

**LICENSING COURT OF SOUTH AUSTRALIA**

*RHINO ROOM PTY LTD TRADING AS THE HOWLING OWL*

**JURISDICTION:** Referral

**FILE NO:** 2963 of 2019

**HEARING DATE:** 14 September 2020

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 19 November 2020

**CATCHWORDS:**

*An application to vary the conditions of a special circumstances licence - The applicant is currently able to sell liquor for on licence consumption – It seeks the variation to permit it to sell a small range of spirits for off licence consumption – **Held** that the revised business plan could be accommodated under a hotel licence – Accordingly a special circumstances would not have succeeded in respect of it – **Held** that this is the test to determine the application for a variation – **Held** that in any event given that if granted the licence would transition to a general and hotel licence in the Court’s discretion the application would be refused – Application refused – Liquor Licensing Act 1997; Liquor Licensing (Liquor Review) Amendment Act 2017; Liquor Licensing (General) Regulations 2012.*

*Bratcas Pty Ltd t/as The Olive Tree Fine Food and Wine [2019] SALC 71*

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

*Facac v Talbot Hotel Group Pty Ltd and Another [2001] SASC 445*

**REPRESENTATION:**

Counsel:

Applicant: In person

Objector: Mr G Coppola

Solicitors:

Applicant: N/A

Objector: Australian Hotels Association, SA Branch

- 1 This is an application by Rhino Room Pty Ltd that seeks a variation to its special circumstances licence to enable it to sell and supply for off licence consumption South Australian gin at its licenced premises in Vaughan Place, Adelaide that trades as The Howling Owl.
- 2 The application is opposed by the Australian Hotels Association (the AHA).
- 3 The applicant formerly traded from premises in Frome Road near the corner of North Terrace. Initially it traded as a live music/comedy venue known as the Rhino Room. Over time it expanded its business. The Howling Owl was added. Its focus was along the lines of a café accompanied by the hosting of smaller live shows, poetry reading and the like. The Urban Cow was also added. Its focus was directed towards exhibitions and the sale of art and crafts.
- 4 A few years ago, as a result of the demolition of the premises where the applicant formerly traded to enable the development of the Crowne Plaza Hotel, it needed to look for alternate accommodation. As part of that process, the applicant decided to split its businesses. It relocated the Rhino Room side of the business to larger premises in Hyde Street, Adelaide, just south of Pirie Street. It remains a licensed venue focussed on live music and comedy. It relocated The Howling Owl and Urban Cow side of the business to the premises in Vaughan Place.
- 5 Following the relocation, the applicant obtained a special circumstances licence for The Howling Owl. For now, the licence has an endorsement that provides as follows:

This is a visual arts and live artistic performance venue. The nature and quality of the live performances make it unique in the precinct and shall be maintained as such. The predominant activity on the premises through the week shall be:

Scheduled Visual Art Exhibitions; or

A mixture of live artistic performances: (such as theatre, comedy, film, spoken word, poetry, performance dance, musicians and singers.)
- 6 Although it is not specified in the licence, given this endorsement it is plain that the licence only permits the sale of liquor for consumption on the licensed premises.
- 7 Like many businesses, The Howling Owl's business has over time evolved. Whilst it still has a focus on live artistic performances, it also focusses on promoting South Australian food and liquor products, especially locally made gin. Its proprietor, Mr Michael Krieg, said that

during the day it essentially operates as a café, and at night it essentially operates as a gin bar. On all accounts the ‘gin bar’ side of the business is doing well and is proving to be an important source of promotion of what seems to be a thriving local artisan gin distilling industry. As a result, the applicant has conducted gin masterclass sessions to enable members of the public to learn about the nuances of gin taste and production. It pursues this application to add a further dimension to that side of its business. It believes that having the capacity to sell for take away consumption small quantities of locally produced gin will enhance its business and provide an opportunity for local producers to sell their products. The application is supported by a number of local gin producers. It would seem that for now The Howling Owl is Adelaide’s premier gin bar and provides sales opportunities for local producers of gin that are not available elsewhere. Although there are two hotels immediately adjacent to the premises, neither opposes the application. Presumably they see the proposed business as unique and is one that in no way threatens their businesses.

- 8 The AHA opposes the application. Apart from the fact that it contends that on the merits the application must fail, it is especially concerned about what the licence will transition to. Special circumstances licences no longer exist. They now transition to one or other of the current species of licence. That transition is regulated by cl 3 of Schedule 2 of the *Liquor Licensing (Liquor Review) Amendment Act 2017*. It relevantly provides as follows:

A special circumstances licence under old Part 3 Division 2 will, on the relevant day, be taken to be—

- (a) in a case where the licensee also holds a gaming machine licence in respect of the premises to which the special circumstances licence relates—a general and hotel licence under new Part 3 Division 2; or
- (b) in the case of a special circumstances licence that authorises the sale of liquor on the licensed premises for consumption off the licensed premises—a packaged liquor sales licence under new Part 3 Division 2; or
- (c) in any other case—an on premises licence under new Part 3 Division 2.

Despite subclause (2), the Commissioner may, on the Commissioner's own initiative or on application by the licensee, issue the holder of a special circumstances licence under old Part 3 Division 2 a licence of a class under new Part 3 Division 2 that the Commissioner considers appropriate taking into account the trade authorised under the licence.

- 9 In its present form, the licence will transition to an on premises licence. The AHA contends that a special circumstances licence that permits the sale of liquor for on premise and off premise consumption, will transition to a general and hotel licence.
- 10 In *Bratcas Pty Ltd t/as The Olive Tree Fine Food and Wine*<sup>1</sup> I made certain observations that are pertinent to this case. I made the point that a special circumstance licence is a unique form of licence that reflects, in the words of the section, the ‘kind of business proposed by the applicant’. Thus where a licensee seeks to vary a special circumstances licence to accommodate a revised business plan, the revised plan must of itself satisfy what would have been necessary to have been granted a special circumstances licence in the first place.
- 11 It can be seen that what the applicant proposes here is materially different to the original business plan that underpinned its earlier application for a special circumstances licence. Accordingly, to succeed the applicant needs to run the gauntlet of what would have been required to be granted a special circumstances licence to cover its now proposed business model.
- 12 The circumstances permitting the grant of a special circumstance licence are prescribed by s 40 of the Act in the terms following:
- “(2) A special circumstance licence cannot be granted unless the applicant satisfies the licensing authority that
- (a) a licence of no other category (either with or without an extended trading authorisation) could adequately cover the kind of business proposed by the applicant; and
- (b) the proposed business would be substantially prejudiced if the applicant’s trading rights were limited to those possible under a licence of some other category.”
- 13 As was discussed in *Little Miss Miami and Little Miss Mexico*<sup>2</sup>, the section involves a series of tests and if the application falls at any one along the way, it must fail.
- 14 First, the various categories of licence provided for by the Act must be considered and a determination must be made as to whether any would fit the proposed business model.
- 15 The Court must consider its power to grant exemptions. If, with appropriate exemptions, a particular type of licence would fit the

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<sup>1</sup> [2019] SALC 71.

<sup>2</sup> [2014] SALC 41.

applicant's business model, the application for a special circumstances licence fails.

- 16 Next, the Court must determine whether 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. Unless there is, the application for a special circumstances licence fails.
- 17 Finally, the Court must determine whether in the Court's discretion it should grant a special circumstances licence.
- 18 It is not immediately obvious why a hotel licence could not adequately cover the kind of business now proposed by the applicant. Prior to the recent amendments to the Act, a hotel licence was provided for by s 32 of the Act, as follows:

32—Hotel licence

(1) Subject to this Act, a hotel licence authorises the licensee—

- (a) to sell liquor on the licensed premises for consumption on or off the licensed premises—
- (i) on any day (except a Sunday, Good Friday and Christmas Day) between 5am and midnight and
  - (ii) on a Sunday (not being Christmas Day or New Year's Eve) between 11am and 8pm; and
  - (iii) if New Year's Eve is on a Sunday, on that Sunday between 11am and midnight; and
  - (iv) on Christmas Day between 9am and 11am; and
  - (v) on New Year's Day between midnight and 2am; and
- (b) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption on the licensed premises during the whole or any part of the following hours as is specified in the authorisation:
- (i) on any day (except a Sunday, Good Friday, the day after Good Friday, Christmas Day and the day after Christmas Day) between midnight and 5am;
  - (ii) on a Sunday (not being Christmas Day or the day after Christmas Day) between midnight and 5am and between 8am and 11am and between 8pm and midnight;

- (iii) if the day after Christmas Day is a Sunday, on that Sunday between 8am and 11am and between 8pm and midnight;
  - (iv) on Good Friday between midnight and 2am;
  - (v) on Christmas Day between midnight and 2am; and
- (c) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption off the licensed premises during the whole or any part of the hours between 8am and 11am, and between 8pm and 9pm, on a Sunday (not being Christmas Day) as is specified in the authorisation; and
- (d) to sell liquor at any time on the licensed premises to a lodger for consumption on or off the licensed premises; and
- (e) to sell liquor at any time in a designated dining area to a diner for consumption in that area with or ancillary to a meal provided by the licensee in that area; and
- (f) to sell liquor at any time in a designated reception area to a person attending a reception for consumption in that area; and
- (g) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only during the hours that the licensee is authorised to sell liquor on the licensed premises to a person other than a lodger for consumption off the licensed premises).
- (2) Subject to this Act, a hotel licence is subject to the following conditions:
- (a) a condition requiring the licensee to keep the licensed premises open to the public for the sale of liquor on every day (except Good Friday, Christmas Day or Sunday) between 11am and 8pm;
  - (b) a condition requiring the licensee to provide a meal, at the request of a member of the public, between noon and 2pm, and between 6pm and 8pm, on any day on which the licensed premises are open to the public for the sale of liquor.
- (3) However—

- (a) the licensing authority may exempt a licensee from the obligation to keep the licensed premises open for the sale of liquor to an extent the authority considers appropriate in the circumstances of a particular case; and
- (b) a licensee is not required by a condition under this section to provide a meal for a person if—
  - (i) the person appears to be intoxicated; or
  - (ii) the licensee has reasonable grounds to believe that the person cannot or will not pay for the meal; or
  - (iii) the licensee cannot comply with the request because of prior obligations to provide meals for others; or
  - (iv) there is some other proper reason for not complying with the request; and
- (c) the licensing authority may exempt a licensee from the obligation to provide meals wholly or to a specified extent.”

- 19 Having reflected upon the legislation I now turn to consider how a hotel licence fits with the applicant’s revised business plan.
- 20 In *Facac v Talbot Hotel Group Pty Ltd and Another*<sup>3</sup> Doyle CJ described the attributes of a hotel licence. He noted that the obligations that such a licence imposes had been relaxed over the years. It no longer required the provision of accommodation for lodgers. A hotel licensee could seek an exemption relieving it of the obligation to provide meals. The requirement that it trade over specified hours could be ameliorated.
- 21 In this case the applicant’s business model contemplates a limited range of liquor for on licence and off licence consumption. This is not inconsistent with a hotel licence. A hotel licensee can choose what liquor is for sale.
- 22 Although the provision of food is primarily undertaken during the day, under the applicant’s business plan, food is available at other times. I understand that the food on offer at night is more basic than that available during the day and may not constitute a ‘meal’. But that is not an obstacle to being able to trade under a hotel licence. If it would not suit the applicant to provide meals at night, it could seek an exemption relieving it of that obligation.

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<sup>3</sup> [2001] SASC 445.

- 23 I think that that the applicant's revised business plan could be conducted under a hotel licence. The application therefore fails at the first hurdle.
- 24 Even if the position were otherwise, in the exercise of the Court's discretion the application would have to be refused. The Court cannot ignore the fact that this licence will transition. It cannot ignore the fact that irrespective of the applicant's current intentions, if this licence transitioned to a general and hotel licence, that licence could come into the hands of another entity that might have different intentions for the licence. A general and hotel licence under the Act in its current form has to run the gauntlet of a community impact assessment. It would not set a desirable precedent to allow the holder of a special circumstances licence to vary the licence that would result in the licence becoming a general and hotel licence and avoid having to run that gauntlet.
- 25 Whilst I am sympathetic to the application and accept that what is proposed seems a relatively modest and harmless variation that will add to the attractiveness of the venue and support an emerging industry, the application must be dealt with according to law. Unfortunately for the applicant, I think that the proper application of the relevant legal principles leads to the conclusion that the application must be refused. I order accordingly.