

*Silks on Grenfell* [2019] SALC 12

**LICENSING COURT OF SOUTH AUSTRALIA**

SILKS ON GRENFELL

**JURISDICTION:** Application to Redefine Licenced Premises

**FILE NO:** 5296/2018

**HEARING DATE:** 22 and 23 January 2019

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 28 February 2019

**CARCHWORDS**

*Application to redefine licensed premises so as to extend the trading area - Whether it would be contrary to the public interest to grant the application and that in accordance with s 53(1)(a) it should therefore be refused - The objectors contend that the applicant is not a fit and proper person to hold a licence - They contend that the premises are not suitable to be licensed - They contend that the grant of the application will cause undue disturbance, annoyance and inconvenience to people in its vicinity - **Held** that the complaints made by the objectors have not been made out - Application granted - Liquor Licensing Act 1997*

*Hotel Eyre and Ryan Nesbitt* [2018] SALC 2

*Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207

**REPRESENTATION:**

Counsel:

Applicant: Mr B Allen

Respondent: Mr M Hamilton

Solicitors:

Applicant: Wallmans Lawyers

Respondent: Grope Hamilton Lawyers

- 1 This is an application to redefine licensed premises so as to extend the trading area. The premises are situated at 10-14, Grenfell Street, Adelaide and are operated by Tobern Investments Pty Ltd. The premises trade under a hotel licence under the name Silks on Grenfell Hotel. The hotel is within an iconic Adelaide building known as the Tatterstalls Building. That building was formerly the home of the Tatterstalls Club, which was situated on the first floor. The other floors contained offices. In the latter decades of the last century the Club fell on hard times and ceased trading as a club in the late 1990s.
- 2 The application has drawn objections from Frappe Australia Pty Ltd, trading as ‘The Loft’ and Adelaide Dance Centre Pty Ltd.
- 3 In the company of the parties the Court inspected the building.
- 4 On the eastern side of the building in the basement area there is a licensed venue trading under a small venue licence, known as Wurst and Stein. The licence is owned by a separate but related company to the applicant. It is a small attractive bar. Adjacent to this is a business, Axiom Communications, which deals with mobile phones and repairs.
- 5 On the ground floor on the eastern side there is a gaming room with a small bar area that forms part of the applicant’s hotel. It is known as “Harry’s Bar”.
- 6 Until recently the western side of the ground floor was occupied by a business trading as H&R Block Taxation. That area has since been vacated and leased by the applicant. It is the area that is the subject of this application. If the extension is granted the applicant proposes knocking out a dividing wall to connect the proposed area to its existing bar and gaming room so as to make it larger. It is anticipated that it would increase existing capacities by about 50 patrons. What is proposed appears to be an attractive extension that will provide a more spacious facility to the public.
- 7 The first floor contains the heritage listed area that formerly comprised of the Tatterstalls Club. It has high ornate ceilings and has retained many of the original fixtures. It is a grand and attractive old world area that has a large bar area on the eastern wall with numerous tables and chairs in the adjacent areas. It forms part of the applicant’s hotel and it is known as “The Tatterstalls”. It presently has a certified capacity of 320 patrons. This area opens up to a balcony overlooking Grenfell Street. It is also part of the applicant’s hotel and it has a certified capacity of 80.
- 8 On the second floor is an internet start-up company. That company has not raised any issues in connection with the application
- 9 On the third floor there is a large function venue and event space known as ‘The Loft’, which occupies the whole floor.

- 10 On the fourth floor is a business known as Finsart-Pilates, which teaches pilates and yoga. Adelaide Dance Centre Pty Ltd occupies more than half of this floor and operates a dance studio. as the name suggests, provides lessons in those areas. It has not raised any issues with the applicant.
- 11 The entire fifth floor is also used for “The Loft” business, including toilet facilities, storage area and a kitchen. The floors are all connected by common passages, stairs and a lift. The various tenants share a common rear door.
- 12 To the west of the building there is a small laneway known as Imperial Place. That laneway also abuts the rear of the building and it is accessed by the rear door of the building. There are Adelaide City Council “Loading Zone” parking signs in the laneway.
- 13 To secure the extension the applicant needs to establish the matters prescribed by s 68 (2) of the Liquor Licensing Act 1997, which provides as follows:
  - (2) An application for approval of an alteration to licensed premises must not be granted unless the licensing authority is satisfied that all other approvals, consents or exemptions required by law have been obtained.
- 14 All of these matters have been established.
- 15 The applicant must also satisfy the Court that the application warrants the favourable exercise of the discretion provided for by s 53 of the Act. This is in issue in this case.
- 16 Also at issue is whether the Court should exercise the broad powers conferred by s 43 of the Act which enables the Court, as a licensing authority, to impose license conditions. These include things such as imposing conditions to prevent excessive noise emanating from the licensed premises, minimising offensive noise and disturbance to persons in the vicinity of licensed premises, preventing offensive behaviour on licensed premises, protecting safety and welfare of customers and staff, ensuring that the nature of the business conforms with representations made to the licensing authority in proceedings for the grant of the licence or other proceedings under the Act, ensuring public order and safety at events expected to attract to large crowds, preventing the consumption of liquor sold for consumption off the licensed premises in the vicinity of the licensed premises, and any other conditions to ensure compliance with the objects of the Act.
- 17 The objectors’ right of objection is provided for by s 77 of the Act. Sub-section 77(5) relevantly provides that an objection may be made on one or more of the following grounds:

- (a) that the grant of the application would not be consistent with the objects of this Act or would be contrary to this Act in some other way;

...

- (g) that if the application were granted—

- (i) undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises or proposed premises to which the application relates would be likely to result; or

...or

- (ii) the amenity of the locality in which the premises or proposed premises to which the application relates are situated would be adversely affected in some other way.

18 The objectors contend that it would be contrary to the public interest to grant the application and that in accordance with s 53(1)(a) it should therefore be refused.

19 The objectors contend that the applicant is not a fit and proper person to hold a licence. They contend that the premises are not suitable to be licensed. They contend that the grant of the application will cause undue disturbance, annoyance and inconvenience to people in its vicinity.

20 The objectors contend that the applicant has not satisfied the requirements of s 57 of the Act. That provision relevantly provides:

- (1) An applicant for a licence for premises or proposed premises must satisfy the licensing authority-
  - (a) the premises for which the licence is sought are, or, in the case of premises not yet constructed, will be, of sufficient standard for the purpose of properly carrying on business under the licence; and
  - (b) that the operation of the licence would be unlikely-
    - (i) to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises.

21 In support of the application the applicant relied upon the evidence of its director, Mr Marcus Bernadi. He said that the company had held the licence for about eight or nine years. He said that the premises generally commence trading at about 8.00 am and cease at about 10.00 or 11.00 pm

during the week except for Saturdays when it normally ceases to trade at 9.00 pm.

- 22 Mr Bernadi was extensively cross examined. He was taken to photographic and film evidence that showed used kegs being stored at the rear of the premises; some used kegs that were placed in Grenfell Street; patrons walking in other areas of the building outside of the licensed areas carrying glasses of liquor; glasses and bottles that had been left in common public areas; furniture being temporarily stored in a common passageway area, cars parked in the laneway at the rear of the premises, a cage at the rear of the premises that contained gas cylinders that was unlocked, and a skip full of rubbish and which partially blocked the emergency exit. There was also film taken at the premises of the Adelaide Dance Centre that showed a number of men carrying beer and wandering in and about the studio when a number of women were there to learn dancing.
- 23 Mr Bernadi said that he had little option but to store the kegs where he did and he was at the mercy of the breweries as to when kegs were delivered and collected. He said that the placement in Grenfell Street was a one-off at the behest of the company delivering kegs and that the kegs were only present in Grenfell Street for a brief period. He said that when he was made aware of patrons taking liquor outside of the licensed area he immediately took action. He said that furniture was temporarily placed in the passageway when the adjacent areas were being cleaned. He described a practice whereby staff on occasions would park in the rear laneway but would affix their mobile phone details so they could be contacted if they needed to move their car. He said that there never had been an issue with the cage. He accepted that the emergency exit should not have been blocked.
- 24 Mr Bernadi said that none of the other tenants in the building had raised any concerns to him about his staff parking their cars in a laneway at the rear of the building, the storage of used kegs at the rear of the premises or any issues about patron behaviour or compliance with the conditions of the licence.
- 25 The objectors called Mr Steven Kelly. Mr Kelly is a director of Frappe and is frequently at the building. He took most of the photographs and video film that was put to Mr Bernadi. He said that he gathered most of this evidence in the two month period prior to the commencement of the hearing in connection with this matter. He accepted that he had never complained to the applicant about any of the matters depicted in the film nor had he ever expressed to the applicant any concerns about its conduct of the business or its use of the premises generally.
- 26 Annexed to Mr Kelly's affidavit is a letter from Tecon Australia. I am permitted to know that Tecon provide a range services in connection with

buildings that includes advice about matters such as compliance with the Australian National Construction Code. In its letter dated 16 January 2019,<sup>1</sup> Tecon advised that based on the plans of the first floor of the Tatterstalls Building that it had been provided and based on the dimensions of the egress path, leading from that area under the current National Construction Code the maximum number of occupants who would be permitted was 200. It acknowledged that it had not inspected the site.

27 It would seem that the National Construction Code was relied upon by the Commissioner for Liquor and Gambling in setting the capacity for Frappe's special circumstances licence for The Loft.

28 Also annexed to that affidavit is a document that contains series of conditions that the objectors seek to be placed upon the applicant's hotel licence.<sup>2</sup> They seek a condition the side door that connects Harry's bar to the common passage be closed. They seek a condition that the common door at the rear of the building be kept closed. They seek a condition that none of the applicant's staff, suppliers or clients be permitted to park in the laneway at the rear of the premises. They seek a condition that the service door that permits direct access from the ground floor licensed area at the common lift be used by staff only. They seek a condition that the certified capacity for the first floor licensed area be limited to 200 patrons to comply with the contemporary Australian Building Code. They seek a condition that the applicant not place any signage in the communal passages. They seek a condition that the communal areas must be kept clear at all times. They seek a condition that deliveries can only be made to the rear of the premises. They seek a condition that there must be a crowd controller at the entry point to the first floor licensed area at all times when it is trading and that the crowd controller remain until 30 minutes after the last patron has left the premises. They seek a condition that there must be an additional crowd controller in that area when the number of patrons in it exceeds 100 patrons and that there be an additional two crowd controllers when the number exceeds 200. They seek a condition that there must be an additional crowd controller in the balcony area on Thursday, Friday and Saturday from 5.00 pm and whenever that area is being used for private functions. They seek a condition that there be additional crowd controllers be required if the within application is granted.

29 The thrust of the objectors' case in opposing this application is their contention that the hotel is poorly managed, that it frequently breaches its obligations by allowing patrons to remove liquor to unlicensed areas and by blocking an emergency exit, and that it is generally uncaring of the way

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<sup>1</sup> Annexure SK 22 to exhibit O4.

<sup>2</sup> Annexure SK 27 to exhibit O4.

its business adversely affects the interests of others that trade in the building. They submit that if the applicant cannot effectively manage the business as it is now, it is scarcely appropriate to permit it to extend its trading area. Next they say that in any event, in the exercise of its discretion, the Court should impose conditions on the existing licence to tighten up security and compliance and to correct an anomaly about patron capacity to bring it into line with the National Construction Code.

- 30 Mr Allen, counsel for the applicant, submitted that this application comprised on no more than a modest increase to a long-standing hotel in the Central Business District that had traded uneventfully for many years. He said that the issues about storage and parking were typical of those faced by inner city licensed premises and that it was telling that none of the co-tenants had raised any issues with the applicant, nor had there been any complaint made by the Commissioner for Liquor and Gambling the Commissioner for Police or the Adelaide City Council. He said that none of the misdemeanours committed by the applicant in respect of the licensed premises were especially serious and that they did not reflect poorly on it.

### **Consideration**

- 31 Mr Kelly would have it that the evidence he gathered reflected poorly on the applicant and was the tip of the iceberg. I think that is unlikely. He clearly was heavily invested in objecting to this application. I think it likely that he was vigilant in gathering evidence that supported his case. Accordingly, I think it likely that over the two month period that Mr Kelly gathered evidence that evidence shows no more than some isolated incidents of when the licensed premises were not being managed in a way that strictly complied with the Act.
- 32 These breaches are unfortunate and it is timely to remind the applicant of the need to be vigilant and to put it on notice that if in the future, matters such as these are brought to the Court's attention in its disciplinary jurisdiction, it has been warned, and that this warning will be taken into account by the Court in determining any sanctions. I also observe that ideally licensed premises should have a dedicated storage area, such that public areas and exits are completely free and passage totally unimpeded.
- 33 That said, this Court accepts that we do not live in an ideal world and that although unfortunate, isolated breaches of the Act are common and when they occur they do not necessarily shake the Court's confidence in the capacity of a licensee to effectively manage licensed premises. As this Court has said, albeit in another context, in considering the conduct of licensed premises, it adopts at a practical, real life approach.<sup>3</sup> It also

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<sup>3</sup> *Hotel Eyre and Ryan Nesbitt* [2018] SALC 2 at [18].

accepts that sometimes behaviour in and about licensed premises can be unruly and that within limits, this is within the reasonable bounds of tolerance.<sup>4</sup>

- 34 The breaches disclosed by the evidence are at the lower end of the scale. There is no hint that patron or public safety was, on any occasion, actually compromised. At worst some of the patron behaviour was mildly irritating. I think it was telling that the person who took the film at the dance studio showing the hotel's patrons wandering about did not give evidence. Had she or any of the others present felt genuinely threatened by the behaviour, I would have expected her to come to Court to say so. After all, Adelaide Dance Centre Pty Ltd is one of the objectors.
- 35 I also factor that the layout of the hotel, housed as it is in an old building with a common passage, staircase and lift. I accept that this would make it more difficult to manage issues like patrons taking liquor out of a licensed area as they moved between bars, than would be the case for a stand-alone facility. I also have regard for the fact that the hotel is in the inner city, and that this makes matters such as the storage and the collection of kegs and the placement of rubbish, very challenging.
- 36 I think it is telling that although some of the applicant's staff have parked in the laneway at the rear of the premises, there is no evidence that anyone has actually been inconvenienced by that.
- 37 I am therefore not prepared to make a findings that the licensee is not a competent manager of licensed premises, that the premises are not well managed or that the applicant in undertaking licensed activities at the premises has ridden roughshod over the rights its neighbours. To the contrary, its almost unblemished record in the disciplinary jurisdiction of this Court, and the absence of any evidence of actual complaints from neighbours, would support the opposite conclusions.
- 38 The issue of capacity on the first floor has been a matter that has troubled me. As a general proposition licensed premises should comply with contemporary Australian Building Standards. That said, I recognise that codes such as the National Construction Code do not as a general proposition require existing buildings to be upgraded so as to comply with the Code and nothing was put to me to indicate that the applicant would be in breach of any law if the capacity was not varied. In light of that, the fact that there is no evidence to suggest the existing capacity of 320 or the

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<sup>4</sup> See, for example, the often cited passage from the judgment of Wells J in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207 at 213 where he cited with approval the following observation made by this Court: "Any resident who lives nearby an hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises. From time to time one or more of the patrons might be expected to be noisier than others-calling out, even yelling and screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents."

width of the stairs have ever been an issue, the absence of any expressed concerns by the Commissioner for Liquor and Gambling, the Commissioner for Police, or the Adelaide City Council, and the fact that this application in reality has nothing to do with the first floor area, I am not persuaded that the Court should use its broad powers to revisit the certified capacity for the first floor area.

- 39 As for the other conditions sought, finding as I do that the existing licensed premises have not caused undue offence, annoyance, disturbance or inconvenience to people who work in the vicinity of the premises, I am not persuaded that it is necessary to impose any of the conditions sought.
- 40 The application to redefine the licensed premises in the terms sought is granted. Counsel are to forward to the Court minutes of order.