SUPREME COURT OF QUEENSLAND

CITATION:	*Pikos & Anor v Bezuidenhout* [2004] QCA 178
PARTIES:	**MICK PIKOS** (appellant/applicant) **SURFERS PARADISE ROCK & ROLL CAFÉ PTY LTD** ACN 050 412 612 (appellant/applicant) **v** **FIROZA ZENOBIA BEZUIDENHOUT** (respondent/respondent)
FILE NO/S:	CA No 26 of 2004 DC No 102 of 2003 DC No 103 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	28 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2004
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted to each applicant** **2. Appeals dismissed with costs**
CATCHWORDS:	LIQUOR LAW – PENAL PROVISIONS – OFFENCES – OFFENCES RELATING TO REGULATION AND CONDUCT OF LICENSED PREMISES – where applicants convicted of contravening conditions of liquor licence – where applicants had breached condition of Adult Entertainment Permit by providing adult entertainment on Good Friday – whether words used in Permit constituted a condition that could be breached EVIDENCE – GENERAL – JUDICIAL NOTICE - MATTERS NOT REQUIRING PROOF – MISCELLANEOUS MATTERS – whether learned primary judge was entitled to take judicial notice of the fact that the day in question was Good Friday *Evidence Act* 1977 (Qld), s 43 *Liquor Act* 1992 (Qld), s 103E, s 103G, s 109, s 149A, s 226

Liquor Regulation 1992 (Qld), reg 19D

Brough v Parkings (1703) 2 Ld Raym 992; 92 ER 161, followed
Wickman Machine Tool Sales Ltd v L Schuler AG [1972] 1 WLR 840, considered

COUNSEL: C E K Hampson QC for the applicants
A K Herbert for the respondent

SOLICITORS: Nyst Lawyers for the applicants
Crown Law for the respondent

[1] **WILLIAMS JA:** Each applicant was convicted in the Magistrates' Court at Southport of the offence of contravening conditions of a licence contrary to s 226(a) of the *Liquor Act* 1992 ("the Act"). Each then appealed unsuccessfully to the District Court pursuant to s 222 of the *Justices Act* 1886. From that decision each seeks leave to appeal to this court pursuant to s 118(1)(b) and (3) of the *District Court of Queensland Act* 1967.

[2] A number of grounds of appeal were raised in the appeal to the District Court and they were repeated in the grounds of appeal and initial written outline with respect to the appeals to this court. Ultimately senior counsel for the applicants limited his submission to one relatively narrow ground. However, given the history of the matter, it is both necessary and desirable that something more be said on the issues raised in the proceedings.

[3] In essence the complaint alleged that the applicants breached a condition of the Adult Entertainment Permit granted to the corporate applicant in that adult entertainment as defined by the Act was provided to patrons on Good Friday 29 March 2002.

[4] Section 103E(2) of the Act provides that live entertainment of an explicit sexual nature may be performed on licensed premises under an Adult Entertainment Permit. Section 103G as amended from 1 July 2001, so far as is relevant, then provides:

"(1) An adult entertainment permit authorises the permittee to provide adult entertainment only—

. . .

(b) during the hours stated in the permit.

(2) The adult entertainment permit is subject to this Act and the conditions prescribed under a regulation or imposed by the chief executive."

[5] Relevant conditions were prescribed as at 1 July 2001 by the *Liquor Regulation* 1992; reg 19D thereof, so far as is relevant, provides:

"For s 103G(3) of the Act, it is a condition of a permit that—

. . .

(b) the permit does not authorise adult entertainment on Christmas Day or Good Friday."

[The amendment to s 103G effective from 1 July 2001 made by Act No 39 of 2001, inter alia, renumbered former subsection (3) as subsection (2) without amending any words. *Liquor Regulation* 1992 was replaced by *Liquor Regulation* 2002 which came into force on 1 September 2002. From that date reg 19D of the *Liquor Regulation* 1992 was replaced by reg 29 of the *Liquor Regulation* 2002. The content of reg 19D(b) was repeated unchanged as reg 29(e).]

[6] The Adult Entertainment Permit in question (exhibit 3 at the trial) was for the period 1 July 2001 to 30 June 2002 and named Surfers Paradise Rock 'N' Roll Pty Ltd as permittee and Mick Pikos as nominee. The venue was stated to be Crazy Horse Nightclub in Orchard Avenue, Surfers Paradise. Relevantly the Permit then stated:

> "APPROVED HOURS FOR ENTERTAINMENT:
> 1 July 2001 to 30 June 2002
> 10.00am – 5:00am – Monday to Sunday
> STANDARD CONDITIONS:
> 108 The permittee must comply with the management plan submitted to the Division.
> 109 The permit does not authorise adult entertainment on Christmas Day or Good Friday.
> 110 The permittee must ensure that spruiking or touting for business does not occur at, outside or in the proximity of, the premises.
> 113 Sufficient lighting must be provided to ensure controllers can properly supervise the entertainment and patron behaviour.
> 114 The approved area must be fully enclosed in a way that prevents a person outside the area from seeing inside the area."

[7] It is obvious that condition 109 picks up condition (b) in reg 19D.

[8] The evidence of the Liquor Licensing Officer, P G Davis, was that he attended the premises of the Crazy Horse Nightclub at about 1.30am on 29 March 2002 "which was Good Friday last year". He gave evidence that between then and about 1.50am he observed two females performing a dance routine on the stage which involved them stripping totally naked and exposing their genitalia towards the audience.

[9] It was contended before the magistrate, and again in the District Court, that the dancing in question did not constitute adult entertainment within s 103E of the Act because it was not "of an explicit sexual nature". That was rejected both by the magistrate and the learned District Court judge, and the point was not relied on before this court because senior counsel conceded that it was not a point of law with respect to which leave to appeal would be granted. However, it should be said that the conclusion of the magistrate, and the learned District Court judge, was clearly correct.

[10] At the trial the solicitor for the applicants objected to the Liquor Licensing Officer saying in evidence that 29 March 2002 was Good Friday; it was contended that that was hearsay. Both in the Magistrates' Court and the District Court submissions were made for and against the proposition that the court could take judicial notice of whether or not 29 March 2002 was Good Friday. In each court it was held that that

could be done and it was on that basis that convictions were recorded. The point was not re-argued in this court because the applicants conceded that it was not a point on which leave would be granted.

[11] However, because of the significance attached to the arguments below it is desirable that this court deal briefly with the question. For at least three centuries the Almanac annexed to the Common Prayer Book has been regarded as part of the common law, and in consequence would have been received into Australia as part of the common law (Halsbury, 3rd Edition Vol 15 para 611 and Vol 37 para 133). In *Brough v Parkings* (1703) 2 Ld Raym 992; 92 ER 161, Holt CJ said at 994: "We take notice of all feasts, and the almanack is part of the common law, the calendar being established by Act of Parliament, and it is published before the Common Prayer-Book." It therefore seems to me that a judge could take judicial notice of the fact that Good Friday in the year 2002 fell on 29 March. Further, it is a fact which could be the subject of evidence, and in my view the evidence of the Liquor Licensing Officer was admissible to prove that fact. But if there be any remaining doubt that was overcome by the fact that the Industrial Gazette published on 7 September 2001 declared that Good Friday 2002 fell on 29 March 2002. That Gazette is a "statutory instrument" of which judicial notice must be taken: s 43 of the *Evidence Act* 1977.

[12] It follows that there was ample material to support the finding of the magistrate that the events in question occurred on Good Friday.

[13] In order to appreciate the submissions of Mr Hampson QC for the applicants it is necessary to refer to two sections of the Act which create an offence. Section 149A is relevantly in these terms:

> "A licensee or permittee must not provide adult entertainment on licensed premises . . . unless the licensee or permittee provides the entertainment under an adult entertainment permit."

[14] Then s 226 relevantly provides:

> "A person who contravenes a condition specified in—
>
> (a) a licence or permit . . .
>
> commits an offence against this Act."

[15] Mr Hampson conceded that on the facts as found by the magistrate the applicants would have found it difficult, if not impossible, to defend a charge brought pursuant to s 149A. That, it was submitted, was because it would be difficult, if not impossible, to contend that the adult entertainment in question was provided "under" the Permit granted to the corporate applicant. As that Permit on its face did not authorise the provision of adult entertainment on Good Friday it could hardly be contended that the adult entertainment in fact provided on Good Friday in 2002 was "under" that Permit.

[16] But the applicants were not charged under that section; they were charged under s 226. The essential submission advanced by Mr Hampson was that the words "The Permit does not authorise adult entertainment on Christmas Day or Good Friday" did not in law constitute a condition breach of which would give rise to an offence

against s 226. The submission can best be understood by quoting extracts from what was put by Mr Hampson to the court:

> "It's not a condition. The others are mandatory and that is the idea of a condition. The condition is something which is demanded or required for the purpose of making effectual something that's given an [sic] exchange for it.
>
> . . .
>
> . . . if it's going to be a condition, it's something directed to ensuring compliance with the Act.
>
> . . .
>
> . . . it wasn't a condition at all, it was merely a permission, a permit, and that's why I stressed when going through the permits how the others are drawn . . .. You must not do this, you must not do that, and I concede that when it's done like that you have the real element of a condition there . . ..
>
> . . .
>
> . . . you can't read the permit to say the permit does not authorise adult entertainment on Christmas Day or Good Friday, it doesn't command the permit holder not to provide such entertainment on these days and therefore it's not breach of a condition which by reason of section 226 can amount to an offence."

In response to a proposition coming from the bench Mr Hampson conceded if the permit said that "the permittee must ensure that there is no adult entertainment on Christmas Day or Good Friday" there would be a mandatory condition which could give rise to an offence under s 226.

[17] Mr Hampson was unable to cite any authority in support of his submission that to be a condition for purposes of s 226 the words had to be mandatory and specifically prohibit the provision of adult entertainment on Good Friday.

[18] The real difficulty with the contentions advanced on behalf of the applicants is that the clause in question is described in the Permit as a "Standard Condition" and in form repeats the words in reg 19D which are said by that regulation to constitute a condition to which each permit is subjected pursuant to s 103G(2) of the Act.

[19] If those matters were not sufficient to establish that the provision in question was a condition for purposes of s 226 of the Act, one could have recourse to the ordinary meaning of the term "condition" when used in a context such as this. In *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 1 WLR 840 Lord Denning MR considered a number of dictionary meanings of the term "condition". At 850 he dealt with the second meaning found in the Oxford English Dictionary: "a provision, a stipulation." He went on to say:

> "The word is frequently used by laymen and lawyers in this sense.
> . . . Whenever a quotation is given or an invoice sent, the printed form invariably says it is subject to the 'conditions' on the back. In

> all these cases the word 'conditions' simply means *terms* of the contract. Sometimes these 'conditions' may contain a provision which is so expressed as to be a 'condition' proper, e g when something or other is a prerequisite of an obligation to pay. At other times it is simply a term of the contract which gives rise to damages if it is broken. Its effect depends solely on the true interpretation of the clause itself and not in the least on the fact that it is labelled a 'condition'."

[20] It is in that sense, namely a term of the permit, that the word is used here. The Shorter Oxford English Dictionary gives as a meaning of the word: "a restriction, a qualification, a limitation." That is taken up in the 3rd edition of the Macquarie Dictionary: "a restricting, limiting or modifying circumstance."

[21] The provision that the "permit does not authorise adult entertainment on . . . Good Friday" is a term of the contract which limits or restricts the otherwise general permission granted by the Permit. On ordinary English usage, provision of entertainment contrary to that would be described as a breach of a "condition of the permit".

[22] The conclusion becomes inescapable that on the facts as found by the magistrate there was a breach of the relevant condition of this Permit because adult entertainment was provided in the early hours in the morning of Good Friday 2002.

[23] Finally s 109 of the Act should be noted. An applicant for an Adult Entertainment Permit (here the corporate applicant) must nominate an individual to be nominee in respect of the permit sought. Here the applicant Pikos was the nominee. By virtue of subsection (6)(b) the nominee is subject to the obligations imposed by the Act on the holder of the permit and specifically for present purposes such nominee "is responsible for ensuring that . . . (ii) for an adult entertainment permit, the conduct of the entertainment under the permit is in accordance with this Act and the conditions of the permit". If there is a breach of those conditions the nominee "is liable as a . . . permittee for an offence against this Act or for any failure to perform any of such obligations"; s 109(6)(c). The conviction of the applicant Pikos is based on those provisions.

[24] Each applicant should be given leave to appeal, but the appeals should be dismissed with costs.

[25] **JERRARD JA:** I have read the reasons for judgment and orders proposed by Williams JA and respectfully agree with those.

[26] **ATKINSON J:** I agree that the appeal should be dismissed with costs for the reasons given by Williams JA.