

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND MOUNT BARKER (No. 2)

JURISDICTION: Application for Review of the Commissioner's Decision

CASE NO/S: 138 of 2021

HEARING DATE: 17 November 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 25 January 2023

CATCHWORDS:

Application to amend and application to introduce new evidence – The applicant contends that given the manner in which the proceedings before the Commissioner were conducted, the hearing before this Court is a hearing de novo such that it can adduce the new evidence as of right – Nature of the rehearing before this Court considered – Some provisions in the Act point to the review being a hearing de novo while others point the other way – As the provisions are ambiguous it is appropriate to compare the convenience and fairness which alternative constructions will achieve – These matters indicate that an application to tender new evidence should be from the premise that it is a matter of discretion – Whether in the Court's discretion the amendment and tender should be granted – The thrust of the new evidence is the opposite of what was previously contended – The grant of the application will result in further delay and expense – The new evidence is of little probative value – The grant of the licence is unlikely to cause issues in the relevant community – The application to amend and tender new evidence is refused – The Application for Review is dismissed – Liquor Licensing Act 1997.

Liquorland Mount Barker [2022] SALC 21

BWS Cumberland Park [2022] SALC 70

Jackpots on Hindley [2009] SALC 35

DM and AJ Bell Pty Ltd v Motor Fuel Licensing Appeal Tribunal and Kalantzis & Kalantzis (1988) 50 SASR 39

Hove Sip n Save [2021] SALC 7

Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd [1976] HCA 62; (1976) 135 CLR 618

Weir Family Supermarket (Warracknabeal) Pty Ltd v Liquor Licensing Commission and Another (1992) 1 VR 305

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175

BWS Mount Barker [2016] SALC 33

Liquorland McLaren Vale (No. 2) [2022] SALC 53

BWS Para Hills [2022] SALC 73

BWS Woodcroft [2022] SALC 108

Police Association of South Australia [2022] SALC 72

BQ & HM Doe Pty Ltd v National Australia Bank [1999] SASC 124

REPRESENTATION:

Counsel:

Applicant: Mr S Henry KC with Mr B Allen

Respondent: Mr M Roder KC with Ms A Humble

Solicitors:

Applicant: Wallmans Lawyers

Respondent: Jones Harley Toole

- 1 This is a further instalment in connection with an Application for Review lodged by the Pulpit Tavern challenging a decision made by the Commissioner of Liquor and Gambling, granting Liquorland a packaged liquor sales licence for a store adjacent to a Coles supermarket in the Mount Barker Shopping Centre, a short distance from the Pulpit Cellars. Pulpit Cellars is a take away liquor facility that trades under the same general and hotel licence as the Pulpit Tavern.
- 2 In an earlier application in these proceedings, the Pulpit Tavern expressed its concern about the economic impact that will result from the grant of the licence. It put evidence before the Court with a view to persuading it that there was a real possibility that, as a result of the grant of the licence, it will need to close the Pulpit Cellars. It argued that this was a relevant consideration in determining whether Liquorland should have been granted its licence. It contended that evidence about this should have been received and taken into account by the Commissioner's delegate who granted the licence. It submitted that it should be received by and taken into account by this Court in determining its application seeking a review of the Commissioner's decision.
- 3 For reasons published on 8 March 2022¹ this Court ruled against that application and refused to permit the tender of documents said to support it.
- 4 The Pulpit Tavern now seeks to amend its Application for Review and to tender evidence that was not placed before the Commissioner. This is opposed by Liquorland.
- 5 To put the competing submissions into context, it is necessary to set out the original grounds of review and the proposed amended grounds.
- 6 The original grounds complained of the Commissioner's alleged failure to:
 - permit the Pulpit Tavern from making final submissions,
 - conduct a hearing at which the Pulpit Tavern could present evidence and challenge evidence filed or called in support of the application,
 - consider expert and lay evidence and the submissions advanced by the Pulpit Tavern,
 - consider the public interest and community interest from the perspective of the adverse impact that the grant of the application could have on the Pulpit Cellars, and

¹ *Liquorland Mount Barker* [2022] SALC 21.

- properly construe the Act in connection with this issue.
- 7 The proposed amended grounds maintained these grounds but made further complaints. At the hearing of this application, Mr Henry KC, counsel for the Pulpit Tavern, advised the Court that the Pulpit Tavern abandoned many of the proposed grounds and now primarily confines itself to the Commissioner's alleged failure to:
- find that the grant of the application was inconsistent with the objects of the Act because it would be inconsistent with the responsible development of the liquor industry,
 - find that the grant of the application would be an undesirable step towards proliferation,
 - give effect to the cautionary principle described by this Court in *BWS Cumberland Park*,² and
 - properly assess the community interest test by failing to weigh the nature and extent of the community benefit associated with the proposed store (if any) with the nature and extent of the community detriment and discretionary issues properly arising under the Act.
- 8 In support of the application to amend, the Pulpit Tavern sought to tender the affidavit of Darren John Steele. Mr Steele is a corporate manager with the corporate group that owns the Pulpit Tavern and another hotel in Mount Barker, Grays Inn. The effect of his evidence was that collectively, although the trading figures of the two entities were down at the start of the COVID-19 pandemic, they have returned to pre-pandemic sales figures and that in some categories of alcoholic beverages there has been an increase. It was submitted that this evidence ought to persuade the Court that the consumption of liquor generally, and also in the relevant community, may have increased and may not have fallen back to pre-pandemic levels. It argues that this ought to weigh heavily on this Court's mind, given that the focus of the Act is towards harm minimisation.

The nature of an Application for Review

- 9 Mr Henry contended that this evidence is placed before this Court as a matter of right. He submitted that in light of the manner in which the proceedings before the Commissioner were conducted, the review hearing

² This is a reference to the passage at *BWS Cumberland Park* [2022] SALC 70 at [56] where the Court said: 'Had there been compelling evidence that there was, and remains, a substantial increase in alcohol consumption as a result of the pandemic a licensing authority would have been entitled to take the view that now is not the right time to be increasing the opportunities for members of the public to purchase liquor from an additional take away liquor outlet.'

before this Court is effectively a hearing de novo, such that either party is at liberty to call such evidence on review as seen fit.

- 10 In developing this argument, Mr Henry relied upon the decision of this Court in *Jackpots on Hindley*.³ In that case, in connection with competing submissions as to whether the review was in the nature of an appeal de novo or an appeal by way of rehearing, this Court suggested by reference to the decision of King CJ in *Bell v Motor Fuel Tribunal*⁴ that:

the nature of the review, that is, a rehearing but not a hearing de novo, **may be approached differently depending upon the level of inquiry** and the extent of the reasons delivered by the Commissioner. (Emphasis mine)⁵

- 11 Mr Henry submitted that because in this case there was no formal hearing in the sense of the parties attending personally at a hearing where witnesses gave oral evidence, the review before this Court should be treated as if it was an appeal de novo.
- 12 Mr Roder KC, counsel for Liquorland, contended that the nature of the review in this Court was settled in *Hove Sip n Save*.⁶ In *Hove Sip n Save* this Court was clearly of the view that a review hearing was akin to an appeal by way of rehearing such that it is open to apply to adduce fresh evidence but the receipt of it is in the Court's discretion. It said that in exercising that discretion: 'Ultimately, the Court must be guided by what is in the public interest.'⁷
- 13 Mr Roder submitted that it follows that there is no absolute right to adduce new evidence and that this Court needs to be satisfied that it is in the interests of justice to receive it.
- 14 Mr Henry submitted that the true nature of the review provided for by s 22 of the Act was not fully argued in *Hove Sip n Save* and that what was said in the case needs to be re-evaluated in light of the submissions put in this case.

Consideration

- 15 The remarks made by the Court in *Hove Sip n Save* were in the context of a submission being advanced in that case that, in light of recent changes in the Act empowering the Commissioner to determine all contested applications, the Commissioner's decisions should be seen as having some

³ [2009] SALC 35.

⁴ *DM and AJ Bell Pty Ltd v Motor Fuel Licensing Appeal Tribunal and Kalantzis & Kalantzis* (1988) 50 SASR 39 at 45.

⁵ *Jackpots on Hindley* *ibid*.

⁶ [2021] SALC 7.

⁷ *Ibid* at [82].

higher status than was previously seen to be the case. It was argued that the right of review to this Court was more in the nature of a strict appeal such that the adducing of fresh evidence should be seen as exceptional, and in the absence of a finding of error on the part of the Commissioner, this Court cannot interfere. I therefore accept the submission that the decision needs to be reconsidered in light of the arguments put in this case.

- 16 Upon reflection, I think to simply describe a right of appeal as an appeal by way of a rehearing as I did in *Hove Sip n Save* was probably not that helpful, because the expression does not define how the appeal is to be conducted. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*⁸ Mason J (as he then was) made the point that an appeal by way of rehearing can take the form of a hearing de novo and it can also take the form of an appeal based on the evidence adduced at trial, with the possibility of further evidence being adduced on appeal. As Mason J observed, where Parliament simply states that an appeal is by way of a rehearing but does not otherwise make its position clear as to what that entails, the Court must endeavour to identify the legislative intent through an examination of the legislative provisions.⁹
- 17 In this case, the legislative provisions point in different directions.
- 18 The Commissioner and his or her delegates do not have to be legally qualified. Pursuant to s 8 of the Act the Commissioner is responsible to the Minister for the administration of the Act and is a public service employee. Pursuant to s 11, the Commissioner is authorised to make disclosure to certain persons of information gained in the course of the administration of this Act. Pursuant to s 17 the Commissioner is effectively given the power to determine any application under the Act. Although many of these will be routine some, like applications for packaged liquor sales licences, can have significant financial ramifications. Pursuant to s 18 the Commissioner must act without undue formality, is not bound by the rules of evidence and may inform himself or herself on any matter as the Commissioner thinks fit. There is no provision that requires the recording of evidence. There is no requirement in the Act for proceedings before the Commissioner to conduct hearings in public. Pursuant to s 81 the Commissioner has an absolute discretion to determine an application without holding a hearing and instead to determine the matter ‘entirely on the papers and any written submissions’.
- 19 These provisions might be thought to indicate that a party aggrieved by a decision of the Commissioner is entitled to a full hearing before a judge, unfettered by what took place before the Commissioner. In other words, a hearing de novo.

⁸ [1976] HCA 62;(1976) 135 CLR 618 at 622.

⁹ Ibid at [11], 622.

- 20 But there are other provisions in the Act that point the other way.
- 21 Section 19 of the Act gives the Commissioner extensive powers in connection with proceedings that the Commissioner conducts. These include the power to issue a summons to require any person to attend before the Commissioner to give evidence, to produce records, for inspection and copying, requiring a person to take an oath or affirmation verifying evidence given, or to be given, and requiring any person appearing before the Commissioner to answer a question put by the Commissioner or some other person.
- 22 Pursuant to s 20 of the Act, apart from proceedings in which the Commissioner has resolved not to conduct a hearing, a party has a general right of representation either personally or by representative.
- 23 Section 77 creates the right for a party to make written submissions in prescribed circumstances and when made, s 77(5) obliges the Commissioner to have regard to them.
- 24 The powers of this Court on review, include a power to refer a matter back to the Commissioner for rehearing or reconsideration.¹⁰
- 25 These provisions point to the proceedings before the Commissioner as involving much more than a preliminary skirmish. This in turn suggests that a review by this Court is not a hearing de novo in which what transpired and what was decided by the Commissioner is ignored.
- 26 Having examined the relevant provisions, I think a good argument for either construction can be put, such that the provisions are ambiguous.
- 27 In *Weir Family Supermarket (Warracknabeal) Pty Ltd v Liquor Licensing Commission and Another*¹¹ McGarvie J made the point that:

In the construction of an ambiguous statute, a court in comparing the convenience and fairness which alternative constructions would produce, a court proceeds on the basis that Parliament, not having actually expressed its legislative intention, intended the legislation to operate reasonably.

- 28 McGarvie J then went on to observe:

If, as the applicant argued, on every review it was mandatory for the Full Commission to receive such relevant oral and other evidence as the parties chose to tender, regardless of whether it had been tendered at first instance, considerable inconvenience, waste of time and expense would needlessly attend the process of review in many

¹⁰ Section 22(8)(c).

¹¹ (1992) 1 VR 305.

cases. Those are strong considerations against giving the Act such a construction.

29 These observations are equally applicable to this Court. To adopt McGarvie J's words, often there would be no advantage in this Court hearing the evidence afresh. There will be other cases in which considerations of fairness and justice would indicate that the appropriate way of determining the real issue on a review is by hearing the whole of the evidence or some of the evidence again or of hearing further evidence not called before the Commissioner. Considerations of good administration would be satisfied if this Court had a discretion by which rehearings anew could be limited to cases where that was the proper exercise of discretion in order to deal fairly and properly with a review in the particular circumstances.

30 An additional observation by McGarvie J in *Weir Family Supermarket (Warracknabeal) Pty Ltd* also bears repeating. He said:

... one must bear in mind that those who come before the commission include litigants with deep purses and those with shallow purses. Experience shows that there are cases where a litigant with large financial resources appeals knowing that the appeal will be unopposed, not because the respondent will lose it but because the respondent will not be able to afford the additional cost of a protracted appeal. If the Full Commission has the discretion as to procedure on review which I consider it has, that economic pressure could be exercised only in cases where a protracted hearing is necessary to resolve the issues on review.

31 The same is true of this Court in dealing with a review of a decision of the Commissioner.

32 Having reconsidered the matter, I am of the view that the review to this Court is a rehearing in the conventional sense and is not a hearing de novo. I therefore approach the application to tender new evidence from the premise that it is a matter of discretion that should only be exercised favourably to the Pulpit Tavern if it is in the interests of justice to do so. This also informs whether the application to amend should be granted.

Should permission to amend and introduce new evidence be granted?

33 Mr Roder submitted that it is not in the interests of justice to admit the evidence of Mr Steele or to allow that application to amend the grounds of review. Underpinning his submissions was his contention that the Pulpit Tavern's challenge to Liquorland's application and its complaints about the Commissioner's decision and his reasons seems to be constantly changing. He submitted that it is unfair for Liquorland to have to meet,

what is essentially a new case, over two years after the Pulpit Tavern first filed its submissions before the Commissioner opposing the grant of the application for a packaged liquor sales licence. He made the point that Pulpit Tavern's case before the Commissioner and its initial complaints before this Court were based upon its precarious financial position and the adverse effect that the grant of the licence would have upon it. He said that in contrast to this, its revised position is that the sales figures of the two hotels within its corporate group that are located in Mount Barker are so positive, they now raise issues about increased alcohol consumption in the relevant community and by the public more generally.

- 34 He submitted that if the application to amend is granted and the new evidence is received, Liquorland will be faced with a new and different case than that which it was faced before the Commissioner and before this Court, and this will result in inevitable delay and expense. He added that no proper explanation had been provided as to why the late change in position was made.
- 35 He submitted that in any event, the evidence of Mr Steele provides little assistance to the Court. He submitted that all it really demonstrates is that the Grays Inn, which is the only hotel in Mount Barker with a drive through bottle shop, had improved sales over the course of the pandemic.
- 36 Mr Henry, in reply, submitted that it was only subsequent to the lodgement of the Application for Review that the Commissioner, in respect of later applications for packaged liquor sales licences, had declared that a cautious approach to the grant of such applications was warranted because of the potential adverse impact upon drinking patterns and alcohol related harm as a result of the COVID-19 pandemic. He submitted that the Commissioner should have adopted the same approach in this case, as should this Court on review, and that in light of it, a different result may ensue.

Consideration

- 37 Whilst this Court must ultimately be guided by what is in the public interest, which as explained in *Hove Sip n Save* can extend beyond the interests of the parties before the Court, principles expressed in cases such as *Aon Risk Services Australia Ltd v Australian National University*,¹² that emphatically put paid to the notion that late applications to amend are there for the taking, must be considered. It is in the public interest for litigation before this Court to be conducted efficiently, no less than it is elsewhere. It is also in the public interest for there to be finality and certainty in connection with licensing matters.

¹² [2009] HCA 27; (2009) 239 CLR 175.

- 38 In dealing with this application, it is important to appreciate what this case is about. It involves an application for a moderately sized convenience style bottle shop to be aligned with a large full line supermarket in a substantial shopping centre serviced by a large, dedicated car park. In connection with a previous application before this Court that shopping centre was described as ‘a large shopping complex’, ‘a major centre’ and that ‘it is the major retail hub of Mount Barker’.¹³ Whilst it is likely that the Liquorland store in Mount Barker will be popular, it is unlikely to be selling alcohol on the ‘industrial scale’ that the Court spoke of in *Liquorland McLaren Vale (No 2)*.¹⁴ Moreover, it might be expected that much of its custom will be drawn from other take away liquor facilities in and about the relevant locality. Indeed, this was the very foundation of the initial claim by the Pulpit Tavern that the grant of the application might see its financial collapse.
- 39 In addition to this licence there are four other take away liquor facilities in Mount Barker. There is the Pulpit Cellars, the drive through at Grays Inn and a Dan Murphys nearby. On the outskirts of the town is a Cellarbrations bottle shop. A few kilometres in the opposite direction is a Sip’n Save drive through and walk-in bottle shop that forms part of the Great Eastern Hotel.¹⁵
- 40 It is also of significance that Mount Barker is experiencing significant population growth. The Court is permitted to know this. It received evidence in 2016 that the rate of growth between 2006 and 2011 was nearly twice the State average, that as of 2016, it was projected that there were over 26,000 residents and that this was expected to climb to over 44,000 by 2034.¹⁶
- 41 Thus the grant of the packaged liquor sales licence to Liquorland has resulted in the creation of a moderately sized bottle shop in a large shopping complex, which will draw much of its custom from existing facilities in and about Mount Barker, a town that is experiencing significant population growth and which, although already adequately catered for in terms of take away liquor facilities, is not awash with them.
- 42 As such, the suggestion that the grant of the application is inconsistent with the responsible development of the liquor industry and is an undesirable step towards proliferation is of no substance.
- 43 In respect of the complaint about the alleged failure to apply the so called ‘cautionary principle’, although there was credible evidence placed before the Commissioner in *Liquorland McLaren Vale* and other cases that

¹³ *BWS Mount Barker* [2016] SALC 33 at [17].

¹⁴ [2022] SALC 53.

¹⁵ These were identified in *BWS Mount Barker* *ibid*.

¹⁶ *BWS Mount Barker* *ibid* at [95]-[96].

suggested a spike in alcohol consumption upon the commencement of the COVID-19 pandemic and a possible increase domestic violence that may have been related to that increased consumption, more recent evidence before this Court suggests that if this was an issue, it is no longer the case.¹⁷

- 44 As to the proposed evidence in this case that apparently suggests otherwise, I think Mr Roder is right is submitting that all that the combined sales figures alluded to in Mr Steele's affidavit demonstrate is that the Grays Inn drive through has enjoyed a period of solid sales over the course of the pandemic. That might not be thought surprising given that over the relevant period members of the public were being urged to avoid unnecessary contact with strangers and to socially distance. It is understandable that over that period many members of the Mount Barker community might prefer to buy their take away liquor from a drive through rather than from a bottle shop. In my opinion this evidence is of little probative value.
- 45 Having carefully considered the proposed evidence and the submissions made in support of the application to amend, I am not in any way concerned that the Commissioner's grant of this application is likely to adversely impact upon drinking behaviours in Mount Barker or lead to an unacceptable risk of harm.
- 46 If the Pulpit Tavern's dissonant complaints about the adverse impact upon its trade and the potential increase in alcohol consumption as a result of the COVID-19 pandemic, as allegedly demonstrated by trade figures combined with another hotel, and its complaints about irresponsible development of the liquor industry and an undesirable step towards proliferation are put to one side, given this Court's earlier ruling that the economic impact upon the Pulpit Tavern was irrelevant, all that is left is a complaint about the way in which the Commissioner conducted the proceedings.
- 47 In respect of this, I repeat what I said in *Police Association of South Australia*:

The edict in the Act about the need to act without undue formality and the removal of the shackles of the strict rules of evidence are not hollow words. **They grant the Liquor Commissioner considerable latitude as to how hearings are conducted.** In my opinion the observations of Lord Denning in *T A Miller Pty Ltd v Minister of Housing and Local Government* are completely apposite to hearings before the Liquor Commissioner. He said:

¹⁷ See: *BWS Cumberland Park* ibid, *BWS Para Hills* [2022] SALC 73, and *BWS Woodcroft* [2022] SALC 108.

A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law... No doubt in admitting [hearsay evidence] **the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross examination.** It only means that the tribunal must give the other side a fair opportunity of commenting on it and contradicting it. (Footnotes omitted)¹⁸ (Emphasis mine)

- 48 Thus, the complaints about the manner in which the Commissioner conducted the proceedings before him were never going to carry the day. I did not understand Mr Henry to seriously contend otherwise.
- 49 Stripped to its essentials, in the end, this is commercial litigation. An existing licensee is attempting to halt the grant of a liquor licence to a commercial competitor. The law permits this, and the Pulpit Tavern is not to be criticised for exploring such options as are legally available to it, to resist the grant of this application. But as a species of commercial litigation, principles applicable to that type of litigation must be considered.
- 50 As Heydon J observed in *Aon*: ‘commercial litigation does have significant claims to expedition. Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest’.¹⁹
- 51 It is over two years since Liquorland lodged its application for a packaged liquor sales licence for a modest bottle shop in a large shopping centre in a fast-growing peri urban community, which is not awash with take away liquor facilities. It is about a year since the Commissioner granted that application. It is over nine months since this Court ruled against the Pulpit Tavern, on an issue that at the time was contended to be the issue that was going to determine whether the Pulpit Tavern’s opposition to the grant of the application would be maintained. The Pulpit Tavern now wishes to advance a new argument inconsistent with its initial contention and seeks to rely upon evidence that demonstrates little more than one unique take away liquor facility in Mount Barker has enjoyed a sustained period of solid sales in recent years. If the application is granted it is inevitable that there will be further delay and the incurring of legal fees. None of this is of Liquorland’s making. I am not aware of the Pulpit

¹⁸ [2022] SALC 72 at [80].

¹⁹ *Ibid* at [137].

Tavern making any offer to Liquorland to compensate Liquorland for any additional costs that it will incur if the amendment is granted. Nothing that has been put to this Court in this case or in other recent cases that suggests that the grant of the licence to Liquorland will have serious adverse implications for the Mount Barker community or the public more generally.

- 52 All parties are entitled to justice before this Court, and that includes Liquorland. Sometimes the only way to do justice between the parties is to shut a party out of the litigation, even if it has an allegedly arguable point.²⁰ This is such a case.

Conclusion

- 53 The Pulpit Tavern's application to amend its Application for Review and to tender fresh evidence is refused. Its Application for Review is dismissed.

²⁰ Albeit, in a different context, see, for example: *BQ & HM Doe Pty Ltd v National Australia Bank* [1999] SASC 124 at [103] per Lander J.