

**Liquor Commission of Western Australia  
(Liquor Control Act 1988)**

**Applicant:** MGA Entertainment Pty Ltd  
(represented by Mr Chris Garvey)

**Respondent:** The Hollow Beach Bar & Grill Pty Ltd  
(represented by Mr Henry Jackson, instructed by Susan Nicholson of Cullen Macleod)

**Intervenor:** Director of Liquor Licensing  
(represented by Mr Edward Fearis of State Solicitor's Office)

**Observers:** Mr Dan Mossenson of Lavan

**Commission:** Mr Michael Egan (Presiding Member)  
Dr Eric Isaachsen (Member)  
Mr Alex Zilkens (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 transfer a tavern licence from MGA Entertainment Pty Ltd to The Hollow Beach Bar & Grill Pty Ltd.

**Premises:** Hungry Hollow Tavern, 135 Ocean Drive, Bunbury

**Date of Hearing:** 21 June 2017

**Date of Determination:** 12 September 2017

**Determination** The application is dismissed.

**Authorities referred to in the determination:**

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146
- *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630
- *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* (1975) 133 CLR 72
- *Cranes 'R' Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd* [2012] WADC 24
- *Harry S Bagg's Liquidation Warehouse Pty Ltd & Ors v Whittaker & Ors* (1982) 44 NSWLR 421
- *Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* (LC 37/2010)

## Determination

- 1 On 12 October 2016, an application was lodged with the Director of Liquor Licensing (“the Director”) for the transfer of a Tavern licence from MGA Entertainment Pty Ltd to The Hollow Beach Bar & Grill Pty Ltd (“the transfer application”).
- 2 The transfer application was approved by the delegate of the Director on 25 November 2016.
- 3 On 2 December 2016, an application for a review of that decision under section 25 of the *Liquor Control Act 1988* (“the Act”) was brought by Lavan, on instruction from Mr Christopher Garvey, lawyer for Mr Graham Coatz (“Mr Coatz”), purportedly on behalf of MGA Entertainment Pty Ltd (“MGA”), the nominal applicant in these review proceedings.
- 4 The Director lodged a notice of intervention on 21 December 2016.
- 5 The matter came before the Liquor Commission of WA (“the Commission”) on 15 May 2017 and the application was adjourned to allow the parties to file submissions and evidence in relation to the preliminary issues below.
- 6 Before the Commission can consider the merits of the application, it must be satisfied:
  - (1) of the identity of the applicant; and
  - (2) that the applicant is eligible to seek a review under section 25 of the Act, (“the preliminary issues”).
- 7 This determination relates solely to the preliminary issues that must be addressed before the Commission can take on the task of a review under section 25.
- 8 For the reasons set out below:
  - (1) The Commission is not satisfied that the application was brought with the proper legal authority of the nominal applicant.
  - (2) The proceedings are a nullity and the application should be dismissed.
  - (3) If the Commission is wrong about the nominal applicant’s lack of legal authority, the application under section 25 of the Act to seek a review of the decision of the Director is in any event misconceived because the nominal applicant is not a party that is dissatisfied with a decision of the Director and is not eligible to bring an application under section 25.

## Background

- 9 MGA operated the premises at 135 Ocean Drive, Bunbury known as the Hungry Hollow Tavern (“the premises”) under a tavern licence (licence number A000216441) (“the tavern licence”).
- 10 MGA has three directors, Mr Graham Coatz, Mr Matteo Daqui and Mrs Angelina Daqui.

- 11 Mr and Mrs Daqui each hold 25% of the shares in the applicant. The remaining 50% of the shares are held by Singold Pty Ltd, a company of which Mr Coatz is the sole director and shareholder.
- 12 Mr and Mrs Daqui are also the directors of Technotron Investments Pty Ltd, the owner and lessor of the premises.
- 13 Mr Coatz managed the premises from June 2006. He was imprisoned in February 2016, but continued to manage the premises until June 2016.
- 14 MGA ceased trading in July 2016.
- 15 Since at least June 2016, Mr Coatz has been in dispute with Mr and Mrs Daqui about various matters involving the premises, the tavern licence, and the lease for the premises.
- 16 As at July 2016, business relations between Mr Coatz, and Mr and Mrs Daqui had broken down irretrievably, and steps were taken by Mr and Mrs Daqui to secure the premises against entry by anyone other than Mr and Mrs Daqui.
- 17 In September 2016, MGA took steps to sell its business to the respondent.
- 18 On 12 October 2016, the transfer application was lodged by the respondent, The Hollow Beach Bar & Grill, for the transfer of the tavern licence to the respondent. The transfer application was initially lodged seeking approval for the transfer pursuant to section 84(1)(a) of the Act and contained consent from MGA to the transfer.
- 19 As MGA had ceased trading the business under the tavern licence and was no longer in occupation of the premises at the time of the transfer application, the respondent was concerned that the interest of MGA in the licence had already ceased. For that reason, the respondent also sought leave from the Director to transfer the tavern licence pursuant to section 84(1)(c).
- 20 A delegate of the Director ultimately approved the transfer of the tavern licence under section 84(1)(c) of the Act.
- 21 This application under section 25 of the Act for a review of that decision was brought on 2 December 2016.

### **Preliminary issues**

- 22 Before the Commission can consider the merits of the review sought, it must first determine:
  - (1) the identity of the applicant; and
  - (2) if the applicant is entitled to make the application for a review under section 25.
- 23 In determining the identity of the applicant, the Commission must be satisfied that the application has been brought with the legal authority of MGA.

- 24 The respondent has submitted that the application was brought without the legal authority of MGA because Mr Coatz lacked the authority to bring the application on behalf of MGA. In the absence of evidence that Mr Coatz was authorised (expressly or implicitly) to act on MGA's behalf, the Director also questioned the authority of Mr Coatz to act on behalf of MGA to bring the application to review the Director's decision to transfer the licence.
- 25 The respondent further submitted that MGA does not have standing to make the application under section 25(1) of the Act for two reasons:
- (1) it cannot be a party that "is dissatisfied with a decision made by the Director" because it consented to the decision; and
  - (2) it is not a "party to proceedings" because it cannot be the transferor of a licence as it had lost its rights in the licence when it ceased to occupy the premises.
- 26 Counsel for Mr Coatz also raised an issue about the Commission taking into account correspondence sent on behalf of Mr Coatz to the Department of Racing, Gaming and Liquor on 15 December 2016 with correspondence of 1 December 2016 attached ("the Lavan correspondence"), as this was material not before the Director when the Director made his decision. Consequently, Mr Coatz argues that the Commission cannot consider the Lavan correspondence when conducting the review of the Director's decision, pursuant to section 25(2c) of the Act.

### **Material before the Commission**

- 27 Section 25(2c) of the Act provides:

*When conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.*

- 28 The applicant submits that this section precludes the Commission from considering the Lavan correspondence when determining the preliminary issues identified in paragraphs 22 to 26 above.
- 29 The Commission does not accept this proposition.
- 30 The opening words of that section, "When conducting a review of a decision made by the Director," provide the circumstances for when that restriction will apply; namely, only when reviewing the merits of the decision made by the Director.
- 31 The rationale for this restriction was considered by Martin CJ in *Hancock v Executive Director of Public Health* [2008] WASC 224 at [53]:

*The fact that Parliament has restricted the materials available to the Commission for the purposes of such a rehearing to those which were before the Director, can be explained by a desire to avoid a situation in which parties to proceedings before the Director 'keep their powder dry' and save their evidence and arguments for presentation to the Commission on review.*

- 32 However, decisions by the Commission as to the merits of the Director's decision should be distinguished from decisions by the Commission as to preliminary issues, such as whether the Commission has jurisdiction to hear the application, whether the applicant has standing to bring an application for review, or indeed whether the application has been brought by the applicant at all.
- 33 These issues can only arise after a decision has been made by the Director, and, consequently, it is unlikely that the material before the Director will contain all the material necessary for the Commission to properly decide on the issues.
- 34 Decisions about these preliminary issues are not part of the review of the Director's decision and, as such, are not subject to the restriction in section 25(2c).
- 35 The Commission, therefore, is entitled, when determining the preliminary issues, to have regard to the Lavan correspondence.
- 36 It should be noted that, if the applicant's proposition as to the effect of section 25(2c) were accepted, the Commission would not have been entitled to have regard to the additional material filed by the applicant, in particular a statutory declaration of Mr Graham Gavin Coatz sworn on 12 June 2017 in which Mr Coatz attempts to address, among other things, the issues regarding his authority as a director of the applicant. However, the evidence contained in Mr Coatz's statutory declaration goes directly to the issue of his authority in bringing the application on behalf of the applicant and must be considered by the Commission.

#### **Authority of Mr Coatz to bring proceedings on behalf of applicant**

- 37 As is evident from the Lavan correspondence and Lavan's submissions of 3 February 2017 (paragraphs [20] to [23]), Mr Coatz has been in dispute with Mr and Mrs Daqui about the premises, the tavern licence, and the lease concerning the premises, since at least June 2016.
- 38 The application for review is dated 2 December 2016, names MGA as the applicant, and is signed by Lavan for the nominal applicant. According to the Lavan correspondence and the letter accompanying the application to review the Director's decision, Lavan acts on instructions from Mr Christopher Garvey, and Mr Garvey acts on behalf of Mr Graham Coatz, a director of MGA.
- 39 A director acting individually, absent any express or implied actual authority, has no apparent authority to bind a company.<sup>1</sup> A managing director of a company may have apparent authority to engage others to provide services for the company,<sup>2</sup> and to enter into contracts to purchase assets for the company and to authorise agents to enter into such contracts.<sup>3</sup> However, the Commission has not been referred to, and is not aware of, any authority supporting the proposition that a managing director has apparent or ostensible authority to commence proceedings on behalf of the company, and certainly not in circumstances where the managing director is in conflict with the majority of the directors of the company.

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<sup>1</sup> *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 205

<sup>2</sup> *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 at 648

<sup>3</sup> *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* (1975) 133 CLR 72 at 79

- 40 Absent any apparent authority, Mr Coatz *prima facie* lacked the necessary authority to bring the application on behalf of the applicant or to instruct Lavan in respect of the same. For the application to have been validly brought, Mr Coatz must establish that he had express or implied actual authority to bring the application on behalf of the applicant.
- 41 Mr Coatz concedes that he did not have the express authority of the board to bring the application, however, it was submitted on his behalf that he had implied authority to do so.
- 42 That implied authority was said to arise from Mr Coatz's history of managing the day to day operation of the premises without the involvement of the other directors, Mr and Mrs Daqui.
- 43 Mr Coatz submits that he was, in effect, the managing director of the company and was singularly responsible for managing the premises from June 2006 until July 2016, with the tacit approval of Mr and Mrs Daqui. In particular, Mr Coatz says that his duties and responsibilities included:
- (1) ordering all stock, liquor and consumables and executing supply contracts on behalf of the applicant for the same;
  - (2) hiring, firing and rostering of all staff;
  - (3) acting as the principal on-site manager of the premises;
  - (4) ensuring the premises were kept clean and tidy;
  - (5) instructing the applicant's accountant to prepare annual tax returns, and signing off on those returns;
  - (6) instructing solicitors to advise on a lease for the premises and the subsequent extension of that lease;
  - (7) entering into insurance policies on behalf of the applicant;
  - (8) purchasing new plant and equipment for the applicant; and
  - (9) responding to and liaising with the Local Government Health Inspector, Liquor Licensing Authority, WA Police, WorkCover and suppliers.
- 44 It was submitted on behalf of Mr Coatz that his history of managing the premises for 10 years gave rise to an implied authority for Mr Coatz to do whatever was necessary to protect the interests of MGA. That is, that he had an unlimited implied authority to act on behalf of MGA in all manner and for all purposes, provided such purposes were not contrary to the best interests of MGA. On this basis, Mr Coatz submits that it was within the scope of his implied authority to instruct Mr Garvey and Lavan to bring the application for review on behalf of MGA.
- 45 It was further submitted by Mr Garvey for Mr Coatz, without authority in support of the proposition, that this implied authority would continue indefinitely unless expressly revoked by MGA's board.

46 The Commission does not accept either of these propositions.

#### Scope of authority

47 The Commission accepts that implied authority of a director can arise where there is acquiescence by the board in specific conduct of an individual director. This may give rise to implied authority for Mr Coatz to perform the specific duties and responsibilities he says he performed in relation to the day to day management of the premises.

48 However, there is no evidence before the Commission that Mr Coatz has ever commenced proceedings on behalf of MGA before, so there cannot have been any prior acquiescence in that conduct which would give rise to an implied authority to bring this application.

49 Further, acquiescence requires more than simple silence. It requires the communication of consent by words or conduct of the members of the board.<sup>4</sup>

50 There is no evidence that there has been any communication by Mr and Mrs Daqui acquiescing in Mr Coatz bringing the application on behalf of MGA.

51 Further, on 12 May 2017, Young and Young, the solicitors for Mr and Mrs Daqui, provided an undated resolution of the directors of MGA, purporting to withdraw the application for review.

52 Lavan, on behalf of Mr Coatz, has identified several deficiencies with the purported resolution that cast doubt on whether it is a valid resolution of MGA. Accordingly, the Commission has not considered that resolution to be a valid resolution of MGA.

53 Notwithstanding the deficiencies in the resolution, the document supports the contention that Mr and Mrs Daqui, being 2 of the 3 directors of MGA, did not consent to Mr Coatz instructing Mr Garvey and Lavan to bring the application on behalf of MGA.

54 Without any evidence of acquiescence by Mr and Mrs Daqui in Mr Coatz bringing proceedings on behalf of MGA, Mr Coatz had no implied authority to do so.

#### Duration of authority

55 Mr Coatz was imprisoned in February 2016. He submits that he continued to manage the business of MGA from prison for some time, until Mr and Mrs Daqui took over. It is in dispute exactly when Mr and Mrs Daqui took over managing the premises, but it is agreed that it was, at the latest, July 2016 – being at least a week or several weeks prior to when the applicant ceased trading.

56 Whatever, then, the scope of Mr Coatz's implied authority while he was managing the premises, his implied authority came to an end either, if the respondent's evidence is accepted, when he was imprisoned in February 2016, or, if Mr Coatz's evidence is accepted, in July 2016.

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<sup>4</sup> *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*, supra, at 643; *Junker v Hepburn* [2010] NSWSC 88 at [45]; *Cranes 'R' Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd* [2012] WADC 24 at [123]



- 57 Further, from at least September 2016, Mr Coatz was in dispute with Mr and Mrs Daqui about the operation of the applicant’s business. Any residual implied authority (that was not solely associated with the managing of the premises) must have ended at this time.
- 58 Accordingly, at the time the application was made, Mr Coatz had no implied authority to manage the premises or the business of MGA. He cannot, therefore, have had implied authority to instruct Mr Garvey or Lavan to bring the application on behalf of MGA.
- 59 This finding seems to the Commission to be entirely consistent with the nature and content of the Lavan correspondence and the Lavan letter accompanying the application for a review of the Director’s decision setting out fully the nature of Lavan’s retainer (see paragraph 38 above), which does not allow for the conclusion, on any interpretation, that Lavan considered itself to be acting for MGA. When asked about this at the hearing on 21 June 2016, Mr Garvey said:

*I hold a retainer agreement which is a fairly stock standard legal form of retainer. It is dated 14 July 2016. The client is known as the directors of MGA Entertainment. The scope of works is envisaged as acting for the client in relation to “Hungry Hollow tavern licence and lease issues”. That retainer has been signed by Mr Graham Coatz and it just sets out the obligations of each party in a retainer agreement, and as far as I am concerned, all of the terms and conditions of this retainer agreement have been complied with by both parties. I have received instructions from a director of the company, albeit not timely. [...] Never at any stage have I received a notice from [MGA] terminating that retainer, nor have I received a communication or a letter from any other law firm stating to me that my retainer has been terminated and they have assumed acting for the company. So neither the directors nor anyone acting on their behalf has terminated that retainer. So as far as I am concerned, it still stands.*

- 60 When asked what the basis was for Mr Coatz’s authority to sign that retainer agreement on behalf of MGA, Mr Garvey referred to Mr Coatz’s statutory declaration sworn on 12 June 2017 and his submissions regarding Mr Coatz’s implied authority.
- 61 The Commission finds that Mr Coatz, as a single director of MGA, had no authority to instruct Mr Garvey or Lavan to bring the application on behalf of MGA. As a result, the proceedings are a nullity and must be dismissed.<sup>5</sup>

### **Standing of the applicant to bring an application for review**

- 62 In the event that the Commission is incorrect in finding that Mr Coatz did not have authority to bring the application on behalf of MGA, the Commission finds that MGA is not a party that is entitled to bring an application under section 25(1) of the Act because it is not satisfied that MGA is a party who is “dissatisfied with a decision made by the Director”.
- 63 The respondent submitted that MGA does not have standing to make the application under section 25(1) of the Act based on two grounds:

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<sup>5</sup> *Cranes ‘R’ Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd* [2012] WADC 24 at [167], [172]

- (1) it cannot be a party that “is dissatisfied with a decision made by the Director” because it consented to the decision; and
- (2) it is not a “party to proceedings” because it cannot be the transferor of a licence as it had lost its rights in the licence when it ceased to occupy the premises.

#### Dissatisfied with a decision made by the Director

64 The question of whether an applicant is “dissatisfied” is one of statutory construction.

65 Section 25 provides for the Commission to undertake a review of the decisions of the Director on the merits, as and by way of rehearing.<sup>6</sup> The purpose of section 25 is to allow a party who has not achieved what they wished to achieve before the Director (either in full or in part) another chance to do so.

66 The term “dissatisfied” was considered by the Full Court of the Federal Court *in McCallum v Commissioner for Taxation (1997) 75 FCR 458*. In that case, Lehane J (with whom Whitlam J agreed) said, at 475:

*It is not altogether easy to see that a test of dissatisfaction with a decision is likely to confer standing on a taxpayer to a more generous extent than a right of appeal does on a party to litigation adversely affected by an order made in it.*

67 A party will be “dissatisfied” if the decision of the Director was different to what the party was seeking. It would seem completely contrary to the intention of section 25 to allow a party whose application was approved by the Director to seek a review of the merits of that decision.

68 Although (as is required by the Act) it was the respondent that made the transfer application, MGA consented to the transfer application. Mr Coatz alleges that the consent to the transfer application was not authorised by MGA, however no evidence has been offered in support of this assertion.

69 In consenting to the transfer application, MGA, in effect, adopted the position of the respondent in seeking for the tavern licence to be transferred.

70 It is irrelevant, in the Commission’s view, that the decision was ultimately made by the Director under section 84(1)(c) of the Act and therefore did not require the consent of the applicant. The effect of the Director’s decision was the same; the transfer sought by the respondent and to which the applicant consented was approved.

71 The Commission is not satisfied that the applicant is “a party...dissatisfied with a decision made by the Director”. Accordingly, the applicant does not have standing to bring the application and the application is dismissed.

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<sup>6</sup> *Hancock v Executive Director of Public Health* [2008] WASC 224 at [53]

### Party to proceedings

- 72 It is unnecessary for the Commission to consider whether or not MGA was a “transferor” for the purposes of section 25(6)(b) and is therefore a party to the proceedings before the Director (being the transfer application).
- 73 On 21 February 2017, the Commission received a letter from Cullen MacLeod, the solicitors for the respondent, regarding the position of the lease of the premises. Lavan, on behalf of Mr Coatz, by a letter of the same date, objected to the Commission relying on that letter.
- 74 The status of legal proceedings regarding the lease may be relevant to whether MGA’s interest in the tavern licence had ceased at the time the transfer application was made and, therefore, whether MGA was a “transferor” under section 25(6)(b).
- 75 However, as the Commission has not considered the issue of whether MGA was a transferor, it has not had regard to the letter from Cullen MacLeod dated 21 February 2017 to the Commission.

### Considerations of the Director

- 76 Lavan made a number of submissions on behalf of Mr Coatz regarding the dispute between Mr Coatz, and Mr and Mrs Daqui over the termination of the lease of the premises and the alleged failure of the Director when considering the transfer of the tavern licence to address this issue, and the objection of Mr Coatz to the transfer.
- 77 As the Commission has dismissed the application following consideration of the preliminary issues, it is unnecessary and inappropriate for the Commission to consider the merits of the Director’s decision, including whether the Director should have considered these issues when determining the transfer application.

### **Determination**

- 78 The Commission finds that Mr Coatz, as a single director of MGA, had no authority to instruct Mr Garvey or Lavan to bring the application on behalf of MGA. The proceedings are therefore a nullity and must be dismissed.
- 79 Even if Mr Coatz did have authority to bring the application on behalf of MGA, the Commission is not satisfied that MGA is a party “dissatisfied with a decision made by the Director”. As a result, MGA has no standing to bring the application and the application must be dismissed.

### **Submissions as to costs**

- 80 In the respondent’s further written submissions on the preliminary issues, the respondent submitted that if the Commission found that Mr Coatz had no authority to bring the application on behalf of MGA, then “the respondent’s costs should be paid by Lavan Legal on an indemnity basis. Alternatively, the Respondent asks that its costs be paid by Mr Coatz.”

- 81 At the hearing of the matter, the issue of costs was not taken any further, and was left to be considered after the Commission had considered the preliminary issues.
- 82 As the preliminary issues have been resolved and the application dismissed, the matter should be relisted so that the Commission can hear from all parties, including Lavan and Mr Garvey, on the issue of costs.

A handwritten signature in black ink, appearing to read 'Michael Egan', with a long horizontal stroke extending to the right.

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**MICHAEL EGAN**  
**PRESIDING MEMBER**