LICENSING COURT OF SOUTH AUSTRALIA

AUSTRALIAN HOTELS ASSOCIATION

and

LIQUORLAND (AUSTRALIA) PTY LTD – MOUNT GAMBIER

and

ENDEAVOUR GROUP LIMITED – BWS – MOUNT GAMBIER

JURISDICTION: Application for Review from a decision of the Commissioner

FILE NO: 54/2020 and 55/2020

HEARING DATE: 2 November 2020

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 4 November 2020

Application made by the Australian Hotels Association seeking a review of a ruling by a delegate of the Commissioner for Liquor and Gambling that applications for packaged liquor sales licenses made not be heard together – Whether the ruling is a decision in relation to a designated application – Held that the ruling was no more than a routine procedural ruling and whatever might be the reach of the right of review provided for by s 22 of the Act, it does not extend to a ruling not to hear and determine particular applications together – Liquor Licensing Act 1997, Liquor Licencing (General) Regulations 2012.

Re the Will of F B Gilbert (1946) 46 SR (NSW) 318
*Wylie v McNeil and Others (*1986) 42 SASR 537
Mobitel (International) Pty Ltd v Dun & Bradstreet (Australia) Pty Ltd (1979) 22 SASR 288
Mitsubishi Motors Australia Ltd v Stone (1994) 179 LSJS 211
DPP v Pace, Collins and Baker (pseudonyms) [2015] VSCA 18

REPRESENTATION:

Counsel:

Applicant:	Mr G Coppola
Respondent (Liquorland):	Mr M Roder QC
Respondent (Endeavour Group):	Mr T Besanko

Solicitors:

Applicant:	Australian Hotels Association
Respondent (Liquorland):	Jones Harley Toole
Respondent (Endeavour Group):	Clelands Solicitors

1 This is an application made by the Australian Hotels Association (the AHA) that seeks a review of a ruling by a delegate of the Commissioner for Liquor and Gambling that applications for packaged liquor sales licenses made by Endeavour Group Ltd and Liquorland (Australia) Pty Ltd not be heard together.

2 Endeavour Group seeks the licence in respect of proposed premises in Mount Gambier to trade under the BWS badge. Liquorland (Australia) seeks the licence in respect of proposed premises in Mount Gambier to trade under Liquorland badge. I will refer to these entities by the badged names under which they propose to trade.

3 Section 54 of the *Liquor Licencing Act 1997* (the Act) provides that: 'The order in which applications for new licences are determined must be consistent with the requirements of the regulations.'

4 Regulation 13 of the *Liquor Licencing (General) Regulations 2012* provides as follows:

> (1) For the purposes of section 54 of the Act, applications for new licences must, subject to subregulation (2), be determined in the order in which they are received by the licensing authority.
>
> (2) A licensing authority may, if satisfied that special circumstances justify it doing so, hear and determine particular applications together regardless of the order in which they were received.

5 BWS filed its application for a packaged liquor sales license on 4 June 2020. Liquorland filed its application on 24 June 2020.

6 At a directions hearing on 7 August 2020, Liquorland requested the Commissioner's delegate to join its application with BWS's application. It contended that special circumstances justified hearing and determining the applications together. The AHA supported the application for joinder. The AHA and Liquorland filed written submissions in relation to the application. BWS ultimately took a neutral position.

7 On 23 September 2020 the delegate published his ruling. He described the primary applications as modest and unexceptional applications for packaged liquor sales licenses. He was not persuaded that there were special circumstances that justified hearing and determining the applications together. He therefore refused the application for joinder.

8 In purported reliance upon s 22 of the Act, the AHA now seeks a review of that ruling.

9 The issues that need to be determined are whether the Court has jurisdiction to entertain the application for review, and if it does, what the fate of the review should be.

10 The right of review and the powers of the Court on a review are conferred by s 22 of the Act, which relevantly provide as follows:

> …
>
> (2) Subject to subsection (3)—
>
> (a) a party to any other proceedings before the Commissioner under this Act who is dissatisfied with a decision made by the Commissioner in the proceedings may apply to the Court for a review of the Commissioner's decision; and
>
> ….
>
> (3) If the Commissioner's decision relates to a subject on which the Commissioner has an absolute discretion, the decision, insofar as it was made in the exercise of that discretion, is not reviewable by the Court.
>
> …
>
> (6) An application for review of a decision of the Commissioner must be made within 1 month after the applicant for the review receives notice of the decision or a longer period allowed by the Court.
>
> (7) A review is in the nature of a rehearing.
>
> (8) On a review, the Court may exercise any 1 or more of the following powers:
>
> (a) affirm, vary or quash the decision subject to the review;
>
> (b) make any decision that should, in the opinion of the Court, have been made in the first instance;
>
> (c) refer a matter back to the Commissioner for rehearing or reconsideration;
>
> (d) make any incidental or ancillary order.

11 The AHA submitted that although the decision made by the delegate involved the exercise of a discretion, the decision did not fall within the bar created by s 22(3). It submitted that the bar related to matters specified in the Act.

12 This submission must be accepted. In numerous provisions in the Act the Commission is vested with an absolute discretion.[1] These are the discretionary judgments caught by the bar provided by s 22(3).

13 The AHA notes that the word 'decision' is not defined in the Act. It submitted that the words 'in relation to' point to the right of review extending beyond the actual decision to grant or refuse a designated application. It submitted that what was involved here was not a mere interlocutory ruling made during a hearing; it was a considered decision made on a specific application in respect of which written submissions were filed and considered. It contended that the ruling was a decision made by the Commissioner in the proceedings, and that it was therefore amenable to review by this Court.

14 Liquorland accepts the ruling made by the Commissioner and it just wants to get on with the merits of its application before the Commissioner. As for the application for review, it queries whether the Court has the jurisdiction to entertain it. It submits that the ruling is not a decision in relation to a designated application.

15 BWS attended before this Court as a matter of courtesy but it not wish to be heard and it made no submissions.

16 In my opinion that fact that the delegate received written submissions, reserved, and then published written reasons does not influence the character of the ruling for the purposes of s 22.

17 Whilst sometimes the distinction between interlocutory and final orders can be difficult to discern, such as a self-executing order, a strike out order, or a permanent stay, what is involved here is a quintessentially interlocutory order concerning a matter of practice and procedure. The ruling has not resolved any of the issues in dispute between the parties. It is a procedural ruling that is similar in character to a ruling allowing or denying an application to fix new dates for hearing or ordering the exchange of expert reports. And like other procedural rulings, if there has been some change in circumstances, it can be revisited.

18 Section 18 of the Act provides that hearings conducted by the Commissioner must be conducted without undue formality. Section 81(1)(a) empowers the Commissioner to determine an application entirely on the basis of the application and any written submissions made without holding a hearing.

[1] See, ss 11, 40(3), 50A(5c), 52A, 53(1aa), 71AA(1), 78(1), 79(1), 80, 81(1), 128(4) and 128B.

19 The Act clearly contemplates that proceedings before the Commissioner will be expeditious. The idea that Parliament intended that interlocutory rulings made by the Commissioner on matters of procedure could be reviewed by this Court through a rehearing hardly seems consistent with that objective. To borrow the words of Jordon CJ in *Re the Will of F B Gilbert*,[2] if the Commissioner's procedural rulings could be the subject of review under s 22, the disposal of cases before the Commissioner could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a delegate of the Commissioner to this Court.

20 These matters inform how the review right is to be construed. In my opinion they strongly point towards a conclusion that where s 22 refers to a decision, it refers to one that finalises the application before the Commissioner.

21 It is notable that the Full Court came to a similar conclusion in *Wylie v McNeil and Others.*[3] That case concerned s 34 of the *Planning Act 1982* which conferred upon a party to proceedings before the Planning Tribunal a right of appeal to the Land and Valuation Court in respect of the Tribunal's determination or decision. The issue before the Full Court was whether the Tribunal's grant of leave to pursue an appeal beyond the stage of a conference was 'the Tribunal's determination or decision'.

22 King CJ referred to the decision of the Full Court in *Mobitel (International) Pty Ltd v Dun & Bradstreet (Australia) Pty Ltd.*[4] That case concerned an appeal to the Credit Tribunal. Prior to the main hearing the Chairman of the Tribunal made a ruling on a preliminary issue. The issue before the Full Court was whether the right of appeal conferred by the relevant Act included a right to appeal the preliminary ruling. Walters J, with whom the other members of the Court agreed, stated that in connection with an appeal from a decision or order of a statutory Tribunal, no right of appeal can be assumed and if there is one it must be plainly given by the legislature. He said that the issue had to be resolved by an examination of the relevant provisions and concluded that had Parliament intended a right of appeal from a preliminary ruling it would have expressly said so.

23 In *Wylie v McNeil* King CJ observed that a grant of leave to pursue an appeal occurs in the course of the appeal proceedings and does not dispose of the proceedings. He noted that the *Planning Act* allowed thirty

[2] (1946) 46 SR (NSW) 318 at 323.
[3] (1986) 42 SASR 537.
[4] (1979) 22 SASR 288.

days within which to appeal. He said that this was 'an inordinately long time to allow an appeal against a mere ruling in the course of proceedings'. He said that to construe the appeal provision as broad enough to include an appeal against such a ruling could result in a multitude of legal procedures which in turn had the potential to hinder or frustrate development. This led him to conclude that the right of appeal was limited to a determination or decision that disposed of the matter before the Tribunal.

24 White J expressly agreed with this. In separate reasons, Legoe J came to the same conclusion.

25 It must be acknowledged that in *Wylie* the appeal provision contained the definite article 'the' before the words 'determination or decision' whereas in this case the review provision contained the indefinite article 'a' before the words 'decision made by the Commissioner in the proceedings'

26 The significance of this was explored in *Mitsubishi v Stone*.[5] In that case the Full Court had to decide whether a decision made by a Review Officer to suspend the operation of a notice of discontinuance could be the subject of an appeal. The relevant appeal right was 'An appeal lies to the Tribunal against a decision of a Review Officer.' The appeal right had previously spoken of the appeal right vesting to the Corporation or a person 'who is dissatisfied with the decision of a Review Officer…'.

27 Bollen J thought that the change from the definite article 'the' to the indefinite article 'a' made all the difference and meant that the appeal right was not confined to final decisions and included the decision that was complained about in that case.

28 Prior J accepted that 'a decision' differs from 'the decision' and that the use of the indefinite article meant that an appealable decision can relate to more than the final order disposing of the substantial dispute between the parties. However, in his view it did not include all interim or provisional orders or procedural orders incidental to the hearing and did not include the decision that was complained of in that case. Duggan J agreed with Prior J.

29 It is clear that in *Mitsubishi Motors Australia Ltd v Stone* the legislative history was considered an important factor in determining how the provision was to be construed. However, notwithstanding the use of the indefinite article, the majority concluded that 'a decision' did not include procedural rulings.

[5] (1994) 179 LSJS 211.

30 In any case, I think the situation here is much closer to that in *Wylie v McNeil*. One month seems an inordinately long time to allow an appeal against a mere procedural ruling in the course of proceedings before the Commissioner. Moreover, what is the damage done if a procedural ruling was wrongly made? Typically where a statute allows for an appeal from an interlocutory ruling, it is because the nature of the proceedings is such that the correction of an erroneous interlocutory ruling may render the trial unnecessary; substantially reduce the time required for the trial; or resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial.[6] Proceedings before the Commissioner are rarely lengthy. They might not result in a hearing at all. Moreover, a party dissatisfied with the ultimate outcome is entitled to a rehearing before a judge of this Court who is given a wide range of powers on review, which includes making the decision that should, in the opinion of the Court, have been made in the first place.

31 This suggests to me that the right of review is confined to the decision that disposes of the application before the Commissioner. However, it is not necessary for me to decide that. It is sufficient for me to hold, as I do, that whatever might be the reach of the right of review provided for by s 22 of the Act, it does not extend to a ruling not to hear and determine particular applications together.

32 Accordingly I dismiss the application for review as incompetent.

[6] *DPP v Pace, Collins and Baker (pseudonyms)* [2015] VSCA 18 at [25].