

LICENSING COURT OF SOUTH AUSTRALIA

OFF DUTY (Formerly known as Elysium Lounge)

JURISDICTION: S 106 Complaint

FILE NO: 3698 of 2012

HEARING DATE: 14 July 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 17 July 2014

The Court previously put some interim measures in place through an interim order that the premises not be permitted to trade as licensed premises until further order with liberty to apply on short notice in connection with a s 106 complaint - The ownership of the premises and the nature of the licence has since changed - Whether the Court still has jurisdiction to deal with the complaint - If so whether it is appropriate to put in place interim orders - Held that the Court still has jurisdiction to deal with the complaint under s 106 of the Act; there is no evidentiary basis to support the imposition of any interim orders; the complaint should not however be dismissed - The complainant has liberty to apply upon giving short but reasonable notice to Off Duty or some subsequent owner of a licence being conducted at the licensed premises - S 106 Liquor Licensing Act 1997

REPRESENTATION:

Counsel:

Complainant: Mr B Allen

Licensee: Mr J Firth

Solicitors:

Complainant: Wallmans Lawyers

Licensee: Donaldson Walsh

- 1 On 7 February 2014¹ I made an interim order in respect of premises then known as the Elysium Lounge. I ordered that the premises not be permitted to trade as licensed premises until further order. I granted liberty to apply on short notice.
- 2 I made the order in connection with a complaint that had been made by Townhouse Investments Pty Ltd, the proprietor of the Rockford Hotel, Adelaide, pursuant to s 106 of the *Liquor Licensing Act 1997*. Townhouse Investments asserted that the noise emanating from the Elysium Lounge was unduly disturbing and that measures needed to be put in place to reduce that disturbance.

The relevant statutory provision

- 3 Section 106 provides as follows:

“106—Complaint about noise etc emanating from licensed premises

(1) If—

- (a) an activity on, or the noise emanating from, licensed premises; or
- (b) the behaviour of persons making their way to or from licensed premises,

is unduly offensive, annoying, disturbing or inconvenient to a person who resides, works or worships in the vicinity of the licensed premises, a complaint may be lodged with the Commissioner under this section.

(2) A complaint under this section may be lodged by—

- (a) the Commissioner of Police; or
- (b) the council for the area in which the licensed premises are situated; or
- (c) a person claiming to be adversely affected by the subject matter of the complaint.

(3) A complaint cannot be made under subsection (2)(c) unless—

- (a) 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

¹ [2014] SALC 2

- (b) the Commissioner is satisfied that the nature or gravity of the complaint is such that it should be admitted despite non-compliance with paragraph (a).
- (3a) If a complaint is lodged with the Commissioner under this section—
 - (a) the Commissioner must cause a copy of the complaint to be served on the licensee of the licensed premises to which the complaint relates no later than 7 days after its lodgement; and
 - (b) no conciliation meeting or other hearing may be held on the complaint until the period of 14 days has elapsed from the day of that service.
- (4) Unless either party to the proceedings on a complaint requests that the matter proceed direct to a hearing and the Commissioner is of the opinion that good reason exists for concurring with the request, the Commissioner must endeavour to resolve the subject matter of the complaint by conciliation and-
 - (a) the Commissioner may, before or during the course of the conciliation proceedings, make an interim order about the subject matter of the complaint; and
 - (b) if the matter is settled by conciliation, the Commissioner may make a final order against the licensee reflecting the terms of the settlement,

(and the terms of an interim or final order under this subsection become conditions of the licence).
- (5) If the subject matter of the complaint is not to be conciliated, or is not resolved by conciliation, as the case may be-
 - (a) if the parties to the proceedings request the Commissioner to do so-the Commissioner must determine the matter; and
 - (b) in any other case-the Commissioner must refer the matter for hearing and determination by the Court.
- (6) In hearing and determining a complaint under this section, the Commissioner or the Court, as the case may be-
 - (a) must give the complainant, the licensee and any other person whom the Commissioner or the Court thinks fit to hear an opportunity to be heard; and
 - (b) must take into account-

- (i) the relevant history of the licensed premises in relation to other premises in the vicinity and, in particular, the period of time over which the activity, noise or behaviour complained about has been occurring and any significant change at any relevant time in the level or frequency at which it has occurred; and
 - (ii) the unreasonableness or otherwise of the activity, noise or behaviour complained about; and
 - (iii) the trading hours and character of the business carried out by the licensee on the licensed premises; and
 - (iv) the desired future character of the locality in which the licensed premises are situated as stated in any relevant Development Plan under the Development Act 1993; and
 - (v) whether or not any environment protection policy made under Part 5 of the Environment Protection Act 1993, or guidelines published by the Environment Protection Authority established under that Act, applicable to the provision of live music on the licensed premises have been complied with; and
 - (vi) any other matter that the Commissioner or the Court considers relevant.
- (6a) On completing the hearing of the complaint the Commissioner or the Court, as the case may be, may-
- (a) dismiss the complaint; or
 - (b) make an order against the licensee resolving the subject matter of the complaint.
- (7) The order may add to or vary the conditions of the licence.
- (8) If a proposal for settlement of the subject matter of the complaint is made in the course of proceedings before the Commissioner, evidence of the proposal is inadmissible in proceedings before the Court.
- (9) An interim order of the Commissioner under this section continues in force until the making of a final order on the complaint by the Commissioner or the Court, or earlier revocation of the interim order by the Commissioner or the Court.”

Background

- 4 As I noted in my earlier reasons the Rockford is a high quality hotel that provides accommodation, dining and conference facilities. It is located on the north western corner of Hindley Street and Morphett Street. Immediately to the west of the Rockford was the Elysium Lounge.
- 5 The Elysium Lounge ceased trading in December 2013. When I made the interim order I understood that its then owners were in the process of selling the business. I have now been advised that the liquidators of the former owners of the Elysium Lounge requested that the licence, which was a restaurant licence, be suspended and that on 28 February 2014 the Commissioner agreed to do so.
- 6 It would seem that Off Duty Holdings Pty Ltd then acquired the right to occupy the premises upon which the Elysium Lounge formerly traded. It then made an application for the grant of a Small Venue Licence, which was successful, and which was issued on 7 July 2014.

The parties' submissions

- 7 Off Duty seeks an order that my interim order be revoked. It submits that my earlier order could only apply to the former owners of the licence and that as there has since been a change in ownership and a change in the nature of the licence the Court no longer has jurisdiction.
- 8 Off Duty contends that it is significant that the sub-section (6a)(b) of s 106 refers to "the licensee" such that it contemplates the relevant parties being the complainant and the licensee of the premises as it was at the time of the complaint.
- 9 Townhouse Investments contends that the jurisdiction of the Court concerns the premises, not the owner of the licensee conducting business at the premises. It therefore submits that the Court retains jurisdiction. It argues that the Court should not lift the interim order until it is either satisfied that the business to be conducted at the premises will not unduly disturb guests staying at its hotel or that measures have been put in place to ensure that there is no undue disturbance.
- 10 Townhouse Investments contend that it is significant that the section refers to "the licensed premises". It argues that if the construction urged by Off Duty were correct the reach of the provision could be circumvented by a change of ownership and that that could not have been intended.

Consideration

- 11 It is clear that the focus of s 106 of the Act is to afford protection to those who reside, work or worship in the vicinity of the licensed premises from being unduly offended, annoyed or disturbed from activities, noise; or the behaviour of persons making their way to or from licensed premises.
- 12 Licences often change hands. Sometimes a change of ownership may bring about a change in the way the business is conducted. But not always. It would be an odd result that the mere fact of a change of ownership will bring to an end the ability of this Court to deal with a legitimate complaint made under s 106. Given the focus of s 106 I think it is far more likely that in enacting this provision, Parliament was concerned with what was happening at the licensed premises and how that was affecting others rather than the actual identity of the licensee.
- 13 This suggests to me that where s 106(6a)(b) speaks of “the licensee” it does not mean the licensee who owned the licence at the time when the complaint was made, but rather the licensee of the premises at the time when the Court is contemplating making an order under the section. On this issue I accept the submissions advanced by Townhouse Investments. Accordingly, in my opinion, the fact that the ownership of the premises and the nature of the licence has changed, does not mean that the Court no longer has the jurisdiction to deal with the complaint.
- 14 It does not follow, however, that the interim order should remain in place. As I stated when I made that interim order I have not made any finding that the level of noise emanating from Elysium has in the past been unreasonable; that the premises traded in a way inconsistent with its planning approval, or that there was cause to impose further conditions upon the licence to deal with these issues. I made the interim order on the basis that allegations made in a supporting affidavit, if true, would suggest the need for the Court to take some action.
- 15 Whilst I can understand Townhouse Investments’ concern that the relative tranquillity that it might have been experiencing since last December might come to an end I have to balance this with other matters.
- 16 There is no evidence before the Court that would indicate that the business Off Duty intends to operate and relevant matters related to it will unduly offend, annoy or disturb those who reside, work or worship in the vicinity of the licensed premises. It will operate under a different licence with different hours to those that applied when the Elysium Lounge was operating. There is nothing to indicate that it was in any way responsible for any of the issues that may have arisen at the premises in the past. Moreover, the Commissioner would not have granted it the

Small Venue Licence unless he was satisfied that it was in the public interest to do so.

- 17 In my view, on the evidence before the Court, there is simply no basis to justify the making of any interim order. I therefore revoke the interim order previously made by me.
- 18 I am not, however, minded to dismiss the complaint. Because of the alleged history concerning the licensed premises (being a matter identified as relevant under s 106(6)(b)(i)) and the proximity of them to Townhouse Investments' hotel I think it is appropriate to enable Townhouse Investments to bring any issue of concern regarding noise or other relevant matters to the Court on short but reasonable notice to Off Duty or some subsequent owner of a licence at the licensed premises.

Summary and orders

- 19 In summary, I reject the submission that the Court no longer has jurisdiction to deal with Townhouse Investments' complaint under s 106 of the Act. I am not persuaded that any interim orders should be put in place that prevents Off Duty from trading in the manner that it described to the Commissioner in respect of its successful application for the grant of a Small Venue Licence. I therefore revoke the interim order previously made by me. I am not, however, minded to dismiss the complaint. Townhouse Investments has liberty to apply upon giving short but reasonable notice to Off Duty or some subsequent owner of a licence being conducted at the licensed premises.