

LICENSING COURT OF SOUTH AUSTRALIA

CEL A DOR PTY LTD

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

FILE NO: 4819 of 2016

HEARING DATE: 15 September 2016

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 16 September 2016

*Application for a review of the decision by the Commissioner refusing to grant the applicant a series of limited licences to conduct functions at its premises in the Adelaide Hills - Whether the proposed functions comprised of a special occasion or series of special occasions - Whether the dispensation that s 57(3) permits should be granted - Whether in light of earlier applications for limited licences at the same premises the proposed trade would be better authorised by a permanent licence or by condition of a permanent licence - The character of the applications for the limited licences that are the subject of this review have to be made by reference to the applicant - From that perspective they cannot be said to be that the events were not usual or commonplace – **Held:** that they are not special occasions - On the material placed before the Court it is not satisfied that it is in the public interest to grant the dispensations under s 57(3) that would be necessary for the applications to proceed - In any event, the circumstances that require the refusal of an application for a limited licence as prescribed under s 41(5) exist such that the licences could not, as a matter of law, be granted - Application for review dismissed - Ss 22, 41, 53 and 57 Liquor Licensing Act 1997*

REPRESENTATION:

Counsel:

Applicant: Mr B Allen

Respondent: Ms J Lieschke

Solicitors:

Applicant: Wallmans Lawyers

Respondent: Crown Solicitors

- 1 This is an application for a review of a decision of the Commissioner for Liquor and Gambling who refused an application made by Cel A Dor Pty Ltd for a series of limited licences pursuant to s 41 of the *Liquor Licensing Act 1997*.
- 2 The application is made pursuant to s 22 of the Act. It is in the nature of a rehearing.
- 3 Although the Commissioner conducted a hearing there was no transcript. Accordingly, the hearing before me proceeded by way of a statement of agreed facts and two affidavits from the proprietor of the applicant, Ms Jan Siemelink-Allen.

Background

- 4 The applicant is the current holder of a producer's licence in respect of premises known as Barrister Block Premium Wines situated at Onkaparinga Valley Road, Woodside.
- 5 Prior to 2012, the applicant conducted its business at the premises as a conventional cellar door facility.
- 6 In 2012 it was approached by a customer to have a wedding on site. It agreed and sought a limited licence pursuant to s 41 of the Act.
- 7 Section 41 provides as follows:

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

- (a) the licensee to sell or supply liquor; or
- (b) the consumption of liquor,

in accordance with the terms and conditions of the licence, in circumstances in which the sale, supply or consumption of liquor would otherwise be unlawful.

- (2) A limited licence may only be granted for a special occasion or series of special occasions.
- (3) A limited licence is not to be granted for a term of more than one month unless the licensing authority is satisfied that there are special circumstances justifying a longer term.
- (4) A limited licence may be granted either to a person who holds a licence of some other class or to an unlicensed person.
- (5) A limited licence is not to be granted if—

- (a) the licence is sought for a function organised by a particular person or group; and
- (b) limited licences have been granted for previous functions organised by the same person or group; and
- (c) the licensing authority is of the opinion that the trade to be authorised by the licence would, in view of the frequency of applications, be better authorised by a permanent licence or by condition of a permanent licence.”

- 8 The Commissioner granted the limited licence and the event was conducted. Thereafter, the applicant conducted another five or so weddings in 2012, and on each occasion it sought and obtained a limited licence.
- 9 The following year this side of the applicant’s business expanded. It conducted twelve of so weddings. Again, on each occasion it sought and obtained a limited licence to conduct the event. In doing so it successfully applied to increase the area covered by the licences to include outdoor spaces.
- 10 In 2014 the number of wedding functions increased to 25. By 2015 it had further increased to 35.
- 11 All events proceeded without incident. All proceeded by way of limited licences granted by the Commissioner.
- 12 In about Easter 2015, the local council, Adelaide Hills Council, started to express concerns about the provision of liquor licences at the premises in connection with these events and in particular the lack of appropriate planning approval.
- 13 In the meantime the applicant continued to take bookings for weddings and other functions and it continued to seek and obtain limited licences from the Commissioner to conduct them.
- 14 No doubt as a result of continued concerns expressed by the Council, the applicant made a formal application for planning approval to allow it to conduct licensed functions at its premises.
- 15 The absence of planning approval had not proved to be an issue in connection with the applicant’s repeated applications for limited licences. Section 57(3) of the Act enables the Commissioner to dispense with the otherwise compulsory requirement “that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained” in connection with applications for limited licences.

Clearly, in respect of all of the previous grants of limited licences to the applicant, the Commissioner gave that dispensation.

- 16 On 3 February 2016 an operations officer from the Commissioner's office emailed the applicant and reported discussions with the Council. The email contained an advice that the Consumer Business Services (CBS) would accept applications from the applicant for limited licences until the end of February 2016, but would not accept applications after that date unless the applicant had made an application to vary its existing licence to allow for ongoing function activity.
- 17 It went on to advise that once that application was made CBS would continue to accept limited licence applications for events up to 30 June 2016 and that no further events would be approved after that date.
- 18 Presumably in response to this, the applicant made an application to the Commissioner on 29 February 2016 to vary the conditions of its producer's licence to increase its hours, to redefine the licensed premises and to vary the conditions. That application is still pending before the Commissioner. It would seem that there are still some issues in connection with planning approval.
- 19 In respect of this class of licence the Commissioner has no discretion under s 57 to excuse the absence of the requisite approvals, consents and exemptions in connection with planning and like matters.
- 20 The issue in connection with planning approval is identified in a letter from the Council of 13 September 2016. The premises are in the Adelaide Hills. The sewerage on the applicant's premises is in the form of septic tanks. The letter reports that the Council received advice from the Environment Protection Authority that the continued use of the premises as a wedding/reception venue might, as a result of the human waste associated with such functions and the form of sewerage available, could lead to water pollution, which was expressed as a matter of concern given that this is in a public water supply catchment area.
- 21 It would seem that the typical season for weddings at the premises is for the period from October to April. In keeping with the obvious popularity of the venue the applicant has received a number of bookings for weddings and like functions, one of which is scheduled for 2 October 2016 and a number later this year.
- 22 The applicant made application to the Commissioner for limited licences to cover these bookings. This culminated in a hearing before the Commissioner that resulted in the refusal of each application.
- 23 These are the decisions that are the subject of this review.

The Commissioner's reasons

- 24 The Commissioner's delegate in refusing the applications noted that the requisite planning approval had not been obtained and refused the applications on that ground. Reference was made to ss 57(2) and (3) of the Act. Plainly in refusing to grant the applications, the Commissioner was declining to grant dispensations, although it is not clear how this issue was dealt with.
- 25 The delegate then referred to s 41 and expressed the view that the primary threshold for the grant of a limited licence had not been met as what was involved here was not a special occasion or series of special occasions as required by s 41(2) of the Act. The delegate reached that conclusion by characterising the functions as part of the applicant's ordinary business.
- 26 Finally, the delegate made reference to s 41(5) and noted that over 100 limited licences had been issued to the applicant over the last four years and that the applicant promoted itself as a wedding/function venue.
- 27 This led the delegate to conclude that all of the pre-requisites of s 41(5) had been met, namely the licences were being sought for functions organised by a particular entity, namely the applicant; limited licences have been granted for previous functions organised by that entity; and the delegate was of the opinion that the trade to be authorised by the licence would, in view of the frequency of applications, be better authorised by a permanent licence or by condition of a permanent licence.

The applicant's submissions

- 28 The applicant complained about all of these conclusions. It contended that each function was a special one off event such that the primary threshold had been met.
- 29 It contended that the Commissioner's repeated grants of limited licences illustrated that in practical terms there were no environmental issues and like with the earlier successful applications, the dispensation that s 57(3) of the Act allows, should have been exercised.
- 30 Whilst it conceded that the first two conditions under s 41(5) had been met, in respect of the third, relating to expectation that the applicant should trade under a permanent licence or by condition of a permanent licence, it submitted that that was only relevant when the licence or condition was available and as that had not occurred here, the pre-requisites to the application of s 41(5) had not been met. It effectively submitted that limited licences can be used as a holding mechanism pending the outcome of an application for a permanent solution.

Analysis

31 It is trite to say it but in construing a provision in a statute, the Act must be read as whole. In my view the dispensations that s 57(3) of the Act allows, informs the meaning of the words “for a special occasion or series of special occasions” as they appear in s 41.

32 Section 57 provides as follows:

“57—Requirements for premises

(1) An applicant for a licence for premises or proposed premises must satisfy the licensing authority—

(a) the premises for which the licence is sought are, or, in the case of premises not yet constructed, will be, of sufficient standard for the purpose of properly carrying on business under the licence; and

(b) that the operation of the licence would be unlikely—

(i) to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises; or

(ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.

(1a) However, the licensing authority must, in respect of the operation of subsection (1)(b)(i), disregard any entertainment that may be provided on the premises without the consent of the licensing authority under section 105.

(2) An application for a licence for premises or proposed premises must not be granted unless the licensing authority is satisfied—

(a) that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained; and

(b) that any approvals, consents or exemptions that are required by law for the carrying out of building work before the licence takes effect have been obtained; and

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

- (3) The licensing authority may dispense with the requirement that an applicant for a direct sales licence or limited licence—
 - (a) satisfy the licensing authority as to a matter referred to in this section; or
 - (b) submit plans.”

33 Plainly Parliament envisaged that in the ordinary course all of the matters required by s 57 will need to be satisfied and be in place before the licence is granted. In allowing for dispensations in the case of limited licences, it is clear that Parliament envisaged that a limited licence is a one off type of licence that enables an entity to trade under a licence for a limited period on a limited number of occasions and that the word “special” was intended to mean “not usual or commonplace”.¹

34 Of course, each event is likely to be very special to those involved. But that is not the test. The test is directed towards the applicant for the licence, not those who will benefit from its grant.

35 In connection with the applications for the limited licences that are the subject of this review, it cannot be said by reference to the applicant that they were not usual or commonplace. To the contrary, they are a normal incident of its business.

36 In my view, the delegate was right to hold that the threshold to the invocation of s 41 had not been met.

37 As for the failure to grant the dispensation that s 57(3) allows, if it had come to it, the Court would need to consider whether it should be exercised.

38 The grant of a dispensation is an indulgence that is not there for the taking.

39 Sometimes, before the licensing authority will contemplate granting that dispensation, it will require some evidentiary material to allay its concerns about the absence of the consents, approvals and exemptions that s 57 contemplates will be in place.

40 This is such a case.

41 The Court now has before it evidence that expresses a legitimate concern for the potential for water pollution if this application is allowed.

42 This is not a mere technical issue of no moment. It raises a serious and legitimate concern about the potential water pollution implications

¹ Collins Australian Dictionary

resulting from human waste associated with the use of the premises in connection with the proposed licences.

- 43 The applicant was on notice that this was an issue. It has been aware of the Council's concern about this issue for several months. It was a matter, amongst others, that the delegate relied upon in refusing the applications. It has placed no evidence before the Court that in any way allays the Court's concern in connection with the application for dispensation. I place little weight on the success of the earlier applications. I do not know why the Commissioner granted the previous dispensations. In any case, this is an issue that the Court must decide for itself on the evidence before it.
- 44 Mr Allen, counsel for the applicant, would have it that notions such as the balance of convenience and general notions of fairness should be taken into account in determining whether the dispensation should be granted.
- 45 I disagree.
- 46 It has been said many times before, but it bears repeating. This is a public interest Court. The rights that the parties seek to assert are always subject to the public interest. That is why s 53(1a) directs a licensing authority to refuse an application if the licensing authority is satisfied that to grant the application would be contrary to the public interest. The effect of this provision is that the public interest trumps the private interests of the parties.
- 47 Whilst at a personal level I have a great deal of sympathy for those affected by the applicant's failure to secure the dispensations that it seeks, their interests must yield to the interests of the public.
- 48 On the material before the Court, I am not satisfied that it is in the public interest to grant the dispensations. Had it come to it, I would not be disposed to grant them.
- 49 Whilst that is sufficient to dispose of the matter as it was fully argued, I propose to deal with the remaining ground concerning s 41(5).
- 50 The applicant conceded that the first two pre-requisites of the sub-section had been met. As to the third, in my view the time had long since passed to form the opinion that the trade to be authorised by the licence would, in view of the frequency of applications, be better authorised by a permanent licence or by condition of a permanent licence. Once the holding of weddings/functions became part of the applicant's core business, as opposed to a series of ad hoc, one off events, it was no longer appropriate for it to be conducting these events through limited licences.

- 51 I reject the applicant's submission that a limited licence can be used as a holding mechanism pending the outcome of an application for a permanent solution. In my view s 41(5) permits no discretion. Once the pre-requisites have been established an application for a limited licence must be refused. That is made clear by the preamble to the stipulated pre-requisites, namely: "A limited licence is not to be granted if ...". Even if the word "may" was used instead of the word "is" there would be serious doubt as to whether that allowed any discretion. But in my view, the words used, put it beyond doubt.
- 52 The delegate was right to conclude that the applications should be refused because the circumstances enlivened the obligation to refuse them as provided for s 41(5).

Conclusions

- 53 The character of the applications for the limited licences that are the subject of this review have to be made by reference to the applicant. From that perspective they cannot be said to be that the events were not usual or commonplace. They are not special occasions.
- 54 Had it been otherwise, on the material placed before the Court it is not satisfied that it is in the public interest to grant the dispensations under s 57(3) that would be necessary for the applications to proceed.
- 55 In any event, the circumstances that require the refusal of an application for a limited licence as provided for by s 41(5) exist, such that the licences could not, as a matter of law, be granted.
- 56 I dismiss the application for review.