

Queens Head Hotel [2012] SALC 79

LICENSING COURT OF SOUTH AUSTRALIA

QUEENS HEAD HOTEL

JURISDICTION: Application for variation to the terms of a hotel licence

FILE NO: 1179 of 2012

HEARING DATE: 28, 29 and 30 May 2012

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 17 July 2012

Application by the proprietors of the Queens Head Hotel for a variation to the entertainment consent that applies to the hotel, a variation to extend the trading authorisation and the conditions of the licence and the approval of alterations to the licensed premise - Consideration of the relevant legal principles - Applications approved subject to conditions - Ss 44, 53 68, 105, 106 and 120 of the Liquor Licensing Act 1997

The Holdfast Hotel [2008] SALC 29

Dalgety Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552

Waiata Pty Ltd v Lane (1985) 39 SASR 290

REPRESENTATION:

Counsel:

Applicant: Mr J Firth and Mr B Allen

Respondent: Mr B Dolling, Mr S Guest and Mr L Zaina

Solicitors:

Applicant: Wallmans

Respondent: N/A

- 1 This is an application by the proprietors of the Queens Head Hotel¹ that seeks a variation to the entertainment consent that applies to the hotel, a variation to extend the trading authorisation and the conditions of the licence and the approval of alterations to the licensed premises.
- 2 The Queens Head is an old heritage listed building on the southern side of Kermode Street, North Adelaide. It is roughly halfway between Palmer Place to the west and King William Road to the east. It is within the Cathedral precinct, which is a very attractive part of North Adelaide that has as one of its landmarks the iconic St Peter's Cathedral.
- 3 At the present time, for the purposes of the *Liquor Licensing Act 1997*, the hotel is divided up into various areas. At the front of the hotel on the footpath are some tables and chairs that enable alfresco dining. This area is licensed and is known as Area 7. In the front part of the hotel is a large bar that services patrons to the east and to the west. This is known as Area 1. Immediately to the southeast of Area 1 are a series of toilets and to the southwest is a small gaming room known as Area 3. In the middle of these is a dining room area known as Area 2. Immediately south of the gaming room is a kitchen. South of that is a cool room and an office. South of the dining room and toilets is a veranda that abuts a courtyard area which is licensed and known as Area 5. South of Area 5 is a passageway that leads into a beer garden which is known as Area 6. In its existing state Area 6 does not have a roof.
- 4 At the moment Areas 1, 2, 3 and 7 have been granted an extended trading authorisation that permits trade until 10.00pm on Sundays. The terms of the Act are as such that all areas of the hotel can trade on Monday to Saturday (excepting Good Friday and Christmas Day) until midnight.
- 5 The hotel has an existing entertainment consent that permits entertainment in Areas 1, 2 and 3. That entertainment is limited in that it only permits three performers at any one time, windows and doors must be shut when entertainment is provided and entertainment is not permitted during extended trading hours. There is also a condition requiring loudspeakers to be directed into the premises and for them not to be placed on or in the fascia or balcony or in the adjacent outdoor area, footpath or in Area 6.
- 6 The applicants seek to substantially alter Area 6. They seek approval to convert the beer garden in Area 6 to an enclosed new structure that will accommodate functions and other hotel activities.
- 7 They seek approval to enlarge the existing entertainment consent. They want it to extend to the modified Area 6 and for that extension to permit the use of speakers in Area 6. They want the present limitations on the entertainment consent to be relaxed. They want the limitation regarding

¹ Tony M Pty Ltd, Peter Maylands Pty Ltd and Vicki Maylands Pty Ltd

no entertainment during extended trading hours removed. They also want an existing condition that presently only permits the use of two side exits into Abbott Lane to be used in an emergency to be modified. In particular, they want to use a side entrance from Abbott Lane to permit entry into Areas 5 and 6.

8 When the applications were lodged with the Commissioner for Liquor and Gambling interventions were filed by the Commissioner for Police and the Corporation of the City of Adelaide. Subject to the imposition of certain conditions those interventions have since been withdrawn.

9 The conditions sought by the Corporation of the City of Adelaide and agreed to by the applicants are:

1. Areas 5 and 6 shall be closed at midnight Monday to Saturday and 10.00pm Sunday.
2. At any time when the Abbott Lane entrance is in use the Licensee shall, half an hour before opening of the doors and 1 hour after ceasing to trade and at all times between, employ 1 security person to manage the Abbott Lane entrance (no persons shall queue on the public road).
3. The Abbott Lane entrance shall be used for entry and emergency exit purposes only.
4. Music noise levels shall not exceed the following to the reasonable satisfaction of Council, L10dB(A) 84 (refer to DA/425/2011 condition 11).

10 The condition sought by the Commissioner for Police and agreed to by the applicants is that the proposed amended condition surrounding the use of an entrance from Abbott Lane shall be subject to a probationary period of 12 months and that during that period the Commissioner can, if thought necessary, bring the matter back before the Court to seek further directions.

11 During the course of and at the conclusion of the hearing the applicants volunteered agreement to further conditions upon the licence:

- There are to be no live bands in Areas 5 and 6.
- There will be no music in Areas 5 and 6 other than through the in house sound system.
- Further to the above, the music noise level shall, after completion of the alterations, be set by the Licensee under the supervision of Sonus Pty Ltd and by incorporating a noise limiting system as described in the email exchange between Harvey Norman Commercial, Sonus Pty Ltd and Wallmans dated 30 May 2012 to 4 June 2012 inclusive,

which system shall be maintained by the Licensee on an ongoing basis.

- Area 6 will only trade beyond 8.00pm on any day for the purpose of a pre-booked function in that area, or on any day when there is a public concert, sporting or other event at the Adelaide Oval.

12 It needs to be noted that pursuant to s 43(1) of the Act the Court, as the relevant licensing authority, can impose conditions upon a licence:

“to ensure that the nature of the business to be conducted under the licence conforms with representations made to the licensing authority in proceedings for the grant of the licence or other proceedings under this Act.”

13 A number objections were lodged by various residents living in the vicinity of the hotel.

14 Those objectors are as follows:

- Christine Cavenagh-Mainwearing,
- Anne Ness,
- Professor Basil Hetzel,
- Felice and Lyn Zaina,
- Jacqueline and Stephen Guest,
- Susan and Brian Dolling,
- Veronica Forsayeth,
- Les and Sandra McKessar,
- John Stening, Kerry Taylor,
- Julian and Bruce Hendry.

15 Ms Cavenagh-Mainwearing did not participate in the proceedings before the Court.

16 The other objectors continue to actively oppose the applications sought.

17 Mr Guest appeared on his behalf as an objector as did Mr Zaina.

- 18 Mr Dolling appeared as an objector in his own right and as the representative of the other objectors. I allowed him to do so pursuant to s 25(1)(e) of the Act.
- 19 To put the grounds upon which the objectors oppose the applications into some context I need to make some further observations about the general locality of the Queens Head and the existing conditions.
- 20 Kermode Street is roughly parallel to Pennington Terrace, which runs along the northern parkland and car park area of the Adelaide Oval.
- 21 The hotel is bounded to the east by Abbott Lane. Although it is a two way street it is barely wide enough to allow the passage of one car. It provides a direct means of access from Kermode Street to the Adelaide Oval. No doubt on days when functions are held at the oval it carries significant pedestrian traffic.
- 22 Immediately to the west of the hotel is a car park that is independently owned and it is not available to the public. West of the car park is Lakeman Street. It is about the same width as Abbott Lane. It is a one-way street that only allows vehicle movement from south to north. It can be expected that it too would have significant pedestrian traffic when the oval is in use.
- 23 In 2004 the Court had to deal with a complaint against the then licensees of the Queens Head that was made pursuant to s 106 of the Act. That provision enables the lodgement of complaints about things like undue noise, unacceptable activities and offensive behaviour concerning licensed premises. It contemplates that such complaints might be resolved through conciliation and that is what occurred.
- 24 The then licensees agreed to a series of onerous alterations to the conditions of the licence that included a very prescriptive provision in respect of increasing security that is in the following terms:

“On Friday and Saturday nights or on any night where the licensee holds a pre-booked function for more than 75 persons the licensee shall, between 9.00pm and 1 hour after ceasing to trade, employ one uniformed licensed security person, equipped with a mobile telephone, two way radio, torch and log book, to patrol the length of Abbott Lane and Lakeman Street, and also Kermode Street between the hotel and Palmer Place. In the event that there are more than 150 patrons in attendance on either night or at a pre-booked function the number of licensed security shall be 2 and if more than 250 patrons are in attendance the number of licensed security shall be 3.”

- 25 It was also agreed that the telephone number of the daily manager and licensed security personnel would be made available to all nearby residents.
- 26 A very prescriptive provision was also agreed to in respect of storage and cleaning up rubbish. It stipulates that no kegs or oil is to be stored in Abbott Lane. It provides that the lids of bottle bins have to be kept shut. Waste bins have to be kept shut except during loading and unloading. Private rubbish and bottle collections are only to be made between 8.00am and 8.00pm Monday to Friday. The licensee is obliged to clean Abbott Lane and Kermod Street between Abbott Lane and Lakeman Street every morning by 9.00am.

The applicants' case

- 27 The applicants frankly admit that the reason why they wish to proceed with this proposal is to take advantage of the opportunities that the redevelopment of the Adelaide Oval will bring. They wish to upgrade the hotel, to have within it, a modern facility where patrons can enjoy drinks and meals in connection with their attendance at functions at the Adelaide Oval and for functions generally, such as weddings, 21st birthdays and the like.
- 28 Computer generated photographs of the proposed alterations of the premises indicate that the appearance of the premises will be substantially improved. In its present state the beer garden area is fairly rudimentary. It is anticipated that the cost of the alterations will be of the order of one million dollars.
- 29 Mr Firth, counsel for the applicants, in his opening said as follows:

“It’s a hotel that doesn’t discount liquor to attract young drinkers. It’s not an entertainment venue or destination; it’s not a band venue; it’s not a nightclub; it’s not a late-night venue; it doesn’t trade after midnight. It’s basically a hotel about meals and drinks and functions, with a wish to increase the quality of the facilities for the functions and to be able to have some music at functions, and to be able to have what these days are common size television screens but which the regulations under the Liquor Licensing Act says must be the subject of entertainment consent. ...

the only music won’t be from live bands; it won’t be from people who bring in their own speakers and equipment; it will be music played, which is played at the present time throughout the hotel through the small existing speakers...

So we’re not trying to go later than the hotel trades at the moment. We’re not trying to increase capacity. All we’re trying to do is improve what is there and to take away the conditions that were put

on because it was an open area which we say are not needed if it's a fully enclosed and acoustically treated area."²

30 It needs to be noted that the applicants do not seek to increase the licensed capacity of the hotel, which presently stands at 300 patrons.

31 In support of the application the applicants relied upon the evidence of two experts.

32 The first is Mr Antonio Zappia. Mr Zappia is an architect. He was engaged by the applicants to design the proposed alterations. He explained that 95% of the hotel is heritage listed. He said that there was a lean-to in Area 6 that was proposed to be demolished. He said that it is not heritage listed. He said that what is contemplated is a two storey six metre high structure, the upper level of which would encompass air conditioning and a refrigeration plant. The lower area would be designated for the use of patrons and would allow a capacity of 100. He said that the wall on the Abbott Lane side of the building would be made of thick glass with a 200-millimetre gap in between to act as a noise buffer.

33 The second is Mr Jason Turner. He is an acoustic engineer. He works for Sonus Pty Ltd. He was instructed by Mr Zappia to make recommendations regarding the design of the proposed alterations. His brief was to make recommendations to contain any noise that might emanate from the proposed structure. He said:

“Certainly I think in terms of a general design of this type we're a step ahead of where you would often be in that you've got a design. You've got some controls in place. Provided that those noise levels are met inside this will be a well-designed and well-contained acoustical structure.”³

34 When asked about the existing structure he gave the following evidence:

“You've seen the existing structure, the open-air beer garden, the doors and gates that open onto Abbott Lane. Is there anything there at the moment to contain noise, even noise of ordinary conversations and people conversing in the beer garden?---It's in very close proximity to residences. There's walls. There's hard walls around. There's no specific treatment that I can see to contain noise other than some restrictions in time that that space could be used. So there's nothing specific there that would contain patron noise for example.”⁴

35 When asked to make a comparison between the two he said:

² Tr 16-7

³ Tr 94

⁴ Tr 94

“Look, it is a purpose-designed facility. It will contain noise to a level which is - I wouldn’t even say significantly. It’s just so far beyond what an open-top structure would give you or an open structure would give you that there is no comparison between the two from an acoustic perspective.”⁵

- 36 Mr Turner described the proposed acoustic treatment as “state of the art”.⁶
- 37 The applicants relied upon the evidence of Mr Franzon, who is one of the proprietors of the applicants. He is directly responsible for the running of the Queens Head. He and his family own and operate five hotels in South Australia. They have routinely invested capital in their hotels to renovate them and improve the services they provide. The applicants have already made substantial improvements to the Queens Head. The front bar, dining and toilet facilities have been extensively renovated and are of good quality.
- 38 He said that he attempts to work through issues with nearby residents. He described local residents as “the corner stone of our businesses”.⁷
- 39 He said that the focus of the Queens Head was directed towards good food and service. He said that he had no interest in turning the venue into a nightclub or a late night entertainment facility or an entity that sells liquor at discount prices.
- 40 He spoke of security issues. He said that the Queens Head was regarded as a quiet hotel.
- 41 Mr Franzon said that he had until now misunderstood the condition that required a security presence in Kermode Street, Abbott Lane and Lakeman Street. I gather from his evidence that he understood that this arrangement only applied when pre-booked functions were held on Fridays and Saturdays.
- 42 Mr Franzon also added that these days security guards are very reluctant to leave the immediate vicinity of licensed premises.
- 43 Mr Franzon accepted that the licensee’s obligation regarding rubbish removal was not being regularly adhered to.
- 44 Mr Franzon has as his base the Bath Hotel in Norwood. He visits the Queens Head regularly but it emerged from his cross-examination that he was not a well acquainted with issues concerning the nearby residents of the Queens Head as he might have been.

⁵ Tr 94

⁶ Tr 95

⁷ Tr 78

- 45 In relation to both of these matters Mr Franzon said he intended to meet with management to improve compliance with these conditions. Later in his evidence he said that he had already taken some steps in improving compliance with the conditions relating to security.
- 46 The applicants relied upon Ms Cross. She is one of the current managers of the Queens Head. She has worked in a number of facilities in the hospitality industry in the past. She described the Queens Head as a small establishment. She said that some of the clientele were students from St Marks College. She said that the predominant clientele were persons in the 30 plus age group. She said that the Queens Head served around 700-800 meals a week. She said that when functions are conducted at the hotel it is sometimes necessary to quarantine some of the front bar area and that this meant that on some occasions patrons could not access the dining facilities at the hotel. She said that she was not aware of any issues concerning the hotel that related to excessive noise, disturbances and misbehaviour.
- 47 It emerged from her cross-examination that she was not as well as acquainted with the conditions of the licence as she should have been.
- 48 The applicants also relied upon the evidence of a number of nearby residents.
- 49 Mr Philipson lives in premises opposite the hotel. He visits the hotel about two to three times per week. He said that the activities of the hotel do not disturb him. He said that he approved of the alterations that have already been made to the Queens Head and he supported the proposed further changes.
- 50 Mr Hay lives opposite the Queens Head. He has lived there for 18 months. He frequents the hotel two or three times a month. He expressed some annoyance when areas of the hotel were unavailable because functions were being held there. He supports the application. He has not experienced any problems coming from the hotel. He said that he was “pleasantly surprised”.⁸
- 51 Mr Eriksen lives across the road from the Queens Head. He filed an affidavit in support of the proposal. He said that in the four months that he lived in the area he found the hotel to be a positive factor. He has not been troubled by noise or rowdy behaviour. He said that he was “very comfortable with the hotel”.⁹
- 52 Ms Anderson lives in Lakeman Street. She has lived there for many years. She goes to the Queens Head once or twice a week for a meal. She

⁸ Tr 118

⁹ Ex A15

thought that the hotel had improved in recent times. She said that she was never disturbed by noise at night from the hotel. She said that there had never been any activity at the hotel that gave her cause to complain. She understood what the applicants propose and thought that it sounded sensible. She supports the application.¹⁰

The evidence advanced by the objectors

- 53 Professor Hetzel is a former Lieutenant Governor of South Australia. He and his wife live a few doors north of the Queens Head. He said that he valued the hotel. He expressed concern about the impact of the redevelopment of the Adelaide Oval on the Cathedral precinct. He spoke of tradition. He said that the Queens Head was a symbolic relic of the past and he wanted it to remain as it is.
- 54 Mrs Dolling lives in Kermode Street just north of the Queens Head. She has lived there for 13 years. She expressed her frustration at this matter being before the Court, having participated in proceedings before the Court in 2004 in respect of an earlier application to alter the conditions of the licence.¹¹
- 55 Mrs Dolling is plainly concerned about the development of the Adelaide Oval. She said: “The fact that the latter [Adelaide Oval] is requesting to trade till 5am, seven days a week will encourage people to drop into the Queens Head Hotel for a top-up drink on their way home with the resultant noise, disturbance and more parking problems.”¹²
- 56 Mrs Dolling said that when she moved into the area there was no Sunday trading at the hotel. She sees this application as part of an incremental escalation of trading hours. She spoke of being disturbed by persons ringing her door bell, of car doors being slammed, of car engines being revved. She said that she wanted the Queens Head to be no more than a peaceful neighborhood eating house where neighbours and friends could meet for a drink and fine dining. She expressed concern about the proposal. She said that she did not have faith in the applicants’ compliance with their licensed obligations.
- 57 Mr Guest lives with his wife in a town house immediately south of the area that is the subject of this application. Indeed, his townhouse is so proximate his northern wall forms the rear wall of the existing beer garden in Area 6.
- 58 Mr Guest noted that he and his wife are likely to be more affected by the proposed changes than any other person.

¹⁰ Ex A16

¹¹ It should be noted that the hotel has changed owners several times since then.

¹² Tr 169

59 He said that he purchased the property about the same time that the applicants acquired the Queens Head. He said that the applicants should have known that the existing licence conditions came about as a result of protracted negotiations with local residents. He said that the manner in which the applicants have conducted the business of the hotel indicates that they were unable to accept that it is a boutique hotel in a residential area. He said that he and his wife understood that living next door to a hotel would bring the occasional annoyance and disturbance. However, he thought that the applicants paid scant regard to the conditions of the licence. He listed a number of specific issues. He cited an occasion when empty beer kegs had been left in Abbott Lane overnight and of drunken young men bowling at each in the early hours of the morning. He described another occasion when a security person from the hotel was arguing with a drunken patron at his front door at 12.30am on a weekday morning. He said that when he remonstrated with the patron he was not only abused by the drunken person but also by the security person. He said that rubbish bins were left overfilled for days so that the lids would not close and that this resulted in a foul stench encroaching into his residence if he left his front window open. He said that bottles were often emptied before 8am and after 8pm in contravention to the licensed conditions. He said on occasions Area 6 continued to trade well past 8pm in contravention with the licensed conditions. He said that on occasions patrons were allowed to enter the hotel via gates to Areas 5 and 6 in Abbott Lane in contravention to the licensed conditions. He did say “To their credit the managers at that time were fairly responsive to our complaints and so we felt no reason to take them further.”¹³

60 Mr Guest said:

“My concern is that if they already struggle to adequately manage their operations (as demonstrated by my list of transgressions) within in the terms of their current license conditions, any increase in hotel operations is only going to increase and exacerbate the likeliness of the annoyance and disturbance that we experience from them.”¹⁴

61 Mr Guest expressed concern of the proposal that persons would be able to enter into Area 5 and 6 via Abbott Lane, just a few metres north of his residence.

62 Finally, Mr Guest expressed concerns about the noise that would be potentially generated by the increased operations in Area 6.

63 Whilst acknowledging the acoustic assessment contained in the proposal, he said:

¹³ Exhibit O22

¹⁴ Exhibit O22

“The assessment has based its recommendations on music levels predicted on measurement of other hotels with amplified music. ... No mention is made of employing a sound limiting device through which music must be played in order to restrict the music levels to those listed in the table. Since it has been stated that the hotel intends to allow DJ music to be played in the proposed function room, it is unlikely that sound levels will be restricted to those in the table.”¹⁵

64 He complained that the assessment did not address the issue of vibration and reverberation transference through the building. He further added that the assessment made no provision for the noise likely to be generated by people standing in Abbott Lane near the entrance to the proposed function room other than to recommend that operational measures be implemented so that queuing or milling around the entrance door does not occur. He said that since this area was only metres away from his front balcony any such noise was likely to have a serious impact causing undue annoyance and disturbance.

65 Ms Hendry said that she spoke on behalf of a number of other residents. She said that when she moved into the Cathedral precinct she was aware that it was a quiet residential area that included a small community hotel. She said that as a consequence of the lack of parking and the increased operating hours of the Queens Head foot traffic to and from the hotel was becoming increasingly problematic, especially late at night. She said that on occasions she had to clean up broken glass, hose off urine and vomit and sweep up rubbish. She made complaints of vandalism, littering, pollution, excessive noise, of difficulty with parking and safety concerns.

66 She said:

“It seems beyond belief that serious consideration be given to increasing the Queens Head Hotel trading hours that will consequentially escalate the potential and frequency for such incidents to occur in a densely populated area such as North Adelaide with due cognisance of the fact that the subject hotel is surrounded by residential properties.”¹⁶

67 She spoke of the applicants’ neglect in abiding by the licensed conditions. She said “This does not engender any confidence that they would necessarily comply with any amended licence conditions should it be granted by the court.”¹⁷

68 She said:

¹⁵ Exhibit O22

¹⁶ Exhibit O23

¹⁷ Exhibit O23

“The application before the court calls for the conversion of the beer garden venue that has restricted noise and patronage conditions, to a two storey function facility that will increase patronage in the order of 10-11%.

The licensee or their representative may argue that 10% this is not a significant increase in patronage! However the increase in the patronage is in the latter part of the evening when the inclination to excessive consumption of alcohol is at its greatest. This will result in a significant multiplier effect to the equation which cannot be ignored. The current 8.00pm licence works as a form of self governance and residents can be confident that most noise will be finished by 8.30-8.45pm at least during the week.”¹⁸

- 69 A statement was placed before me without objection from Mr Parry. He is the manager of the Audit and Investigation section of Consumer and Business Services and he deals with complaints concerning liquor licences. He acknowledged the receipt of complaints concerning the applicants and the Queens Head. These related to late night noise from persons in vehicles in nearby streets, bottles and plastic cups in nearby streets and alleged breaches of licensed conditions.
- 70 Mr Parry had written to the applicants to remind them of their need to comply with licence conditions. He said that his unit attended the premises in January 2012 during the Test match at the oval and did not detect any breaches.

Analysis

- 71 I commence with some general observations about the witnesses who gave evidence. I did not detect any credit issues. I thought that all of the witnesses were honest and were generally reliable.
- 72 Given some of the comments made by some of the witnesses I need to make some general observations about the Queens Head, the Adelaide Oval redevelopment and the applications before the Court.
- 73 It must be remembered that the applicants presently possess a Hotel Licence. Under the terms of the Act that licence permits the applicants to trade between 5.00am and midnight on any day of the year except Sundays, Good Friday and Christmas Day in all licensed areas of the hotel.
- 74 That is their lawful right.
- 75 The applicants already have an extended trading authorisation that enables them to trade in Areas 1 to 3 and 7 up to 10.00pm on Sundays.

¹⁸ Exhibit O23

- 76 Thus, whatever is the fate of this application, the Queens Head is able to trade until midnight on most days and until 10.00pm on Sundays.
- 77 The Adelaide Oval redevelopment will proceed irrespective of the outcome of this case. It will result in a substantial increase in the activity in and around the Cathedral precinct. On days and nights when there are activities at the Adelaide Oval there might be tens of thousands of people in the area.
- 78 It can be expected that even if these applications are refused the Queens Head will take advantage of the trading opportunities that these numbers will create. Even in its present condition the Queens Head is an attractive establishment. On days and nights when there are activities at the Adelaide Oval it can be expected to trade at or near capacity.
- 79 In other words, even if these applications are refused, the trading patterns at the Queens Head will change. It will attract greater patronage.
- 80 It can also be expected that whatever is the outcome of these applications the large number of people that will be in the vicinity of the Cathedral precinct on the days and nights when there are activities at the Adelaide Oval will interfere with the quiet enjoyment of those who reside in and about Kermode Street. Some of those people will be affected by alcohol that will have nothing to do with the Queens Head. In other words, whatever the outcome of these applications, the disturbance, interference and annoyance of some of the residents living in and about Kermode Street will increase.
- 81 Thus, the stated desire of Professor Hetzel for things to stay the way they are is unachievable. So too is the wish of Mrs Dolling and Ms Hendry for the Queens Head to revert to a quiet, small community hotel.
- 82 Ultimately what is involved here are a series of applications under various statutory provisions that involve the application of settled legal principles to the facts.
- 83 First, there is an application pursuant to s 68 of the Act. It relevantly provides:

“68—Alteration and redefinition of licensed premises

- (1) The licensing authority may, on the application of a licensee—
 - (a) approve an alteration or proposed alteration to the licensed premises;
 - (b) redefine the licensed premises as defined in the licence;

- (c) designate a part of licensed premises as a dining area or a reception area;
 - (d) in the case of a producer's licence—remove a production outlet or retail outlet from the licensed premises.
- (2) An application for approval of an alteration to licensed premises must not be granted unless the licensing authority is satisfied that all other approvals, consents or exemptions required by law have been obtained.
- ...”

84 Second, there is an application for extended trading under s 44. It provides:

“44—Extended trading authorisation

- (1) An extended trading authorisation is a condition of a licence extending the hours during which the licence authorises trade in liquor.
- (2) An extended trading authorisation cannot be given unless the licensing authority is satisfied that—
 - (a) the grant of the authorisation would be unlikely to result in undue offence, annoyance, disturbance, noise or inconvenience to people who, for example, reside, work, study or worship in the vicinity of the licensed premises; and
 - (b) the licensee will implement appropriate policies and practices to guard against the harmful and hazardous use of liquor.
- (3) On granting an extended trading authorisation, the licensing authority may include further conditions in the licence that it considers appropriate in view of the extended trading authorisation.”

85 Third, there is an application for entertainment consent under s 105. It relevantly provides:

“105—Entertainment on licensed premises

- (1) A licensee must not use any part of the licensed premises, or any area adjacent to the licensed premises, for the purpose of providing entertainment unless—

- (a) the consent of the licensing authority has been obtained; and
 - (b) in the case of a licence that authorises the sale or supply of liquor for consumption on the licensed premises—
 - (i) the licensed premises are, at all times while the entertainment is being provided, open for the sale or supply of liquor for consumption on the licensed premises under the licence; or
 - (ii) the terms of the consent of the licensing authority expressly allow the provision of entertainment in circumstances in which the licensed premises are not open for the sale or supply of liquor for consumption on the licensed premises under the licence.
- (2) The licensing authority may only grant its consent if satisfied that—
- (a) the giving of the consent would be consistent with the objects of this Act; and
 - (b) the entertainment is unlikely to give undue offence to people who reside, work or worship in the vicinity of the premises.
- (3) The licensing authority may grant its consent under subsection (1) subject to conditions it considers necessary or desirable.
- (4) Any conditions imposed under subsection (3) have effect as conditions of the licence and operate according to their terms whether or not entertainment is being provided in accordance with the consent of the licensing authority.

...”

86 Each application is also subject to the general discretion of the Court that enables it to refuse an application if it would be contrary to the public interest to grant the application.

87 The application to alter the premises under s 68 is one that seeks to convert a rudimentary beer garden that is open and which contains no acoustic dampening into a modern, attractive, acoustically designed

structure. I find that it will make the Queens Head into a more attractive facility.

- 88 Leaving aside issues expressed about noise and permitting access to the facility from Abbott Lane, on the face of it, it seems to me to be a perfectly sensible proposal that warrants the grant of the application.
- 89 The police are clearly concerned that permitting access to the proposed facility from Abbott Lane may cause public safety and policing issues. Hence their proposal to bring the matter back before the Court if thought necessary. I also share Mr and Mrs Guest's concern that this aspect of the proposal could unreasonably interfere with them. They too should have the right to bring this matter back before the Court if they believe that it warrants further consideration.
- 90 I now turn to the issue of noise. At this stage I confine myself to this aspect of the application. In other words, for the moment I ignore the application for extended trading and entertainment.
- 91 I thought that Mr Turner was an impressive witness. I accept his evidence that what is proposed is state of the art. I accept his evidence that the new proposal will provide a greater degree of acoustic protection than that which presently exists.
- 92 Subject to the question of discretion and subject to making the condition regarding Abbott Lane on an interim basis, on the understanding that all other approvals, consents or exemptions required by law have been obtained, I would approve the proposed alterations to the licensed premises.
- 93 I now turn to consider the application to extend the hours during which the licensee can trade.
- 94 The objectors contend that to grant this application will result in undue offence, annoyance, disturbance, noise and inconvenience to people who reside in the vicinity of the licensed premises.
- 95 These words have been the subject of much discussion in cases and I am bound to follow the relevant legal principles. These are as discussed by Judge Soulio in *The Holdfast Hotel* where he said:

“In the context of s 44, ‘undue’ means not appropriate or suitable, or going beyond what is appropriate, warranted or natural, or excessive.

What is undue must be considered in the context of the activities of licensed premises. Any resident living near a hotel must expect a certain amount of necessary or usual noise from people arriving at or departing from the premises. It will often be necessary to expect

residents to tolerate a degree of disturbance or inconvenience, even annoyance or offence in the interests of the community's need for licensed premises.

In *Hackney Tavern* the Full Court accepted Judge Kelly's interpretation of the word 'undue' as a correct application of the law, when he 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. ... Disturbance such as loud talking, swearing, perhaps even the odd screaming, perhaps even a fight or two, even on a relatively regular basis might not in many cases be classed as undue. As I have said, people who live in the vicinity of a hotel must accept some disturbance.'" (footnotes omitted)¹⁹

- 96 I can understand that residents living near the Queens Head might on occasions find members of the public quite annoying, especially late at night. Doubtless some of these members of the public will have spent time at the Queens Head and consumed liquor there. But not all of them.
- 97 There are two University Colleges within close proximity of the Queens Head. Without intending to make any disparaging remarks about these institutions I am permitted to know that on occasions university students drink alcohol and can be quite boisterous. It would be reasonable to assume that at least on some occasions such students might be a source of annoyance to those living near the Queens Head.
- 98 It is also notable that there is another hotel just a few hundred metres east of the Queens Head. Patrons from that hotel could also be a source of problems to those living near the Queens Head. Thus, I do not accept that it is only patrons of the Queens Head that are the source of annoyance to nearby residents.
- 99 Had the evidence established that the existing arrangements were a consistent source of undue offence, annoyance, disturbance, noise and inconvenience to people who reside in the vicinity of the licensed premises it would be a small step to conclude that the proposed extension would fail to meet the criteria provided for by the Act.

¹⁹ [2008] SALC 29

- 100 However, having regard to all of the evidence led on this issue, and directing myself in the manner suggested in *Hackney Tavern* I do not find that that state of affairs exists.
- 101 The same is true in respect of the application under s 105, which contains similar criteria.
- 102 In respect of both of these applications, subject to the imposition of appropriate conditions, unless the exercise of the Court's discretion indicates otherwise, these applications should be granted.

Discretion

- 103 The discretion conferred by s 53 of the Act is very wide²⁰. In *Waiata Pty Ltd v Lane* King CJ said:

“When this is appreciated, it can be seen that at least one purpose, and without doubt the primary purpose, for which the discretion is conferred, is the protection of that general public interest, which is to be distinguished from the public need or demand for liquor facilities, in the number, type, location and standard of liquor outlets and in the conditions under which they are to be permitted to operate.”²¹

- 104 My very firm impression of the evidence is that a major feature of the residents' concerns stems from their lack of confidence in the applicants' willingness and ability to comply with the conditions of the licence.
- 105 That concern is perfectly understandable. Clearly when changes to the conditions of the licence were sought some years ago, albeit when there was a different licensee, the residents were particularly concerned about issues of noise, security and rubbish. Through negotiation they insisted upon significant obligations on the part of the licensee. The residents were entitled to assume that as a result of the agreement that was reached there would be a significant security presence in the nominated streets and that minimising noise and the removal of rubbish in the vicinity of the hotel would be a priority.
- 106 The evidence establishes that this has not eventuated.
- 107 Mr Franzon said that he would never have agreed to those conditions. That is not to the point. They were the conditions the applicants inherited when they acquired this licence.

²⁰ *Dalgety Wine Estates Proprietary Limited v Rizzon and Another* (1979) 141 CLR 552 at 566 per Stephen J and at 566 per Mason J.

²¹ (1985) 39 SASR 290 at 294.

- 108 He said he did not fully appreciate the terms of the licence. This is a lame excuse. The sale of liquor is part of a hotel's core business. In disciplinary proceedings, this Court has repeatedly said that licensees, and especially hotel licensees, are obliged to fully understand the obligations that the licence imposes. The applicants' duty was to fully understand what the conditions of the licence required. They fell short of that duty.
- 109 Mr Franzon said that in light of current security practices, security guards are reluctant to venture too far from licensed premises. I can understand that. But the remedy was not to ignore the condition. If the conditions were unworkable the solution lay in an application to vary them.
- 110 These matters have weighed heavily on my mind. They provide cogent evidence upon which the Court could be satisfied that in the exercise of its discretion the applications should be refused.
- 111 Ultimately, however, I have come to the conclusion that the public interest does not require the refusal of the applications.
- 112 Two factors loomed significant.
- 113 The first is that these applications were pursued as a joint package. In other words, if any aspect of the application fails the application in its entirety will fail.
- 114 In light of the inevitable increase in the trade of the Queens Head that will accompany the completion of the development of the Adelaide Oval, the absence of an acoustically designed structure in Area 6 will add to the issues that the residents already have to contend with. Moreover, the condition that the applicants have now agreed upon that will limit amplification within the hotel premises will improve the situation that presently exists. Thus, it seems to me, that given the consequences of the redevelopment of the Adelaide Oval the proposed changes are likely, on balance, to be to the benefit of, not the detriment of nearby residents.
- 115 The second is that I thought that Mr Franzon was being genuine in expressing his contrition about the present state of affairs. His candour in admitting that he had not managed the premises as well as he might and of not paying sufficient concern to the complaints of residents was refreshingly honest. I believe him when he says that he is committed to improving the situation.

Some miscellaneous matters

- 116 Some of the terms previously agreed upon are unworkable. For example, how could the licensee comply with the obligation to supply the

telephone number of the daily manager and licensed security personnel to all nearby residents?

- 117 For one thing the expression “nearby residents” is not defined. Even if it were, the task of circulating the telephone number of a casual security guard who turned up on the night to fill a casual vacancy would, in all likelihood, be almost impossible to achieve.
- 118 I also think that the obligation to have a security guard patrol the length of Abbott Lane and Lakeman Street, and also Kermode Street between the hotel and Palmer Place is unworkable. The licensee only has control of the licensed premises. A security officer operating outside of the premises has no more authority than a member of the public. Moreover, the primary role of security is to monitor those entering and leaving the licensed premises and ensuring appropriate behaviour within the licensed premises. It would be contrary to the Act to impose conditions upon a licence that deflected from these primary responsibilities.
- 119 I propose to vary the conditions of the licence to provide the residents with some of the comfort they sought in earlier agreeing to the existing conditions but in a way that makes them effective and enforceable in accordance with the Act.
- 120 Subject to any input that the applicants or the objectors might wish to put I would propose that the condition relating to security should read as follows:

The licensee shall whenever the licensed premises are trading engage sufficient crowd controllers as may reasonably be required to adequately supervise the licensed premises. On Friday and Saturday nights and on any night when the licensee holds a function there shall be a minimum of one approved crowd controller. On such occasions if there are more than one hundred patrons within the hotel the licensee shall engage additional crowd controllers. That number shall not be less than one crowd controller per one hundred patrons. Whenever a crowd controller is engaged by the licensee the crowd controllers shall remain and continue to monitor the licensed premises until one hour after the premises have ceased to trade.

Summary and conclusions

- 121 The applications seeking a variation to the entertainment consent that applies to the hotel; a variation to extend the trading authorisation and the conditions of the licence; and approval of the proposed alterations to the licensed premises are granted. These are subject to the conditions proposed by the applicants including those agreed with the Commissioner for Police and the Corporation of the City of Adelaide.

The approval permitting entry to Areas 5 and 6 from Abbott Lane is on an interim basis that is to run for a one-year period following completion of the alterations. The Commissioner for Police and Mr and Mrs Guest has liberty to apply, to seek revocation or modification of that approval during that period.

- 122 I propose amending the condition of the licence regarding security so as to make the condition workable and enforceable. Subject to receiving submissions from the parties, which should be made within 14 days, it shall be in the terms contained within these reasons.
- 123 I conclude by informing the applicants that they are on notice that they need to be vigilant in complying with the conditions of the licence. If in connection with these premises the applicants fall short of their obligations and a complaint is made under s 106 or disciplinary action is taken under s 120 of the Act, and one or the other is proved, the assurances that Mr Franzon has given this Court regarding the applicants' commitment to compliance will weigh heavily on the Court's mind in determining the outcome of any such action.