

Orso Gastronomía [2019] SALC 11

LICENSING COURT OF SOUTH AUSTRALIA

Orso Gastronomía

JURISDICTION: Application for the Review of a decision of the Commissioner

FILE NO: 748/2019

HEARING DATE: 26 February 2019

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 26 February 2019

REPRESENTATION:

Counsel:

Applicant: Mr B Doyle

Objector: Mr B Allen

Solicitors:

Applicant: Clelands Lawyers

Objector: Wallmans Lawyers

- 1 This is an application for review that seeks to revoke an interim order made by the delegate of the Commissioner for Liquor and Gambling in respect of a complaint made under s 106 of the *Liquor Licensing Act 1997*.
- 2 Amongst other things, s 106 of the Act enables those who reside in the vicinity of licensed premises to complain that the noise emanating from those premises is unduly offensive, annoying, disturbing or inconvenient.
- 3 Section 106(4) provides that ‘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’.
- 4 Section 106(4)(a) empowers the Commissioner “before or during the course of the conciliation proceedings, make an interim order about the subject matter of the complaint.”
- 5 This Court granted Orso Gastronomía Pty Ltd a restaurant licence in respect of premises at 36 Kensington Road, Rose Park, on 8 November 2018. The conditions of that licence enabled Orso to trade outdoors on Sunday to Tuesday from 7.00 am to 11.00 pm, on Wednesday and Thursday from 7.00 am to 11.30 pm, and on Friday and Saturday from 7.00 am to 12 midnight. In each case the certified capacity was 50 patrons.
- 6 On 2 December 2018, Mr Andrew McCracken, who resides in Rose Park, filed a s 106 complaint with the Commissioner. The complaint was supported by a number of signatures from nearby residents.
- 7 The Commissioner’s delegate conducted conciliation conferences on 22 January 2019 and 6 February 2019.
- 8 On 13 February 2019, the Commissioner’s delegate published brief reasons wherein she noted that the conference had been adjourned until 13 March 2019. In purported reliance upon s 106(4)(a) of the Act, she stated that she was satisfied that it was appropriate to make interim orders in respect of the outside dining area and ordered that from Monday to Friday that the premises would not trade after 9.00 pm, and that the capacity be reduced to 30 patrons at any one time.
- 9 It would appear that over the course of the conferences that the delegate had spoken to a number of the residents who were complaining about excessive noise. The only other evidentiary material that she had before her was a report from Sonus Pty Ltd dated 18 January 2019. The report purported to record the noise levels at a residence near the licensed premises between 10.00 pm and 10.15 pm on 11 January 2019. It measured the level at 52 decibels. It refers to an adjusted level of 57 decibels. It notes that by reference to the Environment Protection

(Noise) Policy 2007 the recommended level was 50 decibels. It is common ground that the Policy does not, at law, apply to licensed premises.

- 10 Mr Doyle, counsel for Orso, submitted that the Commissioner's delegate, whilst conducting the conciliation phase of the process, did not have the power to make an interim order, other than by consent. He said that participation in the conciliation process is consensual and it would be inconsistent with the nature of that process, for the Commissioner to effectively adopt an arbitral role, by making an interim order that the parties did not consent to. He said that the power was confined to circumstances where the parties agreed to an interim measure on a trial basis.
- 11 Next, he said that in any event, the grant of interim relief is determined by where the balance of convenience lies, and in this case, there was no evidence of irreversible damage being caused by the alleged excessive noise, whereas the loss of trade and possible reputational damage caused by the reduced hours was irreversible.
- 12 Mr Doyle's primary submission has some force. It does seem surprising that within a consensual conciliatory process, the presiding member can impose, over objection, adverse orders. As it is, it is not necessary for me to decide this point and I would prefer not to do so without formally giving the Commissioner the opportunity to be heard.
- 13 Assuming, without deciding that the Commissioner had the power to make interim orders, it was a power not to be exercised lightly.
- 14 In my opinion, absent consent, the making of interim orders should be regarded as exceptional and should only be made where the Commissioner is positively satisfied that they should be made. The Commissioner's delegate provides no explanation as to why she considered it necessary to make interim orders in this case. In the context of a noise complaint, an interim order should be made only where it is fairly necessary to prevent undue hardship to the parties who have made the complaint. Where the making of an interim order reduces trading rights that may impact on the financial viability of the licensee, or cause reputational damage, a very cautious approach should be adopted.
- 15 Whilst it must be acknowledged that the Commissioner must act without undue formality and is not bound by the rules of evidence, the Commissioner should not make an interim order without adequate knowledge and information to enable the making of a reasoned and sound judgment. The Commissioner's delegate provides no explanation as to what information or knowledge she relied upon in forming the judgment that interim orders were necessary. If she relied upon the Sonus report, the information contained in that report did not support a finding that the noise

levels emanating from the licensed premises were so extreme that interim measures were called for.

16 If the Commissioner's delegate relied upon information she received during discussions with the residents, she needed to be cautious in acting on that information, because it was untested evidence. Moreover, to afford Orso procedural fairness, it needed to know what that information was and be given an opportunity to comment.

17 In *Kioa v West*, Mason J said:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.¹ (References omitted)

18 If the Commissioner had the power to make interim orders, there was insufficient evidentiary material to support a finding that interim orders were necessary, or the licensee was denied procedural fairness in connection with that finding.

19 For these reasons, the Commissioner's interim order must be revoked.

¹ (1995) 159 CLR 550, 582