[2006] WASCA 21

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	HIGHMOON PTY LTD -v- CITY OF FREMANTLE & ORS [2006] WASCA 21
CORAM	:	MALCOLM CJ MCLURE JA PULLIN JA
HEARD	:	22 NOVEMBER 2005
DELIVERED	:	16 FEBRUARY 2006
FILE NO/S	:	FUL 96 of 2004
BETWEEN	:	HIGHMOON PTY LTD Appellant AND CITY OF FREMANTLE First Respondent DAVID HAWKS Second Respondent MARIA DONOHUE Third Respondent DARREL CAKE Fourth Defendant GARY CAPLE Fifth Respondent MIKE JENNER Sixth Respondent

ARI ANTONOVSKY
Seventh Respondent

LUCY BORTHWICK
JOHN BORTHWICK
Eighth Respondents

LLOYD HAMMOND
Ninth Respondent

GEORGE HUSBAND
SHEILA HUSBAND
Tenth Respondents

ALEXANDER SMALL
Eleventh Respondent

JEAN TONKINSON
Twelfth Respondent

JILL MURDOCH
Thirteenth Respondent

ANNA O'SULLIVAN
Fourteenth Respondent

SUSAN GRACE
Fifteenth Respondent

JUNE HUTCHINSON
DAVID HUTCHINSON
Sixteenth Respondents

KATHLEEN ROBERTS
Seventeenth Respondent

JANET SAMMONS
Eighteenth Respondent

PIERO GUERRA
Nineteenth Respondent

RICHARD YUNG
Twentieth Respondent

PATRICIA MASON
Twenty First Respondent

YAN FEN WEN
Twenty Second Respondent

MILTON WHYTE
Twenty Third Respondent

PRINCESS VEUIS
Twenty Fourth Respondent

TERRI MCLURE
Twenty Fifth Respondent

T VI HUYNM
Twenty Sixth Respondent

GOOGIE RUMMER
Twenty Seventh Respondent

ON APPEAL FROM:

Jurisdiction	:	LIQUOR LICENSING COURT OF WESTERN AUSTRALIA
Coram	:	GREAVES J
Citation	:	[2004] WALLC 4

Catchwords:

Liquor licensing - Application for removal of licence - Whether question of law raised - Objection by residents - Whether undue offence, annoyance, disturbance or inconvenience likely to be caused to residents in the vicinity

Appeal - Undesirability of repetitive grounds

Legislation:

Liquor Licensing At 1988 (WA), s 16(1), s 28(2), s 37(3), s 74(1)(g)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr W S Martin QC & Mr W J Clements
First Respondent	:	No appearance
Second Respondent	:	In person
Third Respondent	:	No appearance
Fourth Defendant	:	In person
Fifth Respondent	:	No appearance
Sixth Respondent	:	No appearance
Seventh Respondent	:	No appearance
Eighth Respondents	:	No appearance
Ninth Respondent	:	No appearance
Tenth Respondents	:	No appearance
Eleventh Respondent	:	No appearance
Twelfth Respondent	:	No appearance
Thirteenth Respondent	:	No appearance
Fourteenth Respondent	:	No appearance
Fifteenth Respondent	:	No appearance
Sixteenth Respondents	:	No appearance
Seventeenth Respondent	:	No appearance
Eighteenth Respondent	:	No appearance
Nineteenth Respondent	:	No appearance
Twentieth Respondent	:	No appearance
Twenty First Respondent	:	No appearance
Twenty Second Respondent	:	No appearance
Twenty Third Respondent	:	No appearance
Twenty Fourth Respondent	:	No appearance
Twenty Fifth Respondent	:	No appearance
Twenty Sixth Respondent	:	No appearance
Twenty Seventh Respondent	:	No appearance

Solicitors:

Appellant	:	Williams Ellison
First Respondent	:	McLeods
Second Respondent	:	In person
Third Respondent	:	No appearance
Fourth Defendant	:	In person
Fifth Respondent	:	No appearance
Sixth Respondent	:	No appearance
Seventh Respondent	:	No appearance
Eighth Respondents	:	No appearance
Ninth Respondent	:	No appearance
Tenth Respondents	:	No appearance
Eleventh Respondent	:	No appearance
Twelfth Respondent	:	No appearance
Thirteenth Respondent	:	No appearance
Fourteenth Respondent	:	No appearance
Fifteenth Respondent	:	No appearance
Sixteenth Respondents	:	No appearance
Seventeenth Respondent	:	No appearance
Eighteenth Respondent	:	No appearance
Nineteenth Respondent	:	No appearance
Twentieth Respondent	:	No appearance
Twenty First Respondent	:	No appearance
Twenty Second Respondent	:	No appearance
Twenty Third Respondent	:	No appearance
Twenty Fourth Respondent	:	No appearance
Twenty Fifth Respondent	:	No appearance
Twenty Sixth Respondent	:	No appearance
Twenty Seventh Respondent	:	No appearance

Case(s) referred to in judgment(s):

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Brealey v Royal Perth Hospital (1999) 21 WAR 79
CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578
Collector of Customs v Agfa-Gevaert Limited (1995) 186 CLR 389
Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 950287; 8 June 1995

Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Pochi v Minister or Immigration and Ethnic Affairs (1979) 26 ALR 247
Vandeleur v Delbra Pty Ltd (1988) 48 SASR 156
Williams v The Queen (1986) 161 CLR 278
Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors, unreported; SCt of WA; Library No 940553; 20 July 1994

Case(s) also cited:

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207
Laveson Pty Ltd v Smith [2003] WASCA 286
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
T A Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992

MALCOLM CJ
McLURE JA
PULLIN JA

1 **MALCOLM CJ**: In my opinion, this appeal should be dismissed for the reasons to be published by Pullin JA with which I agree. There is nothing I could usefully add.

2 **MCLURE JA**: I agree that the appeal should be dismissed generally for the reasons given by Pullin JA.

3 **PULLIN JA**: This is an appeal against the decision of Judge Greaves in the Liquor Licensing Court of Western Australia on 1 July 2004. Judge Greaves refused the appellant's application for removal of a tavern licence from 24 High Street, Fremantle 400 metres away to 33 South Street, Fremantle. The licence at 24 High Street had been suspended with effect from 19 December 2001. There was evidence that when it was operating as Coakleys Tavern it would attract 50 people on a "big night".

4 The plans for 33 South Terrace revealed large proposed premises, to be named "The Mustang Bar", which were to consist of 411.51m^2 interior floor space together with a public terrace of 139.4m^2. It could accommodate well over 500 people. The Town Planning Appeal Tribunal gave planning approval, but as a condition of approval restricted the number of patrons in the premises to 570 persons. It also imposed a condition that a detailed management plan be submitted to the City of Fremantle dealing with matters specified by the Tribunal, such matters to be to the "reasonable satisfaction of the Director Urban Management of the City of Fremantle". A management plan was submitted and approved by the City.

5 When the application was made, the Director of Liquor Licensing specified an affected area of 3 kms. The application attracted objections including objections from local residents.

6 The appellant called a Town Planner, a Mr G Rowe, who described the area around South Terrace and Market Street between Bannister and Essex Streets, in which the Mustang Bar was to be located, as the "Entertainment Core" of Fremantle. There were 11 category A licences within the Entertainment Core and 55 Category A licences within the affected area.

7 The appellant proposed, as a condition of the removal of the licence, that the appellant be obliged to comply with the management plan which had been approved by the City. A copy of this was tendered and became exhibit 1 ("Management Plan").

8 The Management Plan stated that management would commit to the best practices of the Fremantle Accord. I will refer to the Fremantle Accord later in these reasons. The Management Plan stated that:

> "The aim of this plan is to minimise any harm or ill-health that may be caused to people or any group of people due to the use of liquor within this hotel. It also sets out procedures to be adopted to provide for the orderly conduct of the business in respect of the Local Authority's regulations and best practices.
>
> Management accepts that the minimising of harm not only applies to our patrons but also to the residents of homes located within the vicinity of the hotel and to others who are also members of our community."

9 In broad terms, the Management Plan provided for matters which, if observed by staff, would have the effect of reducing disorderly conduct; it would reduce the incidence of service of liquor to drunken persons and to under aged persons, and it would enhance security and improve crowd and noise control.

10 The City of Fremantle was one of the objectors to the appellant's application for removal, but at the commencement of the hearing it informed the Liquor Licensing Court that it sought leave to withdraw its objection, subject to a determination by the Court that any grant of the application be made subject to a condition that the licensee comply at all material times with the terms of the Management Plan. The objectors who gave evidence were Professor David Hawks, Ms Maria Donahue, Mr Terrence O'Connor QC and Mr Darrel Cake, who were all local residents.

11 His Honour at [11] of his reasons said:

> "It became apparent from the evidence of those objectors that they put in issue the efficacy of the management plan. In order that the court might be fully informed about the objection of the City of Fremantle and the condition proposed in relation to exhibit 1, the court required the manager of development assessments at the City of Fremantle, Mr Andrew Jackson, to produce his statement exhibit 19, referred to by Professor Hawks in the course of his evidence, and make himself available for cross-examination ..."

12 Professor David Hawks gave evidence. In that evidence he quoted par 70 of Mr Jackson's statement, referred to above, and later admitted into evidence. The paragraph read:

> "Licensed premises inherently give rise to noisy recreational activities and revelry and to patrons emerging from the premises, often late at night, in groups and in high spirits – and anti-social human behaviour is therefore a by-product. No degree of management can effectively control this behaviour, particularly as it generally occurs after patrons have left the premises."

13 Professor Hawks went on to say that:

> "Much of the details of the management policy ... reflects the Fremantle Accord which itself reflects a licensee's legal responsibilities under the Liquor Licensing Act ... given the reliance on the Fremantle Accord and specifically on its recommendations, it is pertinent to ask to what extent has the Fremantle Accord been observed in Fremantle?"

14 His Honour referred to Professor Hawks' evidence about the "evaluation" of the Fremantle Accord. The Fremantle Accord referred to by Professor Hawks was dated 27 March 1996. It was an agreed code of practice developed by, *inter alia*, representatives of the police, local operators of licensed premises, liquor licensing authority representatives and local government. It contained a mission statement which was:

> "To ensure and maintain proper and ethical conduct within the region of Fremantle in line with the Local Industry Accord, and to promote the philosophy of responsible service of alcohol in all licensed premises."

15 The document went on to state that a local industry accord commenced in 1995 as an agreed code of practice involving the police, licensees, liquor licensing authority representatives, local government and other relevant agencies and people. The purpose behind that accord or code of practice was to adopt a range of "positive and effective community-based harm minimisation strategies aimed at reducing crime and violence involving intoxicated people" in and around the central business district of Fremantle. The Fremantle Accord went on to state that it sought a "collaborative approach in minimising the harmful effects, social disruption, crime and violence caused by the rapid consumption and irresponsible service and consumption of alcohol." It set out some

guidelines to be adopted by licensees. So, for example, it provided that a licensee should ensure that bar staff would not sell or serve liquor to any person obviously affected by liquor; that the licensee should discourage excessive consumption of alcohol; that the promotion of alcohol should be discouraged if the promotion involved excessive consumption; that proof of age should be required to prevent underage drinkers consuming alcohol. It suggested that the sale of reduced alcohol beers should be at a price less than medium or high strength beers. It contained statements about what was required of licensees in relation to crowd controllers, proper training for staff and by way of a complaints procedure. It stated that if licensees and the City of Fremantle were committed to the Fremantle Accord, an evaluation of practices and objectives of the Accord would be essential.

16 The "evaluation" which Professor Hawks referred to was the evaluation which was carried out and reported on in a Curtin University of Technology publication. The report was published by the National Drug Research Institute and it was entitled "The Evaluation of the Fremantle Police Licensee Accord: Impact on serving practices, harm and the wider community" in September 1999. One of the authors of the report was Professor Hawks. This report was tendered and became exhibit 18. It is only necessary to refer to the executive summary which stated that the Fremantle Accord was implemented in Fremantle in March 1996 and was followed up over a period of 14 months. The report stated that post-accord assessments were carried out seven and 14 months after the introduction of the Fremantle Accord and compared with assessments which had been completed four years before the Fremantle Accord was launched. Data was collected in relation to motor vehicle crashes, drink driving and assaults. The executive summary of the report continued:

> "The measures which most directly relate to the Accord, the refusal of service to 'intoxicated patrons' and age identification, showed little improvement over time and did not differentiate the Fremantle premises from their Northbridge counterparts. The failure, in the vast majority of instances, to refuse service to 'intoxicated patrons' or for bar staff, in the absence of door staff, to require age identification is particularly indicting of the instructions given to the staff.
>
> The availability of drink driving, crash and assault data, which identifies particular premises provided a direct test of the effect of the Accord on the serving practices of such premises. Looked at in general terms none of these indices improved over

> time nor were Fremantle or Northbridge premises differentiated."

17 The executive summary also stated that the views expressed by samples of taxi drivers, patrons, residents and businesses surveyed conveyed the impression that the predominant perception was of little or no change. It also stated:

> "Practices in both hotels and nightclubs included in the assessment may well have changed significantly in the interim recommending caution in the application of these results to current practices."

18 Finally, the executive summary stated:

> "It is concluded that Accords are, by definition, cooperative agreements, the force of which, is only as strong as the commitment of those who are signatories. The retail liquor industry is a particularly competitive industry in which such agreements are constantly under threat, not only from within, by those who are committed to an Accord, but particularly, from those who are without.
>
> ... While the Fremantle Accord has been hailed as a success by both the City of Fremantle and the Police, it needs to be noted that there is little objective evidence of its having achieved its principal objective of a safer Fremantle."

19 Professor Hawks gave evidence about the evaluation the subject of the report. He said:

> "That evaluation found that on the vast majority, that on 95 per cent of occasions when observations were carried out patrons who were simulating drunkenness were served. It also found that only a small minority of occasions youthful patrons judged by licensing police to have the appearance of being under-age were asked – that is, only a small minority of such people were asked – for identification as would have established their age."

20 Professor Hawks further referred to the point made in the report that a comparison made one year before and after the introduction of the Accord showed no significant reduction in the number of assaults occurring in the near vicinity of the licences. Further details about the apparent lack of effect of the Accord are set out in full in Professor

Hawks' evidence, which was recorded verbatim in his Honour's reasons for decision. See ***Highmoon Pty Ltd v City of Fremantle & Ors*** [2004] WALLC 4 at [14].

21 His Honour also referred to the evidence of Mrs Maria Donahue at [15] of his reasons. Most of Mrs Donahue's evidence related to antisocial conduct of persons under the influence of alcohol in the affected area at 5.00 to 5.30 in the morning when she took her dog for a walk, although a part related to conduct of such persons around midnight.

22 Mr O'Connor in his evidence lamented the passing of the old Fremantle where "...you could buy groceries and things ..." He said that as a resident, he was concerned about the impact of licensed premises on the area and he gave evidence of ongoing antisocial behaviour he observed in the area. He said he was concerned that the Mustang Bar would produce a large number of extra people into the area. It was he who gave evidence about Coakleys Tavern and the fact that it attracted 50 people on a "big night" when it was operating.

23 Mr Darrel Cake described antisocial behaviour. His particular concern was with "the hard edge" of antisocial behaviour involving violence and that he had no faith in licensees being able to control such antisocial behaviour in the streets once patrons left the licensed premises.

24 His Honour referred to a statement of evidence which Mr Jackson proposed to give. Mr Jackson was employed by the city of Fremantle as the Manager of Development Assessments. He had proposed giving evidence when the City was an objector. He had prepared a statement containing evidence he planned to give. Paragraph 70 of that statement read:

> "The City has ample experience establishing a direct connection between licensed premises and impacts upon amenity. Licensed premises inherently give rise to noisy recreational activities and revelry and to patrons emerging from the premises, often late at night, in groups and in high spirits – and anti-social human behaviour is therefore a by-product. No degree of management can effectively control this behaviour, particularly as it generally occurs after patrons have left the premises."

25 When the City withdrew its objection his Honour nevertheless directed that Mr Jackson be called and be available for cross-examination. As a result, Mr Jackson did give evidence. His Honour noted in his

reasons that Mr Jackson's statement was made before the management plan came into existence. His Honour said:

> "It is sufficient to say Mr Jackson was of opinion that the management plan is sufficient to satisfy the concerns of the ... the City of Fremantle."

26 He did give that evidence, but he also gave other evidence about the Management Plan. He said:

> "Obviously these plans are designed to look after the operation of the premises, primarily, and to some extent the immediate vicinity when people are leaving. Clearly, a management plan can't go very far to control everything and certainly what people do once they leave the area. ... management plans don't achieve much; generally they do but they can't achieve everything." (AB 241)

and that:

> "In terms of planning approval for a use, it does not have a lot of immediate force and effect". (AB 242)

27 He also confirmed that since he had prepared his proposed statement of evidence, that "[t]here are still problems with antisocial behaviour with existing licensed premises in the City of Fremantle." (AB 243)

28 In his reasons his Honour dealt with matters which required proof in relation to all cases of removal. He concluded that the evidence established, on the balance of probabilities, that the grant of the application was necessary to provide for the reasonable requirements of the section of the public residing in and resorting to the affected area for liquor and related services including musical entertainment and food. His Honour also considered the content of the Management Plan.

29 His Honour then turned to the issue raised by the objectors. He properly directed himself as to the legal issue by referring to the terms of s 37(3) and s 74(1)(g) of the Act. Section 37(3) provides that an application should not be granted where the licensing authority is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the place or premises to which the application relates would be likely to occur, and s74(1)(g) provides that no objection shall be made except on certain grounds, one of which was that if the application were granted, undue offence, annoyance, disturbance or inconvenience to persons who reside or work in

the vicinity or persons travelling to or from an existing or proposed place of public worship, hospital or school would be likely to occur, or if the amenity, quiet or good order of the locality in which the premises are to be situated would in some other manner be lessened. This was the basis of residents' objections.

30 His Honour noted that it was not difficult to conceive of circumstances in which licensed premises, no matter how conducted, would result in offence, annoyance, disturbance or inconvenience to nearby residents, but whether it would be "unduly" so, would be a matter of degree and would depend upon the circumstances. His Honour cited ***Vandeleur v Delbra Pty Ltd*** (1988) 48 SASR 156 at 160 which discusses this point. His Honour said that one of the circumstances to take into account was the Management Agreement. His Honour then concluded that the evidence of the objectors established that residents of the affected area had for some time been unduly affected by the conduct of intoxicated customers of licensed premises in the affected area. He considered that the removal of the licence to the proposed location would introduce 500 to 600 customers to the area when the proposed premises were operating at capacity. His Honour found that there were 11 category A licences "in that part" of the affected area which in my opinion was a reference to an area, described by Mr Rowe, as the Entertainment Core.

31 His Honour at [33] considered that the Fremantle Accord was relevant in considering the extent to which the proposed management agreement might reduce offence, annoyance, disturbance or inconvenience to nearby residents. He then said at [34], [35] and [36]:

> "34 I accept the evidence of Professor Hawkes [*sic*] that the management agreement goes little further than to endorse the obligations of the licensee under the Act. It provides no means of enforcement other than those available under the Act. The information provided by the Director of Liquor Licensing suggests that no proceedings have been commenced against licensees in this affected area in the recent past in relation to the sale of liquor to intoxicated customers. In the light of the conclusion I have expressed about the conduct of intoxicated customers of licensed premises in this part of the affected area, I am inclined to accept the conclusion expressed in exhibit 18 that management agreements of the nature proposed in this case are likely to be less effective in the present context, in the absence of effective enforcement.

35 In reaching this conclusion, I record there is no evidence in this case that should lead the court to conclude that this applicant is likely to conduct the business to be carried on under the licence at these premises other than in accordance with the Act. That, however, is not determinative of the present issue. The principal area of objection, as I have said, is not in the operation of the proposed premises themselves, but in the likely consequences in all the circumstances of the introduction of premises of this size in this location, accommodating the number of persons proposed. Their introduction into this part of the affected area, where there is already existing a large number of Category A licences, is likely to contribute to the undue offence, annoyance, disturbance or inconvenience to residents by intoxicated persons in the vicinity of the premises. While the City of Fremantle may be satisfied that the management agreement will be effective to reduce offence, annoyance, disturbance or inconvenience to nearby residents, the evidence of Professor Hawkes and Mr O'Connor lead me to conclude on the balance of probabilities that this is not the case.

36 For these reasons, I find that the removal of this licence to this proposed location is likely to cause undue offence, annoyance, disturbance or inconvenience by intoxicated persons in the vicinity of the premises that those who reside nearby should not reasonably be expected to tolerate in the interests of the need of the community for the removal of this licence to this part of the affected area as contemplated."

32 His Honour then refused the application.

33 There were 16 grounds of appeal. Many are repetitive or display only slight nuances of difference from other grounds. The drafting of repetitive grounds and an insistence that they all be dealt with is undesirable; see ***Brealey v Royal Perth Hospital*** (1999) 21 WAR 79 at 87. It wastes the time of the Court, it is distracting and it drives up costs. Counsel for the appellant agreed that many of the grounds are repetitive. The grounds are:

"1 The learned Judge erred in law in finding that the Management Plan (Agreement) proposed by the Appellant was the same as the Fremantle Accord and in confusing the evidence relating to the Accord with the evidence relating to the Management Plan.

2. The learned Judge erred in law in finding that the Management Plan (Agreement) proposed by the Appellant only endorses the obligations of the licensee under the Liquor Licensing Act and provided no means of enforcement other than those available under the Liquor Licensing Act.

3. The learned Judge erred in law in treating the evidence of the residential objector David Hawkes [*sic*] as an expert witness on the subject of the terms and likely effect of the Management Plan proposed as a condition of the licence, when he lacked any appropriate qualification for the expression of such an opinion and his evidence was not logically probative of that fact.

4. The learned Judge erred in law in finding that on the totality of the evidence that the ground of objection made by the Second to Thirteen Respondents under Section 74(1)(g) of the Liquor Licensing Act had been made out.

5. The learned Judge erred in law in after finding that the ground of objection under Section 74(1)(g) of the Liquor Licensing Act had been made out failed to consider if the application could still be granted by imposing conditions on the Tavern Licence imposing the Management Plan (Agreement) in the court exercising its discretion pursuant to Section 33 of the Liquor Licensing Act.

6. The learned Judge erred in law in relying on the evidence of the principal town planner of the City of Fremantle Andrew Jackson when the First Respondent's position on the Appellant's Application was it did not oppose the grant of the application if the Management Plan (Agreement) was imposed as a condition on the Tavern Licence and when the tenor of the evidence of Andrew Jackson in its entirety was to the effect that as a result of

the Management Plan, he no longer adhered to the views recorded in his written statement as to the likely effect of the removal of the licence upon the affected area.

7. The Learned Judge erred in law in apparently placing reliance upon the evidence of Maria Dana Hoe for the purpose of his findings as to the likely effect of the removal of the licence upon the amenity of the affected area, when her evidence was limited to her observations of tire behaviour of patrons leaving nightclubs around 5.30a.m. and the application was for the removal of a tavern licence which would trade no later than 1.00a.m.

8. The Learned Judge erred in law in finding that the removal of the license to the proposed location would introduce 500 to 600 customers to this part of the affected area when:

   (a) he did not identify what part of the affected area he was referring to;

   (b) it was necessary for him to consider the effect of the grant of the licence upon the affected area as a whole, not merely an unspecified part of the circa;

   (c) having regard to the presence of numerous other licensed premises in the immediate vicinity of the site to which removal of the licence was sought, there was no evidence capable of sustaining the finding.

9. The Learned Judge erred in law relying upon the evidence of the witness J Hawks, Donohue, O'Connor and Cake as to the behaviour of patrons of licensed premises in the affected area generally, when such evidence was not logically probative of any issue to be determined in the absence of evidence to the effect that the removal of the licence to the proposed premises would increase the total number of persons resorting to licensed premises within the affected area and there was no such evidence.

10. The Learned Judge erred in law in relying upon the evidence of the witnesses Hawks, Donohue, O'Connor

and Cake as to the behaviour of patrons attending licensed premises in the affected area generally, when there was no evidence capable of sustaining the conclusion that the removal of the licence sought would increase or exacerbate that behaviour, given his finding that there was no evidence that the applicant was likely to conduct the business to be carried on under the licence at the premises to which removal was sought other than in accordance with the Act.

11. The Learned Judge erred in law in relying upon information provided by the Director of Liquor Licensing to the effect that no proceedings had been commenced against licensees within the affected area in the recent past relating to the sale of liquor to intoxicated customers in support of his conclusion as to the likely efficacy of the proposed Management Plan, when such information was irrelevant to that issue.

12. The Learned Judge erred in law in relying upon information provided by the Director of Liquor Licensing to the effect that no proceedings had been commenced against the licensees within the affected area in the recent past relating to the sale of liquor to intoxicated customers when such information was irrelevant given his finding that there was no evidence that should lead the court to conclude that the applicant was likely to conduct the business to be carried on under the licence other than in accordance with the Act.

13. The Learned Judge erred in law in accepting a proposition contained in Exhibit 18 (a report on the operation of the Fremantle Accord) as apparently determinative of the issue concerning the likely efficacy of the Management Plan proposed as a condition of the licence given:

    (a) in making such finding he failed to identify and appreciate the distinction between the Accord which was unenforceable and the Management Plan which would be enforceable both as a condition of the Development Approval and the liquor licence;

(b) the proposition contained within Exhibit 18 was expressly conditioned upon the fact that the Accord lacked any means of effective enforcement whereas the Management Plan would be enforceable;

(c) Exhibit 18 provided no evidence in relation to the likely efficacy of a Management Plan of the nature proposed.

14. The Learned Judge erred in law in placing reliance upon his findings relating to the conduct of intoxicated customers of licensed premises in 'this part of the affected area' in arriving at his conclusion with respect to the likely efficacy of the proposed Management Plan when:

(a) he did not identify the 'part' of the affected area to which he was referring;

(b) that evidence was irrelevant to the issue of the likely efficacy of the Management Plan, given that:

(i) there were no enforceable management Plans relating to virtually all of the licensed premises within the affected area;

(b) the uncontradicted evidence of Andrew Jackson was to the effect that the Management Plan proposed was likely to be more effective than any Management Plan utilised in the past.

15. The Learned Judge erred in law in accepting the evidence of the witness Hawkes [*sic*] to the effect that 'the management agreement goes little further than to indorse the obligations of the licensee under the Act' and in making that finding when:

(a) the question was not one of oral testimony but rather for resolution by a comparison of the terms of the Management Plan and the obligations it imposed with the terms of the Act and the obligations it imposed;

(b) any reasonable comparison of the terms of the Management Plan and the obligations it imposed and the terms of the Act and the obligations it imposed necessarily led to the conclusion that the Management Plan imposed significantly greater obligations upon the licensee than the provisions of the Act.

16. The Learned Judge erred in law in taking account of the evidence of the witnesses Hawkes [*sic*] and O'Connor in relation to the issue concerning the likely efficacy of the Management Plan and indeed basing his finding on the issue upon their evidence when:

(a) their evidence was not logically probative in relation to that issue;

(b) the evidence of the witness O'Connor was to the effect that he had never read the Management Plan."

The statutory right of appeal

34 Before 1998, s 28(2) of the *Liquor Licensing Act* provided that no appeal lay to this Court unless the appeal "involves a question of law". In ***Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors***, unreported; FCt SCt of WA; Library No 950287; 8 June 1995, Murray J said, in relation to that provision, that this permitted an appeal upon grounds categorised as errors of mixed fact and law.

35 Perhaps as a result of those observations, s 28(2) was amended by s 15 of the *Liquor Licensing Amendment Act 1998* so that it now provides that no appeal lies from the Liquor Licensing Court to this Court "except upon a question of law". To establish that there is a "question of law" it is necessary to show that an error of law has occurred. See ***Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors***, unreported; SCt of WA; Library No 940553; 20 July 1994, per Anderson J.

36 In my opinion, errors of mixed fact and law may not be entertained under the present version of s 28(2). See ***Williams v The Queen*** (1986) 161 CLR 278 at 287 per Gibbs CJ and Wilson and Dawson JJ at 314.

37 Although the distinction between errors of fact and errors of law are critical to the existence of the right of appeal, no satisfactory test of

universal application has yet been formulated to make the distinction between errors of fact or law clear beyond question in every case. See ***Collector of Customs v Agfa-Gevaert Limited*** (1995) 186 CLR 389 at 394. However, in relation to errors of law made in the course of fact finding, it is uncontroversial and settled that an error of law will occur if there is no evidence to support a finding of fact or the drawing of an inference. See ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321 at 356 per Mason CJ; ***Azzopardi v Tasman UEB Industries Ltd*** (1985) 4 NSWLR 139 . If there is some evidence to support a finding of fact, then the reasoning process leading to the finding of fact will not be open to review as a question of law if the complaint is about mere illogicality in reasoning; see ***Azzopardi*** (*supra*) per Glass JA at 156-157 and ***Australian Broadcasting Tribunal v Bond*** (*supra*) at 356; although if the reasoning is unreasonable in the sense of "***Wednesbury***" unreasonableness, an error of law will occur. See ***Palace Securities Pty Ltd v Director of Liquor Licensing*** (1992) 7 WAR 241 at 251 - 252.

38 Counsel for the appellant referred to ***Pochi v Minister for Immigration and Ethnic Affairs*** (1979) 26 ALR 247 at 256. That decision does not add or subtract anything to or from the judgment of Mason CJ in the ***Australian Broadcasting Tribunal*** case (*supra*). In ***Pochi's*** case, Brennan J discussed the fact that neither the Minister nor the Administrative Appeals Tribunal were bound by the rules of evidence. The same applies in the Liquor Licensing Court by reason of s 16(1) of the *Liquor Licensing Act*. Brennan J explained that in such circumstances, although material before the Minister or the Tribunal might not satisfy the technical rules of evidence in a court of law, it could still be relied upon, but only if it were logically probative of the matters in issue. Brennan J referred also to the distinction between "provable phenomena" and "evaluations" and "prophesies". As Brennan J said at 255:

> "Evaluations and prophesies are not to be proved by evidence, but are to be left to the decision-maker ..."

39 This was a case where the court was obliged to prophesy whether an undue degree of offence would be likely to occur to persons in the vicinity of the new premises.

40 It is an error of law for a decision maker to fail to address a central issue raised in the case: ***CEO of Customs v AMI Toyota Ltd*** (2000) 102 FCR 578 at [45].

Grounds 1, 2 and 13

41 Counsel for the appellant invited the Court to deal with these three grounds together. The points which counsel for the appellant developed in oral and written submissions were as follows. The Fremantle Accord was a voluntary accord which was not enforceable against licensees. The Management Plan on the other hand, if made a condition of the licence, would be enforceable. It would be enforceable by reason of s 64(7) of the Act. Section 64(7) reads:

> "Where a condition imposed under this section in relation to a licence has been contravened the licensing authority may -
>
> (a) impose a more restrictive condition in relation to that licence; or
>
> (b) impose on the licence holder a monetary penalty not exceeding $500 for each day on which the contravention continues, which shall be payable to the Crown by that person,
>
> or both."

42 The appellant submitted that it was therefore an error on his Honour's part to state, as he did in the last sentence in [34], that the Management Agreement would not be effective in the absence of effective enforcement.

43 In my view this attempts to isolate one part of his Honour's reasons and to ignore the overall effect of the reasons. His Honour's reasons reveal that he well understood the difference between the Fremantle Accord and the Management Plan. He was aware that the Fremantle Accord was not enforceable at law. He considered that the Management Plan was enforceable but his point was that it went "little further" than to endorse obligations which the licensee already had under the Act, that obligations under the Act are not well observed by licensees and that such obligations are not enforced by the authorities.

44 That would be the end of these three grounds, except that the appellant then argued that:

(a) the Management Plan went materially further than the obligations imposed under the Act; and

(b) there was a significant difference between prosecution under the Act for non-compliance with the Act and s 64(7) which deals with enforcement of conditions.

45 I will deal first with the submission that the Management Plan went materially further than the obligations imposed by the Act. That submission requires an examination of the obligations imposed by the Act. The obligations imposed by the Act are sanctioned by penalties for non-observance. Thus the Act makes it an offence for licensees to:

(a) permit drunkenness or disorderly behaviour to take place (s 115(1));

(b) sell or supply liquor to a drunken person (s 115(2));

(c) to contravene an order made under s 117 which order would have the object of reducing undue offence, annoyance or disturbance or inconvenience to persons residing or working in the vicinity (s 117(7));

(d) selling or supplying or permitting sale or supply of liquor to a juvenile (s 122(2));

(e) not require a person suspected of being a juvenile to produce evidence of age (s 126(2)).

46 The obligations in the Act are obligations not to do the things which are the subject of sanction. Other provisions in the Act confer authority on licensees to help them observe the obligations. So for example the Act authorises a licensee to remove juveniles (s 126(3) and other persons from premises (eg s 115(4)). These provisions contemplate the use of security personnel.

47 Undoubtedly there were provisions in the Management Plan which could not be precisely found in the Act. The appellant lists these as obligations which the appellant contends go beyond the Act. They included:

> "... with respect to staff training, a dress code for staff, an obligation that staff will discourage any activity that may lead to the irresponsible consumption of liquor, an obligation to provide senior and supervisory staff to assist in the refusal of service, adequate and qualified security staff on immediate call, the processing and treatment of complaints relating to entertainment, a proscribed ratio of security staff to patrons, an obligation to provide security staff to patrol the streets in the vicinity of the venue for 30 minutes after closing, prohibition

> upon drink discount cards, special promotions, contests or games, or any activities that might lead to binge or irresponsible drinking, an obligation to promote the consumption of light or low alcohol drinks, an obligation to encourage the consumption of food and a willingness to serve half measures of spirits, an obligation to ensure that all measures are in place to minimise the escape of undue noise from the hotel, an obligation to promote respect for the amenity of the hotel's immediate neighbourhood, cessation of the sale of packaged liquor 15 minutes before closing time, and an obligation to arrange for the removal of hotel generated litter from around the vicinity of the hotel." (See appellant's submissions).

48 In my opinion, these provisions in the main were directed to achieving the outcome the Act attempts to achieve, that is, that licensees take steps to ensure that there is responsible consumption of alcohol, that there is orderly conduct on premises, that juveniles are not permitted to consume alcohol and that the amenity of the area is not affected by the activities of the licensed premises. It is undoubtedly true that some of the points listed by the appellant do not have a precise counterpart in the Act. So, for example, the fact that there is provision for a dress code is something outside of the requirements of the Act. However, it is hardly a significant point. The requirement that there be willingness to serve half measures of spirits is not a requirement in the Act but it is clearly directed to preventing drunkenness.

49 In my opinion his Honour was quite correct to conclude that the Management Plan went "little further" than to endorse the obligations imposed by the Act.

50 The second point which the appellant sought to make was that there was a significant difference between prosecution under the Act for non-compliance with the Act and the provisions of s 64(7), in the sense that s 64(7) contained a greater sanction. Section 64(7) provides for action which may be taken in the event of the breach of a condition. In my view there is no significant difference. The offences under the Act, examples of which I have given above, result in monetary penalties, but under s 95 the Director of Liquor Licensing may complain to the court seeking disciplinary action against a licensee, which action may be based on the fact that the licensee has been convicted of offences under the Act. Under s 96, disciplinary powers are conferred which have more serious consequences than the exercise of powers found in s 64(7).

51 In my opinion this ground raises a submission which complains about the Liquor Licensing Court's evaluation of undisputed evidence which was before the Court.

52 These grounds raise no question of law.

Ground 3

53 This ground contends that Professor Hawks gave expert evidence. Professor Hawks gave evidence as a resident and he also summarised the effect of the valuation report concerning the Fremantle Accord. The Fremantle Accord was in evidence and the evaluation report was not objected to. No complaint is made in any of the grounds about the fact that the evaluation report became an exhibit.

54 Professor Hawks expressed no expert opinion, even though his Honour referred in [12] and [13] to Professor Hawks expressing an "opinion". A reference to these paragraphs reveals that he was making comment rather than expressing an opinion. The substantive part of his evidence was referred to in [14], where Professor Hawks' evidence was set out and in which he merely summarised the effect of the evaluation report.

55 This ground should be dismissed. His Honour did not treat the evidence of Professor Hawks as an expert witness.

Ground 4

56 The appellant says that this contains a "summation" of the other specific grounds rather than an independent ground in its own right. As a result I say nothing more about it.

Ground 5

57 The written submissions reveal this to be merely a repeat of the arguments raised under grounds 1, 2 and 13, which I have addressed above. The written submissions contend that his Honour did not consider s 33 of the Act and address the extent to which offence, annoyance, disturbance or inconvenience could be overcome by the imposition of a condition on the licence requiring compliance with the Management Plan. As I have already said, his Honour concluded that the Management Plan went "little further" than to impose requirements already found in the Act. His Honour's evaluation of the evidence led him to conclude that neither the Management Plan nor the obligations in the Act would prevent undue offence, annoyance, disturbance or inconvenience to residents.

58 The appellant contends that having reached the conclusion that the objection had been made out his Honour should then have considered whether the application should still be granted (exercising the discretion in s 33) by imposing a condition that the Management Plan be observed. The appellant referred to ***CEO of Customs v AMI Toyota Ltd*** (*supra*). I reject that contention. His Honour had considered the effectiveness of the Management Plan in the course of upholding the objection. He held that the existence of the Management Plan, even if enforceable under the Act, would not prevent undue offence etc to residents. It was unnecessary to consider it again for the purposes of s 33.

Ground 6

59 This ground contends that the learned Judge erred in referring to and relying on the evidence of the City of Fremantle employee Mr Jackson. The essence of the complaint is that his Honour failed to recognise that Mr Jackson did not "adhere to the views recorded in his written statement as to the likely effect of the removal of the licence upon the affected area". The appellant points selectively to some of Mr Jackson's evidence that the Management Plan was a better example and more comprehensive than others that he had seen, and that it was much more enforceable than other management plans and that he regarded it as an important preventative tool. This, however, ignores other evidence that Mr Jackson gave and which I have set out above. This evidence permitted his Honour to conclude (if he did) that what Mr Jackson said in his statement, particularly at par 70, was still the view he held at the hearing, notwithstanding that the City of Fremantle no longer opposed the grant of the application. In fact, the reference to par 70 of the Jackson statement was for the purpose of explaining Professor Hawks' comment on the attitude of the City of Fremantle.

60 In my opinion, the assertion lying at the heart of this ground cannot be sustained and in any event it does not raise a question of law.

Ground 7

61 Mrs Donahue gave evidence about what she observed both at midnight and early in the morning. Her evidence about what she observed around midnight was clearly directly relevant. Her evidence about what she observed about patrons at 5.30 in the morning merely provided some evidence about the behaviour of drunken patrons of other licensed premises albeit at a different time of day. There were other witnesses who gave evidence about the conduct of alcohol affected persons in the area. This ground selects one piece of evidence given by one of several

witnesses and criticises it as though this Court were hearing the original application. The ground raises no question of law.

Grounds 8, 9 and 10

62 Counsel in oral submissions suggested that grounds 8 and 9 should be dealt with together. The written submissions suggest that grounds 9 and 10 should be dealt with together. I have therefore grouped the three grounds together.

63 Ground 8(a) says that his Honour did not identify what part of the affected area he was referring to. In my opinion he does. He is referring to the Entertainment Core. Ground 8(b) says that it was necessary for the learned Judge to consider the effect of the grant upon the affected area as a whole, not merely an unspecified part of the area. That is not correct. In relation to the objection, he was conducting an inquiry about whether residents in the "vicinity" would be unduly affected, and that is the point he examined.

64 Ground 9 contends that there was no evidence that the removal of the licence would increase the total number of persons resorting to the licensed premises within the affected area. Counsel for the appellant submitted that there would merely be a rearrangement of patrons already attending the affected area and that there was no evidence that overall there would be an increase in numbers in the area. In my opinion there was such evidence. Mr O'Connor gave evidence about the fact that 50 persons would be on the premises on a big night, and the appellant's proposal to move into premises with the capacity to hold between 500 and 600 people was evidence which allowed the Court to infer that the appellant expected to achieve that result. That evidence, coupled with evidence led by the appellant that it expected people who resorted to the Mustang Bar in Northbridge to resort to the new Mustang Bar in Fremantle if the removal application were granted, was material from which the court could properly predict that total numbers in the area would increase.

65 The assertion in this ground that there was no evidence to support the finding is incorrect. There is no question of law involved.

66 Ground 10 points to the learned Judge's finding that the applicant was likely to conduct the business at the premises in accordance with the Act. The ground contends that in view of that finding, the finding that the removal would cause an exacerbation of the bad behaviour of patrons of licensed premises was an error of law. His Honour did conclude that the

appellant would conduct business in accordance with the Act but said the "principal area of objection" was not in the operation of the proposed premises themselves but the consequences of the introduction of premises of this size into the particular location, providing for between 500 and 600 people, and that these numbers would be likely to contribute to the undue offence, annoyance, disturbance or inconvenience to residents. No doubt a certain percentage of persons who attend this type of licensed premises will become affected by alcohol, and even if the appellant complied with the Act and refused to serve them and removed them from the premises, they would end up in the streets along with alcohol affected patrons from the many other premises. His Honour prophesied from the evidence that this was likely to contribute to offence, annoyance and disturbance to residents. His Honour found that they would do so to an "undue" extent. To contend, as ground 10 does, that there was no evidence capable of sustaining the conclusion that the removal of the licence would increase or exacerbate such behaviour is unsustainable. As a result the ground raises no question of law.

Grounds 11 and 12

67 Counsel for the appellant invited the Court to deal with these grounds together. The appellant, by these grounds, repeats arguments dealt with in relation to grounds 1, 2 and 13. Grounds 11 and 12 refer to the fact that his Honour stated that no proceedings had been commenced against licensees within the affected area in the recent past. The contention was that such information was irrelevant. In my opinion the information was relevant because even if the Management Plan became a condition of the licence, the finding of the learned Judge was that the Management Plan went "little further" than the obligations already imposed under the Act and the obligations imposed under the Act (coupled with lack of enforcement) had not prevented the already substantial number of intoxicated and disorderly people on the streets within the affected area. I would dismiss these grounds.

Ground 14

68 The appellant's written submissions say in relation to this ground: "See grounds 1, 2, 5 and 6 above". I have therefore disposed of any arguments which relate to these grounds. I would dismiss this ground.

Ground 15

69 The written submissions in relation to this ground read: "See grounds 2 and 3 above". I have already dealt with the arguments that arise under those grounds. I would dismiss this ground.

Ground 16

70 This is a return to an earlier argument. The written submissions stated:

> "The trial Judge has relied upon the evidence of Professor Hawks and Mr O'Connor to conclude that the management agreement will not be effective. The irrelevance of the evidence of Professor Hawks is addressed under Ground 3 ... As to the evidence of Mr O'Connor, that evidence went only to current behaviour in the area and did not, and could not address the critical issue of the efficacy of the proposed management plan, which Mr O'Connor had never read."

71 The fact that Mr O'Connor had not read the Management Plan is irrelevant. He described what he observed in the streets. His Honour drew conclusions by prophesying as required by the Act what would be "likely" to be the effect of the removal of the licence. I would dismiss this ground.

72 As a result, I would dismiss the appeal.

HIGHMOON PTY LTD -v- CITY OF FREMANTLE & ORS [2006] WASCA 21

close **Last Update: 17/02/2006**

HIGHMOON PTY LTD -v- CITY OF FREMANTLE & ORS [2006] WASCA 21

Jurisdiction:	SUPREME COURT OF WESTERN AUSTRALIA	**Citation No:**	[2006] WASCA 21
Court:	THE COURT OF APPEAL (WA)		
Case No:	FUL:96/2004	**Heard:**	22 NOVEMBER 2005
Coram:	MALCOLM CJ, MCLURE JA, PULLIN JA	**Delivered:**	16/02/2006
No Pages:	29	**Judgment Part:**	1 of 1
Result:	Appeal dismissed		
Category:	B		

Lower Court Details

On Appeal from:

Jurisdiction: LIQUOR LICENSING COURT OF WESTERN AUSTRALIA
Coram: GREAVES J
Citation: [2004] WALLC 4

Parties & Catchwords

Parties

HIGHMOON PTY LTD
CITY OF FREMANTLE
DAVID HAWKS
MARIA DONOHUE
DARREL CAKE
GARY CAPLE
MIKE JENNER
ARI ANTONOVSKY
LUCY BORTHWICK
JOHN BORTHWICK
LLOYD HAMMOND
GEORGE HUSBAND
SHEILA HUSBAND
ALEXANDER SMALL
JEAN TONKINSON
JILL MURDOCH
ANNA O'SULLIVAN
SUSAN GRACE
JUNE HUTCHINSON
DAVID HUTCHINSON
KATHLEEN ROBERTS
JANET SAMMONS
PIERO GUERRA
RICHARD YUNG
PATRICIA MASON
YAN FEN WEN
MILTON WHYTE
PRINCESS VEUIS
TERRI MCLURE
T VI HUYNM
GOOGIE RUMMER

Catchwords:

Liquor licensing
Application for removal of licence
Whether question of law raised

Objection by residents
Whether undue offence, annoyance, disturbance or inconvenience likely to be caused to residents in the vicinity
Appeal
Undesirability of repetitive grounds

Legislation: Liquor Licensing At 1988 (WA), s 16(1), s 28(2), s 37(3), s 74(1)(g)

Case References:
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Brealey v Royal Perth Hospital (1999) 21 WAR 79
CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578
Collector of Customs v Agfa-Gevaert Limited (1995) 186 CLR 389
Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 950287; 8 June 1995
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Pochi v Minister or Immigration and Ethnic Affairs (1979) 26 ALR 247
Vandeleur v Delbra Pty Ltd (1988) 48 SASR 156
Williams v The Queen (1986) 161 CLR 278
Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors, unreported; SCt of WA; Library No 940553; 20 July 1994

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207
Laveson Pty Ltd v Smith [2003] WASCA 286
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
T A Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992

Links: [Click here for Judgment in Adobe Acrobat Format]

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : HIGHMOON PTY LTD -v- CITY OF FREMANTLE & ORS [2006] WASCA 21

CORAM : MALCOLM CJ
MCLURE JA
PULLIN JA

HEARD : 22 NOVEMBER 2005

DELIVERED : 16 FEBRUARY 2006

FILE NO/S : FUL 96 of 2004

BETWEEN : HIGHMOON PTY LTD

Appellant

AND

CITY OF FREMANTLE
First Respondent

DAVID HAWKS
Second Respondent

MARIA DONOHUE
Third Respondent

DARREL CAKE

Fourth Defendant

GARY CAPLE
Fifth Respondent

MIKE JENNER
Sixth Respondent

(Page 2)

ARI ANTONOVSKY
Seventh Respondent

LUCY BORTHWICK
JOHN BORTHWICK
Eighth Respondents

LLOYD HAMMOND
Ninth Respondent

GEORGE HUSBAND
SHEILA HUSBAND
Tenth Respondents

ALEXANDER SMALL
Eleventh Respondent

JEAN TONKINSON
Twelfth Respondent

JILL MURDOCH
Thirteenth Respondent

ANNA O'SULLIVAN
Fourteenth Respondent

SUSAN GRACE
Fifteenth Respondent

JUNE HUTCHINSON
DAVID HUTCHINSON
Sixteenth Respondents

KATHLEEN ROBERTS
Seventeenth Respondent

JANET SAMMONS
Eighteenth Respondent

PIERO GUERRA
Nineteenth Respondent

(Page 3)

RICHARD YUNG
Twentieth Respondent

PATRICIA MASON
Twenty First Respondent

YAN FEN WEN
Twenty Second Respondent

MILTON WHYTE
Twenty Third Respondent

PRINCESS VEUIS
Twenty Fourth Respondent

TERRI MCLURE
Twenty Fifth Respondent

T VI HUYNM
Twenty Sixth Respondent

GOOGIE RUMMER
Twenty Seventh Respondent

ON APPEAL FROM:

Jurisdiction : LIQUOR LICENSING COURT OF WESTERN AUSTRALIA

Coram : GREAVES J

Citation : [2004] WALLC 4

Catchwords:

Liquor licensing - Application for removal of licence - Whether question of law raised - Objection by residents - Whether undue offence, annoyance, disturbance or inconvenience likely to be caused to residents in the vicinity

Appeal - Undesirability of repetitive grounds

(Page 4)

Legislation:

Liquor Licensing At 1988 (WA), s 16(1), s 28(2), s 37(3), s 74(1)(g)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr W S Martin QC & Mr W J Clements
First Respondent : No appearance
Second Respondent : In person
Third Respondent : No appearance
Fourth Defendant : In person
Fifth Respondent : No appearance
Sixth Respondent : No appearance
Seventh Respondent : No appearance
Eighth Respondents : No appearance

Ninth Respondent : No appearance
Tenth Respondents : No appearance
Eleventh Respondent : No appearance
Twelfth Respondent : No appearance
Thirteenth Respondent : No appearance
Fourteenth Respondent : No appearance
Fifteenth Respondent : No appearance
Sixteenth Respondents : No appearance
Seventeenth Respondent : No appearance
Eighteenth Respondent : No appearance
Nineteenth Respondent : No appearance
Twentieth Respondent : No appearance
Twenty First Respondent : No appearance
Twenty Second Respondent : No appearance
Twenty Third Respondent : No appearance
Twenty Fourth Respondent : No appearance
Twenty Fifth Respondent : No appearance
Twenty Sixth Respondent : No appearance
Twenty Seventh Respondent : No appearance

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Solicitors:

Appellant : Williams Ellison
First Respondent : McLeods
Second Respondent : In person
Third Respondent : No appearance
Fourth Defendant : In person
Fifth Respondent : No appearance
Sixth Respondent : No appearance
Seventh Respondent : No appearance
Eighth Respondents : No appearance
Ninth Respondent : No appearance
Tenth Respondents : No appearance
Eleventh Respondent : No appearance
Twelfth Respondent : No appearance
Thirteenth Respondent : No appearance
Fourteenth Respondent : No appearance
Fifteenth Respondent : No appearance
Sixteenth Respondents : No appearance
Seventeenth Respondent : No appearance
Eighteenth Respondent : No appearance
Nineteenth Respondent : No appearance
Twentieth Respondent : No appearance
Twenty First Respondent : No appearance
Twenty Second Respondent : No appearance
Twenty Third Respondent : No appearance
Twenty Fourth Respondent : No appearance
Twenty Fifth Respondent : No appearance
Twenty Sixth Respondent : No appearance
Twenty Seventh Respondent : No appearance

Case(s) referred to in judgment(s):

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Brealey v Royal Perth Hospital (1999) 21 WAR 79
CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578
Collector of Customs v Agfa-Gevaert Limited (1995) 186 CLR 389
Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors, unreported; FCt SCt of WA; Library No

950287; 8 June 1995

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Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Pochi v Minister or Immigration and Ethnic Affairs (1979) 26 ALR 247
Vandeleur v Delbra Pty Ltd (1988) 48 SASR 156
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Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors, unreported; SCt of WA; Library No 940553; 20 July 1994

Case(s) also cited:

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207
Laveson Pty Ltd v Smith [2003] WASCA 286
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
T A Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992

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1 **MALCOLM CJ**: In my opinion, this appeal should be dismissed for the reasons to be published by Pullin JA with which I agree. There is nothing I could usefully add.

2 **MCLURE JA**: I agree that the appeal should be dismissed generally for the reasons given by Pullin JA.

3 **PULLIN JA**: This is an appeal against the decision of Judge Greaves in the Liquor Licensing Court of Western Australia on 1 July 2004. Judge Greaves refused the appellant's application for removal of a tavern licence from 24 High Street, Fremantle 400 metres away to 33 South Street, Fremantle. The licence at 24 High Street had been suspended with effect from 19 December 2001. There was evidence that when it was operating as Coakleys Tavern it would attract 50 people on a "big night".

4 The plans for 33 South Terrace revealed large proposed premises, to be named "The Mustang Bar", which were to consist of 411.51m² interior floor space together with a public terrace of 139.4m². It could accommodate well over 500 people. The Town Planning Appeal Tribunal gave planning approval, but as a condition of approval restricted the number of patrons in the premises to 570 persons. It also imposed a condition that a detailed management plan be submitted to the City of Fremantle dealing with matters specified by the Tribunal, such matters to be to the "reasonable satisfaction of the Director Urban Management of the City of Fremantle". A management plan was submitted and approved by the City.

5 When the application was made, the Director of Liquor Licensing specified an affected area of 3 kms. The application attracted objections including objections from local residents.

6 The appellant called a Town Planner, a Mr G Rowe, who described the area around South Terrace and Market Street between Bannister and Essex Streets, in which the Mustang Bar was to be located, as the "Entertainment Core" of Fremantle. There were 11 category A licences within the Entertainment Core and 55 Category A licences within the affected area.

7 The appellant proposed, as a condition of the removal of the licence, that the appellant be obliged to comply with the management plan which had been approved by the City. A copy of this was tendered and became exhibit 1 ("Management Plan").

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8 The Management Plan stated that management would commit to the best practices of the Fremantle Accord. I will refer to the Fremantle Accord later in these reasons. The Management

Plan stated that:

> "The aim of this plan is to minimise any harm or ill-health that may be caused to people or any group of people due to the use of liquor within this hotel. It also sets out procedures to be adopted to provide for the orderly conduct of the business in respect of the Local Authority's regulations and best practices.
>
> Management accepts that the minimising of harm not only applies to our patrons but also to the residents of homes located within the vicinity of the hotel and to others who are also members of our community."

9 In broad terms, the Management Plan provided for matters which, if observed by staff, would have the effect of reducing disorderly conduct; it would reduce the incidence of service of liquor to drunken persons and to under aged persons, and it would enhance security and improve crowd and noise control.

10 The City of Fremantle was one of the objectors to the appellant's application for removal, but at the commencement of the hearing it informed the Liquor Licensing Court that it sought leave to withdraw its objection, subject to a determination by the Court that any grant of the application be made subject to a condition that the licensee comply at all material times with the terms of the Management Plan. The objectors who gave evidence were Professor David Hawks, Ms Maria Donahue, Mr Terrence O'Connor QC and Mr Darrel Cake, who were all local residents.

11 His Honour at [11] of his reasons said:

> "It became apparent from the evidence of those objectors that they put in issue the efficacy of the management plan. In order that the court might be fully informed about the objection of the City of Fremantle and the condition proposed in relation to exhibit 1, the court required the manager of development assessments at the City of Fremantle, Mr Andrew Jackson, to produce his statement exhibit 19, referred to by Professor Hawks in the course of his evidence, and make himself available for cross-examination ..."

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12 Professor David Hawks gave evidence. In that evidence he quoted par 70 of Mr Jackson's statement, referred to above, and later admitted into evidence. The paragraph read:

> "Licensed premises inherently give rise to noisy recreational activities and revelry and to patrons emerging from the premises, often late at night, in groups and in high spirits – and anti-social human behaviour is therefore a by-product. No degree of management can effectively control this behaviour, particularly as it generally occurs after patrons have left the premises."

13 Professor Hawks went on to say that:

> "Much of the details of the management policy ... reflects the Fremantle Accord which itself reflects a licensee's legal responsibilities under the Liquor Licensing Act. ... given the reliance on the Fremantle Accord and specifically on its recommendations, it is pertinent to ask to what extent has the Fremantle Accord been observed in Fremantle?"

14 His Honour referred to Professor Hawks' evidence about the "evaluation" of the Fremantle Accord. The Fremantle Accord referred to by Professor Hawks was dated 27 March 1996. It was an agreed code of practice developed by, *inter alia*, representatives of the police, local operators of licensed premises, liquor licensing authority representatives and local government. It contained a mission statement which was:

> "To ensure and maintain proper and ethical conduct within the region of Fremantle in line with the Local Industry Accord, and to promote the philosophy of responsible service of alcohol in all licensed premises."

15 The document went on to state that a local industry accord commenced in 1995 as an

agreed code of practice involving the police, licensees, liquor licensing authority representatives, local government and other relevant agencies and people. The purpose behind that accord or code of practice was to adopt a range of "positive and effective community-based harm minimisation strategies aimed at reducing crime and violence involving intoxicated people" in and around the central business district of Fremantle. The Fremantle Accord went on to state that it sought a "collaborative approach in minimising the harmful effects, social disruption, crime and violence caused by the rapid consumption and irresponsible service and consumption of alcohol." It set out some

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guidelines to be adopted by licensees. So, for example, it provided that a licensee should ensure that bar staff would not sell or serve liquor to any person obviously affected by liquor; that the licensee should discourage excessive consumption of alcohol; that the promotion of alcohol should be discouraged if the promotion involved excessive consumption; that proof of age should be required to prevent underage drinkers consuming alcohol. It suggested that the sale of reduced alcohol beers should be at a price less than medium or high strength beers. It contained statements about what was required of licensees in relation to crowd controllers, proper training for staff and by way of a complaints procedure. It stated that if licensees and the City of Fremantle were committed to the Fremantle Accord, an evaluation of practices and objectives of the Accord would be essential.

16 The "evaluation" which Professor Hawks referred to was the evaluation which was carried out and reported on in a Curtin University of Technology publication. The report was published by the National Drug Research Institute and it was entitled "The Evaluation of the Fremantle Police Licensee Accord: Impact on serving practices, harm and the wider community" in September 1999. One of the authors of the report was Professor Hawks. This report was tendered and became exhibit 18. It is only necessary to refer to the executive summary which stated that the Fremantle Accord was implemented in Fremantle in March 1996 and was followed up over a period of 14 months. The report stated that post-accord assessments were carried out seven and 14 months after the introduction of the Fremantle Accord and compared with assessments which had been completed four years before the Fremantle Accord was launched. Data was collected in relation to motor vehicle crashes, drink driving and assaults. The executive summary of the report continued:

> "The measures which most directly relate to the Accord, the refusal of service to 'intoxicated patrons' and age identification, showed little improvement over time and did not differentiate the Fremantle premises from their Northbridge counterparts. The failure, in the vast majority of instances, to refuse service to 'intoxicated patrons' or for bar staff, in the absence of door staff, to require age identification is particularly indicting of the instructions given to the staff.
>
> The availability of drink driving, crash and assault data, which identifies particular premises provided a direct test of the effect of the Accord on the serving practices of such premises. Looked at in general terms none of these indices improved over

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> time nor were Fremantle or Northbridge premises differentiated."

17 The executive summary also stated that the views expressed by samples of taxi drivers, patrons, residents and businesses surveyed conveyed the impression that the predominant perception was of little or no change. It also stated:

> "Practices in both hotels and nightclubs included in the assessment may well have changed significantly in the interim recommending caution in the application of these results to current practices."

18 Finally, the executive summary stated:

> "It is concluded that Accords are, by definition, cooperative agreements, the force of which, is only as strong as the commitment of those who are signatories.

> The retail liquor industry is a particularly competitive industry in which such agreements are constantly under threat, not only from within, by those who are committed to an Accord, but particularly, from those who are without.
>
> ... While the Fremantle Accord has been hailed as a success by both the City of Fremantle and the Police, it needs to be noted that there is little objective evidence of its having achieved its principal objective of a safer Fremantle."

19 Professor Hawks gave evidence about the evaluation the subject of the report. He said:

> "That evaluation found that on the vast majority, that on 95 per cent of occasions when observations were carried out patrons who were simulating drunkenness were served. It also found that only a small minority of occasions youthful patrons judged by licensing police to have the appearance of being under-age were asked - that is, only a small minority of such people were asked - for identification as would have established their age."

20 Professor Hawks further referred to the point made in the report that a comparison made one year before and after the introduction of the Accord showed no significant reduction in the number of assaults occurring in the near vicinity of the licences. Further details about the apparent lack of effect of the Accord are set out in full in Professor

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> Hawks' evidence, which was recorded verbatim in his Honour's reasons for decision. See ***Highmoon Pty Ltd v City of Fremantle & Ors*** [2004] WALLC 4 at [14].

21 His Honour also referred to the evidence of Mrs Maria Donahue at [15] of his reasons. Most of Mrs Donahue's evidence related to antisocial conduct of persons under the influence of alcohol in the affected area at 5.00 to 5.30 in the morning when she took her dog for a walk, although a part related to conduct of such persons around midnight.

22 Mr O'Connor in his evidence lamented the passing of the old Fremantle where "...you could buy groceries and things ..." He said that as a resident, he was concerned about the impact of licensed premises on the area and he gave evidence of ongoing antisocial behaviour he observed in the area. He said he was concerned that the Mustang Bar would produce a large number of extra people into the area. It was he who gave evidence about Coakleys Tavern and the fact that it attracted 50 people on a "big night" when it was operating.

23 Mr Darrel Cake described antisocial behaviour. His particular concern was with "the hard edge" of antisocial behaviour involving violence and that he had no faith in licensees being able to control such antisocial behaviour in the streets once patrons left the licensed premises.

24 His Honour referred to a statement of evidence which Mr Jackson proposed to give. Mr Jackson was employed by the city of Fremantle as the Manager of Development Assessments. He had proposed giving evidence when the City was an objector. He had prepared a statement containing evidence he planned to give. Paragraph 70 of that statement read:

> "The City has ample experience establishing a direct connection between licensed premises and impacts upon amenity. Licensed premises inherently give rise to noisy recreational activities and revelry and to patrons emerging from the premises, often late at night, in groups and in high spirits - and anti-social human behaviour is therefore a by-product. No degree of management can effectively control this behaviour, particularly as it generally occurs after patrons have left the premises."

25 When the City withdrew its objection his Honour nevertheless directed that Mr Jackson be called and be available for cross-examination. As a result, Mr Jackson did give evidence. His Honour noted in his

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> reasons that Mr Jackson's statement was made before the management plan came into

existence. His Honour said:

> "It is sufficient to say Mr Jackson was of opinion that the management plan is sufficient to satisfy the concerns of the ... the City of Fremantle."

26 He did give that evidence, but he also gave other evidence about the Management Plan. He said:

> "Obviously these plans are designed to look after the operation of the premises, primarily, and to some extent the immediate vicinity when people are leaving. Clearly, a management plan can't go very far to control everything and certainly what people do once they leave the area. ... management plans don't achieve much; generally they do but they can't achieve everything." (AB 241)

and that:

> "In terms of planning approval for a use, it does not have a lot of immediate force and effect". (AB 242)

27 He also confirmed that since he had prepared his proposed statement of evidence, that "[t]here are still problems with antisocial behaviour with existing licensed premises in the City of Fremantle." (AB 243)

28 In his reasons his Honour dealt with matters which required proof in relation to all cases of removal. He concluded that the evidence established, on the balance of probabilities, that the grant of the application was necessary to provide for the reasonable requirements of the section of the public residing in and resorting to the affected area for liquor and related services including musical entertainment and food. His Honour also considered the content of the Management Plan.

29 His Honour then turned to the issue raised by the objectors. He properly directed himself as to the legal issue by referring to the terms of s 37(3) and s 74(1)(g) of the Act. Section 37 (3) provides that an application should not be granted where the licensing authority is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the place or premises to which the application relates would be likely to occur, and s 74(1)(g) provides that no objection shall be made except on certain grounds, one of which was that if the application were granted, undue offence, annoyance, disturbance or inconvenience to persons who reside or work in

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> the vicinity or persons travelling to or from an existing or proposed place of public worship, hospital or school would be likely to occur, or if the amenity, quiet or good order of the locality in which the premises are to be situated would in some other manner be lessened. This was the basis of residents' objections.

30 His Honour noted that it was not difficult to conceive of circumstances in which licensed premises, no matter how conducted, would result in offence, annoyance, disturbance or inconvenience to nearby residents, but whether it would be "unduly" so, would be a matter of degree and would depend upon the circumstances. His Honour cited ***Vandeleur v Delbra Pty Ltd*** (1988) 48 SASR 156 at 160 which discusses this point. His Honour said that one of the circumstances to take into account was the Management Agreement. His Honour then concluded that the evidence of the objectors established that residents of the affected area had for some time been unduly affected by the conduct of intoxicated customers of licensed premises in the affected area. He considered that the removal of the licence to the proposed location would introduce 500 to 600 customers to the area when the proposed premises were operating at capacity. His Honour found that there were 11 category A licences "in that part" of the affected area which in my opinion was a reference to an area, described by Mr Rowe, as the Entertainment Core.

31 His Honour at [33] considered that the Fremantle Accord was relevant in considering the extent to which the proposed management agreement might reduce offence, annoyance, disturbance or inconvenience to nearby residents. He then said at [34], [35] and [36]:

> "34 I accept the evidence of Professor Hawkes [*sic*] that the management

> agreement goes little further than to endorse the obligations of the licensee under the Act. It provides no means of enforcement other than those available under the Act. The information provided by the Director of Liquor Licensing suggests that no proceedings have been commenced against licensees in this affected area in the recent past in relation to the sale of liquor to intoxicated customers. In the light of the conclusion I have expressed about the conduct of intoxicated customers of licensed premises in this part of the affected area, I am inclined to accept the conclusion expressed in exhibit 18 that management agreements of the nature proposed in this case are likely to be less effective in the present context, in the absence of effective enforcement.

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> 35 In reaching this conclusion, I record there is no evidence in this case that should lead the court to conclude that this applicant is likely to conduct the business to be carried on under the licence at these premises other than in accordance with the Act. That, however, is not determinative of the present issue. The principal area of objection, as I have said, is not in the operation of the proposed premises themselves, but in the likely consequences in all the circumstances of the introduction of premises of this size in this location, accommodating the number of persons proposed. Their introduction into this part of the affected area, where there is already existing a large number of Category A licences, is likely to contribute to the undue offence, annoyance, disturbance or inconvenience to residents by intoxicated persons in the vicinity of the premises. While the City of Fremantle may be satisfied that the management agreement will be effective to reduce offence, annoyance, disturbance or inconvenience to nearby residents, the evidence of Professor Hawkes and Mr O'Connor lead me to conclude on the balance of probabilities that this is not the case.
>
> 36 For these reasons, I find that the removal of this licence to this proposed location is likely to cause undue offence, annoyance, disturbance or inconvenience by intoxicated persons in the vicinity of the premises that those who reside nearby should not reasonably be expected to tolerate in the interests of the need of the community for the removal of this licence to this part of the affected area as contemplated."

32 His Honour then refused the application.

33 There were 16 grounds of appeal. Many are repetitive or display only slight nuances of difference from other grounds. The drafting of repetitive grounds and an insistence that they all be dealt with is undesirable; see ***Brealey v Royal Perth Hospital*** (1999) 21 WAR 79 at 87. It wastes the time of the Court, it is distracting and it drives up costs. Counsel for the appellant agreed that many of the grounds are repetitive. The grounds are:

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> "1 The learned Judge erred in law in finding that the Management Plan (Agreement) proposed by the Appellant was the same as the Fremantle Accord and in confusing the evidence relating to the Accord with the evidence relating to the Management Plan.
>
> 2. The learned Judge erred in law in finding that the Management Plan (Agreement) proposed by the Appellant only endorses the obligations of the licensee under the Liquor Licensing Act and provided no means of enforcement other than those available under the Liquor Licensing Act.
>
> 3. The learned Judge erred in law in treating the evidence of the residential objector David Hawkes [*sic*] as an expert witness on the subject of the terms and likely effect of the Management Plan proposed as a condition of the licence, when he lacked any appropriate qualification for the expression of such an opinion and his evidence was not logically probative of that fact.

4. The learned Judge erred in law in finding that on the totality of the evidence that the ground of objection made by the Second to Thirteen Respondents under Section 74(1)(g) of the Liquor Licensing Act had been made out.

5. The learned Judge erred in law in after finding that the ground of objection under Section 74(1)(g) of the Liquor Licensing Act had been made out failed to consider if the application could still be granted by imposing conditions on the Tavern Licence imposing the Management Plan (Agreement) in the court exercising its discretion pursuant to Section 33 of the Liquor Licensing Act.

6. The learned Judge erred in law in relying on the evidence of the principal town planner of the City of Fremantle Andrew Jackson when the First Respondent's position on the Appellant's Application was it did not oppose the grant of the application if the Management Plan (Agreement) was imposed as a condition on the Tavern Licence and when the tenor of the evidence of Andrew Jackson in its entirety was to the effect that as a result of

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the Management Plan, he no longer adhered to the views recorded in his written statement as to the likely effect of the removal of the licence upon the affected area.

7. The Learned Judge erred in law in apparently placing reliance upon the evidence of Maria Dana Hoe for the purpose of his findings as to the likely effect of the removal of the licence upon the amenity of the affected area, when her evidence was limited to her observations of tire behaviour of patrons leaving nightclubs around 5.30a.m. and the application was for the removal of a tavern licence which would trade no later than 1.00a.m.

8. The Learned Judge erred in law in finding that the removal of the license to the proposed location would introduce 500 to 600 customers to this part of the affected area when:

(a) he did not identify what part of the affected area he was referring to;

(b) it was necessary for him to consider the effect of the grant of the licence upon the affected area as a whole, not merely an unspecified part of the circa;

(c) having regard to the presence of numerous other licensed premises in the immediate vicinity of the site to which removal of the licence was sought, there was no evidence capable of sustaining the finding.

9. The Learned Judge erred in law relying upon the evidence of the witness J Hawks, Donohue, O'Connor and Cake as to the behaviour of patrons of licensed premises in the affected area generally, when such evidence was not logically probative of any issue to be determined in the absence of evidence to the effect that the removal of the licence to the proposed premises would increase the total number of persons resorting to licensed premises within the affected area and there was no such evidence.

10. The Learned Judge erred in law in relying upon the evidence of the witnesses Hawks, Donohue, O'Connor

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and Cake as to the behaviour of patrons attending licensed premises in the affected area generally, when there was no evidence capable of sustaining the conclusion that the removal of the licence sought would increase or exacerbate that behaviour, given his finding that there was no evidence that the applicant was likely to conduct the business to be

carried on under the licence at the premises to which removal was sought other than in accordance with the Act.

11. The Learned Judge erred in law in relying upon information provided by the Director of Liquor Licensing to the effect that no proceedings had been commenced against licensees within the affected area in the recent past relating to the sale of liquor to intoxicated customers in support of his conclusion as to the likely efficacy of the proposed Management Plan, when such information was irrelevant to that issue.

12. The Learned Judge erred in law in relying upon information provided by the Director of Liquor Licensing to the effect that no proceedings had been commenced against the licensees within the affected area in the recent past relating to the sale of liquor to intoxicated customers when such information was irrelevant given his finding that there was no evidence that should lead the court to conclude that the applicant was likely to conduct the business to be carried on under the licence other than in accordance with the Act.

13. The Learned Judge erred in law in accepting a proposition contained in Exhibit 18 (a report on the operation of the Fremantle Accord) as apparently determinative of the issue concerning the likely efficacy of the Management Plan proposed as a condition of the licence given:

(a) in making such finding he failed to identify and appreciate the distinction between the Accord which was unenforceable and the Management Plan which would be enforceable both as a condition of the Development Approval and the liquor licence;

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(b) the proposition contained within Exhibit 18 was expressly conditioned upon the fact that the Accord lacked any means of effective enforcement whereas the Management Plan would be enforceable;

(c) Exhibit 18 provided no evidence in relation to the likely efficacy of a Management Plan of the nature proposed.

14. The Learned Judge erred in law in placing reliance upon his findings relating to the conduct of intoxicated customers of licensed premises in 'this part of the affected area' in arriving at his conclusion with respect to the likely efficacy of the proposed Management Plan when:

(a) he did not identify the 'part' of the affected area to which he was referring;

(b) that evidence was irrelevant to the issue of the likely efficacy of the Management Plan, given that:

(i) there were no enforceable management Plans relating to virtually all of the licensed premises within the affected area;

(b) the uncontradicted evidence of Andrew Jackson was to the effect that the Management Plan proposed was likely to be more effective than any Management Plan utilised in the past.

15. The Learned Judge erred in law in accepting the evidence of the witness Hawkes [*sic*] to the effect that 'the management agreement goes little further than to indorse the obligations of the licensee under the Act' and in making that finding when:

(a) the question was not one of oral testimony but rather for resolution by a comparison of the terms of the Management Plan and the obligations it

imposed with the terms of the Act and the obligations it imposed;

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(b) any reasonable comparison of the terms of the Management Plan and the obligations it imposed and the terms of the Act and the obligations it imposed necessarily led to the conclusion that the Management Plan imposed significantly greater obligations upon the licensee than the provisions of the Act.

16. The Learned Judge erred in law in taking account of the evidence of the witnesses Hawkes [*sic*] and O'Connor in relation to the issue concerning the likely efficacy of the Management Plan and indeed basing his finding on the issue upon their evidence when:

(a) their evidence was not logically probative in relation to that issue;

(b) the evidence of the witness O'Connor was to the effect that he had never read the Management Plan."

The statutory right of appeal

34 Before 1998, s 28(2) of the *Liquor Licensing Act* provided that no appeal lay to this Court unless the appeal "involves a question of law". In ***Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors***, unreported; FCt SCt of WA; Library No 950287; 8 June 1995, Murray J said, in relation to that provision, that this permitted an appeal upon grounds categorised as errors of mixed fact and law.

35 Perhaps as a result of those observations, s 28(2) was amended by s 15 of the *Liquor Licensing Amendment Act 1998* so that it now provides that no appeal lies from the Liquor Licensing Court to this Court "except upon a question of law". To establish that there is a "question of law" it is necessary to show that an error of law has occurred. See ***Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd & Ors***, unreported; SCt of WA; Library No 940553; 20 July 1994, per Anderson J.

36 In my opinion, errors of mixed fact and law may not be entertained under the present version of s 28(2). See ***Williams v The Queen*** (1986) 161 CLR 278 at 287 per Gibbs CJ and Wilson and Dawson JJ at 314.

37 Although the distinction between errors of fact and errors of law are critical to the existence of the right of appeal, no satisfactory test of

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universal application has yet been formulated to make the distinction between errors of fact or law clear beyond question in every case. See ***Collector of Customs v Agfa-Gevaert Limited*** (1995) 186 CLR 389 at 394. However, in relation to errors of law made in the course of fact finding, it is uncontroversial and settled that an error of law will occur if there is no evidence to support a finding of fact or the drawing of an inference. See ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321 at 356 per Mason CJ; ***Azzopardi v Tasman UEB Industries Ltd*** (1985) 4 NSWLR 139 . If there is some evidence to support a finding of fact, then the reasoning process leading to the finding of fact will not be open to review as a question of law if the complaint is about mere illogicality in reasoning; see ***Azzopardi*** (*supra*) per Glass JA at 156 -157 and ***Australian Broadcasting Tribunal v Bond*** (*supra*) at 356; although if the reasoning is unreasonable in the sense of "***Wednesbury***" unreasonableness, an error of law will occur. See ***Palace Securities Pty Ltd v Director of Liquor Licensing*** (1992) 7 WAR 241 at 251 - 252.

38 Counsel for the appellant referred to ***Pochi v Minister for Immigration and Ethnic Affairs***

(1979) 26 ALR 247 at 256. That decision does not add or subtract anything to or from the judgment of Mason CJ in the ***Australian Broadcasting Tribunal*** case (*supra*). In ***Pochi's*** case, Brennan J discussed the fact that neither the Minister nor the Administrative Appeals Tribunal were bound by the rules of evidence. The same applies in the Liquor Licensing Court by reason of s 16(1) of the *Liquor Licensing Act*. Brennan J explained that in such circumstances, although material before the Minister or the Tribunal might not satisfy the technical rules of evidence in a court of law, it could still be relied upon, but only if it were logically probative of the matters in issue. Brennan J referred also to the distinction between "provable phenomena" and "evaluations" and "prophesies". As Brennan J said at 255:

> "Evaluations and prophesies are not to be proved by evidence, but are to be left to the decision-maker ..."

39 This was a case where the court was obliged to prophesy whether an undue degree of offence would be likely to occur to persons in the vicinity of the new premises.

40 It is an error of law for a decision maker to fail to address a central issue raised in the case: ***CEO of Customs v AMI Toyota Ltd*** (2000) 102 FCR 578 at [45].

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Grounds 1, 2 and 13

41 Counsel for the appellant invited the Court to deal with these three grounds together. The points which counsel for the appellant developed in oral and written submissions were as follows. The Fremantle Accord was a voluntary accord which was not enforceable against licensees. The Management Plan on the other hand, if made a condition of the licence, would be enforceable. It would be enforceable by reason of s 64(7) of the Act. Section 64(7) reads:

> "Where a condition imposed under this section in relation to a licence has been contravened the licensing authority may -
>
> (a) impose a more restrictive condition in relation to that licence; or
>
> (b) impose on the licence holder a monetary penalty not exceeding $500 for each day on which the contravention continues, which shall be payable to the Crown by that person,
>
> or both."

42 The appellant submitted that it was therefore an error on his Honour's part to state, as he did in the last sentence in [34], that the Management Agreement would not be effective in the absence of effective enforcement.

43 In my view this attempts to isolate one part of his Honour's reasons and to ignore the overall effect of the reasons. His Honour's reasons reveal that he well understood the difference between the Fremantle Accord and the Management Plan. He was aware that the Fremantle Accord was not enforceable at law. He considered that the Management Plan was enforceable but his point was that it went "little further" than to endorse obligations which the licensee already had under the Act, that obligations under the Act are not well observed by licensees and that such obligations are not enforced by the authorities.

44 That would be the end of these three grounds, except that the appellant then argued that:

> (a) the Management Plan went materially further than the obligations imposed under the Act; and

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> (b) there was a significant difference between prosecution under the Act for non-compliance with the Act and s 64(7) which deals with enforcement of conditions.

45 I will deal first with the submission that the Management Plan went materially further than the obligations imposed by the Act. That submission requires an examination of the obligations imposed by the Act. The obligations imposed by the Act are sanctioned by penalties for non-observance. Thus the Act makes it an offence for licensees to:

(a) permit drunkenness or disorderly behaviour to take place (s 115(1));

(b) sell or supply liquor to a drunken person (s 115(2));

(c) to contravene an order made under s 117 which order would have the object of reducing undue offence, annoyance or disturbance or inconvenience to persons residing or working in the vicinity (s 117(7));

(d) selling or supplying or permitting sale or supply of liquor to a juvenile (s 122(2));

(e) not require a person suspected of being a juvenile to produce evidence of age (s 126(2)).

46 The obligations in the Act are obligations not to do the things which are the subject of sanction. Other provisions in the Act confer authority on licensees to help them observe the obligations. So for example the Act authorises a licensee to remove juveniles (s 126(3) and other persons from premises (eg s 115(4)). These provisions contemplate the use of security personnel.

47 Undoubtedly there were provisions in the Management Plan which could not be precisely found in the Act. The appellant lists these as obligations which the appellant contends go beyond the Act. They included:

> "... with respect to staff training, a dress code for staff, an obligation that staff will discourage any activity that may lead to the irresponsible consumption of liquor, an obligation to provide senior and supervisory staff to assist in the refusal of service, adequate and qualified security staff on immediate call, the processing and treatment of complaints relating to entertainment, a proscribed ratio of security staff to patrons, an obligation to provide security staff to patrol the streets in the vicinity of the venue for 30 minutes after closing, prohibition

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> upon drink discount cards, special promotions, contests or games, or any activities that might lead to binge or irresponsible drinking, an obligation to promote the consumption of light or low alcohol drinks, an obligation to encourage the consumption of food and a willingness to serve half measures of spirits, an obligation to ensure that all measures are in place to minimise the escape of undue noise from the hotel, an obligation to promote respect for the amenity of the hotel's immediate neighbourhood, cessation of the sale of packaged liquor 15 minutes before closing time, and an obligation to arrange for the removal of hotel generated litter from around the vicinity of the hotel." (See appellant's submissions).

48 In my opinion, these provisions in the main were directed to achieving the outcome the Act attempts to achieve, that is, that licensees take steps to ensure that there is responsible consumption of alcohol, that there is orderly conduct on premises, that juveniles are not permitted to consume alcohol and that the amenity of the area is not affected by the activities of the licensed premises. It is undoubtedly true that some of the points listed by the appellant do not have a precise counterpart in the Act. So, for example, the fact that there is provision for a dress code is something outside of the requirements of the Act. However, it is hardly a significant point. The requirement that there be willingness to serve half measures of spirits is not a requirement in the Act but it is clearly directed to preventing drunkenness.

49 In my opinion his Honour was quite correct to conclude that the Management Plan went "little further" than to endorse the obligations imposed by the Act.

50 The second point which the appellant sought to make was that there was a significant difference between prosecution under the Act for non-compliance with the Act and the provisions of s 64(7), in the sense that s 64(7) contained a greater sanction. Section 64(7) provides for action which may be taken in the event of the breach of a condition. In my view there is no significant difference. The offences under the Act, examples of which I have given above, result in monetary penalties, but under s 95 the Director of Liquor Licensing may complain to the court seeking disciplinary action against a licensee, which action may be based on the fact that the licensee has been convicted of offences under the Act. Under s 96, disciplinary powers are conferred which have more serious consequences than the exercise of powers found in s 64(7).

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51 In my opinion this ground raises a submission which complains about the Liquor Licensing Court's evaluation of undisputed evidence which was before the Court.

52 These grounds raise no question of law.

Ground 3

53 This ground contends that Professor Hawks gave expert evidence. Professor Hawks gave evidence as a resident and he also summarised the effect of the valuation report concerning the Fremantle Accord. The Fremantle Accord was in evidence and the evaluation report was not objected to. No complaint is made in any of the grounds about the fact that the evaluation report became an exhibit.

54 Professor Hawks expressed no expert opinion, even though his Honour referred in [12] and [13] to Professor Hawks expressing an "opinion". A reference to these paragraphs reveals that he was making comment rather than expressing an opinion. The substantive part of his evidence was referred to in [14], where Professor Hawks' evidence was set out and in which he merely summarised the effect of the evaluation report.

55 This ground should be dismissed. His Honour did not treat the evidence of Professor Hawks as an expert witness.

Ground 4

56 The appellant says that this contains a "summation" of the other specific grounds rather than an independent ground in its own right. As a result I say nothing more about it.

Ground 5

57 The written submissions reveal this to be merely a repeat of the arguments raised under grounds 1, 2 and 13, which I have addressed above. The written submissions contend that his Honour did not consider s 33 of the Act and address the extent to which offence, annoyance, disturbance or inconvenience could be overcome by the imposition of a condition on the licence requiring compliance with the Management Plan. As I have already said, his Honour concluded that the Management Plan went "little further" than to impose requirements already found in the Act. His Honour's evaluation of the evidence led him to conclude that neither the Management Plan nor the obligations in the Act would prevent undue offence, annoyance, disturbance or inconvenience to residents.

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58 The appellant contends that having reached the conclusion that the objection had been made out his Honour should then have considered whether the application should still be granted (exercising the discretion in s 33) by imposing a condition that the Management Plan

be observed. The appellant referred to ***CEO of Customs v AMI Toyota Ltd*** (*supra*). I reject that contention. His Honour had considered the effectiveness of the Management Plan in the course of upholding the objection. He held that the existence of the Management Plan, even if enforceable under the Act, would not prevent undue offence etc to residents. It was unnecessary to consider it again for the purposes of s 33.

Ground 6

59 This ground contends that the learned Judge erred in referring to and relying on the evidence of the City of Fremantle employee Mr Jackson. The essence of the complaint is that his Honour failed to recognise that Mr Jackson did not "adhere to the views recorded in his written statement as to the likely effect of the removal of the licence upon the affected area". The appellant points selectively to some of Mr Jackson's evidence that the Management Plan was a better example and more comprehensive than others that he had seen, and that it was much more enforceable than other management plans and that he regarded it as an important preventative tool. This, however, ignores other evidence that Mr Jackson gave and which I have set out above. This evidence permitted his Honour to conclude (if he did) that what Mr Jackson said in his statement, particularly at par 70, was still the view he held at the hearing, notwithstanding that the City of Fremantle no longer opposed the grant of the application. In fact, the reference to par 70 of the Jackson statement was for the purpose of explaining Professor Hawks' comment on the attitude of the City of Fremantle.

60 In my opinion, the assertion lying at the heart of this ground cannot be sustained and in any event it does not raise a question of law.

Ground 7

61 Mrs Donahue gave evidence about what she observed both at midnight and early in the morning. Her evidence about what she observed around midnight was clearly directly relevant. Her evidence about what she observed about patrons at 5.30 in the morning merely provided some evidence about the behaviour of drunken patrons of other licensed premises albeit at a different time of day. There were other witnesses who gave evidence about the conduct of alcohol affected persons in the area. This ground selects one piece of evidence given by one of several

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witnesses and criticises it as though this Court were hearing the original application. The ground raises no question of law.

Grounds 8, 9 and 10

62 Counsel in oral submissions suggested that grounds 8 and 9 should be dealt with together. The written submissions suggest that grounds 9 and 10 should be dealt with together. I have therefore grouped the three grounds together.

63 Ground 8(a) says that his Honour did not identify what part of the affected area he was referring to. In my opinion he does. He is referring to the Entertainment Core. Ground 8(b) says that it was necessary for the learned Judge to consider the effect of the grant upon the affected area as a whole, not merely an unspecified part of the area. That is not correct. In relation to the objection, he was conducting an inquiry about whether residents in the "vicinity" would be unduly affected, and that is the point he examined.

64 Ground 9 contends that there was no evidence that the removal of the licence would increase the total number of persons resorting to the licensed premises within the affected area. Counsel for the appellant submitted that there would merely be a rearrangement of patrons already attending the affected area and that there was no evidence that overall there

would be an increase in numbers in the area. In my opinion there was such evidence. Mr O'Connor gave evidence about the fact that 50 persons would be on the premises on a big night, and the appellant's proposal to move into premises with the capacity to hold between 500 and 600 people was evidence which allowed the Court to infer that the appellant expected to achieve that result. That evidence, coupled with evidence led by the appellant that it expected people who resorted to the Mustang Bar in Northbridge to resort to the new Mustang Bar in Fremantle if the removal application were granted, was material from which the court could properly predict that total numbers in the area would increase.

65 The assertion in this ground that there was no evidence to support the finding is incorrect. There is no question of law involved.

66 Ground 10 points to the learned Judge's finding that the applicant was likely to conduct the business at the premises in accordance with the Act. The ground contends that in view of that finding, the finding that the removal would cause an exacerbation of the bad behaviour of patrons of licensed premises was an error of law. His Honour did conclude that the

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> appellant would conduct business in accordance with the Act but said the "principal area of objection" was not in the operation of the proposed premises themselves but the consequences of the introduction of premises of this size into the particular location, providing for between 500 and 600 people, and that these numbers would be likely to contribute to the undue offence, annoyance, disturbance or inconvenience to residents. No doubt a certain percentage of persons who attend this type of licensed premises will become affected by alcohol, and even if the appellant complied with the Act and refused to serve them and removed them from the premises, they would end up in the streets along with alcohol affected patrons from the many other premises. His Honour prophesied from the evidence that this was likely to contribute to offence, annoyance and disturbance to residents. His Honour found that they would do so to an "undue" extent. To contend, as ground 10 does, that there was no evidence capable of sustaining the conclusion that the removal of the licence would increase or exacerbate such behaviour is unsustainable. As a result the ground raises no question of law.

Grounds 11 and 12

67 Counsel for the appellant invited the Court to deal with these grounds together. The appellant, by these grounds, repeats arguments dealt with in relation to grounds 1, 2 and 13. Grounds 11 and 12 refer to the fact that his Honour stated that no proceedings had been commenced against licensees within the affected area in the recent past. The contention was that such information was irrelevant. In my opinion the information was relevant because even if the Management Plan became a condition of the licence, the finding of the learned Judge was that the Management Plan went "little further" than the obligations already imposed under the Act and the obligations imposed under the Act (coupled with lack of enforcement) had not prevented the already substantial number of intoxicated and disorderly people on the streets within the affected area. I would dismiss these grounds.

Ground 14

68 The appellant's written submissions say in relation to this ground: "See grounds 1, 2, 5 and 6 above". I have therefore disposed of any arguments which relate to these grounds. I would dismiss this ground.

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Ground 15

69 The written submissions in relation to this ground read: "See grounds 2 and 3 above". I