

First Commercial Inn [2018] SALC 5

LICENSING COURT OF SOUTH AUSTRALIA

FIRST COMMERCIAL INN

JURISDICTION: Referral from the Officer of Liquor and Gambling
Commissioner

FILE NO: 5595 of 2017

HEARING DATE: 6 and 9 February 2018

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 5 April 2018

REPRESENTATION:

Counsel:

Applicant: Mr N Watson

Objectors: Mr M Hoile

Solicitors:

Applicant: N/A

Objectors: T Legal

- 1 At issue in these proceedings is the extent to which residents living near a hotel should be expected to put up with noise and disturbance.
- 2 The hotel is the First Commercial Inn, a historic hotel on the corner of Commercial Road and Divett Street, Port Adelaide. The hotel comprises of two storeys that contain seven licensed areas. One of the areas, Area 3, is a balcony on the first floor. The balcony extends for frontage on Commercial Road to Divett Street. Another is Area 1, which is an enclosed bar adjacent to Divett Street. It is known within the hotel as the “Sportsman’s Bar”. Immediately to the west of Area 1, is Area 7. This is an outdoor area occupying part of the footpath on the eastern side of Divett Street.
- 3 The current licensee of the hotel is Watson Bros Commercial Hotel Pty Ltd (Watson Bros). When it applied to transfer the licence its application drew several objections. One of those objections went to trial, but for present purposes its outcome is irrelevant. In connection with concerns expressed by objecting residents, Watson Bros agreed to the following conditions being placed on the licence:
 1. The windows facing Divett Street and St Vincent Street are to remain closed during the provision of any entertainment.
 2. Trade shall cease in Area 7 at 10.00 pm Monday to Saturday and at 8.00 pm on Sunday in accordance with the outdoor dining permit issued by the City of Port Adelaide Enfield.
 3. The main entrance (Area 1) shall be fitted with self-closing doors and the doors shall remain closed at all times entertainment is provided in Area 1.

Conditions 1-3 shall apply for a further trial period of 3 months to 17 May 2017.
- 4 Watson Bros has long since sought to have these conditions modified. It contends that the conditions are unreasonable and in particular, given that other licensed venues can trade later in their outdoor areas, the present requirement to cease trading at 10.00 pm on Friday and Saturday nights in Area 7 should be relaxed. It tendered the outdoor dining permit issued by the City of Port Adelaide Enfield that authorises trade in that area to midnight on Friday and Saturday nights.
- 5 Mr Watson said that he did not press for deletion of condition 1 save that he said that the reference to St Vincent Street was pointless as there are no windows facing that street. He sought only partial release from condition 3. He contended that it would be fairer if the requirement was that the doors only be shut from a specified time and suggested that midnight would be a fair compromise.

- 6 The Watson Bros' application has drawn objections from a number of nearby residents. The primary objector is Mr Phillip Winter, who lives with his wife and adult family across the road from the hotel in Divett Street. Their residence was formerly a historic two storey bank which has been converted.
- 7 Despite numerous attempts to reach a conciliated outcome in this matter, the parties have been unable to settle their differences, hence, the within hearing.
- 8 At trial, Mr Watson was asked about the hotel. He said that it is in the process of transformation. Part of the hotel, and in particular the Sportsman's Bar, attracts an older traditional clientele. He said that patrons using the Sportsman's Bar like to go outside into Area 7 to smoke and like to be able to drink there when doing so.
- 9 He said that the front of the hotel and the dining area on the footpath of Commercial Road, attracts a younger trendier clientele. He said that then hotel is trying to develop this side of the business.
- 10 The primary witness for the objectors was Mr Winter. He spoke of his disturbance from the hotel, especially from Area 7. He said:

Our experience was that as the night goes on the patrons tend to become rowdier, as Mr Watson said, and it can get to the point where there's – there's yelling and shouting – and that significantly penetrates into our home in the late evening hours. So they do get rowdier the later the night goes on – and they're in a group. They're not individuals talking there. It's a group – group type discussions.¹
- 11 Watson Bros acknowledge that for now when the premises are trading until 10:00pm in Area 7, the patrons in that area do not vacate the area completely on the dot at 10.00 pm and that some might hang around for up to 30 minutes after that area has ceased to formally trade. In other words, there can still be noise and disturbance from that area up until 10.30 pm.
- 12 Herein lies Mr Winter's concern. He believes that if trade is permitted in that area until midnight that same sort of wind-down period of 30 minutes is likely to occur such that he might be disturbed until 12.30 am. In his view this is unreasonable and constitutes unreasonable disturbance.
- 13 Mr Winter said that he had taken steps to ameliorate the noise. He said that he had progressively fitted "hush glass", being 10.5 millimetre laminated glass, specially designed to mitigate noise. He said that this

¹ Tr 21.

has been installed in all of the upstairs bedrooms and that he is in the process of doing the downstairs rooms.

- 14 He said that these measures have helped but they have not stopped the disturbance from the base beat of the music and the yelling or loud singing or shouting that can occur in Area 7.
- 15 Mr Winter described Area 7 as effectively a beer garden and that in terms of disturbance as the night progresses he has had enough. The effect of his evidence is that closing at 10.00 pm on Fridays and Saturdays is a reasonable compromise but closure at midnight is beyond the pale.
- 16 The objection to the change of conditions was supported by the evidence of Ms Jean Johnson.
- 17 Ms Johnson lives in Lipson Street which is immediately to the north of and parallel to Commercial Road connecting St Vincent Street and Divett Street. Like Mr Watson she lives in a converted bank. She has lived there since 2008. She said that when she moved in Port Adelaide was very quiet. She said that a lot of the businesses including local hotels were closed and had been for some time. She spoke of the growing number of people residing in this area and my impression of her evidence is that she regards the sorts of activities conducted in nearby hotels as incompatible with the residential nature of the area.
- 18 Mr Hoile, counsel for the objectors, was critical of Watson Bros for its failure to adduce evidence for the need to extend trading hours. I do not accept that submission. I think it can be safely assumed that Watson Bros would not have pursued this matter if there were not a relevant demand.
- 19 Mr Hoile said that the evidence established that the hotel is in a transition phase and that I should proceed with this application from the premise that the focus of hotel's future direction is to operate and attract patrons to use the Commercial Road outdoor area for longer hours into the night. He said that this was consistent with the changing nature of the Port Adelaide central precinct, part of which was that the area away from Commercial Road is becoming increasingly residential.
- 20 He submitted that this Court should recognise this and accept that the outdoor drinking and dining areas should in the main be limited to Commercial Road.
- 21 He said that I should accept the evidence of Mr Winter that after 10.00 pm on Friday nights and Saturday nights he and his wife and family are subjected to excessive noise and disturbance; that the shouting and the yelling tends to increase into the later hours; and that it disturbs their enjoyment of their residence and their sleep.

- 22 He submitted that the conditions sought to be maintained by Mr Winter are consistent with the changing amenity of the area; they are consistent with the licensees' own recognition of that changing amenity; and are consistent with the licensees' own plans to extend their hours out of Commercial Road.
- 23 He said that the restrictions for which Mr Winter contends will significantly reduce noise and disturbance and the congregation of crowds milling about the sports bar, and that will be to the particular benefit of the Winters, and to the general benefit of the residents and the locality more broadly.

Consideration

- 24 Pursuant to s 43 of the *Liquor Licensing Act 1997* a licensing authority can impose conditions on a licence. They are expressly authorised to impose conditions:

to ensure that the noise emanating from the licensed premises is not excessive;

to minimise offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises, or to minimise prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises, resulting from activities on the licensed premises, or the conduct of people making their way to or from the licensed premises;

...

to prevent offensive behaviour on the licensed premises (including offensive behaviour by persons providing or purporting to provide entertainment (whether live or not) on the licensed premises).

- 25 It follows that this Court is able to insist that the interim conditions placed upon the licence as initially agreed upon by Watson Bros remain in place.
- 26 But for the Court to do so, it is not enough for a person who resides in the vicinity of the licensed premises to establish that he or she is annoyed, disturbed or inconvenienced by the activities conducted at the licensed premises. It is a question of reasonableness. And in determining that issue, it must be accepted that licensed premises are a source of noise and disturbance and that those who chose to reside near such premises cannot expect to be protected above that which is typically associated with such premises.
- 27 As King CJ said in *Vandeleur v Delbra Pty Ltd*:

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.²

28 Although in that case King CJ was dealing with a noise complaint similar considerations apply when we are dealing as we are here, with an existing licence that but for a conciliated interim condition did not contain the conditions under consideration.

29 In *Hackney Tavern v McLeod* Wells J expressly approved the following observation made in this Court in *Norton Summit Residents Association*³ where it said:

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. From time to time one or more of the patrons might be expected to be noisier than others—calling out, even yelling and screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents.

30 It follows that I would only be prepared to continue to impose the condition if I thought that it was necessary to protect Mr Winter and others from noise, offence, annoyance, disturbance or inconvenience that exceeds what they, bearing in mind that they live nearby to a hotel can reasonably be expected to tolerate.

31 I am permitted to know that there are a number of hotels in what I would describe as the Commercial Road precinct at Port Adelaide. About a block west of the First Commercial is the Port Admiral Hotel. A block further west is the Lighthouse Hotel. To the east in St Vincent Street is the Royal Arms Hotel. To the north-west in Lipson Street is the Dockside tavern. There are a number of other hotels that are not that far away. There also a number of licensed restaurants in the immediate vicinity, including one almost next door to Mr Winter's residence.

32 Whist in the not too distant past this area was in economic decline, it is in the process of being revitalised, and is plainly trying to make itself an attractive, vibrant dining and drinking area. I accept that it also has become an attractive place for people to reside and there is understandably some tension between these two activities. In *Little Miss Miami* I had to deal with a similar tension that exists in the East End of

² (1988) 48 SASR 156 at 160.

³ (Delivered 13 May 1983).

Adelaide which in more recent years has become an attractive place to reside but which has also established itself as a cosmopolitan destination that contains many hotels, restaurants and other licensed venues. I made the following observation:

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.⁴

- 33 I accept that the revelers in Area 7 of the hotel can be noisy and can be a source of offence, annoyance, disturbance and inconvenience to those who live near the hotel. But, within reason, this is the price that those who choose to live in the vicinity of a hotel, have to pay. In my view, provided the noise etc ceases prior to 12.30 am on a Saturday and Sunday morning, it is within the bounds of what residents can reasonably be expected to tolerate. If a condition requiring trade in this area to cease at midnight on a Friday and Saturday night is imposed, this will be achieved.
- 34 As to the other conditions, the suggested variation put forward by Mr Watson in connection with condition 1 makes sense. As to the suggested variation in connection with condition 3, I agree, for the reasons just expressed, that to set a limit at midnight on Friday and Saturday nights seems to me to be reasonable. But I think that for the other days of the week an earlier cut off time consistent with what applies to condition 1 would reflect an appropriate balance between the competing interests of the hotel and the nearby residents.
- 35 Accordingly the application by the Watson Bros is allowed and I impose the following conditions upon the licence:
1. The windows facing Divett Street are to remain closed during the provision of any entertainment.
 2. Trade shall cease in Area 7 at 10.00 pm Monday to Thursday, midnight on Friday and Saturday and at 8.00 pm on Sunday in accordance with the outdoor dining permit issued by the City of Port Adelaide Enfield.
 3. The main entrance (Area 1) shall be fitted with self-closing doors and when entertainment is provided in Area 1, the doors shall remain closed at all times after midnight on Friday and Saturday after 10.00 pm Monday to Thursday, and after 8.00 pm on Sunday.

⁴ [2014] SALC 41 at [127].