[2001] WASCA 410

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	EXECUTIVE DIRECTOR OF PUBLIC HEALTH -v- LILY CREEK INTERNATIONAL PTY LTD & ORS [2001] WASCA 410
CORAM	**:**	WALLWORK J WHEELER J MILLER J
HEARD	**:**	24 AUGUST 2001
DELIVERED	**:**	14 DECEMBER 2001
FILE NO/S	**:**	FUL 74 of 2001
BETWEEN	**:**	EXECUTIVE DIRECTOR OF PUBLIC HEALTH Appellant (Intervener) AND LILY CREEK INTERNATIONAL PTY LTD First Respondent (Applicant) PETER JOHN SAYERS DEBORAH LEE SAYERS Second Respondents (First Objectors) AUGZEN PTY LTD Third Respondent (Second Objector) AAPC PROPERTIES PTY LTD Fourth Respondent (Third Objector)

Catchwords:

Liquor licensing - Conditional hotel licence in Kununurra - Proposed drive-in liquor store - Whether proper regard paid to potential alcohol related health problems - Whether proper regard paid to expert evidence

Legislation:

Liquor Licensing Act (1988) (WA), s 5, s 28, s 63, s 64(3)

Result:

Order of Licensing Court varied - conditions imposed

Category: B

Representation:

Counsel:

Appellant (Intervener)	:	Mr G T W Tannin & Mr B P King
First Respondent (Applicant)	:	Mr A D Wilson
Second Respondents (First Objectors)	:	No appearance
Third Respondent (Second Objector)	:	No appearance
Fourth Respondent (Third Objector)	:	No appearance

Solicitors:

Appellant (Intervener)	:	Crown Solicitors Office
First Respondent (Applicant)	:	Frichot & Frichot
Second Respondents (First Objectors)	:	No appearance
Third Respondent (Second Objector)	:	No appearance
Fourth Respondent (Third Objector)	:	No appearance

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

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Flannery v Halifax Estate Agencies Ltd [2001] 1 All ER 373
H v Schering Chemicals Ltd (1983) 1 All Er 849

Case(s) also cited:

Lily Creek International v Sayers & Ors; unreported; Liquor Licensing Court of WA (Greaves J); CRT 35/98; 9 December 1999
Executive Director v Lily Creek (2000) 22 WAR 510
Re Lily Creek International; Lily Creek International Pty Ltd v Sayers & Ors [2001] WALLC 4
Kelly v Liquor Licensing Court of New South Wales & Ors (Unreported; SCt of NSW Dunford J; 15 July 1996, 11729 of 1994); BC-9603021) 5

1 **WALLWORK J**: On 19 April 2001, the first respondent was granted a conditional hotel licence for a proposed hotel on Victoria Highway at Kununurra. The licence will allow the sale of packaged liquor from a drive-in liquor store on the premises.

2 The Executive Director of Public Health appeals from the decision to grant the licence on a number of grounds. The first is that the learned Licensing Court Judge failed to have proper regard to the potential for alcohol-related harm or ill-health to people, or any group of people, in and in the vicinity of Kununurra due to the increased availability and use of liquor arising from the granting of the licence. Particulars of that ground include that the learned Judge:

> "failed to have proper regard to the minimisation of alcohol-related harm or ill-health to people, or any group of people, in and in the vicinity of Kununurra arising from the granting of the First Respondent's application;
>
> failed to have proper regard to the uncontroverted evidence that the granting of the Respondent's application would detract from the practical avenues for indigenous communities to create and implement strategies in a manner that promotes self-determination and culturally appropriate methods of minimising the harm associated with alcohol abuse;
>
> failed to have proper regard to the uncontroverted evidence of Mr Edward Carlton, Dr Stephen Lefman, and Professor Dennis Gray about the potential dangers of alcohol-related harm or ill-health to people, or any group of people in and in the vicinity of Kununurra posed by the granting of the Respondent's application at its proposed location on the Victoria Highway; and
>
> failed to properly weigh the primary object of alcohol-related harm minimisation contained in section 5(1) of the *Liquor Licensing Act 1988* with the subsidiary objects contained in section 5(2)."

3 There are two further grounds of appeal. Ground 3 is similar to ground 1. It is:

> "3. The Learned Judge erred in law in failing properly to consider whether the objects in section 5(2) of *Liquor Licensing Act 1988* (the Act) and the reasonable

> requirements of the public under section 38 would be met by granting a restricted hotel licence or by imposing conditions under section 64(3)(c) of the Act."

4 Ground 2 is that the learned Judge erred in substituting and accepting his own unevidenced opinion for that of the uncontroverted expert opinion evidence of Professor Dennis Gray.

5 The Court was advised that the second, third and fourth respondents to the appeal did not wish to appear and would abide the decision of the Court.

6 This is the second time that the question of this hotel licence has been before this Court. On 12 September 2000, the Court allowed an appeal against the granting of an unrestricted hotel licence and remitted the matter to the Liquor Licensing Court to be dealt with according to law in the light of the reasons given by the Full Court on that occasion. When the matter came back before the Licensing Court, and by agreement, no further evidence was called.

7 In the earlier appeal, Ipp J stated the reasons of the court. Owen and Miller JJ agreed with his Honour's reasons.

8 At 520 of the report, Ipp J said:

> "Professor Gray expressed the opinion that the greater the availability of alcohol the greater the level of consumption. In his evidence-in-chief he expressed the opinion that:
>
> '[I]t is likely that the granting of another liquor licence in Kununurra will result in increased consumption and related harm - although it is not possible to predict the magnitude of this.' "

9 Because the expert evidence which was commented on by the first Appeal Court was the same evidence for the decision from which this appeal is brought, I now set out part of what Ipp J had to say about it before the matter was remitted to the learned Judge to be reconsidered. Ipp J said at [51]:

> "Professor Gray was an important witness called by the Executive Director. He is an associate professor of medical anthropology at the National Centre for Research for the Prevention of Drug Abuse, Curtin University of Technology.

He holds degrees of doctor of philosophy in anthropology and master of public health, and for 24 years has worked as a researcher, teacher and practitioner in the public health field, particularly as it applies to Aboriginal people. He has written widely on Aboriginal health issues, has been involved in research and evaluation of alcohol use upon Aboriginal people, and has conducted research on liquor licensing laws and their effects on Aboriginal people. It was not suggested that he was not an expert in the areas in respect of which he testified.

According to Professor Gray, the grant of the licence would lead to increased consumption of alcohol by the Aboriginal communities in and in the vicinity of Kununurra, and this, in turn, would have adverse effects upon various programs initiated by the local Aboriginal people to reduce alcohol consumption and the harm to them that flowed from that. He described the harm as being an increase in arrest rates for alcohol-related offences, an increase in the mortality rate for alcohol-related conditions that was already 4.2 times the norm in Western Australia, and an increased hospital discharge rate for alcohol-related conditions among Aboriginal people.

Professor Gray was of the view that there was a positive relationship between levels of per capita consumption in populations and the frequency and range of social and health problems. This he sought to establish by reference to a considerable body of research that extended back for 30 years. He said that international literature and research have demonstrated that consumption levels are influenced by the availability of alcohol. He was of the opinion that while earlier work was equivocal in its results:

> 'The most recent methodologically sound studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales. Outlet density has also been shown to be associated with the frequency of alcohol-related motor vehicle crashes.'

He stated that experts in the field 'are unanimous in their conclusions that - although the relationship is complex and may vary in magnitude over time and place – there is a clearly demonstrable, positive relationship between the availability of

alcohol and the level of consumption.' He expressed the view that increased alcohol consumption in Kununurra would adversely affect the health of the local Aboriginal communities, would result in increases in the annual rates of arrest for alcohol-related offences, and in an increased number of motor vehicle accidents in the area. He stressed his opinion that alcohol consumption in Kununurra had not yet reached saturation point. He was therefore of the view that one more licence could make an appreciable difference.

The Executive Director relied further on the testimony of Sgt Murray, the senior sergeant in charge of the Kununurra police station, a man with considerable experience of alcohol-related offences in Aboriginal communities. Unlike Professor Gray, Sgt Murray was of the opinion that the grant of the licence would be unlikely to alter to any marked degree the overall amount of alcohol purchased in Kununurra.

It was an open question as to whether the view expressed by Professor Gray was to be preferred to the view expressed by Sgt Murray. Plainly, the view expressed by Professor Gray was based on research and experience and was fortified by academic analysis. Sergeant Murray's view was based on his personal experience. It was a matter for the learned Judge to determine which of these two views he preferred. He does not appear to have embarked on this exercise.

Sergeant Murray was of the opinion that the proposed drive-in bottle store would attract people in the Aboriginal community to the vicinity of that outlet which was on the fringe of the town and on the highway which allows passage of heavy vehicles. He expressed the view that the safety and security of the people attracted to that area would be at risk.

Mr Edward Carlton, the co-ordinator of the Waringarri Alcohol Project, testified. Mr Carlton has been concerned with the containment of alcohol abuse in the Kununurra area for some 10 years. He has considerable experience in the area and holds the degree of bachelor of science and Aboriginal community management and development and has studied and worked in the area of alcohol education amongst the community for many years. He is plainly an expert on the topic. He expressed the opinion that the grant of a licence would break down voluntary

arrangements and agreements made by the Aborigines in the Kununurra area concerning limitation of alcohol use. He said that it would result in 'a dramatic increase in access to alcohol by Aboriginal people'. He was of the view that that would 'increase the level of problems in Kununurra and surrounding areas'. He said, also:

> 'The Victoria Highway is a major road and carries a high volume of traffic during the tourist period. Any alcohol licence on this thoroughfare will increase the risks of an alcohol-affected person being injured especially when one town camp is directly over the road. Any increase in alcohol accessibility will increase the level of alcohol and related problems to Aboriginal people in Kununurra and surrounding communities as already described.'

Dr Stephen Lefmann, a medical practitioner with the East Kimberley Aboriginal Medical Service, was also called as a witness by the Executive Director. Dr Lefmann testified that he had been employed with the East Kimberley Aboriginal Medical Service for nearly 13 years. He described in graphic terms the health problems suffered by Aboriginal children and Aborigines generally in consequence of alcohol consumption. He expressed the opinion that the problem of drunkenness 'and its spin-off problems' would increase 'enormously' if the licence were to be granted.

The opinion evidence to which I have referred was not controverted. Other than the internal conflicts between the testimony of Professor Gray and Sgt Murray as to whether a further outlet would result in increased alcohol consumption, there were no conflicting opinions. Whether the conflicting inferences drawn by Professor Gray and Sgt Murray give rise to equal degrees of probability is seriously open to question. After all, Professor Gray based his inference on a considerable body of research as well as experience, while it is not clear what gave rise to the opinion expressed by Sgt Murray. Further, Professor Gray is an acknowledged expert on the relationship between the availability of alcohol and the level of consumption, while Sgt Murray, arguably, is not."

10 At [66], Ipp J said:

> "The opinions to which I have referred above were all based on inferences drawn from past facts which were undisputed, and were based on many years of experience in the particular field. Many of the opinions were based on research and analysis as well."

11 At [72], Ipp J said:

> "Professor Gray's testimony concerning the relationship between availability of liquor and consumption of liquor was said by him to be based on his research and experience. In my opinion, this question does not fall within the ordinary experience of a judicial officer. It is open to serious question (on which I do not express a concluded view) whether even a specialist tribunal such as the Liquor Licensing Court has the knowledge and experience with which to deal with the issue, but this is not the ground on which the factual finding was justified by the learned judge. As mentioned, his Honour put it on the basis that the issue was simply a question within the ordinary experience of the trier of fact - in other words, by any court. In my opinion, this is an issue which could only be reliably commented upon by a person who is knowledgeable on the issue by reason of appropriate research or experience or both. It is not a matter within the ordinary knowledge of a judicial officer."

12 Having reconsidered the matter after it was referred back to him, the learned Judge said:

> "I have re-examined the evidence presented on behalf of the Intervener in the context of the overall factual questions and I conclude on that evidence that there is at most no more than a small possibility that the grant of this application may cause harm or ill-health to some people of Aboriginal descent due to the use of liquor. While that possibility must be taken into account when considering whether to grant or refuse the application, or to grant it subject to conditions, I am of the opinion on the evidence in this case that the possibility and extent of any increased harm to that section of the public is not such that the court should refuse the application in order to minimise harm of ill-health."

13 It was contended for the appellant that there was no basis for that finding of his Honour and that it could not follow from the evidence in the case which is summarised in the extracts above from the reasons of Ipp J.

14 In the course of his reasons, the learned Judge had referred to evidence that "the reviews also conclude that while earlier work was equivocal in its results, the most recent, methodologically sound, studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales". His Honour referred to evidence that "… the reviewers are unanimous in their conclusions that although the relationship is complex and may vary in magnitude over time and place, there is a clearly demonstrable, positive relationship between the availability of alcohol and the level of consumption". Further that "the weight of the empirical evidence has supported the argument that limitation on the availability of alcohol can be an effective part of a public health approach to reduce alcohol consumption".

15 His Honour said that the question which required consideration was the certainty of the facts on which Professor Gray's opinions were based and the weight which should be attributed to his opinion that the grant of the application may increase consumption of packaged liquor in the affected area and may thereby cause harm or ill-health to people in the affected area, or any group of people in the affected area. His Honour concluded:

> "In my opinion, however, the facts and research to which Professor Gray refers establish no satisfactory foundation for the opinion that the grant of this application may increase the consumption of packaged liquor in this affected area."

16 His Honour also referred to the evidence of Mr Carlton that:

> "This licence includes a walk-in and buying alcohol option which is against the voluntary code already in operation. This aspect if approved is likely to result in the breaking down of the code in other alcohol providers and a dramatic increase in access to alcohol by Aboriginal people. This will increase the level of problems in Kununurra and surrounding areas. … The Victoria Highway is a major road and carries a high volume of traffic during the tourist period. Any alcohol licence on this thoroughfare will increase the risks of an alcohol affected

> person being injured especially when one town camp is directly over the road."

17 That evidence concerned the fact that the proposed premises are on the main highway between Darwin and Perth, just outside of Kununurra, and that there is considerable traffic on that highway. It was contended that Aboriginal people were likely to buy alcohol at the proposed premises and then congregate on the other side of the highway near the shore of the lake to drink it. This, it was said, could result in people affected by alcohol crossing the highway and perhaps being injured.

18 His Honour referred to the evidence of Dr Lefmann who, amongst other things, said:

> "The foreshore of Lake Kununurra is almost opposite this motel complex. Aboriginal people already congregate in one area of this foreshore to drink alcohol on a daily basis. Having a liquor outlet close nearby will only promote a higher proportion of these people congregating here and making a nuisance of themselves when in a state of drunkenness. … Vehicles using the highway are only metres away from this drunken group of people. … I personally see this drunkenness problem and its spin-off problems increasing enormously if liquor is made available from yet another drive-through bottle shop."

19 His Honour also referred to the evidence of Sergeant Murray, which was to the effect that the proposed outlet was at the fringe of the town and on the highway which allows passage of heavy vehicles. His Honour said: "He expressed the view that the safety and security of people attracted to that area would be at risk".

20 There was evidence before the Court that during 1998 there were two road fatalities involving Aboriginal men who were intoxicated and lying on the carriageway at night.

21 The learned Judge concluded:

> "I accept that the grant of this application will increase access to liquor by people residing in and resorting to the affected area, including people of Aboriginal descent. Once again, so far as the evidence of Mr Carlton and Dr Lefman is understood to suggest that the grant of this application may increase consumption of liquor in this affected area, I observe there is no research or experience to support that conclusion."

22 When referring to evidence of Professor Gray and a text to which Professor Gray had referred, which had been produced by a body set up by the European office of the World Health Organisation, his Honour said:

> "In this context, it is also worth noting that while research may indicate that increased outlet density may increase sales, no such research demonstrates an equivalent increase in per capita consumption."

23 In my view, that last comment by the learned Judge reveals an error in his approach, as does his further comment that:

> "Furthermore and importantly, it is to be observed that Professor Gray's opinion refers to the effect of outlet densities on sales and not consumption. While the research demonstrates a correlation between sales and consumption, in my opinion neither the research nor the evidence as a whole in this case demonstrates that sales in this affected area will increase significantly as a result of any grant of this licence. Furthermore, the overseas research is less than convincing in supporting the conclusions advanced."

24 The learned Judge, when discussing Professor Gray's evidence, had also said:

> "Most of the research was carried out overseas in circumstances and conditions far removed from an affected area in a small West Australian country town …."

There was no evidence before the Court to suggest that there was something particular about a small West Australian country town which made Professor Gray's evidence inapplicable.

25 His Honour then said that if he was wrong in his conclusion concerning the weight which Professor Gray's opinion was to be given:

> "… the evidence suggests to me there is no more than a possibility of a small increase in consumption of liquor in this affected area from a grant of this application. There is, therefore, no more than a possibility of a small increase in harm or ill-health consequent upon the grant of this application."

26 His Honour then referred to the opinion of the witnesses that the grant of the application might increase the risk of a person affected by

liquor being injured on the Victoria Highway in proximity to the premises and said:

> "On the evidence there is already a risk that those people who congregate on the foreshore and are affected by liquor may come to harm on the highway. In my opinion the likelihood of increased risk of harm resulting from the grant of this application must be small, since this group must already cross the highway moving between the town of Kununurra and the foreshore. The opinion of these witnesses is that the proposed premises will also attract people of Aboriginal descent to the premises and to the foreshore who do not currently frequent the foreshore. This is also a matter of prediction. Given the number of licensed premises in the town, I think there is a possibility of a small increase in the number of people of Aboriginal descent who may be attracted to these premises, not other premises. There must, therefore, be a similar likelihood of harm to such people if they become intoxicated."

27 It was submitted for the appellant that the findings of the learned Judge that the increase in consumption of liquor and risk of harm would be small was contrary to all the evidence and revealed error in his Honour's approach to the assessment of the evidence.

28 Reference was made to his Honour's remark when referring to Dr Lefman's evidence that the grant of the application may increase consumption of liquor in the affected area, that "I observe there is no research or experience to support that conclusion". It was submitted that that conclusion ignored the expertise and experience of Dr Lefman, who had been working in the area for 13 years and who had given detailed evidence of his experience of the effect of alcohol on Aboriginal people and their children. That evidence had not been contradicted. To say that there was no "experience" to support his conclusions was obviously contrary to the evidence.

29 Counsel for the appellant submitted that in making the point that Professor Gray's opinion referred to the effect of outlet densities on sales and not on consumption, the learned Judge had failed to draw the obvious inference from Professor Gray's evidence.

30 Professor Gray had said "an increase in alcohol sales can be expected from the opening of a further outlet, and this would be likely to result in an appreciable rise in alcohol consumption". The learned trial Judge came

to the conclusion that the evidence "suggests to me that there is no more than a possibility of a small increase in consumption".

31 In the earlier Full Court decision, Ipp J said (at 58):

> "Dr Lefman expressed the opinion that problems of the drunkenness and its spin-off problems would increase enormously if the licence were to be granted. The opinion evidence to which I have referred was not controverted."

32 It was submitted that the learned Licensing Court Judge had erred in law because the uncontradicted testimony from experts had not been given its proper due. His Honour had come to his own conclusions contrary to that evidence.

33 It was conceded for the first respondent that the notion that there might be only a small increase in the consumption of liquor had not been suggested by anybody in evidence. The evidence had been to the effect that the magnitude of the increase was unpredictable.

34 His Honour was required to judge whether the opening of the new outlet was consistent with the primary objects of the Act in s 5, one of which is "(1)(b) To minimise harm or ill-health caused to people or any group of people, due to the use of liquor".

35 His Honour came to the conclusion that "There is, therefore, no more than a possibility of a small increase in harm or ill-health consequent upon the grant of this application". That conclusion in my opinion was inconsistent with all the evidence and the medical evidence that children in the community were being seriously harmed by reason of alcohol related neglect.

36 With respect to Sergeant Murray's evidence that the problems "may be exacerbated by having the outlet on the fringe of town and on the highway which allows passage of heavy vehicles", and from all the evidence in this case, it is a fair inference that if a new bottle shop was opened at the relevant premises, sales of alcoholic liquor would increase in that area and Aboriginal people would purchase liquor from the outlet and take it across the highway to drink it with their friends in the area near the edge of the lake opposite the premises.

37 There was in my view no evidence to support the finding that "… the evidence suggests to me there is no more than a possibility of a small increase in consumption of liquor in this affected area from a grant of this

application". There was evidence that there could be an appreciable increase in sales. It is more than likely, in all the circumstances, that an appreciable increase in sales would result in an appreciable increase in consumption.

38 For the above reasons, in my opinion, his Honour erred in downgrading, without sufficient reasons, the expert evidence which was not contradicted in its overall effect. Therefore the appeal should be allowed.

39 If a hotel licence was granted for these premises, there would be a public bar in the hotel and people could walk into that bar and buy packaged liquor. They could take it away just as they could from a bottle shop.

40 In my view and on all the evidence, a condition which is required in this case is that people who are not guests at the hotel, or guests of guests at the hotel, should not be able to buy packaged liquor at the premises, whether from a bar or a bottle shop, and walk across the road and drink it. Further, in my view, another condition should be imposed so that persons who are not guests or guests of guests, will not be able to drink at a bar on the premises and then walk across the highway in an alcohol affected condition and be injured.

41 At the hearing of the application, we were informed that the question of persons buying liquor from a bar was not discussed in detail. However, it would be permissible under s 63 of the Act to impose conditions such as those suggested above on an ordinary hotel licence.

42 This matter has now been before this Court twice. Pursuant to s 28(5) of the Act, this Court may affirm, vary or quash a decision subject to appeal, or remit the matter to the Licensing Court for further hearing with such directions, if any, as it thinks fit, and make any incidental or ancillary order.

43 In my view, it would cause unnecessary trouble and expense to all the parties to send this matter back to the Licensing Court to have it considered on a third occasion. This Court has sufficient evidence before it to draw the conclusion that to allow general packaged liquor sales from the proposed premises, or to have a public bar where people can drink and then cross the busy highway, would be contrary to the provisions of the Act. It should therefore, in my opinion, vary the order made by the learned Judge and impose the conditions I have referred to above.

44 The reason for granting a hotel licence with conditions attached to it, rather than a hotel restricted licence is that, in the case of a hotel restricted licence, only a guest can buy liquor. With the conditions proposed above, guests and guests of those guests would be allowed to purchase liquor and drink it on the premises or take it away.

45 **WHEELER J**: I have had the advantage of reading in draft the reasons for judgment of Wallwork J. I gratefully adopt his Honour's summary of the history of this matter and am generally in agreement with his Honour's analysis of the reasoning of the learned Licensing Court Judge. I wish however to add some brief additional observations of my own.

46 By reason of s 28 of the *Liquor Licensing Act*, an appeal lies in this matter only upon a question of law. At least on their face, there is a question whether some of the grounds of appeal in this matter do raise questions of law. A number of them complain that the learned Judge failed to have "proper regard" to certain matters or to "properly" weigh evidence. It is by no means clear, in the way in which these matters were developed, that they were directed to anything other than faulty or illogical reasoning, rather than an error of law properly so called.

47 In ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321, Mason CJ discussed at 355-360 the relationship between want of evidence, insufficiency of evidence, and error of law at common law. While his Honour accepted that there was room for argument as to whether findings are reviewable for error of law on the ground that they could not reasonably be drawn from the evidence, his Honour noted that at common law, according to Australian authorities, want of logic was not synonymous with error of law and that, so long as there was some basis for an inference, even if the inference appeared to have been drawn as a result of illogical reasoning, an error of law could not be established. However, his Honour averted also to the traditional understanding that whether there was any evidence of a particular fact was itself a question of law, and the further question whether a particular inference was capable of being drawn from facts was also a question of law.

48 If these are questions of law, then it follows that a finding that inferences are not open from particular facts, when those inferences are open, is also an error of law. It seems to me that this is the primary error which the learned Judge made, and it is the error which is largely captured in ground 2 of the grounds of appeal which reads:

> "The learned Judge erred in law in substituting and accepting his own unevidenced opinion for that of the uncontroverted expert opinion evidence of Professor Gray."

49 Professor Gray took the view that a further liquor outlet would increase alcohol consumption, and, hence, harm which might flow from it. His Honour did not accept that view expressed by Professor Gray. Although his reasons refer to a conclusion about the "weight" due to Professor Gray's opinion, it is in my view reasonably plain from the way in which the learned Judge dealt with that opinion that he accorded it no weight, and for the reason that he took the view that the underlying facts to which Professor Gray referred could not justify the drawing of the inference of increased consumption.

50 The learned Judge began by quoting a passage from ***H v Schering Chemicals Ltd*** (1983) 1 All Er 849 at 853, at which Bingham J said:

> "If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper."

51 The learned Judge then dealt with the views of Professor Gray in a manner which it is necessary to set out in full. He said:

> "It should be said immediately the opinion of Professor Gray under consideration is obviously an opinion which he honestly holds. It is equally obvious that it is an opinion which he has reached by reasoning from research carried out in quite different circumstances from those existing in the affected area in this case. Most of the research was carried out overseas in circumstances and conditions far removed from an affected area in a small West Australian country town where, contrary to the opinion of Professor Gray, the existing number of outlets in proportion to the population is not above average. As Ipp J pointed out, Professor Gray expressed the opinion that the most recent methodologically sound studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales. So far as the research relied upon does demonstrate that effect, the outlet density in this particular affected area is not above average. Furthermore, and importantly, it is to be observed that

> Professor Gray's opinion refers to the effect of outlet densities on sales and not consumption. While the research demonstrates a correlation between sales and consumption, in my opinion neither the research nor the evidence as a whole in this case demonstrates that sales in this affected area will increase significantly as a result of any grant of this licence.
>
> Furthermore, the overseas research is less than convincing in supporting the conclusions advanced. Having expressed these views, I should make it abundantly clear again that I accept the opinion of Professor Gray that there is a positive relationship between levels of per capita consumption and the frequency and range of social and health problems in this affected area.
>
> If I am wrong in my conclusion about the weight which Professor Gray's opinion is due in this regard, it is then necessary to determine on the evidence the extent of any increase in consumption likely upon a grant of this application. The question which now requires consideration is the extent of such increase in consumption by reference to a degree of probability. Given the current average outlet density in the affected area, and notwithstanding that in absolute terms I accept the affected area has not reached saturation point, the evidence suggests to me there is no more than a possibility of a small increase in harm or ill health consequent upon the grant of this application. If it is assumed that such a possibility exists on the evidence, then regard must be had to that possibility in considering the exercise of discretion under s 33 of the Act in deciding whether a grant should be made at all and if so, whether subject to conditions necessary to reduce that harm."

52 So far as the rejection of the opinion of Professor Gray is concerned, it seems that the learned Judge advanced four reasons. Those reasons were that:-

1. Most of the research was carried out overseas in conditions not those of a "small Western Australian country town";
2. The outlet density in this particular area is not above average;
3. Professor Gray's opinion is based upon sales, and there is no evidence that an increase in sales will result in an increase in consumption; and

4. The overseas research is "less than convincing" in supporting the conclusions advanced.

53 The reasons advanced for suggesting that the research to which Professor Gray referred is not capable of supporting the inference drawn by Professor Gray, are incapable of leading to that conclusion. So far as the first of the reasons is concerned, there was no evidence before the learned Judge which could suggest that the research referred to was not capable of being applied in a small West Australian country town. So far as the second reason is concerned, there was no evidence that suggested that the correlation between increased numbers of outlets and increased consumption applied only where outlet densities were above average. The third reason is contrary to the evidence to which the learned Judge referred, and which he apparently accepted, that there was a demonstrated correlation between sales and consumption. So far as the fourth reason is concerned, there is simply an absence of reasons which would permit one to evaluate the proposition that the overseas research is "less than convincing".

54 Although it is concerned with the somewhat different case of an appeal at large, rather than an appeal confined to a question of law, there is a valuable summary of the way in which a Judge should approach the evidence of an expert such as Professor Gray, in the decision in ***Flannery v Halifax Estate Agencies Ltd*** [2001] 1 All ER 373. It is there observed that where a dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, "the judge must enter into the issues canvassed before him and explain why he prefers one case over another … Transparency should be the watchword" (at 378). Because of the way in which the learned Judge in this case structured his reasons, it appears that expert evidence has been rejected, on the basis that it lacks a factual foundation capable of supporting it, when it was adequately supported by underlying facts referred to in evidence.

55 It further appears that in rejecting that expert evidence, the learned Judge erroneously thought that he was assessing the "weight" to be given that evidence, when he was really engaged in considering whether to accept or reject it. This seems to me to be the only conclusion open from the final paragraph I have quoted, which expresses an alternative view which his Honour would take, in the (hypothetical) event that <u>any</u> weight were to be attributed to Professor Gray's opinion that there would be an increase in consumption.

56 In any event, it seems to me that the dismissal of the views of Professor Gray by reference to considerations which are either unspecified or which do not in any way detract from the conclusions which the Professor reached, is in the end no more than a different way of committing the error, identified previously by this Court in its earlier decision in [2000] WASCA 258 at par 66, of dismissing as "conjecture guess work or surmise" the opinions of an expert based upon undisputed past facts and many years of experience.

57 Looking to the final paragraph which I have quoted from the reasons of the learned Judge, in which there is expressed a view which is apparently in the alternative to the primary conclusion reached, it was conceded before us that there was no evidentiary foundation for the conclusion that there was no more than a possibility of a "small" increase in consumption and hence of a "small" increase in harm or ill health; indeed, it was the case of the first respondent that the increase in consumption and of harm or ill health, if any, was unquantified and unquantifiable. The error in this alternative view, then, was the drawing of an inference unsupported by any evidence.

58 I would add in that context one observation which is only indirectly raised by the grounds of appeal, but which nevertheless reveals an error of a kind to which attention should be drawn. The undisputed evidence was that the level of alcohol related harm and ill health in the community in question was already significantly higher than the average level of such harm in the Western Australian community. There was evidence of two deaths of persons who had been run over on the road while apparently lying upon it intoxicated at night, and there was graphic evidence of neglect and malnutrition of children, to a very serious degree, which was a consequence of alcohol consumption.

59 The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather, it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level

of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made. It appears that the learned Judge approached his task without considering the relevance of the existing levels of alcohol-related harms.

60 **MILLER J**: I have had the advantage of reading in draft the reasons published by Wallwork J. I agree with them and with the orders proposed and I have nothing to add.

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE FULL COURT (WA)
CITATION	:	EXECUTIVE DIRECTOR OF PUBLIC HEALTH -v- LILY CREEK INTERNATIONAL PTY LTD & ORS [2001] WASCA 410 (S)
CORAM	:	WALLWORK J WHEELER J MILLER J
HEARD	:	24 AUGUST 2001 & 28 MARCH 2002
DELIVERED	:	14 DECEMBER 2001
SUPPLEMENTARY DECISION	:	14 MAY 2002
FILE NO/S	:	FUL 74 of 2001
BETWEEN	:	EXECUTIVE DIRECTOR OF PUBLIC HEALTH Appellant (Intervener) AND LILY CREEK INTERNATIONAL PTY LTD First Respondent (Applicant) PETER JOHN SAYERS DEBORAH LEE SAYERS Second Respondents (First Objectors) AUGZEN PTY LTD Third Respondent (Second Objector) AAPC PROPERTIES PTY LTD Fourth Respondent (Third Objector)

Catchwords:

Liquor licensing - Hotel licence conditions - Restrictions - Jurisdiction of court to make orders

Legislation:

Liquor Licensing Act 1988, s 41, s 63, s 64, s 108

Result:

Order made

Category: B

Representation:

Counsel:

Appellant (Intervener)	:	Mr G T W Tannin
First Respondent (Applicant)	:	Mr Mr G D Crocket
Second Respondents (First Objectors)	:	No appearance
Third Respondent (Second Objector)	:	No appearance
Fourth Respondent (Third Objector)	:	No appearance

Solicitors:

Appellant (Intervener)	:	State Crown Solicitor
First Respondent (Applicant)	:	G D Crocket & Co
Second Respondents (First Objectors)	:	No appearance
Third Respondent (Second Objector)	:	No appearance
Fourth Respondent (Third Objector)	:	No appearance

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

Executive Director of Public Health v Lily Creek [2001] WASCA 410
Executive Director v Lily Creek (2000) 22 WAR 510
FACAC Pty Ltd v Talbot Hotel Group Pty Ltd [2001] SASC 445
McAdam v Robertson (1999) 73 SASR 360; [1999] SASC 169

Case(s) also cited:

Nil

1 **JUDGMENT OF THE COURT**: The background to this matter is to be found in the decisions of this Court in ***Executive Director v Lily Creek*** (2000) 22 WAR 510 ("***Lily Creek No 1***") and in ***Executive Director of Public Health v Lily Creek*** [2001] WASCA 410 ("***Lily Creek No 2***").

2 A question has arisen as to the jurisdiction of the court to make orders giving effect to the view expressed in ***Lily Creek No 2***, which was put in the following way in the reasons for decision of Wallwork J in that case (at [40]):

> " ... another condition should be imposed so that persons who are not guests or guests of guests, will not be able to drink at a bar on the premises and then walk across the highway in an alcohol affected condition ... ".

As Wallwork J notes in ***Lily Creek No 2***, the Full Court was informed that the question of persons buying liquor from the bar was not discussed in detail at the hearing of the application. Having reviewed the transcript of the appeal hearing in ***Lily Creek No 2***, we think it is fair to say that the court from time to time expressed the view that it was undesirable that those who are not either guests or the guests of guests should be able either to drink at the proposed premises or to buy packaged liquor there, but that, despite those references, the discussion at the hearing of the appeal was overwhelmingly concerned with the question of whether there should be a prohibition or a restriction upon the sales of packaged liquor, rather than upon the ability of any person to drink at the premises.

3 Notwithstanding the occasional references during the course of argument to the question of persons drinking alcohol on the premises, a condition in the terms indicated by Wallwork J appears not to have been in the contemplation of the parties when the court delivered its reasons for decision in ***Lily Creek No 2*** on 14 December 2001. Because the alternative draft minutes of orders prepared on behalf of the appellant did not reflect the views expressed in those reasons and because it was not convenient to formulate an order in those terms at the time, the parties were given liberty to apply in relation to the precise form of the conditions which should be imposed. It was not intended that that liberty to apply should give rise to further consideration of the desirability of making an order containing a condition of the kind which had been indicated by the court in its reasons.

4 However, it subsequently appeared that the parties were not able to agree upon an appropriate form of order. The matter was relisted before us in February with a view to the finalisation of orders and on that

occasion the first respondent, represented by a director, raised the question of the court's jurisdiction to make such an order and sought an adjournment in order to obtain legal advice.

5 On 28 March this year, the matter was relisted in order to deal with that jurisdictional argument. The appellant conceded that if there was a real issue as to the jurisdiction of the court to make an order in the terms proposed, then that matter ought to be resolved notwithstanding that it had not been the subject of submission on the hearing of the appeal. This is not an appropriate occasion to consider in detail the question of when a Full Court is able to re-open its own earlier decision in the same matter, a question discussed in some detail in the Supreme Court of South Australia in ***McAdam v Robertson*** (1999) 73 SASR 360; [1999] SASC 169. For the present, it is sufficient to accept that where there are no perfected orders and a real question arises as to the court's jurisdiction to make an order, it is generally desirable for the court to determine that jurisdictional issue; at least that is so where, as here, it appears that a party may have been taken by surprise in relation to the precise form of order likely to be made.

6 The relevant provisions of the *Liquor Licensing Act 1988* are as follows:

> "**41. Hotel licences**
>
> (1) For the purposes of this Act –
>
> (a) where a hotel licence is not subject to the condition referred to in subsection (4) it shall be referred to as a tavern licence; and
>
> (b) where a hotel licence is subject to a condition –
>
> (i) prohibiting the sale of packaged liquor to persons other than lodgers; and
>
> (ii) restricting other sales to liquor sold for consumption on the licensed premises,
>
> it shall be referred to as a hotel restricted licence,
>
> and an application may be made for a tavern licence if the applicant does not seek a licence for a hotel

offering accommodation, or for a hotel restricted licence only.

(2) Subject to this Act, during permitted hours the licensee of a hotel licence is authorised to keep open the licensed premises, or part of those premises, and, while those premises are open, is required –

(a) to sell liquor on the premises to any person for consumption on the premises; and

(b) unless the licence is a hotel restricted licence, to sell packaged liquor on and from the premises to any person.

...

63. Restriction on power to vary terms fixed or conditions imposed by the Act

The licensing authority may, of its own motion or on the application of the licensee –

(a) where the permitted hours applicable under section 97 to particular licensed premises are to be the hours specified in the licence or permit which relates to those premises, vary any term or condition specifying those hours;

(b) in relation to a particular licence, exempt that licensee from a requirement imposed by or under this Act to keep the premises open for the sale of, and to sell, liquor there during any particular day or part of a day;

(c) vary a hotel licence in accordance with section 41(6) or (7);

(ca) remove the restrictions on a club restricted licence so that it is converted to a club licence;

(cb) in relation to a hotel licence, other than a hotel restricted licence, vary the requirement under section 41(2)(a) to sell liquor, while the licensed premises are open, for consumption on

the premises if the premises are temporarily damaged or rendered unsuitable by an unforeseen event;

(d) vary the terms of a club restricted licence in accordance with section 48(9); or

(e) vary, in such a manner as to become more restrictive, a term fixed or a condition specifically imposed by this Act in relation to the licence,

but is not otherwise empowered to vary or cancel a term specifically fixed or a condition specifically imposed by this Act, as distinct from pursuant to this Act, in relation to licences of that class or permits of that kind, except in relation to such provisions or circumstances as may be prescribed.

64. Power of licensing authority to impose, vary or cancel conditions

(1) Subject to this Act, in relation to any licence, or to any permit, the licensing authority may at its discretion impose conditions -

(a) in addition to the conditions specifically imposed by this Act; or

(b) in such a manner as to make more restrictive a condition specifically imposed by this Act,

and may vary or cancel any condition previously imposed by the licensing authority, having regard to the tenor of the licence or permit and the circumstances in relation to which the licensing authority intends that it should operate.

...

(3) Without derogating from the generality of the discretion conferred on the licensing authority, the licensing authority may impose conditions which it considers to be in the public interest or which it considers desirable in order to -

...

(c) ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk

...

(cc) minimize harm or ill-health caused to people, or any group of people, due to the use of liquor;

...

(5) A condition may be imposed under this section which varies the obligation imposed by section 108(2)(a).

...

108. Certain services to be provided

...

(2) The licensee of any licensed premises to which this section applies –

(a) subject to subsection (3) and any condition of the licence, shall not without reasonable cause (the burden of proof of which shall lie on the licensee) refuse –

(i) to receive a person on the licensed premises; or

(ii) to sell liquor there to any person,

at any time that the premises are open for business during permitted hours; or

... "

7 The first respondent asserts that by reason of those provisions, properly understood, it is not open to the court to impose a condition which contradicts the requirement in s 41(2)(a) which is to the effect that, whilst the premises are open, the licensee is required to sell liquor on the premises to any person for consumption on the premises. We think that this analysis is correct.

8 Section 41 imposes three requirements on the holder of a hotel licence. One, relating to the provision of residential accommodation, is dealt with under subs (4) – (6) and it is not necessary to consider it. The other two are those set out in subs (2), being the requirement to sell liquor on the premises to any person for consumption on the premises, and (unless the licence is a hotel restricted licence) to sell packaged liquor on the premises to any person. So far as the condition in par (b) of subs (2) is concerned, there is provision in subs (7) for the licensing authority to vary that requirement (at any time or during any specific period). Section 41(1)(b) contemplates the imposition of a condition prohibiting the sale of packaged liquor to persons other than lodgers, in which case the licence is not an hotel licence *simpliciter*, but is to be referred to as a "hotel restricted licence".

9 Section 63 both expressly permits the licensing authority to impose conditions of the sort set out in that section, and, as the heading to the section suggests, imposes a restriction on the power of the licensing authority to vary conditions imposed by the Act. Having recited what conditions may be imposed pursuant to s 63, that section provides that the licensing authority is "not otherwise empowered to vary or cancel ... a condition specifically imposed by this Act, as distinct from pursuant to this Act, in relation to licences of that class". The condition or requirement that the licensee of an hotel must sell liquor on the premises to any person for consumption on the premises is plainly a condition imposed by, rather than pursuant to, the Act. We will return to the other provisions of s 63 in a moment.

10 Turning to s 64, the appellant argues that the power to impose a condition which would have the effect that the licensee of an hotel would not be permitted to give effect to the condition imposed by s 41(2)(a) is conferred by s 64. However, the power to impose conditions in s 64 is by subs (1), expressed to be "subject to this Act ... "; that is, it is subject to the prohibition on varying or cancelling conditions specifically imposed by the Act itself contained in s 63. Subsection (3) of s 64 is not in terms expressed to be subject to the Act. However, it commences with the words "Without derogating from the generality of the discretion conferred on the licensing authority ... ". This can only be a reference back to the discretion conferred pursuant to subs (1) of that section, to impose conditions at the licensing authority's discretion. It is our view that subs (3) of s 64 is no more than an amplification of the nature of the discretion conferred by subs (1) and must be read as subject to the same limitation.

11 Our view that subs (3) of s 64 should be read in this way, and as not permitting the licensing authority to override the condition in s 41(2)(a), is fortified by the express terms of s 63. That section contains two provisions which would appear to allow the licensing authority to affect the requirement in s 41(2)(a), and each is apparently carefully limited in its scope. Section 63(b) gives power to exempt a licensee from "a requirement imposed by ... this Act to keep the premises open for the sale of, and to sell, liquor there during any particular day or part of a day" (emphasis supplied). Section 63(c)(b) expressly permits variation of the requirement in s 41(2)(a), but confined to the circumstance where the premises are temporarily damaged or rendered unsuitable by an unforeseen event. Both of those provisions, in our view, indicate a legislative scheme in which the licensing authority does not have a general power to impose conditions which vary the requirement imposed by s 41(2)(a). The only contrary indication appears to us to be found in s 64(5), which permits a variation of the obligation imposed under s 108(2)(a). That latter provision is a general one which prevents a licensee of any licensed premises from refusing either to receive a person or to sell liquor to them on the premises at any time the premises are open for business during permitted hours. Pursuant to s 108(1), the section applies in relation to premises licensed under any hotel licence or any special facility licence if the special facility licence so provides. In its application to a hotel licence, s 108(2) appears to be no more than a negative way of putting the positive obligation created by s 41(2)(a). It seems anomalous that the licensing authority is apparently specifically permitted to vary the negative requirement but not the positive one. However, although anomalous, it does not seem to us that the presence in the statute of s 64(5) is able to overcome what appears to us to be the clear words of the restriction in s 63.

12 Subsequent to the further hearing of the matter, the first respondent supplied to the court a copy of an unreported decision of the Supreme Court of South Australia, being ***FACAC Pty Ltd v Talbot Hotel Group Pty Ltd*** [2001] SASC 445. That case concerned the question whether the Licensing Court of South Australia could properly grant an hotel licence with a condition exempting the licensee from the obligation to keep the premises open for the sale of liquor during the hours specified in the Act. The court reviewed the provisions of the South Australian Liquor Licensing Act which, like the Act in this State, creates a variety of classes of licences with a variety of particular requirements attaching to each, and which gives a power to the licensing authority to impose conditions. Doyle CJ notes during the course of his reasons in that decision that (as is

also the case with the West Australian legislation) over time the Act has given to the licensing authority a greater power than formerly existed to mould a licence, including an hotel licence, and to exempt a licensee from obligations. At [32] to [35], his Honour said:

> "[32] ... I consider that the Act is still based on the fundamental concept of licence classes ... but I accept that the characteristics of each class and the boundaries between each class are less clear than they were in the past. The Act permits licences to be shaped or moulded to a greater extent than was possible under the former Act, and contemplates licences being shaped so as to permit trading in a way that would not have been consistent with the scheme of the previous Act.
>
> [33] Just how far a court can go in a given case will depend upon the circumstances of the particular case, and will require the court to make what will sometimes be a difficult judgment.
>
> [34] But in my view the applicant's proposal goes to a point to which the court cannot go. The hotel licence envisaged by the Judge would wholly exempt the applicant from the statutory conditions ... . To my mind that would go beyond the power to grant an exemption. The court would have departed from the fundamental statutory concept of a hotel licence.
>
> [35] In saying that I did not mean the statutory concept of a hotel is the concept of a hotel as it was in the past. When I refer to the statutory concept of a hotel licence I mean the concept embodied in s 32 of the Act."

13 There is much to be said for the proposition that a similar analysis could be applied in the circumstances of this case. It is arguable that the statutory scheme identifies three essential characteristics of an hotel licence, but permits the imposition of conditions dispensing with two of them, those two being the requirements relating to the sale of packaged liquor and the requirement relating to the provision of accommodation. In those circumstances, it may well be said that the requirement to sell liquor on the premises to any person for consumption on the premises while the premises are open is seen by the legislature as fundamental to the concept of an hotel licence, and that a licence with a condition which varied this

requirement would not in truth be an hotel licence properly so called at all. However, it is not necessary to determine that question, since in our view the same result is reached by reading the words of s 63 itself.

14 For those reasons, we are of the view that it is not open to the court to impose a condition which would prohibit the sale of alcohol for consumption on the premises to persons other than lodgers and guests of lodgers. It therefore seems to us appropriate to make an order which varies the decision of the Liquor Licensing Court by substituting for the grant of an hotel licence, an hotel restricted licence.

15 We now make that order.