence, it would be catering for the requirements of consumers for liquor and related services.

Determination

- 39 A review under section 25 requires the Commission to undertake a full review of the material before the Director and make its own decision on the basis of those materials and is not constrained by a finding of error on the part of the Director. (*refer Hancock-v-Executive Director of Public Health [2008] WASC 224*).
- 40 Pursuant to section 38(2) of the Act, an applicant for the grant of a small bar licence must satisfy the licensing authority that granting the application is in the public interest.

The Commission in its determination in respect of an application by *Woolworths Ltd* (LC 34/2011) stated that:

*"Determining whether the grant of an application is "in the public interest" requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:*

"The reference to "the public interest" appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression."

The expression "in the public interest" directs attention to that conclusion on determination which best serves the advancement of the interest or welfare of the public, society or the nation and its nature and its content will depend on each particular set of circumstances."

Whilst this application was for a liquor store licence the principles are equally applicable to this applicant.

- 41 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd v Director of Liquor Licensing* (1992) 7 WAR 241).

- 42 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community (refer *Supreme Court proceedings in Executive Director of Public Health v Lily Creek International Pty Ltd and Others [2000] WASC 258; and section 19 of the Interpretation Act 1984 when read in conjunction with the Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).
- 43 It is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of its application. Such opinions and assertions must be supported by an appropriate level of evidence (refer *Busswater Pty Ltd v Mr KV House and Mrs LV Verhoog (LC 17/2010) at [36]*).
- 44 The applicant seeks to establish a small bar as defined in section 41(1aa) of the Act. Currently the premises enjoys a restaurant licence but seeks the ability to serve alcohol without a meal in order to enhance the premises appeal and improve the viability of its operation.
- 45 Whilst the small bar style of operation might be relatively low risk compared with a number of other styles of licence as argued by the applicant, the Commission accepts the first intervener's argument that it is a higher risk category than a restaurant. It follows that a small bar licence would not necessarily be granted in the circumstances and on the evidence for which a restaurant licence has been granted.
- 46 The evidence to support the grant of the small bar licence sought was sketchy. The letters of support were very general and very often did not make it clear what style of licensed premises they were indeed supporting and may well have been supporting a restaurant style of operation.
- 47 The Commission thus does not accept the applicant's submission that the letter from Suzie Oates is objective evidence and as has been observed earlier (para 34) it is unspecific as to what type of licensed premises, the strata owners, on whose behalf Ms Oates writes, support.
- 48 The Commission agrees with the applicant that the letter from Mr Fran Logan MLA Member for Cockburn should be given some weight and whilst it is acknowledged that Mr Logan, as a local member, is expressing a view on behalf of his constituency, the letter does not include any concrete supporting evidence.
- 49 The applicant argues that the evidence submitted to support the application was adequate however the applicant was advised of the need for objective evidence by letter from the Department of Racing, Gaming and Liquor in December 2011 and was again orally advised of this requirement by the Department in March 2012.

The applicant elected not to respond to this advice but to rely on what the Commission earlier found (para 46 and 47) to be lacking.

- 50 The observation of the Commission in *Element WA Pty Ltd (LC32/2010)* at para 28 is relevant:

"The Commission must be satisfied, based on the evidence presented, that the grant of the application is in the public interest. Based upon the scant evidence submitted by the applicant, the Commission is unable to arrive at that conclusion.

The applicant's submissions are largely predicated on assertions which are not supported by any evidence, and therefore the Commission is unable to be satisfied about the veracity of those assertions."

The Commission further stated at para 29 that:

"To grant a liquor store licence based upon a 'good idea' by an applicant is not consistent with the Act or the intent of Parliament. The proliferation of licences was not an intended outcome of the introduction of the public interest test under section 38 of the Act (see Parliamentary Debates, WA Parliament, vol 409, p 6342). As stated earlier in this decision (and previous decisions of the Commission), the public interest test under section 38(2) requires the licensing authority to consider the merits of an application based upon the positive and negative impact that the grant of the licence would have on the local community. In this context, an applicant needs to adduce sufficient evidence to support its claims, not just abstract generalisations. Otherwise, the granting of licences under the Act would become arbitrary and not in accordance with the objects of the Act. Needless to say, the level and quality of evidence to be submitted by an applicant will vary on a case by case basis. Whilst the Commission acknowledges the provisions of sections 16(1)(a) and 16(7)(a), this does not diminish an applicant's obligations under section 38(2) of the Act."

Whilst this determination refers to a liquor store licence the principles hold in respect of this application.

- 51 Accordingly, the Commission must be satisfied, based on the evidence presented, that the grant of the application is in the public interest as required under section 38(2) of the Act.
- 52 To do so it is necessary for the applicant to provide appropriate evidence in support of its application to discharge its obligations under the Act. The onus is on the applicant to demonstrate that the grant is in the public interest. It is fair to say that the applicant has amply demonstrated that the granting of the application is not contrary to the public interest but the Act clearly requires the applicant to go further than this and demonstrate in a positive sense that the grant of the application furthers the public interest.
- 53 Examination of all the material presented in relation to this application does not constitute sufficient evidence that the applicant has discharged its onus of proof.
- 54 The application is therefore refused.



MR JIM FREEMANTLE
CHAIRPERSON