

Little Miss Miami and Little Miss Mexico [2014] SALC 41

LICENSING COURT OF SOUTH AUSTRALIA

LITTLE MISS MIAMI and LITTLE MISS MEXICO

JURISDICTION: Application for Review of Commissioner's decision

FILE NO: 3657 of 2014

HEARING DATES: 1, 2, 15, 16 and 23 July 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 5 September 2014

CATCHWORDS:

*An application for a special circumstances licence - Whether the applicant's business model could operate effectively under a hotel licence - **Held** that it could not - Whether the business would be substantially prejudiced if its trading rights were limited to those possible under such a licence - **Held** that it would - Whether in light of the history of the proposed licensed premises and the making of certain representations made by the applicant in a conciliation conference, the Court should exercise its discretion to refuse the licence - **Held** that it should not - Whether the business that the applicant proposes to conduct at the premises is likely to produce noise that will unduly disturb those who reside in the vicinity of the premises - **Held** that subject to a modification in the proposed hours of trading that it will not – Ss 17, 32, 34, 40, 44 and 53 Liquor Licensing Act 1997.*

The Gallery on Waymouth [2014] SALC 30

Pierce v Liquor Licensing Commissioner (1987) 47 SASR 22

Facac Pty Ltd v Talbot Hotel Group Pty Ltd and Another [2001] SASC 445

Bottega Rotolo Pty Ltd v Saturno's Colonist and Another [2008] SASC 16

Liquorland [2012] SALC 42

Tillmann's Butcheries Pty Ltd v Australasian Meat Industry Employees
(1979) ALR 367

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

Vandeleur and Others v Delbra Pty Ltd and Liquor Licensing Commissioner
(1988) 48 SASR 156

REPRESENTATION:

Counsel:

Applicant:

Objectors:

Mr M Roder SC with Mr G Griffin

Mr M Livesey QC with Mr S McDonald and
Mr B Allen

Solicitors:

Applicant:

Objectors:

Griffin Lawyers

Patsouris and Associates and Wallmans Lawyers

- 1 The ultimate issue before the Court is whether Little Miss Miami Pty Ltd should be granted a special circumstance licence and an extended trading authorisation to permit it to trade as licensee in premises in an enclosed and open area situated near the corner of Frome Road and Grenfell Street, Adelaide.
- 2 In order to succeed, the applicant must satisfy the Court that:
 - it being a corporation, each person in a position of authority is a fit and proper person to do so;¹
 - the premises will be of sufficient standard;²
 - the operation of the licence would be unlikely to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity, and prejudice to the safety or welfare of children attending education facilities in the vicinity of the premises;³
 - any approvals, consents or exemptions required to permit the use of premises for the sale of liquor have been obtained;⁴
 - any other relevant approvals, etc, to carry on the proposed business have been obtained;⁵
 - it satisfies the pre-requisites for the grant of a special circumstances licence;⁶
 - that the application warrants the favourable exercise of the Court's discretion;⁷ and
 - it satisfies the pre-requisites for the grant of an extended trading authorisation.⁸
- 3 The application has drawn objections from Rundle Street East Company Pty Ltd, Complete Hospitality Pty Ltd and a number of persons who reside in the vicinity of the premises.
- 4 The objectors contend that the prerequisites have not been met. They contend that the applicant's business could operate effectively under a

¹ Section 56 of the *Liquor Licensing Act 1997*

² Section 57(1)(a)

³ Section 57(1)(b)(i)

⁴ Section 57(2)(a)

⁵ Section 57(2)(c)

⁶ Section 40

⁷ Section 53

⁸ Section 44

hotel licence and that its business would not be substantially prejudiced if its trading rights were limited to those possible under such a licence. Next they contend that in any event, given the history of the proposed licensed premises and the making of certain representations made by the applicants in a conciliation conference, the Court should exercise its discretion to refuse the licence. They also contend that the business that the applicants propose to conduct at the premises is likely to produce noise that will unduly disturb those who reside in the vicinity of the premises and that this provides another basis for the Court to exercise its discretion to refuse the application. By implication they rely upon this in opposing the grant of an extended trading authorisation.

- 5 These are the issues that the Court must determine.

The proposed premises and surrounding areas

- 6 The premises are owned by 188 Grenfell Pty Ltd, which is part of the Karidis group of companies. It comprises of a two storey building on the north-west corner of Frome Road and Grenfell Street and an outside area.
- 7 The general area could be described as the East End of Adelaide. Immediately to the rear of the premises is Union Street, which runs from south to north connecting Grenfell Street to Rundle Street. The premises and outside area are wrapped around the back of the Crown and Anchor Hotel, the front of which is on the northern side of Grenfell Street. The hotel extends to Union Street. So too does the outside area of the premises.
- 8 On the eastern side of Union Street is a five story apartment building. South of that is another multi-story apartment building, which fronts onto Liberman Close, a small laneway which runs from south to north connecting Grenfell Street to Ebenezer Place and ultimately Rundle Street. Ebenezer Place starts from west to east joining Union Street to Liberman Close. It then runs from south to north connecting with Rundle Street. On the northeast corner of the junction of Liberman Close and Ebenezer Place is the Oostende Belgian Beer Café.
- 9 Directly opposite the Crown and Anchor Hotel, on the south west corner of Grenfell Street and Frome Road, is a high rise building known as the Mantra on Frome.
- 10 Immediately to the north of the premises is a multi-story car park. Across the road, to the west, is a police station.
- 11 Rundle Street East Company is the landlord of the Belgian Beer Café and the Stag Hotel, which is on the south west corner of Rundle Street and East Terrace. Complete Hospitality is the licensee of the Stag Hotel.

- 12 The relevant part of the ground floor area of the premises has been developed so as to assume the ambience of a cocktail lounge. It abuts Frome Road. It is fully enclosed. In the north east corner is a small commercial kitchen. Adjacent to the eastern wall is a bar, which extends about half the width of the area. To the west are a series of booths and in the southern section are some tables and chairs.
- 13 The outdoor area is to the south of the building. It has been constructed and decorated in a way designed to create the atmosphere of a rudimentary rustic Mexican themed bar.

The history of the premises

- 14 The premises started as licensed premises in February 2013. The applicant sought and obtained a limited licence that permitted it to trade on various days during the 2013 Fringe Festival as Little Miss Mexico. In its original form the licence contemplated three areas, the upstairs area of the building, with a certified capacity of 50 patrons, the downstairs area of the building, with a certified capacity of 100 patrons, and the outdoor area, with a certified capacity of 250 patrons.
- 15 The applicants then obtained a series of further limited licenses to enable it to trade at the premises. These were for various dates in March, April, May and October 2013.
- 16 In the meantime, the applicant sought and obtained on 11 July 2013 a small venue licence that permitted it to trade inside the building. In accordance with s 40A(3)(a) of the Act the maximum certified capacity was 120 patrons.
- 17 On 16 October 2013 the applicant applied for a special circumstances licence. It sought the licence to permit it to sell liquor for consumption on the premises from Monday to Saturday from 11am to 2am the following day and from 11am to midnight on Sundays and entertainment consent for the same hours. It was advised that it had to surrender the small venue licence if the special circumstances licence was granted. It has done so.
- 18 As a result of objections to the grant of this licence, the Commissioner for Liquor and Gambling embarked upon the process of conciliation as required by s 17(1)(b) of the Act. In that process there were some negotiations around some limitations in respect of live music. Importantly by email dated 27 November 2013 the applicant's then solicitor wrote:

“You will no doubt be aware that as it currently stands the premises will be unavailable to be occupied beyond 30 April next because it

is the intention of the lessor – Gerry Karidis – to demolish the improvements and undertake a development on the site.

The licensed premises will cease to exist...

Unlike other licenses issued under the Act, it is not a simple matter to remove a SCL...

Although my clients have no current intention of conducting a similar business in the East End, if the opportunity arose, they might want to create (for example) a little Miss Morocco!!”⁹

19 The following day the solicitor noted that the applicant undertook to Rundle Street East Company that the licence would not be removed from the licensed premises to other premises within the area bounded by North Terrace, East Terrace, Grenfell Street and Pultney Street, Adelaide.

20 A chain of emails followed, culminating in the formulation of draft conditions that included the following:

“The licensee must cease trading from the licensed premises no later than 30 April 2014 at which time the licence is to be automatically suspended pending a removal of the licence to other premises with such premises not to be within the area bounded by North Terrace, East Terrace, Grenfell Street and Pultney Street, Adelaide. Any such removal application must be completed by 31 October 2014 or such other period as the Licensing Authority may allow failing which the licence will automatically lapse or terminate.”¹⁰

21 As it was the licence that was issued by the Commissioner on 29 November 2013 contained a different condition. It read:

“The licensee must cease trading from the licensed premises no later than 30 April 2014 at which time the licence is to be suspended.”¹¹

22 The solicitor acting for Rundle Street East Company endeavoured to obtain a copy of the licence. He did not obtain a copy until 22 January 2014. He then became aware that the licence that had been issued did not correlate to the agreed wording. On 17 February 2014 he sent an email to the Commissioner’s delegate complaining that the licence did not contain all of the agreed conditions. He was advised that the Assistant Commissioner had deemed it appropriate to alter the wording of the condition regarding the suspension of the licence “as any potential

⁹ Exhibit O2 at p 21

¹⁰ Exhibit O2 at p 64

¹¹ Exhibit O2 at p 71

removal of the licence will be the subject to rigorous advertising requirements.”¹²

- 23 In the meantime the applicant traded at the premises. It conducted Little Miss Mexico in the outdoor area and Little Miss Miami in the indoor area.

The within applications

- 24 Sometime in April 2014 the Karidis Corporation decided to defer the development of the site. On 17 April 2014 its solicitors wrote to Rundle Street East Company and advised that 188 Grenfell Pty Ltd intended to re-enter the premises as at 30 April 2014 as landlord in possession and that it intended to make an application that the condition imposed by the Commissioner about the licensed premises ceasing trading no later than 30 April 2014 be deleted. On 24 April 2014 Rundle Street East Company’s solicitors advised that any such application would be opposed.
- 25 The application seeking the variation was lodged. It attracted objections and interventions from Complete Hospitality, Rundle Street East Company, The Commissioner of Police and the Adelaide City Council. A conciliation conference was held. As no resolution was reached it was referred to the Court. At a directions hearing conducted on 5 June 2014 the Court was informed that 188 Grenfell Pty Ltd intended to trade as licensee and to enter into a management agreement with another entity to manage the premises and that it was likely that that entity would be the applicant. I understand that this strategy has since been abandoned and that applicant seeks a special circumstances licence in its own right. It has executed a lease with 188 Grenfell Pty Ltd to secure the premises.
- 26 Rundle Street East Company remained concerned that the original special circumstances licence did not reflect what was agreed between the parties and it sought an extension of time to review the Commissioner’s determination issuing the licence.
- 27 At this point there were some issues about standing and jurisdiction. But it seemed to me that the resolution of them would not especially advance the matter. The Court has an unqualified discretion to grant or refuse any licence and is obliged to act without undue formality.¹³ It seemed to me that if the Court was satisfied that a special circumstances licence should never have been granted because the necessary pre-requisites had not been established, even if it were dealing only with the application to vary its conditions, it might nevertheless exercise its discretion to refuse the application on that basis alone. I thought that the most sensible and

¹² Exhibit O2 at p 79

¹³ Sections 23 and 53

expeditious way to deal with this was to effectively require the applicant to make out its case that it should be granted a special circumstance licence and an extended trading authorisation and that is how the case proceeded.

The hearing

- 28 The applicant relied upon the evidence of Mr Stuart Duckworth, Mr Trevor Liddell, Mr Jason Januszke, Mr Robert Fiacci, Mr Daniel Ap-Thomas, Ms Beverley Roberts, Mr Paul Turley and Mr Chris Turnbull.
- 29 Mr Duckworth is a director of the applicant. The other director is Mr Tom Skipper. Mr Duckworth said that in late 2012 he was approached by Mr Skipper about the prospect of the Little Miss Mexico venture.
- 30 He described the business model as follows:

“The concept of Little Miss Mexico, as Tom approached me, was very much a Mexican themed activation. It was much more than just a bar. It was to incorporate a whole bunch of things, but very much centralised around the theme of Mexico and Mexican. It had at the time a Mexican food truck. That was when the food truck was the craze at the time, and he had the Mexican food truck called La Cantina. So he had experience with not only the Mexican food, but obviously the Mexican culture as well, and he had also been keeping his eye on the space which is in question owned by the Karidis Corporation, which was always earmarked for development, but due to the nature of the building and the way it looked and the rustic nature of what could be formed, he thought it was the perfect location to really emphasise a Mexican creative culture.

...

The premise behind the idea is that every aspect of the experience of the venue would needed to be themed culturally. It wasn't good enough to just have a Mexican bar which served Mexican food, for example, but not look like what you would imagine a Mexican bar would look like or not have a food offering which would be typically Mexican, and so what I mean by that is the food needed to be Mexican, whether it just be tacos or nachos, and then the drink offering needed to add to the Mexican theme - we had imported Mexican sodas, non-alcoholic sodas for kids to drink, which carried on that theme; we had signature sangria drinks, margaritas were the signature cocktail and a very limited range of then bottle beers which was limited to three beers, I think, at that stage, which were

all imported Mexican beers. So the whole idea was to replicate a Mexican cultural experience right in the heart of the CBD...’’¹⁴

- 31 It is proposed that the premises are to trade under the same business model as it did under the special circumstances licence and subject to the same conditions.
- 32 Mr Duckworth said that the Little Miss Mexico concept could only work during the summer months as the casual nature of the drink offering, the casual nature of the food offering and idea of people milling around in an open air bar or area is the whole premise of the space were central to its theme. It was for this reason that they developed the Little Miss Miami concept so as to have a summer offering and a winter offering. Mr Duckworth said that the interior of the building, containing as it did, lots of white timber, inspired the concept. He said it reminded them of an 80’s, beachside Miami sort of style. So they went about creating a similar concept with a more polished offering with a nicer feel.
- 33 Little Miss Miami commenced in mid July 2013. It stocked three beers, Budweiser, Corona and Negra Modelo a very limited range of wine and a small range of cocktails. It offered a small range of food comprising of things like small burgers, onion rings and fries. In the beginning it traded seven days a week, but the applicant found that there was not as much appeal for the venue. They closed on Mondays and did not open until 4pm. If it succeeded in this application it would seek to trade similar hours. Mr Duckworth said that to open any earlier would result in the venture losing money.
- 34 Mr Duckworth spoke of the conciliation that led to the grant of the special circumstances licence. He said that main point of discussion concerned noise generally and a specific complaint that when Little Miss Mexico traded the music played there was too loud. The applicant accepted that complaint and agreed that there would no longer amplified sound in the space used as Little Miss Mexico. It agreed to limit music in the outdoor areas to background music using very small surround speakers played off an iPod which had a limited set volume and a Mariachi band, limited to 9pm. Any other form of entertainment was limited to the indoor area.
- 35 Mr Duckworth said he and Mr Skipper had no reason for us to believe that they would have tenure beyond 30 April 2014. Indeed that formed part of the application for a special circumstances licence, it being for a finite period.
- 36 Mr Duckworth said that the peak period in the Little Miss Mexico area was between 9pm and midnight. He said that beyond that, patrons tended

¹⁴ Tr 57 and 62

to move indoors. He spoke of “consumer rules”. He said that whether it is liquid or food, nothing was allowed to be taken in or out of the venue. When asked why the applicant did not offer liquor for consumption off the premises he said it was not suitable for its business model.

- 37 Mr Duckworth said that if granted the licence the applicant would trade in the outdoor area in the warmer months and in that time use the indoor area on Friday and Saturday nights. It would then only use the indoor area and would open five days a week from 4pm or later.
- 38 I was concerned that the form of the application and in particular the hours of trading stipulated did not correlate to the business model identified by Mr Duckworth. The applicant has since amended the application in the terms following:

DAY	PROPOSED SUMMER 1/11 – 30/4		PROPOSED WINTER 1/5 – 31/10	
	MIAMI	MEXICO	MIAMI	MEXICO
MON	Closed	4pm - midnight	Closed	Closed
TUES	Closed	4pm - midnight	Closed	Closed
WED	Closed	4pm - midnight	4pm – midnight	Closed
THURS	Closed	4pm - midnight	4pm – midnight	Closed
FRI	5pm – 2am	12pm – 2am	4pm – 2am	Closed
SAT	5pm – 2am	12pm – 2am	4pm – 2am	Closed
SUN	Closed	12pm - midnight	4pm – midnight	Closed

- 39 It was put to Mr Duckworth that the duration of the licence was ultimately a matter for the applicant’s landlord and that just as it was in April 2014 it was conceivable that the demolition of the site might be postponed beyond the presently scheduled May 2016. When asked what the applicant would do in that event and in particular whether it would seek to continue to trade he said:

“At this stage I don’t think we would, no, and I don’t think that that - no, I think that’s a very, very slim possibility that that would ever eventuate.”¹⁵

- 40 Elsewhere in his evidence Mr Duckworth said that a feature of the business model was that this venture would be of a finite duration.

¹⁵ Tr 114

41 It was suggested to Mr Duckworth that if it wanted, the applicant could offer meals at lunchtimes all year round. He said:

“We’ve tested it and that’s why the hours of duration have changed. The demand is not there for those meals during lunchtime hours and so therefore it’s not financial – we’d have staff opening the bars and getting the kitchens ready, preparing meals – we’ve tested that through the limited licences and it’s just not financially viable.”¹⁶

42 Mr Duckworth was asked whether he had given any consideration to obtaining a hotel licence and using it to trade at the premises. He said that the matter had been discussed with the applicant’s solicitors but he had not undertaken any careful planning or consideration as to how a hotel licence might work on that site.

43 It was put to him that Mr Skipper had made some enquiries in February 2013 about the possible acquisition of a dormant hotel licence. He said that he had discussed with Mr Skipper the possibility of buying a hotel licence, but it was in connection with other venues. He said that it was never in contemplation of the premises because they did not have tenure on the property for longer than six months.

44 It is apparent from Mr Duckworth’s evidence and the applicant’s business records that Little Miss Mexico and Little Miss Miami were very popular and quite profitable ventures.

45 Mr Liddell is the Chief Operations and Finance Manager for Karidis Corporation. He oversees the financial dealings of the various operations of the Group. He said that a significant amount of money had been spent on the plans for the redevelopment of the site but the development had been deferred because of the state of the economy. He conceded that in two years time the state of the economy might suggest that the redevelopment of the site would be a risk. He said that he doubted whether a further extension would be granted by the council and that other arrangements would have to be put in place.

46 Mr Januszke is a security manager who runs his own business. His company provided the security for Little Miss Mexico and Little Miss Miami. He said that when Little Miss Mexico and Little Miss Miami were trading together on a Friday and Saturday night five guards were provided at the venue. Two were placed on Frome Road by the Little Miss Miami entrance to control queues, count numbers in and out, and provide a sort of meet and greet presence at the front door. One was placed between the Little Miss Mexico and Little Miss Miami door. One

¹⁶ Tr 127

was in Little Miss Mexico. Another patrolled the emergency exit, which was located on the Grenfell Street near the corner of Frome Road.

47 He said that when Little Miss Miami traded alone he supplied three guards and that that was one or two too many.

48 He said that the peak trading was between 10pm till about midnight and 12.30am by which time it started to empty out. He said that he occupied a position at the front door. He said that when patrons left most headed north towards Rundle Street.

49 He described the patrons as follows:

“Their behaviour generally very good, and that’s why I’m most happy to be involved with the contract. I don’t like trouble; a younger crowd; business professionals; the ‘in’ good-looking crowd of Adelaide.”¹⁷

50 He spoke of the noise at the venue. He said that he never received any music complaints. He described big double doors on both sides of the enclosed building. He said that the noise there was not loud and that the venue would die about midnight to 12.30am, because everyone knew the music was going off and they would be leaving to another venue.

51 Mr Fiacci is an accounts manager. He owns an apartment in Union Street. He leases it out. He said that he had no difficulty in renewing the lease on favourable terms. He has frequented Little Miss Mexico and Little Miss Miami on a number of occasions. He supports the application.

52 Mr Ap-Thomas is the manager of the Mantra. He said that it comprises of 70 apartments of various sizes that provide a mix of permanent and temporary accommodation. About 16 apartments face the premises. He said that if the premises trade as they did under the most recent licence he did not anticipate any issues of concern.

53 When it was put that the proposal contemplated that 300 people would be in the outdoor area Mr Ap-Thomas expressed some reservations and added:

“It would be with that volume of voices because then you would get people talking over each other quite loudly but if it was all shut up shop by 12 o’clock in that area over those weekend periods it would be acceptable.”¹⁸

¹⁷ Tr 167

¹⁸ Tr 42

- 54 Ms Roberts lives in one of the apartments in the Mantra. It faces north, straight over from Little Miss Mexico and Little Miss Miami. She has lived there for many years. At one time she had an issue with noise emanating from the premises. She took this up with the applicant and the issue was resolved. She also had the French doors of her apartment re-sealed and this reduced noise. Provided there is to be no amplified music in the outdoor area she supports the application.
- 55 Mr Turley is a religious minister. He lives in Ebenezer Place. He has been to Little Miss Mexico. He has eaten meals there and has been there to drink. He said that it is exciting, vibrant and well run. He described it as the kind of place that he enjoys being in.
- 56 He lives near the Belgian Beer Café. He said that the activities there did not disturb him. It was put to him that after midnight the activities conducted at the café are inside the building. He agreed that in terms of the potential impact upon him that made a difference.
- 57 Mr Turnbull is an acoustic engineer. His brief was to find a situation in this area where there were relatively high levels of noise from licensed premises and to measure the noise inside and outside of an apartment in the near vicinity so as to determine whether the noise levels inside were reasonable. He did so by reference to the Belgian Beer Café and Mr Turley's apartment. He noted that the apartment also had 6-millimetre thick external glass. He described this as a good acoustic sealing. He measured the noise level on the balcony at 64 decibels. This exceeded the relevant standard. He measured the noise level inside the apartment, at about 32 decibels. He said that this level fell within the Australian Standard for noise within a bedroom. He noted that under the Adelaide City Council development plan relevant to this area there is a requirement that has been present for a long time, that the apartments take some action to reduce the noise from the general vibrancy. In light of this and his opinion that having some glazing makes a significant difference to noise levels he thought a measurement of noise levels confined to outside was inappropriate.
- 58 He compared the results with data that he had from a number of other sites where outdoor patrons were either proposed or were in place. He concluded that the measurements were consistent.
- 59 In connection with predictive noise levels emanating from the proposed premises he thought that there was a potential issue of noise reflecting off a wall and off some of the veranda roofing and suggested that some acoustic insulation on the wall to reduce the reflections from those surfaces was appropriate. The applicant gave an undertaking that if granted the licence it would undertake the modifications necessary to provide this insulation.

- 60 Subject to this, his opinion was that the predictive noise levels emanating from the proposed premises would be reasonable and should not cause undue disturbance to those residing in the vicinity of them.
- 61 The objectors relied upon the evidence of Mr Peter Russell, Mr David Tarry, Ms Marjorie Hewitt and Mr Jan Hendrik Moen and Mr Peter Maddern.
- 62 Mr Russell is a retired school principal. He lives in an apartment in Liberman Close. The apartment has a balcony facing west. He and his wife moved into the apartment about ten years ago. When they purchased it they understood that the area was essentially residential. Their bedroom window faces Grenfell Street directly over a tunnel that is in the building. He said that cars would come down and people would stand in that space, and the noise would come into the bedroom window. When they first arrived they found it particularly difficult to get to sleep because of the noise outside. Over time things settled down. He said that there was still the occasional interruption when people would congregate outside their bedroom window. He said that after February 2013 when Little Miss Mexico opened he noticed an increase in the number of disturbances that he would get during the night from people in the street. He said that he and his wife would be woken at around 2am once or twice a week by noise in the street. He said that since April and May 2014 the disturbance has abated. He said that he had not complained about the noise because he knew that the noise would finish. He opposes the within application because he expects large numbers of people on the street again resulting in the interruptions that he has had to put up with in the past. He said that the East End had changed, that it was not the same as when he arrived, there are many more venues supplying alcohol and he thinks that is a problem.
- 63 Mr Russell understood that as a result of this application the numbers using the premises would increase substantially he said that he was happy to hear that there is no proposed increase.
- 64 Mr Tarry is a building supervisor. He and his wife live in an apartment in Liberman Close. They have done so for three years. Their apartment has a balcony that faces west. He and his wife use it quite a bit. He can see the premises from his balcony. He spoke of the time when Little Miss Mexico first traded. He found the music and crowd noise to be very disturbing. He said that since it obtained the special circumstances licence that music noise had abated. However he is still disturbed by crowd noise. He finds noise when patrons are leaving the premises after 1.00am to be a particular problem. He was intending to object when an application was made for a special circumstances licence in October 2013 but on the understanding that the venue would close at the end of April 2014 he did not do so. He said that since the venue stopped trading

the level of disturbance had dropped. He said that if this application succeeds he would consider leaving. He said: “We didn’t move there to live in a premises where you can’t sleep.”¹⁹

- 65 Ms Hewitt lives in an apartment in Ebenezer Place. She has done so for over twelve years. Her apartment has a return veranda. The longer side faces north, and the shorter side by a couple of metres faces west onto Union Street. She spoke of the time when Little Miss Mexico first traded. She said that on weekends it was particularly noisy especially when patrons left the venue as some would walk down Ebenezer Place. She found the noise disturbing. She said that she was unable to entertain on her balcony. The noise also had an effect on her sleep. She was woken between 2am and 3am. She put this down to noise from patrons leaving the premises at closing time. She said that things had changed for the better when the premises traded under a special circumstances licence. She described being disturbed, only very occasionally. Since the premises closed she has not been disturbed at all. She did not complain about the noise because she understood that the venue would close at the end of April 2014. She opposes the application. She said that if the venue traded for two more years, it would change and spoil the amenity and lifestyle that she has come to enjoy within the East End. She said that she would consider leaving.
- 66 Mr Moen lives in an apartment in Liberman Close. He has lived there with his wife since 1998. They live above Mr Russell’s apartment. The two apartments have the same configuration. He spoke of the time when the Little Miss Mexico first traded. He was particularly disturbed by amplified music. He was also disturbed by patron noise. He said that the noise interfered with their use of the balcony. He said that he complained about the noise. He said that the proprietors appreciated his point of view and undertook to reduce the volume on the speakers and did so. He said that patron noise essentially remained unchanged. He said that he was disturbed by the patron noise very late in the evening. He put this down to patrons becoming more intoxicated and also when the premises were being vacated. He said that his bedroom window overlooks Grenfell Street and there was a lot of noise coming in and out. He said that the disturbance was mainly on weekends. He spoke of the conciliation that led to the grant of the special circumstances licence. He said he was influenced in agreeing to the licence by his understanding that the venue would be closed by the end of April 2014. He sees the within application as a breach of that undertaking. He said that he does not fancy the idea of continued trading for an additional period of two years. He said:

“The concept that there might be 500 people leaving the premises at say 2 o’clock in the morning and hanging around our building,

¹⁹ Tr 198

et cetera, et cetera for God knows how long really scares me and disturbs me.”²⁰

- 67 Mr Maddern is a consulting engineer. He questioned the suitability of the Belgian Beer Café as a comparator. He said that without knowing the number of patrons outside, their age profile, the levels of intoxication and the presence or absence of music one could not be sure that you would be comparing like venues.
- 68 He thought the appropriate measure was the outside measure. He thought that this was best achieved by attribution of a level of noise to each patron. He nominated 83 decibels per person. In his opinion the noise emanating from the proposed premises would measure as 59 decibels outside an apartment on the eastern side of Union Street and at times it could be as high as 70.
- 69 His opinion was that the predictive noise levels emanating from the proposed premises would be unreasonable and were likely to cause undue disturbance to those residing in the vicinity of them.

The parties' submissions

- 70 The objectors contend that this application is improper because it constitutes a renegeing of an unqualified representation made last year that there was to be no licensed trading from these premises beyond April 2014. They said that what tipped the matter over the line, in terms of their agreement to the licence, was that this venue would only exist for a relatively short closed period. They contend that this was a fundamental plank upon which the special circumstances came to be and to the extent that Mr Duckworth suggests otherwise and played down the clear change in position that the applicant now takes does him no credit. They say that even now it cannot be assumed that if a further opportunity presented itself in two years time that the applicant would not attempt to extend the licence.
- 71 They argued that had the applicant indicated that if the opportunity presented itself it would contemplate trading after April 2014 it was possible that no agreement was reached and there would have been a trial. It was said that one of the benefits of avoiding that trial was to get on trading during the valuable summer months.
- 72 They submitted that by agreeing as they did on the basis of the representation that had been made the objectors had acted to their detriment because back in October or November last year they could have put a stop to this, then and there, with a trial before this Court.

²⁰ Tr 226

- 73 They argued that a powerful consideration is the sanctity of the conciliation process; that when people go to conciliations under the umbrella of this Court before a Deputy Commissioner, they can be reassured that when they make an agreement that agreement will stick; that conciliation means what it says, and that is why s 17 is framed in the terms in which it is. They said that the idea that there has been no harm done and that this does not involve a broken agreement is rubbish and a nonsense that needs to be disregarded right at the outset and on that basis alone the application should be refused.
- 74 Next they said that the evidence does not establish that for the premises to trade under a hotel licence would not be viable and that the applicant has not established substantial prejudice if it had to do so.
- 75 They submitted that in its most recent form the premises sounds and trades like any other bar under a hotel licence. They said that the fact that it only sells a few lines of beer and a few lines of wine is not especially to the point and that there are other themed hotels that operate in the same way under hotel licences. They said that in reality the applicant's proposed business is simply a bar with meals, in which there is a request for extended trading hours.
- 76 As to the fact that it does not propose to sell liquor for consumption off licence they contended that it is simply the applicant's desire or wish not to do so and that it has got nothing to do with the idea that this has some special affinity with the business model.
- 77 As to the proposed limitation on trading hours they pointed to the fact that the initial application suggests hours almost indistinguishable from hotel hours. It sought approval to trade from 11am to midnight, Monday to Thursday for Area 2; Friday to Saturday, 11am to 2am; Sunday, 11am to midnight and that the licence that was agreed upon contained the same hours.
- 78 They said that this proposal looks, sounds and trades like a bar under a hotel licence and that to the extent that such a licence does not fit perfectly it could be resolved through the array of exemptions that are now recognised as being available for a hotel licence.
- 79 They submitted that on the facts here, what has happened is that the original business model has receded and the proprietors have settled into a longer-term business with a new business model contrived and designed to circumvent the hotel licence.
- 80 Next they said that the evidence shows that these premises were operating profitably and at worst, forcing the applicant to trade under a hotel licence would diminish profits. It said that this does not amount to proof of substantial prejudice.

- 81 They submitted that the fact that the licence was being sought for a closed period did not exclude the possibility of a hotel licence fitting the proposed business model because the Act permits any form of licence being of a finite duration.
- 82 Finally, on the issue of disturbance, they asked me to find that the level of disturbance created by this business was not apparent to anyone before February 2013; between February 2013 and November 2013 there was a significant problem with music but that was addressed; the level of disturbance encountered by the residents was different to that which they had encountered with the Crown and Anchor and any other premises before or after; and that it was patron noise, quite apart from music, which disturbed the residents.
- 83 They contended that on the basis of the evidence they called, including Mr Maddern, I should find that it is likely that the proposed venture will unduly disturb those who reside in the vicinity of the premises and that for this reason the Court should exercise its discretion and refuse the application.
- 84 The applicant submitted that it is unfair to suggest that it or Mr Duckworth have been tricky or clever in connection with this matter. It says that no-one had any conception that these premises would be available to trade beyond April 2014.
- 85 It said that Mr Duckworth made it clear was that there was no interest in continuing to trade, even if the premises became available at the end of the period now available.
- 86 It said that there is nothing in the argument about detriment because the objectors now have the trial that they were supposedly deprived of.
- 87 As to the prerequisites of s 40 it argued that the business model proposed here is substantially different to what one might regard as a hotel. It suggested that if this model does not merit a special circumstances licence it would be difficult to envisage what model would.
- 88 It contended that the authorities do not stand for the proposition that one is only substantially prejudiced for the purposes of s 40 upon proof that the business will lose money.
- 89 It submitted that this is a bona fide business plan and that any suggestion of contrivance should be rejected.
- 90 As to disturbance it submitted that no-one has made any material complaint of disturbance from within the premises either by music or patrons on the second period of trading. It said that in the context of

persons living in a vibrant part of the city the allegation of undue disturbance had not been made out.

Analysis

91 I commence with the submission that the applicant should be held to the representation that underpinned the resolution of the earlier dispute about the licence.

92 In *The Gallery on Weymouth* I said this:

“...it is in the public interest to expect licensees and would be licensees to act in good faith in their negotiations with objectors and intervenors and to faithfully accept and honour conditions imposed upon a licence that they agreed to in those negotiations. The practice of agreeing to conditions to get around the legitimate complaints made by others only to resile from them once the licence has been granted is not one that the Court should condone.”²¹

93 Had there been the slightest indication that the applicant made the representation about ceasing to trade as at the end of April 2014 in the knowledge that there might be an opportunity to trade at the premises after that date and that in that event it would seek to explore that opportunity I would have dismissed this application for that reason alone.

94 There is, however, no indication that this was so. I find that no-one contemplated in October and November 2013 that these premises would be available to trade beyond April 2014. I also accept the applicant’s submission on the issue of alleged detriment. The objectors have through this hearing been given the opportunity to argue the case that they were contending that they had been deprived of. The fact of the earlier representation does not lead me to conclude that for that reason the application should be refused.

95 I now turn to consider whether the application for a special circumstances licence has been made out.

A special circumstances licence – a series of tests

96 The circumstances permitting the grant of a special circumstance licence are prescribed by s 40 of the Act in the terms following:

“(2) A special circumstance licence cannot be granted unless the applicant satisfies the licensing authority that –

²¹ [2014] SALC 30 at para 49

- (a) a licence of no other category (either with or without an extended trading authorisation) could adequately cover the kind of business proposed by the applicant; and
- (b) the proposed business would be substantially prejudiced if the applicants trading rights were limited to those possible under a licence of some other category.”

97 It follows that an application for a special circumstances licence involves a series of tests. If the application falls at any one along the way it must fail.

98 First, the various categories of licence provided for by the Act must be considered. They being: hotel licence; residential licence; restaurant licence; entertainment venue licence; club licence; retail liquor merchant’s licence; wholesale liquor merchant’s licence; producer’s licence; direct sales licence; special circumstances licence; small venue licence; and a limited licence.

99 A limited licence is one that is granted for a special occasion, or series of special occasions. It contemplates a one off or series of one off events. It has no application here.

100 All of the other categories have to be considered and a determination must be made as to whether any would fit the proposed business model.

101 In connection with that the Court must consider its power to grant exemptions. That power has some limitations. The granting of exemptions cannot fundamentally change the character of a particular category of licence.²² But, depending upon the type of licence, the exemptions can be quite wide.

102 If, with appropriate exemptions, a particular type of licence would fit the applicant’s business model, the application for a special circumstances licence fails.

103 Next, the Court must determine whether the applicant’s business model would be substantially prejudiced if it were forced to trade under an existing category of licence, with or without appropriate exemptions. Unless there is, the application for a special circumstances licence fails.

104 Finally the Court must determine whether in the Court’s discretion it should grant a special circumstances licence. If it found that the business model was contrived to enable the applicant to obtain a licence that it

²² *Pierce v Liquor Licensing Commissioner* (1987) 47 SASR 22; *Facac Pty Ltd v Talbot Hotel Group Pty Ltd and Another* [2001] SASC 445

otherwise would not have been entitled to²³ that might be a reason to exercise the discretion to refuse the application. So too would be the creation of an undesirable precedent. Special circumstances licences are intended for anomalous types of businesses. If the grant of a particular special circumstances licence was seen to create, what was in effect a new category of licence that would serve as a precedent for future applications, that might be seen as disturbing the hierarchy of licences and interfering with the rationale which underpins that hierarchy.²⁴ This would warrant the exercise of the wide discretion provided for by s 53 of the Act to refuse the application.

- 105 The applicant’s proposed business model contemplates that there will be no sale of liquor for off licence consumption; there will only be a limited range of liquor available; the hours of trading will be quite restricted; and the food available will be relatively limited and the provision of food will not be the prime focus of the business.
- 106 It is plain that only two categories of licence could potentially fit the applicant’s proposed business model, a restaurant licence or a hotel licence.

Could the proposed business model trade under a restaurant licence?

- 107 Section 34 of the Act deals with restaurant licences.

“(1) Subject to this Act, a restaurant licence—

- (a) authorises the consumption of liquor on the licensed premises at any time with or ancillary to a meal provided by the licensee; and
- (b) authorises the licensee to sell liquor at any time for consumption on the licensed premises with or ancillary to a meal provided by the licensee; and
- (c) if the conditions of the licence so provide—authorises the licensee to sell liquor at any time for consumption on the licensed premises by persons attending a function at which food is provided or seated at a table...”

- 108 The applicant’s business model contemplates supplying liquor to patrons who will not be consuming food. It would not fit that model to require those patrons to be seated at a table when consuming liquor. The Court

²³ For example it might be apparent that an applicant would not establish need in connection with a hotel licence. To contrive a business model to establish that a hotel licence would not suit so as to attempt to qualify for a special circumstances would be such an example.

²⁴ *Bottega Rotolo Pty Ltd v Saturno’s Colonist and Another* [2008] SASC 16 at para 57 per DeBelle and Bleby JJ

has no power to grant the holder of a restaurant licence an exemption from that requirement. Thus a restaurant licence would not adequately cover the kind of business proposed by the applicant. It is plain that the proposed business would be substantially prejudiced if the applicant's trading rights were limited to those possible under a restaurant licence.

Could the proposed business model trade under a hotel licence?

109 The hotel licence is provided for by s 32 of the Act, which provides as follows:

“32—Hotel licence

- (1) Subject to this Act, a hotel licence authorises the licensee—
 - (a) to sell liquor on the licensed premises for consumption on or off the licensed premises—
 - (i) on any day (except a Sunday, Good Friday and Christmas Day) between 5am and midnight; and
 - (ii) on a Sunday (not being Christmas Day or New Year's Eve) between 11am and 8pm; and
 - (iii) if New Year's Eve is on a Sunday, on that Sunday between 11am and midnight; and
 - (iv) on Christmas Day between 9am and 11am; and
 - (v) on New Year's Day between midnight and 2am; and
 - (b) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption on the licensed premises during the whole or any part of the following hours as is specified in the authorisation:
 - (i) on any day (except a Sunday, Good Friday, the day after Good Friday, Christmas Day and the day after Christmas Day) between midnight and 5am;
 - (ii) on a Sunday (not being Christmas Day or the day after Christmas Day) between midnight and 5am and between 8am and 11am and between 8pm and midnight;
 - (iii) if the day after Christmas Day is a Sunday, on that Sunday between 8am and 11am and between 8pm and midnight;

- (iv) on Good Friday between midnight and 2am;
 - (v) on Christmas Day between midnight and 2am;
and
 - (c) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption off the licensed premises during the whole or any part of the hours between 8am and 11am, and between 8pm and 9 pm, on a Sunday (not being Christmas Day) as is specified in the authorisation; and
 - (d) to sell liquor at any time on the licensed premises to a lodger for consumption on or off the licensed premises; and
 - (e) to sell liquor at any time in a designated dining area to a diner for consumption in that area with or ancillary to a meal provided by the licensee in that area; and
 - (f) to sell liquor at any time in a designated reception area to a person attending a reception for consumption in that area; and
 - (g) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only during the hours that the licensee is authorised to sell liquor on the licensed premises to a person other than a lodger for consumption off the licensed premises).
- (2) Subject to this Act, a hotel licence is subject to the following conditions:
- (a) a condition requiring the licensee to keep the licensed premises open to the public for the sale of liquor on every day (except Good Friday, Christmas Day or Sunday) between 11am and 8pm;
 - (b) a condition requiring the licensee to provide a meal, at the request of a member of the public, between noon and 2 pm, and between 6pm and 8pm, on any day on which the licensed premises are open to the public for the sale of liquor.
- (3) However—
- (a) the licensing authority may exempt a licensee from the obligation to keep the licensed premises open for the sale of liquor to an extent the authority considers

appropriate in the circumstances of a particular case;
and

- (b) a licensee is not required by a condition under this section to provide a meal for a person if—
 - (i) the person appears to be intoxicated; or
 - (ii) the licensee has reasonable grounds to believe that the person cannot or will not pay for the meal; or
 - (iii) the licensee cannot comply with the request because of prior obligations to provide meals for others; or
 - (iv) there is some other proper reason for not complying with the request; and
- (c) the licensing authority may exempt a licensee from the obligation to provide meals wholly or to a specified extent.”

110 In *Facac v Talbot Hotel Group Pty Ltd and Another*²⁵ Doyle CJ described the attributes of a hotel licence. He said that although it continues to be the class of licence with the most extensive trading rights, the obligations that such a licence imposes have been relaxed over the years. The holder of a hotel licence is no longer required to provide accommodation for lodgers. It can seek an exemption relieving it of the obligation to provide meals. The requirement that it trade over specified hours can be ameliorated. He suggested that it might be possible for the holder of a hotel licence to obtain an exemption from the obligation to sell liquor for consumption off the premises.

111 On the face of it, the Court could grant a range of exemptions that could accommodate the applicant’s business model. But the exemptions are not to be looked at individually. Cognisant of the fact that the character of a hotel licence has changed over the years, the Court must ask itself whether the end result has sufficient characteristics of a hotel as contemplated by the Act as to be one and whether in the exercise of its discretion it would grant such a licence.

112 It also must be borne in mind that a hotel licence can only be granted if need is established.²⁶ That does not mean that an applicant for a special circumstances licence has to establish need. As explained by DeBelle and Bleby J in *Bottega Rotolo Pty Ltd v Saturno’s Colonist and Another* it

²⁵ [2001] SASC 445

²⁶ Section 58(1) of the Act

does not.²⁷ What it does mean is that the Court in considering the matters just discussed must do so from the premise that hypothetically the applicant has established a relevant need for a hotel licence.

113 The Court does not know what if any take away facilities are available at the various hotels in the vicinity of the proposed premises. But it does know as a result of *Liquorland*²⁸ that very close by is the East End Cellars, which is a high quality retail liquor facility. Granting an exemption that allows this hypothetical applicant to not sell liquor for off licence consumption would not prejudice those who notionally need this hotel. It is an exemption that the Court might grant.

114 However, I cannot envisage that if that “need” was established that the need would be met through the limited hours of trading that the applicant’s business plan contemplates. It is an exemption that the Court would not, in my view, grant.

115 Moreover, I think in any event, it is likely that the Court would regard that grant of a hotel licence enabling the holder of the licence to not sell liquor for off licence consumption and to trade for such limited hours as setting an undesirable precedent and that the Court in the exercise of its discretion would refuse to grant the licence.

116 Accordingly, I find that a hotel licence, even with exemptions, would not adequately cover the kind of business proposed by the applicant.

Substantial prejudice?

117 The word “substantial” appears in a number of statutes. It was considered by the Federal Court in the context of Trade Practices legislation in *Tillmann’s Butcheries Pty Ltd v Australasian Meat Industry Employees*. In that case Deane J the following observations that I regard as helpful here. He said:

“The word ‘substantial’ is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase ‘substantial loss or damage’, it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v. Grinling* [1948] AC 291 at 371 where, after holding that, in the context there under consideration, the meaning of the word was equivalent to ‘considerable, solid or big’ he said:-

²⁷[2008] SASC 16 at para 34

²⁸ [2012] SALC 42

‘applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case’.”²⁹

118 I accept Mr Duckworth’s evidence that for the venue to be open for trading beyond the hours stipulated in the amended application would result in it losing money. Based on the Court’s view of the premises and the photographs that were tendered I find that the ambience that the outdoor area of the premises has attempted to create is best suited to warm and balmy weather. I doubt that it would attract much interest on a cold wet night in winter. I find that the inside area does have the feel of a cocktail lounge. I doubt that it would attract much interest by patrons during daylight hours.

119 I find that to require the applicant to conduct its proposed business by the use of a hotel licence, which would require it to trade for much longer hours than contemplated, would a result in the proposed business suffering a degree of prejudice that would be real and of substance. I find that it would be substantially prejudiced.

Should the application in the exercise of the Court’s discretion be refused?

120 I now turn to the issue of discretion. The discretion conferred by s 53 must be exercised for a purpose consistent with the Act. But it is very broad and if I were to find the slightest hint of contrivance in connection with this application I would be minded to exercise the discretion to refuse the application.

121 But I did not get any sense that the applicant has manufactured its business model to avoid a finding that it could effectively trade under a hotel licence. I accept Mr Duckworth’s evidence that it did not contemplate acquiring a hotel licence in connection with these premises. The fact that it might have been considering the possibility of acquiring a hotel for another venture is in my view irrelevant. I imagine that many of those involved in the hospitality industry are alive to all sorts of possibilities in terms of business ventures. The proprietors of the applicant strike me as very creative and entrepreneurial. I expect that they are generally on the alert for new opportunities.

122 I am not troubled by the concession that Mr Duckworth made that he could not exclude the slim possibility that if the opportunity presented itself that the applicant might consider trading at the premises beyond May 2016. I think he was just being honest. I do not see it as inconsistent with the business model that the applicant has presented in connection with this application.

²⁹ (1979) ALR 367 at 382

123 I am however troubled by the potential for the grant of this application to set an undesirable precedent. Without significant qualifications the licence would effectively be a modified form of hotel licence that would enable the applicant to not sell liquor for off licence consumption and to trade for quite restricted hours. The applicant chooses to only offer a limited range of beers, wine and spirits. Without any conditions there would be nothing preventing it from extending that range. If after obtaining the licence the applicant sought to expand its hours of trade to meet an increased demand the end result would become increasingly similar to a hotel. That would be an undesirable precedent. If, however, the licence contained conditions limiting the range of liquor to say 25 lines; eliminating altogether the capacity for the applicant or a successor from increasing the hours of trade; and fixing the life of the licence to 31 May 2016; those concerns would be allayed. It would be a licence to suit an anomalous type of business that would not become a blueprint for future applications.

124 Pursuant to s 43(1) of the Act the Court is authorised to impose conditions that accord with representations made by an applicant during a hearing about the nature of the business to be conducted if the licence is granted. The conditions just described accord with those representations.

Issues of noise etc and whether an extended trading authorisation be granted?

125 I now turn to the issues surrounding noise and the like and the application for an extended trading authorisation.

126 The touchstone for determining issues of noise, disturbance and the like is whether what is involved is “undue”. In the context of the Act it means “... not appropriate or suitable; going beyond what is appropriate, warranted or natural; excessive”.³⁰ In *Vandeleur and Others v Delbra Pty Ltd and Liquor Licensing Commissioner*, King CJ, in discussing a similar concept under the *Liquor Licensing Act 1985*,³¹ said:

“Clearly the remedies contained in s 114 cannot be availed of where the noise or behaviour **does not exceed what is to be reasonably expected from the conduct of licensed premises** of the particular class. Those remedies can only be available where **the noise or behaviour goes beyond what is naturally to be expected and where the consequent offence, annoyance, disturbance or inconvenience exceeds what those who reside, work or worship nearby can reasonably be expected to tolerate.**”³² (emphasis mine)

³⁰ *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207 at 212

³¹ Section 114

³²(1988) 48 SASR 156 at 160

- 127 The East End is a vibrant area of Adelaide. It contains many hotels, restaurants and other licensed venues. It will inevitably attract a lot of people and many of them can be expected to make noise as they enter and leave licensed premises and as they walk around the streets. I do not think that anyone living in the East End could seriously complain about noise and disturbance from revellers in the area before midnight.
- 128 Pursuant to s 40(1)(a) absent an extended trading authorisation a special circumstances licence only permits trade until midnight from Monday to Saturday and to 8pm on Sundays. In light of the restricted music condition applying to the outdoor area and the reduction of noise in the indoor areas I would not regard potential noise and disturbance emanating from the premises within the trading hours provided for by a special circumstances licence as being a matter of concern.
- 129 In relation to the primary application for a special circumstances licence I find that the proposed venture will not unduly disturb those who reside in the vicinity of the premises. Hence I am not persuaded that on account of potential disturbance that the Court should exercise its discretion and refuse the application
- 130 It will be noted, however, that the hours of trading that the applicant proposes contain a request to trade beyond these hours. Hence its application for an extended trading authorisation.
- 131 Applications for extended trading authorisation are governed by s 44 of the Act, which provides:

“44—Extended trading authorisation

- (1) An extended trading authorisation is a condition of a licence authorising extended trade in liquor.
- (2) An extended trading 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.
- (3) On granting an extended trading authorisation, the licensing authority may include further conditions in the licence that it

considers appropriate in view of the extended trading authorisation.”

- 132 In dealing with the issue of alleged undue offence, annoyance, disturbance, noise or inconvenience to people who reside in the vicinity of the licensed premises, I did not find the evidence of the experts to be particularly helpful. Their evidence was directed towards predictive models. That exercise involves the making of assumptions and a degree of guesswork. Given that the premises have actually traded in the manner in which it is proposed that they will trade in the future, and I have the testimony of persons residing in the vicinity of the premises who are able to attest to their own observations, I think that evidence is far more persuasive.
- 133 Mr Russell spoke of him and his wife being woken at around 2am once or twice a week by noise in the street.
- 134 Ms Hewitt spoke of being woken between 2am and 3am.
- 135 Mr Tarry found noise when patrons are leaving the premises after 1am to be a particular problem.
- 136 Mr Moen expressed his concern about the prospect of patrons leaving the premises at 2am.
- 137 This evidence, which I accept, paints a picture of patron noise in the early hours of the morning causing an interference with their sleep.
- 138 I note that Mr Ap-Thomas, who the applicant called in support of its application, spoke of the outdoor area being all shut up shop by midnight as being acceptable.
- 139 It is of some significance that there is no extended trading authorisation for the licensed outdoor area of the Belgian Beer Café.
- 140 I note that Mr Turley, who also supports this application, agreed that in terms of the potential impact of noise upon him from the Belgian Beer Café the fact that the activities conducted at the café are inside the building after midnight made a difference.
- 141 As I said earlier, no one living in the East End could seriously complain about noise and disturbance from revellers before midnight. But in the hours beyond that I think it has the potential to become an issue. Patron noise coming from in the outdoor area is clearly causing a disturbance to a number of residents living in the western area of the East End, particularly from 1am onwards. I find that from that time onwards it will in all likelihood result in undue annoyance, disturbance, noise or inconvenience to those who reside in the vicinity of the premises.

- 142 As to the inside area there is no evidence that indicates that patron noise or other noise is causing a problem. I accept the evidence that suggests that noise from people who were walking around the vicinity of the premises after 1am, when it last traded, was at times disturbing. But it is difficult to attribute much of this to Little Miss Mexico and Little Miss Miami. I have no reason to doubt Mr Januszke's evidence that the peak trading was between 10pm till about midnight and 12.30am; that it was at that time when the premises started to empty out; and that most of the patrons when they left headed north towards Rundle Street. I accept that evidence.
- 143 It seems to me that if patrons were required to leave the premises through the front doors facing Frome Road and the applicant was required to engage security to oversee the conduct of patrons leaving the premises after closing time the grant of the authorisation in respect of the indoor area to 2am is not likely to cause undue offence, annoyance, disturbance, noise or inconvenience to people who reside in the vicinity of the licensed premises.

Some final matters

- 144 The evidence of Mr Duckworth suggests that he and Mr Skipper are likely to have a fair handle on what will happen at the premises. Their previous conduct suggests that they are responsible. I am encouraged by their conservative approach to security as evidenced by the suggestion that at times they have too many. I am confident that the applicant will discharge the duties imposed by s 44(2)(b).
- 145 As to the issue of discretion generally I see no other basis upon which I should exercise the discretion conferred by s 53 of the Act to decline to grant the application.

Conclusions

- 146 The application for a special circumstances licence is granted. The application for an extended trading authorisation is granted in the outside area to 1am and in the inside area to 2am. I impose a condition on the licence requiring the applicant to engage security to oversee the conduct of patrons leaving the premises after closing time. In accordance with the applicant's undertaking I direct it to implement the acoustic insulation that Mr Turnbull recommended. I impose a condition limiting the range of liquor available to 25 lines. I impose a condition that neither the applicant nor a successor may apply to increase the hours of trade beyond those that I fix. The licence will expire on 31 May 2016 and no application to extend the life of the licence will be entertained.

147 I limit the hours of operation to that indicated by the applicant subject to the modification regarding the outside area. That table of hours will therefore be as follows:

DAY	PROPOSED SUMMER 1/11 – 30/4		PROPOSED WINTER 1/5 – 31/10	
	MIAMI	MEXICO	MIAMI	MEXICO
MON	Closed	4pm - midnight	Closed	Closed
TUES	Closed	4pm - midnight	Closed	Closed
WED	Closed	4pm - midnight	4pm – midnight	Closed
THURS	Closed	4pm - midnight	4pm – midnight	Closed
FRI	5pm – 2am	12pm – 1am	4pm – 2am	Closed
SAT	5pm – 2am	12pm – 1am	4pm – 2am	Closed
SUN	Closed	12pm - midnight	4pm – midnight	Closed