

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND MOUNT BARKER

JURISDICTION: Application for Review of or an Appeal from the Commissioner's Decision – Preliminary Issue

FILE NO: 138 of 2021

HEARING DATE: 18 February 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 8 March 2022

CATCHWORDS:

*Application seeking a review of a decision by the Commissioner for Liquor and Gambling granting an application for a packaged retail liquor licence – An objector to the application and the applicant of review trades under a general and hotel licence through which it operates a take-away liquor facility near to the proposed new licensed premises and is very concerned about the economic impact that will result from the grant of the licence and sought to lead evidence that would establish the adverse economic impact that it would have upon its business – The Commissioner's delegate refused to act upon that evidence – The applicant submitted that such evidence is a relevant consideration in determining whether to grant the licence and that it should have been received and taken into account by the Commissioner and that it should now be received and taken into account by this Court in determining an application made by it to review the Commissioner's decision – Section 53(1) of the current Act under the heading of Discretionary powers and discretions of licensing authority' includes: 'but is not to take into account an economic effect on other licensees in the locality affected by the application' – The applicant contends that this bar only applies in respect of the exercise of discretion and does not act as a bar in determining whether it would or would not be contrary to the public interest and whether the grant of the application is or is not in the community interest to do so – The applicant now applies to tender this evidence – The respondent contends that the words in s 53(1) create an absolute bar and the tender should be refused – **Held** that when viewed in context and with a view to achieving harmony between the various provisions in the Act the embargo created by s 53(1) must be seen as applying generally, and not just in connection with the discretion conferred by s 53(1)*

such that the application for tender must be refused – Liquor Licensing Act 1967, Liquor Licensing Act 1985, Liquor Licensing Act 1997.

Wilman Nominees v Harvey (1984) 35 SASR 473
Jattadd Pty Ltd v Liquor Licensing Commissioner (1993) 172 LSJS 246
Review of the Liquor Licensing Act 1985 – Mr T R Anderson QC
BWS – Seaford [2015] SALC 19
Liquorland – Parkholme Shopping Centre [2017] SALC 2
Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors [2018] SASFC 31
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 81 ALJR 1107
Hackham Community Sports & Social Club Inc v Joperi Hotel Pty Ltd & Ors [2009] SASC 333
Waiata Pty Ltd v Lane (1985) 39 SASR 290
Certain Lloyd’s Underwriters Subscribing to Contract No IHOOAAQS v Cross [2012] HCA 56; (2012) 248 CLR 378
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503
Hot Holdings Pty Ltd v Creasy [1996] HCA 44; (1996) 185 CLR 149
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Plaintiff S4/2014 v The Minister for Immigration and Border Protection and Another [2014] HCA 34; (2014) 253 CLR 219

REPRESENTATION:

Counsel:

Applicant: Mr S Henry QC

Respondent: Mr M Roder QC

Solicitors:

Applicant: Wallmans Lawyers

Respondent: Jones, Harley and Toole

- 1 The Pulpit Tavern¹ trades under a general and hotel licence in Mount Barker. Amongst its offerings is a retail take-away liquor facility known as the Pulpit Cellars/Urban Cellars.
- 2 Following a recent determination made by the Commissioner of Liquor and Gambling, Liquorland² has been granted a packaged retail liquor licence for a store adjacent to a Coles supermarket in the Mount Barker Shopping Centre, a short distance from the Pulpit Cellars.
- 3 The Pulpit Tavern is very concerned about the economic impact that will result from the grant of the licence to Liquorland and believes that as a result it will need to close the Pulpit Cellars. It argues that this is a relevant consideration in determining whether Liquorland should have been granted its licence. It maintains that evidence about this should have been received and taken into account by the Commissioner's delegate who granted the licence and that it should now be received and taken into account by this Court in determining an application made by it to review the Commissioner's decision.
- 4 Liquorland contended before the Commissioner and submits to this Court that the *Liquor Licensing Act 1997* (the current Act) forbids the receipt of this type of evidence.
- 5 The evidence comprises of the following:
 - A report from Mr Paul Tisato, a self-employed management consultant who has extensive experience in the liquor industry. He was engaged by the solicitors for the Pulpit Tavern to provide a statement of the local market effect in connection with what were then applications for proposed a packaged retail liquor licences for a proposed liquor store trading in Mount Barker under the BWS badge and another proposed liquor store trading in Mount Barker under the Liquorland badge. Amongst other things, the report provided estimates of the trade that each of the proposed stores would generate
 - A report from Tilbrook Rasheed, chartered accountants, dated 17 September 2021, which was originally commissioned in connection with a proposed liquor store trading in Mount Barker under the BWS badge and which gave a pessimistic assessment of the viability of the Pulpit Cellars/Urban Cellars should the proposed BWS store proceed.
 - A report from Tilbrook Rasheed dated 19 October 2021, which was commissioned in connection with the then proposed Liquorland store

¹ Chelsea Bay Pty Ltd, Takma Pty Ltd, and Hutchinson Hotel Investments Pty Ltd, are the joint proprietors of the Pulpit Tavern.

² The full name is Liquorland (Australia) Pty Ltd.

that is the subject of the within application. This report assumed a lower level of trade than the proposed BWS store, but nevertheless again which gave a pessimistic assessment of the viability of the Pulpit Cellars/Urban Cellars should the proposed Liquorland store proceed.

6 The Pulpit Tavern has formally applied to tender this evidence in connection with its application for review before this Court.

7 Liquorland opposes the tender.

8 This is a preliminary issue that I must now resolve.

9 The critical issue is the reach of the bar created by s 53(1) of the current Act. It provides as follows:

Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (**but is not to take into account an economic effect on other licensees in the locality affected by the application**).
(Emphasis mine)

10 Liquorland contends, that properly understood, this subsection provides an absolute bar to the receipt of evidence regarding the potential economic impact upon existing licensed facilities in connection with applications under the current Act.

11 Pulpit Tavern contends that the opening words of the subsection “Subject to this Act” hold the key and point to a very different outcome. It notes that s 53(1a) provides:

An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.

12 It also notes that the newly inserted s 53A(1) provides:

The licensing authority may only grant a designated application if the licensing authority is satisfied that granting the designated application is in the community interest.³

13 It submits that the discretion conferred by s 53(1) is anterior to the satisfaction required of ss 53(1a) and 53A(1) and that in determining whether the grant of the licence would or would not be contrary to the public interest and whether the grant of the application is or is not in the community interest, the potential economic impact upon existing

³ It is common ground that an application for a packaged retail liquor licence is a designated application.

licensed facilities and their possible closure, if the licence is granted, are relevant considerations.

- 14 To put the competing submissions into context it is necessary to trace some of the history of the legislation and case law that has applied it.
- 15 Contemporary liquor regulation in this State can be traced back the *Liquor Licensing Act 1967*.
- 16 Under the 1967 Act, and the Acts that followed it, the licensing authority, which originally was only the Licensing Court, was given a discretion in connection with matters before it. By s 61(1) of the 1967 Act it was provided that the Licensing Court –

shall hear, inquire into, and determine the application (for the grant, renewal, transfer or removal of a licence) . . . and all such objections (if any) on the merits, and shall grant or refuse the application with or without conditions upon any ground or for any reason whatsoever which, entirely in the exercise of its discretion, it deems sufficient.
- 17 Importantly, one of the stated grounds of objection provided for by s 48(2)(i) of the 1967 Act was ‘that the grant of the licence would result in undue competition and economic waste’.
- 18 Doubtless with these provisions in mind, in respect of applications for licences under the 1967 Act, on occasions objectors would lead evidence of the economic impact that the grant or removal of a licence would have on their licensed premises. And on occasions, such evidence would trump what would otherwise have been a successful application. It is sufficient to refer to the case of *Wilman Nominees v Harvey*.⁴ That case concerned an application for a retail shopkeeper’s licence in connection with a new shopping centre at Salisbury Downs. The Licensing Court judge found that the existing take-away liquor facilities in the relevant locality were not meeting the public demand. In other words, the application had cleared the first hurdle. The judge then turned to consider the issue of discretion under s 61(1) of the 1967 Act. He noted evidence that two hotels in the locality were struggling financially and found that the grant of the licence would make further inroads into their viability. In light of this the judge resolved to exercise his discretion to refuse the application. The Full Court held that the judge was entitled to exercise his discretion as he did.
- 19 The 1967 Act was replaced by the *Liquor Licensing Act 1985*. In the 1985 Act the stated grounds of objection were changed and there was no

⁴ (1984) 35 SASR 473.

equivalent of s 48(2)(i) of the 1967 Act. But the general discretion remained. It was expressed in s 59(1) as follows:

Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers sufficient.

- 20 In that form the Licensing Court and the Full Court took the view that the economic impact that a grant or removal would have upon licensed premises in the relevant locality remained a relevant consideration in connection with the exercise of discretion. It is sufficient to refer to the case of *Jattadd Pty Ltd v Liquor Licensing Commissioner*.⁵ That case concerned an application to move a bottle shop on Payneham Road to the Marden Shopping Centre. Evidence was led about the range of liquor at the Payneham Tavern which was located between the existing and proposed premises. With some hesitation, the Full Court upheld the Licensing Court's judgment that the Payneham Tavern was meeting the public's need. The Licensing Court judge went on to hold that even if he had found that the Payneham Tavern was not meeting the public's need, he would have exercised his discretion to refuse the application. He found that if the application succeeded, the Payneham Tavern might close or at the very least its services would be reduced. He thought that this was sufficient to adversely exercise his discretion against granting the application. King CJ, with whom Olsson and Debelle JJ agreed, found no basis to interfere with the judge's ruling on that issue.
- 21 In 1996, Mr Timothy Anderson QC, published his review of the 1985 Act that formed much of the basis of the current Act. Importantly, the Review contained the following:
- 3.1 It has been suggested that there should be a ground of objection added to the effect that where it can be demonstrated that the grant of a new licence may in effect result in the loss of another licence then that should be a ground in the general community interest for refusing the application.
 - 3.2 I do not believe that this is consistent with the principles of the National Competition Policy and in my view if an applicant is successful in a Category A application in establishing the onus of proof, that is, need having regard to licensed premises which already exist in the locality, then it should not be part of the licensing authority's function to protect a licensee whatever the history of the licence. Put simply, if the decision is that there is a need for a new licence

⁵ (1993) 172 LSJS 246.

it should be granted, subject of course to satisfying the objects of the Act.⁶

- 22 This appears to have been picked up by the legislature by its prohibition in s 53(1) of the current Act, that expressly excludes taking into account the economic impact on other licensees in the locality.
- 23 In connection with this provision, two decisions of this Court and a decision of the Full Court warrant discussion.
- 24 The first is *BWS - Seaford*.⁷ The case concerned an application for the grant of a Retail liquor licence to establish a BWS convenience liquor store in a recently constructed supermarket complex at Seaford Rise. The Court found that within the relevant locality was a family-owned liquor store, a takeaway liquor facility at a hotel, a Cellarbrations store and importantly a virtually identical store to the proposed store at the nearby and much larger shopping centre at Seaford Rise also trading as a BSW store. The Court found that the existing facilities were meeting public demand. It then went on to state that it accepted a submission advanced by an objector that it would be ‘contrary to the balance of the industry to be setting up two BWS stores at such short distance from each other’. It then went on to say:

To put it another way, the grant of this licence will not add to the range of facilities in the locality. It has the potential to result in the public ultimately having less choice not more.⁸

- 25 Whilst the Court’s primary focus was on the undesirability of having two like stores within such a short distance of each other, the Court clearly made reference to the potential adverse implications for two of the existing licensees.
- 26 This judgment was relied upon in a later case of *Liquorland – Parkholme Shopping Centre*.⁹ Liquorland applied for a retail liquor licence adjacent to a Coles supermarket in the Parkholme Shopping Centre. The objector contended that the existing facilities in and about the locality were satisfying the public need. It was submitted that in any event the grant of the licence could impact upon the viability of some of the Hotels. The judge accepted that submission and held that even if the requisite tests had been met, he would have exercised his discretion to refuse the licence.
- 27 The judge said:

⁶ *Review of the Liquor Licensing Act 1985* - Mr T R Anderson QC: Submitted 23 October 1996, p 70.

⁷ [2015] SALC 19.

⁸ *Ibid* at

⁹ [2017] SALC 2.

The granting of the licence in this case may assist one form of consumer, such as those reflected by the need witnesses at the expense of other groups, especially the adjacent hotels and their patrons. As such, the granting of the licence could also have the effect of impairing the statutory objectives referred to earlier herein, which can only be met by Hotels eg: the promotion of hospitality, live music and the amenity of community life, and which encourage a competitive market for the supply of liquor.¹⁰

28 On appeal, the Full Court was critical of this approach. Parker J, with whom Peek J and, on this point, Kourakis CJ also agreed, said:

Section 3(1)(b) states that it is an object of the Act to regulate the sale, supply and consumption of liquor to further the interests of the liquor industry and industries closely associated with it such as the live music industry and the hospitality industry. His Honour also referred to the objective in s 3(1)(d) that the sale and supply of liquor should contribute to the amenity of community life.

At first glance there might appear to be some tension between the prohibition in s 53(1) upon taking into account an economic effect on other licensees in the locality when exercising the unqualified discretion to grant or refuse an application and, on the other hand, the requirement in s 3(2) for the licencing authority to have regard to the objects set out in s 3(1).

I do not consider that, when properly understood, there is any conflict between the objects in 3(1)(b) and 3(1)(d) and **the statutory direction not to take into account the economic effect on other licensees when exercising the discretion under s 53(1). It is clearly not permissible to take into account that other licensees in the locality may suffer a loss of revenue if a particular licence application is approved.** The statutory objective in s 3(1)(e) reinforces that prohibition by requiring a licencing authority to have regard to the objective of encouraging a competitive market for the supply of liquor.

The objective in s 3(1)(b) of furthering the interests of the liquor industry and closely associated industries is qualified by the statutory direction that these matters be considered in the context of appropriate regulation and controls and in accordance with the statutory scheme. For that reason, the object of furthering the interests of the liquor and associated industries does not prevail over the specific statutory prohibition in s 53(1) on taking into account the economic effect of a decision upon local licensees.

The approach adopted by the Judge at [111] of his reasons is contrary to the observations I have made concerning the interaction between the statutory objectives in s 3(1) and the prohibition in

¹⁰ Ibid at [111].

s 53(1). Whilst the grant of the licence may have the consequence of reducing competition or otherwise impairing the statutory objects, in order to reach that secondary conclusion, the Judge made an assessment of the “economic effect on other licensees”. Such an assessment was clearly impermissible under s 53(1).¹¹ (Emphasis mine)

- 29 Mr Henry QC, counsel for the Pulpit Tavern, submitted that this judgment was no obstacle to the arguments that the Pulpit Tavern now puts. He submitted that the majority upheld the primary judge’s decision that the existing facilities were meeting the public demand such that the remarks are merely obiter. He submitted that this Court, notwithstanding its inferior status to the Full Court, was at liberty not to follow what was said by the Full Court and that it should come to a different conclusion to it.
- 30 Next, he said that the case was distinguishable because it only dealt with the issue of discretion. He submitted that his argument is not focussed upon the issue of discretion, but rather, he was contending that the economic impact was relevant to the primary enquiries as to whether the grant of the application was in the public interest and the community interest.
- 31 In contending otherwise, Mr Roder QC, counsel for Liquorland, referred me to the decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹² where the High Court appeared to admonish the New South Wales Court of Appeal for ignoring seriously considered dicta of the High Court. He submitted that for this Court to ignore the seriously considered dicta of the Full Court would be to commit the same error.
- 32 Next, Mr Roder submitted that contrary to Mr Henry’s submissions, the discretion conferred by s 53 was not subordinate to the other provisions in that Act. By reference to the judgment of White J in *Hackham Community Sports & Social Club Inc v Joperi Hotel Pty Ltd & Ors*¹³ he submitted that it was the opposite. In that case White J stated that ‘the discretion is at the heart of the liquor licensing system under the LLA and is not ancillary to the other sections of the Act’¹⁴ He did so by reference to the judgement of King CJ in *Waiata Pty Ltd v Lane*¹⁵ where King CJ said:

While the discretion under s 61 must be exercised in conformity with the legislative policy disclosed by the Act, it is by no means ancillary to the other sections of the Act. Truly understood, it is at

¹¹ *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors* [2018] SASFC 31 at [128]-[132].

¹² [2007] HCA 22; (2007) 81 ALJR 1107.

¹³ [2009] SASC 333.

¹⁴ *Ibid* at [78].

¹⁵ (1985) 39 SASR 290.

the heart of the liquor licensing system construed by the 1967 Act.¹⁶

- 33 He submitted that in light of this, the prohibition created by s 53(1) applied to the enquiries required by ss 53(1a) and 53A(1).

Consideration

- 34 The task at hand is one of statutory construction. Does the bar contained in s 53(1) of the current Act, that forbids a licensing authority from taking into account the economic effect on other licensees in the locality affected by the application, only apply to the exercise of discretion, or does it apply generally?
- 35 The contemporary approach to statutory construction emphasises that legislation is to be construed in accordance with its text, context and purpose.¹⁷ The ‘context includes legislative history and extrinsic materials’.¹⁸
- 36 I commence by observing that little weight can be given to the phrase ‘Subject to this Act’ as it appears in s 53(1). As observed by Dawson and Toohey JJ in *Hot Holdings Pty Ltd v Creasy*, it goes without saying that all provisions in an Act are subject to each other, because an Act of Parliament must be read as a whole.¹⁹ Thus, the use of the expression ‘subject to this Act’ within a statutory provision does not necessarily mean that the provision is qualified by or conflicts with other provisions in the same Act.
- 37 Thus the text does not emphatically point in any one direction.
- 38 I think the position becomes clearer when consideration is given to the context of the Act.
- 39 If, as Mr Henry submits, it is permissible for a licensing authority to take into account the economic effect on other licensees in the locality affected by the application in determining whether the grant of the application is in the public interest or the community interest, the effect of the bar created by s 53(1) would be significantly diminished. Indeed, I struggle to see how it would operate. If it is not in the public interest or community interest to grant an application if the grant would adversely affect other licensees in the locality, on his argument, the issue of

¹⁶ Ibid at 295.

¹⁷ See, for example: *Certain Lloyd’s Underwriters Subscribing to Contract No IHOOAAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23] per French CJ and Hayne J.

¹⁸ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.

¹⁹ [1996] HCA 44; (1996) 185 CLR 149 at 176.

discretion, and hence the bar that qualifies that discretion, would never arise.

- 40 I think the position becomes even clearer when the legislative history is considered. It indicates that Parliament has evinced the intention that a licensing authority must, in determining whether to grant the application, disregard the economic effect on other licensees in the locality affected by the application. To achieve that goal, and to construe the various provisions harmoniously, the embargo created by s 53(1) must be seen as applying generally, and not just in connection with the discretion conferred by s 53(1).
- 41 To so conclude reflects the principles of construing a provision ‘by reference to the language of the instrument viewed as a whole’²⁰ ‘on the prima facie basis that its provisions are intended to give effect to harmonious goals’²¹ and to achieve a coherent outcome²².
- 42 To so conclude is also consistent with the approach taken by Parker J in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*²³ which even if technically is obiter dicta, is one that I would feel bound to follow in any event.
- 43 Accordingly I rule against the proposed tender of the documents outlined above.
- 44 I shall hear from counsel as to how the matter should now proceed.

²⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

²¹ *Ibid* at 382 [70].

²² *Plaintiff S4/2014 v The Minister for Immigration and Border Protection and Another* [2014] HCA 34; (2014) 253 CLR 219 at 236 [42] per French CJ, Crennan, Kiefel and Keane JJ.

²³ *Ibid*