

LICENSING COURT OF SOUTH AUSTRALIA

CROWN & SCEPTRE HOTEL

JURISDICTION: Section 73(3) Application

FILE NO: 124 of 2013

HEARING DATE: 25 February 2013

JUDGMENT OF: His Honour Judge WD Jennings

DELIVERED ON: 6 March 2013

REPRESENTATION:

Counsel:

Landlord: Mr S Thomas

Liquidators: Mr V Fragos with Mr J Dodd

Solicitors:

Landlord: Grope Hamilton Lawyers

Liquidators: Piper Alderman

- 1 The background as to how this matter is before the Court is set out in the reasons for decision of Brenton Sleep, Assistant Commissioner Compliance, Delegate of the Liquor and Gambling Commission dated 12 December 2012 in relation to an “Application to Carry on the Business as Licensee” filed by the Landlord, Grimaldi Investments (SA) Pty Ltd (Grimaldi) dated 5 November 2012. His reasons stated in part:

“This is an application dated 5 November 2012 by Grimaldi Investments (SA) Pty Ltd pursuant to section 73(3) of the Liquor Licensing Act 1997 (the Act) to carry on business conducted in pursuance of the licence for the premises known as the Crown and Sceptre Hotel, licence number 51204275 for premises situated at 308 King William Street Adelaide. I note Grimaldi Investments (SA) Pty Ltd owns these premises.

The licensee of these premises is recorded as Jaam Hotels Pty Ltd. I note on 27 July 2012, by order number 165652 pursuant to section 74(2) of the Act, the Liquidators of this company Peter Ivan Macks and Ian Wayne Burford were noted as carrying on the business conducted in pursuance of the licence as the licensee. The licence was suspended at this time under section 66 of the Act at the request of the Liquidators.

The legal representative of the Liquidators, Piper Alderman advised the Commissioner by letter dated 21 November 2012 that they were aware of the application by Grimaldi Investments (SA) Pty Ltd and wished to be heard in relation to this application.

In their letter Piper Alderman advised, ‘The landlord has purported to re-enter into possession of the premises and terminate the lease. Our clients do not accept this is done legally. It is our client’s position that the lease remain current and that our client remains entitled to exclusive occupation of the premises’.”

- 2 Mr Sleep referred to the decision of *Montague Cellars* [2002] SALC 12 and then noting that an agreed outcome could not be reached by conciliation, pursuant to s 17 of the *Liquor Licensing Act* at the request of the objector, referred the matter to this Court for determination.
- 3 The matter proceeded before the Court with Mr Thomas representing Grimaldi and Mr Fragos representing the Liquidators.
- 4 Parliament recognised that it might be in the public interest for licensed premises to continue to trade for a time through someone other than the nominated licensee in the case of the licensee’s death or incapacity, the licensee’s yielding up possession of the licensed premises or bankruptcy or insolvency. Accordingly it enacted ss 73 and 74 of the Act. Section 73

concerns the devolution of a licensee's rights upon death, incapacity and yielding possession. Section 74 does so in respect of bankruptcy and insolvency.

5 It is in these capacities that Grimaldi and the Liquidators are before this Court.

6 In some instances prior permission of the licensing authority is required before an entity can assume the position of licensee. In the case of the Liquidator it was not. In the case of Grimaldi, as landlord, it is. Section 73(3) provides:

“If a licensee ceases to occupy the licensed premises to which the licence relates, a landlord, mortgagee or other person acting **with the permission of the licensing authority** may, for a period of 1 month or a longer period approved by the licensing authority, carry on business as the licensee under the licence.” (emphasis mine)

7 It is that request for the grant of permission that is ostensibly the issue before the Court.

8 The hearing before the Court occupied a full day.

9 Evidence was given by Mr Macks and Mr Burford, the Liquidators, and a Mr Phillips from their office.

10 Mr Grimaldi, a director of Grimaldi, also gave evidence. In so doing he described himself as an investor. Mr Grimaldi gave no evidence as to his intention through his company to carry on the business of the Hotel. In the Application to Carry on the Business as Licensee, Mr Grimaldi in answer to a pro forma question “Proposed period to carry on business” wrote “NA”.

11 Large books of documents were tendered by both parties dealing with the somewhat acrimonious history between the parties. While I do not propose to traverse those issues here, suffice it to say, the competing positions are that Grimaldi purports to have entered the hotel premises, locked the Liquidators out and says it is a landlord in possession. The position of the Liquidators is that they have never ceased to occupy the premises within the meaning of s 73(3) of the Act. Other issues in dispute involve the use of a right of entry clause and whether the statutory role and obligations of the Liquidators has been fettered by the actions of Grimaldi. These are matters which will no doubt be litigated in other appropriate jurisdictions.

- 12 In the course of my deliberations over this matter that evidence and the absence of any evidence from Grimaldi indicating a desire to occupy the Crown and Sceptre Hotel for the purposes of carrying on the business of a hotel troubled me greatly.
- 13 In matters such as this the Court is acting as the relevant licensing authority. And in exercising that power the Court is bound to exercise the discretion conferred upon it by s 53 of the Act. That discretion is extremely wide¹. It requires the Court to focus upon the public interest. It puts the jurisdiction of the Court into context. It requires the Court in determining whether to grant or refuse that permission to be guided by what it considers is in the public interest. That public interest is directed in a case such as this to the needs of the public and in particular its access to this licensed facility.
- 14 If Grimaldi indicated a willingness to carry on the business as licensee consideration would need to be given to the arguments each advanced before the Court. But that is not a position that it took. As indicated earlier, it has expressed no indication of a preparedness to act as licensee. Stripped to its essentials this matter is nothing more than a commercial dispute between the landlord and the liquidator of the licensee that at the present time has nothing to do with the immediate resumption of trade at the Crown and Sceptre Hotel.
- 15 If that were to become the position of the landlord this Court would determine the matter with appropriate expedition. But, for now, the Court is being asked to resolve issues that have very little to do with the exercise of its powers as the relevant licensing authority. It is being asked to act in respect of a matter that seems to have very little to do with the public interest beyond the general public interest in having commercial disputes resolved. It has nothing to do with public interest considerations as to whether the public should be provided with access to the licensed facilities that were previously being provided for by this licensed venue. It seems to me that these proceedings have, as their primary focus, collateral issues and that therefore the pursuit of this application amounts to an abuse of process.
- 16 In *Crown Inn Hotel* Judge Gilchrist observed:

“Notwithstanding the fact that this Court is an inferior Court with a limited jurisdiction that does not extend beyond the jurisdictions conferred upon it by Parliament, it has been recognised that such judicial entities possess such jurisdiction arising by implication as is necessary for the orderly and effective control of proceedings

¹ *Dalgety Wine Estates Proprietary Limited v Rizzon and Another* (1979) 141 CLR 552

within them. This must necessarily include a capacity to prevent the Court from being used as an instrument of oppression, which will be the case if the proceedings are vexatious. That must therefore carry with it the capacity to bring proceedings to an end to prevent an abuse of the process.”²

- 17 The categories of “abuse of process” are not limited to cases that are vexatious. They extend to cases that are being prosecuted to achieve collateral purposes. In *Williams v Spautz*³, Mason CJ, Dawson, Toohey and McHugh JJ cited with approval the following passage from the judgment of Lord Evershed in *In re Majory*:

“that court proceedings may not be used or threatened for the purpose of obtaining for the persons of using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused”.⁴ (emphasis mine)

- 18 This is such a case. For these reasons I dismiss Grimaldi’s application.

² [2011] SALC 92 at para 14

³ (1992) 174 CLR 509 at 528

⁴ (1955) Ch, 600 at pp 623-624