

LICENSING COURT OF SOUTH AUSTRALIA

BRATCAS PTY LTD T/AS THE OLIVE TREE FINE FOOD AND WINE

JURISDICTION: Referral from the Commissioner

FILE NO: 2947/2019

HEARING DATE: 3 December 2019

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 6 December 2019

CATCHWORDS

*An application to vary the conditions of a special circumstances licence - Whether in light of the amendments to the Act that have now abolished special circumstances licences the Court should entertain the application - **Held** that the Liquor Licensing (General) Regulations 2012 expressly provide that the Court may deal with the application as if the Act had not been amended and that it is appropriate in this case to do so - The applicant is currently subject to a condition that permits it to only sell a limited range of wine, being 18 lines from no more than 3 wineries at any given time - The applicant seeks a variation to sell a full range of South Australian wines and spirits, excluding products from Kangaroo Island - **Held** that the case for extending the range of the applicant's special circumstances licence to extend to spirits and liqueurs has not been made out - **Held** that there is nothing objectionable about the applicant re-positioning its business plan and hence the focus of its special circumstances licence to take advantage of the unique tourist opportunities that the Central Market presents by showcasing South Australian wines to tourists and others - **Held** that to maintain the hierarchy of the licensing regime and to avoid an undesirable precedent it is necessary to place some restriction on the number of lines to be available - Application to vary partially allowed - Liquor Licensing Act 1997; Liquor Licensing (Liquor Review) Amendment Act 2017; Liquor Licensing (General) Regulations 2012.*

South Australia v Collings (1996) 65 SASR 432 [1996] SASC 6145

Plaintiff S157/2002 v Commonwealth [2003] HCA 2; 211 CLR 476

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

Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd [2008] SASC 6; (2008) 100 SASR 1

Hyde Park Gourmet Grocer [2009] SALC 32

BWS - Seaford [2015] SALC 19
Erythos Holdings Pty Ltd [2015] SALC 34
Liquorland - Gawler [2014] SALC 15
BWS - Mount Gambier [2013] SALC 82

REPRESENTATION:

Counsel:

Licensee: Mr N Healy
Respondent Objector: Mr G Coppola
Respondent Intervenor: Ms Z Thomas

Solicitors:

Licensee: Solomon and Humble
Respondent Objector: Australian Hotels Association
Respondent Intervenor: Crown Solicitors

- 1 This is an application to vary the conditions of a special circumstances licence. The application was lodged in May 2019. In its amended form the applicant licensee, Bratcas Pty Ltd, trading as The Olive Tree Fine Food and Wine, seeks a variation to the conditions to permit it to sell for off licence consumption a full range of South Australian wines and spirits, excluding products from Kangaroo Island. At present the applicant is only permitted to sell a limited range of wine, being 18 lines from no more than 3 wineries at any given time.
- 2 The applicant's store is on the western edge of the Adelaide Central Market. Even without direct evidence, this Court is permitted to know that the Central Market is an iconic institution in the centre of Adelaide. It offers a huge range of fresh food and other produce, along with some of Adelaide's most popular cafes and eateries. It is a genuinely multicultural experience and it is a popular tourist attraction. In its revised business plan the applicant stated that the Central Market attracts over 9 million visitors a year that include local, interstate and international tourists. It stated that many tourists do not have the time or opportunity to go to South Australia's wine regions or distilleries and have enquired to it about locally made premium wines and spirits. The applicant would like the opportunity to fill that niche.
- 3 In granting the applicant a special circumstances licence on 5 November 2014, the Commissioner for Liquor and Gambling must be taken as being satisfied that none of the various categories of licence provided for by the *Liquor Licensing Act 1997*, even with appropriate exemptions, fitted the applicant's then proposed business model; that 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;¹ and that in the Commissioner's discretion he was satisfied that it was appropriate to grant the licence.
- 4 Based on the conditions imposed on the special circumstances licence it would seem that the applicant's then business model contemplated that a limited range of wine would complement the applicant's main business, which was selling produce such as olives and olive oil.
- 5 What is now being proposed is a little different. Underpinning the amended application is a business plan that focusses on the tourist opportunities that the Central Market presents.

Should the Court entertain the application?

- 6 A complication has arisen since the application to vary was made. The Act has since been extensively amended, and since 18 November 2019, special

¹ These were the qualifying criteria under the then s 40 of the Act.

circumstances licences cease to exist. Mr Coppola, for the objector, the Australian Hotels Association, submitted that this was a serious, if not complete impediment to the within application, and that the applicant needs to start all over again under the new licensing regime.

- 7 The Commissioner exercised the right of intervention conferred by the Act² and made submissions contrary to Mr Coppola's argument. Mr Healy, counsel for the applicant, adopted the Commissioner's submissions in contending that the within application remained competent.
- 8 To put the competing arguments into context, it is necessary to set out the relevant legislative provisions.
- 9 The *Liquor Licensing (Liquor Review) Amendment Act 2017* (The Transitional Act) contains within Sch 2, Transitional provisions that regulate the transition to the new licensing regime that took effect from 18 November. Clause 3(2)(b) of the Transitional Act provides that an existing special circumstances licence that authorises the sale of liquor on the licensed premises for consumption off the licensed premises is, from 18 November 2019, taken to be a packaged liquor sales licence.
- 10 Section 53A(1) of the Act in its current form provides:
 - (1) The licensing authority may only grant a designated application if the licensing authority is satisfied that granting the designated application is in the community interest.
 - (2) Without limiting subsection (1), in determining whether or not a designated application is in the community interest, the licensing authority-
 - (a) must have regard to-
 - (i) the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
 - (ii) the cultural, recreational, employment or tourism impacts; and
 - (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
 - (iv) any other prescribed matter; and

² Section 25A of the Act provides that the Commissioner 'may intervene in proceedings before the Court under this Act for the purpose of introducing evidence, or making representations, on any question before the Court.

- (b) must apply the community impact assessment guidelines.
 - (3) The applicant in respect of a designated application must comply with any requirements set out in the community impact assessment guidelines, and any other requirements specified by the licensing authority for the purposes of this section.
 - (4) In this section-
 - ‘designated application’ means-
 - (a) an application for the grant or removal of a designated licence; or
 - (b) any other application that the licensing authority has determined, in accordance with the community impact assessment guidelines, to be a designated application for the purposes of this section.
- 11 Section 53B of the Act requires the Commissioner to publish guidelines for the purposes of determining:
 - (a) whether or not an application is a designated application for the purposes of section 53A; and
 - (b) whether or not a designated application is in the community interest,(the ‘community impact assessment guidelines’).
- 12 The guidelines have since been published. Among other things, they provide that a designated application for the purposes of s 53A of the Act, includes an application to vary a condition of a packaged liquor sales licence that restricts the type of liquor that the licensee can sell of supply.
- 13 The condition on the applicant’s licence that it is only permitted to sell a limited range of wine, being 18 lines from no more than 3 wineries at any given time, fits that description. Thus, there is no doubt that had the application to vary been made after 18 November 2019, by which time the applicant’s licence would have transitioned to a packaged liquor sales licence, the applicant would have had to have satisfied the requirements of s 53A of the Act.
- 14 Consideration also needs to be given to regulation 22 of the *Liquor Licensing (General) Regulations 2012*. It provides:
 - Pursuant to section 138(2a) of the Act, an application in relation to a licence made to the licensing authority under the Act and any proceedings related to such an application that have not been finally

determined before the commencement of this regulation may be continued and completed under the Act as if the amendments to the Act effected by the *Liquor Licensing (Liquor Review) Amendment Act 2017* had not come into operation.

- 15 The reference to s 138(2a) is a reference to the regulation making power conferred by the Act.
- 16 Mr Coppola submitted that it is instructive that regulation 22 uses the expression ‘may be continued and completed’. He said that this imports a discretion.
- 17 Next, he said, that the discretion should not be exercised because it would require the Court to deal with an application in connection with a licence that no longer exists. He said that the application to vary should be measured against the criteria that apply to the current licence rather than those that applied to what is now a defunct category of licence.
- 18 Mr Coppola accepted that the applicant was entitled to think when it lodged its application that the matter would be determined under the law as it then was and that there was arguably a sense of unfairness in having to confront a new test. But he submitted that this was the consequence of the change and that changes to the law can often produce what might be seen as an unfair outcome.
- 19 He referred me to cases such as *State of South Australia v Collings*³ where Doyle CJ spoke of the difficulties that arise when the law changes and determining how the new law applies to existing circumstances and that the results are always satisfactory. He said that this might be seen as such a case, but be that as it may, the new law should apply.
- 20 Ms Thomas, counsel for the Commissioner, submitted that the wording of regulation 22 was clear and it enables this Court to deal with an application filed prior to 18 November 2019 as if the Act had not been amended on that date. She submitted that the regulation was consistent with the approach that Gleeson CJ spoke of in *Plaintiff S157/2002 v Commonwealth* where he said that ‘courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.’⁴
- 21 I agree with Mr Coppola that *South Australia v Collings* is instructive in determining the jurisdictional issue. The learned Chief Justice made some helpful observations about the impact of amending legislation that bear repeating. He said:

³ (1996) 65 SASR 432 [1996] SASC 6145.

⁴ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at [30]; 211 CLR 476, at 492.

There is a presumption against giving retrospective operation to legislation. But the correct identification of what is a retrospective operation is not always easy, because most legislation affects existing rights and obligations. A distinction is drawn between procedural provisions and provisions having a substantive effect, but once again in our system of law it is often difficult to distinguish between what is procedural and what is substantive. There is a presumption against the interference with vested rights, but deciding what is a right for these purposes is not always easy. Procedural statutes can affect rights. And in the end one is searching for a Parliamentary intent, and when Parliament is silent on the matter the process of divining that intent, once one moves from the application of the presumptions, can be quite subjective.

I mention these matters only to explain that if the result of the application of these rules at times seems unpredictable, or to provide unsatisfactory results, the answer lies in the fact that the rules themselves are difficult to apply. But the Courts must do the best they can if Parliament leaves the issue to them.⁵ (Emphasis mine)

- 22 What must be borne in mind is that in *Collings*, Parliament did not make its intention clear, and it left it for the court to work the matter out for itself. In this case, Parliament has made its intention clear. It has given the two licensing authorities, being the Commissioner, and this Court⁶ the discretion to determine an application lodged but not finally determined before 18 November 2019, as if the amendments to the Act had not come into effect.
- 23 Nothing has been put to me that persuades me that I should not exercise that discretion in this case. Accordingly, I propose to deal with the application as I would have had I been hearing and determining it before the amendments took effect.

Should the variations be granted?

- 24 A special circumstance licence is just that. It is a unique form of licence that reflects, in the words of the section, the ‘kind of business proposed by the applicant’.
- 25 Thus, although this is an application to vary the conditions of the licence, considerations of the type relevant to the grant of the licence in the first place must be considered. I say that for two reasons. First, the variations must be consistent with the varied licence being a special circumstances licence. If the effect of the variations is that an existing licence, with or without appropriate exemptions, could fit the applicant’s revised business plan, the application to vary would have to be refused. Secondly, if the

⁵ (1996) 65 SASR 432 [1996] SASC 6145 at [13] and [14].

⁶ See s 17 of the Act.

revised business plan is materially different to the original business plan, the Court would need to be satisfied in the exercise of its discretion that it is appropriate to grant the variation.

- 26 The only categories of licence that could potentially fit the applicant's revised business plan would be a hotel licence and a retail liquor licence.
- 27 Plainly a hotel licence would not fit. Hotels are intended to trade for extensive hours and the provision of liquor for on licence consumption is an essential feature. A hotel licence with conditions substantially limiting trading hours and preventing the sale of liquor for on licence consumption would be to alter the general character of such a licence.⁷
- 28 The same is true of a retail liquor licence. Conditions that would restrict the sale of liquor by the holder of a retail liquor merchant's licence to certain classes of liquor would qualify the right conferred by the Act to sell any type of liquor that the licensee wished. This too would be to alter the general character of such a licence.⁸
- 29 Thus, the revised business plan is consistent with the grant of a special circumstances licence. The issue then becomes whether in the exercise of the Court's discretion,⁹ the application should be granted.
- 30 In *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd*,¹⁰ a landmark decision in respect of special circumstances licences, the Full Court explained:

It should not be assumed from this decision that anyone who wishes to sell a limited range of packaged liquor will be entitled to be granted a special circumstances licence. The ability to obtain a grant of a special circumstances licence will depend on a number of circumstances including the range of liquor to be sold. Likewise, it should not be assumed that a special circumstances licence enabling the sale of packaged liquor is but a stepping-stone to a full retail liquor merchant's licence or that it can be extended to become a thinly disguised retail liquor merchant's licence.¹¹

- 31 With these matters in mind, this Court has adopted a cautious approach to the grant of special circumstances licences, especially those that relate to the sale of liquor for off licence consumption.¹²

⁷ See, for example: *Little Miss Miami and Little Miss Mexico* [2014] SALC 41

⁸ *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd* [2008] SASC 6; ((2008) 100 SASR 1.

⁹ Section 53 (1) provides 'Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).'

¹⁰ *Ibid.*

¹¹ *Ibid* at [60].

¹² See, for example: *Hyde Park Gourmet Grocer* [2009] SALC 32.

- 32 The cases also make it clear that in granting a special circumstances licence, a licensing authority must be at pains to ensure that the hierarchy of the licensing regime is maintained.¹³ For the reasons explained above, the same considerations apply in respect of an application to vary the conditions of a special circumstances licence.
- 33 Mr Coppola contended that for all intents and purposes the applicant's business is a bottle shop that sells wine and sells produce on the side. He said that to allow this application would be to extenuate that fact and that it should therefore be refused. Several photographs of the applicant's business were tendered. The applicant tendered photographs that were taken recently. Mr Coppola tendered photographs that were taken some months ago. It has to be said that that earlier photographs demonstrate that the sale of wine was a significant feature of the applicant's business. That does not emerge quite so clearly from the later photographs. It is tempting to think that the applicant may have reduced to focus of wine in respect of the more recent photographs with a view to persuading this Court that the sale of wine was a secondary consideration.
- 34 Mr Coppola focused on the applicant's trade figures. They indicate about a 60/40 split between produce sales and wine sales in terms of number and that overall, each were of almost equal value. Again he relied upon this in submitting that the sale of wine is a significant feature of the applicant's business.
- 35 I am not especially troubled by these figure. The average unit cost of wine is more that the average unit cost of produce. What these figures establish is that although the sale of wine is an important component of the applicant's business, at least by volume of sales, the sale of produce is even more important. The figures are not inconsistent with the condition of the licence that stipulates that the business must be primarily conducted in connection with the sale of assorted produce including pate, dips, olives, pickles, preserves and the like and that the sale of wine is ancillary to the sale of produce.
- 36 The notion of selling wine with special produce such as olives and olive oil is a common feature of the original business plan and the revised business plan. The focus on a large range of South Australian wines in the revised plan as opposed to a limited range of wines from any region in the original plan is different, but not radically so. I am permitted to know that there is a natural synergy between wine and the produce on sale at the applicant's store.
- 37 But the notion of selling spirits produced in South Australia is quite different. It lacks a natural synergy with produce. Sometimes that synergy

¹³ *Bottega* Ibid at [6].

can exist in other ways. In *Bottega*, the connection was between Italian wines and spirits and premium Italian produce. The whole *Bottega* experience was directed to Italian delicacies, including liquor. In this case, the produce on sale is not limited to South Australian produce. And, unlike Italian spirits, which are almost a genre in their own right,¹⁴ South Australian spirits are no more than a disparate range of liquors that are not readily identified as uniquely South Australian. In other words, the case to include South Australian spirits is not a strong one.

- 38 The photographs tendered by Mr Coppola illustrate that the applicant's store looks a bit like a bottle shop. If spirits and wine were available, this business would look very much like a de facto retail liquor store.
- 39 In all the circumstances, I am not satisfied, in the exercise of the Court's general discretion, that it is appropriate to vary the conditions of the licence to permit the sale of spirits. That aspect of the application for variation must be refused.
- 40 I now turn to the application to vary in respect of increasing the number of wineries and limiting the sale to South Australian wines.
- 41 As explained above, this change is broadly consistent with the applicant's original business plan. I can see nothing objectionable about the applicant re-positioning its business plan and hence, the focus of its special circumstances licence, to take advantage of the unique tourist opportunities that the Central Market presents in connection with the sale of South Australian wine. It makes sound business sense to use the store and the licence as a means of showcasing South Australian wines to tourists and other visitors to the Central Market by matching it with produce consistent with the name of the store: 'The Olive Tree Fine Food and Wine'. I did not understand Mr Coppola to seriously contend otherwise. The case to extend the range of wines to include South Australian wines generally, is strong.
- 42 But the number of lines is another matter. To allow the applicant to sell an unlimited number of lines of wine for off licence consumption from any region in South Australia save Kangaroo Island, could potentially undermine the licensing hierarchy and set an undesirable precedent.
- 43 It matters not that the notion of a precedent is hypothetical because this class of licence no longer exists. For the reasons I explained earlier, I have to approach this application in the same way as I would have if I had been hearing this case some time ago.
- 44 As I have just observed, the applicant's store already looks a bit like a bottle shop. If it could sell an unlimited number of lines from just about

¹⁴ Such as Amaretto, Campari, Frangelico, Grappa, Limoncello, and Sambuca.

every winery in South Australia and have them on display, it could very easily be seen to be basically a retail wine shop.

- 45 I appreciate that a unique feature of this application is that it is in connection with a store in the Central Market. But that said, similar arguments could be put in connection a special circumstances licence in other tourist areas that contain a range of retail facilities, such as Glenelg.
- 46 In order to ensure that this is, and is seen to be, a one off licence reflecting the unique character of a special circumstances licence, as opposed to a de facto retail liquor merchant business, I think it is necessary to limit the number of lines of wine that can be sold at any one time. In oral evidence, Mr Bratovic, the proprietor of the applicant, suggested that if there needed to be a cap, 48 lines would be appropriate.
- 47 In determining what an appropriate number is, the Court must make an evaluative judgment based on its own knowledge and experience. Over the years, in connection with applications for retail liquor licences, I have seen many bottle shops attached to hotels that have a relatively small number of lines of wine.¹⁵ I think they provide a benchmark that gives me a sense of what is a maximum number of lines that is necessary to set, so as to positively differentiate this business in its revised form, from retail liquor facilities trading under a retail liquor merchant licence. In my view, a cap of 40 lines would better reflect the fact that this is a unique business.

Summary and conclusions

- 48 I find that the Court has jurisdiction to entertain the application to vary the conditions of the applicant's special circumstances licence. In doing so it is to determine the application as it would have done under the former licensing regime. Insofar as the application seeks to vary the conditions to permit the sale of South Australian spirits, it is refused. I grant the variation to enable the applicant to sell wine from any winery in South Australia other than those on Kangaroo Island. I qualify that condition by imposing a limitation that it is only able to present for sale, at any given time, no more than 40 lines of wine.

¹⁵ For example: *BWS - Seaford* [2015] SALC 19, which included a view of the Port Noarlunga Hotel; *Erythos Holdings Pty Ltd* [2015] SALC 34, which included a view of the Central Hotel in Port Pirie; *Liquorland - Gawler* [2014] SALC 15, which included a view of the Criterion Tavern; and *BWS - Mount Gambier* [2013] SALC 82, which included a view of the Commercial Hotel.