*Heysen Hotel (SA) Pty Ltd v Fassina Investments Pty Ltd (No. 2)* **[2025] SALC 112**

**LICENSING COURT OF SOUTH AUSTRALIA**

HEYSEN HOTEL (SA) PTY LTD

v

FASSINA INVESTMENTS PTY LTD

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| **JURISDICTION:** | Referral from Commissioner |
| **CASE NO/S:** | LC-24-00043 and LC-24-00049 |
| **HEARING DATE:** | 15 August 2025 |
| **JUDGMENT OF:** | His Honour Judge BP Gilchrist |
| **DELIVERED ON:** | 23 September 2025 |

**CATCHWORDS:**

*Form of orders following the publication of reasons for decision granting a certificate of approval under s 59(1) of the Liquor Licensing Act 1997 approving the plans submitted by the Applicant on 14 August 2023 in respect of the hotel premises to be constructed at Mount Barker, SA, and a certificate of approval under s 17C(1) of the Gaming Machines Act 1992 approving the plans in respect of the hotel premises to be constructed at the premises – Whether the orders should include a direction that any application seeking approval for variation to the premises plans prior to the grant of the licences shall be made to the Licensing Court Judge, with the objector being notified at the time of any such application and given the opportunity to be heard on any such application – The objector is right to contend that the applications before this Court succeeded because they were founded on a very specific footing, that is that it would result in the creation of a large, attractive hotel offering a generous suite of facilities. It is also right to contend that this Court is entitled to proceed on the understanding that the hotel will be built as promised, and that if there is to be any change to the plans, this Court is entitled to know about them and decide for itself, whether any variation to the plans ought to be permitted –* ***Held*** *that an order in the terms proposed by the objector should be included – Liquor Licensing Act 1997, Gaming Machines Act 1992.*

*Heysen Hotel (SA) Pty Ltd v Fassina Investments Pty Ltd* [2025] SALC 3
*BWS – Mount Gambier* [2013] SALC 82
*Erythos Holdings Pty Ltd* [2015] SALC 34

**REPRESENTATION:**

Counsel:
Applicant: Mr T Duggan KC with Mr J Dodd
Respondent: Mr M Roder KC with Mr B Allen

Solicitors:
Applicant: Piper Alderman Lawyers
Respondent: Wallmans Lawyers

1 For reasons published by me on 18 February 2025,[1] I found that subject to imposing a condition requiring the applicant to attend to the satisfaction of the planning authority the matters that it reserved, a certificate of approval should be granted in respect of the applicant's application for a general and hotel licence relating to the Heysen Hotel, Mount Barker. I also found that subject to imposing conditions, the applicant's application for the gaming machine licence and 40 gaming machine entitlements for use at that hotel should be granted. I concluded by directing counsel for the applicant to prepare draft orders that reflected these outcomes for the Court's consideration. In doing so, I anticipated that there would be some engagement with the objector's lawyers regarding the form of those orders. That occurred, and the parties have reached a consensus as to the form of the orders, subject to one matter.

2 It goes without saying that it is not for the parties to determine the final form of the orders. Ultimately, it is the Court's order, and it has the final say. But as a matter of good practice and procedural fairness, input from the parties is both desirable and necessary.

3 The applicant and the objector agree upon the following orders:

> UPON A REFERRAL FROM THE COMMISSIONER OF AN APPLICATION FOR A NEW GENERAL AND HOTEL LICENCE AND GAMING MACHINE LICENCE ("THE APPLICATION")
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> THE COURT ORDERS:
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> 1. THAT a certificate of approval under section 59(1) of the Liquor Licensing Act 1997 (LLA) is granted to the Applicant approving the plans submitted by the Applicant on 14 August 2023 (Plans) in respect of the hotel premises to be constructed at 239 Wellington Road, Mount Barker SA 5251 (Premises).
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> 2. THAT a certificate of approval under section 17C(1) of the Gaming Machines Act 1992 (GMA) is granted to the Applicant approving the Plans in respect of the hotel premises to be constructed at the Premises.
>
> 3. THAT the certificate of approval under the LLA is granted on the following conditions:
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>  3.1. A General & Hotel Licence conferring the trading rights specified below at paragraph 3.2 shall be granted to the Applicant, upon the Applicant providing a certificate of occupancy in respect of the Premises so as to satisfy the Licensing Authority that the Premises have been completed

[1] *Heysen Hotel (SA) Pty Ltd v Fassina Investments Pty Ltd* [2025] SALC 3.

in accordance with the Plans, or such variation as later approved by the Licensing Authority;

3.2. The General & Hotel Licence shall confer the following trading rights pursuant to section 32 of the LLA:

(a) the licensee shall be authorised to sell liquor in the areas marked in red on the Plans (or such variation of the Plans as may be later approved by the Licensing Authority) (Licensed Premises) for consumption on the Licensed Premises, during the following trading hours:

Monday to Sunday: 8:00 am to 2:00 am the following day.

(b) the licensee shall be authorised to sell liquor on the Licensed Premises for consumption off the Licensed Premises, during the following trading hours:

Monday to Sunday: 9:00 am to 10:00 pm.

(c) the licensee shall be authorised to sell liquor at any time through direct sales transactions.

3.3. The certificate shall lapse on 31 December 2028 if the Premises are not completed by this date, or such other date as may be approved by the Licensing Authority.

4. THAT the certificate of approval under the GMA is granted on the following conditions:

4.1. A Gaming Machine Licence conferring the trading rights specified below at paragraph 4.2 shall be granted to the Applicant, upon the Applicant providing a certificate of occupancy in respect of the Premises so as to satisfy the Licensing Authority that the Premises have been completed in accordance with the Plans, or a variation of those plans later approved by the Licensing Authority;

4.2. The Gaming Machine Licence shall confer the following trading rights in accordance with section 14(1)(a) and section 27(1) of the GMA:

(a) subject to paragraph 4.2(b) below, the licensee shall be authorised to possess on the Premises and operate 40 machines in the gaming area of the Licensed Premises during the following trading hours:

8:00 am to 2:00 am the following day;

(b) for the period commencing on the day upon which the Gaming Machine Licence is granted and expiring five years thereafter, the licensee may only conduct gaming in the gaming area of the Licensed Premises during the following trading hours:

(1) Sunday to Thursday: 8:00 am to midnight (unless any of those days fall before a public holiday, in which case the licensee shall be permitted to trade until 2:00 am on the morning of the relevant public holiday); and

(2) Friday to Saturday: 8:00 am to 2:00 am the following day.

4.3. The certificate shall lapse on 31 December 2028 if the Premises are not completed by this date, or such other date as may be approved by the Licensing Authority.

5. THAT upon completion of the five year period referred to at paragraph 4.2(b), without any need for any further application to or order of the Licensing Authority:

5.1 the trading hours restriction referred to at paragraph 4.2(b) shall expire and have no further effect;

5.2 the Gaming Machine Licence shall authorise gaming on the Premises during the following trading hours;

8:00 am to 2:00 am the following day;

5.3 the Licensing Authority shall issue an updated Gaming Machine Licence reflecting the expiry of the trading hours restriction.

4 What the parties disagree upon is whether there should be specific wording of an order dealing with the contingency that a variation to the plans is sought.

5 As I understand the objector's position, it contends that in the event of any proposed variation to the approved plans in respect of the proposed premises, any such variation must be presented to the Licensing Court for approval, and the objector must be notified of the application and afforded an opportunity to be heard in respect of such proposed variation.

6 Hence it seeks an order in the following terms:

> That any application seeking approval for variation to the premises plans prior to the grant of the licences shall be made to the Licensing Court Judge, with the objector being notified at the time of any such

> application and given the opportunity to be heard on any such application.

7 The applicant opposes this. It submits that the *Liquor Licensing Act 1997* (the Liquor Act) and the *Gaming Machines Act 1992* (the Gaming Act) contemplate that the approved plans in respect of premises in respect of which a certificate or certificates have been granted may change. It notes that s 59(3)(ii) of the Liquor Act provides for the grant of a licence conferring the trading rights, and subject to the conditions in a certificate, if "the premises have been completed in accordance with plans approved by the licensing authority on the grant of the certificate or a variation of those plans later approved by the licensing authority". It notes that s 17C(4)(b) of the Gaming Act provides for the grant of a gaming machine licence if "the conditions (if any) on which the certificate was granted have been complied with; and that the premises have been completed in accordance with plans approved by Commissioner on the grant of the certificate or a variation of those plans later approved by the Commissioner".

8 It submits that the use of the words "the licensing authority" in s 59(3) of the Liquor Act is instructive and contemplates that this issue of any approval of variation is, in the first instance a matter for the Liquor and Gambling Commissioner, as that office would be seen as the usual decision-maker in respect of proposals to make alterations to licensed areas plans and trading rights pursuant to licences.

9 It notes that some changes to the approved plans may be exceptionally minor, and may be required at multiple and urgent times during the construction phase of the premises. It submits that in respect of such matters, it would be unduly onerous upon the applicant to require such applications to be made to the Licensing Court. It added that it would also be unduly administratively burdensome and time-consuming to the Court, to have to deal with such matters. It also argued that to so require is contrary to the purposive nature of these sections of the Liquor Act and the Gaming Act and contrary to the community interest and the public interest.

10 The objector noted that a matter that was of great significance in this case was the nature of the proposed premises.

11 It referred to various passages from the reasons for decision, such as

> It submitted that it will be a major building project that will inject millions of dollars into the local economy. It submitted that as a destination venue it was likely to bring into Mount Barker additional tourism. It submitted that it would be of great social benefit to the many residents who reside in the general vicinity, who for now are

> denied ready access to a large facility where they can socialise and enjoy all the benefits of a family orientated hotel. It submitted that as might have been expected of such an attractive offering, its survey indicated a very positive community response.[2]
>
> …
>
> What is proposed here is a large, attractive hotel offering a generous suite of facilities.[3]
>
> … the area in the immediate vicinity of the proposed premises is lacking in infrastructure and it can be safely inferred that many residing there would welcome a large attractive licensed facility...[4] (Emphasis added)

12 The objector submitted that this Court is entitled to proceed on the understanding that the hotel will be built as promised, and that if there is to be any change to the plans, this Court is entitled to know about them and decide for itself, whether any variation to the plans ought to be permitted.

13 It referred to *BWS – Mount Gambier*.[5] That case concerned an application for a retail liquor merchant's licence that was founded upon the desirability of offering a small takeaway facility adjacent to a supermarket. After referring to s 43(1) of the Act, which gives a licensing authority, which includes this Court,[6] a general power to impose a condition on a licence, the Court imposed a condition "requiring the applicant to obtain permission from the Court for any alteration to the licensed premises should be imposed".[7]

14 It also referred to *Erythos Holdings Pty Ltd.*[8] That case also concerned an application for a retail liquor merchant's licence. It was founded on a very specific footing, namely a smallish, good quality bottle shop offering a better range of liquor than was presently available in Port Pirie that would also offer extra convenience to those residing in the vicinity of the proposed premises. Having effectively expressed the view that the application may not have succeeded if it were otherwise, the Court invoked s 43(1) of the Liquor Act and imposed a condition on the licence that any application to remove the licence or any application to change the

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[2] Ibid at [121].
[3] Ibid at [175]
[4] Ibid at [231].
[5] [2013] SALC 82
[6] Section 4 of the Liquor Act relevantly defines a licensing authority as: "in relation to a matter that is to be decided by the Court under this Act—the Court".
[7] Ibid at [84].
[8] [2015] SALC 34.

dimensions of the licensed premises, must be referred to the Court for determination.[9]

15 The objector concluded by submitting that having had an application to vary referred to it, if the application concerned a minor matter, the Court could remit the matter to the Liquor and Gambling Commissioner. Its point was, that at first instance, this was a matter for the Court, not the Commissioner.

**Consideration**

16 The objector is right to contend that the applications before this Court succeeded because they were founded on a very specific footing, that is that it would result in the creation of a large, attractive hotel offering a generous suite of facilities. I repeat the following observation made by the Court in the primary decision:

> I approach the issue of discretion from the premise that this case has been decided very much on its own unique facts. These include that the locality has and will continue to experience rapid population growth; there have been no additional gaming machine entitlements granted in the locality for over twenty years; the area in the immediate vicinity of the proposed premises is lacking in infrastructure and it can be safely inferred that many residing there would welcome a large attractive licensed facility, which will not be constructed without the grant of the gaming machine entitlements; the locality has a socio-economic profile that is not normally associated with alcohol related issues or significant problem gambling; the existing NGR in the locality is not, by general standards, concerningly high; there is little evidence of community opposition to the establishment of the facility; and it is positively endorsed by the local council.
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> Indeed, this case serves as a paradigm example of "the importance of looking at the factual picture as a whole", in recognition of the fact that the addition or subtraction of a particular factor might tip the balance one way or the other.[10]

17 The objector is therefore right to submit that this Court is entitled to proceed on the understanding that the hotel will be built as promised, and that if there is to be any change to the plans, this Court is entitled to know about them and decide for itself, whether any variation to the plans ought to be permitted.

18 It is therefore appropriate to invoke s 43(1) of the Act to ensure that an application for variation is, at least in the first instance, to come before the

[9] Ibid at [200]-[201].
[10] Ibid at [231] and [232].

Court. Accordingly I adopt the proposed wording set out in paragraph 6 herein. I otherwise adopt the terms of the draft order submitted.

19 Draft orders will now be forwarded to the parties for final consideration.