

LICENSING COURT OF SOUTH AUSTRALIA

MAZZE ON RUNDLE PTY LTD

JURISDICTION: Review of a Commissioner's decision

FILE NO: 9707 of 2015

HEARING DATE: 24 March 2016

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 6 May 2016

*Application for the review of a decision of the Liquor and Gambling Commissioner - On the basis of information that was classified as criminal intelligence that was produced by the Police Commissioner the Liquor Commissioner imposed a condition on an application for the transfer of a special circumstances licence that the licensee's brother not enter or remain on the licensed premises, except in such limited circumstances as would ordinarily be allowed in his capacity as landlord for the purpose of conducting an inspection of the Lessee premises - The Police Commissioner in closing submissions raised for the first time the fitness and propriety of the applicant and made submissions on issues not put to the witnesses who gave oral evidence - Rule in Browne v Dunn considered and discussed – **Held** that the rule had been breached and that the inferences that the Police Commissioner sought to draw in respect of these matters were not open - Consequences of the belated assertion by the Police Commissioner concerning the fitness and propriety of the applicant discussed - **Held** that Liquor Commissioner's ruling concerning the fitness and propriety was correct - Whether the condition imposed by the Liquor Commissioner was lawful - **Held** that it was - Whether in the circumstances of this case it goes too far - **Held** that it did and that a condition that prevented the applicant's brother from working at the licensed premises and subjecting him to a condition when he attended the premises as a patron prevented him from being present in any of the work areas of the premises, such as the kitchen, the bar and the office was a far more proportionate response to the risk that the Liquor Commissioner's condition was attempting to deal with - Ss 4, 22, 28A, 43, 53, 125, 125A and 128 Liquor Licensing Act 1997.*

Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia [1932] HCA 9; (1932) 47 CLR 1
Brown v Dunne (1893) 6 R 67
Allied Holdings Pty Ltd v Federal Commissioner for Taxation (1983) 70 FLR 447
Bellingen Shire Council v Colavon Pty Ltd [2012] NSWCA 34
Jonathon Symons-Lawrence [2016] SALC 5
K-Generation Pty Ltd v Liquor Licensing Court [2009] HCA 4; (2009) 237 CLR 501
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Clark Hotel Group Pty Ltd [2015] SALC 54

REPRESENTATION:

Counsel:

Applicant:	Mr J Firth
Respondent Intervenor:	Ms J Lieschke
Respondent Intervenor:	Sergeant R Handley
Solicitors:	
Applicant:	Piper Alderman
Respondent Intervenor:	Crown Solicitors Office
Respondent Intervenor:	Commissioner of Police

- 1 This is an application for the review of a decision of the Liquor and Gambling Commissioner (the Liquor Commissioner) pursuant to s 22 of the *Liquor Licensing Act 1997*.
- 2 On 25 May 2015 Mazze on Rundle Pty Ltd lodged an application with the Liquor Commissioner seeking the transfer of a special circumstances licence in respect of premises that previously traded as the Scoozzi Café Bar in Rundle Street, Adelaide. That entity traded under a special circumstances licence owned by Scoozime Pty Ltd. Scoozime sold the licence to Mazze, hence the application to transfer.
- 3 The building in which the premises are situate was owned by D&M Zappia Pty Ltd. The proprietors of that company were the owners of Scoozime. They effectively leased the area in which Scoozzi occupied to themselves and leased other areas of the building to other tenants, both of whom operated licensed premises. When they resolved to cease trading they decided to sell the building and the business.
- 4 The building was purchased by Investra Australia Pty Ltd. The directors and shareholders of Investra are Mr Emanuael Katsidonis and Mr Sasan Sabet.
- 5 Mazze is owned by Mr Sasan Sabet's older brother, Mr Mayzar Sabet.
- 6 Thus under the proposed arrangement Mr Sasan Sabet would become his older brother's landlord.
- 7 In connection with the proposed transfer the Commissioner of Police (the Police Commissioner) lodged a notice of intervention. He contended that Mr Mayzar Sabet was not a fit and proper person to hold office under the Act. The ground for the assertion was founded on Mr Mayzar Sabet's criminal record, his lack of appropriate experience and his association with his brother, Sasan. The Police Commissioner contended that the reputation, honesty and integrity of Mr Sasan Sabet were seriously wanting. In doing so he relied upon Mr Sasan Sabet's criminal history as well as information that was classified as criminal intelligence that it placed before the Liquor Commissioner and before this Court pursuant to s 28A of the Act.¹
- 8 Contrary to the submission advanced by the Police Commissioner, the Liquor Commissioner found that Mr Mayzar Sabet was a fit and proper person. He did, however, consider that he needed additional training and

¹ Section 28A prescribes a procedure for dealing with material classified by the Police Commissioner as "criminal intelligence". Criminal intelligence is defined in s 4 of the Act as "Information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement."

incorporated a condition to that effect. With the consent of the Crown and with the concurrence of this Court the terms of that condition were varied on 26 February 2016.

- 9 As a result of the evidence of Mr Sasan Sabet's criminal history and criminal intelligence provided, the Liquor Commissioner imposed the following conditions upon the licence:

- “1. Mr Sasan Sabet shall not enter or remain on the licensed premises, except in such limited circumstances as would ordinarily be allowed in his capacity as landlord for the purpose of conducting an inspection of the Lessee premises.
2. Mr Sasan Sabet shall not receive any capital or income distributions including but not limited to profits from Mazze on Rundle. This does not preclude Investra Australia Pty Ltd from receiving ordinary commercial rent pursuant to its rental agreement with Mazze on Rundle.
3. Mr Sasan Sabet shall not exercise control or influence over the Licensee in the conduct of its affairs.”

- 10 He did so pursuant to s 43 of the Act. Section 43 is a very general provision. It enables a licensing authority² to impose licensed conditions. It provides examples of the types of licensed conditions that the licensing authority might impose. These include things such as imposing conditions to prevent excessive noise emanating from the licensed premises, minimising offensive noise and disturbance to persons in the vicinity of licensed premises, preventing offensive behaviour on licensed premises, protecting safety and welfare of customers and staff, ensuring that the nature of the business conforms with representations made to the licensing authority in proceedings for the grant of the licence or other proceedings under the Act, ensuring public order and safety at events expected to attract large crowds, preventing the consumption of liquor sold for consumption off the licensed premises in the vicinity of the licensed premises, and any other conditions to ensure compliance with the objects of the Act.

- 11 Presumably because he felt constrained by s 28A of the Act the Liquor Commissioner did not provide reasons for imposing the conditions.

- 12 Mazze now seeks a review of the decision. Its primary position is that there should not be any conditions relating to Mr Sasan Sabet. In the alternative, it seeks the revocation of the conditions that the Liquor Commissioner imposed and their substitution with a condition that prevents him from being employed in any role that would involve managerial work.

² A licensing authority is, for the purposes of the Act, either the Liquor Commissioner or the Court.

- 13 For reasons published by me³ I concluded that in considering the review this Court must consider the criminal intelligence and having done so that it must take steps to maintain the confidentiality of classified information, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives.
- 14 I have considered the criminal intelligence. I shall return to it later.
- 15 Although there was a hearing before the Liquor Commissioner the proceedings were not recorded and there is no transcript or complete record of what took place.
- 16 A statement from Mr Mayzar Sabet that was tendered at that hearing was placed before me. The Liquor Commissioner also heard oral evidence from Mr Mayzar Sabet and the co-owner of the building in which the premises are situate, Mr Emanuel Katsidonis.
- 17 Mr Mayzar Sabet's statement reveals that he came to Australia in 1986 when he was nine years old. He is single and has no children or nieces and nephews. His parents live in Australia.
- 18 He finished school in 1994 and went to University to study commerce. He did not complete his degree. Whilst at University he worked in second-hand stores and petrol stations.
- 19 Between 1999 and 2005 he worked in security. He had a licence to do so. In June 2005 he was convicted of assault occasioning actual bodily harm. He received a custodial sentence of six months that was suspended upon him entering into a two year good behaviour bond and completing some community service. The offence arose out of a road rage incident that had occurred two years previously.
- 20 In light of his conviction he surrendered his security licence.
- 21 Mr Mayzar Sabet then had a career change and commenced driving heavy vehicles and buses. He worked for Transfield for five years and then worked for Torrens Transit until May 2015. At that point he began to explore moving into the hospitality industry and running the business previously conducted by Scoozi. He entered into negotiations with Scoozime and Investra and purchased the business and entered into a lease.
- 22 Between 6 July 2015 and 23 August 2015 he and Mr Sasan Sabet renovated the building.

³ *Mazze on Rundle Pty Ltd* [2016] SALC 4

- 23 The business opened on 24 August 2015 and traded unlicensed without liquor being available pending the outcome of the application for transfer.
- 24 In addition to the background material that is contained in Mr Mayzar Sabet's statement I have received oral evidence from him and his brother, Mr Sasan Sabet.
- 25 Mr Mayzar Sabet told me that the transfer of the licence was granted on 24 September 2015 and that he has traded as licensed premises without incident ever since.
- 26 He described the business as a family restaurant that attracted an upmarket trendy crowd, families and young couples. He said that they were a low risk crowd.
- 27 He said that in addition to himself he has four responsible persons approved by the Liquor Commissioner who work different shifts at the premises.
- 28 He said that the business usually trades from midday to 10 o'clock during the week and late on Friday and Saturday.
- 29 He said that the staff comprises of himself, a chef, two fulltime staff and about 30 casual staff.
- 30 He said that because of the extensive hours of trading he cannot be at the premises at all times. He said that he would like to be able to employ his younger brother, Sasan, to work at the premises.
- 31 He said:

“Well, there's business reasons and there's personal reasons. The business reasons are my brother is someone I can trust, including running errands for me, help me with the chores of the business, keep an eye on the staff when I'm not there. And his presence would be a good influence to the business and the staff so basically it's a trust factor because he's family, that's what it is, I can trust him when I'm not there. For example, someone might be pinching money out the till. And personal reasons, you know, since the opening day of the business we've had 50,000 people come into the premises since the day of opening, 50,000 people, there's 20,000 people just during the Fringe period and not one single incident. So everyone else - everyone can come except my brother which is very hard and embarrassing for me.”
- 32 If permitted he said that he would like Sasan to work as a waiter; to help round the kitchen; do odd chores and run errands; and on some days to open up or maybe close up the premises.

- 33 He contemplated him working there for between 25 to 30 hours a week.
- 34 He said that in his capacity as landlord Sasan had visited the premises on about six or seven occasions. He said that when he did so he often offered him some coffee and cake and sometimes a meal.
- 35 None of his evidence was seriously challenged in cross examination.
- 36 Mr Sasan Sabet is 36 years old. He confirmed that he and Mr Emanuel Katsidonis are the 50/50 owners of the building where his brother's restaurant is situated.
- 37 He explained how the building was acquired.
- 38 He said that he had been friends Michael and Derek Zappia since 2009. The Zappia brothers owned D&M Zappia Pty Ltd and Scoozime.
- 39 He said that he and Derek were close friends. He said that at some point Derek said to him that he had had enough and wanted out. He asked him to consider purchasing the building. The asking price was \$4.5 million. He said that he could not afford it but approached his friend, Mr Katsidonis, whom he knew to be an investor. It was agreed that Mr Katsidonis would put up the money necessary to secure a bank loan and that Mr Sasan Sabet would sell a property that he owned on Unley Road. He said that the effect was that he borrowed \$560,000 from Mr Katsidonis and that following the sale of the Unley Road property and the liquidation of some other assets about \$160,000 was still owing.
- 40 He said that he and Mr Katsidonis approached the bank to arrange the finance which was duly obtained.
- 41 He said that in connection with that they had to provide about three years of tax assessments and roughly five years of bank statements.
- 42 He spoke of his experiences and employment.
- 43 He said that he repeated year 12 and enrolled in an Arts Degree He did a full year and then got a job in security at the age of 19. He said that it was good money. As a result he focussed more on his job than his studies and decided to defer.
- 44 At one point he did an advanced diploma in justice systems at Adelaide TAFE. He then got a position doing security at the Adelaide Airport.
- 45 In about 2005 he was involved in the criminal matters that would have jeopardised his continued employment there. Accordingly he sought alternative employment.

- 46 He worked in a plastics factory for about a year. After that he obtained employment with Interior Joinery and Furniture.
- 47 He said that he was also into buying and selling cars. He would buy some cars interstate and sell them here for a profit.
- 48 In about 2011 he got a job at West Side Car Wholesale, where he remained until the yard closed in roughly May 2013.
- 49 He said that he would travel interstate to Sydney, Melbourne and Queensland to buy cars from auctions. He organised car inspections, ID inspections, roadworthy inspections for interstate cars and sales.
- 50 He said that the owner of that yard was Mr Severino Scarponi. He said that he did not know him before he got the job there.
- 51 He said that about four or five months after he started working there he learnt that was Mr Scarponi was in some sort of trouble. He believed that he was involved in a drug shipment in Australia.
- 52 Mr Scarponi was eventually gaoled. Mr Sasan Sabet said that he had never been questioned by the police about Mr Scarponi's offending or about any other matter concerning him.
- 53 As far as he knew Mr Scarponi was still in gaol. He said that he had not spoken to him for nearly three years.
- 54 He said that when Mr Scarponi was sent to prison he stayed on to help Mr Scarponi's wife with the business.
- 55 He said that eventually this became too much.
- 56 He said that he visited Mr Scarponi a number of times and on some occasions he took Mr Scarponi's children. He said that he also visited Mr Scarponi to discuss the closure of the car yard.
- 57 He said that over the 18 months that he worked there, he was paid about \$1,200 a week.
- 58 He said that when that business closed he decided to go back into security and opened a company called Zar Security Consultants.
- 59 He also continued to buy and sell cars on the side. Based on his evidence it seems to be a reasonably profitable undertaking.
- 60 He said that when his security company started it was very busy, but more recently business had slowed. He spoke of a present need to supplement his income and of his desire to learn to be a qualified chef by

being able to work his way up by working in a kitchen. He spoke of his desire to help his brother out and ease the pressures on him.

- 61 Mr Sasan Sabet has a reasonably significant criminal record. In 1999 he was convicted of breaking and entering. In 2000 he was convicted of common assault and carrying an offensive weapon. In 2005 he was convicted of assault occasioning actual bodily harm. He received a custodial sentence of 12 months that was suspended upon him entering into a two year good behaviour bond and completing some community service. The offence arose out of the same road rage incident that involved his brother.
- 62 In 2008 he was convicted of dishonestly taking property without consent. In 2013 he was convicted of criminal damage.
- 63 In addition to this he has a reasonably significant matter that is yet to be dealt with. On 6 December 2014, he was involved in a fatal car accident. He was the driver of a car that collided with a pedestrian. As this matter has yet to be determined I give it no weight.
- 64 He said that he has never been barred from any licensed premises in Australia. He said that he has never been evicted from any licensed premises nor has he caused any trouble in licensed premises, such as fights, violence or drunkenness.
- 65 He said that in his capacity as landlord he had visited his brother's premises somewhere between eight to ten times.
- 66 He spoke of an occasion when contrary to the condition of the licence he went there for a meal. He said that he was put on the spot. He had been on a charity car cruise with friends and when it concluded they suggested that they go out for dinner at his brother's restaurant. He said that he felt too embarrassed to explain that he could not attend and therefore agreed to go.
- 67 None of his evidence was seriously challenged in cross examination.
- 68 I received an affidavit from Mr Katsidonis. As I noted earlier, Mr Katsidonis gave evidence before the Liquor Commissioner. In the absence of transcript his affidavit comprises of his best recollection of what he said in the hearing.
- 69 He confirmed Mr Sasan Sabet's evidence about the circumstances leading to the acquisition of the building, the provision of financial information to the bank, of his loan to Sasan, and the anticipation of partial repayment upon the sale of Sasan's property.

- 70 He said that he independently checked Sasan's financial situation and was satisfied that they "stacked up".
- 71 He deposed to the fact of Sasan's renovations of the subject premises and the fact that he was very satisfied with them.
- 72 He stated that he had visited the premises on a number of occasions since it started trading and thought it was well managed.
- 73 He said that he did not have any issues with Sasan, he trusted him and regarded his prior criminal history as mere indiscretions.

The parties' submissions

The applicant

- 74 Mr Firth submitted that there was little dispute about the evidence. He said that both brothers were very open and frank about their past, about the trading to date at the premises, and about Sasan's visits to the premises since the transfer. He submitted that their evidence was impressive and that the Court should accept it.
- 75 He submitted that I should not be concerned about the isolated breach when Sasan attended with friends after a function to have a meal.
- 76 He argued that the effect of the conditions concerning Mr Sasan Sabet was that it was a de facto form of a barring order. He said that on the information publically available there was no reasonable ground for a licensee or the Police Commissioner barring Mr Sasan Sabet under ss 125 or 125 A of the Act.⁴ He challenged the legality of imposing a de facto barring order pursuant to s 43. He made reference to the decision of this Court in *Crown Inn Hotel*⁵ and the citation there of the High Court decision in *Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* where Gavin Duffy CJ and Dixon J observed:

"When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."⁶

- 77 In *Crown Inn Hotel* the Court relied upon the so called Anthony Horden principle in holding that the Police could not use the general powers

⁴ These provisions enable a licensee and the Police Commissioner to issue barring orders in prescribed circumstances.

⁵ [2011] SALC 92.

⁶ [1932] HCA 9; (1932) 47 CLR 1 at 7.

under s 43 as a backdoor means of achieving disciplinary action when s 120 specifically provided the mechanism through which disciplinary action could be taken. It was argued that by parity of reasoning that the general power conferred by s 43 could not be relied upon to achieve a barring order when there are specific provisions that prescribe how and when a barring order can be made.

78 He said that on the information publically available there appeared to be no apparent reason why any restrictions on Mr Sasan Sabet should be put in place. He said that he has never been imprisoned and has never been evicted or barred from these or any other licensed premises anywhere. He submitted that the application to be relieved of the condition was reasonable: Mr Sasan Sabet is the part owner of the premises; the undisputed evidence is that he needs a job to supplement his income; he wants to learn to be a qualified chef by being able to work his way up by working in the kitchen; he wants to help his brother out.

79 He submitted that public interest did not warrant the imposition of these conditions.

80 He said that if I was concerned about Mr Sasan Sabet exercising inappropriate influence over the running of the business I can be comforted by the applicant's agreement to a condition of the licence that provides that Sasan is not to exercise any control or influence over his brother.

81 He said that the applicant would agree to a condition that provided:

“The licensee shall be permitted to employ Sasan Sabet to work in the business at the licensed premises only in a non-managerial capacity and at all times subject to the directions and supervision of the licensee's director or an approved responsible person on duty at the premises.”

82 He said that if the Court thought it appropriate the applicant would have no difficulty in this matter being the subject of a trial period of say six or 12 months.

The Police Commissioner

83 Sergeant Handley submitted that the Liquor Commissioner had indeed erred, but contrary to the submissions advanced by the applicant, his error was not that he unnecessarily imposed conditions concerning Mr Sasan Sabet, but rather, that he allowed the transfer to occur. He submitted that the Liquor Commissioner should have found that Mr Mayzar Sabet was not a fit and proper person for the purposes of the Act and that this Court should correct that error.

- 84 Notwithstanding that this point was not raised at any time prior to final submissions, Sergeant Handley contended that it was open for the Police Commissioner to raise it. He said that the application for review is a rehearing in total, and that if I conclude, as I should, that Mr Mayzar Sabet is not a fit and proper person, the Court should act on that finding.
- 85 In the alternative the Police Commissioner submitted that Mr Sasan Sabet should be totally excluded from the licensed premises.
- 86 Sergeant Handley submitted that there could be no dispute that Mr Sasan Sabet is a very close associate of Mayzar. He submitted that I should be very concerned about Mr Sasan Sabet's relationship with Mr Scarpone. He submitted that I should find that Mr Sasan Sabet is an associate of Mr Scarpone.
- 87 He said that I should be concerned about the significant assets accumulated by Mr Sasan Sabet at around that time Mr Scarpone was being sentenced.
- 88 He submitted that I should be concerned about the way in which Mr Mayzar Sabet has applied the condition relating to his brother and that he has permitted a degree of access well beyond that contemplated by the conditions.
- 89 He said that I should be very concerned by the admitted flagrant breach of the conditions.
- 90 Sergeant Handley submitted that I can take judicial notice of the costs involved in pursuing this review. He rhetorically asked: "And why would spend such a significant amount of money, just to have a coffee and a meal in one particular restaurant?"
- 91 Sergeant Handley submitted that the whole venture sounds suspicious: Mr Sasan Sabet purchases a building and then his brother, a bus driver, all of a sudden wants to be a restaurateur, purchases a business and licence and enters into a significant lease.
- 92 He asked me to find that the business was in reality a joint venture.
- 93 He submitted that if Mr Sasan Sabet was permitted to work at the premises he would in reality have unrestricted access and would be able to conduct any business within those premises that he wished without any restrictions.
- 94 He said that in that event Mr Sasan Sabet could be expected to have a leading or a more influential role in the business and the running of the premises.

The Liquor Commissioner

- 95 Ms Lieschke submitted that the conditions as currently in place should remain. She said that she did not support the submission advanced by the Police Commissioner concerning the fitness and propriety of Mr Mayzar Sabet.
- 96 She submitted that from the evidence given it was clear that the role anticipated for Sasan to play would be much more than a kitchen hand or floor staff. She said that it indicated that he would be opening and closing and effectively having the role of a duty manager.
- 97 She submitted that no employment of Sasan should be allowed on the property and that the Liquor Commissioner strongly opposes any suggestion that Sasan should be allowed on the premises as a patron.
- 98 She asked me to find that the existing conditions are being interpreted so as to allow Sasan frequent and lengthy attendances on the premises and justifies him eating, drinking and socialising on the premises.
- 99 She submitted that these attendances suggest that he is not attending there for the purposes of a landlord but as a brother, a patron and an owner of the building and as a result the condition needs to be varied to specifically exclude attendances which would lead to socialising and patronising the premises.
- 100 She submitted that the evidence clearly established that Sasan would dominate his brother Mayzar and control him and be very involved in the business. She said that if Sasan was employed or had a frequent presence on the premises he would become the licensee by default.

Consideration

- 101 Before dealing with the merits I make some observations about some of the submissions advanced by the Police Commissioner.
- 102 Although the provision of criminal intelligence in this case compromises some of the normal expectations of procedural fairness it does not mean that none of the rules apply. In particular, subject to preserving the confidentiality of the criminal intelligence, the rule in *Brown v Dunne*, that:

“If you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity to make any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses”⁷

should be adhered to.

- 103 It was never put to Mr Sasan Sabet that his accumulation of assets was in any way connected with Mr Scarpone or the crimes that he committed.
- 104 Neither Mr Mayzar Sabet nor Mr Sasan Sabet was asked about the financial cost of these proceedings, how they funded them or why in light of the cost they thought it expedient to pursue them.
- 105 In the absence of them being given the opportunity to comment upon these allegations, the rule in *Brown v Dunne* was not complied with. In accordance with the broad discretion that the Court has in determining the consequences of such a breach,⁸ in my view the inferences that Sergeant Handley asks me to draw in respect of these matters are not open.
- 106 There also is a serious sense of unfairness about the belated assertion by the Police Commissioner concerning the fitness and propriety of Mr Mayzar Sabet.
- 107 It must be accepted that the review is in the nature of a rehearing. It is also must be accepted that on that review the Court is obliged to make any decision that should, in the opinion of the Court, have been made in the first instance.
- 108 But that obligation must be tempered by the Court’s obligation to ensure that the litigation before it is conducted fairly.

“At the most basic level, a party is entitled to have legal advice as to the issues that are to be litigated. In particular, a party is entitled to have legal advice as to whether and how it is able to resist any claim that is to be made. ...A party is also entitled to advice as to what steps are to be taken, including the gathering of evidence, to meet any claim that is to be made.”⁹

- 109 In my view raising for the first time the issue of Mr Mayzar Sabet’s fitness and propriety after the evidence had closed was, to use the words of Beazley AJ in *Bellingen Shire Council v Colavon Pty Ltd* “a classic ambush and the ...[applicant] was denied any adequate opportunity to receive advice so as to consider its position.”

⁷ (1893) 6 R 67.

⁸ *Allied Holdings Pty Ltd v Federal Commissioner for Taxation* (1983) 70 FLR 447 per Hunt J.

⁹ *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34 at para 33 per Beazley JA.

- 110 If this was a typical civil case I would have been inclined to not to entertain submissions from the Police Commissioner concerning the fitness and propriety of Mr Mayzar Sabet. But this is not such a case. Section 53 of the Act makes it clear that my overriding duty is to protect the public interest¹⁰ and that in exercising that duty the Court is obliged to act independently of the positions taken by any of the parties before it.
- 111 If I considered that there was doubt about the Liquor Commissioner's ruling concerning the fitness and propriety of Mr Mayzar Sabet, I would have been obliged to entertain overruling it. Given the way the hearing was conducted and the lack of procedural fairness afforded to Mr Mayzar Sabet on this issue, before doing so, I would have had to consider steps to address that unfairness.
- 112 Ultimately that might have resulted in me declaring a mistrial and starting the hearing afresh.
- 113 As it was, I was in no doubt about the correctness of the Liquor Commissioner's ruling concerning the fitness and propriety of Mr Mayzar Sabet.
- 114 The matters relevant to Mr Mayzar Sabet's fitness and propriety are his criminal record, his association with Mr Sasan Sabet, and the manner in which he has conducted the licensed premises.
- 115 In the ordinary course of events a conviction for assault occasioning actual bodily harm would raise a significant concern in respect of the issue of a person's fitness and propriety in connection with working in the hospitality industry. To put it bluntly, we cannot have persons occupying positions of authority within licensed premises who have a short fuse or a propensity to thump someone. Licensees will on occasions have to deal with intoxicated persons and patrons who are determined to goad them, insult them, provoke them, and generally act in an offensive way. Part of their job is to resist the temptation to respond in a like manner, to avoid confrontation and to minimise the risk of arguments escalating into violence.
- 116 However, as was said in *Jonathon Symons-Lawrence*,¹¹ behaviour that at an earlier point in time that might have resulted in disqualification does not necessarily foreclose the possibility that through sustained good conduct over time, a person's reputation might be restored. In this case the relevant offending occurred over ten years ago. There is no suggestion of any criminal conduct in the intervening period. If this

¹⁰ Section 53 (1a) provides that "An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest." Section 53 (2) provides that "A licensing authority should not grant an application as a matter of course without proper inquiry into its merits (whether or not there are objections to the application)."

¹¹ [2016] SALC 5.

matter was before me shortly after his conviction for assault, I would have regarded Mr Mayzar Sabet's conviction as warranting a conclusion that he was not then a fit and proper person. However, his unblemished criminal record over the intervening period and his evidence of uneventful employment as a bus driver over that time, which I accept, has restored my confidence in him to such an extent that I would not regard his conviction for assault occasioning actual bodily harm as conclusively adversely determining the issue of his fitness and propriety.

117 The same cannot be said of Mr Sasan Sabet. Independently of the information contained within the criminal intelligence I would conclude that his more recent convictions of dishonestly taking property without consent and criminal damage illustrate that he has not, through a sustained period of good conduct, restored his reputation.

118 The issue that then arises is whether Mr Mayzar Sabet's association with Mr Sasan Sabet adversely reflects on the latter's fitness and propriety.

119 Whilst I give the information contained within the criminal intelligence some weight, it must be said, without disclosing the information, that the evidence of Mr Sasan Sabet, given on oath and not seriously challenged, has allayed many of the concerns that that information raised. Moreover, as Kirby J observed in *K-Generation Pty Ltd v Liquor Licensing Court*:

“A court, called upon to weigh any such evidence, including any character evidence submitted, would have to take into account the forensic disadvantages facing the applicant.”¹²

120 I also must take into account the fact that the information contained within the criminal intelligence is untested, some of it is hearsay, and it has to be looked at through the prism of *Briginshaw v Briginshaw*.¹³

121 The evidence does not support a finding that Mr Sasan Sabet is a hardened, depraved criminal or that he is a person devoid of respect for the law. It does not support a finding that he is a member of a criminal syndicate or that he could be expected to have the intention of using the licensed premises as an opportunity to intermingle criminal enterprises and their proceeds with an otherwise legitimate commercial venture.

¹² [2009] HCA 4 at para 257; (2009) 237 CLR 501 at 79.

¹³ In that case Dixon J made the observation that “The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.” [1938] HCA 34; (1938) 60 CLR 336 at 362.

- 122 What it does support is a finding that Mr Sasan Sabet might have a short fuse and he might continue to have a propensity to resort to violence and that I cannot be completely confident that if he was in a position of authority within licensed premises that he would behave appropriately towards patrons. It does support a finding that I cannot be completely confident that he can be relied upon to resist the temptation of putting his own financial interests ahead of the public's best interests in connection with the running of licensed premises. It does support a finding that in his business dealings he cannot necessarily be trusted to always act appropriately and not be tempted by dodgy collateral deals.
- 123 As I explained in *Clark Hotel Group Pty Ltd*¹⁴ these are matters that are very pertinent to the issue of fitness and propriety.
- 124 Overall the evidence establishes that Mr Sasan Sabet is not a fit and proper person for the purposes of the Act.
- 125 As I also explained in *Clark Hotel Group Pty Ltd* the significance of association with a person of disrepute in terms of fitness and propriety is the risk that the licensee might be tempted to allow or even be coerced into allowing that person or his or her associates to use the licensed premises in a way that is not in the public interest.¹⁵
- 126 What is significant in this case is that there is no hint that Mr Sasan Sabet has prevailed upon his brother in any way that has compromised the integrity of the licensed premises.
- 127 Overall the evidence does not support a finding that Mr Mayzar Sabet's association with Mr Sasan Sabet adversely reflects on the former's fitness and propriety.
- 128 The only matters of concern proved by the evidence, as to the manner in which Mr Mayzar Sabet has conducted the licensed premises are Mr Sasan Sabet's attendances at the premises.
- 129 Apart from the one occasion when Mr Sasan Sabet turned up unexpectedly, all other attendances appear to have been bona fide. I agree with Ms Lieschke that the Sabets appear to have construed the condition concerning Mr Sasan Sabet more liberally than might have been contemplated, but there is no evidence that it was wilfully disobeyed.
- 130 Mr Sasan Sabet's explanation as to the occasion when he turned up unexpectedly was plausible and was not seriously challenged. I accept it. Mr Mayzar Sabet should have asked him to leave, but I would not regard

¹⁴ [2015] SALC 54.

¹⁵ [2015] SALC 54 at para 63.

that failure as a serious breach of Mr Mayzar Sabet's obligations as licensee.

131 Mr Sasan Sabet's attendances at the premises do not support a finding that Mr Mayzar Sabet is a not fit and proper person for the purposes of the Act.

132 None of the matters raised by the Police Commissioner taken individually or collectively support a finding that Mr Mayzar Sabet is not a fit and proper person for the purposes of the Act.

133 To the contrary, the evidence supports the opposite conclusion.

134 I now turn to the conditions concerning Mr Sasan Sabet.

135 As I have said, Mr Sasan Sabet's criminal record and the information contained within the criminal intelligence are of concern. For the reasons set out above he is not is a fit and proper person for the purposes of the Act.

136 The evidence clearly establishes that he is much more business savvy than his older brother. If the opportunity presented itself it might be expected that in the running of the business of the licensed premises he might exercise considerable influence over his brother. Given my findings that: he might have a short fuse and might continue to have a propensity to resort to violence and that I cannot be completely confident that if he was in a position of authority within licensed premises that he would behave appropriately towards patrons; that I cannot be completely confident that he can be relied upon to resist the temptation of putting his own financial interests ahead of the public's best interests in connection with the running of licensed premises; and that in his business dealings he cannot necessarily be trusted to always act appropriately and not be tempted by dodgy collateral deals; he should not be involved in the supervision or management of the business.

137 Although s 97(4) of the Act makes it an offence for a licensee to allow the business conducted under a licence to be supervised or managed by a person who is not a fit and proper person for the purposes of the Act, I think it was reasonable for the Liquor Commissioner to put in place measures to ensure that in this case that occurred.

138 If Mr Sasan Sabet was employed to work at the licensed premises it would be practically difficult to isolate him from any part of the licensed premises.

139 Given Mr Mayzar Sabet's expectation that if he worked there Sasan would "keep an eye on the staff when I'm not there" and that he would keep an eye on the staff and make sure that no one was "pinching money

out the till” I think that if Mr Sasan Sabet was employed to work at the licensed premises there would be a very real risk that he would quickly assume the role of de facto manager.

- 140 A limitation on employment that only permitted Sasan Sabet to work in the business in a non-managerial capacity would be unworkable and does not reflect Mr Mayzar Sabet’s expectation as to how his brother would fit into the business.
- 141 To my mind the imposition of a condition preventing Mr Sasan Sabet from being employed by Mazze is entirely appropriate.
- 142 The issue is whether to ban him from the premises altogether, other than in his capacity as landlord, is lawful and, if so, whether in the circumstances of this case, it goes too far.
- 143 In my view to direct that a person not to enter or remain on licensed premises, except in the limited capacity as landlord for the purpose of conducting an inspection, is tantamount to barring the person.
- 144 The barring powers conferred upon the Police in the Act can be relied upon if there is a serious concern for the welfare of the person, or the welfare of a person residing as a result of the consumption of alcohol by the person; or if there is a concern about the impact upon others as a result of the behaviour of the person or *if there is any other reasonable ground*.
- 145 I think it is clear enough that “any other reasonable ground” includes barring a person because that person’s presence at the licensed premises might have the potential to compromise the integrity of the licensed premises.
- 146 That is clearly the Police Commissioner’s view of Mr Sasan Sabet. Having formed that view, the Police Commissioner could have used the powers conferred by s 125A to bar him from the premises. Had that occurred Mr Sasan Sabet could have applied for a review of the order in which case the order could have been confirmed, varied or revoked.¹⁶
- 147 The issue then is whether the specific grant of power conferred by s 125A excludes the use of the general power provided for by s 43 to achieve essentially the same outcome.
- 148 *Anthony Hordern* concerned the *Commonwealth Conciliation and Arbitration Act 1904*. That Act seemingly contained two powers for the making of an award with respect to union preferences. One empowered

¹⁶ Section 128 of the Act enables a person who has been barred from premises to seek a review of that order.

the Court of Conciliation and Arbitration to create an award provision that gave preferential employment to members of unions over other persons, subject to certain conditions. The other power was a general power given to the Court to hear and determine industrial disputes. A judge of the Court purported to rely upon that general power to include in an award an order unconditionally requiring certain employers to give preference to union members in employing female workers. A majority of the High Court held that the general powers did not authorise the judge to make the award. McTiernan J, who was one of the majority, said:

“Reading the Act as a whole, there does not appear to me to be any reason for holding that Parliament intended to give to the Court two powers, entirely different in scope, to order ‘preference.’ I do not think that the Legislature intended that, in a case in which preference was in dispute, the Court should be free to make any award it deemed fit and that the award might be entirely unconditional, whereas, in a case in which preference was not in dispute, the Court should be fettered and its award moulded by the provisions of s 40.”¹⁷

149 What was regarded as significant in *Anthony Hordern* and the cases that have adopted its reasoning is a conclusion that there was only one power which could be relied to achieve the particular outcome that effectively covered the field to the exclusion of any other power conferred by the relevant Act.

150 I do not think that the same can be said here.

151 Section 43 does much more than granting a licensing authority with a general power to impose conditions. It expressly contemplates a licensing authority imposing conditions in prescribed circumstances, some of which, in some situations, could only be achieved by imposing a condition that bars a person or group of persons from licensed premises.

152 Thus the fact that through the general powers conferred through s 43 the Liquor Commissioner can impose a condition that can produce the same outcome as a barring order made by the Police Commissioner under s 125A does not give rise to the tension that underpinned the outcome in *Anthony Hordern*. The two powers are compatible.

153 I therefore conclude that it was permissible for the Liquor Commissioner to impose through the invocation of s 43 a condition that is tantamount to a barring order.

154 I now turn to consider whether it should have been made in this case.

¹⁷ [1932] HCA 9; (1932) 47 CLR 1 at 20.

- 155 It must be said that to ban a person from entering a particular licensed premises, even conditionally, is a significant thing.
- 156 The evidence given by Mr Mayzar Sabet and Mr Sasan Sabet about the embarrassment that the ban has caused them was plausible, was not seriously challenged, and I accept it.
- 157 Clearly the reasoning underpinning the condition was the concern that Mr Sasan Sabet was at the premises he might exercise considerable influence over his brother in the running of the licensed premises. However, the ban does not prevent the two brothers from communicating with one another. It would not be a breach of the condition for them to talk all day by telephone or via any other electronic device whilst the business was trading. They could physically meet and communicate face to face at any other premises, including licensed premises, at any time of day or night.
- 158 In terms of aiding the prevention of Mr Sasan Sabet becoming a de facto manager, the Liquor Commissioner's condition provides some assistance in the sense that it prevents Mr Sasan Sabet from working there or from being in any of the work areas of the premises and it prevents him from dealing directly with staff, but that is about it. Similar outcomes could be achieved by preventing Mr Sasan Sabet from working there and in permitting him to be at the premises as a patron, subjecting him to a condition that when he did so he was prevented from being present in any of the work areas of the premises, such as the kitchen, the bar and the office.
- 159 This was an option that the Liquor Commissioner appears not to have considered. Moreover, unlike the Liquor Commissioner, I have had the benefit of hearing oral evidence from Mr Sasan Sabet. For the reasons given above, I am not nearly as concerned by the information contained within the criminal intelligence as I was prior to hearing his evidence.
- 160 It seems to me that in all the circumstances the alternate condition just mentioned is a far more proportionate response to the risk that the Liquor Commissioner's condition was attempting to deal with than that which he imposed.

161 I therefore vary the conditions imposed by the Liquor Commissioner by deleting condition (1) as set out at the beginning of these reasons and substituting it with the following:

“Mr Sasan Sabet shall not be employed in any capacity by Mazze on Rundle. He shall not enter or remain on the licensed premises, except as a patron or in such limited circumstances as would ordinarily be allowed in his capacity as landlord for the purpose of conducting an inspection of the Lessee premises. In attending the premises as a patron he is precluded from being present in any of the work areas of the premises, such as the kitchen, the bar and the office.”