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25 Pages

# EXPLORER CRUISE LINES PTY LTD v BURUNDI HOLDINGS PTY LTD - BC9301556

SUPREME COURT OF WESTERN AUSTRALIA THE FULL COURT
FRANKLYN (1), WALLWORK (2) AND ANDERSON (3) JJ

40 of 1993

24 September 1993, 24 September 1993

*BC9301556 at 1*

**Liquor Licensing -- removal application -- tavern licence -- appeal from Licensing Court's second refusal of application following appeal against first refusal and remittal back by Appeal Court for determination in accordance with its reasons -- on remittal no further evidence taken -- application again refused on basis of fresh findings inconsistent with earlier findings on which remitting appeal court formed its judgment -- such findings not open in circumstance. Liquor Licensing Court -- use of tribunals experience in Court and personal experience of the affected area to achieve a finding -- Liquor Licensing Act s16. Liquor Licensing Act -- s33 -- exercise of discretion in public interest -- principles**

*BC9301556 at 2*

Cases referred to in judgment:
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Charlie Carter Pty Ltd v Streeter and Male Pty Ltd (1991) 4 WAR 1
Coulton v Holecombe 162 CLR 1
Orr v Holmes (1948) 76 CLR 632
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
Pearce v Lakeview and Star Ltd [1969] WAR 84
Quade v Commonwealth Bank of Australia (1991) 27 FCR 569
Re Barrell Enterprises [1972] All ER 631
Smith v NSW Bar Association Ltd (1992) 176 CLR 256
Wollongong Corporation v Cowan (1955) 93 CLR 435

Cases also cited:
Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd; unreported; FCt SCt of WA; Library No 920441; 28 August 1992
Green v Martin (1986) 63 ALR 627
In Re Harrison's Share under a Settlement; Harrison v Harrison (1955) 1 Ch 260
Martin v Green [1984] 1 NSWLR 148
Norman v Norman (1991-1992) 6 WAR 372
Re Barrell Enterprises (1972) 3 All ER 631
Re Dunsborough Districts Country Club Inc (1982) WAR 321
Wilson v Madden (NSW Supreme Court, 10 May 1991)
Woodford v O'Sullivan (NSW Supreme Court; 27 February 1984)

*BC9301556 at 3*

Franklyn J

The appellant appealed against the decision of his Honour Judge Greaves of the Liquor Licensing Court ("the Court") delivered 17 February 1993 whereby it refused the appellant's application for removal of the Arcadia Tavern licence

from premises at 268 Newcastle Street Northbridge, to Lot 11 James Street Northbridge ("Lot 11"), both being within the affected area. The matter came on for hearing before this Court on 24 September, when his Honour's order was set aside and the application granted with reasons to be delivered subsequently. I now deliver my reasons.

It is desirable for the purposes of this appeal to recount some of the history of the application. It was one of three which, in November 1991, the Licensing Court held to be simultaneous applications which may conflict within the meaning of Licensing Court Rules 4 and 5. The other two were respectively an application by Emendo Pty Ltd ("Emendo") for a cabaret licence and an application by Pelworth Pty Ltd ("Pelworth") for a restricted hotel licence, each in respect of premises in the immediate vicinity of Lot 11. His Honour determined to hear each such application before deciding upon any, "to assist in deciding how best to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand in this area". He heard the three applications in succession and, on 2 April 1992, refused those of Emendo and the appellant and allowed that of Pelworth subject to certain conditions, one of which was that, prior to the issue of the licence, it demonstrate "that it can, upon the grant, comply with the requirements of s37(5) of the Act". In refusing the appellant's application his Honour took into account "the extent to which the requirements of the section of the public upon which the applicant relies will be provided for by the grant of the hotel restricted licence to Pelworth" and found the requirements of that section of the public would be provided for by the grant of that licence. It is not in dispute that at the time his Honour gave its decision in favour of Pelworth and refused the appellant's application, Pelworth had lost its entitlement to part of the land on which its proposed hotel was to be constructed and could not in any event comply with the condition imposed. As was subsequently found by the Full Court, his Honour could not have been satisfied in respect of its application as required by s37(5) of the Act.

*BC9301556 at 4*

The appellant appealed his Honour's decision to this Court differently constituted on the ground that he had erred in law in the application of s38(4) of the Act by taking into account Pelworth's proposed licence when Pelworth had not in law been granted a licence and, further, in taking into account an erroneous and irrelevant consideration being that the section of the public upon which the appellant relied for the grant of its application would be provided for by the grant of a restricted hotel licence to Pelworth. That appeal was upheld by the Full Court on 16 December 1992 on both grounds, it delivering its reasons the same day. It remitted the appellant's application back to the Court "for further consideration in the light of the reasons for judgment of this Court".

The appellant's application was brought on again before his Honour pursuant to that order and, on 17 February 1993, was again refused for reasons then delivered. The appeal to us was against that refusal, the grounds being:- "1. The Liquor Licensing Court erred in law in failing to deal with the application for removal in accordance with the reasons of the Full Court in that His Honour Judge Greaves rejected the application by reason of two new findings which His Honour made, which were inconsistent with findings made in His Honour's earlier decisions of 2 April and 11 June 1992, were not warranted by the Full Court's reasons and were not supported by any evidence, namely that: (a) the proposed premises would not meet the requirements of the relevant section of the public, identified in the reasons dated 2 April 1992, whose requirements were found not to be currently catered for, because the locality, design and facilities of the proposed premises was such that they would quickly become patronised by younger clientele; and (b) the public interest required refusal of the application because the proposed premises would provide more of the same kind of facility as that already available in the affected area.

*BC9301556 at 5*

2. The learned judge misconstrued s38 of the Liquor Licensing Act 1988 in that: (a) His Honour applied s38 as if the reasonable requirements of the public could only be established by reference to a discrete section of the public resorting to the affected area, being a section distinguishable from other discrete sections of the public also resorting to that area; (b) His Honour failed to consider whether the reasonable requirements of the public for services of the kind proposed to be provided by the appellant were reasonable requirements of a broad cross-section of the public who sought different services on different occasions; (c) His Honour failed to find that if, as he predicted, the proposed premises would quickly become patronised by younger people that was itself tantamount to the existence of reasonable requirements of the public sufficient to warrant the grant of the removal application. 3. The learned judge erred in law in refusing the application in the public interest in the exercise of discretion under s33(1) in that: (a) the discretion was exercised upon a false premise, namely that to grant the removal would result in 'more of the same' when the differences between the proposed facilities and services and those already provided in the affected area would remain the same, regardless of the age group patronising the proposed premises; (b) in any event, if there is sufficient public demand in the younger age group for the proposed facilities and services such that those facilities would be fully patronised, there is no proper public interest which justified refusal of the application."

*BC9301556 at 6*

It is important to identify certain of the court's findings in its reasons for judgment delivered on 2 April 1992 on the appellant's original application. Those reasons were paragraphed and I set out the relevant findings by reference to those paragraphs, with underlining added. "111. Given the proposed operation of these premises including the seating facilities described, I accept that the maximum number of people who should be permitted on the premises at any one time is in the vicinity of 320 to 350, if this application were granted. I observe in passing that in numerical terms such maximum patronage, if achievable, could easily be accommodated in the public facilities of the hotel proposed by

Pelworth Pty Ltd. ... ... ... 119. In my opinion, this evidence must be viewed in the light of the evidence of Mr Hardie to which I have already referred at para62 in the application by Emendo Pty Ltd. I repeat that on the evidence before me in these three applications there is no doubt whatever that during the peak trading hours between 6.00 pm and midnight in this affected area, and particularly on Thursday, Friday and Saturday nights, the cabaret licensees and the hotel and tavern licensees provide for and compete for the requirements of the public for liquor in this affected area. ... I do accept that such licensees, speaking generally, offer different related services to the public in conjunction with the supply of liquor.

*BC9301556 at 7*

120. The evidence of Mr Hardie, to which I have referred in some detail, in order that its merits may be considered in the context of this application and the simultaneous proceedings as a whole, makes it quite clear in my opinion, that this applicant seeks to provide for the requirements of a section of the public with what may be regarded as more mature and sophisticated tastes and whose requirements include the opportunity to consume light food and meals at licensed premises in this affected area during the day but more particularly during the hours between 6.00 pm and midnight. ... ... 122. The evidence of these witnesses is the evidence of a representative sample of a relevant section of the population which resorts to this affected area particularly during the evening in the latter part of the week. The requirement of this section of the public is for licensed premises in the affected area which offer good quality facilities, an uncrowded atmosphere and an opportunity to eat and drink at the same time and place without the requirement to purchase a substantial meal in a licensed restaurant. The evidence of these witnesses also demonstrates that some of the time their requirements for liquor and related services for consumption on the premises are satisfied by premises both inside and outside the affected area. That is not surprising when one has regard to the fact that the section of the public identified is almost entirely a section of the public which resorts to this affected area during the limited times which I have mentioned. I believe the evidence of these witnesses is consistent with the evidence throughout the simultaneous proceedings to the effect that the largest section of the public patronising licensed premises in this affected area is, speaking generally, in the 18 to 25 year old age group. That section of the public is very much larger than the section of the public upon which this applicant relies. The section of the public upon which this applicant relies is, in my opinion, larger than that upon which Emendo Pty Ltd relies in its application for the conditional grant of a cabaret licence.

*BC9301556 at 8*

... ... 124. To some extent, I consider the requirement reflected by the evidence of these witnesses for uncrowded premises in this affected area to be an unrealistic requirement on the part of that section of the public represented. I consider that it is unrealistic in the sense that those who resort to this affected area and the entertainment which it offers do so because it is an affected area with a large concentration of premises licensed and unlicensed offering facilities for social activity. Those who resort to this affected area can expect a concentration of people commensurate with the concentration of premises. 125. To that extent, I do not consider that the requirements of this section of the public reflected by the evidence to be reasonable. They are over stated. Having said that, I do accept that owing to the preponderance of young people frequenting this affected area, the section of the public upon which this applicant relies has a reasonable requirement for licensed facilities of a standard in design and operation which may be less attractive to the younger age group.

*BC9301556 at 9*

126. In my opinion, what I have said about the requirements of this section of the public also goes to endorse the view which I expressed earlier in these reasons that the determination of this application is to be approached as if it were an application for a new licence. In my opinion, the evidence in support of this application reflects the requirements of a section of the public which are not currently catered for in this affected area. In my opinion, the evidence upon which the case for this applicant is presented demonstrates quite clearly that if this application were granted not only would the proposed premises trade during peak trading hours, in effect in addition to the existing Newcastle Street premises, but they would provide for a section of the public which for one reason and another does not patronise the existing premises. In my opinion, there is no other conclusion open on the evidence other than that this is an application tantamount to an application for a new licence. In all the circumstances, it is of no consequence that the removal sought is within this small affected area. 127. That being the case, I am of the opinion that the requirements of s38 of the Act and the scheme of the Act as a whole are such that it is necessary for the Court to determine in conflicting applications of this nature the extent to which the requirements of the section of the public upon which this applicant relies will be provided for by the grant of the hotel restricted licence to Pelworth Pty Ltd. S38(4) would require such an approach in the absence of the present conflict. 128. I think I have said enough about the evidence in support of the application by Pelworth Pty Ltd to demonstrate that in large part the section of the public upon which that applicant relies is the same section of the public upon which this applicant relies. In my opinion, the reasonable requirements of the public for liquor and related services as identified by this applicant will be more than adequately catered for by the substantial premises proposed by Pelworth Pty Ltd. The public facilities offered by Pelworth Pty Ltd are in large part equal to and more substantial than those proposed by this applicant.

*BC9301556 at 10*

129. While, therefore, the evidence in support of the Pelworth Pty Ltd application and this application is such that it clearly demonstrates that the grant of the application by Pelworth Pty Ltd is necessary to provide for reasonable requirements of the public for liquor and related services, and in particular the section of the public identified, I am of

the opinion that taking into account the size of the premises proposed and the size of the section of the public relied upon, the grant of this application is not necessary to provide for the reasonable requirements of the public for liquor and related services in this affected area at the moment. ... ... 132. For the same reasons, I also find that even if the present application is treated in isolation and it could be said that the evidence is sufficient to establish that the grant is necessary to provide for the reasonable requirements of the public, the grant of this removal should be refused in the public interest. I am of the opinion that for this applicant and its associated company to establish both sets of premises in the circumstances described by the evidence would not contribute to the proper development of the liquor industry in this state because it would result in an increase in licensed premises and facilities well beyond the present requirements of the public in this affected area disclosed by the evidence."

*BC9301556 at 11*

In para133 the court dismissed the objections lodged to the appellant's application, holding that the evidence failed to address the grounds of objection in material particular and did not materially challenge the evidence for the appellant. "137. In addition to the reasons which I have given for the determination of each of these applications, the evidence in respect of which and the reasons for which are interrelated, I believe it is necessary for me to observe that having regard to the use and development of licensed facilities reflecting the diversity of consumer demand for liquor, related services and accommodation in the affected areas of these three applications and having regard to the competition between the sections of the liquor industry to which I have referred to provide for the requirements of the public for liquor in this affected area, the evidence before me does not suggest that to grant either the application by Emendo Pty Ltd or Explorer Cruise Lines Pty Ltd in addition to that by Pelworth Pty ltd would contribute to the proper development of the liquor, hospitality and related industries in this state at the moment."

*BC9301556 at 12*

In his reasons for decision in respect of the appeal against his Honour's decision of 2 April 1992, Ipp J, (with whom Malcolm CJ and Walsh J agreed), pointed out that his Honour had found the premises to which the appellant sought to remove its tavern licence would provide for a section of the public not catered for by its existing premises but that a larger part of the section of the public on which Pelworth relied is the same section as that upon which the appellant relied and that the reasonable requirements of that section of the public would be more than adequately met by Pelworth's proposed premises. Ipp J pointed out that in so finding his Honour was plainly affected by the assumption that the condition precedent to which the conditional grant to Pelworth was made would be fulfilled and consequently refused the appellant's application on the basis that Pelworth's premises would provide for those reasonable requirements and so the removal sought by the appellant was not necessary. I too agree with that rationale of his Honour's said reasons. Ipp J also concluded that in arriving at the alternative reasons expressed by his Honour in para132 of his reasons his Honour again took into account the conditional grant of the conditional restricted hotel licence to Pelworth.

Also clear from his Honour's reasons of 2 April 1992 and in particular from the passages underlined in the paragraphs quoted above, are the following matters. In para120 his Honour identified the section of the public on whose requirements the appellant relied. In para122 he found it to be a relevant section which resorts to the affected area and its requirements to be as set out therein, one of which is "an uncrowded atmosphere". He further found in that paragraph that the largest section patronising the affected area is the 18 to 25 year old group, it being very much larger than that relied on by the appellant. In para124 and para125 he found the requirements of the section of the public on which the appellant relied for "uncrowded premises" to be unrealistic and unreasonable because, in his view, it had to be expected that the affected area, with its large concentration of premises licensed and unlicensed, would attract a commensurate concentration of people. He nevertheless accepted that, because of the large preponderance of young people frequenting the area, the section of the public relied on by the appellant has a reasonable requirement for licensed facilities of a standard in design and operation "which may be less attractive to the younger age group". In para126 he found that the reasonable requirements of that section of the public is not currently catered for in the affected area. He further found that the evidence demonstrated that, if the application were granted, the proposed premises would provide for the relevant section of the public on which the appellant relied.

*BC9301556 at 13*

In my view it is clear from all of those findings, having regard also to his Honour's findings in para127, para128, para129, para132 (this last being considered in the light of the reasons for judgments of Ipp J) and para137 that on 2 April 1992 he found that, absent the restricted hotel licence proposed by Pelworth, the appellant's licence was necessary in order to provide for the reasonable requirements of the public within the meaning of s38(1) and, if granted, its proposed premises would meet those requirements. (Charlie Carter Pty Ltd v Streeter and Male Pty Ltd (1991) 4 WAR 1).

In May 1992, following the lodging of its appeal against the said refusal of its application, the appellant made a fresh application, ex parte, to remove the tavern licence to Lot 11, having obtained a dispensation from the provisions of s38 (5) and a dispensation under s81 from the need to advertise. That application was heard by the Court, again constituted by his Honour Greaves J, on 11 June 1992, he identifying it as "for all intent and purposes...the same application which was refused" on 2 April 1992 but distinguishing it because Pelworth was "no longer able to proceed with the conditional grant of the hotel restricted licence". The appellant's submission on that occasion was that its application

should be dealt with on its merits uninfluenced by the possibility of the proposed premises to be established by Pelworth providing the same or better services and facilities than those proposed by it. It was also drawn to his Honour's attention that the objections to its previous applications had been rejected on 2 April 1992. His Honour accepted there to be no prospect of the restricted hotel licence granted conditionally to Pelworth coming into existence. He also accepted a submission that if the appeal lodged by the appellant against its decision of 2 April 1992 succeeded its application would be referred back to the Court for decision and consequently there was in principle no reason why he should not then deal with the application before him. The appellant made it clear that it did not challenge the essential findings of fact set out in the reasons of decision of 2 April 1992. His Honour accepted that he should "view the application as one in respect of which all of the evidence has largely been heard", concluded that there could be no objection to it and that "on the evidence which was presented, the application should be granted". That decision was subsequently over-turned by this Court on a certiorari application lodged by the respondent.

*BC9301556 at 14*

When the original application was referred back to the Court following the successful appeal against the decision of 2 April 1992 no additional evidence was offered or taken and it was determined by his Honour on the material on which he had come to his decision on 2 April 1992 but on the basis that the court take no account "of its purported grant to Pelworth Pty Ltd of a hotel restricted licence" and no account "that the requirements of the public, which the [appellant] contended justified the grant of the removal of its tavern licence, would be satisfied by the order which this Court made in regard to the application by Pelworth Pty Ltd". In his reasons for decision, delivered 17 February 1993 his Honour expressly adopted para102 to para110 and para112 to para126 of his reasons for decision of 2 April 1992 as part of his reasons for decision on that occasion. He then referred specifically to certain of those paragraphs but, curiously, not to para126 although that is a paragraph expressly adopted and having considerable relevance to this appeal. He concluded that the evidence given at the initial hearing before him identified a relevant section of the community whose requirements are shown to be objectively reasonable but that it was "unlikely that the proposed premises, operating under a tavern licence, will be of a standard in design and operation less attractive to the younger age group and thereby deter them from patronising the premises, allowing the licensee to provide for the requirements of this section of the public offering good quality facilities, an uncrowded atmosphere and an opportunity to eat and drink at the same time and place without the requirement to purchase a substantial meal in a licensed restaurant".

*BC9301556 at 15*

In para10 of his reasons of 17 February 1993 his Honour went on to say that from his experience and his knowledge of the affected area, the proposed premises would not meet the requirements of that section of the public, that it was more likely than not that the premises would quickly become crowded and noisy because they would be patronised by the younger age group whatever might be the appellant's intention and that would be so despite the evidence given on its behalf as to the design, size and nature of the premises, and the facilities, services and management attitudes proposed and that would be so "whatever may be the intention of the applicant". He expressed the view that "a licensee may not, cannot and does not always dictate the style and operation of the licensed premises". He concluded that to grant the application would not provide for the section of the public relied upon, in whole or part and again refused the application. As to that, it was the appellant's evidence, in general terms, that the premises were designed and would be managed to cater for the more mature patrons resorting to Northbridge whose requirements were identified by his Honour in his reasons of 2 April 1992 and who are not presently being adequately catered for in the existing tavern and hotel premises, with emphasis on alfresco dining, extensive seating and entertainment limited to soloists and duos. Further, in para126 of his reasons of 17 February 1939 his Honour had concluded that the evidence upon which the appellant's case was presented demonstrated quite clearly that if granted, the appellant's proposed premises would trade during peak trading hours additionally to the existing Newcastle Street premises and would provide for a section of the public which for one reason and another does not patronise the existing premises.

*BC9301556 at 16*

In my opinion such findings of his Honour of 17 February 1993 ignore and contradict his clear findings in para126 of his reasons of 2 April 1992 and in particular the finding "that if this application were granted it would provide for the requirements of the relevant section of the public". They also sit unhappily with his dismissal of the objections to the appellant's application which included objections that the premises and the services proposed would be inadequate to meet the requirements of the public and would be unsuitable or unsatisfactory. Para133 to para134 of the reasons of 2 April 1992 make it clear that his Honour refused the original application not because of any matter relating to the premises but because the accommodation and services it could provide for the relevant section of the public in which it relied could be met by Pelworth's proposed premises. As he stated in para137 headed "Conclusions", the evidence did not suggest that to grant the application "in addition to that of Pelworth" would contribute to the proper development of the liquor, hospitality and related industries in this state at the moment.

*BC9301556 at 17*

In para125 on 2 April 1992 his Honour had found the reasonable requirements of the section of the public on which the appellant relies to arise at least in part because of the preponderance of young people resorting to the area. On 17 February 1993 he relied on that preponderance to conclude that those requirements cannot be met either wholly or in part. It seems to me that there is a contradiction in that conclusion. If the preponderance of youth in an affected area gives rise to the reasonable requirements of another section of the public in the area it is difficult to see how that same

preponderance can then negate the need to provide for those reasonable requirements. On his Honour's reasoning it is difficult to see how, in such circumstances and having regard to his Honour's views as to the inability of management to manage its licence, any premises can adequately provide for that section of the public whose reasonable needs are not being met.

As was made clear in Charlie Carter Pty Ltd v Streeter and Male (supra) the test, for the purposes of s38(1), of what is "necessary" is in terms of the reasonable requirements of the public. Is the proposed licence necessary in order to provide for those requirements?, that meaning probably being no more than that the licence is "reasonably required" to provide for the reasonable requirements, the word "reasonable" being used objectively. The finding of para125 is effectively that the relevant section of the public has a reasonable requirement for facilities of a standard and design which may be less attractive to the younger age group. Para126 finds that that requirement is not being met and that if the licence were granted the appellant's premises would provide for the reasonable requirements of that section of the public and so, in my opinion it follows that, absent the hotel restricted licence, the grant of the removal application is established to be necessary.

*BC9301556 at 18*

It is clear that in rejecting the application on 17 February 1993 the Court resiled from its findings in April 1992 and June 1993 that, absent the restricted hotel licence, the removal of the appellant's tavern licence was necessary to provide for the reasonable requirements of the relevant section of the public for liquor and related services and found to the contrary. It did so without giving the appellant any opportunity to be heard and on the basis of the personal experience of his Honour in the Court and his knowledge of the affected area, no particulars of such experience or knowledge having been provided to the appellant and no notice having been given that his Honour proposed to rely on such matters. Whilst pursuant to s16 the Court is not bound by legal rules relating to evidence or procedure and may obtain information as to any question that arises for decision in such manner as it thinks fit, it is nevertheless a judicial body and must act judicially in exercising those powers (Pearce v Lakeview and Star Ltd [1969] WAR 84). It was his Honour's obligation in such case to give to the parties sufficient notice of intention to rely on his own experience and knowledge and particulars of the experience and knowledge on which he proposed to rely to enable them, it they so wished, to dispute or qualify the same as it or they applied to the particular application. Whilst the Court is "a specialist court with an exclusive area of jurisdiction and a fund of knowledge and experience which forms the basis of a body of principles regarding the regulation of the industry over which it has that jurisdiction" (Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241 Malcolm CJ at 250-251) in this case his Honour did not purport to rely on any principle, but upon his personal opinion of the likelihood of what might happen in the future and that despite his earlier findings which do not support that expressed opinion. It is not without significance that that same knowledge and experience did not prevent his Honour on 2 April 1992 from reaching the conclusions in para126.

*BC9301556 at 19*

I also have concern with his Honour's assertions as to the inability of the management of licensed premises, whatever the intention of that management might be, to prevent premises becoming crowded and noisy or to dictate the style and operation of the licensed premises. There are statutory obligations on licensees and the Court has power to restrict the number of persons permitted on licensed premises. I refer specifically to the observations of the Court at para111 of the reasons of 2 April 1992 as to the limits on the number of persons to be permitted on the proposed premises at any one time. Management has its own interests to consider and there seems no reason why, having regard to the conditions upon which it may operate and in its own interests, it should not be able to dictate the style and operation of the licensed premises. There is certainly no evidence to suggest any such inability. What his Honour seems to be saying is that "despite the need for a tavern licence to meet the reasonable requirements of the relevant section of the public, there is a risk that the management will not be able to limit its numbers to the permitted limit, to control noise or to control the style and operation of its premises and for that reason the premises will not meet the requirements of the public in whole or in part. And this despite his earlier findings that the section of the public upon which this application relies has a reasonable requirement for licensed facilities of a standard in design and operation which "may be" less attractive to the younger age group", that it cannot realistically expect those premises to be uncrowded and that the appellant's premises would provide for the reasonable requirements of the relevant section of the public. Those reasons do not suggest that these premises need be anything other than possibly ("may be") less attractive to the younger age group. That young people may resort there does not mean that the premises cannot provide for the relevant section of the public. The corollary to his Honour's reasons is that the reasonable requirements of the relevant section of the public can never be met whilst the affected area attracts a preponderance of young people. His reasoning in my view overlooks the fact that the crowding will be limited to the numbers permitted by law and the management in any event, and that the "crowd" might well be made up of members of the relevant section of the public of whatever age, or a mixture of those and others, and that he has himself excluded "crowding" from the "reasonable requirements" which the relevant section of the public are entitled to have provided by the premises.

*BC9301556 at 20*

It is also my opinion that in the circumstances of this case, having regard to the findings made on 2 April 1992, and the grant of the application on the same evidence on 11 June 1992, the finding of 17 February 1993 that the appellant's premises will not meet the requirements of the public in whole or in part for the reasons given was not open to his Honour. There was nothing in the reasons for decision of the Full Court of 16 December 1992 or in the orders made by

it which called for any re- consideration of the findings of fact already made and no justification for his Honour to undertake a complete rehearing of the evidence so as to arrive at different findings of fact from the identical evidence. In my opinion he was in error in doing so. See Orr v Holmes (1948) 76 CLR 632 at 640; Wollongong Corporation v Cowan (1955) 93 CLR 435 at 444, Quade v Commonwealth Bank of Australia (1991) 27 FCR 569; Re Barrell Enterprises [1972] All ER 631; Smith v NSW Bar Association Ltd (1992) 176 CLR 256 at 265; Coulton v Holecombe 162 CLR 1 at 8-11. Even were his Honour entitled to reconsider the evidence, having regard to his findings of 2 April 1992 and 11 June 1992, the conclusion he came to on 17 February 1993 was not open on that evidence, and was founded upon the irrelevant consideration of the preponderance of young people in the area who might also patronise the premises.

*BC9301556 at 21*

It would seem that, with some justification, his Honour was not confident of the correctness of his finding that the appellant had failed to establish that the grant of the removal is necessary to provide for the reasonable requirements of the public for liquor and related services because, in para13 of his reasons of 17 February 1993, he held that should that conclusion be not open and that the appellant has satisfied s38, he nevertheless refused the application in the public interest. His expressed reason for so doing was that to grant "a new tavern licence in the circumstances disclosed will not contribute to the proper development of the liquor, hospitality and related industries in the State and will not facilitate the use and development of licensed facilities reflecting the diversity of consumer demand but more likely than not provide more of the same in this area". That on its face is an exercise of the discretion conferred by s33. The principles upon which that discretion is to be exercised are set out in Palace Securities Pty Ltd v Director of **Liquor** Licensing (supra) Malcolm CJ at 249 et seq. S33(2) expressly provides that an application may, as a matter of discretion, be refused even if all requirements are met, or granted even if a valid objection is made out, but must be dealt with **"on its merits"**. As Mr Zelestis QC pointed out, the expressed public interest reason for refusal of the application is a statement of those objects of the Act set out in sub-para(a) and (c) of s5.

*BC9301556 at 22*

I agree with counsel that in utilising these provisions to justify the refusal, his Honour has erred and demonstrated a misunderstanding of the scope of the public interest. S5 sets out the objects of the Act. The provisions of the Act can be seen to be expressing and directed towards the achievement of those objects. Section 38 provides that the applicant must satisfy the Court that removal of the licence is necessary, having regard to the number and condition of licensed premises in the affected area, the manner and extent of their distribution, the extent and quality of the services they provide and, where so required, any other relevant factor as to which the Licensing Authority seeks to be satisfied. In the present case it is not suggested that there was any such other relevant factor. To be satisfied pursuant to s38 that the removal of a tavern licence is necessary to provide for the reasonable requirements of the public in an affected area having regard to those factors but to nevertheless refuse it because it would be against the public interest to grant another tavern licence in the area because it may produce "more of the same" is, in my opinion, again a contradiction. The discretion must be exercised reasonably (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 229). The application must be dealt with on its merits (s33) and consequently in my opinion those merits must be brought into account when determining how to exercise the discretion. When those merits produce the conclusion that removal of the licence is necessary to provide for the reasonable requirements of the public it would require, in my opinion, substantial evidence that its removal, in some recognisable sense, would be contrary to the public interest for it to be refused, and it is unreasonable to refuse it without any such evidence. In the present case, no such evidence is identified or suggested. All that is said in effect is that in its opinion, for reasons not identified or suggested to be based on the evidence, the grant would not conform with the objects enunciated in s5(a) and (c), a proposition which, having regard to the provisions of the Act for specifying the affected area (s71), the provisions relating to objections (s73 and s74), and the provisions of s33 and s38, is not self evident. I point out that his Honour's reasons dated 2 April 1992 make it clear that the objections lodged against the application and rejected by him were lodged by leave in the public interest. One ground of such objections was that the grant would be contrary to the public interest, a number of particulars being provided, including one that "the grant of the application will be contrary to the provisions and intent of the Liquor Licensing Act." His Honour held in para134 that the objectors had "plainly failed to establish any ground of objection". In his finding that to grant the application will be to provide "more of the same" his Honour is clearly referring to the other tavern licences in the affected area. This Court was taken through the evidence of what is being provided by such other taverns and what is proposed to be provided in the appellant's proposed premises. On that evidence it is abundantly clear that the expression "more of the same" is totally inappropriate to describe the proposed premises and is not based on the evidence. In my view, there was no evidence before the court to justify the exercise of its discretion to refuse the licence in the public interest. I would find that discretion to have been purportedly exercised contrary to the merits of the case and contrary to principle.

*BC9301556 at 23*

I note that in his reasons of 17 February 1993 his Honour refers to the ex parte application and the order made by him in that case but considers it of no significance in his re-consideration of this application. In my opinion, like his findings of 2 April 1992, it has considerable relevance to the matter and to the reasonableness of the purported exercise of his discretion.

*BC930 . 6 at 24*

For these reasons I joined in allowing the appeal and making the orders made consequent thereupon.

Wallwork J

I agree with the reasons for judgment of Mr Justice Franklyn and have nothing to add to them.

Anderson J

After argument on this matter on 24 September, I joined in the decision of the Court that his Honour's order should be set aside and that the application should be granted. I have had the opportunity to read in draft the reasons for judgment written by Franklyn J. I agree with those reasons and do not wish to add anything.

**Order**

Application granted.

Representation:

Mr C L Zelestis QC and Mr G H Murphy (instructed by Blake Dawson Waldron) appeared for the appellant.

No appearance for the respondent.