

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

Applicant: Mr Jaegan Francis McNeill
(*represented by Mr Desmond McNeill*)

Intervener: Commissioner of Police
(*represented by Ms Emily Negus of the State Solicitor's Office*)

Commission: Mr Paul Shanahan (Presiding Member)
Dr Eric Isaachsen (Member)
Mr Alex Zilkens (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 refuse an application for approval as an unrestricted manager.

Date of Hearing: 19 July 2018

Date of Determination: 2 August 2018

Determination The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in Determination:

- *Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Commissioner of Police v Bloo Moons Pty Ltd* LC 05/2010
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127
- *Maxwell v Dixon* [1965] WAR 167

Background

- 1 This is an application brought under section 25 of the *Liquor Control Act 1988* (WA) ("the Act") for review of a decision of the Director of Liquor Licensing ("the Director").
- 2 On 28 December 2017, Jaegan Francis McNeill ("the applicant") applied to the Director for approval as an unrestricted manager pursuant to section 102B of the Act.
- 3 The application incorporated a copy of a Statement of Attainment, evidencing the completion of a course in Management of Licensed Premises (MLP1) and a National Police Certificate which showed that the applicant had been convicted of the following 9 criminal offences over the period 3 October 2016 to 9 December 2017:
 - a. On 3 October 2016, the applicant committed the offences of:
 - i. giving any detail or producing evidence that is false or misleading in a material particular in purported compliance with a direction by a police officer under section 32(4)(b) of the *Road Traffic (Administration) Act 2008* (WA) ("the Road Traffic (Administration) Act");
 - ii. using an unlicensed vehicle under section 4(2) of the *Road Traffic (Vehicles) Act 2012* (WA); and
 - iii. driving without authorisation under section 49(1) of the *Road Traffic Act 1974* (WA) ("Road Traffic Act").
 - b. On 20 October 2016, the applicant committed the offence of breach a bail requirement under section 51(1) of the *Bail Act 1982* (WA).
 - c. On 1 January 2017, the applicant committed the offences of:
 - i. driving or attempting to drive while having blood alcohol content of or above 0.08g per 100ml of blood under section 64(1) of the Road Traffic Act;
 - ii. driving without authorisation under section 49(1) of the Road Traffic Act; and
 - iii. giving information that the person knows to be false or misleading to a person performing a function under a road law under section 36(1) of the Road Traffic (Administration) Act.
 - d. On 17 November 2017, the applicant committed the offence of driving without authorisation under section 49(1) of the Road Traffic Act.
 - e. On 9 December 2017, the applicant committed the offence of driving without authorisation under section 49(1) of the Road Traffic Act.
- 4 The National Police Certificate also showed that the applicant had been issued with 25 traffic infringements during the period 24 January 2014 to 14 October 2016. In addition, as at

24 January 2018, the applicant had 42 unpaid fines referred to the Fines Enforcement Registry.

- 5 On 26 January 2018, the Commissioner of Police ("Police") lodged a Notice of Intervention pursuant to section 69(6)(c)(i) of the Act on the grounds that due to his antecedents, character and reputation, the applicant was not a fit and proper person to supervise or manage the conduct of a licensed premises.
- 6 On 20 February 2018, the applicant filed responsive submissions addressed to the Director. The submissions were accompanied by a character reference from Alexis Graff, operations manager of the Leederville Hotel.
- 7 On 15 March 2018, the delegate of the Director refused the application as he was not satisfied that the applicant was a fit and proper person to be approved as an unrestricted manager.
- 8 The applicant then lodged an Application for Review of the decision of the delegate of the Director.
- 9 On 21 June 2018, a Notice of Intervention was lodged by the Police.
- 10 No further submissions were filed by the applicant.
- 11 A hearing of the Commission was held on 19 July 2018.
- 12 The Commission, pursuant to section 17(1)(e) of the Act, gave its approval to Desmond McNeill, the applicant's father, ("Mr D McNeill") to appear on behalf of the applicant.

Submissions on behalf of the applicant

- 13 It was submitted by Mr D McNeill that the issue of whether the applicant is a fit and proper person could not be answered as the applicant has not been given the opportunity to demonstrate that he is a fit and proper person. Mr D McNeill submitted that the applicant could only demonstrate this by working as an unrestricted manager.
- 14 Mr D McNeill stated that working at the Boardroom Bar with his family would give him the discipline, structure and confidence to excel personally and professionally.
- 15 The applicant accepted the criminal convictions outlined in the Police's written submissions. However, Mr D McNeill submitted that while the applicant's 9 criminal convictions appeared to be a high number, weight should be given to the fact that a total of 6 convictions were in relation to 2 specific incidents.
- 16 Mr D McNeill also stated that the applicant's convictions were not on, or related to, licensed premises, and this meant those convictions were not relevant to the role and responsibilities of an unrestricted bar manager.
- 17 In relation to giving false and misleading statements to police officers, Mr D McNeill asserted that the applicant gave false and misleading information to the police officers only to protect himself. In addition, in relation to the conviction on 3 October 2016, the applicant stated that

after giving false information to the police officers (when he claimed to be his brother), the following day he went to the Kensington Police Station, accompanied by his father, and admitted that he had lied to the police officers.

- 18 In relation to the 42 fines owed by the applicant, Mr D McNeill submitted that the applicant had not paid the fines as he does not have the money to do so.
- 19 Mr D McNeill also submitted that the applicant could not remain employed at his previous position at the Leederville Hotel because he was not an approved unrestricted manager.
- 20 The applicant stated that he loves hospitality and would like to make a career out of it.
- 21 The Commission noted that the applicant might have better prospects of success in seeking for approval to be an unrestricted manager if he delayed applying for that approval until a later date and if he were able to show that had no further convictions at that time. The applicant said that he did not want to wait for a longer period of time to re-apply for approval to be an unrestricted manager, as the wait would have an adverse effect on him and on his partner's livelihood. The applicant also said that he presently has an interview with the TGI Friday's Bar and Grill for the role of a manager and is a state champion barista.
- 22 Mr D McNeill submitted that, even though the applicant could still work on the Boardroom Bar premises even if the application is refused, the applicant cannot work on the premises by himself. Mr D McNeill submitted that the potential employers of bar managers in WA's hospitality industry currently require their bar manager employees to be able to work alone because of the state of the economy. Mr D McNeill submitted that if the application is refused, then the applicant will only be able to find work in a bar on a casual part-time basis doing 3 hour shifts, which is not sufficient to support himself and his partner. Mr D McNeill also asserted that if the application is granted and the applicant is able to seek work as an approved manager, then the applicant can expect to be employed for approximately 50 hours a week worth of shifts.
- 23 Mr D McNeill also submitted that approving the application would be in the public interest as the applicant has a great rapport with the public due to his communication skills.

Submissions on behalf of the intervener

- 24 The Police relied substantially on the written submissions lodged on 21 June 2018.
- 25 In summary, in its written submission, the Police asserted that the Director's decision was cogent and compelling for the following reasons:
 - a. The applicant's criminal history demonstrates a disregard for the law that reflects adversely on his character.
 - b. The applicant demonstrates dishonesty and the willingness to mislead persons exercising public functions which is incompatible with the responsibilities and obligations associated with being an approved manager under the Act.

- c. The decision by the Director was made in March 2018 and the applicant's most recent offence was committed in December 2017. It was reasonable for the Director to conclude that a four-month period with no offending was insufficient to demonstrate that the applicant no longer maintained a disregard for the law or demonstrated qualities inconsistent with the responsibilities or obligations of an approved manager.
- 26 Counsel for the Police ("Counsel") in oral submissions also raised the following issue, which was not dealt with in those written submissions. The Police submitted that the Commission should not take into account paragraphs 16 - 27 of the submissions lodged by the Police in response to the application dated 30 August 2016 for a small bar liquor licence submitted by the applicant and his brother Jordan John McNeill for the Boardroom bar in Subiaco and page 4 of the annexed statement of material facts (marked A1), because the charge of stealing as a servant, to which the above-mentioned paragraphs and statement of material facts applies to, was discontinued due to insufficient evidence.
- 27 Counsel submitted that while the criminal offences were on the lower end of seriousness of criminal behaviour, the nature and frequency of the conduct was relevant.
- 28 Counsel submitted that, while the offences were not on committed licensed premises, those offences were nonetheless relevant and should be taken into account. Counsel submitted that the history of offences by the applicant demonstrated a blatant disregard for the law.
- 29 Counsel submitted that the applicant's conviction for giving false and misleading information to police officers was particularly relevant because, as an unrestricted manager, the applicant would have to interact honestly with public officers and because that conviction demonstrated that the applicant may not do so.
- 30 In summary, Counsel submitted that the delegate of the Director correctly found that the applicant was not a fit and proper person to be an approved as an unrestricted manager and, on that basis, it was open to the Commission to affirm the Director's decision.

Determination

- 31 On a review under section 25 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;*
 - c. *give directions –*
 - i. *as to any question of law, reviewed; or*
 - ii. *to the Director, to which effect shall be given; and*
 - d. *make any incidental or ancillary order.*

- 32 The Commission is obliged to consider afresh the whole of an application in the course of any review proceedings before it (*Commissioner of Police v Bloo Moons Pty Ltd* LC 05/2010).
- 33 The Commission is to undertake this review having regard to the material that was before the Director, on its merits, and by way of rehearing (*Hancock v Executive Director of Public Health* [2008] WASC 224, [53]).
- 34 The decision that the applicant was dissatisfied with in this case was a decision to refuse an application for approval as an unrestricted manager. The Commission must now determine whether the application should be granted.
- 35 In considering whether the applicant is a fit and proper person to be approved as an unrestricted approved manager under section 102B(3), the Commission has considered the following factors, which are prescribed as relevant under section 33(6) of the Act:

Where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as an approved unrestricted manager, or an approved restricted manager or a trustee –

- (a) The creditworthiness of that person; and*
- (b) The character and reputation of that person; and*
- (c) The number and nature of any convictions of that person for offences in any jurisdiction; and*
- (d) The conduct of that person in respect to other businesses or to matters to which the Act relates; and*
- (e) Any report submitted, or intervention made, under section 69,*

are relevant and amongst the matters to which consideration may be given,

and the Commission has given particular consideration to the factors listed in section 33(6)(b) and 33(6)(c).

- 36 As outlined in paragraphs [3]-[4] above, the applicant has been convicted of 9 criminal convictions over a period of 14 months and has had 25 traffic infringements over a period of 32 months. This includes giving false and misleading personal details to persons exercising public functions on 2 occasions and breaching his bail undertaking by failing to appear at the Magistrates Court as required.
- 37 The expression "fit and proper person" allows a wide scope for judgment and involves an inquiry about a person's honesty, knowledge and ability (*Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127 at 156-157 and *Maxwell v Dixon* [1965] WAR 167 at 169).

- 38 In *Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321, Toohey and Gaudron JJ held that:

*"The expression 'fit and proper', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, **character (because it provides indication of likely future conduct or reputation (because it provides indication of likely future conduct)) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.**" (bold emphasis added)*

- 39 The role of an approved manager is to supervise the day to day operations of the business and ensure that it complies with the provisions of the Act. The Commission is of the view that the applicant's criminal convictions are relevant pursuant to section 33(6)(c) of the Act and are also relevant to an assessment of the applicant's regard for the law and his honesty, including his honesty in dealing with the public, with the police and with authorised officers. The history of the applicant's convictions show that, in the past, the applicant has lacked the requisite honesty and integrity that are expected of an approved manager. The applicant's convictions for giving false and misleading personal details to persons exercising public functions are particularly significant in any assessment of the applicant's likely future honesty and integrity. In addition, this past conduct is of particular relevance to the assessment of the applicant's likely future conduct because the conduct is so recent (latest offence on 9 December 2017) and because there is no period of "off-setting" conduct that would indicate otherwise. In accordance with the decision in *Australian Broadcasting Tribunal v Bond & Ors*, the Commission finds that this past conduct provides an indication of the applicant's likely future conduct.
- 40 The applicant's convictions for giving false and misleading personal details to persons exercising public functions demonstrate that the applicant has been willing to commit offences and, when he is caught, he has also been willing to lie to the authorities in order to avoid being held responsible for his actions. Those convictions thereby raise a concern that, if the application were granted, if there were any issues arising in relation to licensed premises where the applicant worked as an approved manager, and if authorised officers then requested information from the applicant about those issues, then the applicant may lie or mislead those authorised officers in order to try to avoid any adverse consequences.
- 41 Mr D McNeill submitted that the applicant only lied to the public officers to protect himself. The Commission is not persuaded that the applicant would not also lie to authorised officers in order to protect himself in his role as an approved manager.
- 42 In the applicant's written submission dated 20 February 2018 to the Director, the applicant stated that "*the incidents regarding the no authority to drive under fines suspension back in February 2017 were mistakes that I have learnt from and grew from*". The applicant then

stated that the most recent driving without authorisation conviction (17 November 2017) was because the fine in question was sent to his previous address. However, in the applicant's submissions, there was no mention or explanation for the applicant driving without authorisation on 9 December 2017 for which he was convicted on 5 February 2018.

- 43 The applicant's last conviction was approximately 4 months before the delegate of the Director decided to refuse the application. The Commission is of the view that insufficient time has passed since the applicant last committed an offence to demonstrate that the applicant has learnt from his past mistakes and is unlikely to re-offend.
- 44 If the applicant were found by the Commission to be a fit and proper person under section 102B(3) of the Act, then the applicant would still have to satisfy the Commission that approving the application would be in the public interest under section 38(2) of the Act. However, that issue does not arise for consideration in this case, as the Commission has not determined that the applicant is a fit and proper person.
- 45 In summary, given the nature and number of the applicant's convictions and the relatively short amount of time that has passed since the applicant's last offence, the Commission is of the view that the applicant is not a fit and proper person for approval as an unrestricted manager under the section 102B of the Act.
- 46 The application is refused and the decision of the delegate of the Director is confirmed.



PAUL SHANAHAN
PRESIDING MEMBER