SUPREME COURT OF QUEENSLAND

CITATION:	*Revestar Pty Ltd & ors v The Chief Executive of the Office of Liquor and Gaming Regulation & anor* [2012] QSC 304
PARTIES:	**REVESTAR PTY LTD ACN 089 001 525** (first applicant) **OTTO HEINRICH WILHELM** (second applicant) **MICHAEL PERRY DEMPSEY** (third applicant) v **THE CHIEF EXECUTIVE OF THE OFFICE OF LIQUOR AND GAMING REGULATION** (first respondent) **ALLAN BRITCLIFFE** (second respondent)
FILE NO/S:	BS 7871 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2012
JUDGE:	Martin J
ORDER:	**Declare that the "Stop the Noise Requisition" purportedly issued under s 187 of the *Liquor Act* 1992 and dated 19 March 2012 in respect of the Normanby Hotel is invalid.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – CONSTRUCTION – CONFERRAL AND EXTENT OF POWER – where respondent has power to issue 'Stop the Noise Requisitions' – where respondent issued requisition to applicant to stop all noise – where respondent issued a Complaint and Summons to each applicant for breach of requisition – whether s 187 allows respondent to issue requisition to stop all noise *Liquor Act* 1992 (Qld), s 3, s 111, s 112, s 187 *Liquor Amendment Bill* 2001, cl 96 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, applied *Chief Executive, Department of Natural Resources and Mines*

v Kent Street Pty Ltd & ors [2011] 2 Qd R 417, considered
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, considered
Hoffman v State of Queensland [1997] 2 Qd R 602, considered
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566, considered
Momcilovic v The Queen (2011) 245 CLR 1, applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, applied

COUNSEL: P J Flanagan SC with M Henry for the applicants
M J Taylor for the first respondent

SOLICITORS: Michael Drummond Lawyers for the applicants
Middletons for the first respondent

[1] The first applicant ("Revestar") operates the Normanby Hotel and holds a "Commercial Hotel Licence" under the *Liquor Act* 1992 (Qld) ("the Act"). The second and third applicants are directors of Revestar.

[2] The applicants seek:

(a) a declaration that a notice purportedly issued under s 187 of the Act is invalid; and

(b) declarations that the first two charges contained in the three complaints issued to the applicants fail to disclose any offence known to law.

[3] The second respondent (Mr Britcliffe) is an officer of the first respondent, the Chief Executive of the Office of Liquor and Gaming Regulation ("the OLGR").

Background

[4] On 19 March 2012, Mr Britcliffe issued a "Stop the Noise Requisition" ("the Notice") to an employee of Revestar. It stated:

> "On 18 March 2012 from approximately 9:30pm to 10:05pm it was found that an unreasonable noise was caused by entertainment/music and/or related activities emanating from the above premises.
>
> …
>
> … you are required to **Stop the Noise** emanating from entertainment/music and/or related activities in area(s) of lower Beer Garden area adjacent to Kelvin Grove Road… by ceasing all amplification of music and voice/non-amplified entertainment noise at the area(s) aforementioned of the premises until further notice."

[5] On 22 March 2012, the applicants' solicitor objected in writing to the Notice.

[6] On 23 March 2012, the OLGR denied that the Notice was invalid and advised that it would continue until lifted by an authorised officer.

[7] On 11 May 2012, the OLGR served on each of the applicants a Complaint and Summons ("the Complaints"). Each Complaint contained three identical charges. The applicants take issue with the first two charges in each complaint. The charges are based on alleged breaches of the Notice.

[8] In late May 2012, Revestar applied to QCAT for a review of the decision to issue the Notice. It is accepted by the applicants that the QCAT application was out of time and an extension of time was required before it could be brought. It was later withdrawn, though no explanation is provided in the material for this.

[9] There was correspondence in early August between the parties where the applicants sought to have the first two charges in each Complaint withdrawn. The OLGR did not consent to this.

[10] On 21 August 2012, each of the applicants applied to the Magistrates Court to have the first two charges struck out on the basis that they did not reveal offences known to law.

Section 187 of the Act

[11] The Notice was purportedly issued under s 187 of the Act. Section 187 relevantly states:

> "**187 Abatement of nuisance or dangerous activity**
>
> (1) This section applies if an investigator believes on reasonable grounds that –
>
> (a) noise coming from licensed premises or a utility area for licensed premises is –
>
> (i) an unreasonable noise; or
>
> …
>
> (2) The investigator may give written notice to the licensee, permittee, or person who appears to be in charge of the premises, requiring that –
>
> (a) the noise stop or be reduced to, and kept at, a level so that it is no longer an unreasonable noise; or
>
> (b) the premises be closed immediately.
>
> …
>
> (3) If the notice is contravened, the investigator may take all steps necessary and reasonable to ensure compliance, or continued compliance, with the notice.
>
> (4) A person who contravenes a requisition under subsection (2) commits an offence.
> Maximum penalty – 25 penalty units.
>
> (5) In this section –
> ***licensed premises*** includes premises to which a restricted liquor permit relates.
> ***unreasonable noise*** means noise that exceeds limits prescribed under a regulation.
> ***utility area***, for licensed premises, includes an area containing plant or equipment that is not part of the licensed

> premises, but is used for the benefit of the licensed premises."

The dispute

[12] The primary dispute concerns the interpretation of the phrase "the noise" in s 187(2)(a). Mr Flanagan SC for the applicants argues that it refers to that noise identified by the investigator in s 187(1)(a)(i) to be "unreasonable noise". Mr Taylor submits that the section allows the investigator to stop all noise, whether it is unreasonable or not.

[13] The effect of this determination is twofold:

(a) first, it goes to the validity of the Notice issued on 19 March 2012 requiring Revestar to cease "all amplification of music and voice/non-amplified entertainment noise… until further notice"; and

(b) secondly, it has an impact on the Complaints issued to the applicants as they relate to a failure to comply with the Notice.

The principles of interpretation

[14] The relevant principles were considered in *Project Blue Sky Inc v Australian Broadcasting Authority*:[1]

> "…the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. **The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning**."[2] (footnotes omitted, emphasis added)

[15] In *Momcilovic v The Queen*,[3] Heydon J said:

> "[441] Pursuant to the principle of legality, the common law of statutory interpretation requires a court to bear in mind an assumption about the need for clarity if certain results are to be achieved, and then to search, not for the intention of the legislature, but for the meaning of the language it used, interpreted in the context of that language. **The context lies partly in the rest of the statute (which calls for interpretation of its language), partly in the pre-existing state of the law, partly in the mischief being dealt with and partly in the state of the surrounding law in which the statute is to operate. The search for 'intention' is only a search for the intention revealed by the meaning of the language.** It is not a search for something outside its meaning and anterior to it which may be used to control it. The same is true of another anthropomorphic reference to something which is also

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1 (1998) 194 CLR 355, 384.

2 Per McHugh, Kirby, Gummow and Hayne JJ at [78].

3 (2011) 245 CLR 1.

> described as a mental state but in this field is not — 'purpose'. And it is also true of the search for 'policy'.
>
> [442] Thus in *Project Blue Sky v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said of the common law rules of statutory interpretation:
>
> > [69] **The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute**. **The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'.** In *Commissioner for Railways (NSW) v Agalianos* Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, **the process of construction must always begin by examining the context of the provision that is being construed.**" (footnotes omitted, emphasis added)

[16] It is clear from the authorities that the process of interpretation requires a consideration of the context in which the language is found, and that the provision be construed in a way that is consistent with the language and purpose of the statute as a whole. This is also consistent with s 14A of the *Acts Interpretation Act* 1954 (Qld).

[17] It is with this in mind that I turn to consider s 187.

Interpretation of s 187

[18] The section commences with the heading "Abatement of nuisance or dangerous activity". The heading to a section of an Act forms part of the provision.[4] It constitutes part of the context within which the provision is to be construed,[5] with the caveat that it "does not… control the permissible scope of the substantive provisions… and cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions."[6]

[19] The body of the section is concerned with the concept of "unreasonable noise" rather than "nuisance". The wording of the section was amended in 2001 to substitute "nuisance" with "unreasonable noise",[7] for the purpose of providing investigators with guidelines as to the appropriate level of noise.[8] The appropriate levels of noise are now prescribed under the *Liquor Regulation* 2002.[9] The substance and purpose of the section has not otherwise changed

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4 s 35C *Acts Interpretation Act* 1954 (Qld).

5 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 602; see also *Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd & Ors* [2011] 2 Qd R 417.

6 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 602.

7 *Liquor Amendment Bill* 2001, cl 96.

8 Explanatory Notes to the *Liquor Amendment Bill* 2001, p 35.

9 s 40.

[20] The word "abatement" is not defined in the Act. Its ordinary meaning is "a reduction; diminution; decrease"[10] or "alleviation, mitigation".[11]

[21] The section operates in this way:

1. if an investigator believes on reasonable grounds that noise coming from licensed premises or a utility area for licensed premises is an unreasonable noise;[12]
2. the investigator may then give written notice to a prescribed person,[13] and in doing so is required to take into account the matters in s187 (2A);
3. the notice may require that:
   (a) "the noise stop **or** be reduced to, and kept at, a level so that it is no longer an unreasonable noise;[14] **or**
   (b) "the premises be closed immediately";[15]
4. if the notice is contravened, the investigator may take all steps necessary and reasonable to ensure compliance.[16]

[22] The interpretation contended for by the respondent – that is, that "the noise" means "all noise" – is a strained one, both on a literal reading of the section and also in its context.

[23] The investigator's power is enlivened when he or she reasonably believes that the noise is an "unreasonable noise". Then, and only then, may the investigator give written notice in accordance with s 187(2). The power the investigator has, therefore, is power only in relation to the trigger – "an unreasonable noise". Secondly, s 187(2)(a) has been drafted so that it can be required that "the noise" either

(a) "stop" or
(b) "be reduced to, and kept at, a level so that it is no longer an unreasonable noise".

[24] If the words "the noise" are examined in the context of the entire sentence, in particular the expression "so that it is no longer an unreasonable noise", it becomes obvious that "the noise" can only refer to a noise that is an "unreasonable noise".

[25] Mr Flanagan SC referred me to the case of *Hoffman v State of Queensland*,[17] where Ambrose J considered s 187 as it stood prior to the amendments referred to above. The section was worded slightly differently to accommodate the use of "nuisance" instead of "unreasonable noise", but does not have to be set out in full for the purposes of this matter.

[26] Relevantly, his Honour stated:[18]

> "The construction problem arises from the fact that **the written notice requiring that 'the noise stop…' can only refer to the 'noise' referred to in s 187(1)(a)**… **When one comes to s 187(2)(a)**

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10 Encyclopaedic Australian Legal Dictionary.
11 The Macquarie Dictionary.
12 s 187(1)(a)(i).
13 s 187(2).
14 s 187(2)(a).
15 s 187(2)(b).
16 s 187(3).
17 [1997] 2 Qd R 602.
18 Ibid, 606.

> **'the noise' which obviously refers back to the noise which the investigator believes on reasonable grounds amounts to a nuisance** may be required to be reduced to and kept at a level 'that is no longer a nuisance'." (emphasis added)

[27] These statements by Ambrose J support the interpretation that "the noise" in the present s 187(2)(a) refers to the "unreasonable noise" identified by the investigator in s 187(1)(a)(i).

[28] I turn now to consider the section in the broader context of the Act and its purpose.

[29] Section 3 sets out the main purposes of the Act. They include, among other things:

(a) minimising adverse effects on the health or safety of members of the public;[19]

(b) minimising adverse effects on the amenity of the community;[20] and

(c) providing a flexible, practical system for regulation of the liquor industry of the State with minimal formality, technicality or intervention consistent with the proper and efficient administration of this Act.[21]

[30] The applicants submit that the effect of the respondent's interpretation of s 187 would allow the investigator to ban any emission of noise from licensed premises for an unspecified period. This would operate so as to permanently alter the conditions of a licensee's liquor license, or otherwise curtail their ordinary commercial operations. Such a construction, it is said, is incompatible with the purpose of regulating the liquor industry with minimal intervention in a licensee's affairs.

[31] There is merit to this submission. Section 111(2)(g) of the Act provides specifically for the variation of a licence by the chief executive in relation to a "matter for the purpose of ensuring compliance with this Act…" There is a procedure that has to be followed in doing so, which includes the chief executive giving written notice to the licensee and allowing the licensee to make any objections.[22]

[32] The OLGR's interpretation of s 187 would essentially enable investigators to bypass the procedure set out in s 112, giving licensees no notice and no opportunity to object to what is effectively a variation of its licence conditions. Given that there is specific provision in the legislation for such a variation, the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[23] can be invoked. In that case, Gavan Duffy CJ and Dixon J said: [24]

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same

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19 s 3(a)(ii).
20 s 3(a)(iii).
21 s 3(d).
22 s 112.
23 (1932) 47 CLR 1.
24 Ibid, 7

> instrument which might otherwise have been relied upon for the same power."

[33] *Anthony Hordern* and subsequent authorities were considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*.[25] Gummow and Hayne JJ observed in that case: [26]

> "*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power", or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power." (footnotes omitted)

[34] The requirements in s 112 of the Act which have to be observed in order to change the conditions of a licence clearly establish the means by which a condition relating to noise can be altered. Although the actual terms of the licence are not altered by the Notice the effect is the same as an alteration under s 112. That requires that s 187 be read so as to confine its application to circumstances where a notice does not impose a condition which effectively changes the conditions under which a licensee may operate.

Conclusion

[35] The words "the noise" in s 187(2)(a) refer to the "unreasonable noise" identified by the investigator in s 187(1)(a)(i).

[36] I declare that the "Stop the Noise Requisition" purportedly issued under s 187 of the *Liquor Act* 1992 and dated 19 March 2012 in respect of the Normanby Hotel is invalid.

[37] Further declarations were sought with respect of the charges concerning alleged breaches of the notice. Given the declaration that I have made, I expect that those complaints will, so far as they relate to alleged breaches, be withdrawn.

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25 (2006) 228 CLR 566.

26 Ibid, 589.