

8 Diamonds Pty Ltd t/as Phonatic [2017] SALC 33

LICENSING COURT OF SOUTH AUSTRALIA

8 DIAMONDS PTY LTD T/AS PHONATIC

JURISDICTION: Application for Special Circumstances Licence,
Entertainment Consent and Extended Trading
Authorisation

FILE NO: 872 of 2017

HEARING DATE: 21 June 2017

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 21 June 2017

REPRESENTATION:

Counsel:

Applicant: Mr J Firth

Solicitors:

Applicant: Fletcher Lawson

- 1 This is an application for a special circumstances licence, an entertainment consent, and an extended trading authorisation made by 8 Diamonds Pty Ltd, as trustee for the 8 Diamonds Family Trust, in respect of premises at 171 Hindley Street, Adelaide, across the road from the Rockford Hotel.
- 2 Although there were initially objections and interventions in connection with this application, the applicant has agreed certain conditions that have dealt with the objectors' and intervenor's concerns, such that all that remains is for it to persuade the Court that it should be granted the orders that it seeks.
- 3 In light of the absence of opposition I can be briefer than usual in dealing with this application.
- 4 There is no issue in this case about the fitness and propriety of those who will be running the proposed business, the standard of the premises and whether that the requisite approvals, consents or exemptions required to permit the use of premises for the sale of liquor have been obtained.
- 5 The only serious matter of concern is whether the applicant has established the pre-requisites for the grant of a special circumstances licence as provided for by s 40 of the *Liquor Licensing Act 1997*. This provision was analysed by the Full Court of the Supreme Court of South Australia in *Facac v Talbot Hotel Group Pty Ltd*. There Doyle CJ made some observations that are particularly pertinent to this case. He said:

“An object of the Act is to regulate ‘the sale, supply and consumption of liquor for the benefit of the community as a whole’: s 3. While the Act is premised on licensed holders finding it in their financial interest to supply liquor to the public, it also creates structures and classes of licence to enable that to be done. **Sometimes an applicant must accept that the applicant will not be able to trade in the precise manner that best suits the applicant.** The applicant may have to trade in a way that reflects the legislature's judgment in general terms, and the Court's judgment in particular terms, as to the benefit of the community. The applicant may be faced with choosing between trading under a licence which will carry certain obligations it would prefer not to have, and not trading at all.”

- 6 Then later he said:

“To assist the Licensing Court I add that there is a discernible statutory policy that s 40 should be used to accommodate what I might call non-standard or anomalous types of business. **But the Licensing Court must also bear in mind that s 40 is not to be used simply to create a licence to meet an applicant's wishes. If**

an existing class of licence will fit the proposed business, s 40 should not be used, unless the use of the existing class of licence would produce a result that ‘the proposed business would be substantially prejudiced.’ The special circumstances licence is not, as I have said, to be created simply to meet an applicant’s wishes and proposal. The Court must consider whether another class of licence can and should be granted, even if requiring the applicant to trade under that licence imposes obligations that the applicant would rather not have, and even if that means that the applicant must prove a need for the grant of the licence.” (emphasis mine)¹

The Applicants’ case

- 7 The premises traded some years ago as Max’s Karaoke Club under an entertainment venue licence. That licence was suspended for many years after the landlord had assumed possession from the previous licensee in 2009.
- 8 The applicant has been trading at the premises under the restaurant licence since 2012. It has recently developed a business plan that contemplates significant alterations and development at the site.
- 9 Underpinning the application is the applicant’s contention that its preferred business model does not fit comfortably within the conditions of a restaurant licence. It wishes to operate the venue over three floors, with a restaurant type facility offering Vietnamese food at various times throughout the day and evening in the ground floor area, and a bar and function facility in the upper floors. For now it does this through its restaurant license and a series of limited licences.

Analysis

- 10 It is plain that only three categories of licence could potentially fit the applicant’s proposed business model are an entertainment venue licence, a restaurant licence or a hotel licence.
- 11 The applicant’s business model contemplates a strong focus on the supply of meals. Section 35(2)(a) imposes a mandatory condition on an entertainment venue licence that the business conducted at the licensed premises must consist primarily and predominantly of the provision of live entertainment. Thus an entertainment venue licence would not adequately cover the kind of business proposed by the applicant. On the basis of the evidence placed before the Court I am satisfied that the proposed business model would be substantially prejudiced if the

¹ 2001] SASC 445; (2001) 80 SASR 580 at 587 and 588

applicant's trading rights were limited to those possible under such a licence.

- 12 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, which is a requirement of a restaurant licence. The Court 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 model proposed by the applicant. On the basis of the evidence placed before the Court I am satisfied that the proposed business would be substantially prejudiced if the applicant's trading rights were limited to those possible under a restaurant licence.
- 13 In *Facac v Talbot Hotel Group Pty Ltd and Another*² Doyle CJ described the attributes of a hotel licence and noted 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.
- 14 Whilst the Court could explore accommodating the applicant's business model through a range of exemptions to a hotel licence, the end result would not have sufficient characteristics of a hotel as contemplated by the Act as to be one that in the exercise of its discretion it would grant. Accordingly, I find that a hotel licence, even with exemptions, would not be an option. I am satisfied that the proposed business would be substantially prejudiced if the applicant was forced to trade under a hotel licence.
- 15 The discretion conferred by s 53 must be exercised for a purpose consistent with the Act. There is nothing about the within application that causes me to think that I should exercise the Court's discretion adverse to the applicant.

Extended trading

- 16 The applicant wishes to trade until 3.00am. The premises are in what might be described as the late night entertainment precinct of the city. It is a part of Adelaide that has many venues that trade until the early hours. I see no difficulty in allowing the applicant to do likewise.

Entertainment

- 17 The applicant proposes entertainment especially in connection with the upper floors. In addition to the acoustic treatment of the building it has purchased and installed a music noise limiter and has satisfied the Rockford Hotel that noise will not be an issue. Given the proximity of

² [2001] SASC 445

that Hotel and its obvious interest in ensuring that its guests are not adversely affected by noise from nearby premises, its satisfaction with the applicant's proposal has allayed any concern that I might otherwise have had. In the circumstances I am satisfied that it is appropriate to grant entertainment consent.

Conclusion

- 18 I therefore grant the application for a special circumstances licence, an entertainment consent and an extended trading authorisation subject to the conditions agreed.