Victoria Hotel **[2011] SALC 98**

LICENSING COURT OF SOUTH AUSTRALIA

VICTORIA HOTEL

JURISDICTION: S 106 Complaint

FILE NO: 2441 of 2011

HEARING DATES: 1, 2 and 27 September 2011
View of premises on 12 September 2011

JUDGMENT OF: His Honour Judge WD Jennings

DELIVERED ON: 21 October 2011

REPRESENTATION:

Counsel:
Applicant: Ms H Moustous
Respondent: Mr J Firth
Solicitors:
Applicant: In person
Respondent: Talbot Olivier

Note The following is an abridged version of the judgment delivered

1 The Victoria Hotel operates its business pursuant to a Special Circumstances Licence at premises situated at Main South Road O'Halloran Hill.

2 It operates a nightclub or disco on Friday nights which continues on until 3am to 4am on Saturday mornings.

3 The Applicant, with her parents, lives on a property which is situated near the hotel. She filed a noise complaint pursuant to s 106 of the *Liquor Licensing Act* on behalf of her parents and herself. Initially the Commissioner of Police intervened in the proceedings whilst they were being conciliated before the Liquor and Gambling Commissioner. Following discussions with management of the hotel and having been given certain undertakings, the Commissioner of Police withdrew his intervention.

4 The complaint of the Applicant which focussed on the noise and disturbance she alleged occurred regularly on Friday nights and Saturday mornings was not resolved before the Liquor and Gambling Commissioner and was referred to the Court for hearing.

5 I asked the Applicant at the start of the proceedings if she wished to be legally represented: she declined.

Evidence

6 ***His Honour then discussed the evidence adduced and the following is a summary of his treatment of the evidence***.

7 He noted the Applicant's evidence that included complaints of patrons in the hotel car park screaming and shouting; vehicles revving and doing wheelies; people (who she said were patrons of the hotel) trespassing on to their property; bottles and other debris including clothing being thrown or dumped on their property by hotel patrons; their possessions have on occasions been stolen from their property; their fences have regularly been damaged; and trees she planted on the South Road boundary have regularly been pulled out of the ground or damaged.

8 His Honour noted that the Applicant complained of music noise which she said was unbearable and kept her and her parents awake until the early hours of Saturday morning and that she wanted the hours of the hotel operation on Friday nights/Saturday mornings reduced.

9 His Honour then discussed the evidence called on behalf of the hotel. This comprised of evidence from Mr Maddern, a consultant acoustic engineer, Mr Jones, the State Manager of the ALH Hotel Group, and Mr Rogers, the present manager of the hotel.

10 His Honour noted that Mr Maddern said that a brick fence, which was part of the relief that the Applicant was seeking, would not eliminate the noise problem that the Applicant complained of. He noted Mr Maddern's statement that he had no reason to conclude there was any serious impact from patron noise to the Applicant's dwelling.

11 His Honour noted Mr Jones' evidence that prior to the complaint being lodged by the Applicant in early 2011, he had no knowledge of her concerns and he had not received any communication from her; that the Applicant did not convey to him or his Group her intention to lodge a complaint; and that his first meeting with the Applicant was at the conciliation in March 2011.

12 His Honour noted Mr Jones' evidence that apart from the Applicant they have not received any other complaints.

13 He also noted Mr Jones' agreement that the current fencing between the hotel and the Applicant's property was not in good condition and that they offered to contribute towards its replacement. That offer, he said, remains "on the table" but the Applicant refused that offer, indicating that she wanted the hotel to bear all of the cost of replacing that fencing including her front fence that does not adjoin the hotel's property.

14 His Honour noted Mr Rogers' evidence that the first time he became aware of the Applicant was when he received her complaint from the Liquor Licensing Commission in March this year. Prior to that he had not had any contact from her in writing or otherwise. He did not know who she was. He noted that Mr Rogers said that whilst he has been managing the venue there have been no reports to him from the security people reporting incidents of people causing damage to the neighbour's fencing nor any sightings of bottles or objects being thrown over the fence.

15 He noted Mr Jones' evidence that on one occasion he telephoned the Applicant having received a text message from her regarding a noise complaint. He was outside and could not identify any noise. He conveyed that to the Applicant. She then invited him into their house to "hear it for yourself". He thought that would be a good idea but she then told him "this is not my problem, you are the manager, you deal with it". He confirmed with her at that time that he could not pinpoint where the noise she was complaining about was coming from.

Consideration

16 The decision of Acting Judge Cramond in the *Synagogue 2* case[1] is particularly apposite to this case. That matter also concerned a complaint pursuant to s 106 of the Act. The complainants in that case, Mr and Mrs Heaven, brought the proceedings in respect of noise said to be emanating from the Synagogue Nightclub. Mr and Mrs Heaven occupied premises immediately adjoining the nightclub. His Honour made the following observations and findings:

> "**The immediate shortcoming of the evidence that I have heard today presented in support of the complaint is that it is confined to the subjective assessment by the complainants as to what the actual noise levels are. That is, the noise levels in their house**. Evidence there is as to the methods adopted to control sound originating and moving out of the Synagogue Nightclub **but no evidence there is of the levels within the Heaven household**.
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> …
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> Section 116 is based on noise simpliciter and unless the evidence before me is such as to establish, on the balance of probabilities that noise is emanating from the premises at a level sufficient to cause offence and annoyance to neighbours and I **believe it must be construed as being an objective test**, a neighbour with reasonable sensitivities, then the complaint is not made out. As I have said, **no noise level measurements have been taken within the complainant's household but they have subjectively been annoyed by the level of music or sound**.
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> I accept the submission of Mr Costello that the words of the former Chief Justice King in *Van Deleur v Delbra Pty Ltd and The Liquor Licensing Commissioner* 48 SASR 156 particularly at page 160, are quite apt. The Chief Justice was referring to s 114 of the previous Act. However, that is in substantially similar terms and is indistinguishable for the present purposes from the provisions of s 106 of this Act.
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> **The Chief Justice points out the distinction that is to be made in the initial grant of a licence having regard to the potential for noise, annoyance and disturbance to neighbours from that which is appropriate under s 106 where the issue relates to noise emanating from a long established and licensed business.** He recognises the fact that **almost inevitably there will be some noise, some annoyance from sound in such circumstances**.

[1] [1999] SALC 19

> Perhaps, as Mr Costello points out, there is an essential incompatibility in having a nightclub business of this type situated cheek by jowl abutting a residential premise. I suspect that is so.
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> That, however, of course is beyond my control. Had Mr and Mrs Heaven been living in these premises and an application made for a nightclub licence in abutting premises, the situation might well be very different." (my emphasis)

His Honour dismissed the complaint.

17 The relevant passage of the judgment of former Chief Justice King in *Van Deleur* is:

> "The applicant was required to satisfy the Licensing Court 'that the grant of the licence is unlikely to result in undue offence, annoyance, disturbance or inconvenience to those who reside, work or worship in the vicinity of the licensed premises'. One of the grounds of objection was that such undue offence, annoyance, disturbance or inconvenience would be caused. In dealing with this issue, the learned Licensing Court judge applied the test which was approved in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207. That case was concerned with s 86d of the Licensing Act 1967 the corresponding provision in the Liquor Licensing Act 1985 being s 114, and the Licensing Court judge pointed out that 'any resident who lives nearby an hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises', and also certain other causes of annoyance, disturbance and inconvenience. Those provisions are designed to protect persons who reside, work or worship near the licensed premises from offence, annoyance, disturbance or inconvenience which exceeds the degree reasonably to be expected from the licensed premises. I do not think that that test can properly be applied to the issue which arises under s 62(1)(b). **Section 114 deals with a situation in which licensed premises already exist and would have a right to continue in existence. Clearly the remedies contained in s 114 cannot be availed of where the noise or behaviour does not exceed what is to be reasonably expected from the conduct of licensed premises of the particular class. Those remedies can only be available where the noise or behaviour goes beyond what is naturally to be expected and where the consequent offence, annoyance, disturbance or inconvenience exceeds what those who reside, work or worship nearby can reasonably be expected to tolerate.** The question under s 62(1)(b), however, arises at a stage at which no licence has been granted. Those who reside, work or worship nearby are not faced with the exigencies arising from the existence of licensed premises having a right to continue to exist. The question is whether the licence should be

> granted at all. The test of what is undue therefore is not concerned with excess over what will naturally result from the conduct of licensed premises but with what those who reside, work or worship in the vicinity can reasonably be expected to tolerate in the interests of the need of the community for a further licence of the type contemplated. It is not difficult to conceive of circumstances in which hotel premises, no matter how conducted, would result in offence, annoyance, disturbance or inconvenience to nearby residents, workers or worshippers of such a degree as to be properly characterised as undue. **It is true, of course, that licensed premises, particularly hotel premises, will usually produce some degree of inconvenience to nearby residents and perhaps to nearby workers and worshippers. It will often be necessary to expect such persons to tolerate a degree of disturbance or inconvenience, even annoyance or offence, in the interests of the community's needs for licensed premises**. Whether such offence, annoyance, disturbance or inconvenience can be regarded as undue will be a matter of degree and will depend upon the circumstances. The question cannot be judged, however, in the same way as the question whether existing licensed premises are causing undue offence, annoyance, disturbance or inconvenience."
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> (my emphasis)

18 Section 106(6)(b) of the *Liquor Licensing Act* directs that the Court in determining the complaint must take into account:

> "(i) the relevant history of the licensed premises in relation to other premises in the vicinity and, in particular, the period of time over which the activity, noise or behaviour complained about has been occurring and any significant change at any relevant time in the level or frequency at which it has occurred; and
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> (ii) the unreasonableness or otherwise of the activity, noise or behaviour complained about; and
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> (iii) the trading hours and character of the business carried out by the licensee on the licensed premises; and
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> …
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> (vi) any other matter that the Commissioner or the Court considers relevant."

19 Having regard to those submissions I make the following observations and findings.

20 The hotel and the Applicant's property are situated in the Hills Face Zone. The Applicant's property is the only residence in the locality. This

distinguishes this case from virtually all other s 106 complaints where hotels are situated in residential areas where potentially large numbers of residents are affected by hotels' late night activities. The Applicant's family have been living next door to the hotel for some 27 years. For about the last 16 years a Friday night disco has been operational. The Applicant's evidence is that the noise and disturbances have continued from that date. When they purchased their property the hotel which is quite large with a carpark catering for upwards of 150 cars was already operational. It is hardly a small boutique hotel. Even without the disco the Applicant's family should have anticipated some disturbance from noise and the behaviour of patrons emanating from the car park.

21 Based on the evidence of Mr Jones and Mr Rogers which I accept, I find that they have instituted and maintained adequate security (both in terms of the of the number of security guards and cameras); an adequate cleaning regime; appropriate signage including signs asking people to respect neighbours, and they have taken steps to confine the noise including music noise emanating both internally and from patrons in the car park. Traffic noise has been minimised on the southern boundary of the hotel by the installation of temporary bollards on Friday nights.

22 I find there has been no significant change "at any relevant time in the level or frequency" noise or behavioural problems in relation to the operation of the disco, nor of its trading hours, nor has "the character of its business" changed. The noise and behaviour complained about by the Applicant is based solely on her (and presumably her parents') subjective assessment of same and no objective assessment was undertaken. The Applicant is aware of the fact that expert evidence (in this case acoustic evidence) plays an important role in the Court in s 106 proceedings. She in fact engaged Mr Maddern for just that purpose in the earlier proceedings against the Saturno Group. Here she chose not to do so. The only objective assessment of noise was that undertaken by Mr Maddern whose evidence I accept. His conclusion was that noise was not an issue at the hotel. The predominant noise, he said, was that generated from traffic on Main South Road and on occasions he could hear the music noise which was not excessive. There is no direct evidence that the bottles and litter the Applicant says she found on the property were thrown or left there by hotel patrons. The evidence of Mr Rogers would indicate a contrary conclusion.

23 I now come to Mr Firth's submission that pursuant to s 26 of the Act I should make an award of costs against the Applicant on the basis that the objection was frivolous or vexatious.

24 The law in relation to this topic is succinctly set out in *The Attorney-General for the State of Victoria v Bahonko*[2]:

> "Whether a proceeding is vexatious is to be objectively determined as a question of fact. The test is whether the proceedings themselves are vexatious, not whether they were instituted vexatiously. With one qualification I adopt the categorisation of Roden J in *Attorney-General v Wentwort*h where he described proceedings as vexatious if:
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> (1) they are instituted with the intention of annoying or embarrassing the person against whom they are brought; or
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> (2) they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise; or
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> (3) irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.
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> The category of proceedings that are vexatious because they are hopeless was discussed by the Full Court of the Supreme Court of Western Australia in *Attorney-General v Michael*. Anderson J, in the leading judgment, said that proceedings brought without bad faith need not be plainly devoid of any merit whatsoever in order to be considered vexatious. He said:
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> > 'The litigant who sees dark conspiracies and the threat of great harm to himself or herself in the trivial wrongs of another may provide an example. The commencement of an action by such a person, containing outlandish allegations and seeking forms of relief that the courts do not grant, may be vexatious, notwithstanding that it may be possible for the court to identify for the litigant a cause of action for which, arguably, there may be some form of remedy. In this case … [w]hilst it is not possible to say that the claim … is "utterly hopeless", the allegations as to that, and the relief sought in respect of it, are so deeply buried in bizarre allegations and untenable claims for relief that the court ought to be able to say, as a matter of judgment, that it is a vexatious proceeding within the meaning of the section.'
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> …

[2] [2011] VSC 352 at para 82

> The fact that a proceeding is utterly hopeless may not be apparent until a trial of the issues. The complete absence of any evidential basis for allegations pleaded, for example, will not be apparent on a strike-out application. A proceeding may be vexatious even if it was not or would not be struck out."

25 In a letter of 4 August 2011, Mr Ryan, the solicitor for the hotel, put the Applicant on notice regarding costs:

> "It is our understanding that you have continually sent text messages to the manager of the Victoria Hotel in a harassing manner alleging that there are disturbances occurring frequently at the hotel. Each time the manager investigates your allegations and finds that there is no cause for complaint.
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> This section 106 complaint appears to be unfounded frivolous and vexatious. We put you on notice that our client will be applying for costs in relation to this complaint pursuant to section 26 of the Liquor Licensing Act 1997."

26 Mr Firth submitted that the Applicant's case against the licensee was without merit. He said that the Applicant did not accept a reasonable offer of compromise that was put by the licensee in open court. He contended that she did not participate in any meaningful discussions with the licensee to resolve the matter. He said that in all the circumstances I should make an order for costs against her.

27 I am sympathetic to these submissions. If the Act provided the Court with a general discretion as to costs that extended to unreasonable conduct in connection with the conduct of proceedings I would have been disposed to make some order as to costs.

28 However, the power enabling the Court to award costs is very limited. It does not provide the Court with a general discretion. The only power in connection with costs is as contained in s 26 which provides as follows:

> "If, in the opinion of the Court, a person has brought proceedings, or has exercised the right to object to an application, frivolously or vexatiously, the Court may award costs against that person."

29 It can be seen that the power is only enlivened where the bringing of the proceedings is frivolous or vexatious. Absent a power vesting the Court with a general discretion as to costs if an order for costs were to be made it would have to be in terms of an order indemnifying the licensee in respect of the expense that it has been put to as a result of the bringing of the proceedings. If it were otherwise the Court might in appropriate cases direct that costs be paid for costs incurred after a sensible offer of compromise had been made. That, however, is not an option.

30 An allegation that proceedings have been issued frivolously or vexatiously is serious. The consequence of such a finding is potentially grave because it could involve a substantial order for costs.

31 In *Briginshaw v Briginshaw* Dixon J (as he then was) made the following observation that is pertinent to the issue under consideration. He said:

> "…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."[3]

32 With these matters in mind, and not without some hesitation, in my view the evidence before the Court does not enable me to make a finding that the bringing of these proceedings was frivolous or vexatious.

Some observations on the question of costs

33 I conclude with two observations.

34 First, whilst s 106 of the Act clearly contemplates that people with legitimate complaints about the matters covered by that provision should feel free to pursue them before the Commissioner, and if necessary in the Court; they need to understand that the consequences of pursuing a complaint that is frivolous or vexatious could be very severe.

35 Secondly, the Applicant needs to understand that if she pursues another application under s 106 of the Act against the licensee and there has not been a significant change in circumstances, her application will fail. If at the time of issuing that application there is not cogent evidence that supports the application, it is likely that there will be a finding that in bringing the proceedings the Applicant has acted vexatiously. That in turn is likely to result in an order that she pay the licensee's costs, which might be substantial.

Orders

36 I dismiss the complaint and make no order as to costs.

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[3] (1938) 60 CLR 336 at 362