

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hermitage Trading Pty Ltd v Commissioner for Liquor and Gaming & Anor* [2019] QCAT 407

PARTIES: **HERMITAGE TRADING PTY LTD**
(applicant)

v

**COMMISSIONER FOR LIQUOR AND GAMING
and
BRUNSWICK ENTERPRISES (AUST) PTY LTD**
(respondents)

APPLICATION NO/S: GAR253-18

MATTER TYPE: General administrative review matters

DELIVERED ON: 28 November 2019

HEARING DATE: 6 March 2019

HEARD AT: Brisbane

DECISION OF: Member Paratz

ORDERS: **The Application to Review a Decision filed by Hermitage Trading Pty Ltd on 31 July 2018 is struck out pursuant to Section 47 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where an application to strike out an application to review a decision of the Commissioner for Liquor And Gaming as to the granting of an Adult Entertainment Permit was made – where the principles in relation to consideration of a strike out application were considered

Liquor Act 1992 (Qld), s 107D, s 107E, s 119(4)
Queensland Civil And Administrative Tribunal Act 2009 (Qld), s 47, s 48

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

Douglas v CTML Pty Ltd & Ors [2018] QCAT 110

Magin v Chief Executive, Office Of Liquor And Gaming Regulation And Starwood Capital Group Pty Ltd [2012] QCAT 646

Staddon & Ors v Chief Executive, Department of Employment, Economic Development and Innovation

[2011] QCAT 258
Yeo v Brisbane Polo Club Inc [2013] QCAT 261

**APPEARANCES &
REPRESENTATION:**

Applicant: A Herbert of Counsel, instructed by Russell Steele and Associates Pty Ltd t/as RSA Liquor Professionals

Respondents: Commissioner for Liquor and Gaming – D Robinson of Counsel, instructed by the Commissioner for Liquor and Gaming

Brunswick Enterprises (Aust) Pty Ltd – M Jones, Liquor & Gaming Specialists

REASONS FOR DECISION

- [1] The Commissioner for Liquor and Gaming Regulation (‘the Commissioner’) made a decision on 19 July 2018 to provisionally grant an Adult Entertainment Permit to Brunswick Enterprises (Aust) Pty Ltd (‘Brunswick’) for premises situated at Ground Floor, Chopstix Arcade, 247 Brunswick Street, Fortitude Valley, Queensland.
- [2] Hermitage Trading Pty Ltd (‘Hermitage’) is the licensee of, and holds an Adult Entertainment Permit for, premises known as the Eye Candy Adult Bar, also situated at 247 Brunswick Street, Fortitude Valley.
- [3] Entities related to Hermitage Trading Pty Ltd also operate two other adult entertainment premises elsewhere in Fortitude Valley known as the Candy Club Nightclub at 194-198 Wickham Street, Fortitude Valley; and OMFG’s Nightclub, at 367 Brunswick Street, Fortitude Valley.
- [4] Hermitage filed an application in the Tribunal on 31 July 2018 to Review the decision of the Commissioner to provisionally grant the Adult Entertainment Permit to Brunswick.
- [5] Brunswick filed an Application for Miscellaneous Matters in the Tribunal on 22 August 2018, to strike out the Application to Review filed by Hermitage.
- [6] Directions and Orders were made by the Tribunal on 18 October 2018 as to the strike out application. For convenience, I will set out the full directions made on that day:
 1. All parties have leave to be legally represented in the proceeding.
 2. The Commissioner for Liquor and Gaming must file two copies in the Tribunal of:
 - a) a written statement of reasons; and
 - b) an indexed and page-numbered bundle in date or other logical order of the documents and other material in its possession or under its control that may be relevant to the Tribunal’s review of the decision, by: 4:00 pm on 2 November 2018
 3. Until further order, the Commissioner for Liquor and Gaming is not to give a copy of the material filed under Direction 2 to Hermitage Trading Pty Ltd or Brunswick Enterprises (Aust) Pty Ltd.

4. Until further order, and subject to Direction 5, publication of the material filed under Direction 2 is prohibited to Hermitage Trading Pty Ltd, Brunswick Enterprises (Aust) Pty Ltd, and all other persons except members and staff of the Tribunal.

5. The Commissioner for Liquor and Gaming must file two copies in the Tribunal, and give to Hermitage Trading Pty Ltd and Brunswick Enterprises (Aust) Pty Ltd one copy each, of the objection lodged by Hermitage Trading Pty Ltd to the licence application made by Brunswick Enterprises (Aust) Pty Ltd, by: 4:00 pm on 26 October 2018.

6. A directions hearing is to be held on a date to be advised, not before 5 November 2018. At the directions hearing, the parties will be invited to make submissions on what material should be provided by the Commissioner for liquor and gaming to the other parties and whether the non-made on 18 October 2018 publication order should continue, partly or wholly.

7. The application to stay a decision and the application for miscellaneous matters will proceed to an oral hearing, after the directions hearing, on a date to be advised.

[7] A further Directions Hearing was held on 19 November 2018. At that Directions Hearing:

- (a) The application for a stay of a decision was dismissed by consent; and
- (b) The matters to be considered at the oral hearing of the strike-out application were discussed.

[8] The application to strike out was heard by me at an oral hearing on 6 March 2019. These are my reasons in relation to the application.

[9] The grounds for the application to strike out, as attached to the application, were as follows:

Ground 1

The Tribunal's jurisdiction to hear and determine an application for a review of a decision made pursuant to the *Liquor Act 1992* (the Act) arises under section 21 of the Act.

Pursuant to section 30 of the act, to have standing to bring an application for review a person must have 'made an application, submission or objection in the proceeding in which the decision was made'.

The applicant in these proceedings did not make an application, submission or objection in the proceeding in which the decision was made. Accordingly, the applicant does not have standing, and the proceedings should be struck out.

Ground 2

Additionally, or alternatively, the proceedings are, as set out in section (47) (1) of the *Queensland Civil and Administrative Tribunal Act 2009*:

- a) frivolous, vexatious or misconceived; or
- b) lacking in substance; or
- c) otherwise an abuse of process

and should therefore be struck out.

- [10] Submissions were filed in relation to the strikeout proceeding as follows:
- (a) by Brunswick;
 - (b) by Hermitage dated 28 September 2018;
 - (c) by Brunswick filed on 5 October 2018; and
 - (d) by Hermitage (in reply) filed on 5 October 2018.
- [11] In its submissions in reply filed on 5 October 2018, Hermitage referred to the unreported Supreme Court of Queensland decision of Fryberg J in *Nordale Management Pty Ltd* (application number 77 of 1995) delivered on 20 July 1995, as to the standing of a Corporation, and submitted that:¹
11. Despite the submissions of the second respondent as to what the court might have said, Fryberg J unequivocally dismissed the contentions to the effect that the definition in section 119 of the Liquor Act of a ‘member of the public’ precluded a Corporation from being either an objector or an appellant under that Act. That definition as introduced into the Act in 1991 remains in identical terms at the present date, despite that section having been amended on several occasions.
12. It can therefore be assumed that the Parliament is content with his Honour’s interpretation.
- [12] As to ground 1, at the commencement of the hearing, Mr Jones, appearing for Brunswick, advised that in light of that decision in *Nordale*, he would not press the issue of the standing of the Corporation as an objector.
- [13] As to which documents would be considered at the hearing, Mr Robinson, appearing for the Commissioner, advised that a Statement of Reasons, and a bundle of documents, had been filed in the Tribunal by the Commissioner, and that a Schedule, which was an index to the documents, had been given to the other parties.
- [14] Mr Robinson advised that the index identified the following documents which were not required to be subject to the non-publication order made on 18 October 2018:
- (a) Item (e) ‘Objection – P 86 - P 271’; and
 - (b) Item (f) ‘Additional Submission to Objection – P 291 - P 295’.
- [15] Those documents identified by Mr Robinson were the basis of discussion at the hearing.
- [16] Mr Robinson advised that the Commissioner’s position at the hearing was that it neither supported nor opposed the application to strike out.

Submissions of Brunswick

- [17] Mr Jones, representing Brunswick, who is the applicant on the striking out provision, submitted that a valid objection must identify impacts of the relevant kind which will be experienced specifically by the objector and an application to the

¹ Submissions Of the Applicant In Reply, filed on 5 October 2018, [11].

Tribunal for review of a decision to which an objection related is similarly limited in scope.²

- [18] Brunswick refers to the grounds of objection to granting of an Adult Entertainment Permit set out in section 119(4) of the *Liquor Act* 1992 ('the Act'):³

The grounds on which an objection about an application for an adult entertainment permit may be made are that, if the application were granted, 1 or more of the following may happen –

- (a) undue annoyance, disturbance or inconvenience to persons who reside, work or do business in the locality concerned, or to persons in, or travelling to or from, an existing or proposed place of public worship, hospital, school, or other facility or place regularly frequented by children for cultural or recreational activities;
- (b) harm from alcohol abuse and misuse and associated violence;
- (c) an adverse effect on the health or safety of members of the public;
- (d) an adverse effect on the amenity of the community

- [19] Brunswick submits that the grounds of the Application to Review do not refer to any matter that falls within the scope of the grounds upon which an objection may be made under section 119 (4) of the Act:⁴

28. The grounds for the application are set out in the QCAT form 23 filed by the Applicant. They are, in summary, that the First Respondent did not give sufficient weight to the suitability of the Second Respondent, and that the First Respondent did not properly consider that the approval of the Second Respondent's application would create a red light district.

29. The grounds do not refer to any matter that falls within the scope of the grounds upon which an objection may be made as set out in paragraph 14 above. Rather they refer to matters within the licensing process that are strictly between the Second and First Respondents.

- [20] It is convenient to set out in full the particulars of Ground 2 of the strike out application relied upon by Brunswick, which are attached to the application:

- The Applicant (*Hermitage*) is the licensee and adult entertainment permittee of Eye Candy Adult Bar, 247 Brunswick Street, Fortitude Valley and a commercial competitor of the Second Respondent (*Brunswick*).
- Entities related to the Applicant also operate two other adult entertainment premises in Fortitude Valley. These are Candy Club Nightclub, 194 – 198 Wickham Street, Fortitude Valley and OMFG's nightclub, 367 Brunswick Street, Fortitude Valley.
- The proceedings are therefore vexatious.

² Submissions of the Second Respondent, filed on 28 September 2018, [26], referring to *Staddon & Ors V Chief Executive, Department Of Employment, Economic Development And Innovation* [2011] QCAT 258; *Magin v Chief Executive, Office of Liquor and Gaming Regulation and Starwood Capital Group Pty Ltd* [2012] QCAT 646.

³ Ibid [14].

⁴ Ibid [28].

- The Applicant is aware of the Second Respondent's other business activities and aware that liquor licences and adult entertainment permits have been granted to the Second Respondent and its associated entities on numerous previous occasions.
- The applicants purported objection focuses on matters that are well beyond the grounds for an objection set out in section 119 (4) of the Act. No genuine connection is established between the matters raised in any of the grounds of objection. It is therefore an attempt to traverse matters which are strictly between the First and Second Respondent and confidential which is an abuse of process.
- To be clear, to respond to the matters raised in the Applicant's purported objection the Second Respondent would be forced to disclose information of a personal, commercial and confidential nature to the Applicant that would otherwise remain between the First and Second Respondent. For the Second Respondent's private information to be provided to the applicant would be an abuse of process.
- The Applicant is aware that adult entertainment venues, including venues conducted by the Second Respondent, have very little deleterious impact on the amenity, do not cause undue annoyance, disturbance or inconvenience to any person, or harm from alcohol abuse and misuse and associated violence, or an adverse effect on the health or safety of members of the public.
- There were no other objections to the application, including no objections from Queensland Police Service and Brisbane City Council, and the application was investigated, considered and granted by the First Respondent.
- The proceeding is therefore lacking in substance.

[21] In its submissions in response, Brunswick submits that there is no logical connection between the suitability of an Adult Entertainment Permit applicant pursuant to sections 107D and 107E of the Act with the grounds upon which an objection may be made as set out in section 119(4):⁵

3. For example, the suitability of an applicant for an AEP might be affected by the personal bankruptcy of the applicant. Whether a person is or has been bankrupt makes it no more or less likely that the operation of the business will cause any of the impacts set out in the section 119 (4) grounds.

4. Similarly, if an associate of an applicant for an AEP is shown to be a serial tax avoider, or a defrauder, it is false logic to suggest that this would somehow have a bearing on amenity related matters.

[22] Brunswick submits that the arguments of Hermitage in relation to consideration of the development of a 'red light district' are hypocritical, and separate to the scope of the section 119(4) grounds for an objection:⁶

11. The Applicants references to the approval of the Second Respondent's application causing the development of a 'red light district' are entirely hypocritical. The applicant, through related entities, is responsible for the

⁵ Submissions of the Second Respondent in Response to the Submissions of the Applicant, filed on 6 October 2018, [3], [4].

⁶ Ibid [11], [12].

establishment of the three most recent adult entertainment businesses in Fortitude Valley.

12. The ‘red light district’ argument arises from considerations that are again separate to, and outside the scope of the section 119(4) grounds for an objection. Section 107D relevantly places the following obligation on the Commissioner:

the Commissioner may grant an application for an adult entertainment permit only if the Commissioner is satisfied that –

...

- (b) after considering that, if the application were granted, the combined total of licensed brothels and premises permitted to provide adult entertainment in the locality in which the relevant premises are situated would not substantially affect the character of the locality.

Importantly, there are no licensed brothels in the locality.

- [23] In relation to transparency, Brunswick refers to section 107E(1)(f) of the Act, and says that no such issue arises, as the possibility of involvement of Robert Johnson, who appears to be Heritage’s principal concern, is well known:⁷

16. Notwithstanding the inappropriateness and unlawfulness of the Applicants attempt to involve itself in this aspect of the AEP application process, the Tribunal should note the correct context for transparency considerations. These arise by virtue of section 107E(1)(f) of the Act:

107E Suitability of applicant for adult entertainment permit

- (1) In deciding whether an applicant for an adult entertainment permit is a suitable person to provide adult entertainment, the Commissioner must consider all relevant matters including the following –

...

- (f) whether the applicant’s business structure is sufficiently transparent to enable all associates of the applicant, whether individuals or bodies corporate, to be readily identified

17. ‘Associate’ is defined narrowly in the context of a corporate applicant. Section 4C (2) states:

A person is an associate of a corporation if the person is an executive officer of the corporation.

18. The Applicant’s principal concern appears to be the possibility of influence by the Second Respondent’s director’s father, Robert Johnson. Whether or not Robert Johnson is an executive officer of the corporation (as defined in section 4 of the act), his identity and relationship with his son is well known, including to the First Respondent, and no transparency issue relevantly arises.

Submissions of Hermitage

⁷ Ibid [16], [17], [18].

- [24] In its submissions, Hermitage submits that its objection is relevant to grounds under s 119 (4):⁸

32. Some of the matters raised in the objection appear of themselves to be outside the scope of traditional ‘amenity, quiet and good order’ however the objection clearly ties those matters to the traditional grounds by the following:

‘Where a non-transparent licensee structure exists all valid grounds for objection apply as no reasonable risk of compliance enforcement exists’.

It is the position of the applicant that where a licensee can operate without reasonable transparency, and therefore without fear of oversight or censure, they are unlikely to exercise the necessary controls to ensure the quiet, good order and amenity of the locality is appropriately maintained and that each of the grounds for objection are directly related to valid grounds of objection under s 119(4)...

- [25] Hermitage notes that the basis of their objection was said to lie in five significant areas regarding corporate transparency, and submits that this is relevant to effects upon the locality:⁹

28. It was further said that: –

‘In this instance we seek to raise what we see as very serious probity and transparency issues with the proposed Applicant and submit to the Commissioner that the proposed applicant and/or his father is neither ‘fit and proper’ having regard to section 107(1) nor a ‘suitable’ person to provide adult entertainment as required by section 107D of the Act’.

29. These issues are said by the objector to be causal factors of the kinds of potential harm about which an objection may lawfully be made. The mechanism by which that harm could be caused is by lack of compliance with the rules and regulations that apply to AEP holders because of the unfitness of the permit holder, leading to unsafe and undesirable effects upon the locality in which the non-compliant premises are being conducted.

- [26] Hermitage submits that it is only necessary for it to show that its objection is directed towards a particular source of loss of amenity deriving from the lack of proven fitness and propriety on the part of Brunswick, rather than from more traditional or common sources of a loss of amenity;¹⁰ and that it is irrelevant that it is a commercial competitor of Brunswick, as a commercial competitor is perfectly entitled to insist upon a preservation of the amenity of the area in which the business is being conducted.¹¹

Discussion

- [27] The objection to the application for adult entertainment permit by Hermitage was dated 12 March 2018. It consists of a 12 page document, with a substantial bundle of supporting documents. The objection runs from page 87 to page 271 of the bundle of documents provided by the Commissioner.

⁸ Applicant's Submissions on Stay and Strike out Miscellaneous Applications, dated 28 September 2018, [32].

⁹ Ibid [28], [29].

¹⁰ Ibid [37].

¹¹ Ibid [42].

[28] The objection notes at the outset that it is based upon corporate transparency:¹²

... We acknowledge this objection may be seen as a competitor objection and would ordinarily be given less weight accordingly. We do not propose to outline a standard amenity objection as we generally believe well-managed and compliant AEP venues have very little real amenity impact when properly approved under a strict approval regime. To object on the basis of amenity would be somewhat hypocritical.

Hence the basis for our objection lies in five significant areas regarding corporate transparency.

[29] The objection states that Hermitage had engaged the services of a forensic accountant to investigate the business structure and history of the father (Mr Robert Johnson) and son's (Mr Nathan Johnson) companies.¹³

[30] The headings within the objection are as follows:

- Diligent probity in Queensland
- Full weight and consideration of s 107(1)
- Nature of the 'sale' of the businesses to the son
- Corporate history of the father
- Patterns of association
- Phoenix company practices
- Level playing field
- Analysis of the corporate structure and the corporate map
- Why the layer of operating companies?
- Possibility of diverting funds to the father overseas
- The \$7 million question
- Questions as to 'fit and proper'
- Powers to investigate

[31] Hermitage suggests that persons associated with Brunswick are not 'fit and proper' persons to be involved in running an adult entertainment establishment.¹⁴ In the course of the hearing, Brunswick submitted that the assessment of persons as 'fit and proper' is purely one to be considered by the Commissioner of Police and the Prostitution Task Force, not by members of the public, and that there is no opportunity for third-party involvement in that process.

[32] In the hearing Brunswick submitted that the application to Review by Hermitage should be seen as frivolous and vexatious, taking into account the tone and aggressive language of its objection, and the competitor status of Hermitage; and referred to:

¹² Objection of Hermitage Trading Pty Ltd 12 March 2018, 1.

¹³ Ibid 4.

¹⁴ Ibid 8.

- (a) suggestions by Hermitage in the objection of what Hermitage saw as attempts by Brunswick to hide the role the father may continue to play in the operation of the various companies, licensed premises and AEP's operated by the son;¹⁵
 - (b) suggestions by Hermitage of activities of prostitution in the father's business in Ghana;¹⁶
 - (c) Hermitage's query as to whether any false or misleading statements or documents were provided in a former AEP application at 299 Brunswick Street by the son;¹⁷ and
 - (d) Hermitage asking for the Commissioner to also consider the suspension and cancellation provisions in section 134A and 136 for the current licenses and AEP permits held by the son.
- [33] Counsel for Hermitage submitted that the answer to the submissions of Brunswick was that context is everything, and that any decision that didn't take into consideration suitability was wrong.
- [34] Counsel for the Commissioner made submissions on the hearing to assist the Tribunal, and raised consideration of the argument as to the development of a 'red light district'. Counsel for Hermitage indicated that the grounds in that respect should be considered, but were not the substantive basis of its case.
- [35] Counsel for the Commissioner submitted that section 119(4)(d) as to community is not a decision I have to make, as the review is based upon the documents placed before the original decision-maker.
- [36] In its letter dated 27 July 2018 to Mr Matthew Bellward (an objector together with Hermitage) the Commissioner advised that it had approved the application for an Adult Entertainment Permit on 19 July 2018 in respect of the subject premises (named as Club 247 – Fortitude Valley), and that factors involved in the Commissioner's decision included:
- investigations conducted by the OLGR and the police found the applicant and its associates suitable persons to hold an adult entertainment permit
 - members of the public may object to applications to adult entertainment permit but only if they hold a proper interest in the locality and objection is made under one of the grounds for objection under section 119 (4) of the Liquor Act.
 - The premises is in keeping with the surrounding commercial uses of the area. There has been no evidence to suggest adult entertainment venues, or their patrons, have adversely impacted their surrounding communities.
 - Compliance with the Liquor Act should leave little visible indication of the activities that are permitted to occur inside the premises.
 - The community will have avenues of complaint with OLGR should the perceived issues arise. There are disciplinary actions that may be taken

¹⁵ Ibid 8.

¹⁶ Ibid 10.

¹⁷ Ibid 11.

including an ability to cancel an adult entertainment permit in the event that the business or its patrons become the subject of complaints and non-compliance with the permit or Liquor Act can be substantiated.

[37] The Tribunal has power under sections 47 and 48 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to dismiss or strike out a proceeding, or part of a proceeding, if it is variously unjustified or causing disadvantage.

[38] The general principles to be applied on a striking out application are well-established.¹⁸ The Tribunal discussed these in *Yeo v Brisbane Polo Club Inc*,¹⁹ and adopted the principles enunciated in *Dey v Victorian Railways Commissioners*,²⁰ as follows:

[5] Mr Yeo submits that the principles enunciated in *Dey v Victorian Railways Commissioners* apply. Mr Yeo submits that his application should only be dismissed if there is the clearest case that he can not succeed on the merits of his application. He suggests that the evidence before the Tribunal is scant and that at a contested hearing, the Club may provide additional evidence in support of the claimed exemption which would allow the Tribunal to more closely consider its manner of operation and therefore whether it does in fact carry out its purposes for the purposes of making a profit.

[6] Essentially, *Dey* is authority for the proposition that in considering a strike out application, the evidence should be weighed in order to reach a conclusion about whether or not a claimant has an arguable case. It does not require a determination on the merits. Striking out should be sparingly granted to prevent abuse of process when a claim is groundless or futile. But if there is a real question of law or fact to be determined, then summary dismissal is not appropriate. A lack of any cause of action must be very clear. The party seeking to strike out must demonstrate a high degree of certainty about the outcome if the proceeding is allowed to continue.

[7] A question of law may be determined on a strike out application, although not an important or difficult question or law. A question of fact may not be determined in summary proceedings. Summary dismissal should not be granted simply because it appears an applicant is unlikely to succeed on an issue of fact, in circumstances where there are factual issues in dispute and capable of dispute.

[39] An application to strike-out in a review under the Act was considered by the Tribunal in *Magin v Commissioner, Office of Liquor and Gaming Regulation & Anor*²¹ where the member noted the onus placed on such an application:²²

[12] The question in an application of this kind is not whether the pleadings that are impugned should be upheld, but whether they are so obviously untenable that they cannot possibly succeed, or are such that no reasonable person would regard them as bone fide or worthy of further consideration. That is a considerable onus, and courts and Tribunals are understandably reluctant to nip even dubious claims in the bud. In my view the relevance of Magin's various complaints can best be decided at a trial, in the light of further evidence and argument. If Mr Magin raises and persists in

¹⁸ *Douglas v CTML Pty Ltd & Ors* [2018] QCAT 110.

¹⁹ [2013] QCAT 261, [5]-[7].

²⁰ [1949] 78 CLR 62.

²¹ [2013] QCAT 196.

²² *Ibid* [12].

irrelevancies, or presses arguments that the Tribunal clearly cannot entertain, or attempts to conduct a wide-ranging crusade against evils of the liquor trade – however well-intentioned – he is apt to provide applications for substantial costs on behalf the respondent's. It is to be hoped that he will bear this in mind.

- [40] In the Application to review a decision, Hermitage describe the details of what it sought from the Tribunal as follows:²³

Merit review of the application to determine if the applicant is either fit and proper to hold a licence and/or suitable to hold an adult entertainment permit and to determine if the granting of the application will create a red light district having regard to s 107D(1)(a) and(b) of the Liquor Act 1992.

- [41] Hermitage went on to state why it thought the decision was wrong or not properly made as follows:²⁴

We believe the Commissioner has not given sufficient weight to the suitability of the applicant and the historical corporate structuring and restructuring evidently for the purpose of avoiding taxation obligations associated with the high rate of cash business transactions prominent in the AEP business model IAW the decision of the Court of Appeal in *Chief Executive, Department Tourism, Fair Trading and Wine Industry Development v 4 Play (Oz) P/L* [2008] QCA 267 relating to the applicant's father. We believe the Commissioner has not properly considered the objector submissions on a red light district emerging in the locality should this application be granted.

- [42] Hermitage described what it wanted to happen in the proceedings as follows:²⁵

For the decision to be set aside and the applicant and directors/associates to be declared as not fit and proper and not suitable to hold an AEP

- [43] In the course of the hearing of the application, several of the legal aspects were conceded, or reduced as to the level of contention.

- [44] The standing of Hermitage, a company, to be an objector was initially the subject of contention, and of initial submissions by the parties. On the hearing, it was conceded, on the authority of *Nordale*, that a company does have standing to be an objector, and there is no issue for determination in that respect.

- [45] Hermitage bases its Application to Review on the questions of the 'fit and proper' status of the permit applicants; and upon the creation of a 'red light district' in the Fortitude Valley area.

- [46] The issue of the creation of a 'red light district' was not discussed in any depth at the hearing.

- [47] The contention that the granting of a further Adult Entertainment Permit to Brunswick, for premises in exactly the same building as that in which Hermitage currently trades, would create a 'red light district', is obviously a difficult argument for Hermitage to make and maintain.

- [48] The test under section 107D of the Act is as to whether the combined total of licensed brothels and premises permitted to provide adult entertainment in the

²³ Application to Review a Decision filed On 31 July 2018, at Part C.

²⁴ Ibid Part C.

²⁵ Ibid part C.

locality in which the relevant premises are situated would substantially affect the character of the locality.

- [49] Hermitage would therefore have to establish that the addition of this single adult entertainment premise would substantially affect the character of the locality.
- [50] In essence Hermitage would have to establish that current character of the area is at such a tipping point that one further adult entertainment premise, in addition to the three adult entertainment premises which Hermitage currently operates, together with the several other existing adult entertainment premises, in Fortitude Valley, would so substantially change the character of the area as to require the further permit to be refused under section 107D.
- [51] Sufficient evidence has not been put forward in relation to the 'red light area' contention for it to be determined. Specifically, there is no evidence of whether there are any, and if so how many, licensed brothels in the locality, which together with an extra adult entertainment premise would combine to substantially affect the character of the locality.
- [52] On the basis of the evidence provided to the Tribunal, and considering the submissions of the parties, I consider that the 'red light area' argument has not been made out to any extent, having regard to section 107D of the Act, and that Hermitage has no prospects of success on this argument.
- [53] The other limb of the application by Hermitage is as to a 'fit and proper' evaluation of the persons behind the proposal by Brunswick.
- [54] The decision which is sought to be reviewed is a decision to grant an Adult Entertainment Permit. The factors which the Commissioner is to consider are those set out in section 119(4) of the act which relate to annoyance, disturbance or inconvenience to persons in or travelling to or from an existing or proposed place of public worship, hospital, school, or other facility or place regularly frequented by children for cultural or recreational activities; harm from alcohol abuse and misuse and associated violence; an adverse effect on the health or safety of members of the public; or an adverse effect on the amenity of the community.
- [55] It is the role of the Commissioner to assess whether an applicant is 'fit and proper' under section 107E. The Act does not provide for such a ground of objection under s 119(4).
- [56] Hermitage acknowledges that it is a commercial competitor of Brunswick. The mere fact that Hermitage is a competitor does not preclude it from raising issues in the public interest, or challenging a decision of the Commissioner which is not properly made.
- [57] The matters that Hermitage raised as to corporate transparency in its objection were matters which the Commissioner had an opportunity to consider, and had the opportunity to obtain opinion on from the Queensland Police. Such consideration may conceivably involve matters that are commercial in confidence, and also may involve consideration of criminal intelligence known to the Queensland Police, and also may include consideration of operational details of current investigations being conducted by Queensland Police. The details of the material before the Commissioner, apart from the matters discussed in these Reasons, have been made the subject of a non-publication order by the Tribunal.

- [58] The Commissioner, in its letter advising of its decision, noted the investigations conducted by the Office of Liquor, Gaming and Racing and the Queensland Police, which found that Brunswick and its associates were suitable persons to hold an adult entertainment permit.
- [59] Hermitage has had a report in relation to Brunswick prepared by a forensic accountant. That report is of course only based upon the material available to Hermitage. Aspects of the report are clearly conjectural, and based upon suggested possible scenarios relating to the financial dealings of Brunswick.
- [60] Hermitage submits that the link between its concerns as to corporate transparency and the effects upon the locality is that if the permit holder is unfit, there would be a lack of compliance with the rules and regulations that apply to adult entertainment permit holders which would lead to unsafe and undesirable effects upon the locality in which the non-compliance premises are being conducted.
- [61] The Commissioner in its letter advising of approval of the permit notes that if perceived issues arise, there are avenues of complaint by the community with the Office of Liquor Gaming and Revenue, and that disciplinary actions may be taken, including the ability to cancel an adult entertainment permit in the event that the business or its patrons become the subject of complaints and non-compliance with the permit or liquor act can be substantiated.
- [62] The regime of supervision and enforcement by the Commissioner is the protection that the community has against a lack of compliance with the rules and regulations that apply to an adult entertainment permit.
- [63] I do not consider that the link between corporate transparency and the effects on the locality, which Hermitage raises, is established.
- [64] The ground of corporate transparency is therefore not made out in the context of a review of the decision of the Commissioner to grant an Adult Entertainment Permit to Brunswick.
- [65] I consider that neither ground for review put forward by Brunswick can succeed on the evidence put forward to the Tribunal, and taking into consideration the submissions of the parties.
- [66] I am considerate of the caution referred to in *Magin* that there is a considerable onus for the Tribunal to consider to strike out an application. I am also considerate of the principles enunciated in *Dey* that the evidence should be weighed in order to reach a conclusion about whether or not a claimant has an arguable case. Whilst these cases sound notes of caution, the corollary is that in a clear case, where no arguable case is shown, and where the applicant's claim is groundless or futile, the application should be struck out.
- [67] As I am satisfied that the grounds for review put forward by Hermitage cannot succeed:
1. I grant the application made by Brunswick Enterprises (Aust) Pty Ltd; and
 2. Order that the Application to review a decision filed by Hermitage Trading Pty Ltd on 31 July 2018 is struck out pursuant to Section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) as being misconceived and lacking in substance.