

Village Tavern [2016] SALC 56

LICENSING COURT OF SOUTH AUSTRALIA

THE VILLAGE TAVERN

JURISDICTION: Compliant to Section 106 of the Liquor Licensing Act 1997

FILE NO: 2214 of 2016

HEARING DATE: 5, 6 and 19 September 2016 with further written submissions supplied on

JUDGMENT OF: His Honour Auxiliary Judge W Jennings

DELIVERED ON: 12 December 2016

*Application by resident contending that the activities at the respondent hotel are unduly offensive, annoying, disturbing or inconvenient such that the intervention of this Court is warranted – Principles guiding such applications considered and discussed – Whilst the evidence establishes some level of annoyance view objectively it cannot be said to be unduly offensive, annoying, disturbing or inconvenient under the Act – **Held** complaint dismissed – S 106 Liquor Licensing Act 1997*

Victoria Hotel (2011) SALC 98

Van Deleur v Delbra Pty Ltd and The Liquor Licensing Commissioner (1988)
48 SASR 156

REPRESENTATION:

Counsel:

Applicant: Mr S Binnion

Respondent: Mr B Doyle with Mr D Meegan

Solicitors:

Applicant: N/A

Respondent: DMAW Lawyers

- 1 The Village Tavern (the hotel) has a hotel licence (50107250). The licence was first granted in 1992. Its premises are located at the corner of The Grove Way and The Golden Way, Golden Grove. Extensive renovations were carried out in 2014 which included the establishment of, amongst other things, an internal beer garden (area 5).
- 2 The complainant Mr Shawn Binnion, pursuant to s 106 of the *Liquor Licensing Act 1997* (the Act) lodged a complaint on 3 February 2016 on his own behalf and on behalf of eight of his neighbours. A summary of the complaint is that the hotel:
 - is not complying with s 42 of the Liquor Licensing Act 1997;
 - is hosting live bands in an open air setting subjecting residents to loud noise denying people peace and quiet in their own homes. Additionally, this is disturbing local residents rest for the following day whether that is work, school, or play;
 - has received multiple complaints and failed to act and;
 - does not adequately supervise the car park of the venue.
- 3 The relief sought was :

“The conditions of the hotel licence be reviewed and altered to include:

 - No live bands are to perform in the beer garden, only within the four wall confines of the venue with no open doors or windows,
 - Only family friendly acoustic music be allowed to be played in the beer garden. Currently the venue has an acoustic performance on a Sunday afternoon in the beer garden which does not disturb the local residents, and
 - The requirement for additional car park security to prevent unruly behaviour.”

Evidence

- 4 The complainant evidence was Mr Binnion and other neighbours Ms Perrotta and Ms Morris.
- 5 Mr Binnion tendered a document (Ex 01) detailing certain complaints for the period from January 2016 to the date of the hearing.
- 6 He also tendered footage from his I-pad or laptop (Ex 02). He tendered a security clearance letter in support of his character (Ex 03) and some

photographs showing broken glass in the car park. His complaint about the noise related to bands playing in Area 5 (this Area is not enclosed) and the complaints included a performance by the band Thirsty Merc on 25 January 2016 which caused his daughter to be kept awake for about one and a half hours and led him to go to the hotel with his daughter to complain. There were, he said, about eight subsequent occasions when he was disturbed by band noise. As to the asserted unruly behaviour outside the hotel, he identified three incidents:

- 27 March 2016 - included patrons in two cars shouting and beeping their horns;
- 4 April 2016 - a woman screaming and an argument by three men at the nearby service station;
- 29 April 2016 - involved a disturbance in the car park and a glass being broken.

7 The I-pad footage or video taken by him related to incidents on 20 January, 15 April and 12 August 2016 which were taken from the balcony of his home or from just outside his house with his glass doors open. The footage taken on 1 April was taken from the staircase of his house.

8 Late in the proceedings Mr Binnion tendered some weather data which I will deal with later in the reasons for the decision.

9 **Ms Perrotta** lives next door to Mr Binnion. She has resided at those premises for three years. Her complaints were of music and singing emanating from the hotel. She said that the disturbances began in December 2015 and continued through to March 2016 and were worse on Friday and Saturday nights. She and her children could not sleep when the bands were playing. She has phoned the police on two or three occasions. She has complained to the hotel but has not received any response. In cross-examination she said that the incidents were worse when the hotel had previously had an “unsociable nightclub” and that since it has closed things had improved. She agreed that since March 2016 there had only been a handful of occasions where there were live bands in the beer garden and that this was restricted to Friday and Saturday nights. She agreed that the bands finished by midnight.

10 **Ms Morris** lives nearby and has done so for eleven years. Her complaints were of people swearing and broken bottles. Since the renovations she said there was a very bad incident on the night of 22 January 2016 (the Thirsty Merc performance) when she said she had not sleep. She said this night was worse than others. She did not disagree that the music may have finished by 11.30pm. She complained to the

Manager the next morning who advised her that it was “a one off gig” and offered her breakfast. On 15 July 2016 she phoned the hotel complaining that the noise was too loud and the lady she spoke to said that she would speak to the band but nothing happened. She wants the owners of the hotel to consider the interests of members of the community. She agreed in cross-examination that the noise of people in the street may not have been from patrons of the hotel.

The Hotel evidence

- 11 **Ms Mullins** is the Venue Manager of the hotel and has worked in the hospitality industry in Australia for ten years. The renovations of the hotel were completed about one year before she commenced working there. She said that Area 5 was partly created to allow entertainment. There were never more than two nights in a row where the beer garden had bands and that that area was used less frequently in winter although they have now installed heaters. There were ten occasions during 2016 when a band played in Area 5. There were no performances in that area other than on Friday and Saturday nights. There is no intention to increase the number of performances in that Area. Band performances had occasionally been held in Area 6, the more formal dining area, but that area is not suitable for such performances and creates inconvenience. As to the incident on 22 January 2016 (Thirsty Merc) she said that it was a different and larger style performance compared to other bands. Over 100 or more tickets were pre-sold and there were walk in customers. She described the customers that night as being “engaged”. Four security guards were employed that night. The band started after a support act at about 10pm and was finished by 11.30pm.
- 12 As to Mr Binnion’s complaint (when he arrived with his daughter) she apologised to him and assured him that they would not intentionally have caused any disruption and that she would speak to the sound engineer. She told him that it was a “one off”. She did not regard the band as being excessively loud and it did not continue for very long after Mr Binnion’s complaint. Apart from the complaint by Mr Binnion, Ms Perrotta (which included an email from her) and Ms Morris she is not aware of other complaints having been received during the relevant period. Since the hotel has introduced live music her observation has been that there have not been any behavioural problems with patrons. There has occasionally been anti-social behaviour associated with customers drinking but this has not been a regular occurrence and is light or minor compared with other venues that she has worked at. There are always three security guards on duty on Friday and Saturday nights.
- 13 The hotel has ensured that all staff are trained in codes of practice and in responsible service of alcohol. On Friday and Saturday nights they

employ about twenty staff. She has spoken to local residents who have welcomed the bands and her feedback from them has been positive.

- 14 **Mr Graham Henderson** is a security officer with Adelaide Security. He has worked in this role at various hotels for ten to twelve years. He has been working solely at the hotel for one year. He works on Wednesday, Thursday, Friday and Saturday nights. He finishes at 4.00am on Friday nights. The hotel's focus is on being family friendly and he referred to the playground area that has been installed for use of children. He acknowledged that occasionally people behave badly but there are limits to what security can do about that. Their main aim is to ensure that staff are safe. He described the volume of the band's music as "not extreme" and said that there was no correlation between the bands and bad behaviour. He said that people other than patrons e.g., people from fast food outlets can cause disturbance. He noticed some people doing "burn outs" from time to time but they were not frequent.
- 15 **Mr Andrew Gunn** is the State Manager of operations for ALH, the hotel is part of that group. Approximately four million dollars has been spent on the renovations at the hotel including \$600,000 on the internal beer garden. The objective was always to offer entertainment in that area. Following the complaints they looked at acoustic treatment of Area 5 at a cost of between \$30,000 and \$40,000 but they had doubts as to its potential effectiveness. A retractable overhead sail will shortly be installed in that area. Acoustic testing was carried out at the first available opportunity following the conciliation conference.
- 16 **Mr Jason Turner** has a Bachelor of Engineering (Honours) and is a member of the Australian Acoustic Society. He works for Sonus Pty Ltd which amongst other things does vibration testing. He helped draft the environment protection noise policy 2007 although he acknowledged that doesn't apply to matters under the Licensing Act. For the purposes of this case he prepared a report dated 26 April 2016 following one of his colleagues Mr Moharis Kamis undertaking site measurements. He noted that provision five of the hotel's licence currently provides "noise emanating from the premises (including live and recorded entertainment and singing or persistent patron noise) when assessed at the nearest noise sensitive location shall not exceed 8dB(A)."
- 17 Noise levels from the live bands at the hotel on 18 March 2016 were taken between 9.30-10.00pm from a position representative of the closest dwelling to the hotel. He noted that those nearest dwellings were significantly influenced by noise sources in the environment e.g., traffic noise and the activities from the nearby service station. Music from the band at the hotel was only audible intermittently when the ambient noise sources were at their lowest levels. The music noise levels were taken when the music was audible. Applying the appropriate formula he

concluded that the music achieved the EPA noise guidelines criteria at the closest dwelling.

- 18 **Mr Moharis Kamis** has bachelor degrees in mechanical engineering and applied mathematics and is employed as an Acoustic Engineer at Sonus Pty Ltd. He undertook the noise level testing at the hotel and he confirmed the report of Mr Henderson contained the measurements that he made on the night of 18 March 2016.
- 19 He confirmed that the extraneous noise levels comprised mainly of traffic on three main roads: Aeolian Drive, The Grove Way and The Golden Way, as well as activities in the nearby service station. Music from the hotel was only audible intermittently. He is comfortable that the wind noise on the night in question (which did not exceed five metres per second at the microphone) did not affect his noise assessment. He was also satisfied that the measurements that he took were representative of the music volume emanating from the hotel.

Considerations

- 20 In my consideration in the case of *Victoria Hotel* (2011) SALC 98 I said the decision of Acting Judge Cramond in the *Synagogue 2* case is particularly apposite to this case. That matter also concerned a complaint pursuant to s 106 of the Act. The complainants in that case, Mr and Mrs Heaven, brought the proceedings in respect of noise said to be emanating from the Synagogue Nightclub. Mr and Mrs Heaven occupied the premises immediately adjoining the nightclub. His Honour made the following observations and findings:

“The immediate shortcoming of the evidence that I have heard today presented in support of the complaint is that it is confined to the subjective assessment by the complainants as to what the actual noise levels are. That is, the noise levels in their house. Evidence there is as to the methods adopted to control sound originating and moving out of the Synagogue Nightclub but no evidence there is of the levels within the Heaven household.

...

Section 116 is based on noise simpliciter and unless the evidence before me is such as to establish, on the balance of probabilities that noise is emanating from the premises at a level sufficient to cause offence and annoyance to neighbours and I **believe it must be construed as being an objective test**, a neighbour with reasonable sensitivities, then the complaint is not made out. As I have said, **no noise level measurements have been taken within the complainant’s household but they have subjectively been annoyed by the level of music or sound.**

...

I accept the submission of Mr Costello that the words of the former Chief Justice King in *Van Deleur v Delbra Pty Ltd and The Liquor Licensing Commissioner* 48 SASR 156 particularly at page 160, are quite apt. The Chief Justice was referring to s 114 of the previous Act. However, that is in substantially similar terms and is indistinguishable for the present purposes from the provisions of s 106 of this Act.

The Chief Justice points out the distinction that is to be made in the initial grant of a licence having regard to the potential for noise, annoyance and disturbance to neighbours from that which is appropriate under s 106 where the issue relates to noise emanating from a long established and licensed business. He recognises the fact that almost inevitably there will be some noise, some annoyance from sound in such circumstances.

Perhaps, as Mr Costello points out, there is an essential incompatibility in having a nightclub business of this type situated cheek by jowl abutting a residential premise. I suspect that is so.

That, however, of course is beyond my control. Had Mr and Mrs Heaven been living in these premises and an application made for a nightclub licence in abutting premises, the situation might well be very different.”¹ (emphasis mine)

- 21 His Honour dismissed the complaint.
- 22 The relevant passage of the judgment of former Chief Justice King in *Van Deleur* is:

“The applicant was required to satisfy the Licensing Court ‘that the grant of the licence is unlikely to result in undue offence, annoyance, disturbance or inconvenience to those who reside, work or worship in the vicinity of the licensed premises’. One of the grounds of objection was that such undue offence, annoyance, disturbance or inconvenience would be caused. In dealing with this issue, the learned Licensing Court judge applied the test which was approved in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207. That case was concerned with s 86d of the Licensing Act 1967 the corresponding provision in the Liquor Licensing Act 1985 being as 114, and the Licensing Court judge pointed out that ‘any resident who lives nearby a hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises’, and also certain other causes of annoyance, disturbance and inconvenience. Those provisions are designed to protect persons who reside, work or worship near the licensed premises from offence, annoyance,

¹ [2011] SALC 98

disturbance or inconvenience which exceeds the degree reasonably to be expected from the licensed premises. I do not think that test can properly be applied to the issue which arises under s 62(1)(b).

Section 114 deals with a situation in which licensed premises already exist and would have a right to continue in existence. Clearly the remedies contained in 2 114 cannot be availed of where the noise or behaviour does not exceed what is to be reasonably expected form the conduct of a 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.

The question under s 62(1)(b), however, arises at a stage at which no licence has been granted. Those who reside, work or worship nearby are not faced with the exigencies arising from the existence of licensed premises having a right to continue to exist. The question is whether the licence should be granted at all. The test of what is undue therefore is not concerned with excess over what will naturally result from the conduct of licensed premises but with what those who reside, work or worship in the vicinity can reasonably be expected to tolerate in the interests of the need of the community for a further licence of the type contemplated. It is not difficult to conceive of circumstances in which hotel premises, no matter how conducted, would result in offence, annoyance, disturbance or inconvenience to nearby residents, workers or worshippers of such a degree as to be properly characterized as undue. **It is true, of course, that licensed premises, particularly hotel premises, will usually produce some degree of inconvenience to nearby residents and perhaps to nearby workers and worshippers. It will often be necessary to expect such persons to tolerate a degree of disturbance or inconvenience, even annoyance or offence, in the interests of the community's need for licensed premises.** Whether such offence, annoyance, disturbance or inconvenience can be regarded as undue will be a matter of degree and will depend upon the circumstances. The question cannot be judged, however, in the same way as the question whether existing licensed premises are causing undue offence, annoyance, disturbance or inconvenience.”²

(emphasis mine)

23 Those comments are apposite to this case.

24 As before mentioned Mr Binnion tendered a document (Ex 05) which was based on weather information relating to Parafield Airport: Mr Doyle representing the hotel objected to the tendering of that

² (1988) 48 SASR 156

document. The document related to weather conditions and wind directions on the night of 18 March 2016. The hotel's solicitors responded to that report by way of an affidavit. I have considered all of the material relating to this topic and I find that the wind direction and other data contained in Ex05 cannot be relied upon as those prevailing at or about the hotel on the night of 18 March 2016 as it clearly relates to another location. I prefer and accept the more reliable evidence of Mr Kamis that he would not have conducted acoustic testing if the wind speed was greater than five metres per second and I also accept his evidence that the wind on that night "wasn't anything significant" and that it would not have influenced his measurements. I also accept Mr Turner's evidence that the influence of other weather features or sources such as humidity and temperature did not influence or effect the results of the testing. I note and find that the Sonus report showed that according to measurements taken slightly closer to the hotel and Mr Binnion's home, the levels did not exceed background noise by more than 8dB(A) in any frequency band, and the overall levels likewise did not exceed tolerance. I note that Mr Binnion did not make a recording of noise levels on 18 March 2016.

- 25 As to Mr Binnion's I-pad footage which I have viewed, I find generally unhelpful and unreliable as there is no evidence about the recording capacity of the devices he used. As to the complaint of noise on 22 January 2016, i.e., the Thirsty Merc performance, I accept the evidence of Mr Binnion and Ms Morris that the band on that evening did disrupt their sleep. Ms Morris also complained of band noise on 15 July 2016 which involved a band not in Area 5 but Area 6. I find that the complaints on 22 January 2016 were justified but also find that the band on that night finished playing by 11.30pm. The complaints of band noise on the other occasions is generalised and I also note that both Ms Perrotta and Ms Morris acknowledge that whilst there had been noise associated with the hotel for many years but that it has improved over time.
- 26 As to the complaints of unruly behaviour outside of the hotel, there is an assumption by the complainants which is not supported by any evidence that the persons causing the various disturbances were patrons of the hotel. I also reject any suggestion that the security personnel at the hotel have in any way failed to discharge their duties properly and to police incidents outside the hotel. I find that there is no link or correlation between the complaints relating to persons in the car park late at night with the live music in Area 5 of the hotel.
- 27 Ms Mullins was a particularly impressive witness and I unreservedly accept her evidence as set out earlier herein. I also accept the evidence of Mr Henderson that generally the security arrangements at the hotel have been well organised and that security is adequately staffed and is

sufficient. I find that there is no evidence to support a conclusion that the provision of live entertainment i.e., bands in Area 5 (or elsewhere) or any other conduct of the hotel or its patrons can be categorised as “unduly offensive, annoying, disturbing or inconvenient”. As to the music from Area 5 I find that there have only been relatively few occasions on which subjective annoyance has been caused to the neighbours. The complaints in this matter do not fall outside the ordinary range of disturbance that is an incident to living near licensed premises.

- 28 Ultimately the resolution of cases such as this involve balancing the legitimate interest of nearby residents for quiet and order, especially at night, and the legitimate interests of those involved in the hospitality industry in being able to conduct their businesses without undue restrictions. Whilst I accept that Mr Binnion and the other residents that he called genuinely feel that the disturbance created by the hotel is excessive, viewed objectively it cannot be said to be “unduly offensive, annoying, disturbing or inconvenient” for the purposes of s 106 of the Act.
- 29 The complaint must be therefore dismissed.