

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

Applicant: [REDACTED]

Respondent: Commissioner of Police
(*represented by Ms Thea Chee of State Solicitor's Office*)

Commission: Ms Sarah Oliver (Presiding Member)

Matter: Application seeking review of a barring notice pursuant to s.115AD of the *Liquor Control Act 1988*.

Date of lodgement of Application: 2 September 2020

Date of Determination: 30 November 2020

Determination: The decision under review is affirmed.

Authorities referred to in Determination:

- *KRB v Commissioner of Police* (LC 33/2011)
- *LMC v Commissioner of Police* (LC 05/2012)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *GML v Commissioner of Police* (LC 58/2011)
- *MP v Commissioner of Police* (LC 55/2011)
- *AQ v Commissioner of Police* (LC 46/2011)
- *SVS v Commissioner of Police* (LC 19/2011)
- *YZ v Commissioner of Police* (LC 13/2013)
- *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 at 715
- *Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758

Background

1. At around 8.12pm on 24 June 2020, an incident occurred at and/or in the vicinity of the [REDACTED] ("**the Bar**"). The Bar is a licensed premise for the purposes of the *Liquor Control Act 1988* ("**the Act**").
2. Following that incident, the Applicant was charged with one offence of breaching a family violence restraining order ("**FVRO**"), contrary to s.61(1) of the *Restraining Orders Act 1997*. The Applicant entered a plea of guilty to this charge on 21 August 2020 and was fined.
3. As a result of that incident, a delegate of the Commissioner of Police issued a barring notice under s.115AA(2) of the Act in respect of the Applicant dated 17 July 2020 ("**Barring Notice**"). The Barring Notice was served on the Applicant on 9 August 2020.
4. The Commissioner of Police, or his delegate (pursuant to s.115AB), has the power to ban people from licensed premises, pursuant to s.115AA(2) of the Act, if he believes on reasonable grounds that the person has, on licensed premises "or in the vicinity of licensed premises":
 - (a) been violent or disorderly; or
 - (b) engaged in indecent behaviour; or
 - (c) contravened a provision of any written law.
5. A single incident can be sufficient to found a barring notice.
6. The underlying purpose of a barring notice is not to penalise an individual but to act as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; *LMC v Commissioner of Police* (LC 05/2012) at [14]; *GML v Commissioner of Police* (LC 58/2011) at [20]).
7. The Barring Notice issued in this case (which remains in force until 13 April 2021) prohibits the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - (a) All small bar licences issued under s.41A;
 - (b) All nightclub licences issued under s.42;
 - (c) Casino licence issued under s.44;
 - (d) All liquor store licences issued under s.47;
 - (e) All club licences issued under s.48;
 - (f) All restaurant licences issued under s.50;
 - (g) All producer's licences issued under s.55;
 - (h) All wholesaler's licences issued under s.58;
 - (i) All occasional licences issued under s.59; and
 - (j) All special facility licences issued under s.46 of the Act and regulation 9A of the *Liquor Control Regulations 1989* (WA).

Application for Review

8. On 2 September 2020, the Applicant applied to the Commission for review of the decision to issue the Barring Notice, pursuant to s.115AD(3) of the Act. That application was filed within the time specified in s.115AD(4).
9. The Applicant has now elected to have the review determined on the papers, and the matter was referred to me on 22 October 2020 for that purpose.

10. The primary issue for determination by the Commission on review, on the balance of probabilities (s.16(1)(b)(ii) of the Act), is whether there are reasonable grounds for believing that the Applicant has been violent or disorderly, or contravened a provision of a written law, on licensed premises or in the vicinity of licensed premises (*YZ v Commissioner of Police* (LC 13/2013) at [15]). In considering that issue, the relevant considerations include the nature and circumstances of the incident giving rise to the issue of the Barring Notice, the risk of the Applicant behaving in a similar manner and the need to protect the general public, the licensee and the Applicant themselves (*KRB v Commissioner of Police* (LC 33/2011) at [34]; *AQ v Commissioner of Police* (LC 46/2011) at [34]; *MP v Commissioner of Police* (LC 55/2011) at [21]; *GML v Commissioner of Police* (LC 58/2011) at [19]; *YZ v Commissioner of Police* (LC 13/2013) at [19]).
11. On review, the Commission can affirm, vary or quash the decision under review (s.115AD(3)). The Commission is to undertake full review of the materials before it and to make its own determination on the basis of those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224 at [54], which was considering s.25(4) of the Act, which also includes a power to affirm, vary or quash a decision). The discretion to affirm, vary or quash a barring notice must be exercised consistently with the objects and purposes of the Act.
12. In conducting a review of the decision in this case, the Commission can only have regard to material that was before the delegate and any information or document provided by the Applicant (s.115AD(6)). In the circumstances, I have had regard to the following material (pursuant to s.115AAD(6) of the Act):
 - (a) the material that was before the delegate of the Commissioner of Police when making the decision, consisting of:
 - i. statement of material facts for brief number 2026221-1;
 - ii. brief jacket for brief number 2026221-1;
 - iii. Incident report 240620 2130 16196 (redacted);
 - iv. Restraining Order details for order number 2019 00020;
 - v. a witness statement by [REDACTED];
 - vi. six photographs of the damage to [REDACTED] vehicle;
 - vii. a witness statement by [REDACTED];
 - viii. a witness statement by [REDACTED];
 - ix. ten still images from the City of Stirling's CCTV footage;
 - x. six still images from the Bar's CCTV footage;
 - xi. a USB device containing CCTV footage;
 - xii. the Applicant's criminal history as at 29 June 2020;
 - xiii. statement of material facts for brief number 1941570-1-1;
 - xiv. statement of material facts for brief number 1965690-1; and
 - xv. statement of material facts for brief number 1965690-2;
 - (b) the Barring Notice;
 - (c) the application for review filed by the Applicant, together with a letter/submission filed by the Applicant (undated); and
 - (d) the outline of submissions filed by the respondent (dated 25 September 2020).

Submissions of the Parties

13. The Applicant submits that the Barring Notice ought to be revoked.
14. The Applicant raises an argument that the Barring Notice is invalid as his conduct did not occur on a licensed premises. He says that the actual breach occurred when he was outside

of the Bar, and that at no time did a member of staff from the Bar ask him to leave. Further, he says he was neither drunk nor under the influence of drugs at the time of the offending.

15. The Applicant submits, in effect, that there are no reasonable grounds to believe that his behaviour on the night in question was violent or disorderly such as to warrant the issuing of a barring notice. It is submitted that he was neither physically nor verbally violent that day.
16. The Applicant contends that the Barring Notice is a direct attempt by [REDACTED] to "further attempt to destroy my wellbeing and prevent me from going about my daily life". The Applicant believes that the decision to issue the Barring Notice was made having regard to information that was "at the very least misleading", but which he considers involved a deliberate misrepresentation of the facts.
17. The respondent submits that the Commission should affirm the Barring Notice because there is clear evidence, and therefore reasonable grounds, for finding that the Applicant has been violent or disorderly, and has contravened a provision of a written law, at or in the vicinity of the licensed premises. It is further submitted that, in light of his conduct, banning the Applicant from licensed premises under the terms of the Barring Notice is reasonable and appropriate in all the circumstances, in order to provide a level of protection to the community.
18. The respondent further submits that the discretion to affirm, vary or quash the Barring Notice must be exercised consistently with the objects and purposes of the Act, citing *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 at 715 and *Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758. It is said that the primary object of the Act in s.5(1) that is relevant to this case is in paragraph (b), "*to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor*"; and the relevant secondary object in s.5(2) is in paragraph (d), "*to provide adequate controls over, and over the person directly or indirectly involved in, the sale, disposal, and consumption of liquor*".
19. Further, the respondent submits that the Commission should have regard to the entirety of the conduct of the Applicant on the night in question, as outlined in the witness statements. Relevantly this includes allegations that he spat on [REDACTED] (whilst he was inside the Bar) and later damaged her vehicle. It is said that the Applicant has a propensity to breach the FVRO, as demonstrated by his previous convictions for such offending. It is also said that he has a propensity to engage in violent and threatening behaviour, based on his previous convictions for assaults and the circumstances in which his previous convictions for breaching the FVRO occurred. The respondent submits that there is a real risk that the Applicant will engage in similar violent and/or disorderly behaviour in the future.

Consideration

20. Having considered all of the materials before the Commission, I am satisfied on the balance of probabilities of the following salient matters:
 - (a) On 14 January 2019, the Applicant was served with a FVRO, which prevented him from (amongst other things) coming within 10 metres of [REDACTED].
 - (b) The Applicant breached that FVRO on four occasions. Most relevantly, he breached the FVRO at about 10.30pm on 13 July 2019, by throwing the contents of a glass on [REDACTED] when they were at the [REDACTED] restaurant in Perth (statement of material facts for brief number 1941570-1-1). The [REDACTED] is a licensed premises.
 - (c) On 15 May 2020, the Applicant was served with a FVRO, which prevented him from (amongst other things) coming within 10 metres of [REDACTED]. That FVRO remained in effect until 13 November 2020.

- (d) On the evening of 24 June 2020, the Applicant was present at the Bar, in company with a number of friends. He had dinner at the Bar before becoming aware, at around 8:12pm, that [REDACTED] had arrived at the Bar.
- (e) Upon becoming aware that [REDACTED] was in the Bar, the Applicant left the Bar. Whilst [REDACTED] was inside the Bar, the Applicant approached a glass fence from the outside of the Bar to call out to a friend. At this time, the Applicant came within a metre or so of [REDACTED]. As a result of that conduct, the Applicant was charged with breaching the FVRO.

In this regard, I pause to note that the Applicant raises an argument that the Barring Notice is invalid as his conduct did not occur on a licensed premises. He says that the actual breach occurred when he was outside of the Bar, and that at no time did a member of staff from the Bar ask him to leave. This submission is based on a misunderstanding of the legislation. As set out at [4] above, the relevant conduct can occur at a licensed premise “or in the vicinity of licensed premises”. In the present case, the incident occurred on the street outside the Bar, after the Applicant left the Bar, and at a time when [REDACTED] was still inside the Bar. In the circumstances, I am satisfied that the relevant conduct occurred at or “in the vicinity of licensed premises”, such that it could be the subject of a barring notice, assuming the other relevant requirements of the Act were met (which I will consider further below).

- (f) I am unable to be satisfied that, whilst the Applicant was within one metre of [REDACTED], he spat at or on her. The only person who refers to the alleged spitting is [REDACTED]. The other witness did not observe this to occur, and the CCTV footage is not sufficiently clear to see any spitting action by the Applicant. I also observe that the Statement of Material Facts for the relevant breach of FVRO offence did not allege any spitting by the Applicant.
- (g) After the Applicant and two to three of his friends left the Bar, they were seen standing around [REDACTED] vehicle. Shortly after they left the area, the vehicle was observed to have been damaged, with mirrors smashed, the petrol cap damaged and marks to the paint work. The Applicant was not charged with an offence of criminal damage, however I am satisfied that he was involved to some extent in the damage to [REDACTED] vehicle.

21. Based on the above findings, I am satisfied that the Applicant contravened a provision of a written law, namely s.61 of the *Restraining Orders Act 1997*, whilst in the vicinity of the licensed premises, on 24 June 2020, for the purposes of s.115AA(2)(c) of the Act. I am therefore satisfied that there were reasonable grounds and a proper basis for the delegate of the Commissioner of Police to exercise the power conferred by s.115AA of the Act.

22. I turn then to consider whether there remain reasonable grounds to exercise the discretion in s.115AA to issue (or affirm) the Barring Notice. In considering this:

- (a) I have had regard to the fact that, whilst a barring notice may have a detrimental effect on the recipient, it is not meant to be seen as a punishment imposed upon the recipient, but rather is to be seen as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; *LMC v Commissioner of Police* (LC 05/2012) at [14]; and *GML v Commissioner of Police* (LC 58/2011) at [20]).
- (b) I have considered the primary and secondary objects of the Act and considered whether the period and terms of the Barring Notice reflect the objects and purpose of the Act and are not punitive in nature.

23. Having regard to all the circumstances of this case and in particular to the matters discussed further below, I am satisfied that there remain reasonable grounds to exercise the discretion in s.115AA to issue the Barring Notice. In reaching this view, I have taken into account:
- (a) the fact that, whilst the Applicant's behaviour during the incident did not involve actual violence, it was still serious and amounted to a contravention of a written law;
 - (b) the fact that the Applicant has a number of convictions for breaching FVRO that have been issued to protect [REDACTED]. These prior convictions demonstrate a disregard for the FVRO process, a level of anger or even contempt for [REDACTED], and a disregard for the enforcement of the law generally;
 - (c) the fact that the Applicant has previously engaged in conduct that resulted in a conviction for breaching a FVRO whilst in a licensed premises. This previous conviction is relevant to whether the Applicant has a tendency to act in a violent and/or disorderly manner, or in contravention of a law, in a licensed venue, such that there is a likelihood of him engaging in similar behaviour if not subject to the Barring Notice; and
 - (d) the fact that he now has two convictions for breaching a FVRO that have involved conduct at licensed premises.
24. The above matters give rise to an inference that the Applicant has a tendency to become disruptive and disorderly in his behaviour if he encounters [REDACTED] when at a licensed premises, resulting in him committing the offence of breaching a FVRO. The inference arising from the evidence before me is that the Applicant had been drinking on both of the occasions where he breached the FVRO at a licensed premises. This type of incident is of a kind that the objects of the Act are seeking to avoid: see s.5(1)(b), *"to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor"*.
25. The Applicant has not sought to put any material before the Commission to indicate that he has taken any steps to address his anger issues, or other factors that may have led to such disruptive behaviours in the past.
26. Based on all the material before me, I am satisfied on the balance of probabilities that there is a strong likelihood that the Applicant would engage in similar behaviour in the future, if he were to encounter [REDACTED] at a licensed premises.
27. In the circumstances, I consider there is a risk that the Applicant may engage in similar disorderly or unlawful behaviour in a licensed premise in the future. I note, in any event, that even where the risk of the Applicant reoffending is low, such risk may be further minimised by the terms of the barring notice (*KRB v Commissioner of Police* (LC 33/2011)).
28. I accept that the Barring Notice is having or has the potential to have a detrimental effect on the Applicant. However, I consider that any punitive effect of the Barring Notice is relatively low when balanced with the protection of the public from alcohol related harm, whether as a victim of such harm or a witness to same. The users of licensed premises are entitled to feel safe in those venues without being subjected to the type of behaviour in which the Applicant engaged. There is a strong public interest in those who engage disorderly and/or unlawful behaviour being barred from licensed premises.

29. In all the circumstances, I consider the imposition of the Barring Notice to be justified and appropriate, and I affirm the decision under review.

A handwritten signature in black ink, appearing to read 'SO', with a small mark below the 'i'.

SARAH OLIVER
PRESIDING MEMBER