

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicants: Mr Dougal and Mrs Gail McLay
(represented by Mr Dougal McLay)

Mr James and Mrs Ida Bennett

Respondents: Garrett Hotels 2010 Pty Ltd and Primary
Securities Ltd
*(represented by Mr John Prior, instructed by
Mr Peter Fraser of Dwyer Durack Lawyers)*

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Mr Evan Shackleton (Member)

Matter: Application pursuant to section 25 of the
Liquor Control Act 1988 for review of the
decision of the delegate of the Director of
Liquor Licensing to dismiss an application
pursuant to section 117 of the Act.

Premises: Cottesloe Beach Hotel

Date of Hearing: 29 April 2015

Date of Determination: 21 July 2015

Determination: The application is refused.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *PSB Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant v Jansen & Anor* [2006] WASCA 270
- *Re McHenry* [1987] 4 SR (WA) 31
- *Hackney Tavern Nominees Pty Ltd v Mcleod* (1983) 34 SASR 207

Introduction

- 1 This is an application pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) to review the decision (A225105) of the Delegate of the Director of Liquor Licensing (“the Director”) to dismiss an application pursuant to section 117 of the Act.
- 2 Complaints were originally lodged with the Director by Ms Dorothy Sadlier, Mr James Bennett and Mrs Ida Bennett, Ms Gail McLay, Mr Barry McKenna, Mr David Miller and Mr Fulvio Prainio.
- 3 Mr and Mrs Bennett and Mr Dougal McLay applied for the review.
- 4 The Liquor Commission (“the Commission”) conducted the review hearing on Wednesday, 29 April 2015.
- 5 Essentially, the applicants complain that the amenity, quiet or good order of the neighbourhood is frequently unduly disturbed by the noise emanating from the Cottesloe Beach Hotel Beer Garden (“The Beach Club”).
- 6 Section 117(1) of the Act provides that a complaint can be made that the amenity, quiet or good order of the neighbourhood of the premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises.
- 7 Section 117(2) of the Act provides that a complaint can be made that any behaviour of patrons on the licensed premises, or noise emanating from the licensed premises, or disorderly conduct occurring frequently in the vicinity of the licensed premises on the part of persons who have resorted to the licensed premises, is unduly offensive, annoying, disturbing or inconvenient to persons who reside or work in the vicinity, or to persons in or making their way to or from a place of public worship, hospital or school.
- 8 Section 25(2c) of the Act provides that the Commission may have regard only to the material that was before the Director when making the decision.
- 9 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director’s decision. The Commission is required to undertake a full review of the materials before the Director and make its own determination on the merits, based upon those materials (*Hancock v Executive Director of Public Health [2008] WASC 224*).
- 10 Pursuant to section 25(4) of the Act, the Commission may: (a) affirm, vary or quash the decision subject to the review; (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 as to any questions of law reviewed, or to the Director, to which effect shall be given; and (d) make any incidental or ancillary order.

Specific details of the complaints

- 11 Ms Sadleir owns a rental property at 15 Warnham Road, Cottesloe. She says that since the Beach Club opened, noise and anti-social behavior has become a problem. She says that her tenants have told her that her property is a much less attractive residence since the Beach Club opened.
- 12 James and Ida Bennett say that the noise and anti-social behavior, as well as problems with parking, have caused residents to move away from the locality, and say that the Beach Club should never have been approved.
- 13 Dougal and Gail McLay complained of the noise emanating from the Beach Club, and they provided the Director with 2 noise reports.
- 14 The first was commissioned by the Town of Cottesloe, and produced by Gabriel's Environmental Design, dated 4 February 2013. That report concluded that the noise emissions from the Beach Club exceeded the assigned level pursuant to the *Environmental Protection (Noise Regulations) 1997* over the period of Saturday, 2 February 2013 and Monday, 4 February 2013, by 22 to 27 dB, and 37 to 43 dB when music was audible.
- 15 The second was commissioned by Dougal McLay, and produced by Lloyd George Acoustics, dated 23 January 2013. It concluded that the noise emissions from the Beach Club exceeded the *Environmental Protection (Noise Regulations) 1997* by 33.9 dB on Sunday, 22 January 2013.
- 16 At the hearing, Mr McLay said that the ND Engineering Acoustic Assessment, prepared for the Cottesloe Hotel, demonstrated that the Cottesloe Hotel was built like a megaphone and focused on numbers 4 and 6 Warnham Road.
- 17 Mr Barry McKenna signed the letter of complaint lodged by Mr and Mrs McLay but made no further submissions and was not a active party to the section 25 review.
- 18 Mr David Miller says that the Beach Club has caused problems for residents such as noise, congestion and anti-social behavior.
- 19 Mr Fulvio Prainito originally complained that the noise emanating from the Beach Club is annoying and makes it impossible to sleep. He complained that the Cottesloe Hotel and the Indiana Tea Rooms generate intoxicated persons after closing time. By email dated 5 February 2015, Mr. Prainito advised the Commission that he would not be able to attend the hearing, but that the Cottesloe Hotel had satisfactorily addressed all of his complaints.

Licensee's response to the complaints

- 20 The licensee says that the Cottesloe Hotel has operated pursuant to a hotel Licence since 1905.
- 21 Since the 1970's the Hotel has operated an open-air beer garden, which has continuously traded since then, other than in 2010 when it was closed for renovations.
- 22 The licence for the Beach Club restricts liquor being sold after 10:00 pm on any night and has a maximum capacity of 840 people. The licence restricts live music from being played at any time.
- 23 The licensee has sought and obtained all the required approvals for the Beach Club building works, and has spent approximately \$6 million on them. During mediation, the Licensee engaged ND Engineering acoustic experts and spent \$300,000.00 on acoustic attenuation, which reduced the noise levels by 80% of previous levels. Since then, the licensee has agreed to complete further works, which are anticipated to reduce noise levels by 90% of previous levels.
- 24 8 persons from 6 households have made the complaints and 3 persons from 2 households have applied for review. The licensee submits that 8 persons from 6 households does not, and could not represent the neighbourhood, and that the applicants have failed to demonstrate that the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed.
- 25 The licensee provided statements from 11 residents, 2 of whom reside in the same building as Mr and Mrs McLay, supporting the licensee's position with respect to the Beach Club.
- 26 The licensee accepts that the level of noise that emanates from the Beach Club is in breach of the regulations, but denies that that noise is "undue", because it represents conversational noise, that should be expected from such a facility.
- 27 In order to consider any section 117 complaint, the Commission is required to take into account the specific type and character of the area where the premises operates. In this case, the licensee submits that the Cottesloe Beach front, and in particular the immediate surrounds to the Cottesloe Beach Hotel, is a mixed use, high density tourist precinct, not outer suburbia.
- 28 The onus is on the complainants to prove their case on the balance of probabilities, pursuant to section 117 of the Act. The onus never shifts to the respondent.
- 29 Neither the Town of Cottesloe nor the Commissioner of Police sought to be heard in relation to the application.

The law

- 30 Section 5 of the Act provides that the primary objects of the act are to regulate the sale, supply and consumption of liquor, and to minimize the harm or ill-health caused to people, or any group of people, due to the use of liquor, and to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 31 In order to discharge their onus, the applicants in this case must demonstrate that the amenity, quiet or good order of the neighborhood of the licensed premises is frequently unduly disturbed, or that any noise emanating from the licensed premises is unduly offensive, annoying, disturbing or inconvenient to persons who reside or work in the vicinity.
- 32 It is clear from all of the acoustic reports that the *Environmental Protection (Noise Regulations) 1997* is being exceeded. This is clearly a relevant consideration, but it is not determinative. The question is whether the applicants have discharged their onus of establishing a breach of section 117 of the Act (*PSB Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant –v- Jansen & Anor [2006] WASCA 270*).
- 33 “Undue” or “unduly” in this context creates an objective test, adopting the ordinary meaning of the words and does not leave a licensee at risk by the subjective sensibilities of its immediate neighbours.
- 34 The noise must be one that would be regarded by a reasonable person as “undue”, having regard to what could reasonably be expected from a facility of the kind licensed (*PSB Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant –v- Jansen & Anor [2006] WASCA 270*).
- 35 In *Re McHenry [1987] 4 SR (WA) 31*, Sharkey J held that the word “undue” had to be determined and qualified according to the nature of the neighbourhood, so that what might constitute “undue” noise in one neighbourhood may not constitute undue noise in another. In this case, the neighbourhood is a mixed use, high-density tourist precinct, comprising of hotels, restaurants, tourist accommodation and residential accommodation. It is not outer suburbia.
- 36 In *Hackney Tavern Nominees Pty Ltd –v- Mcleod (1983) 34 SASR 207*, Wells J held that “Any resident who lives nearby a hotel must expect a certain amount of necessary or usual noise from people either arriving at, or, more likely, departing from the premises. From time to time one or more of the patrons might be expected to be noisier than the others – calling out, even yelling and screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents”.

- 37 In this case, it is particularly relevant that the licensed premises has been operating pursuant to a hotel licence since 1905, and that it has operated an open-air beer garden, which has continuously traded since then, other than in 2010 when it was closed for renovations. Obviously, all of the applicants moved into the area after 1905 and therefore must expect a certain amount of necessary noise to emanate from the premises. It is of note that the original applicants to the section 117 complaint before the Director, and in particular the applicants in relation to this review, are relatively low in number given the neighbourhood.
- 38 The Commission is not satisfied that the applicants have discharged their onus of establishing a breach of section 117 of the Act, and on that basis, the application is refused.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', with a stylized flourish at the end.

JIM FREEMANTLE
CHAIRPERSON