

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Westkor Pty Ltd
(represented by Mr Soo Yong Yoon of Chan Galic)

Commission: Ms Elanor Rowe (Presiding Member)
Dr Kim Hames (Member)
Professor Colleen Hayward (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to cancel a Liquor Licence.

Premises: Hi Mart
5B/113 Collins Road, Willetton, Western Australia 6155

Date of Hearing : Determined on the Papers

Date of Determination: 6 November 2021

Determination The application is allowed. The decision of the delegate of the Director of Liquor Licensing is quashed and the Liquor Licence is reinstated on a suspended basis.

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*

Background

- 1 This matter concerns an application (**Application**) by Westkor Pty Ltd (**the Applicant**) to quash the decision (**Decision**) made by the delegate of the Director of Liquor Licensing (**Director**) on 13 July 2021 to cancel liquor store licence number 6030139627 (**LSL**). The LSL had been issued in relation to premises known as the “*Hi Mart*” store, located at 5B/113 Collins Road, Willetton, Western Australia 6155 (**Premises**).
- 2 The Decision was made pursuant to the *Liquor Control Act 1988* (**the Act**) and Regulation 26 of the *Liquor Control Regulations 1989* (**Regulations**). In summary, the Director found that the Applicant had failed to pay the annual licence fee and a late penalty fee.
- 3 On 11 August 2021, the Applicant applied for a review of the Decision pursuant to section 25 of the Act (**Review**), with such decision to be made by the Liquor Commission of Western Australia (**the Commission**), either on the papers, or by way of a hearing. The Commission determined that the matter was to be considered on the papers.

Submissions on behalf of the Applicant

Background

- 4 The Applicant has operated a small Korean supermarket (**Store**) located at the Premises, since 2012. The Store specialises in Korean groceries and miscellaneous goods.
- 5 According to the Applicant, most supermarkets in Korea sell alcohol. Therefore, to make the Store more authentic, the Applicant applied for a liquor licence.
- 6 The Applicant was granted the LSL on 5 June 2018. Korean alcohol was then displayed in a single fridge in a corner of the Store, as typical in a Korean supermarket.

The Review

- 7 On 15 July 2021, the Applicant was personally served with a Notice of Cancellation of the LSL (**Notice of Cancellation**). The LSL was cancelled for the reason of non-payment of the annual licence fee.
- 8 The Department of Local Government, Sport and Cultural Industries (**Department**) had submitted that every reasonable effort had been made to contact the current principal of the licensee company prior to service of the Notice of Cancellation. However, the Applicant asserted that it had not been contacted by the Department and it had not received any written or oral notice for payment of the annual licence fee or the late penalty fee, until the Notice of Cancellation had been served.

- 9 The Applicant has always had the financial means to pay the LSL fees and had previously always done so, on time. There had not been any prior issue with regard to the payment of fees relating to the LSL.
- 10 There was no reason for the Applicant not to pay the fees for the LSL. The Applicant is fully aware that the LSL is required for it to be able to sell liquor on the Premises.
- 11 The LSL is a key success factor for the Applicant to be able to operate a Store with the look and feel of a typical Korean supermarket that caters to the needs of consumers in the locality. Without a liquor licence, the Store, which specialises in Korean food and Korean alcohol products, will be irreparably damaged.
- 12 The Applicant suspected that there may have been an administrative error on the part of the Department in issuing and posting the notices for payment of the annual licence fee and the late penalty fee. Alternatively, another possibility was that even if the notices had been duly issued and posted, they may have been lost during the delivery process, due to the COVID-19 lockdown and related postal delivery issues.
- 13 In the current COVID-19 situation, the Applicant's business is experiencing difficulties; the decision to cancel the LSL has had a much greater impact than it would have done under normal circumstances.
- 14 The Applicant had not been contacted prior to the Notice of Cancellation and it is unfair to the Applicant if the LSL is cancelled.

Submissions on behalf of the Director

- 15 The Director did not make formal submissions in relation to the Application.

Legal and Statutory Framework

- 16 The Commission is not required to find error on the part of the Director, but to undertake a full review and make a determination on the basis of the same materials as were before the Director when the decision was made *Hancock v Executive Director of Public Health [2008] WASC 224, [53]*.
- 17 The Commission is required to make its determination on the balance of probabilities (s16 (1)(b)(ii) of the Act).
- 18 On review under section 25 of the Act, the Commission may:
- a affirm, vary or quash the decision subject to the review; and
 - b make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - c give directions:

- i as to any questions of law, reviewed; or
 - ii to the Director, to which effect shall be given; and
 - d make any incidental or ancillary order.
- 19 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 20 Section 16 of the Act prescribes that the Commission:
- a may make its determination on the balance of probabilities [sub section(1)]; and
 - b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)];
- 21 The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*).

Determination

- 22 The Commission has undertaken a full review and now determines the Application based on the same materials as were before the delegate of the Director of Liquor Licensing when the Decision was made. This is the correct and established procedure as referred to in *Hancock v Executive Director of Public Health [2008] WASC 224*.
- 23 As a matter of course, annual licence fees are payable yearly, and invoices are posted by the Department to licensees towards the end of November.¹
- 24 The following documents (**Documents**) were all posted by the Department to the Applicant, prior to the issuing of the Notice of Cancellation. The recorded postal address for the Premises (5B/113 Collins Road, Willetton, Western Australia 6155) was used on all occasions:
- a Notice of Prescribed Annual Licence Fee, dated 17 November 2020;
 - b Notice of Prescribed Annual Licence Penalty Fee, dated 14 January 2021;
 - c Reminder regarding outstanding Annual Licence Fee and Penalty Fee, dated 11 March 2021; and

¹ Liquor licence renewal fees and/or penalty fees for 2020 were waived as part of an economic and health relief package to support Western Australian businesses and the community during the COVID-19 pandemic.

d Suspension of Licence for non-payment of annual licence fee, dated 21 April 2021.

25 It appears that the proper process was followed by the Department, in the issuing of the Documents, and no fault on the part of the Department could be found. Rather, the Commission noted the extent to which the Department went to, in efforts to contact the Applicant to make it aware that the Annual Licence Fee and Annual Licence Penalty Fee were outstanding, and subsequently that the LSL had been suspended. As well as by post, the Department had also attempted to send all the Documents to the Applicant via email. Further attempts were made to contact the Applicant by telephone, but again, to no avail.

26 Conversely, while it is not entirely clear and only limited information is available, it may be the case that the Applicant itself was, to some extent, responsible for the problems incurred by the Department, both in contacting the Applicant and delivering the Documents successfully to it.

27 However, the fact of the matter is that the Documents were all marked "*Return to Sender*" and sent back to the Department, after they had been issued. Consequently, although the reason for the non-delivery of all the Documents is unknown, the Commission finds it reasonably plausible, that the Applicant did not receive the Documents prior to being served with the Notice of Cancellation, as it asserted. Therefore, the Applicant may have been genuinely unaware that the fees were due and owing. This is supported by the following submissions by the Applicant:

- a there was no reason for it not to pay the Annual Licence Fee or Annual Licence Penalty Fee, and in fact not doing so would be extremely detrimental to their business;
- b had the Applicant been aware that the fees were outstanding, it would have paid them, and indeed, it had the means to do so; and
- c the unusual circumstances that prevailed at the time the Documents were sent to the Applicant, due to the COVID-19 pandemic and the resultant disruption to postal deliveries.

28 Given the above, as well as the fact that the Applicant has made the effort and incurred the cost to appeal the Decision, and the substantial time and considerable expense that would be involved in reapplying for a suitable licence, the Commission finds that in this case, the Applicant should be afforded the benefit of doubt and the LSL should be reinstated, albeit on a conditional basis.

Conclusion

29 The Application is allowed in part. The LSL is reinstated on the following basis and subject to the following terms:

- a. The LSL is reinstated but on a suspended basis;
- b. Within thirty (30) days from the date of this Determination the Applicant must:
 - i pay the Annual Licence Fee 2021 (Ref: 0000150793), less a proportion for the period when the Licence was cancelled from 13 July 2021 to the date of this Determination inclusive (amount to be deducted from Annual Licence Fee payable by the Applicant = daily rate of Annual Licence Fee x number of days Licence was cancelled);
 - ii pay the Annual Licence Penalty Fee (0000156870) in the sum of \$306.00 in full; and
 - iii confirm with the Department its correct current contact details, including any applicable contact name(s), postal address(es), telephone number(s) and email address(es).
- c. The LSL will remain suspended until such time as the terms in paragraph 29(b) above have been complied with;
- d. If the terms in paragraph 29(b) above are complied with, the suspension on the LSL is to be lifted;
- e. If the terms in paragraph 29(b) above are not complied with, the LSL is to be cancelled immediately.


Elanor Rowe
Commissioner


Ms Colleen Hayward
Commissioner


Dr Kim Hames
Commissioner