

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: AJL

First Intervener: Director of Liquor Licensing
(represented by Mr Daniel Harrop of State Solicitor's Office)

Second Intervener: Commissioner of Police
(represented by Mr Daniel Harrop of State Solicitor's Office)

Commission: Emma Power (Presiding Member)

Matter: Application seeking review under section 25 of the *Liquor Control Act 1988* of the decision of the Director of Liquor Licensing that AJL is not a fit and proper person to be an unrestricted manager.

Date of lodgement of Application: 4 September 2017

Date of Determination: 26 October 2017

Determination: The application is refused.

Authorities referred to in Determination:

- *Tavelli v Johnson* (Unreported, WASC Library No 960693, 25 November 1996)
- *Director of Liquor Licensing v Mr Saran Singh Bajaj* (LC06/2011)
- *Director of Liquor Licensing v Mr Vladimir Hardi* (LC03/2011)
- *Hughes and Vale Pty Ltd v New South Wales [No 2]* [1955] HCA 28
- *Australian Broadcasting Tribunal v Bond* (1990) HCA 33

Background

- 1 On 23 December 2016, an application was lodged by AJL (“the applicant”) for approval as an unrestricted manager pursuant to section 102B of the *Liquor Control Act 1988* (“the Act”) and regulation 14ADA of the *Liquor Control Regulations 1989* (“the Regulations”).
- 2 On 21 February 2017, the Commissioner of Police (“the Police”) submitted that the applicant was not a fit and proper person to be in a position of authority at licensed premises owing to her antecedents, extensive prior convictions and poor character.
- 3 On 23 February 2017, the applicant was invited to lodge submissions to establish why she should be found a suitable person to be an unrestricted manager.
- 4 On 17 August 2017, the Delegate of the Director of Liquor Licensing (“the Delegate”) refused the application finding that the applicant was not a fit and proper person to be approved as an unrestricted manager (“the Decision”), such decision being substantially based on the applicant’s prior behaviour involving 15 criminal convictions and 5 traffic convictions occurring over the last 15 years.
- 5 On 4 September 2017, the applicant applied for review of the Decision of the Delegate pursuant to section 25 of the Act.
- 6 The applicant has requested to have this review determined on the papers.
- 7 Submissions in relation to the question of whether the applicant is a fit and proper person were lodged by the Director of Liquor Licensing (“the Director”) as first intervener on 10 October 2017.
- 8 Submissions in relation to the question of whether the applicant is a fit and proper person were also lodged by the Police as second intervener on 10 October 2017.

Submissions on behalf of the applicant

- 9 The applicant has put forward various grounds on which she argues that the Delegate’s Decision be quashed or varied as follows:
 - a. although the applicant recognises that “considerable weight” has been put on her prior convictions, she has demonstrated that she is addressing her past issues and more weight should be given to her current well-being;
 - b. in mid-2016, the applicant was formally diagnosed with bi-polar disorder and since that time has been undergoing active counselling and is taking medication for her disorder;
 - c. the applicant takes responsibility for her past behaviour and conduct and contends that many of the prior convictions, poor judgement and conduct and inappropriate behaviours were contributed to by, and are consistent with, the established symptoms of her diagnosed mental condition;

- d. the applicant again stresses her embarrassment and remorsefulness regarding her actions and states she does now “respect the police and appreciate that they have a difficult job”;
 - e. the applicant is confident that due to her determination and with support she can do whatever is necessary to “bring my life back into good order” and lead a “normal and productive life”;
 - f. during the time the applicant worked at the [REDACTED] (“the Club”) in the capacity as approved manager (from January 2017 until 21 August 2017), no negative incidents occurred;
 - g. the applicant submits that the Delegate should have given more weight to:
 - i the letter provided by [REDACTED], Consultant Psychiatrist in the applicant’s favour;
 - ii the 14 week “Start Court” programme attended by the applicant and the encouraging comments given by councillors and the magistrate;
 - iii the fact that since undergoing medical treatment, there has been no further reoccurrences of behavioural issues;
 - iv the fact that during the 7 and a half month decision making process she was expressly permitted by the Director to continue in her capacity as approved manager;
 - v during her time working at the Club the applicant:
 - a) had no adverse incidents;
 - b) successfully trained 2 other bar staff who were each granted approvals to act as approved manager under the Act; and
 - c) assisted with a successful audit pursuant to the provisions of the Act;
 - h. the management of the Club support the applicant and are holding the position open for her; and
 - i. although the applicant concedes her prior history records improper conduct, future episodes are not likely to occur due to the significant changes in the applicant’s lifestyle.
- 10 The applicant also submits that she would be pleased to accept any conditions on an approval including random alcohol and drug testing, submission of psychiatric reports, performance reviews and/or the approval to act as approved manager to be limited to only the Club.

Submissions on behalf of the First Intervener – Director of Liquor Licensing

- 11 The Director submits:
- a. a summary of the Delegate’s Decision;
 - b. that the Decision was cogent and compelling and that the Decision should be affirmed by the Commission; and
 - c. that the Delegate correctly concluded that the applicant is not a fit and proper person and correctly refused the initial application under section 102B(3) of the Act.
- 12 The Director sets out various submissions on the applicable law and review process, which are not repeated here, but referred to as necessary below.
- 13 The Director responds to the applicant’s submissions in her application as follows:
- a. the history of offending of the applicant remains highly relevant and represents a course of disregard for the law so as to reflect adversely on the character of the applicant;
 - b. the applicant only provides submissions that demonstrate her mental health condition *may*, or is likely to have, contributed to her behaviour;
 - c. the Director gave regard and sufficient weight to the applicant’s mental health issues and the materials provided to it regarding the same; and
 - d. notwithstanding the changes made by the applicant to her lifestyle, such changes have not occurred over a “sufficient enough time frame to outweigh the applicant’s overall offending behaviour so as to reasonably conclude that the factors giving rise to these behaviours have been eliminated” given the long history of the offences.
- 14 The Director further submits that it would be inappropriate to impose any suggested conditions on any approval as the requirement to be a fit and proper person under section 102B(3) is mandatory in its language.

Submissions on behalf of the Second Intervener – Commissioner of Police

- 15 The Commissioner of Police has adopted the Director’s submissions.

Statutory and Legal Framework

- 16 On a review under section 25 of the Act, the Commission may:
- a. affirm, vary or quash the decision subject to the review; and
 - b. make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - c. give directions:
 - i as to any question of law, reviewed; or
 - ii to the Director, to which effect shall be given; and
 - d. make any incidental or ancillary order.
- 17 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 18 Further, section 16 of the Act, prescribes that the Commission:
- a. may make its determinations on the balance of probabilities (subsection(1)); and
 - b. is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply (subsection (7)(a)); and
 - c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; (subsection (7)(b)).
- 19 Pursuant to section 33(6) of the Act, where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as an approved unrestricted manager, an approved restricted manager or a trustee:
- a. the creditworthiness of that person; and
 - b. the character and reputation of that person; and
 - c. the number and nature of any convictions of that person for offences in any jurisdiction; and
 - d. the conduct of that person in respect to other businesses or to matters to which this Act relates; and
 - e. any report submitted, or intervention made, under section 69,

are relevant and amongst the matters to which consideration may be given.

- 20 Section 102B(3) of the Act expressly provides that the Director *must not* grant a manager's approval unless satisfied that the applicant is a fit and proper person to be approved.
- 21 Section 5 of the Act sets out the primary and secondary objects of the Act in particular:
- a. In subsection (1)(b) one of the primary objects of the Act are to "minimise harm or ill health caused to people, or any group of people, due to the use of liquor"; and
 - b. In subsection 5(2)(d) a secondary object is to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.

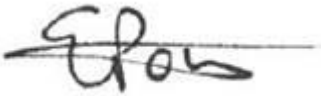
Determination

- 22 The relevant decisions to be made are whether:
- a. the Delegate gave sufficient weight to the materials supplied by the applicant as to her current character as a "fit and proper" person; and
 - b. the applicant is a "fit and proper" person to be granted an unrestricted manager's approval, taking into account the applicant's past and present convictions and behaviour.
- 23 The term "fit and proper" person is not defined in the Act. Section 33 provides some guidance as to what *may* be considered, as do prior decisions of the Director and the Commission.
- 24 It is clear from *Tavelli v Johnson* (Unreported, WASC Library No 960693, 25 November 1996) that prior convictions may be taken into account if those convictions represent a course of disregard for the law so as to reflect adversely on the character of the person committing them.
- 25 It is equally clear that each case turns on its facts.
- 26 The Director correctly points out, in paragraphs 40 and 41 of its submissions, instances where the applicants' prior convictions have resulted in a determination that they were not a fit and proper person pursuant to the Act. Equally, instances exist where person with prior criminal convictions were considered to be "fit and proper" persons namely *Director of Liquor Licensing v Mr Saran Singh Bajaj* (LC06/2011) and *Director of Liquor Licensing v Mr Vladimir Hardi* (LC03/2011).
- 27 The purpose of the words "fit and proper" is to give the decision maker the widest possible scope for judgement (*Hughes and Vale Pty Ltd v New South Wales* [No 2] [1955] HCA 28). Further, in *Australian Broadcasting Tribunal v Bond* (1990) HCA 33 it was found that it is not

a concept which is to be narrowly construed or confirmed.

- 28 As such, the decision of who is a fit and proper person should not stand in isolation from the Act's objectives, primarily to "*minimise harm or ill-health minimise harm or ill health caused to people, or any group of people, due to the use of liquor*" (section 5(1)(b)) and secondarily to "*provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor*" (section 5(2)(d)).
- 29 The controls over the persons involved in the sale, disposal and consumption of liquor and the professional standards of the industry positions are expected by the public to be set, and maintained at, the highest level.
- 30 Although the nature of the applicant's past convictions are each separately relatively minor on the scale of criminal behaviour, the number and frequency must be considered. Further, and more importantly, many of the same involve alcohol and the type of disorderly behaviour that is expressly contemplated as undesirable under the Act.
- 31 The applicant's explanation that her prior behaviour was contributed to by, and is consistent with, her mental health condition is likely accurate and is, to a limited extent, supported by the letter provided by [REDACTED].
- 32 The additional internet articles provided by the applicant in her submission as to bi-polar disorder were not before the Delegate when making the Decision so cannot be considered here.
- 33 The applicant's submissions in relation to her current actions and well-being are positive and compelling and show that the applicant, for seven and a half months, managed the requisite responsibilities in the Club effectively and without incident.
- 34 Despite this, significant weight must be given to the applicant's prior actions and convictions as "*the concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is...engaging in those activities*" *Australian Broadcasting Tribunal v Bond (1990) HCA 33*.
- 35 Regrettably, the applicant's current period of positive behaviour is outweighed by the past 15 years of regular behavioural episodes and convictions arising from the same. More time and evidence is required to conclude that (on the balance of probabilities) similar conduct will not occur in the future and that the general community can have confidence that it will not occur.
- 36 Given the above, the Commission finds that:
- a. the Delegate gave proper consideration and weight to the materials supplied by the applicant in making the Decision; and
 - b. at this time, the applicant is not a fit and proper person to hold a position of authority in a licensed premises.

- 37 The Commission has also considered the applicant's request to apply conditions on any approval or review procedures as may be found appropriate by the Director of Liquor Licensing.
- 38 The Commission's view is that any limited or conditional grant of approval would not address the issue of the applicant currently not being a fit and proper person, but rather only operate to discourage another occurrence of similar behaviour. Although such conditions may be helpful to the applicant, as section 102B(3) is expressed in mandatory language, this would not be appropriate.
- 39 The application is refused and the Decision of the Delegate is affirmed.

A handwritten signature in black ink, appearing to read 'E Power', written over a horizontal line.

EMMA POWER
PRESIDING MEMBER