

# SUPREME COURT OF QUEENSLAND

CITATION: *Chief Executive, Department Tourism, Fair Trading and Wine Industry Development v 4 Play (Oz) P/L* [2008] QCA 267

PARTIES: **CHIEF EXECUTIVE, DEPARTMENT TOURISM, FAIR TRADING AND WINE INDUSTRY DEVELOPMENT**  
(respondent/appellant/applicant)  
v  
**4 PLAY (OZ) PTY LTD** ACN 103 511 762  
(applicant/respondent/respondent)

FILE NO/S: Appeal No 2701 of 2008  
BD No 2678 of 2007

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 5 September 2008

DELIVERED AT: Brisbane

HEARING DATE: 30 July 2008

JUDGES: Fraser JA, Mackenzie AJA and Dutney J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

- 1. Grant leave to appeal**
- 2. Allow the appeal, set aside the orders of the District Court, and instead of those orders order that the appeal to that court be allowed, the order of the Commercial and Consumer Tribunal be set aside, and that the case be remitted to the Commercial and Consumer Tribunal to be heard and determined in accordance with law**
- 3. Order that the respondent pay the applicant's costs of and incidental to the application and appeal to the District Court and the application and appeal to this Court**
- 4. Grant the respondent an indemnity certificate pursuant to the *Appeal Costs Fund Act 1973 (Qld)* with respect to the costs ordered to be paid to the applicant**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the respondent held a general licence and an “adult entertainment permit” under the *Liquor Act* 1992 (Qld) – where the permit expired and the respondent applied for a new permit proposing its director be the nominee under the permit – where s 107D(1) of the *Liquor Act* 1992 (Qld) provides that the chief executive may grant a permit if satisfied that the applicant is a “suitable person to provide adult entertainment” – where the effect of s 107E(3) of the *Liquor Act* 1992 (Qld) meant that the director was also required to be a “suitable person” before a permit could be issued – where in making the decision the chief executive was obliged to take into account the criteria expressed in s 107E(1) of the Act – where the chief executive refused the respondent’s application – where in refusing the application the chief executive referred to evidence that revealed matters adverse to the respondent’s suitability – where the respondent appealed to the Commercial and Consumer Tribunal – where the tribunal reversed the chief executive’s decision on the basis that the tribunal found that the chief executive had taken into account matters not relevant to the criteria in s 107E(1) – where the appellant’s appeal to the District Court was dismissed – where the appellant then appealed to this Court – where an appeal to this Court lies only by force of s 118(3) of the *District Court of Queensland Act* 1967 (Qld) – where the grant of leave was not opposed and the appeal turned on the interpretation of a provision important to the administration of the Act – whether leave to appeal should be granted

PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – STATEMENT OF REASONS FOR DECISION – where the appellant contended that the reasons of the learned District Court judge were inadequate – where the respondent contended that because the judge adopted the tribunal’s detailed analysis the judge’s reasons were themselves adequate – where the appeal to the District Court did not involve a short point or one that merely depended upon impression – where the arguments of senior counsel advanced on behalf of the appellant raised substantial issues about the correctness of the tribunal’s construction and its process of reasoning – where the judge did not identify any of the flaws he must have found in the applicant’s argument or give any reason for preferring the tribunal’s view about the proper construction of s 107E(1) – whether adoption of the tribunal’s reasons in those circumstances was an adequate response to the judicial obligation to give reasons

LIQUOR LAW – LICENSING – RENEWALS – HEARING OF APPLICATION AND POWERS OF LICENSING

AUTHORITY – OBJECTIONS AND GROUNDS FOR GRANT OR REFUSAL – where, in assessing the respondent’s suitability to hold a permit against the criteria in s 107E(1), the appellant considered the manner in which the respondent had conducted its financial and taxation affairs – where the tribunal held that the financial and taxation affairs of an applicant or nominee were irrelevant for the purposes of s 107E(1) – where the evidence revealed that the respondent’s director had a complex corporate strategy to keep tax liabilities to an asset poor company – where the evidence revealed that the director had distanced himself from the role of director – where the evidence revealed that the company records did not reflect the true position concerning the beneficial ownership of shares in a company – whether the chief executive was correct in taking this evidence into account in determining whether the respondent was a “suitable person” to hold a permit – discussion of the breadth of enquiry to be undertaken in assessing suitability of an applicant for a permit against the criteria in s 107E(1)

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – where the tribunal found a negative implication in the *Liquor Act* 1992 (Qld) that the financial and taxation affairs of an applicant or nominee were irrelevant for the purposes of s 107E(1) – where the tribunal held that the implication arose due to the absence in s 107E(1) of any express provision analogous to s 107(1)(c) of the Act which required that the applicant demonstrate a “responsible attitude to the management and discharge of the applicant’s financial obligations” in an application for other licenses and permits under the Act – where the tribunal held that the appellant would have considered the respondent’s financial and taxation affairs when determining the respondent’s application for a general licence under the Act and that therefore the respondent’s business and taxation affairs were not relevant to the application for an “adult entertainment permit” – whether the existence of any such negative implication should narrow the construction of s 107E(1) to be adopted in applying the provision

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – where the tribunal held that the only lawful purpose of an enquiry into the business structure of an applicant is to ensure that persons involved in the operation of the adult entertainment business are not also involved with legal or illegal prostitution or drug dealing or have links to organised crime – whether the tribunal erred in applying that narrow ambit of enquiry

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – where s 33 of the *Liquor Regulation* 2002 (Qld) provides that for s 107E(1)(h) of the Act “any previous conduct of the business of providing adult entertainment by the applicant is a relevant matter” – where the tribunal held that s 33 should only be construed as referring to “conduct related to dealings between patrons and adult entertainment” – whether the tribunal erred in applying that narrow construction to s 33

*Appeal Costs Fund Act* 1973 (Qld)

*Commercial and Consumer Tribunal Act* 2003 (Qld), s 34, s 100

*District Court of Queensland Act* 1967 (Qld), s 118(3)

*Liquor Act* 1992 (Qld), s 21, s 103E, s 103F, s 103G, s 106, s 107, s 107D, s 107E, s 107F

*Liquor Regulation* 2002 (Qld), s 29, s 32, s 33, s 34

*Prostitution Act* 1999 (Qld), s 17, Part 9, Part 10

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33, applied

*Bawden v ACI Operations P/L* [2003] QCA 293, cited

*Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, discussed

*Camden & Anor v McKenzie & Ors* [2008] 1 Qd R 39; [2007] QCA 136, cited

*Crystal Dawn P/L & Anor v Redruth P/L* [1998] QCA 373, cited

*Cypressvale P/L & anor v Retail Shop Leases Tribunal* [1996] 2 Qd R 462; [1995] QCA 187, cited

*Haraba P/L v Castles* [2008] 1 Qd R 151; [2007] QCA 206, followed

*Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, cited

*Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255, cited  
*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171, cited

*Plato Films Limited v Speidel* [1961] AC 1090, cited

*Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; [1986] HCA 7, applied

*Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, cited

COUNSEL: M D Hinson SC for the appellant  
P J Flanagan SC, with J M Horton, for the respondent

SOLICITORS: C W Lohe, Crown Solicitor for the appellant  
Rostron Carlyle for the respondent

[1] **FRASER JA:** The respondent, 4 Play (Oz) Pty Ltd, holds a general licence under the *Liquor Act* 1992 (Qld) at premises known as “Show Girls” at Queen Street in

Brisbane. The respondent also held an “adult entertainment permit” under which it was authorised to provide entertainment of an explicit sexual nature. That permit expired on 5 July 2007. On 13 April 2007 the respondent applied under s 106 of the *Liquor Act 1992* (Qld) for a new adult entertainment permit. The respondent proposed that its nominee under the permit be Mr Johnson, the respondent’s sole shareholder and director.

- [2] Section 107D(1) of the *Liquor Act 1992* (Qld) provides that the chief executive may grant an application for an adult entertainment permit only if the chief executive is satisfied that the applicant is a “suitable person to provide adult entertainment” in the premises. The effect of s 107E(3) of the Act is that a nominee, such as Mr Johnson, must also be a “suitable person to provide adult entertainment” before a permit can be issued.
- [3] In considering whether the respondent and Mr Johnson were suitable persons to provide adult entertainment the chief executive was obliged to take into account the criteria expressed in s 107E(1). It is the proper construction of this provision that is in issue in this Court. It provides:

“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 chief executive must consider all relevant matters including the following—
- (a) the applicant’s reputation, having regard to character, honesty and integrity;
  - (b) whether the applicant has been convicted of—
    - (i) an indictable offence; or
    - (ii) an offence against the *Prostitution Act 1999*;
  - (c) whether the applicant is an associate of a person who has been convicted of—
    - (i) an indictable offence; or
    - (ii) an offence against the *Prostitution Act 1999*;
  - (d) whether the applicant is an associate of a corporation, an executive officer of which has been convicted of—
    - (i) an indictable offence; or

- (ii) an offence against the *Prostitution Act 1999*;
- (e) whether the applicant has been charged with any offence of a sexual nature that involves violence, intimidation, threats or children, including the circumstances surrounding the laying of the charge and whether proceedings in relation to the charge are continuing or have been discontinued;
- (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;
- (g) whether the applicant has the ability to control the noise and behaviour of the number of persons that could reasonably be expected to be on and in the vicinity of the premises if the permit were granted;
- (h) any other matters prescribed under a regulation."

[4] Subsection 33(1) of the *Liquor Regulation 2002* (Qld) provides:

“33 Suitability of applicant for permit

- (1) For section 107E(1)(h) of the Act, any previous conduct of the business of providing adult entertainment by the applicant is a relevant matter.”

[5] The chief executive referred to evidence that in his view revealed matters adverse to the respondent's suitability in relation to its reputation, character, honesty and integrity in terms of s 107E(1)(a), lack of transparency in the respondent's business structure in terms of s 107E(1)(f), and the manner in which other companies controlled by Mr Johnson had previously conducted an adult entertainment business in terms of s 33(1) of the *Liquor Regulation 2002* (Qld) and s 107E(1)(h) of the Act. The chief executive considered that those matters demonstrated that the respondent was not a suitable person to provide adult entertainment at the licensed premises. He therefore refused the respondent's application for a permit.

[6] The respondent appealed to the Commercial and Consumer Tribunal. Section 21 of the *Liquor Act 1992* (Qld) confers on that tribunal both jurisdiction to review a decision of the chief executive and the powers, discretions and duties imposed on the chief executive in respect of the application for a permit. Pursuant to s 34(1) of the *Commercial and Consumer Tribunal Act 2003* (Qld) the appeal proceeded by way of a rehearing on the evidence that was before the chief executive. The issue for the tribunal was whether the tribunal was satisfied that the respondent was a suitable person to provide adult entertainment.

- [7] In the tribunal's decision of 29 August 2007 it held that the chief executive had erred by taking into account matters that were not relevant to the criteria in s 107E(1). The tribunal was satisfied that on the relevant evidence the respondent was "a suitable person to provide adult entertainment". It therefore reversed the chief executive's decision and granted a permit to the respondent for a period of one year from the date of its decision. (Such permits may be granted only for one year and they are not renewable: s 103I.)
- [8] With the leave of the District Court, the chief executive appealed to that court under s 100 of the *Commercial and Consumer Tribunal Act 2003* (Qld). The chief executive contended that the tribunal had erred in law by construing s 107E(1) too narrowly. That appeal was dismissed on 5 March 2008.
- [9] The chief executive now applies under s 118(3) of the *District Court of Queensland Act 1967* (Qld) for leave to appeal against the decision of the District Court. The chief executive repeats in this Court his contention in the District Court that the tribunal adopted an erroneously narrow construction of s 107E(1) of the *Liquor Act 1992* (Qld). The respondent did not oppose leave. The proper construction of that provision is of importance in the administration of the Act. For reasons to which I am about to turn I consider that the proposed appeal has substance. I would therefore grant leave to appeal.

### **The statutory scheme**

- [10] The statutory provision for adult entertainment permits was introduced as part of a broader statutory scheme aimed at distinguishing between "legitimate adult entertainment" and prostitution. The provisions of the *Liquor Act 1992* (Qld) dealing with adult entertainment permits were introduced into that Act by Part 9 of the *Prostitution Act 1999* (Qld). At the same time, Part 10 of the *Prostitution Act 1999* (Qld) introduced into the *Criminal Code 1899* (Qld) a new definition of "prostitution", s 229E(2). The legislation excluded from "prostitution" the provision of "adult entertainment" under an adult entertainment permit and prohibited a person from holding both a brothel licence and an adult entertainment permit.
- [11] This regulatory scheme and the reasons for its introduction were discussed in the Minister's second reading speech:<sup>1</sup>

"Sexually explicit adult entertainment at licensed premises in Queensland has grown as a form of entertainment, raising community, social and legal concerns. Without any regulation of tabletop dancing and other similar activities, it is likely that the number of venues offering this form of entertainment will continue to increase. In the past, this entertainment has been inappropriately dealt with in the same manner as prostitution offences. The intention of the new legislation is to distinguish legitimate adult entertainment from prostitution, allowing both to be regulated separately. To that end, adult entertainment will not be prosecuted –

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<sup>1</sup> Parliamentary Debates (Hansard), 10 November 1999, p 4828.

where it occurs on premises for which a liquor licence or permit exists and a permit for the adult entertainment has been issued;

where the adult entertainment does not breach the conditions and restrictions of –

the permit;  
this legislation;  
the Liquor Act 1992, or liquor regulations of 1992;

where the behaviour does not involve an act such as sexual intercourse, or other serious sexual act; and

the person performing the adult entertainment is not under 18 years of age.

Where acts like stripping, lap dancing and tabletop dancing exceed these parameters, persons involved will be liable to prosecution under the criminal law for indecent behaviour - or in more serious cases, prostitution.

In addition, the Liquor Licensing Division, Department of Tourism, Sport and Racing, may require the licensee of the premises where unlawful adult entertainment occurs to show cause as to why their liquor license and/or their permit for adult entertainment should not be cancelled. The Police Service and the Liquor Licensing Division will share responsibility for policing adult entertainment.”

- [12] The Minister referred to the historical background to this new regulatory approach in his second reading speech in the following terms:<sup>2</sup>

“We cannot ever forget the part prostitution has played in corruption and organised crime in this state during some dark years in Queensland’s history. We must remain ever-vigilant against corruption and organised crime, and the passage of this Bill will assist us in that task.”

- [13] That an aim of this new form of regulation was the elimination of corruption and crime formerly associated with prostitution and adult entertainment is also suggested in the explanatory notes to the *Prostitution Bill* 1999 (Qld):

“A fundamental principle of the proposed legislative regime is the Government’s strong commitment to ensuring corruption will not be tolerated through establishment of a legal industry and introduction of appropriate checks and balances.

The government is well aware of the difficulties associated with the control of prostitution. The proposed legislative framework has been developed with a view to controlling and minimising the harm, or potential harm, associated with prostitution, rather than assuming that it can be eliminated.”

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<sup>2</sup> Parliamentary Debates (Hansard) 10 November 1999, p 4826.



- [14] The distinction between prostitution and adult entertainment foreshadowed in that material is reflected in s 103E of the *Liquor Act* 1992 (Qld). Section 103E provides that there is to be an “adult entertainment code” which “prescribes the live entertainment that may be performed for an audience, by a person performing an act of an explicit sexual nature (*adult entertainment*), on licensed premises or premises to which a general purpose permit or restricted club permit relates under an adult entertainment permit.” Subsection 103E(3) excludes sexual intercourse, masturbation, and oral sex from the meaning of “adult entertainment”. The code then prescribes in some more detail the particular acts of an explicit sexual nature which may not be performed by an “adult entertainer”. Those prohibitions repeat the statutory exclusion of sexual intercourse, masturbation and oral sex and add a variety of other forms of proscribed conduct involving interaction between “entertainers” or between an “entertainer” and an audience member, including soliciting persons for the purposes of prostitution.
- [15] Subsection 103F(1) of the *Liquor Act* 1992 (Qld) provides that a person is eligible to apply for or to be granted an adult entertainment permit only if that person is a licensee or the holder of a general purpose permit or restricted club permit under the Act.

### **Factual background**

- [16] It is necessary to refer only to so much of the extensive factual material before the chief executive and the tribunal as is required to put the issues of statutory construction into context.
- [17] The evidence demonstrated that Mr Johnson controlled the operation of other licensed premises known as “Club VIP”, at Paddington, operated by City Lappers Pty Ltd, “Club 299”, at Fortitude Valley, operated by What is Next Pty Ltd, “The Living Room”, at Petrie Terrace, operated by Viva Night Club Pty Ltd, and “Bar Burlesque”, at Fortitude Valley, operated by What is Next Pty Ltd. He had also used a variety of other companies to conduct his business at the subject licensed premises:
- Showgirls (Aust) Pty Ltd, which formerly held the adult entertainment permit and liquor licence at the premises (and which later changed its name to Closeup (Aust) Pty Ltd);
  - Showgirls (Oz) Pty Ltd, which never held a licence or permit but was put into liquidation as a result of debts connected with Showgirls (Aust) Pty Ltd’s operation;
  - Mistrough Pty Ltd, a service company which paid the bills for the premises known as “Showgirls”, employed people at those premises, paid for liquor and held credit card accounts; and
  - Club Minder Pty Ltd which was incorporated to replace Mistrough Pty Ltd.

[18] Mistrrough Pty Ltd, Closeup (Australia) Pty Ltd and Showgirls (Oz) Pty Ltd had been put into liquidation owing various debts to creditors and about \$887,000 in tax to the Australian Taxation Office ('the Australian Taxation Office').

[19] In an affidavit made on 3 July 2007 Mr Johnson swore:

- '4. In February 2004 my then Solicitor Mr Ron Lawson incorporated Mistrrough Pty Ltd ('Mistrrough') on my instructions. Mistrrough was intended, to be a component in a business structure recommended to me by Mr Lawson. The structure was designed to achieve a number of purposes. These included centralising banking, payment of bills and wages and creating a single point of liability for GST, group tax and so on.
5. The structure also had the purpose of assisting in my ongoing dispute with the Australian Taxation Office in relation to certain aspects of my adult entertainment businesses. The strategy was to ensure that liability for tax was kept to an asset-poor company to deter the Australian Taxation Office from winding the company up. I believed that if winding the company up was not a good option for the Australian Taxation Office they would be forced to either negotiate reasonably with me or take any issue to Court. I would have been happy with either of these outcomes.
6. I did not take on the role of the director or shareholder myself as a precaution, I thought at that time that if I distanced myself from these roles then there would be less risk to the liquor licences and other approvals.
7. Mistrrough was incorporated with Ms Melinda Jane Leach as it's sole Shareholder. Although company records at the time did not reflect it, Ms Leach at all times held the shares in Mistrrough on trust for me. Ms Leach was at the time employed, by me in an administrative and semi management role and her functions included responsibility for accounting and bookkeeping matters.
8. ASIC records show Malcolm Paul Hurst as the original director of Mistrrough. He resigned as director in about May 2006 and was replaced by Donald Edward Wheatley. The date of Mr Wheatley's appointment is not accurately reflected in the ASIC records. His registration as director, with ASIC was delayed by a number of months because I did not have access to the corporate key for the company. Upon his departure I believe Mr Hurst removed substantial company records including documentation relating to the corporate key.' ..."

[20] In a letter dated 20 June 2007 the liquidators of Closeup (Australia) Pty Ltd, Cranstoun and Hussein, advised that upon their appointment in late 2005 as liquidators they requested Mr Hurst, the director of the company, and Mr Johnson to

submit a report as to the affairs of the company and to deliver up the company's books and records. As at the date of the letter the requested report and company records had not been delivered to the liquidator.

- [21] In a letter dated 22 June 2007 Mr Currie of Currie Biazos Insolvency Accountants advised that he and a Mr Lucas were appointed voluntary administrators of Showgirls (Oz) Pty Ltd on 5 February 2004. The company was subsequently wound up and he and Mr Lucas were appointed as liquidators. The liquidation was finalised on 3 May 2006. Mr Currie said that Mr Johnson provided minimal company records or assistance to the administrators or liquidators; that at a second meeting of creditors Mr Johnson proposed a Deed of Company Arrangement; that whilst the majority in number of creditors voted for the Deed, the Tax Department voted against the Deed and the company was placed in liquidation; and that Mr Johnson was to contribute \$200,000 to the Deed but as the Deed did not proceed no funds were paid for the benefit of creditors.
- [22] In a letter dated 7 June 2007, Mr Hutson, liquidator, of the firm Korda Mentha, said that he and a Mr Park were appointed as administrators of Mistrrough Pty Ltd (in liquidation) on 21 November 2006 and subsequently were appointed as liquidators of the company on 18 December 2006. He and Mr Park had received limited information regarding the company and investigations were continuing to establish the financial position and role of the company. Mr Hutson said that the Australian Taxation Office had submitted a proof of debt in the amount of \$351,865.71. He had received only \$64,321.47 from the company's bank accounts.

#### **The reasons of the chief executive**

- [23] The chief executive summarised his conclusions in the following paragraphs of his reasons of 10 August 2007:

“109. The following matters demonstrated that the applicant was not a suitable person to provide adult entertainment:

- The circumstances of the liquidations of Mistrrough, Closeup (Aust) (previously known as Showgirls (Aust) and Showgirls (Oz)).
- The Applicant 4 Play has used Mistrrough as a bill paying agent and allowed it to accrue a substantial tax debt resulting in liquidation demonstrating an insufficient degree of character, honesty or integrity.
- The Applicant 4 Play has conducted the business of providing adult entertainment on the licensed premises of Showgirls in an inappropriate way by using Mistrrough in this way.
- The Applicant 4 Play has engaged in a course of conduct in this respect as demonstrated by the insolvency of Closeup (previously known as Showgirls (Aust) and Showgirls (Oz)). The use of Brando's bank accounts also suggests a previous course of conduct in this regard.

- The Applicant does not have a sufficiently transparent business structure to enable all associates to be ascertained. The apparent absence of books and records for Mistrrough, Closeup (Aust) (previously known as Showgirls (Aust) and Showgirls (Oz) demonstrate that the use of the various structures by Johnson is insufficiently transparent to identify all associates as it is unknown where money from these companies went.
- The inability of the Applicant to be in control of Mistrrough's conduct for some time due to inability to access the corporate key (461 and 491) demonstrates an unsuitability of character.
- The deliberate use of Mistrrough and the corporate structure as a defensive strategy for Johnson's dealings with the Australian Taxation Office (491 Wheatley) and (461 Johnson) demonstrates an unsuitability of character and integrity and an inappropriate previous conduct of the business of providing adult entertainment.
- That the Applicant has since the liquidation of Mistrrough personally taken responsibility for maintaining business records and paying bills does not detract from the previous use of Mistrrough and Showgirls (Oz) as bill paying agents which accrued debt (467).

111.<sup>3</sup> Finally, I held concerns that the applicant had not provided any evidence that it had resolved its difference with Australian Taxation Office which had led to the demise of various companies previously controlled by Johnson. The applicant's attitude appeared to be that it intended operating the Showgirls premises in the same manner as before and that the proposed new entity Club Minder would assume the same role as Mistrrough Ply Ltd. In these circumstances there could be no guarantee that Club Minder would not meet the same fate as Mistrrough and before it Showgirls (Oz)."

### **The reasons of the tribunal**

- [24] The tribunal considered that the chief executive had adopted an unduly broad view of the matters that were relevant to a determination of an applicant's suitability to provide adult entertainment in its licensed premises. The tribunal observed that the main purpose of the suitability test under both the *Liquor Act 1992* (Qld) and the *Prostitution Act 1999* (Qld) was to ensure that the applicant's reputation, criminal history and transparency of business structure was such as to enable the chief executive to be satisfied that there were no links between the applicant and illegal prostitution, organised crime and police corruption. That was said to be reinforced by s 107F of the *Liquor Act 1992* (Qld), which provides for the Queensland Police Service Commissioner to make enquiries about an applicant's criminal history, including enquiries to the prostitution licensing authority. The tribunal then pointed out that whilst the analogous suitability requirements prescribed by s 17(1) of the

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<sup>3</sup> There was no paragraph 110.

*Prostitution Act 1999* (Qld) require consideration to be given to “whether the applicant has, or is, or will be able to obtain, financial resources that are adequate to ensure the financial viability of the brothel” there is no similar provision in s 107E(1) of the *Liquor Act 1992* (Qld).

- [25] The tribunal concluded that this difference reflected the fact that an applicant for an adult entertainment permit (who, as I have mentioned, must hold a licence under the *Liquor Act 1992* (Qld)) will earlier have satisfied the chief executive under s 107(1)(c) of the *Liquor Act 1992* that it “demonstrates a responsible attitude to the management and discharge of the applicant's financial obligations.”
- [26] The tribunal’s construction of s 107E(1) is encapsulated in the following paragraphs of its reasons:

“40 We consider that. the proper interpretation of section 107E(1) is that the chief executive in considering an application for an AEP is not entitled to take into account the financial and taxation affairs of an applicant or nominee. If the chief executive has concerns about the management and discharge of their financial obligations by an applicant or nominee, he may issue a Show Cause notice with a view to cancelling the General Licence, which has been done here, but he may not lawfully refuse to grant an AEP solely on the ground of concerns about the overall financial affairs of the applicant or nominee.

41 The only lawful purpose for an enquiry into the business structure of an applicant or nominee for an AEP is to ensure that there are no persons involved in the operation of the adult entertainment business who are involved with legal or illegal prostitution, or drug dealing or who have links to organised crime.

42 In circumstances where the business structure is disclosed, disclosure of associates has been made, all proper enquiries with respect to the reputation of those associates have been undertaken, and no relevant concerns about those associates are revealed, it is not intended that there should then be an exhaustive investigation into the money trail of the business. ...

43 Any previous conduct of the business of providing adult entertainment is imported into section 107E(1)(h) as a matter relevant to suitability by virtue of section 33 of the *Liquor Regulation 2002*. This requirement refers in our view to conduct related to dealing between patrons and adult entertainment. It would be relevant under section 107E(1)(h) to consider, for example, whether there were complaints made to the Division by patrons or dancers, or other evidence, about dishonesty or unfair trading practice on the part of an applicant or nominee in relation to payment for adult entertainment services as between patrons and dancers.”

### The reasons of the District Court judge

- [27] After setting out relevant background material and summarising the parties' submissions and the tribunal's reasons, his Honour gave the following reasons for dismissing the appeal:

“[10] On a consideration of all of the above, I find that the appellant has not shown any error of law on the tribunal’s part in reaching its decision of 29 August 2007 in that the tribunal conducted what could only be described as an exhaustive analysis of the many facets of evidence which lead to a consideration of 'all relevant matters' to determine the suitability of an applicant for an AEP under s 107E(1) of *the Act* and as such considered the matter correctly according to law.”

### Adequacy of the reasons

- [28] The applicant contends that those reasons were inadequate. He relies upon the principle expressed in decisions of this Court that a failure to give reasons that ought to have been given amounts to appealable error.<sup>4</sup> The respondent does not take issue with the principle but contends that because the judge’s reasons adopted the tribunal’s detailed analysis the judge’s reasons were themselves adequate.
- [29] In *Bawden v ACI Operations P/L*<sup>5</sup> reference was made to those justifications that have been advanced for the judicial obligation to give reasons that were identified by Meagher JA in *Beale v Government Insurance Office of NSW*:<sup>6</sup> to avoid disabling the right of appeal, to prevent the “real sense of grievance” felt by a party who does not know or understand why the decision was made; to enhance judicial accountability, provide the educative effect resulting from the exposure of the trial judge or magistrate to review and criticism and encourage consistency in decisions; and to save time for appeal courts by reducing the number of appeals and the time taken in considering appeals. Ultimately, the obligation may be grounded in the notion that justice should not only be done but be seen to be done.<sup>7</sup> Those justifications are all potentially applicable here.
- [30] The appeal to the District Court involved a question of law. As Gibbs CJ observed in *Public Service Board of New South Wales v Osmond*<sup>8</sup>, “[i]t has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law.”<sup>9</sup> The giving of reasons, although not universally required, is a normal “incident of the judicial process”.<sup>10</sup> What amounts to sufficient compliance with the obligation must vary according to the circumstances

<sup>4</sup> *Camden & Anor v McKenzie & Ors* [2008] 1 Qd R 39; [2007] QCA 136; *Bawden v ACI Operations P/L* [2003] QCA 293 at [29] per Fryberg J, with whose reasons Muir J agreed; McPherson JA did not express any view on this topic; *Crystal Dawn P/L & Anor v Redruth P/L* [1998] QCA 373.

<sup>5</sup> *Bawden v ACI Operations P/L* [2003] QCA 293 at [29],

<sup>6</sup> *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441-2

<sup>7</sup> *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 at [56], per Buchanan, Nettle and Dodds-Streton JJA.

<sup>8</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; [1986] HCA 7.

<sup>9</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666; [1986] HCA 7.

<sup>10</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666 -7; [1986] HCA 7.

of the particular case,<sup>11</sup> but the reasons at least should set out the essential grounds for the decision.<sup>12</sup>

- [31] In my respectful opinion, the circumstances of this case justify the appellant's contention that the judge erred by failing to give adequate reasons. The appeal to the District Court did not involve a short point or one that merely depended upon impression. In that court the applicant's senior counsel advanced much the same contentions about the construction of s 107E(1) that he now advances in this Court. Those contentions, which I discuss later in these reasons, plainly raised substantial issues about the correctness of the tribunal's construction and its process of reasoning. The judge did not identify any of the flaws he must have found in the applicant's arguments or otherwise give any reason for preferring the tribunal's view about the proper construction of s 107E(1). That was so even though the proper construction of that provision was the only issue in the appeal. In my respectful opinion, the mere adoption of the tribunal's reasons in those circumstances was an inadequate response to the judicial obligation to give reasons.
- [32] It is necessary then to consider the applicant's challenge to the reasons given by the tribunal, which the judge adopted.

### **The proper construction of s 107E(1)**

- [33] The extract from the tribunal's reasons set out above reveals that in determining whether the applicant was a suitable person to hold an adult entertainment permit the tribunal directed itself that it was not entitled to take into account the financial and taxation affairs of an applicant; that the only lawful purpose of an enquiry into the business structure of an applicant was to ensure that persons involved in the operation of the adult entertainment business were not also involved with legal or illegal prostitution or drug dealing or had links with organised crime; that it should exclude the use of financial records to identify as associates persons who had entered into a business arrangement or relationship with an individual for the provision of adult entertainment; and that s 33 of the *Liquor Regulation 2002* (Qld) referred only to dealings "between patrons and adult entertainment".
- [34] The applicant contends that the tribunal misdirected itself in each of those respects and that the District Court judge erred in failing to correct those errors. In my respectful opinion, that contention must be accepted.

### Were the financial and taxation affairs of an applicant relevant to the determination under s 107E(1) (paragraph 40 of the tribunal's reasons)?

- [35] As Toohey and Gaudron JJ observed in *Australian Broadcasting Tribunal v Bond*<sup>13</sup> about a similar expression, the expression "suitable person" "takes its meaning from its context, from the activities in which the person is or will be engaged, and the ends to be served by those activities". The tribunal correctly appreciated that what is in issue here is not suitability to hold a general liquor licence or to practise law or

<sup>11</sup> *Cypressvale P/L & anor v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 per Fitzgerald P at 476-7; McPherson and Davies JJA at 482; [1995] QCA 187; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 269C.

<sup>12</sup> Cf: *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171, per Buchanan JA at [64].

<sup>13</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 380; [1990] HCA 33.

to hold a financial adviser's licence, but suitability to provide explicit sexual entertainment under an adult entertainment permit. It follows that material directed to the respondent's reputation, character, honesty and integrity is to be assessed primarily by reference to its potential to reveal whether or not an applicant will fulfil its obligations under the permit.

- [36] Contrary to the respondent's submission, however, that consideration does not justify the conclusion that the manner in which the respondent had in the past managed its financial affairs and conducted its dealings with the Australian Taxation Office are irrelevant considerations in the determination of the respondent's suitability to hold an adult entertainment permit.
- [37] The obligations under an adult entertainment permit are central to the policy objective of separating "adult entertainment" from prostitution. The "adult entertainment code" requires the holder of a permit to confine itself to the provision of "adult entertainment" and prohibits involvement in the provision of prostitution. Further, an adult entertainment permit authorises the holder to provide adult entertainment only in an area of the holder's premises approved by the chief executive and during hours stated in the permit (s 103G(1)). Such a permit is also qualified by the provisions of the Act and conditions prescribed under a regulation or imposed by the chief executive. The *Liquor Regulation 2002* (Qld) requires the holder to provide (s 32) and comply with (s 29(a)) a management plan providing a detailed plan of the area in which the entertainment is to be provided, the staff and security persons to be on duty during performances, and the name and contact details of the "promoter" of the adult entertainment. The form of permissible advertising in relation to adult entertainment is regulated (s 34), the holder must keep records of various kinds (s 29(b), s 29(c)) and "spruiking or touting" is also regulated (s 29(d)).
- [38] The holder must comply with those important and quite extensive obligations despite any temptation to stray outside them to save expense or to profit by doing so. Evidence that reveals an applicant's attitude to and history of compliance with other obligations, whether sourced in statute, contract, or otherwise, might well shed light upon the likelihood that the applicant will comply with this regulatory scheme.
- [39] Paragraph 109 of the chief executive's reasons indicates that he relied upon the manner in which the respondent had conducted its financial and taxation affairs as bearing upon its suitability because it shed light on the respondent's character in terms of s 107E(1). The chief executive took into account, for example, the evidence in Mr Johnson's affidavit that he adopted a complex corporate strategy "to ensure that liability for tax was kept to an asset-poor company to deter the Australian Taxation Office from winding the company up" so that the Australian Taxation Office "would be forced to either negotiate reasonably with me or take any issue to court". It was open to the chief executive to conclude from this evidence that Mr Johnson considered it appropriate to create a complex and artificial corporate structure for the purpose of frustrating attempts by the Australian Taxation Office to take legal proceedings to vindicate a claimed entitlement to a tax debt from Mr Johnson's company.
- [40] On the face of it, evidence of that kind was capable of being regarded as bearing upon the applicant's character in a way that reflected adversely on its suitability to be entrusted with the rights and obligations under an entertainment permit. The



same is true of the other matters relied upon by the chief executive, such as Mr Johnson's evidence that he "distanced himself" from the role of director and shareholder of a particular company he controlled; that company records did not reflect the true position concerning the beneficial ownership of shares in a company; and his explanation concerning the inaccuracy for a period of ASIC records concerning one of his companies.

[41] The tribunal, however, treated the evidence of this kind as being irrelevant. It held:

"52 Mr Johnson certainly operates his adult entertainment business by means of a complex corporate structure and such a complex structure could possibly be indicative of impropriety, but there is no evidence before us that the corporate structure has facilitated illegal activities. Mr Johnson no longer has a service company from which he is distanced. The new service company is Club Minder Pty Ltd of which he is the director.

53 We make no finding as to whether Mr Johnson's companies are responsible corporate citizens or as to whether, as the chief executive alleges, Mr Johnson can be characterized fairly as a serial liquidator of companies, or as to whether there is a real risk that Club Minder Pty Ltd may also fail to be financially viable. These are matters relevant to whether the applicant is a fit and proper person to hold a liquor licence and will fall to be determined in the current Show Cause proceedings."

[42] I would reject the submission made for the respondent that s 107E(1) should be construed so narrowly.

[43] The tribunal found a negative implication in the Act that the financial and taxation affairs of an applicant or nominee were irrelevant for the purposes of s 107E(1). It derived that implication from the absence in s 107E(1) of any express provision analogous to s 107(1)(c) of the *Liquor Act* 1992 (Qld), which makes relevant in applications for other licences and permits (such as the respondent's general licence under the Act) the question whether the applicant "demonstrates a responsible attitude to the management and discharge of the applicant's financial obligations". The tribunal thought that it was significant that an applicant for the permit must already have demonstrated its financially responsible attitude when the chief executive decided to grant it a general licence. It also thought that the extrinsic evidence to which I earlier referred pointed in the same direction.

[44] That s 107E(1) should not be confined by any such negative implication is suggested by the word "including" in the introductory part. It is clear that subparagraphs (a) – (h) do not comprehensively state the criteria relevant to the question whether the applicant is a "suitable person to provide adult entertainment". The breadth of the expressions in paragraph (a) of s 107E(1) also militates against the narrow construction preferred by the tribunal.

[45] That an applicant for an adult entertainment permit must earlier have persuaded the chief executive of its responsible attitude to the management and discharge of its financial obligations when applying for a general licence under s 107(1) does not suggest a contrary view. Having regard to the regulatory obligations I summarised earlier, compliance with an adult entertainment permit must involve the holder of it in management obligations and financial commitments additional to those

associated with the pre-existing licence. It is in the highest degree unlikely that the legislative purpose was that the chief executive would be obliged to disregard material that demonstrated, for example, a substantial risk that an applicant would not remain viable for the period of the permit sought by that applicant. Material that reveals whether or not an applicant has a responsible attitude to the management and discharge of its financial obligations may bear upon the suitability of a person to hold an adult entertainment permit for that reason, or because it otherwise concerns an applicant's character, integrity, honesty or reputation.

- [46] The criteria in paragraphs (b)(ii), (c)(ii) and (d)(ii) of s 107E(1) reflect the policy objective evidenced in the extrinsic evidence and other statutory provisions to which I have referred of ensuring the separation of the adult entertainment industry from prostitution. That the objective was not so limited, however, is indicated by the presence of the other paragraphs and by the fact that the expressed criteria are not exclusive. Subsection 107E(1) reflects a perception that the prospect that a permit holder will comply with its obligations is likely to be enhanced by permitting the determination of an applicant's suitability to be made with reference to a very broad range of matters.
- [47] The respondent referred to Lord Radcliffe's reference in *Plato Films Limited v Speidel*<sup>14</sup> to the "difficulty that "general evidence of reputation" does not convey an idea of any content." The question there in issue concerned the relevance of evidence of a plaintiff's disposition (rather than reputation) in a libel claim. Similarly, in *Melbourne v The Queen*<sup>15</sup> (where the issue concerned directions as to the use of good character evidence in criminal trials) reference is made to a common misconception that people have stable, one dimensional characters ("good" or "bad").
- [48] However the conceptual difficulties in the use of evidence of character and reputation are not germane to the issue of statutory construction that arises in this application. Nor is it significant that, as the respondent submitted, many in the community would not associate notions of character, honesty and integrity with a person who provides "adult entertainment". Material that bears upon an applicant's character in a way that informs an assessment of the suitability of an applicant for an adult entertainment permit must be taken into account because that is what paragraph (a) of s 107E(1) requires. That paragraph is premised upon the view that "character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."<sup>16</sup> That being so, an assessment of an applicant's character for the purposes of s 107E(1) may well be informed by an examination of the manner in which the applicant has conducted its financial and taxation affairs.
- [49] For these reasons I accept the applicant's contention that the judge erred by adopting the tribunal's view that the proper construction of s 107E(1) was that, in determining whether the applicant was a suitable person to hold an adult

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<sup>14</sup> *Plato Films Limited v Speidel* [1961] AC 1090 at 1130

<sup>15</sup> *Melbourne v The Queen* (1999) 198 CLR 1 at [34]–[35] per McHugh J, [63] per Gummow J, [105]–[107] per Kirby J, [152] per Hayne J; [1999] HCA 32

<sup>16</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Toohey and Gaudron JJ at 380; [1990] HCA 33.

entertainment permit, the tribunal was not entitled to take into account the manner in which the respondent had conducted its financial and taxation affairs.

Is the only lawful purpose of an enquiry into the business structure of an applicant to ensure that persons involved in the operation of the adult entertainment business are not also involved with legal or illegal prostitution or drug dealing or have links to organised crime (paragraph 41 of the tribunal's reasons)?

- [50] A similar error attends the tribunal's conclusion that the only lawful purpose for an enquiry into the business structure of an applicant is to ensure that persons involved in the operation of the adult entertainment business are not also involved "with legal or illegal prostitution or drug dealing or ... have links to organised crime".
- [51] It may be accepted, as was submitted for the respondent, that an important purpose of the suitability test was to ensure that the applicant's reputation, criminal history and transparency of business structure were such as to enable the chief executive to be satisfied that there were no links between the applicant and illegal prostitution, organised crime and police corruption. But that does not justify disregard of other identifiable purposes of the suitability test, including the selection of persons of such a character as to be likely to comply with and require "adult entertainers", patrons of such entertainment, and others to comply with all aspects of the regulatory scheme I have described.
- [52] The tribunal erred whether or not paragraph 41 of the tribunal's reasons is construed, as the respondent contends, as intended to relate only to paragraph (f) of s 107E(1). To the extent that any lack of transparency in an applicant's business structure reflects upon the suitability of the applicant to provide adult entertainment it is plainly a relevant consideration for the chief executive, whether or not the nature of the business structure is apt to conceal links with prostitution, drug dealing or organised crime. That the criteria in paragraphs (b) – (d) refer in general terms to "an indictable offence" rather than being limited to "legal or illegal prostitution or drug dealing or ... organised crime" also supports that view.
- [53] It seems that the tribunal's erroneously narrow view contributed to its disregard of its own conclusion, expressed in paragraph 52 of the reasons, that the complex structure by which Mr Johnson operated his adult entertainment business "could possibly be indicative of impropriety". For the reasons I have given, contrary to the tribunal's view, these matters were capable of being regarded as bearing upon the suitability of the applicant.

The use of financial records to identify as associates persons who have entered into a business arrangement or relationship with an individual for the provision of adult entertainment (paragraph 42 of the tribunal's reasons)

- [54] I would also reject the tribunal's conclusion that what it characterised as "an exhaustive investigation into the money trail of the business" involved a misconstruction of s 107E(1)(f). That provision is not confined "to a consideration of whether or not associates are able to be identified", as the tribunal observed, but to whether those associates may be "readily" identified. Furthermore, as the applicant contended, the word "associate" is defined in s 4C as comprehending any person who "has entered into a business arrangement or relationship with the [applicant] for the provision of adult entertainment". Following the "money trail"

may lead to the identification of “associates” of that character. Paragraph (f) dictates the conclusion that such an exercise is a legitimate one.

Should s 33 of the *Liquor Regulation 2002 (Qld)* be construed as referring only to dealings between patrons and adult entertainment (paragraph 43 of the tribunal’s reasons)?

- [55] Section 33 provides that, for section 107E(1)(h) of the Act, “any previous conduct of the business of providing adult entertainment by the applicant is a relevant matter.” The unqualified terms of that provision are inconsistent with the tribunal’s view that it is confined to “conduct related to dealing between patrons and adult entertainment”
- [56] The respondent sought to support the tribunal’s construction of s 33(1) by reference to the definition of “adult entertainment” to which I earlier referred. It is, however, apparent that the “business of providing” adult entertainment which a permit authorises may extend beyond the dealings between patrons and “adult entertainment”, even assuming that this was intended to refer to dealings both between the “entertainers” and patrons and between the licence holder and “entertainers” and patrons.
- [57] Section 33 permits reference to any aspect of an applicant’s previous conduct of the business of providing adult entertainment for what light it throws on an applicant’s suitability. The chief executive did not err by taking into account the manner in which Mr Johnson had caused his companies to conduct business in the past, including the circumstances of the company liquidations. For the reasons I earlier gave, those matters were capable of being regarded as casting light on the applicant’s character, honesty and integrity in a way relevant to the assessment of its suitability to hold an adult entertainment permit.
- [58] It appears that this erroneously narrow construction of s 33 of the *Liquor Regulation 2002 (Qld)* informed the tribunal’s decision, expressed in paragraph 53 of its reasons, to make no finding as to whether Mr Johnson’s companies were responsible corporate citizens or not or whether Mr Johnson could be characterised fairly as a “serial liquidator of companies”, or whether there was a real risk that a company associated with Mr Johnson “may also inevitably fail to be financially viable”. Contrary to the tribunal’s conclusion, matters of that kind are capable of bearing upon the question whether the applicant is a suitable person to provide adult entertainment in the context of the regulatory scheme summarised earlier.

### **The effect of the tribunal’s errors**

- [59] For the reasons I have given, I do not accept the further submission made for the respondent that the tribunal’s errors of construction did not affect its disposition of the appeal to it.

### **Disposition**

- [60] I would grant the application for leave to appeal and allow the appeal. The applicant’s senior counsel did not press in oral submissions the contention that this Court should itself determine the respondent’s application for a permit. I would accede to the respondent’s submission that the matter should be remitted to the

tribunal for hearing and determination on the basis of the proper construction of s 107E(1).

[61] The respondent should be ordered to pay the applicant's costs. Adopting the form of order made by this Court in *Haraba P/L v Castles*,<sup>17</sup> I would grant the respondent an indemnity certificate pursuant to the *Appeal Costs Fund Act 1973* (Qld)

[62] I would make the following orders:

1. Grant leave to appeal.
2. Allow the appeal, set aside the orders of the District Court, and instead of those orders order that the appeal to that court be allowed, the order of the Commercial and Consumer Tribunal be set aside, and that the case be remitted to the Commercial and Consumer Tribunal to be heard and determined in accordance with law.
3. Order that the respondent pay the applicant's costs of and incidental to the application and appeal to the District Court and the application and appeal to this Court.
4. Grant the respondent an indemnity certificate pursuant to the *Appeal Costs Fund Act 1973* (Qld) with respect to the costs ordered to be paid to the applicant.

[63] **MACKENZIE AJA:** I have had the opportunity to read Fraser JA's reasons in draft form, and agree with what he has written. I agree that the orders proposed by him should be made.

[64] **DUTNEY J:** I agree with the reasons for judgment of Fraser JA and with the orders he proposes.

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<sup>17</sup> *Haraba P/L v Castles* [2008] 1 Qd R 151; [2007] QCA 206.