

**LICENSING COURT OF SOUTH AUSTRALIA**

HAMRA FOOD AND WINE PTY LTD

**JURISDICTION:** Application for an Extension of a Trading Area

**FILE NO:** 5596 of 2017

**HEARING DATE:** 23 November 2017

**JUDGMENT OF:** His Honour Judge Gilchrist

**DELIVERED ON:** 18 December 2017

**CATCHWORDS**

*Preliminary points in connection with an application to extend the trading area - The applicant was directed by the Commissioner to give notice of its application to adjacent premises - Whether this amounts to “advertised” for the purposes of s 77 - **Held** that it does - Whether the “date of the hearing” as it appears in s 77 refers only to the date for trial in this - **Held** that it refers to the first return date before the Commissioner - Whether on an application to redefine the licensed premises the applicant must prove that all other approvals, consents or exemptions required by law have been obtained - **Held** that it does not - **Held** that the ground of objection are limited to those prescribed by s 77 - Liquor Licensing Act 1997.*

*Duxsell Pty Ltd v Stirling* (1989) 68 LGRA 157

**REPRESENTATION:**

Counsel:

Applicant: Mr B Hayes QC

Respondent: Mr S Henry SC with Mr B Allen

Solicitors:

Applicant: Scammell and Co

Respondent: Wallmans Lawyers

- 1 A number of preliminary issues have arisen in connection with an application to extend the trading area of certain licensed premises owned by Hamra Food & Wine Pty Ltd.
- 2 Hamra trade under a restaurant licence under the name Hula Hoop at Shops 1 and 2 at 269-75 Kensington Road, Kensington Park. Adjacent to the restaurant is an outdoor area known as the Regal Theatre Garden. The Garden is under the control of the City of Burnside (the council). Hamra has an agreement with the council that enables it to use that area. Hamra wishes to extend the area of the licence so as to permit it to sell and supply liquor under the terms of its restaurant licence in that area.
- 3 Hamra applied to the council for consent to trade as a licensed venue in that area and by letter dated 16 October 2017, the council provided that consent. All that remains for it to fulfil its intentions for that area, is for it to secure an extension of the trading area of its licensed premises.
- 4 To secure an extension of the area of the licensed premises Hamra needed to make a successful application pursuant to s 69 of the *Liquor Licensing Act 1997*. That provision provides:
  - “(1) The licensing authority may, on application by a licensee who holds a licence authorising the sale of liquor for consumption on the licensed premises, extend the authority conferred by the licence so that the licensee is authorised to sell liquor in a place adjacent to the licensed premises for consumption in that place.
  - (2) The place to which the authorisation relates is, when the sale of liquor is authorised, taken to form part of the licensed premises.
  - (3) An authorisation cannot be granted under this section unless—
    - (a) the licensing authority is satisfied that the object of the application could not be more appropriately achieved by redefinition of the licensed premises; and
    - (b) the licensee will, when the sale of liquor is authorised, be entitled to sell or supply liquor to customers in the relevant place; and
    - (c) the relevant place can be adequately defined and supervised; and
    - (d) the owner of the relevant place (if not owned by the licensee) consents to the application; and

- (e) if the relevant place is under the control of a council—  
the council approves the application.”

5 Hamra duly made that application to the Commissioner for Liquor and Gambling. Upon receipt of the application the Commissioner directed Hamra to give notice of the application to the occupiers of land or premises adjacent to the licensed premises. In doing so the Commissioner relied upon s 52 of the Act which provides as follows:

“(1) This section applies to applications for—

- (a) the grant of a licence (other than a temporary or limited licence);
- (b) the transfer of a licence;
- (c) the removal of a licence;
- (d) an extended trading authorisation;
- (e) the conversion of a temporary licence into a permanent licence;
- (f) a condition authorising sale of liquor under a club licence for consumption off the licensed premises;
- (g) consent of the licensing authority under section 105;
- (h) the variation of trading hours previously fixed in relation to the licence.

(2) Notice must be given of an application to which this section applies as follows:

- (a) the applicant must, at least 28 days before the date fixed for hearing the application, give written notice to—
  - (i) the council for the area in which the licensed premises are, or are to be, situated; and
  - (ii) the occupiers of land or premises adjacent to the licensed premises or proposed licensed premises; and
- (b) the applicant must, at least 28 days before the date fixed for hearing the application, give notice of the application by publication of an advertisement, in the prescribed form—
  - (i) in a newspaper circulating generally throughout the State; and

- (ii) in another newspaper circulating in the area in which the licensed premises are, or are to be, situated; and
      - (iii) in the Gazette; and
    - (c) the applicant must, for 28 days immediately preceding the date fixed for hearing the application, keep posted a notice of the application, in the dimensions and form prescribed under the regulations, in a prominent position—
      - (i) on the premises to which the application relates; or
      - (ii) if the premises have not been constructed—on the land on which it is proposed to construct the premises,  
  
so as to be clearly visible to, and legible by, persons passing the premises or land.
  - (2a) A notice under subsection (2) must specify that the application and certain documents and material relevant to the application may be inspected at a place and during a period specified by the Commissioner.
  - (3) The licensing authority—
    - (a) may, in an appropriate case, dispense with, or modify, a requirement of this section; or
    - (b) may direct that—
      - (i) notice be given under this section of other applications to the authority; or
      - (ii) notice be given to specified authorities and persons in addition to the notice specifically required by this section.”
- 6 Upon learning of the within application OTR 211 Pty Ltd filed a notice of objection. In doing so it purported to rely upon s 77 of the Act which provides:
- “77—General right of objection
- (1) If an application has been advertised under this Part, any person may, by notice in the prescribed form lodged with the licensing authority at least 7 days before the day appointed for the hearing of the application, object to the application.

- (1a) Subsection (1) does not apply to an application for, or in relation to, a small venue licence.

Note-

There is, however, a right to make submissions in relation to such applications—see section 77A.

- (2) Subject to section 28A, a copy of the notice of objection must be served by the objector on the applicant at least 7 days before the day appointed for the hearing of the application.
- (3) However, the licensing authority may (in its absolute discretion) accept an objection even though it is lodged, or served on the applicant, out of time.
- (4) An objection may be made on behalf of an unincorporated association under this section by an agent duly appointed for the purpose.
- (5) 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;
  - (b) in the case of an application for the grant or removal of a hotel licence—that the grant of the application is not necessary in order to provide for the needs of the public in the area in which the premises or proposed premises to which the application relates are situated;
  - (c) in the case of an application for the grant or removal of a retail liquor merchant's licence—that the grant of the application is not necessary in order to adequately cater for the public demand for liquor for consumption off licensed premises in the area in which the premises or proposed premises to which the application relates are situated;
  - (d) in the case of an application by a natural person for the grant or transfer of a licence, or for the conversion of a temporary licence into an ordinary licence—that the applicant is of bad reputation or character or is in other respects not a fit and proper person to be licensed;
  - (e) in the case of an application by a trust or corporate entity for the grant or transfer of a licence, or for the conversion of a temporary licence into an ordinary licence—that the applicant is not a fit and proper person to be licensed or that a person who occupies a

position of authority in the entity is of bad reputation or character or is in other respects not a fit and proper person to hold such a position in an entity that holds a licence;

- (f) in the case of an application for the grant or removal of a licence—that the position, nature or quality of the premises renders them unsuitable to be licensed, or to be licensed under a licence of the kind to which the application relates;
- (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
  - (ia) the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises or proposed premises to which the application relates would be likely to be prejudiced; 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.

(6) However—

- (a) the grounds of an objection cannot relate to entertainment that may be provided on the premises or proposed premises without the consent of the licensing authority under section 105 (and any objection relating to such entertainment will, to the extent that it so relates, be taken to be void and of no effect); and
- (b) the licensing authority must, in respect of the operation of this section, disregard any entertainment that may be provided on the premises without the consent of the licensing authority under section 105.”

7 The Commissioner met with the applicant and OTR on 4 September 2017 following which the matter was referred to this Court on 11 September 2017 pursuant to s 17 of the Act. That section delineates the responsibilities of the Commissioner and the Court. It provides that in certain circumstances, having made reasonable attempts to achieve agreement between the parties by conciliation the differences between the parties are not resolved by conciliation, the Commissioner must refer

the matter for hearing and determination by the Court. That is what occurred in this case.

- 8 On 27 October 2017 Hood Nominees Pty Ltd and RSJ Lovell Nominees Pty Ltd filed objections. In connection with these I received an affidavit for Mr Matthew Binns, on behalf of Hood, and from Mr Richard Lovell, on behalf of RSJ Lovell.
- 9 Mr Binns is the director of Hood. Hood is the licensee of the Robin Hood Hotel. It trades under a hotel licence at 315 Portrush Road. Mr Binns said that he became aware of Hamra's application to expand its restaurant licence into the adjacent park in about August 2017. After discussing the matter with staff at the Australian Hotels Association, he resolved not to file a notice of objection. He said that on 25 October 2017 he had a discussion with Mr Lovell and learnt that there might be an issue regarding Hamra's planning approval. He then resolved to instruct lawyers and file an objection.
- 10 Mr Lovell is the sole director of RSJ Lovell, the licensee of the Marryatville Hotel, 239 Kensington Road, Kensington. The Marryatville Hotel is a block away from Hula Hoop. Mr Lovell said that he was aware of Hamra's application but did not seek legal advice until after he had a discussion with a Mr Moir, whom I assume is connected with OTR. Mr Lovell expressed concern that Hula Hoop intend to trade as more of a wine bar/function centre/beer garden, rather than as a restaurant, hence his desire to object.
- 11 The preliminary issues concern the standing of the objectors, whether an extension of time to object is required, and what is the scope of the hearing before the Court.

### **The parties' respective positions**

- 12 Hamra contends that the objectors have no standing because the right to object is contingent on the application being one that has been advertised and it contends that in this case that has not occurred. It says that the word "advertised" as it appears in s 77(1) contemplates giving information to the public by some means such as a publication, posters, broadcast or sign, whereas in this case all that has happened is the giving of notice to the occupiers of land or premises adjacent to the licensed premises.
- 13 Next, it says, that Hood and RJS Lovell have not provided any satisfactory reason as to why they should be granted an extension of time within which to lodge an objection.
- 14 It then says that the scope of the hearing is strictly limited to the matters that it must establish under s 69 and the specified grounds of objection

under s 77. It submitted that these do not include whether or not the initial planning consent was validly given.

- 15 Finally it says that whilst s 53 gives the Court wide discretion in connection with any application before it, it would not be an appropriate exercise of the Court's discretion to re-visit the grant of planning consent in this case.
- 16 Hood and RJS Lovell contend that their notice of objections are not out of time and that no extension is required. They submit that where s 77(1) speaks of authority "at least 7 days before the day appointed for the hearing of the application" it means the formal hearing of the application in this Court and that as a hearing date has not as yet been allocated, time has not commenced to run.
- 17 OTR, Hood and RJS Lovell then contend that because the granting of an authorisation results in the extended area being taken to form part of the licensed premises, it is in effect a new licence such that all of the matters relevant to the grant of a new licence are relevant. In particular they contend that all of the matters stipulated in s 57 must be proved. That section provides:
  - (1) An applicant for a licence for premises or proposed premises must satisfy the licensing authority—
    - (a) that 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; or
      - (ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.
  - (1a) However, the licensing authority must, in respect of the operation of subsection (1)(b)(i) disregard any entertainment that may be provided on the premises without the consent of the licensing authority under section 105.
  - (2) An application for a licence for premises or proposed premises must not be granted unless the licensing authority is satisfied—



- (a) that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained; and
  - (b) that any approvals, consents or exemptions that are required by law for the carrying out of building work before the licence takes effect have been obtained; and
  - (c) that any other relevant approvals, consents and exemptions required for carrying on the proposed business from the premises have been obtained.
- (3) The licensing authority may dispense with the requirement that an applicant for a direct sales licence or limited licence—
- (a) satisfy the licensing authority as to a matter referred to in this section; or
  - (b) submit plans.”

18 They submit that a planning consent is an administrative action and that if it was made unlawfully it is *void ab initio* and is of no legal effect. They contend that there is a serious issue as to the validity of the original planning consent. They asked me to note that the validity of the purported planning consent is currently before the Environment, Resources and Development Court. They submitted, however, that in conformity with what the Full Court decided in *Duxsell Pty Ltd v Stirling*<sup>1</sup> and the cases referred to in the decision, it would be an abdication of the duty of this Court to await the outcome of the challenge in the Environment, Resources and Development Court and that this Court’s duty is to determine for itself whether a lawful planning consent to permit the use of proposed premises for the sale of liquor has been obtained.

### **Consideration**

19 I commence with Hamra’s challenge to the objector’s right to object.

20 If one simply focusses on the word “advertised” as it appears in s 77, there appears to be much force in what Hamra put. But it seems to me that do so is to commit that the learned authors Pearce and Geddes spoke of in their text “Statutory Interpretation in Australia”(Sixth edition) at 115, where they said:

“It is often tempting to look only at the section that seems immediately applicable to the problem at hand. But this is likely to

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<sup>1</sup> (1989) 68 LGRA 157.

lead to a misconception of the total effect of the provisions as is the reading of a passage of a novel out of context.”

- 21 In my view s 77 must be read with s 52 and s 17. What would be the point of giving notice to the occupiers of land or premises adjacent to the licensed premises pursuant to s 52 unless those occupiers could file a notice of objection and participate in the conciliation process provided for by s 17? I accept that even when read in this context, the word “advertised” connotes communication to the public. But it would be reading much too much into the word to conclude that it is also concerned with the mode of communication. What is important is the fact of communication to the public, not the means by which it is communicated. “Advertised” can plainly include a letter drop. And it does not mean that the communication must be to the public at large. Depending upon the context, that communication could be to section or class of the general public. In this case the Commissioner directed Hamra to give notice to adjoining properties. To my mind, in doing so, the Commissioner was directing Hamra to advertise to that section of the public that the Commissioner felt should be aware of its application. I therefore conclude that OTR were entitled pursuant to s 77 of the Act to object to Hamra’s application. Whether Hood and RJS Lovell also have that right depends upon they need and extension of time and if so what the outcome of their application for an extension is.
- 22 I now turn to the submission that “the hearing of the application” means hearing before this Court. In my view that suggested construction has little to commend it. The advertising referred to in s 77 is advertising as provided for by s 52. The plain purpose of advertising “the hearing” is to enable affected parties to participate in all of the proceedings before the relevant licensing authority, and especially the conciliation phase. It makes no sense that an applicant is only required to advertise the fact of a hearing after the conciliation phase has concluded because without notice of a conciliation presumably there will be no objections and more often than not no referrals to the Court that would ultimately require the advertising of the fact of a hearing.
- 23 In my view, to participate in this matter Hood and RJS Lovell need an extension of time. I note that Hamra reserved the right to cross examine Mr Binns and Mr Lovell in connection with the applications for an extension of time. The evidence placed before the Court in support of the application for an extension of time is not especially compelling. In the circumstances I think it is appropriate to hear further from the parties on this issue.
- 24 I now turn to consider the other issues that were argued.

- 25 The Act permits the sale of liquor pursuant to 12 different types of licence, each of which contain their own rights, restrictions and obligations. It can be seen that requirements of s 57 apply without qualification to all prospective licenses, apart from a direct sales licence and a limited licence.
- 26 That Act then contains specific provisions that deal with existing licences.
- 27 Section 44 enables a licensee either at the time of applying for the licence or at some time thereafter to obtain an extended trading authorisation. The section provides that the authorisation:
- “...cannot be given unless the licensing authority is satisfied that—
- (a) the grant of the authorisation would be unlikely to result in undue offence, annoyance, disturbance, noise or inconvenience to people who, for example, reside, work, study or worship in the vicinity of the licensed premises; and
  - (b) the licensee will implement appropriate policies and practices to guard against the harmful and hazardous use of liquor.”
- 28 Section 60 enables a licensee to apply to remove a licence to premises or proposed premises. The section provides that with the possible exception of a removal of a direct sales licence the removal cannot occur unless the applicant satisfy the licensing authority of the following:
- “(a) that the premises to which removal of the licence is sought are, or, in the case of premises not yet constructed, will be, of an appropriate standard for carrying on business under the licence; and
  - (b) that the removal 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; or
    - (ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.
  - (2) An application for the removal of a licence to premises or proposed premises cannot be granted unless the licensing authority is satisfied—
    - (a) that any approvals, consents or exemptions that are required under the law relating to planning to permit

the use of the premises or proposed premises for the sale of liquor have been obtained; and

- (b) that any approvals, consents or exemptions that are required by law for carrying out of building work before the removal of the licence takes effect have been obtained; and
- (c) that any other relevant approvals, consents and exemptions required for carrying on the proposed business from the premises have been obtained.”

29 Section 62B enables the owner of a producer's licence to apply to a licensing authority for additional premises or proposed premises to be licensed as a production outlet or retail outlet. The licensing authority cannot accede to that request unless satisfied:

“(1)...

- (a) that the premises sought to be added are, or, in the case of premises not yet constructed, will be, of an appropriate standard for carrying on business under the licence; and
  - (b) that the addition of the premises to 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; or
    - (ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.
- (2) An application for the addition to a producer's licence of premises or proposed premises as a production outlet or retail outlet cannot be granted unless the licensing authority is satisfied—
- (a) that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained; and
  - (b) that any approvals, consents or exemptions that are required by law for carrying out of building work before the removal of the licence takes effect have been obtained; and

(c) that any other relevant approvals, consents and exemptions required for carrying on the proposed business from the premises have been obtained.

(3) If adding a production outlet or retail outlet to a producer's licence would result in the establishment of a collective outlet or an increase in the number of licensees for whom the outlet constitutes a collective outlet, the licensing authority must not grant the application for the addition if of the opinion that the trade to be authorised at the outlet would, in view of the number of licensees involved or the nature and extent of the trade or for any other reason, be better authorised by a retail liquor merchant's licence or a licence of some other category.”

- 30 Section 68 permits a licensee to apply to a licensing authority to alter and redefine licensed premises. The authority can approve an alteration or proposed alteration to the licensed premises. It can redefine the licensed premises as defined in the licence. It can designate a part of licensed premises as a dining area or a reception area. And, in the case of a in the case of a producer's licence it can remove a production outlet or retail outlet from the licensed premises.
- 31 Pursuant to s 68(2) the licensing authority cannot approve an application for approval of an alteration to licensed premises unless it “is satisfied that all other approvals, consents or exemptions required by law have been obtained.”
- 32 Section 69A permits the holder of a producer's licence with a producer's event endorsement to apply to a licensing authority to alter the terms of the endorsement. It contains no qualifications to the exercise of the power of the licensing authority to grant the request.
- 33 Subject to the proviso that a licensing authority cannot vary or revoke a condition fixed or imposed by this Act, s 70 permits a licensee to apply to a licensing authority to “vary trading hours previously fixed by the licensing authority in relation to the licence” and “vary or revoke a condition of the licence”. It contains no qualifications to the exercise of the power of the licensing authority to grant the request.
- 34 That then brings us to the final provision that enables a licensee to apply to alter an existing licence, being s 69, which deals with an application to extend a trading area to permit that sale and supply of liquor in a place adjacent to the licensed premises for consumption in that place. It can be seen that the section specifies the things in respect of which the licensing authority must be satisfied. It can be seen that they do not include, as is required in connection with an application for removal under s 60, an application for additional premises or proposed premises to be licensed a

as a production outlet or retail outlet under s 62B or an application for an approval of an alteration to licensed premises pursuant to s 68(2), “that all other approvals, consents or exemptions required by law have been obtained.”

- 35 The fact that in respect of some applications concerning alterations to existing licences Parliament expressly requires an applicant to re-meet one of the tests postulated by s 57 and establish “that all other approvals, consents or exemptions required by law have been obtained” and that it did not impose that obligation in respect of other applications to alter existing licences, is in my view telling. It suggests to me that in connection with an application to extend a trading area to permit that sale and supply of liquor in a place adjacent to the licensed premises for consumption in that place, Parliament has not seen fit to treat it as if it were a “new” licence such that an applicant does not need to establish approvals, consents or exemptions required by law have been obtained. In respect of such an application, subject to the applicant meeting the basis threshold requirements “... all that is required to be proved is that “the relevant place can be adequately defined and supervised; ... the owner of the relevant place (if not owned by the licensee) consents to the application; and ...if the relevant place is under the control of a council—the council approves the application.” I do not consider that s 53 takes the matter any further. It will be noted that pursuant to s 69(1) an application for extension can only succeed if the licensing authority is satisfied that the object of the application could not be more appropriately achieved by redefinition of the licensed premises. If a licensing authority forms the view that this threshold has been met, I can see no warrant to apply the general discretion that s 53 of the Act confers to impose an obligation upon an applicant in connection with a s 69 application that Parliament has not seen fit to impose.
- 36 That is not to say that if in time it transpires that the planning consent was invalidly given the licensing authorities are powerless to act on that. One way or another, it can be assumed that if the licence has been granted on a false premise that it can be revoked.
- 37 In the first place, there is every reason to think that the Commissioner has the power of a common law court to reopen a matter. Doyle CJ described this power in *McAdam v Robertson* where he said:

“The power is to be exercised with great caution. The reasons for that are obvious. There is a strong public interest in the finality of litigation. Once a stage in the process of litigation has been completed, ordinarily it should not be revisited. Our system of adversary litigation, with the obligation that it imposes upon the parties to present their whole case and to present their best case, would begin to collapse if courts too readily entertained applications to reopen decisions given after a full hearing. The

power can be exercised if some important principle of law has been overlooked, or if there is an apparent misapprehension as to a significant fact, but this is to be distinguished from enabling a party to attempt to persuade a court that it should change its view of a matter that it has considered and decided.”<sup>2</sup>

38 If the Commissioner does have that power or considers that it is not appropriate to exercise it, an extension of time could be sought to have this Court review the Commissioner’s original determination.

39 As to the grounds upon which an objection can be based, in my view, s 77 speaks for itself and the grounds are limited to those specified.

### **Conclusion**

40 Accordingly, in respect of the various preliminary points that were argued I rule as follows:

- OTR has the right to object to the within application.
- Hood and RJS Lovell will only be able to participate in the proceedings if the Court grants them an extension of time within which to object and I list their application for that extension for further evidence and argument.
- In connection with its application to extend a trading area to permit that sale and supply of liquor in a place adjacent to the licensed premises for consumption in that place Hamra does not need to establish that all approvals, consents or exemptions required by law have been obtained and that it is sufficient for it to prove the matters set out in s 69.
- In objecting to the application OTR, and if an extension is granted, Hood and RJS are limited to raising the matters stipulated in s 77.

41 I will now list this matter for hearing.

42 The parties are to attend a directions hearing at **2pm on Thursday 21 December 2017.**

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<sup>2</sup> [1999] SASC 169 at [39].