

**LICENSING COURT OF SOUTH AUSTRALIA**

GOODLIFE MODERN ORGANIC PIZZA (No 2)

**JURISDICTION:** Application for alterations to licensed premises and redefinition of licensed premises

**FILE NO:** 1563 of 2012

**HEARING DATE:** 20 March 2013

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

**DELIVERED ON:** 26 March 2013

*Application for approval to licensed premises - Applicant proposes to erect a deck area at the rear of premises in Hutt Street - Residents occupying houses in a laneway at the rear of the premises object - Council approval obtained and expert evidence establishes that the proposal achieves the minimum requirements regarding acoustic protection - Previously held that given the proximity of the residents the proposed level of acoustic protection and visual screening was inadequate - Applicants invited to submit an amended application - Amended application addresses the issues previously raised by the Court and the present proposal is a far more robust and expensive structure than that which was initially submitted - Applicants invited to and did confirm their willingness to address issues relating to excessive noise - Appropriate to incorporate these undertakings as conditions of the licence - Application granted - Ss, 26, 53, 68, 106, 118, 119 and 120 Liquor Licensing Act 1997*

*Liquorland v Hurley's Arkaba Hotel and Others* [2001] SASC 232  
*Liquorland (Australia) Pty Ltd & Others v Lindsey Cove Pty Ltd & Another* [2002] SASC 17

**REPRESENTATION:**

Applicants: In person  
Objectors: Ms J Boisvert, on behalf of herself and Ms L Burslem,  
Mr A Kalali, Mr D Braid, Ms S Edwards, Mr D Boisvert  
and Ms C Braid

- 1 This is an application made pursuant to s 68 of the *Liquor Licensing Act 1997* that seeks the Court's approval for alterations to licensed premises known as Goodlife Modern Organic Pizza, a restaurant situated at 170 Hutt Street Adelaide.
- 2 These reasons should be read in conjunction with reasons published by me on 16 October 2012<sup>1</sup>.
- 3 In essence the applicants seek approval for the erection of a roof deck in the rear of the restaurant premises.
- 4 The objectors reside in Corryton Street, which is a narrow street to the rear of the premises. They opposed the application because of concerns that the creation of this facility would be visually unattractive to those living south of it and that all of them would be unduly affected by noise emanating from it.
- 5 I upheld that objection. I found that the proposed facility had the potential to interfere with the quiet enjoyment that the residents in Corryton Street are entitled to. I did not consider that the proposed level of acoustic protection was good enough. I also thought that there needed to be visual screening to the south and that the screening generally should not contain any gaps.
- 6 Although this Court is a court of record that has all of the attributes of a court it has some characteristics that make it a little different. Its ultimate charter is to do what is in the best interests of the public. That does not mean that it can ride roughshod of the requirements of the Act. But what it does mean is that it is not merely concerned with the parties before it. Thus it can refuse an application, even if all of the parties before it consent to it. It can refuse an application, even if, after a full hearing, it is satisfied that the legal prerequisites to the granting of the application before it have been met. This is so because s 53 of the Act gives it an unqualified discretion to refuse an application if it is in the public interest to do so.<sup>2</sup>

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<sup>1</sup> [2012] SALC 100

<sup>2</sup> In *Liquorland v Hurley's Arkaba Hotel and Others* [2001] SASC232 at para 89 Perry J described the discretion conferred by s 53 as follows: "The discretion is 'the widest of possible discretions' although it is doubtful that it might properly be used to enable a grant to be made if specific criteria for such a grant, to be found elsewhere in the Act, are not met". Doyle CJ qualified the breadth of the discretion in *Liquorland (Australia) Pty Ltd & Others v Lindsey Cove Pty Ltd & Another* [2002] SASC 17 at para 28. He said: "... the discretion must be exercised for a purpose consistent with the Act, and to advance or to maintain principles and policies found in the Act, or which the Court in its experience finds appropriate or necessary in the proper application of the Act. On the other hand, the Court must be careful not to use the discretion as a basis for imposing views about what is desirable, unless those views are firmly linked to the principles on which the Act operates or is administered."

- 7 A corollary of this is that if an application in its present form fails it is not necessarily the end of the matter. It would be, if this Court were only concerned with the parties before it, but as I emphasise, its charter goes beyond that. If the Court is presented with an application that does not meet the legal requirements prescribed by the Act, but with some modifications could meet those requirements, it might be in the public interest to invite an applicant to put up an amended proposal.
- 8 I thought that this might be such a case. I found that the proposed facility would add to the attractiveness of the licensed premises and the Hutt Street precinct. I thought that an amended application that provided for a screen on the southern boundary that was of the same height as the proposed screen to the east, that is 2.1 metres, and which provided that the screening was such that so far as is reasonably practicable all gaps are filled that I would be inclined to grant the application.
- 9 I therefore did not dismiss the application outright, but rather, adjourned the application to enable the applicants to submit an amended application.
- 10 The applicants took up that invitation. They re-engaged designers to come up with a revised design that met the matters that I raised. They sought and obtained consent from the Adelaide City Council for the modified plans. The deck that they now propose is a far more robust and expensive structure than that which was initially submitted. They now seek an order approving the application in its amended form.
- 11 The objectors maintain their objection. They are concerned that even in its revised form the proposed facility will unduly interfere with their quiet enjoyment of their homes. They remain concerned that the grant of this application might be the thin edge of the wedge and that other premises nearby will be encouraged to make similar applications in the future.
- 12 As I said in my previous reasons:

“... my task is to undertake a discretionary value judgment as to what is in the public interest that takes into account the legitimate interests of the applicant to seek to improve its licensed premises and the legitimate interests of the resident objectors who wish to avoid being unduly annoyed, disturbed or inconvenienced by the proposed changes.”
- 13 I understand the residents’ concerns. Over the course of the hearing before me I required the applicants to confirm their willingness to address issues relating to excessive noise. Ms Boisvert tendered a photograph that showed a gate at the rear of the premises that was hanging by only one hinge. It might be assumed that it would flap and

generate noise. I sought and obtained from the applicants an undertaking that that gate would function as it should and that it would be hinged by at least two hinges. I required them to confirm that they were willing to go beyond a requirement insisted upon by the Council that music noise emanating from the premises must not exceed 43 db. They agreed that this caveat should apply to all forms of noise emanating from the premises. I accept Ms Boisvert's submission that the condition relating to noise levels will be difficult for the applicants to meet. That will be a matter for the applicants.

- 14 I am firmly of the view that striking the right balance between the public interest, the legitimate interests of the applicants to seek to improve the licensed premises and the legitimate interests of the resident objectors, requires that the application in its amended form to be granted and that these conditions should be imposed.
- 15 Accordingly I grant the application subject to these conditions.
- 16 At the conclusion of the hearing Ms Boisvert asked me to provide her with guidance as to what action she should take and how she was to present evidence in anticipation that these conditions were not met.
- 17 The Court cannot act as an advocate for litigants, nor can it give specific advice. That is essentially what Ms Boisvert seeks it to do.
- 18 All that the Court can do is state matters of public record in connection with the potential to take action against a licensee that relate to issues such as allegedly excessive noise and non compliance with the conditions of a licence.
- 19 The Act contains provisions that enable disciplinary action to be taken against a licensee in prescribed circumstances.<sup>3</sup> That action can only be taken by the Commissioner for Liquor and Gambling, the Commissioner of Police or if the subject matter of the complaint is relevant to the responsibilities of the council in whose area the licensed premises are situated, by the council.<sup>4</sup> If Ms Boisvert or anyone else thinks that such action should be taken in connection with these or any other licensed premises it is open for them to report the matter to one of these authorities. It will be a matter for the relevant authority as to whether that report is acted upon and if so how it is to be prosecuted.
- 20 Section 106 of the Act enables the lodging of a complaint if an activity on, or the noise emanating from, licensed premises or if the behaviour of persons making their way to or from licensed premises is unduly offensive, annoying, disturbing or inconvenient to a person who resides,

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<sup>3</sup> See ss 118 and 119 of the Act

<sup>4</sup> See s 120 (2)

works or worships in the vicinity of the licensed premises. Such a complaint may be lodged by the Commissioner for Liquor and Gambling, the Commissioner of Police or the council in whose area the licensed premises are situated. Again, if Ms Boisvert or anyone else thinks that such action should be taken under this provision it is open for them to report the matter to one of these authorities. It will be a matter for the relevant authority as to whether that report is acted upon.

- 21 A complaint under this section can also be lodged by a person claiming to be adversely affected by the subject matter of the complaint. However, in that event it can only proceed if the complainant is authorised to make the complaint by at least 10 persons who reside, work or worship in the vicinity of the licensed premises or if the Commissioner for Liquor and Gambling is satisfied that the nature or gravity of the complaint is such that it should be admitted despite that authorisation or threshold number not being met.
- 22 It is important for anyone contemplating the lodging of a complaint under s 106 to be aware that that action can, in appropriate circumstances, give rise to an adverse ruling as to costs. Section 26 of the Act provides:

“If, in the opinion of the Court, a person has brought proceedings, or has exercised the right to object to an application, frivolously or vexatiously, the Court may award costs against that person.”