

LICENSING COURT OF SOUTH AUSTRALIA

THE CURIOUS SQUIRE

JURISDICTION: S 120 Complaints for Disciplinary Action

FILE NO: 4207 & 4208 of 2013

HEARING DATES: 5 and 6 May 2014

JUDGMENT OF: His Honour Judge B Gilchrist

DELIVERED ON: 29 May 2014

Disciplinary complaint - The police allege a breach of a condition requiring external doors and windows to be closed in prescribed circumstances; a breach of a condition stipulating that the prime use of the premises must be as a restaurant; and a breach of a condition that prohibits the placement of loudspeakers on the fascia of the premises and/or on or in any adjacent outdoor area - Whether it is permissible for the police to adduce evidence of their experience as to whether this licensed premises was being run as a restaurant or as something else at the time of their visit - Held that it is not - How are the conditions of a licence to be construed? - Held that as a matter of general principle they should be construed in the same way as a statute or a written contract - What does the expression "external doors and windows" as it appears in the conditions of the licence mean? - Held that it concerns doors and windows that separate the premises from areas outside of the premise - Whether the evidence establishes that the prime use of the premises was not that of a restaurant - Held that it did not - What do the expressions "the fascia of the premises" and "in an adjacent outdoor area" as they appear in the conditions of the licence mean? - Held that fascia of the premises means the upper part of a shopfront with the proprietor's name etc. and that the expression "an adjacent outdoor area" refers to the area outside of the licensed premises - Held that that there is not proper cause for taking disciplinary action against the respondents and the complaint is dismissed - Ss 34, 119, 120 and 134(3) of the Liquor Licensing Act 1997.

Queens Head Hotel [2012] SALC 79
R v Fazio (1997) 69 SASR 54
R v Barker (1988) ACR 143
Quartuccio v State of South Australia [2013] SASC 167
Investors Compensation Scheme v West Bromwich Building Society [1998]
1 WLR 896
Cibolini Pty Ltd v Sullivans Hotels Pty Ltd [1999] SASC 326
The Venue unreported delivered 28 March 1994 cited in *Wine Barrel
Restaurant* [1995] SALC 24

REPRESENTATION:

Counsel:

Applicant: Mr M Nicholas

Intervenor: Mr P Kelly

Respondent: Mr D Edwardson QC with Mr J Firth

Solicitors:

Applicant: Commissioner for Police and Office of Liquor and
Gambling Commissioner

Intervenor: Norman Waterhouse

Respondent: Duncan Basheer Hannon

- 1 This is an application for disciplinary action that has been taken by the Commissioner of Police pursuant to ss 119 and 120 of the *Liquor Licensing Act 1997* against Majestic Entertainment Pty Ltd, the licensees of “The Curious Squire” (the premises) and against its director, Mr Antony Tropeano.
- 2 The premises operate under a restaurant licence. The application is founded on the assertion that Majestic, when conducting the business under the licence on the evening of Saturday 18 May 2013, breached certain conditions of the licence. Action is taken against Mr Tropeano on the basis of his vicarious responsibility for the alleged breaches as provided for by s 134(3) of the Act.
- 3 The police allege a breach of a condition requiring external doors and window to be closed in prescribed circumstances; a breach of a condition stipulating that the prime use of the premises must be as a restaurant; and a breach of a condition that prohibits the placement of loudspeakers on the fascia of the premises and/or on or in any adjacent outdoor area.
- 4 At issue are the following:
 - whether it is permissible for the police to adduce evidence of their experience as to whether this licensed premises was being run as a restaurant or as something else at the time of their visit;
 - how are the conditions of a licence to be construed;
 - what does the expression “external doors and windows” as it appears in the conditions of the licence mean;
 - whether the evidence establishes that the prime use of the premises was not that of a restaurant; and
 - what do the expressions “the fascia of the premises” and “in an adjacent outdoor area” as they appear in the conditions of the licence mean.

The premises

- 5 The premises are situated at premises at 10 O’Connell Street in what might be described as the south eastern corner of the O’Connell Street precinct. Unlike some other licensed premises in North Adelaide with which the Court is familiar¹, it is relatively isolated. To the immediate

¹ Such as the Queens Head in Kermode Street which is situated in a densely residential area and which was discussed in some detail in *Queens Head Hotel* [2012] SALC 79.

south is a park which adjoins the Women's and Children's Hospital, some distance away. To the north are other commercial premises. To the east is O'Connell Street, which at that point is a four lane road and on the other side of the road is the Hotel Adelaide. To the west are an apartment block and other residences.

- 6 The premises are currently divided into three areas for licensing purposes. Area 1 to the north, Area 2 in the middle and Area 3 to the south.
- 7 Area 1 is rectangular in shape. It is an enclosed structure that is within the Brougham Plaza. It has solid walls to the north and east. The western wall is solid to about waist height. The remainder comprises of windows that can be opened. It abuts the footpath on the eastern side of O'Connell Street. There is a large doorway in the middle of the western wall that provides the only means of entry and exit into the premises. East of that, almost on the centre of Area 1 is a bar that extends across most of the length of the area. It has a set of barstools where people may sit at the bar. There is an area to the north of the bar called the servery area, and a wooden pizza oven. East of the bar is an enclosed commercial kitchen. The southern wall of Area 1 is generally made of glass with bi-fold glass doors leading into Area 2, which is immediately south of Area 1. There is a service window between Areas 1 and 2. Area 2 has a vergola roof. This is a structure like a pergola that has the capacity to be changed into essentially a solid roof. It is bounded to the west by a fence comprising of iron pickets. There is facility for a plastic see through blind to also act as a form of wall on the western side. There is no structure on the eastern boundary. It is adjacent to the side wall of a large majestic building. It appears that Areas 2 and 3 were once part of the courtyard/yard of that building. Those areas have stone or concrete floor pavers in contrast to Area 1 that has a wood or linoleum floor. The southern boundary of Area 2 is marked by a set of steps that lead into a raised area delineated as Area 3. Within Area 2 is a large tree. In the middle of Area 3 is a large umbrella that is permanently fixed. It provides shelter for most of Area 3. The western boundary of Area 3 comprise of a solid elegant bluestone fence. As with Area 2 there is no structure on the eastern boundary of Area 3. The southern boundary also comprises of a solid elegant bluestone fence. There are tables and chairs in all areas.

The history of the licence

- 8 On 23 February 1996 this Court granted the then proprietors of the premises a General Facility licence which was later reconfigured as a Special Circumstances licence. In both instances the licence contained conditions that included the following.

“No live entertainment shall be provided on or adjacent to the licensed premises.

There shall be no speakers placed on the facias of the premises.

There shall be no speakers placed on the pavement adjacent to the premises.

No speaker in the premises to be placed closer than four metres from any entrance to or exit from the premises and at all times any such speaker is to be directed away from the entrance to or exit from the premises and into the premises proper.

Noise emanating from the premises shall not exceed 5dbA above the ambient background noise level when measured in any octave such measurement to be taken at the boundary of any nearby premises.”

9 Entertainment consent was provided on 1 October 1997. At that time live entertainment was not allowed.

10 On 1 March 1999 the conditions of the licence were varied. The bar to live entertainment was removed and the following condition was imposed:

“Any live entertainment provided shall not include ‘live amplified entertainment of a rock band or DJ type’.”

11 The licence changed hands on 19 August 2010 and the then occupants of the premises made an application for a restaurant licence so as to conduct the business of a restaurant from the premises. The Corporation of the City of Adelaide intervened in that application and the Commissioner for Liquor and Gambling conducted a conference between the parties culminating in the grant of the licence with an extended trading and entertainment consent on certain agreed conditions. These included the following:

“Noise from the premises (including live or recorded entertainment, singing, patron noise or similar) when assessed at the nearest noise sensitive location shall be less than 8dB(A) above the level of background noise in any octave band of the sound spectrum.

All external doors and windows are to be closed when the ‘in-house’ sound system is in use (other than for low level background music), live entertainment is being undertaken or a jukebox is available for use.

The prime use of the premises shall be that of a restaurant with any entertainment being ancillary to that prime use.

Entertainment shall cease at 12 midnight on any night.

There shall be no loudspeakers placed on or in the fascia of the premises, balcony or in any adjacent outdoor area.”

- 12 It is reasonably clear that the discussion around the conditions of the licence included discussions about extending the licensed premises to include Area 4 being a series of tables and chairs on the footpath outside the premises on O’Connell Street. When a formal restaurant licence was issued on 31 December 2010 it made provision for a provisional entertainment consent and reference to Area 4 subject to the issue of an appropriate Council permit. On 13 March 2012 the licence was transferred to Majestic. For present purposes the conditions of the licence are unchanged, although the provisional licensing of Area 4 has since lapsed.
- 13 In the present licence the condition relating to all external doors and windows being closed at certain times is condition 3. The condition relating to the prime use of the premises being that of a restaurant is condition 4. The condition relating to there being no loudspeakers placed on or in the fascia of the premises, balcony or in any adjacent outdoor area is condition 8.

The complaint

- 14 The police contend that on 18 May 2013 Majestic breached each of these conditions. The particulars in support of that contention are as follows:²

Ground 1 Entertainment/Noise: Breach of condition 3

On Saturday 18 May 2013, between 22.30 hours and midnight, at a time when the business/licensed premises was open to the public, Majestic breached condition 3 in that an external bi-fold door in the wall dividing Area 1 and outdoor Area 2 was open whilst live entertainment was being undertaken in Area 1 and/or the ‘in house’ speakers were operating in the business/licensed premises

Ground 2 Prime use of premises: Breach of condition 4

On Saturday 18 May 2013, between 22.30 hours and midnight, at a time when the business/licensed premises was open to the public, Majestic breached condition 3 in that the prime use of the premises was not as a restaurant by reason that the use of the premises involved:

- the service of liquor to patrons, with bar stools at the bar;

² These are not a verbatim reproduction of the particulars. They have been modified slightly without material change to make for easier reading.

- the provision of live entertainment involving loud music being undertaken by a DJ;
- no patron being present at that time being served, or eating food; and
- only a restricted meal being available.

Further, live entertainment was not ancillary to the 'prime use' as a restaurant by reason that live entertainment involving loud music being played by a DJ to patrons is not ancillary to the operation of a restaurant.

Ground 3 Placement of loudspeakers: Breach of condition 8

On Saturday 18 May 2013, between 22.30 hours and midnight, at a time when the business/licensed premises was open to the public, Majestic breached condition 8 in that:

- loudspeakers were attached to a large umbrella placed on or in an adjacent outdoor area, namely the raised outdoor seating area (area 3) of the business/licensed premises; and
- loudspeakers were placed 'on the fascia of the premises' and/or 'on or in any adjacent outdoor area', namely on the outside of the southern wall in the raised outdoor bar area (Area 2) of the business/licensed premises.

The police case

- 15 The police case comprised of a schedule of agreed facts and the oral evidence of Senior Constables Jessica Oldfield and Simon Coleman. Both are members of the Liquor Enforcement Branch.
- 16 The schedule establishes that at all relevant times two loudspeakers that were operational were located above the bi-fold doors that separate Areas 1 and 2. One was in the north western corner of Area 2 facing south. The other was in the north eastern corner facing south. It also establishes that that at all relevant times two loudspeakers that were operational were located in Area 3. Both were attached to the mast of the umbrella.

Admissibility of experience evidence

- 17 Before I turn to discuss the evidence of the two officers I need to make a ruling as to the admissibility of certain evidence that they gave. In connection with Ground 2 and the allegation that condition 4 had been breached in that the prime use of the premises was not as a restaurant the

police wished to adduce what they described as “experience evidence” from the two officers. I received that evidence *de bene esse*.

18 It was submitted that the officers are experienced in going into licensed premises, and that they can give evidence based upon that experience as to whether this licensed premises was being run as a restaurant or as something else at the time of their visit. It was said that because of that experience they were in the position of knowing, by reference to contemporary standards, the difference between a restaurant, and other types of businesses operating under a liquor licence. It was said that in light of their evidence that:

- a DJ was playing modern music loudly;
- there were patrons standing whilst drinking alcohol and some patrons were drinking “shots”;
- there were no table settings, such as cutlery and crockery and condiments being on tables;
- there was no-one eating at the premises;
- they were not greeted by wait staff or approached to have a seat at any point;
- there was no wait staff bringing drinks to tables; and
- the lighting was dark;

they were entitled to rely upon their experience and say that the premises had more of a club feel than a restaurant feel, and that the ambience of the premises was not that of a restaurant.

19 In support of that submission I was taken to *R v Fazio*³. In that case the appellant was found guilty by a jury and convicted of possessing cocaine for sale. At trial evidence was led from an experienced police officer of the street value of the cocaine that was alleged to have been in the appellant’s possession. In rejecting a submission on appeal that the evidence should not have been placed before the jury, Bleby J, with whom Doyle CJ and Lander J agreed, said:

“The High Court recognised in *Weal v Bottom* that evidence as to the likely behaviour of a vehicle, based on a course of actual and observed experience, is not so much opinion evidence of the type often given by experts, but evidence of that person’s experience or observation which, given similar circumstances, he would expect to

³ (1997) 69 SASR 54

be repeated. Thus, evidence of value or sales based on this type of information will be admissible.

Evidence of price based on hearsay material, such as the Australian Bureau of Criminal Intelligence Digest and information obtained from other Task Force officers is also admissible. It is not, strictly speaking, opinion evidence, but is information outside the ordinary range of human experience, of a type to which persons who have the requisite degree of study or experience may depose.”

(footnotes omitted)

- 20 I was also taken to *R v Barker*⁴, a case that involved the admissibility of evidence given by a police officer from the drug task force who had extensive experience with drugs and in particular cannabis. The prosecution led evidence at trial from the officer to the effect that based upon her experience the green vegetable matter in the possession of the accused was cannabis. That was led over objection and formed the basis of an appeal to the Court of Criminal Appeal. That Court dismissed the appeal on the basis that evidence of an experienced officer would assist the court and was admissible.
- 21 The police contended that by parity of reasoning it was permissible to adduce evidence from Officers Oldfield and Coleman about their experience of the ambience of restaurants as opposed to other sorts of licensed premises, such as hotels and night clubs. It was submitted that this evidence would assist the Court in determining whether the allegations regarding the prime use of the premises was as a restaurant had been made out.
- 22 I have two difficulties with this submission. The first is that here, we are not dealing with information outside the ordinary range of human experience. *Fazio* concerned the street value of cocaine. *Barker* concerned the identification of green vegetable matter as cannabis. It can readily be seen that in both of those cases the information sought to be adduced was outside the ordinary range of human experience. In such cases the triers of fact could not be expected to have an appreciation of the street value of cocaine or the visual characteristics of a cannabis plant.
- 23 In contrast to this, the supposed feel or ambience of restaurants as opposed to other sorts of licensed premises is not something that I would regard as outside of the ordinary range of human experience. It would certainly not be a subject outside of the experience of this Court, being a specialist court that routinely deals with licensed premises of all descriptions.

⁴ (1988) ACR 143

24 Secondly, the notions of “feel” and “ambience” are elusive concepts that are apt to stereotype. A stereotypical view of a restaurant would be an establishment where a patron would be met at the door by waiting staff, escorted to a table upon which was a tablecloth with set cutlery and glasses, whereupon the patron would be offered a drink and menu offering a range of fine meals in an environment comprising of slightly dimmed lighting, perhaps candlelight, and unobtrusive background music. A restaurant under the Act is not so defined. The characteristics of a restaurant as contemplated by the Act can be gleaned from the provision that enables the obtaining of a restaurant licence, being s 34. It relevantly provides:

“(1) Subject to this Act, a restaurant licence—

- (a) authorises the consumption of liquor on the licensed premises at any time with or ancillary to a meal provided by the licensee; and
- (b) authorises the licensee to sell liquor at any time for consumption on the licensed premises with or ancillary to a meal provided by the licensee; and
- (c) if the conditions of the licence so provide—authorises the licensee to sell liquor at any time for consumption on the licensed premises by persons attending a function at which food is provided or seated at a table...”

25 Thus the key features are that it is a business establishment that serves meals and sells liquor to customers to consume with or ancillary to their meals or in an appropriate case without food provided the customers are seated at a table or without a meal if it conducts a function and supplies food.

26 There is no requirement that such an establishment must have waiters, tables with tablecloths and set cutlery or menus offering a range of meals that are fine dining. Nor are they required to be conducted within an environment comprising of slightly dimmed lighting and unobtrusive background music.

27 Thus the experience of two officers about the feel and ambience that they have experienced at various licensed premises that they have visited will not assist the Court in determining whether the allegation in connection with an alleged breach of condition 4 has been made out. I rule that such evidence is inadmissible. I therefore will confine my discussion of the officers’ evidence to their observations on the night in question.

Senior Constable Oldfield

- 28 Senior Constable Oldfield said that she and Senior Constable Coleman were in plain clothes and attended the premises at about 11.00pm on the evening of 18 May 2013. They entered the front door from O'Connell Street. As she entered the premises she saw a DJ in the south west corner of Area 1 playing music. He was standing at a booth using a deck or DJ equipment. She described the music as dance type music with a loud bass. She said it was loud to the point that to have a conversation you needed to raise your voice. She observed the bi-fold doorway between Areas 1 and 2 and noted that it was open. As she entered Area 2 she could still hear music. She observed loudspeakers in Areas 2 and 3 and said that the same music being played in Area 1 was also emanating from those speakers, albeit at a lower volume. She said that within the three areas in all there were all up about 30 to 40 patrons. She said that there were more patrons in Areas 2 and 3 than in Area 1. She said that there were patrons seated at tables drinking what she believed to be liquor. She said that there were some patrons standing around the bar area in Area 1. She did not recall anyone actually being served liquor at the bar. She could not recall seeing anyone move liquor from the bar to some other part of the premises. She said that there were menus on the northern end of the bar. She described them as being white sheets of paper containing black print. She did not observe any cutlery on any of the tables within the premises. She did not see any serviettes or any evidence that a meal had been served. She was not greeted by anyone as she entered the premises. She described the lighting as very dim.
- 29 She took footage of her observations at the premises that also recorded sound. This was converted to a disk that was tendered⁵. It confirmed much of her evidence of her observations, with one important exception. It clearly shows a patron seated at a table upon which there was a menu and cutlery. She said that the audio played in Court was of a lower volume than the actual sound being generated at the premises. The music was contemporary and of no particular genre.
- 30 Under cross examination she conceded that none of the patrons were interviewed. She agreed that when Senior Constable Coleman inquired about food he was told he could have a pizza. She did not inspect the kitchen. She did not ascertain what, if any, food had been supplied to patrons. She agreed that she might have been present at the premises for perhaps no more than ten or fifteen minutes. She said that she was unable to say whether there was a function that had been held at the premises that day.

⁵ Ex C3

Senior Constable Coleman

- 31 Senior Constable Coleman confirmed that he attended the premises with Senior Constable Oldfield. He confirmed her observations. He said that the music was loud. He described that patronage as a young crowd in their early 20s. He saw people standing at the bar drinking but he was unable to say what they were drinking. He said that there were people seated at tables. He said that some of the patrons were drinking out of shot glasses. This was not something that he regarded as typically seen in a restaurant. He saw nothing to suggest that any of the patrons had eaten anything. He was not offered a menu. When he was asked for food he was offered a menu that he described as a small piece of paper. As it was the menu that he was provided is the premises standard late night menu. He said he was told: "We only do pizzas."
- 32 He accepted that there was a sign at the premises setting out the terms of the restaurant licence relevant to drinking liquor. He said that he did not enter the kitchen at the premises; he did not inspect its books; he did not see what bookings it had; he did not check whether any functions had been held. He said that based upon his observations there had not been a function. When asked what a function was he suggested that it was a party or special event. He did not think that that was happening because as far as he could tell there were patrons scattered all over the premises.

The respondents' case

- 33 The respondents relied upon the evidence of Mr Antony Tropeano.
- 34 Through him a series of exhibits were tendered. These comprised a series of menus available at various times at the premises, including the late night menu that was offered to Senior Constable Coleman when he asked for a meal; an extract from the premises' diary on the day in question, including a booking update sheet; and a record of the sales conducted at the premises on that day.
- 35 The diary reveals that a number of bookings, including functions, were made for the evening of 18 May 2013.
- 36 The record of sales reveals that on that day patrons ordered 89 entrees and appetisers, 36 pizzas, 195 main courses and 12 desserts.
- 37 Mr Tropeano said that food is available at all times and that there is always a chef on site. He said that the practice at the premises was for a patron to order food at the bar whereupon the patron would be given a number to place on a table and that the food, once prepared, would be taken to that table.

- 38 He said that the premises offer a range of menus depending upon the time of day. He confirmed that the menu offered to Senior Constable Coleman was the standard late night menu and that if he had placed an order he would have been served a meal from that menu.
- 39 He said that the sales at the premises are between 45 to 50% food and 50 to 55% liquor.
- 40 He said that on Saturdays the premises usually closes between midnight and 2.00am.
- 41 He said that the volumes of the speakers and the dimming of the lights were electronically measured and varied depending upon what atmosphere was sought. He said that he set the levels in conjunction with the premises' manager.

Analysis

- 42 I now turn to consider whether the various allegations have been proved. I remind myself that the standard of proof is as provided for by s 121(1) of the Act and that the issue is whether the Court is satisfied on the balance of probabilities that there is proper cause for taking disciplinary action against the person to whom the complaint relates.
- 43 In terms of the oral evidence I did not get the sense that there were any credit issues. I was left with the very firm impression that the three witnesses were doing their best to help me and that their evidence was truthful.

Ground 1

- 44 I commence with the allegation that there has been a breach of condition 3 which forms the basis of Ground 1.
- 45 The evidence establishes that the "in house" sound system at the premises was in use and that it was playing other than low level background music. Thus the threshold requiring all external doors and windows to be closed was met. I therefore do not need to decide whether a DJ operating decks comprises of "live entertainment" but I am inclined to think that it did.
- 46 It is beyond dispute that at all relevant times the doorway between Area 1 and 2 was open. The real issue here is what is meant by "external doors and windows". The police would have it that because the doorway between Areas 1 and 2 separated a plainly internal area from an outdoor area, it was an external door. Hence, they contend that it should have been closed. The respondents submit that the expression concerns doors and windows that separate the licensed premises from areas outside of

the licensed premises and that that in turn meant the front door and windows overlooking O'Connell Street and that as there is no allegation that they were open the allegation that they breached this condition fails.

47 Ultimately the fate of this allegation depends upon how the condition is to be construed.

48 A liquor licence is a legal document that contains statements of rights and obligations. As a matter of general principle, in my opinion, it should be construed in the same way as other legal documents that stipulate rights and obligations, such as a statute or a written contract. It should be read as a whole and the starting position is that the words used should be given their ordinary and grammatical meaning. Even in connection with statutes and contracts there is scope to deviate from that meaning. There will be occasions when the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the contractual term or the canons of construction may require the words of the statutory provision or contractual term to be read in a way which does not correspond with the literal or grammatical meaning.⁶

49 In connection with licence conditions that will be even more so, because consideration must be given to the fact that conditions are often inserted by the consent of the licensee and intervening or objecting parties and that they may have been drafted by laypersons with some urgency in the context of a conciliated outcome.⁷ They might therefore be inelegantly expressed or contain internal inconsistencies when read with other conditions within the licence. In undertaking the task of construction the Court must ask itself what a reasonable person, knowing the background giving rise to the condition, would understand the words to mean. When there is ambiguity, this may inform which construction should be preferred. It might on occasions indicate that the strict meaning of the words used makes no sense and that therefore there must have been a serious linguistic error in the drafting. In such a case the literal construction will have to yield to one that reflects common sense. But that does not mean that the Court can re-write the condition to reflect what it thinks should prevail. Ultimately the task is construing what the author is taken to have meant and by and large it can be assumed that the author of a condition meant what he or she wrote.⁸

50 Condition 3 is plainly intended to protect those outside of the premises from being unduly exposed to noise. Requiring the doors and windows

⁶ *Quartuccio v State of South Australia* [2013] SASC 167 at para 18 per Stanley J.

⁷ Pursuant to s 17(1) (b) of the Act in connection with a contested application the Commissioner is expected to make reasonable attempts to achieve agreement between the parties by conciliation and if the differences between the parties are resolved by conciliation, the Commissioner must determine the matter so as to reflect the agreement reached by conciliation.

⁸ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912-3 per Lord Hoffmann

that separate the premises from areas outside of the licensed premises to be closed when noisy activities are being undertaken within the premises is an effective way of achieving that. It might be said that closing the windows and doors that separate an enclosed area within the premises from an unenclosed area, when noisy activities are being undertaken in the enclosed area, would also achieve that. But if that was what was intended here it might have been expected that the condition would have simply stipulated that if the designated activity was being undertaken in Area 1 that the doors and windows in Area 1 had to be kept closed. It does not say that.

- 51 Moreover, to construe the expression “external doors and windows” in the way suggested by the police leads to a surprising outcome. Live entertainment is permissible in Area 2. What if a band were playing in Area 2? If the door between Areas 1 and 2 is an external door it is arguably not just an external door for the purposes of Area 1. It might also be an external door for the purposes of Area 2. It makes no sense to require the door leading into Area 1 to be closed when live entertainment is being undertaken in Area 2. If it is not an external door for the purposes of Area 2 why would the condition require all doors in Area 1 to be closed in prescribed circumstances with no such requirement applying to the relatively unenclosed area, Area 2, in such circumstances?
- 52 All of this suggests to me that the respondents are correct in contending that the condition concerns doors and windows that separate the premises from areas outside of the premises. It does not concern doors and windows that separate a part of the premises from other parts of the premises. That in turn means that only the front door and windows overlooking O’Connell Street are subject to the condition. As there is no allegation that they were open it follows that there has been no breach of condition 3. Accordingly Ground 1 must be dismissed.

Ground 2

- 53 I now turn to the allegation that there has been a breach of condition 4 which forms the basis of Ground 2.
- 54 There are two aspects of this allegation. The first is that at the relevant time the prime use of the premises was not that of a restaurant. The second is that the entertainment being provided was not ancillary to the prime use of the premises as a restaurant.
- 55 In respect of the first aspect the police allege that:
- the fact of service of liquor to patrons sitting on bar stools at a bar;

- the provision of live entertainment involving loud music being undertaken by a DJ;
- the fact that no patron being present at that time being served, or eating food; and
- only a restricted meal was available;

establishes that the prime use of the premises was not that of a restaurant.

56 The evidence does not establish that when the police were present a patron was served liquor whilst standing or sitting at the bar. Even if it did it would not take matters anywhere. As Bleby J explained in *Cibolini Pty Ltd v Sullivans Hotels Pty Ltd*:

“... there is nothing in the Act which would prevent the holder of a restaurant licence from selling liquor for consumption on the premises at a bar, by people standing, provided that this was ancillary to a meal. There is nothing in the Act which would prevent the holder of a restaurant licence from selling liquor, not with or ancillary to a meal, for consumption in a bar area by persons seated at a table. The Act does not specify the type of table required, but it need not necessarily be a table of the type at which the appellant might serve a meal in the restaurant section.

... it need not necessarily be the same table or tables on which meals are served ... the chairs provided for seating need not be dining chairs...”⁹

57 I now turn to the allegation that the provision of live entertainment involving loud music being undertaken by a DJ indicates that the prime use of the premises was not that of a restaurant.

58 I can envisage that there might be circumstances where the provision of live entertainment will indicate that to be so. Although the evidence of the two police officers was that the music was loud the audio recording from the disk that was tendered in evidence indicates that it was not so loud as to prevent patrons from conversing with one another. The recording indicates that patrons were talking to each other during the entire period that was recorded; that there were breaks in the music; and that one of the two pieces recorded was relatively subdued. It was the sort of music that I can imagine young people would enjoy listening to whilst eating or having eaten a pizza and sharing a drink with friends. It does not of itself indicate that the prime use of the premises was not that of a restaurant.

⁹ [1999] SASC 326 at paras 18 and 42

59 As to the provision of food the evidence establishes that:

- a lot of meals were served at the premises on the day in question;
- cutlery and menus consistent with the provision of meals was present when the police attended the premises;
- when a police officer asked for a meal he was provided with a menu that provided a number of alternatives, albeit that they were all pizzas;
- had the officer accepted the offer he would have been provided with a meal.

60 All of these matters suggest that when the police attended the premises it was operating as a restaurant.

61 The fact that when police were present no patrons were being served with or were eating food does not in this case establish a breach. If the police observed not one of 200 patrons at the premises over a two hour period between 6 and 8pm consuming a meal, that would be significant. But a small number of patrons, between 30 and 40, not eating a meal within a fifteen or twenty minute period after 11 o'clock at night? Nothing can be drawn from that. It is perfectly consistent with many of the patrons having consumed a meal a little earlier and staying on for a while to have a few drinks and listen to some music before moving on. There is no evidence that those patrons had not in fact consumed a meal at the premises before the police arrived. Indeed, the fact that a lot of meals were served at the premises on the day in question would suggest that it is likely that they did.

62 As to the assertion that only a restricted meal was available there might be situations where the offer of a meal is so rudimentary that the inference can be drawn from that fact alone that the prime use of the premises was not that of a restaurant. Judge Kelly spoke of examples of this in *The Venue*:¹⁰

“Where I draw the line is the ‘force feed’ situation. Here the provider merely wants to trade during hours which, without consumption of a meal, would be otherwise illegal. The ‘consumer’ does not have any such want but is told (either directly or by simply being handed a plate of food) that the law requires consumption of a meal and that is what he/she must have to comply with the law. Such food is generally of very insubstantial quality and size and the consumer simply does not want it. It is simply put

¹⁰ Unreported delivered 28 March 1994 but cited in *Wine Barrel Restaurant* [1995] SALC 24

there on the basis 'eat it or else'. The provider is disinterested in supplying a need and more often than not is disinterested in whether the food is consumed or otherwise. This is not, in my view, a meal as defined within the terms of the legislation.

In the past there was, to my memory, in this jurisdiction, quite a debate as to the method by which this Court should determine whether food constitutes a 'meal' within the terms of the legislation. In those days the terms "bona fide meal" and 'substantial food' were often the cause of that debate. The approach then was to look at the size of the meal to determine its bona fides or substantiality. If it was the good old 'steak and eggs' there was no debate. But if it were a 'Pizza Supreme' - in those days there was only one size - dissension became common. I can recall one case where knives and forks became the solution. If it was eaten by hand - no meal. If knives and forks were provided it miraculously turned into a bona fide meal. This is just an example of the absurdity of dealing with the question in that way."

- 63 But this was not such a case. The unchallenged evidence of Mr Tropeano was that a chef was on hand. The meals on offer comprised of eleven varieties of wood oven cooked pizzas with a range of exotic toppings such as "Mount Barker smoked salmon, mascarpone, rocket, horseradish cream and tomato sugo" and "confit duck, balsamic, radicchio and salsa verde" at a price of over \$20 a serve. If that is not restaurant quality food a significant number of licensed restaurants in Adelaide would not make the grade.
- 64 None of the matters raised by the police either individually or taken collectively satisfy me that the prime use of the premises was not that of a restaurant.
- 65 The second basis for alleging a breach of this condition is based upon the assertion that the entertainment being provided was not ancillary to the prime use of the premises as a restaurant. The police contend that the fact that live entertainment involving loud music being played by a DJ establishes that to be so.
- 66 In my view to reach that conclusion here would be to take a very stereotypical view of what entertainment ancillary to the prime use of the premises as a restaurant should be. As I said earlier, the music was not so loud as to prevent patrons from conversing with one another, it was not continuous and at least some of it was relatively subdued. No one would seriously suggest that if the entertainment comprised of a string quartet playing Vivaldi following a degustation meal with matched wines that the entertainment was not ancillary to the prime use of the premises as a restaurant. Why should it make any difference that the meals were

pizzas, the liquor consumed was beer and shots, and the music was contemporary and played over loud speakers?

- 67 As I have just said, there is no evidence that the patrons present when the police were in attendance had not in fact consumed a meal at the premises before the police arrived. The fact that a lot of meals were served at the premises on the day in question would suggest that it is likely that they did. Under the terms of the licence those patrons were entitled to remain at the premises after their meal to consume liquor and listen to some music before moving on.
- 68 In my opinion the allegation that the entertainment being provided was not ancillary to the prime use of the premises as a restaurant has not been made out.
- 69 It follows that there has been no breach of condition 4 and Ground 2 must be dismissed.

Ground 3

- 70 I now turn to the allegation that there has been a breach of condition 8 which forms the basis of Ground 3.
- 71 There is no issue about where the loudspeakers are placed. The only issue is whether they can be said to have been placed on or in the fascia of the premises and in an adjacent outdoor area. As with Ground 1, the fate of this allegation depends upon how the condition is to be construed.
- 72 The police contend that the top of the external southern wall separating Areas 1 and 2 is a fascia of the premises and that as there are loudspeakers attached to it the condition has been breached. They further contend that Area 3 is an adjacent outdoor area such that the attachment of loudspeakers to the mast of the permanent umbrella there is also a breach. Implicit in the police case is that a fascia means the upper part of any external wall that separates an internal part of premises from an external part of premises and that adjacent outdoor area includes an outdoor area within the premises.
- 73 The respondents contend that fascia of the premises means the upper part of a shopfront with the proprietor's name etc. and that here that refers to the upper section of the external wall facing west into O'Connell Street, upon which no loudspeakers are attached. They contend that the expression "an adjacent outdoor area" refers to the area outside of the licensed premises and that when read in context it refers to the area that was previously licensed, being Area 4. They submit that this becomes clear when the history of the licence is considered and in particular the insertion of this condition when the licence was issued on 31 December 2010 at a time when the licensing of Area 4 was being proposed.

- 74 The literal meaning of fascia is as suggested by the respondents. The history leading to the insertion of the condition identifying an adjacent outdoor area supports their suggested construction. Moreover, given that fact that Areas 2 and 3 have entertainment consent, the construction urged upon by the police makes no sense. On their construction Areas 2 and 3 would have to be regarded as adjacent outdoor areas. It would follow that no loudspeakers could be placed anywhere within those areas. Why would there be such a bar in circumstances where those areas have entertainment consent and the licence clearly envisages the provision of entertainment through the use of loudspeakers in connection with that consent? On the police case loudspeakers could only be used in Area 1. If that were the case, it might be expected that the licence conditions would have said so.
- 75 The licence contains an overriding protection in respect of noise by stipulating that noise from the premises cannot exceed a prescribed limit. As indicated earlier the premises are not in an area that could be described as densely residential. There is nothing incongruous in the conditions of the licence permitting the placement of loudspeakers on the upper southern wall facing Area 2 or on the mast of the umbrella in Area 3. The construction of condition 8 as suggested by the respondents should be preferred. It follows that there has been no breach of condition 8 and Ground 3 must be dismissed.

Conclusion

- 76 I am not satisfied on the balance of probabilities that there is proper cause for taking disciplinary action against the respondents. Accordingly I dismiss the complaints.