

LICENSING COURT OF SOUTH AUSTRALIA

AGOSTINO, Dean

JURISDICTION: Application for Review from a decision of the Commissioner

FILE NO: 61 of 2020

HEARING DATE: 2 December 2020

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 18 December 2020

CATCHWORDS

*Application for review – Commissioner refused to grant a licence to an applicant who had been found guilty of a relatively minor breach of the Firearms Act on 7 November 2019 before the amendment to the Liquor Licensing Act enacting s 55 was proclaimed – The offence is a prescribed offence for the purposes of s 55(a1) – Having determined that s 55 applied to the facts of the case the Commissioner refused the application – Whether s 55 has any retrospective reach – **Held** that because it is a deeming provision that can deem a fact contrary to fact to the potential disadvantage of an applicant it would require a clear indication that it should apply retrospectively – As there is no such indication, held that it did not apply to the facts in this case – **Held** on the merits that the applicant is a fit and proper person – **Held** that the decision of the Commissioner is set aside and it is remitted to the Commissioner to deal with the applicant’s application for a restaurant and catering licence – Liquor Licensing act 1997, Liquor Licensing (General) Regulations 2012, Firearms Act 2017 Serious and Organised Crime (Control) Act 2008.*

Fisher v Hebburn Ltd [1960] HCA 80; (1960) 105 CLR 188

Colonial Sugar Refining Co v Irving [1905] AC 369

Samuels v Songaila (1977) 16 SASR 397

R v Miah (1974) 1 WLR 683

South Australia v Collings (1996) 65 SASR 432; [1996] SASC 6145

Coates v Commissioner for Railways (1961) 78 WN (NSW) 377

REPRESENTATION:

Counsel:

Applicant:

Mr I Rice

Respondent:

n/a

Solicitors:

Applicant:

Griffins Lawyers

Respondent:

n/a

- 2 This is an application seeking a review of a decision of the Commissioner for Liquor and Gambling, wherein he refused to grant approval to the applicant, Dean Agostino, under the *Liquor Licensing Act 1997*.
- 3 Mr Agostino own guns. The *Firearms Act 2017* requires the owner of guns to register their ownership and to store them in a secured place. Mr Agostino had two guns and both were registered and securely stored.
- 4 In about November 2018, Mr Agostino purchased an air rifle. It was required to be registered. Mr Agostino overlooked attending to this.
- 5 In order the ensure compliance with the obligation to store guns in a secure place, from time to time police conduct random audits. On 18 January 2019, police conducted such an audit of Mr Agostino's guns. They noted that all of his guns were appropriately secured. But they also noted that Mr Agostino's air rifle was unregistered. They seized the gun and charged him with an offence under s 27(3) of the *Firearms Act* of possessing an unregistered firearm. On 7 November 2019, Mr Agostino pleaded guilty to that charge in the Port Adelaide Magistrates Court. He was fined \$200 and discharged without conviction. The air rifle was returned to him and he has since registered it.
- 6 At this point it needs to be noted that on 18 November 2019, s 55 of the *Liquor Licensing Act* came into force.
- 7 I return to the narrative.
- 8 Mr Agostino is the founder and sole owner of Raw Nation Whole Foods, a fresh food manufacturing business. In connection with that business, Mr Agostino resolved to apply for a restaurant and catering licence. Pursuant to s 56 of the *Liquor Licensing Act*, a person cannot be granted a licence unless he or she satisfies a licensing authority that he or she is a fit and proper person.
- 9 On 20 January 2020, Mr Agostino applied for such a licence. In connection with that application he disclosed his offending regarding the air rifle.
- 10 By decision made on 20 March 2020, a delegate of the Commissioner for Liquor and Gambling refused Mr Agostino's application. The delegate felt obliged to do so because of s 55 (a1)(a) of the *Liquor Licensing Act*. That subsection deems a person who has been found guilty or convicted of an offence as prescribed by the regulations to not be a fit and proper person.
- 11 Regulation 13AA of the *Liquor Licensing (General) Regulations 2012* lists the various offences to which s 55(a1)(a) of the Act applies. Reg 5 states that this includes any offence under the *Firearms Act*, subject to stipulated exceptions none of which are for present purposes relevant. The

offence with which Mr Agostino was charged and found guilty of was a prescribed offence.

- 12 An aggrieved party can seek a review of certain decisions made by the Commission in this Court. This includes a decision about fitness and propriety. A review is supposed to be lodged with one month of the decision. But the Court has the unfettered power to extend time. Mr Agostino did not lodge his application for review until 16 November 2020. Initially he was advised by a consultant that he had no chance of overturning the decision. He was then adversely affected by the effects of Covid, was on job keeper, and did not have the resources to seek legal advice. He later renegotiated his lease and secured additional space. At that point he renewed his interest in securing a licence. He obtained legal advice that led to the within belated application for review. The Commissioner does not oppose the granting of an extension of time. I was satisfied with the explanation for the delay and therefore granted the extension.
- 13 The resolution of this case turns on whether s 55 of the *Liquor Licensing Act* as amended on 18 November 2019 applies, because if it does, the application for review must fail.
- 14 Subject to any constitutional constraints, it is within the power of the Parliament to make and to change such laws as it sees fit. New laws and changes to existing laws inevitably can affect the status quo and issues such as whether, and if so how they do so, need to be resolved. Parliament can make its intentions clear in respect of such matters through the creation of transitional provisions. And in respect of some of the changes to the *Liquor Licensing Act* it has done so. But where Parliament has not done so, courts must attempt to discern Parliament's intention as to whether the changes act retrospectively and if so how, through the rules of statutory construction, the application of which can be difficult.
- 15 The starting proposition is as described by Fullagher J in *Fisher v Hebburn Ltd*:

There can be no doubt that the general rule is that an amending enactment - or, for that matter, any enactment - is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.¹
- 16 There is a general presumption that legislation does not affect accrued rights,² but determining what is an accrued right is not always easy.

¹ [1960] HCA 80; (1960) 105 CLR 188 at [9].

² *Colonial Sugar Refining Co v Irving* [1905] AC 369.

- 17 An amendment to penal legislation is presumed not to act retrospectively³ whereas the opposite is true of an amendment to remedial legislation. But the characterisation of legislation as penal or remedial is again, not always easy.
- 18 In connection with the issue of retrospectivity, Parliament can be presumed not to have intended arbitrary or capricious outcomes⁴, but a court cannot be too swayed by what it thinks is fair or what it thinks Parliament probably would have had in mind if the issue had been brought to its intention.⁵
- 19 With these matters in mind, I now turn to consider the provision.
- 20 I think the fact the s 55(a1) is a deeming provision holds the key to determining whether it has any retrospective reach.
- 21 Deeming provisions can deem facts contrary to facts.⁶ This becomes clear from the following example.
- 22 Section 55(a1) also provides that a person is not a fit and proper person to hold a licence under the Act if the person is a close associate of a person who is a member of a prescribed organisation or is subject to a control order under the *Serious and Organised Crime (Control) Act 2008*.
- 23 Amongst other definitions s 55(5) defines a ‘close association’ as including the fact that ‘the person is a spouse, domestic partner, parent, brother, sister or child of the other’.
- 24 Section 55(6) provides that ‘a reference to a parent, brother, sister or child of a person will be taken to include a reference to a step-parent, step-brother, step-sister or step-child (as the case requires) of the person.’
- 25 To demonstrate how these provisions can deem facts contrary to facts consider the following.
- 26 A is a qualified chef who is very experienced and highly regarded. She is a woman of great integrity, has never committed an offence, and her good character is vouched for by many. Her parents were married but her father left the matrimonial home before she was born and she has had very little contact with her father and has not seen or spoken to him for many years.
- 27 Some years ago A’s father remarried. His second wife had a child from a previous relationship, B. B has been estranged from his mother for some time. A’s father and his second wife separated after a short time but remain

³ *Samuels v Songaila* (1977) 16 SASR 397.

⁴ *R v Miah* (1974) 1 WLR 683.

⁵ *South Australia v Collings* (1996) 65 SASR 432; [1996] SASC 6145 at [13].

⁶ *Coates v Commissioner for Railways* (1961) 78 WN (NSW) 377.

legally married. A's father no longer sees his second wife and has never had any meaningful contact with B. A has never met B and knew nothing of him until it was brought to her attention that B had recently become a member of a prescribed organisation.

28 As a matter of fact, A is a fit and proper person. Indeed, she is of exemplary character. But if s 55(a1) applies to her, she is denied the opportunity of asking a licensing authority to make that assessment of her, because B is a member of a prescribed organisation. As a matter of fact, A is not a close associate of B. In fact, she has never met him. But contrary to the true position, s 55(6) deems her to be a close associate of him.

29 Most deeming provisions are remedial in character. For example, s 188(2) of the *Return to Work Act 2014* assists workers in making claims for noise induced hearing loss by generally deeming the whole of the hearing loss to have occurred immediately before notice of the injury was given.

30 But it can be seen that s 55(a1) of the *Liquor Licensing Act* is anything but remedial. It has a significant potential to act in a particularly disadvantageous way. It can defame a person by declaring him or her to not be fit and proper person, notwithstanding the fact that the person is of exemplary character.

31 In *Samuels v Songaila*, Bray CJ referred to a passage in the judgment of Cave J in *Re Raison; Ex parte Raison*, that I think is apposite here:

‘There is an old and well-known saying with regard to new laws, that you are not by a new law to affect for the worse the position in which a man already finds himself at the time when the law is actually passed.’⁷

32 In December 2018, when he failed to register his new gun, and on 7 November 2019, when pleaded guilty to an offence under the *Firearms Act*, these facts did not prevent Mr Agostino from applying to a licensing authority and have it assess his fitness and propriety on the merits. To allow the change in the law made on 18 November 2019 to alter that fact, and deny him of that right is to give the provision a retrospective operation that detrimentally affects an accrued right. The fact that he had not exercised that right at that time, is in my view not to the point. Given the potential draconian consequences of s 55(a1) I think it would require the clearest of language to attribute to Parliament its intention to apply to any events that occurred before the new law took effect.

33 Accordingly, Mr Agostino's application for a finding that he is a fit and proper person for the *Liquor Licensing Act* had to be determined on its merits. It must be said that his breach of the *Firearms Act* is a blemish. But

⁷ *Ibid* at 404.

the offending was very much at the lower end of the scale. I was advised by his counsel that the failure was ‘a brain fade’. This was the only relevant matter brought before the Court. The Commissioner advised that he did not wish to be heard on the application and would abide by the decision of the Court.

- 34 It is notable that under the *Firearms Act* a person cannot lawfully be in possession of a firearm unless the person is ‘fit and proper’ and that the criteria under that Act are no less stringent than those under the *Liquor Licensing Act*.
- 35 In the circumstances I set aside the decision of the Commissioner and in lieu thereof I find that Mr Agostino is a fit and proper person for the purposes of the *Liquor Licensing Act*. I therefore remit the matter to the Commissioner to deal with his application for a restaurant licence.