

Glennelg Jetty Hotel [2011] SALC 59

LICENSING COURT OF SOUTH AUSTRALIA

GLENELG JETTY HOTEL

JURISDICTION: Application for summary relief in respect of a s 120
Complaint for Disciplinary Action

FILE NO: 637/2011

HEARING DATE: 31 May 2011

JUDGMENT OF: His Honour Judge B Gilchrist

DELIVERED ON: 1 June 2011

REPRESENTATION:

Counsel:

Applicant: Brevet Sergeant C Brannan

Respondent: Mr W Woehlert

Solicitors:

Applicant: Commissioner for Police

Respondent: Australian Hotel Association

These reasons for decision are uncorrected and subject to revision before external publication and distribution.

- 1 On 8 February 2011 the Commissioner for Police issued a complaint for disciplinary action pursuant to s 120 of the *Liquor Licensing Act 1997* against the respondent, Jethot Road Pty Ltd trading as the Glenelg Jetty Hotel.
- 2 The respondent seeks an order dismissing the complaint on the basis of submissions it made by reference to the *Expiation of Offences Act 1996*.
- 3 The complaint alleges that on 9 May 2010 the respondent breached a condition of its liquor licence in that it permitted patrons to consume alcohol that was not ancillary to a meal.
- 4 Having detected this misconduct police initially issued the respondent with an expiation notice in purported reliance upon s 45 of the Liquor Act. That provision provides that if a condition of a licence is not complied with the licensee is guilty of an offence. After prescribing maximum penalties the section then contains the following:

“Expiation fee: for an offence of the kind prescribed by the regulations –

 - (a) in the case of the licensee-\$1 200;
 - (b) in other any cause-\$210.”
- 5 On 3 May 2010 the Office of the Liquor Gambling Commissioner issued an information sheet in relation to expiable offences. It specifically made reference to s 45 and stipulated the expiation fees provided for by the Liquor Act. The significance of this is that the respondent had no reason to question the validity of the notice.
- 6 It is common ground that in fact no regulation has been promulgated pursuant to s 45 of the Liquor Act. Accordingly, as a matter of law, as at 9 May 2010 it was not permissible for the police to have issued the respondent with the expiation notice.
- 7 As it was, the respondent paid the fine stipulated in the expiation notice.
- 8 Having realised that as a matter of law it had no right to issue the notice, by letter dated 10 December 2010, the expiation notice branch of the South Australian Police advised the respondent that the expiation notice had been withdrawn and it issued a refund cheque for the amount paid. That is pretty much all that the letter said.
- 9 The respondent contends that in the circumstances, as a matter of law, the complainant cannot proceed with disciplinary action in respect of the same alleged misconduct.

10 In the course of argument I was taken to following provisions within the Expiation Act.

11 Section 16(1) of the Expiation Act, which provides:

“The issuing authority may withdraw an expiation notice with respect to all or any of the alleged offences to which the notice relates if-

- (a) the authority is of the opinion that the alleged offender did not commit the offence, or offences, or that the notice should not have been given with respect to the offence, or offences; or
- (ab) the authority receives a statutory declaration or other document sent to the authority by the alleged offender in accordance with a notice required by law to accompany the expiation notice or expiation reminder notice; or
- (ac) the notice is defective; or
- (b) the authority decides that the alleged offender should be prosecuted for the offence, or offences.”

12 Section 16(10), which provides:

“The notice of withdrawal must specify the reason for withdrawal.”

13 Section 16(11), which provides:

“If an expiation notice is withdrawn under this section and the notice of withdrawal does not specify that the notice is withdrawn for the purposes of prosecuting the alleged offender-

...

- (c) the issuing authority cannot prosecute the alleged offender for an alleged offence to which the withdrawal related unless the alleged offender has been given a fresh expiation notice and allowed the opportunity to expiate the offence.”

14 The gist of the respondent’s argument is that because the police elected to deal with this matter through an expiation notice and withdrew it without an advice that the notice was withdrawn for the purposes of prosecuting the respondent the police cannot issue disciplinary action without issuing a fresh notice, which of course it cannot do. In the alternative it relies upon the failure of the police to comply with the requirements of the Expiation Act by not stipulating the reasons why the notice was withdrawn. It contends that as a consequence it might be

argued that the notice has not been withdrawn such that related disciplinary action is not allowed.

- 15 The difficulties that I have with these arguments are that first, they fail to recognise that there is a fundamental difference between a prosecution for an offence under the Liquor Act and disciplinary action taken under the Act. Second, they fail to recognise that the Liquor Act itself clearly contemplates that the two processes can proceed in respect of the same alleged misconduct.
- 16 Pursuant to s 121(1) of the Liquor Act upon finding that there is proper cause to take disciplinary action, the Court can make any one of the number of orders including: adding to or altering conditions of a licence, suspending or revoking a licence, reprimanding the person, imposing a fine not exceeding \$15,000 or disqualifying the person from being licensed or approved under the Act.
- 17 Section 121(3) of the Liquor Act provides:

“If-

 - (a) a person has been found guilty of an offence; and
 - (b) the circumstances of the offence form, in whole or in part, the subject matter of the complaint,

the person is not liable to a fine under this section for conduct giving rise to the offence.”
- 18 That provision clearly contemplates dual actions taken in respect of the same misconduct, one being the prosecution, the other being an application for disciplinary action. The effect of this provision is that if a fine has been issued in relation to the prosecution that is an order that is no longer available to the Court in dealing with the matter by way of disciplinary action.
- 19 The reason why a prosecution and an application for disciplinary action might be taken in respect of the same misconduct is because they serve different, albeit at times overlapping purposes.
- 20 The end point of a prosecution is sentencing. Its purpose is to impose punishment as part of the administration of the criminal law.
- 21 The purpose of disciplinary action is not to punish the entity against which disciplinary action is sought. Although the analogy is not perfect, it seems to me that the primary purpose of disciplinary action is akin to the purpose that it serves in connection with the regulation of professionals.

- 22 The New South Wales Court of Appeal in *Richter v Walton*, which was a case concerning the disciplining of a medical practitioner, said:

“Necessarily, **the exercise of a disciplinary power and respect of a professional person may have a consequence that seems punitive** and that has results for the person that are burdensome and hard. **That is not their purpose in the eye of the law.** In case such as the present, **punishment can be left to the application (if any) of the criminal law.... Punishment is not the purpose of the proceedings. That purpose remains, from first to last, ... the protection of the public** who deal with medical practitioners upon the assumption of their integrity and ethical behaviour, including those who deal with this practitioner.”¹ (emphasis mine)

- 23 In *Craig v Medical Board of South Australia* Doyle CJ made the following observations which are also apt:

“In the case of professional disciplinary tribunal, an obvious type of order protective of the public is an order cancelling the registration or recognition of a person as a member of a profession.

...

In other cases **the protection of the public or the public interest** may justify an order intended to bring home to the practitioner the seriousness of the practitioner’s departure from professional standards and intended to deter the practitioner from any further departure. A fine might well be imposed with this object. **An order imposing a fine might look like a punishment imposed by a court exercising criminal jurisdiction but in professional disciplinary proceedings it is imposed on a different basis.** An order might also be made in professional disciplinary proceedings to emphasise to other members of the profession, or to reassure the public, that **a certain type of conduct is not acceptable professional conduct.** In the later case the order is in part to protect the profession, by **demonstrating that the profession does not allow certain conduct.** This, in the end, is also in the public interest.”² (emphasis mine)

- 24 As I said earlier, although the analogy is not perfect, the same sorts of considerations underpin the Court’s approach to determining what disciplinary action is appropriate. The public needs to have confidence in those operating licensed premises. That confidence might be shaken by something as trivial as a technical failure to comply with the conditions of a licence such as not having a licence appropriately displayed. That confidence might be seriously shaken by something as serious as allowing barred persons from operating licensed premises or by gross

¹ [1993] NSWCA 233

² (2001) 79 SASR 545 at 555

overcrowding or hazardous blocked exits. The purpose of disciplinary action is focussed towards protecting the public. That may be achieved by attempting to change behaviour for the benefit of the public and demonstrating to the public and to those involved in licensed premises that licensing authorities take obligations imposed by the Act and the conditions of a license seriously. Ultimately it may require removing the person from the service of the public. All of these serve the public interest.

- 25 In my opinion that an expiation notice may have been issued, may have been issued incorrectly, may have been withdrawn and its withdrawal may not have complied with requirements of the Expiation Act, are not, as a matter of law, of any direct relevance in relation to the taking of disciplinary action. They might be highly relevant to a belated attempt to prosecute but because disciplinary action is a different exercise concerned with fulfilling a different purpose there is no direct relationship between the two.
- 26 That is not to say that these facts would necessarily be irrelevant to the Court's determination as to whether this is an appropriate case to take disciplinary action. They might also, if it came to it, be relevant to determine what disciplinary action should be taken. These matters will depend upon the material placed before the Court in the hearing proper.
- 27 The application to summarily dismiss the complaint is refused.