

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr Adam Tony Forsyth
(represented by Mr J Prior of Counsel, instructed by Michael Tudori & Associates)

Respondent: Commissioner of Police
(represented by Mr S Bagley, Prosecutor, Police Licensing Enforcement Division)

Premises: "Club Red Sea"

Commission: Mr E.J Watling

Matter: Application for Review, Section 25 of the *Liquor Control Act 1988* ("the Act").

Date of Hearing: 5 November 2008
Date of Determination: 17 November 2008

Authorities referred to by the Applicant:

- Hancock v Executive Director of Public Health [2008] WASC 224.

Authorities referred to by the Respondent:

- Edwards v Justice Giudice [1999] FCA 1836;
 - The King v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd [1924] KB 171 per Atkin LJ.
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Preliminary Matters

1. Mr Prior advised that Mr Forsyth was unable to attend the hearing due to commitments in the eastern states.
2. The Commission advised that as a consequence of a 30 October 2008 memo (forwarded to all parties of the hearing) from the Acting Director Liquor Licensing, informing that a memo from the WA Police received by the Director on 30 November 2007 was not in fact considered by the Delegate in reaching the decision of 11 August 2008, the Commission would take no regard of that memo.
3. Mr Prior sought clarification on the Acting Director's memo which stated that the WA Police memo was dated 30 November 2007. The Commission confirmed that the date stated in the memo was incorrect and was in fact dated 27 November 2007 and received by the Department on 30 November 2007.

4. Mr Prior pointed out that there were actually two applications that had been lodged, which now appeared to have been consolidated for the purposes of the Director's Decision of 11 August 2008 and the Review Hearing. The Commission acknowledged that this was the position.
5. Mr Prior drew attention to the fact that the WA Police Notice of Intervention, dated 17 January 2008, stated that "The applicant currently holds Approved manager status at Club Red Sea, and at the time of being charged with the alleged offence", when in fact Mr Forsyth had not been approved as a manager. Mr Prior further stated that while this was not a major factor in the Hearing, the error should be noted.

This observation was inaccurate as section 35B(2) states:

Where an application for a person to be approved as a manager has been made to the Director and has not been refused, that person shall be deemed for the purposes of this Act to be a manager approved under this section.

As prescribed, this would confer manager status approval the moment an application is lodged, rather than after the process of consideration and written approval. No time frame for the process of approval is stated in the Act.

Background

6. On 17 October 2007 the licensee of the Club Red Sea lodged an application for Mr Adam Tony Forsyth to be approved as a manager under section 100 of the Act. Mr Forsyth lodged a Personal Particulars Form LLD/5 on the same date.
7. On 21 December 2007 the WA Police advised the Director that, on the basis of concerns about an incident at the Burswood Ruby Room Nightclub on 26 November 2007 and recorded on CCTV video surveillance, it was considered that Mr Forsyth's behaviour was such as to render him unsuitable to hold the position of manager.
8. As a consequence of the WA Police advice, the Director wrote to Mr Forsyth on 7 January 2008 enclosing a copy of the WA Police objection and inviting written submissions as to why Mr Forsyth might consider that he is a fit and proper person to be approved as a manager at the Club Red Sea.
9. On 8 January 2008 the licensee lodged an application for approval of Mr Forsyth as a person in a position of authority under section 102 of the Act. This application arose from a resolution (dated 17 December 2007) of Red Cee Pty Ltd, the company owning and operating Club Red Sea, to appoint Mr Forsyth as a Director of that company.
10. On 23 January 2008 the Director received a letter from Michael Tudori & Associates, representing Mr Forsyth, stating that the WA Police report is "extremely one sided and biased" and that in relation to the pending trial, "Mr Forsyth has pleaded not guilty". It was further requested that the decision of the Director in relation to the applications not be determined until the matter went before the Perth Magistrates Court.
11. On 24 January 2008 a WA Police Notice of Intervention was lodged with the Director, detailing the incident of 26 November 2007 and advising that Mr Forsyth was facing serious criminal charges before the Perth Magistrates Court in relation to two charges of Assault occasioning Bodily Harm. The matter was set for trial on 24 April 2008.

12. On 7 February 2008, the Director wrote to Michael Tudori & Associates advising that the determination on Mr Forsyth's applications would be held over, as requested, until the charges before the Perth Magistrate's Court have been determined. The Director further advised that "as no decision has been made in relation to this matter, Mr Forsyth has no approval to assume a position of authority in relation to the body corporate that hold the Club Red Sea license".
13. On 19 May 2008 the Director received a letter from Michael Tudori & Associates advising that "on 24 April 2008 the West Australian Police discontinued the prosecution against Mr Forsyth and accordingly he was acquitted".
14. On 3 June 2008, the Director wrote to Mr Forsyth advising that notwithstanding the discontinuance of the prosecution, the WA Police intervention remains relevant and that "In this respect, I have viewed CCTV footage of the incident in question and am of the view that your actions and behaviour on 26 November 2007 are relevant to the issue of your fitness to occupy the position of authority." Mr Forsyth was invited to contact a Departmental officer to make arrangements to view the CCTV footage and to make written submissions "as to why discretion should be exercised in your favour and the applications approved". Those submissions to be lodged no later than 18 July 2008.
15. On 18 July 2008, the Director received a letter from Michael Tudori and Associates setting out reasons to support the applications from Mr Forsyth. Four character references were included with the submission.
16. On 11 August 2008 the Director wrote to the licensee of the Club Red Sea and provided a copy of the decision which refused the sections 35B and 102 applications.
17. On 8 September 2008, Mr Prior, under instructions from Michael Tudori & Associates, lodged an application for a review of the decision, pursuant to section 25 of the Act.

The Hearing

Applicant's Submission

18. The grounds for the review as stated in the application dated 5 September 2008 and lodged 8 September 2008 are:
 - The Delegate erred in finding that Mr Forsyth was not a proper person to be a manager of a licensed premises or be in a position of authority in a body corporate that holds the liquor license in that her finding was based on video footage only of an incident at the Burswood Casino on 26 November 2007 and that there was no other evidence before the Delegate to indicate the Applicant was not a fit and proper person.
 - The Delegate erred in failing to give any weight or sufficient weight to the applicant's lack of criminal record and the references provided of the Applicant's previous good character.
 - The decision was made in circumstances where the Applicant was denied natural justice and procedural fairness by the failure of the delegate to disclose evidence and material she relied upon to ground her findings when she found the Applicant was not a fit and proper person to be associated with licensed premises.

19. Mr Prior sought clarification of all of the material that was before the Director/Delegate when making the decision. The Commission confirmed that the material listed was correct.
20. Mr Prior advised that the Applicant was only aware of the material referred to in 19 above, therefore if the decision reached by the Delegate considered other material without the Applicants knowledge the Applicant would have been denied procedural fairness and natural justice. Mr Prior referred to section 16(11) of the Act and *Hancock v Executive Director of Public Health [2008] WASCA 224*.
21. Mr Prior pointed out that section 25(2c) of the Act precludes the Commission from having regard to any other material other than the material that was before the Director (or his Delegate) when making the decision. Therefore, the Applicant submitted that if the Commission finds the Delegate did consider material other than the material listed, it should be disregarded.
22. In particular, the fifth last paragraph of the Delegate's decision indicates the Delegate took into account the history of the Club Red Sea licensed premises including 2007 proceedings pursuant to section 64 of the Act. The Applicant was never made aware that that material would be considered by the Delegate.
23. It was submitted that the main material that the Delegate based her decision on in considering the character and reputation of the Applicant and that the Applicant was not fit and proper to be either an approved manager or a person in position of authority of a licensed company was the Applicant's behaviour in the CCTV footage provided to her by the WA Police of an incident at Burswood Casino on 26 November, 2007.
24. It was contended that the following additional material supported a finding that the Applicant was a fit and proper person:
 - The Applicant was 27 years of age and had no record of criminal convictions.
 - The various references of good character which indicated the Applicant's behaviour at Burswood Casino on 26 November 2007 was totally out of character.
 - The submissions made on behalf of the Applicant that his behaviour at the Burswood Casino on 26 November 2007 were actions in self defence and due to provocation.
 - There was no material to suggest to the delegate that the Applicant had behaved in a way which evidenced bad character between 27 November 2007 and the date of her decision on 11 August 2008.
25. It was further contended that in considering the material contained in the video footage showing the Applicant's behaviour at Burswood Casino on 26 November 2007, the reasons of the delegate fail to indicate she gave any consideration to the following:
 - The Applicant's behaviour at Burswood Casino on 26 November 2007 is not conduct carried out while he was working as an employee at a licensed premises.
 - The Applicant was not convicted of any criminal offence relating to the behaviour depicted in the CCTV footage and the presumption of innocence remained paramount and continuing.
 - The significant injuries sustained by the Applicant in the incident at Burswood Casino on 26 November 2007.
 - The behaviour of the Applicant was a one off incident and there was no material which suggested he had acted in this way before. There was no other material

other than the CCTV footage before the Delegate which indicated the Applicant "has a tendency to violence".

- There was no material before the delegate which indicated the Applicant was dishonest.

26. Mr Prior referred to elements of the decision in *Hancock v Executive Director of Public Health [2008] WASC 224* which related to the functions of the Commission.

Respondent's Position

27. Mr Bagley addressed the three grounds for the application for review as listed in the Applicant's correspondence dated 5 September 2008 – refer 18 above.

28. In respect to the Applicant's claim that the Delegate erred in finding that Mr Forsyth was not a fit and proper person to be a manager of a licensed premises or be in a position of authority in a body corporate that holds the liquor license, the Respondent submitted:

"In her conclusions, the Delegate made findings that are quite proper in the circumstances. Irrespective of the case for the Appellant, including *inter alia*, his character references, the CCTV footage of the incident in question at the Ruby Room within the Burswood Casino complex will speak for itself and it will be open to the Commission to confirm the delegates finding under Section 25(4)(a)."

29. Mr Bagley contended that in regard to the Applicant's claim that the Delegate erred in failing to give any weight or sufficient weight to the applicant's lack of criminal record, the fact that there are no recorded convictions means that there is nothing in existence to which the delegate is required to consider. However, a number of references to there being no history of criminal convictions throughout the material considered by the Delegate indicates, that the Delegate was aware of this circumstance when making the decision.

30. In relation to the Applicant's submission that there was a denial of natural justice due to the Delegate taking into account the history of the Club Red Sea licensed premises, including proceedings pursuant to section 64 of the Act, and not advising the Applicant accordingly, Mr Bagley referred to other references in the material, some submitted by the Applicant, that refer to past violence at Club Red Sea. Therefore, it was contended that there is no validity in the claim that the Applicant was denied natural justice and/or procedural fairness.

31. Mr Bagley further stated that should the Commission find that the Delegate's references relating to the Club Red Sea nightclub did not arise from the material put forward by the Applicant, then it was submitted that this case falls into the class referred to in the decision in *Hancock v Executive Director of Public Health [2008] WASC 224* where it is stated:

"Sometimes the nature of the proceedings themselves will be sufficient to provide adequate notice of the prospect of an adverse finding."

Further, in the event the Commission finds that the Delegate's references in relation to the history of the Red Sea Nightclub did not arise from material put forward by the Applicant and that there was a consequential denial of natural justice then it is

submitted that this is a case of the nature referred to in *Hancock v Executive Director of Public Health [2008] WASC 224*:

"...the only way in which the Commission could uphold the decision of the Director would be if it decided to entirely exclude from consideration the matters upon which the Director relied, and in respect of which procedural fairness was denied."

Findings

32. **Having heard the parties and considered all of the material that was before the delegate to the Director when making the decision, the Commission affirms the decision which is the subject to this review application.**

Reasons

33. The CCTV footage shows considerable violence being carried out by the Applicant to the extent that the WA Police lodged a Notice of Intervention with the Director and advised that two charges of Assault occasioning Bodily Harm had been lodged before the Perth Magistrates Court.
34. Despite the discontinuance of the prosecution, the CCTV footage remains critical in the determination of Mr Forsyth's character and in the assessment as to his suitability to be approved as a manager and a person of authority in relation to the licenses premises, the Club Red Sea.
35. Arguments put forward in the submission by the Applicant "*that other matters were not, or should have been considered, to reach a decision of approval*" have been evaluated and have not been accepted by the Commission. These are summarized as follows:

- *There was no other evidence before the Delegate, other than the CCTV footage to indicate that the Applicant was not a fit and proper person.*

The Commission finds that the actions of Mr Forsyth, as shown in the 26 November 2007 CCTV footage, are such as to render him unsuitable for approval as a manager and a person of authority in relation to the licenses premises, the Club Red Sea.

- *Insufficient weight was given to the Applicants lack of any criminal record and the references provided of the Applicant's previous good record.*

There is ample reference within the materials before the Delegate when making the decision, and before this Commission in undertaking the review, to the Applicant's lack of any criminal record and to the existence of strong character references. The Commission gave due consideration to these circumstances when reaching its decision.

- *The Applicant was denied natural justice and procedural fairness by the failure of the Delegate to disclose evidence and material relied upon to reach the finding.*

The Commission did not consider the past history of Club Red Sea when making its determination.

- *The Delegate did not adequately consider other material which supported that the Applicant was a fit and proper person.*

The Applicant's submission at the Review hearing listed matters which were considered to have not been given sufficient weight by the Delegate – refer items 24 and 25 above.

The Commission is satisfied that the information relating to all of the matters listed in items 24 and 25 above was available in the material before the Delegate when reaching her decision, albeit in not such a composite format as provided in the submission to this Review. The majority of the above was supplied by the Applicant's representative Michael Tudori and Associates in a letter dated 16 July 2008 (received by the Director on 18 July 2008) in response to the invitation by the Director to submit reasons why discretion should be exercised in the Applicant's favour and the applications approved.

Costs

There is no order as to costs.

Footnote

This is the first hearing of the Commission since the determination of Chief Justice Martin in the case *Hancock v Executive Director of Public Health [2008] WASC 224* defining the role of the Commission.

Both the Applicant and the Respondent to this review have referred to the case *Hancock v Executive Director of Public Health [2008] WASC 224* and the Commission has applied the findings and the directions set for the Commission in that case, to the processes of this Review.



Mr E Watling