

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

- Applicant:** Goldbay Enterprises Pty Ltd
*(represented by Mr Phil Cockman of
Canford & Associates)*
- Intervener:** Director of Liquor Licensing
*(represented by Mr David Anderson of
State Solicitor's Office)*
- Commission:** Mr Jim Freemantle (Chairman)
Mr Eddie Watling
Dr Eric Isaachsen
- Premises:** Fonty's Pool and Caravan Park
699 Sevenday Road, Manjimup
- Matter:** Application for Review pursuant to Section 25 of the
Liquor Control Act 1988 of a Decision A218800 of
the Director of Liquor Licensing refusing a
conditional grant of a tavern licence.
- Date of Hearing:** 30 September 2011
- Date of Determination:** 30 November 2011
- Determination:** The Application is refused

Authorities cited in the determination:

- *Hancock v Executive Director of Public Health – Martin CJ [2008] WASC324*
- *Tamberlin J McKinnon v Sec Department of Treasury [2005] FCAFC142*
- *Palace Securities v Director of Liquor Licensing [1992] 7WAR344*
- *Executive Director of Public Health v Lily Creek International Pty Ltd [2000] WASCA258*

Background

- 1 An application for a tavern licence for the premises together with a Public Interest Assessment and supporting evidence was lodged on 6 September 2010.
- 2 The Executive Director Public Health ("EDPH") lodged a Notice of Intervention on 19 October 2010.
- 3 Comments on behalf of the Commissioner of Police were lodged on 26 October 2010.
- 4 On 5 May 2011 the applicant lodged various letters of support from the Shire of Manjimup and others.
- 5 In decision A218800 dated 1 July 2011, the Director of Liquor Licensing ("the Director") refused the application.
- 6 On 12 July 2011, the applicant lodged an application for a review of the Director's decision pursuant to section 25 of the Act.
- 7 Pursuant to section 69(11) of the Act the Director lodged a Notice of Intervention in respect of the application.
- 8 Further submissions by the parties were lodged with the Commission during August and September 2011.
- 9 A hearing before the Commission was held on 30 September 2011.

Submissions by the Applicant

- 10 The applicant was misled and confused in respect of the appropriate category of licence to be applied. It was submitted that the Director misunderstood the availability of internal toilet facilities which (the applicant claims) were satisfactory to the Licensing Inspector who visited the premises.
- 11 Licensing of the premises will make the task of controlling liquor consumption easier than the present circumstance of BYO liquor for consumption at the premises.
- 12 The applicant would be better able to exercise control over unaccompanied juveniles in the premises if it were licensed.
- 13 The EDPH did not intervene for the application to be refused and in support of its intervention used data that was not specific to the premises in question.
- 14 Furthermore the applicant agreed to adopt the restrictions recommended by the EDPH to lower its risk of alcohol related harm.
- 15 The applicant's PIA and further submissions demonstrated a high level of support from the local community.
- 16 The evidence clearly demonstrates that the premises are a major local facility and tourist attraction.
- 17 The granting of the licence will assist turning marginal functions into profitable ones.
- 18 The premises have been operating since at least 1925 in one form or another and is

widely recognised as an icon of the area having great historical significance.

- 19 The applicant has used 17 occasional licences in the past 12 months whereas the Director's guidelines states 12 as a usual maximum.
- 20 Failure to gain the licence for which the applicant has applied will result in the demise of the venue in any recognisable form.
- 21 The Director dwelt on reasons the applicant shouldn't be successful rather than reasons why it should be.

Submissions by the Director

- 22 The Director elected to rely on his correspondence dated 1 July 2011 to Mr Cockman wherein he was advised that the applicant could and did seek guidance from the Department of Racing, Gaming and Liquor. However the onus is on the applicant to determine the class of licence to apply for.
- 23 The Director reiterated the reasons provided in his determination and that criticism of the licensing regime did not constitute a valid consideration in the granting or refusing of a licence.

Submissions by the Executive Director of Public Health

- 24 Although the EDPH intervened before the Director in relation to the application, he did not intervene in the application for review before the Commission.
- 25 The grounds of intervention submitted by EDPH are summarised as follows:
 - (i) the applicant is proposing for unaccompanied juveniles to be permitted to remain in the licensed area, which raises child safety concerns;
 - (ii) the area around Fonty's Pool is proposed to be licensed and there is no barrier separating the pool from the licensed area. Research demonstrates that alcohol use increases the risk of water-related harm. The applicant has not considered this in their Public Interest Assessment;
 - (iii) families and children will be a key patron group and are at-risk groups for alcohol-related harm;
 - (iv) the venue is located out of the Manjimup town centre and there is a lack of public transport which increases the risk of drink-driving for those not staying at the Park;
 - (v) the granting of this application will increase the availability and access to alcohol at Fonty's Pool, which is likely to result in impulse (unplanned) purchasing, increased consumption and associated increased risk of harm; and inclusive of the convenience of obtaining alcohol, increases consumption and levels of harm (National Drug Research Institute, 2007).
- 26 Thus the application by Fonty's Pool and Caravan Park potentially exacerbates the risk of harm in the locality, however, should the application be granted, the imposition of a number of formal conditions on the licence would be required to minimise the risk of alcohol-related harm.

Determination

- 27 Section 25(1) of the Act provides that a person who is a party to the proceedings before the Director may apply to the Commission to review a decision with which they are dissatisfied.
- 28 When conducting a review the Commission may only have regard to the material that was before the Director when making the decision (section 25(2c)).
- 29 The Commission is not constrained to finding fault with the decision of the Director but is to review the material before the Director ab initio and make its own determination (*Hancock v Executive Director of Public Health Martin CJ [2008] WASC324*).
- 30 Section 38(2) of the Act requires the Applicant for a licence to satisfy the licensing authority that the ground of the licence is in the public interest and in meeting the requirements of section 38(2), the applicant must address the positive and negative impact that granting the licence may have in the community.
- 31 Section 33 gives the licensing authority an absolute discretion to grant or refuse an application under the Act if it considers it to be in the public interest to do so. This power is constrained only by the scope and purpose of the Act (*Palace Securities v Director of Liquor Licensing (supra)*).
- 32 Tamberlin J *McKinnon v Secretary Department of Treasury [2005] FCAFC142* observed "the expression in the public interest directs attention to that conclusion and determination which best serves the interest or welfare of the public.....and its content will depend on each particular set of circumstances".
- 33 Important considerations in determining the public interest lies in section 38(4) of the Act which provides that, without limiting section 38(2), the matters licensing authority may have regard to when determining whether granting an application is in public interest include:
- (a) the harm and ill health that might be caused;
 - (b) the impact on the amenity of the locality;
 - (c) whether offence, annoyance or disturbance might be caused to people living or working in the locality.
- 34 In determining the public interest the objects of the Act are important (*Refer Palace Securities v Director of Liquor Licensing [1992] 7WAR344.*)
- Section 5(1)(c) sets out one of the primary objects of the Act "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."
- Section 5(1)(b) sets out another primary object of the Act "to minimize the harm or ill health caused to people or any group of people due to the use of liquor".
- 35 Where there is any conflict between the various objects of the Act, the licensing authority needs to weigh and balance these conflicting interests (*Executive Director of Public Health v Lily Creek International Pty Ltd [2000] WASCA258*).
- 36 The Commission notes that the applicant has been granted well in excess of the guideline number of occasional licences by the Director and is aware that there is an

ability to apply in advance to the Director for the likely number of occasional licences which might be required in the ensuing period. This gives the applicant a significantly greater certainty in planning.

- 37 Notwithstanding the above, the applicant is seeking a licence to cover two quite separate and easily distinguishable situations.
- i) the increasing demand for weddings and various other functions for which the applicant is currently relying on occasional licences. The demand is such that the applicant is significantly exceeding the number of occasional licences for which the Director's policy guidelines provide;
 - ii) the ability to sell liquor to visitors to the site of Fonty's Pool (the premises).
- 38 The Commission formed the view that the applicant had established that it was in the public interest to allow the applicant to continue to develop and expand the function centre aspect of the business which justified the granting of a licence to permit this.
- 39 However, the second aspect of the proposed operation of the premises is of sufficient concern to the Commission for it to conclude that the application must be refused.
- 40 The very nature of the set up at Fonty's Pool permits unaccompanied juveniles to have free access to, and be present on, the premises. Indeed the premises could be described as a magnet for unaccompanied juveniles providing attractive playing areas and a pool.
- 41 The Act pursuant to section 120 quite specifically sets out the conditions under which juveniles may be on licensed premises and the circumstances of these premises do not fall within the exemptions under section 120 of the Act.
- 42 The argument that a licence was required to ensure the ongoing viability of the premises is not a valid argument for the purpose of the Act.
- 43 The modus operandi of the premises does not permit segregation of the pool/swimming areas from the remainder of the licensed premises known as Fonty's Pool thus it could not comply with section 120(2) as a way to overcome the restrictions imposed by the Act relating to juveniles on licensed premises and consequently the application must fail.



JIM FREEMANTLE
CHAIRPERSON