

LICENSING COURT OF SOUTH AUSTRALIA

CUMBERLAND ARMS HOTEL

JURISDICTION: Application for Directions

FILE NO: 7007 of 2016

HEARING DATE: 22 October 2019

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 6 December 2019

CATCHWORDS

*Application for directions seeking an order that the proceedings be dismissed because of undue delay - Primary action concerns a noise complaint made over three years ago. The Trial was adjourned part heard over 18 months ago pending the completion of the noise reduction measures that were a condition of the complainant's planning approval - **Held** that the delay in this case is unacceptable; it is primarily of the complainant's making; although the complaint is arguable, it is not without its difficulties; its dismissal does not preclude the lodging of a later complaint about excessive noise; the continued prosecution of the complaint is oppressive to the hotel; it is an affront to this Court's mission to provide the timely resolution of these types of matters to countenance further indulgence three years after a noise complaint was lodged - **Held** that the grounds in support of the application to strike out the complaint have been made good such that the complaint is dismissed - Liquor Licensing Act 1997, Liquor Licensing Rules 2012.*

BQ & HM Doe Pty Ltd v National Australia Bank [1999] SASC 124

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46

Aon Risk Services Australia Limited v Australian National University [2009] HCA 27

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207

Van Deleur v Delbra Pty Ltd and The Liquor Licensing Commissioner (1988) 48 SASR 156

Beverage Bottlers (SA) Ltd (In Liquidation) & Anor v Abode Enterprises Pty Ltd [2009] SASC 272

Ulowski v Miller [1968] SASR 277

REPRESENTATION:

Counsel:

Complainant: Mr McCarthy

Licensee: Mr Billington

Solicitors:

Complainant: Starke Lawyers

Licensee Crawford Legal

- 1 In *BQ & HM Doe Pty Ltd v National Australia Bank*, Lander J made the observation that ‘there must come a time when a party has so conducted the litigation that it would be appropriate to shut that party out of that party’s litigation even if the point is arguable. Justice delayed can be justice denied.’¹
- 2 The Cumberland Arms Hotel² (the hotel) contend that in this case that point has been reached. Accordingly, by amended application filed on 17 October 2019, it seeks an order pursuant to Rule 31 of the *Liquor Licensing Rules 2012*, that the within proceedings be dismissed. That rule empowers the Court to dismiss proceedings in the case of a procedural irregularity. A procedural irregularity is defined in the Rules to include unnecessary delay.
- 3 In order to deal with the application it is necessary to traverse some of the history of these proceedings.
- 4 Pursuant to s 106 of the *Liquor Licensing Act 1997*, a person who resides in the vicinity of licensed premises may complain to the Commissioner for Liquor and Gambling that an activity on, or the noise emanating from the licensed premises or the behaviour of persons making their way to or from them, is unduly offensive, annoying, disturbing or inconvenient.
- 5 In September 2016, Mr Toby Bensimon, who resides in premises next to the hotel, which is on the south eastern corner of the intersection between Waymouth Street and Elizabeth Street, Adelaide, lodged a s 106 complaint. Mr Bensimon’s apartment is in Elizabeth Street and it is immediately adjacent to the southern boundary of the hotel.
- 6 In support of his complaint, Mr Bensimon wrote an email to the Commissioner on 19 September 2016, wherein he recorded that he had lived next to the hotel for 12 years without incident, that he initially was not opposed to a recent expansion of the hotel’s beer garden and courtyard area, but was now concerned about what he described as ‘a lack of due diligence around sound proofing of our shared wall as the sound of patrons as well as the music is now clearly audible through the walls.’
- 7 Section 106 of the Act contemplates the Commissioner attempting to achieve a conciliated outcome of the complaint and that is what his delegate attempted to do. Having failed to achieve an agreed position, by notice dated 22 December 2016, the delegate referred the matter to the Court for hearing and determination.

¹ [1999] SASC 124 at [103].

² The legal entity is Cumberland Arms Hotel (SA) Pty Ltd as trustee for the Cumberland Arms Unit Trust.

- 8 The matter was initially listed for directions in this Court on 6 February 2017. Thereafter, upon the application of the parties, the matter was adjourned on various occasions as the parties attempted to reach an out of Court settlement. The matter eventually commenced for hearing on 1 March 2018. At the conclusion of the hearing on 2 March 2018, the matter was adjourned for further hearing on dates in the week of 23 April 2018. As it was it did not proceed. On 3 April 2018, at the request of the parties, I made an order vacating the trial dates that had been allocated and I referred the matter to the suspense list. No further activity has been taken by either party in respect of this matter until the filing of the application that I now have to deal with.
- 9 During the course of the hearing before me it became apparent that a number of the conditions that had been placed on the planning approval in connection with Mr Bensimon's apartment and which were directed towards minimising the impact of external noise had not been complied with.
- 10 This constituted a serious impediment to the prosecution of the complaint.
- 11 Be that as it may, I understood that the purpose of the adjournment was to enable Mr Bensimon to attend to these matters to determine whether in light of them, noise continued to be an issue.
- 12 I am advised, that even now, some year and a half later, not all of these matters have been attended to. That fact and that fact of delay generally are relied upon by the hotel in seeking an order that the proceedings be dismissed.
- 13 The hotel's counsel, Mr Billington, noted the when Mr Bensimon gave his evidence, he spoke of the noise being so excessive that he had to wear ear plugs to get to sleep. He submitted that if it were so bad, it was surprising that he had such a relaxed attitude to the continued prosecution of the complaint. I took him to contend that if Mr Bensimon was serious about the complaint, he would have taken steps a long time ago to bring things to a head.
- 14 In the circumstances, simply stated, the hotel contends that enough is enough and that it should be entitled to go about its business without having this long-standing complaint hanging over its head.
- 15 Mr McCarthy, counsel for Mr Bensimon, accepts that there has been delay. He relied upon an affidavit from Mr Bensimon in submitting that part of the delay was due to unfortunate personal circumstances of Mr Bensimon, his extended family and his lawyer. He submitted that the case law makes it clear that if a party is to be shut out of court because of delay, the delay

has to be inordinate. He said, by reference to cases in other jurisdictions, that the delay here could not be so characterised.

- 16 Mr McCarthy submitted that Mr Bensimon has a genuine claim about excessive noise levels emanating from the hotel next-door, the case is part-heard, and that he should not be prevented from continuing to bring and agitate his complaint.
- 17 He submitted that it was significant that there is no breach of any order of the Court. He said that all that has happened is that the works have not been completed in the time that everybody thought they would be. He said that this is no enough to prevent Mr Bensimon from continuing to run an arguable case.

Consideration

- 18 The attitude of courts to the conduct of litigation has in recent years changed. It is now recognised that Courts and Tribunals have an obligation to drive litigation to a prompt conclusion. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* the High Court made the point that in contemporary litigation: ‘Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings.’³
- 19 Efficiency and just resolution are relative terms. One would not expect the same level of detail, patience and indulgence in a case concerning a minor breach of the peace compared to one concerning a capital crime. Similarly, what might be regarded as undue delay in a small claim case between two individuals, might be seen as acceptable in respect of major litigation involving vast amounts of money between major trading corporations. Thus, looking to other cases litigated in other jurisdictions to get a sense of what is an appropriate tariff to determine what is unreasonable delay is not especially helpful. The test for unreasonable delay has to be measured by reference to this species of litigation at hand.
- 20 The principles guiding application of this type are well known.⁴ The discretion to dismiss for want of prosecution is unfettered but there are ‘five paramount matters’ to be considered by the Court. In *Ulowski v Miller*, Bray CJ stated:

[The] five paramount matters to be considered are the length of the delay, the explanation for the delay, the hardship to the plaintiff if the action is dismissed and the cause of action left statute-barred, the prejudice to the defendant if the action is allowed to proceed

³ [2013] HCA 46 at [51].

⁴ See *Beverage Bottlers (SA) Ltd (In Liquidation) & Anor v Abode Enterprises Pty Ltd* [2009] SASC 272.

notwithstanding the delay, and the conduct of the defendant in the litigation.⁵

- 21 The Chief Justice added that the discretion should be exercised as seems best in the interests of justice after considering these matters in relation to the particular case.⁶ Those circumstances include whether to countenance further delay would bring the particular litigation process into disrepute.
- 22 In determining the fate of this application, it is important to bear in mind that this is a noise complaint. It is not litigation that finally defines parties' rights and liabilities. Pursuant to s 106(6a) of the Act all that the Court can do is either dismiss the complaint or make an order against the licensee resolving the subject matter of the complaint that may include adding or varying the conditions of the licence. As such these matter are a species of litigation that should be dealt with promptly. If there is nothing in the complaint, the licensee needs to be freed of the distraction that litigation causes as quickly as possible.⁷ If there is something in the complaint, appropriate orders to ameliorate the disturbance need to be put in place with some urgency.
- 23 Looked at in this context, the words of Lord Woolf in *Arbuthnot Latham Bank v Trafalgar Holdings* have especial significance. In that case, His Lordship accepted that there was a time when courts would have countenanced a party to in effect 'warehouse' proceedings until it was convenient to pursue them. He noted that this is no longer the case and that if a party is not prosecuting an action in such a way as to indicate that the party is serious about wanting to advance the case, consideration should be given to their discontinuance. As he said: 'The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes.'⁸
- 24 Mr Bensimon made his complaint in September 2016. This Court gave him about a year to explore settlement options before listing it for trial. It is now over three years since the complaint was lodged. It is over 18 months since the trial was adjourned to enable him to undertake the noise attenuation measures that were required to have his apartment comply with the Council's planning approval. Looked at in this light, the delay in this case is long.
- 25 As for the reason for the delay, it is primarily of the complainant's making. The hotel could have complained about the delay sooner than it did. But it was not in any way responsible for the delay. Moreover, as Layton J

⁵ [1968] SASR 277 at 280.

⁶ Ibid at 281.

⁷ See, for example: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [101].

⁸ [1988] 1 WLR 1426 at 1437.

observed in *Beverage Bottlers (SA) Ltd (In Liquidation) & Anor v Abode Enterprises Pty Ltd*,⁹ the fact that the other party has not itself taken positive steps to progress that matter does not prevent that party from relying on prejudice as one of the factors to be considered in the overall exercise of discretion to dismiss an action.

- 26 As for the hardship to the complainant if the action is dismissed, it is notable that this is a noise complaint from a person who chose to build and reside immediately adjacent to a hotel. People who choose to live next to hotels must accept that they have to put up with a certain level of noise. As Wells J observed in *Hackney Tavern Nominees Pty Ltd v McLeod*, where he cited with approval the following observation made by this Court:

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.¹⁰

- 27 King CJ elaborated upon this some years later in *Van Deleur v Delbra Pty Ltd and The Liquor Licensing Commissioner* where in connection with an analogous provision to s 106 he said that it:

...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.

...

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.¹¹

- 28 Thus the fact that Mr Bensimon has to endure noise from the hotel is not especially persuasive. He should have known and I suspect did know when

⁹ Ibid at [38].

¹⁰ (1983) 34 SASR 207 at 213.

¹¹ (1988) 48 SASR 156 at 160.

he chose to build immediately adjacent to the hotel that he would be subject to noise. The Adelaide City Council was obviously mindful of this when it issued its planning approval to Mr Bensimon. That is why it was at pains to make sure that Mr Bensimon implemented appropriate noise-attenuation measures that were a pre-condition to the grant of his planning approval.

- 29 Frankly, it is of concern that a party is complaining in this Court about excessive noise when the party itself has not implemented the noise reduction measures that were a condition of the party's planning approval.
- 30 It also has to be said that a party's complaint that the level of noise is so unacceptable that the intervention of the Commissioner and the Court is required to ameliorate the situation seems a bit hollow, when the party is still seeking further delay to resolve the matter over three years after the complaint was lodged.
- 31 Thus, whilst Mr Bensimon has an arguable case, it cannot be put much higher than that.
- 32 It also of significance that the fact that a complaint is dismissed at a particular point in time does not preclude the lodgement of a subsequent complaint. Plainly, if nothing has changed since the earlier dismissal, questions as to the reasonableness of the complaint will arise and that may have adverse costs implications. But the point to be made is that this is not conventional inter parties litigation that finally defines the rights of the parties. Thus the dismissal of the complaint now does not mean that Mr Bensimon will be unable to complain about excessive noise from the hotel in the future.
- 33 As for the hotel, I think that its assertion that the continued prosecution of the complaint is oppressive has been made out. It is not acceptable to have a noise complaint hanging over a licensee's head for over three years.
- 34 Finally, there is the wider consideration of the interests of justice generally. This includes matters beyond the immediate interests of the parties. It takes into account factors such as the public interest in the expeditious dispatch of the business of the Courts. It is an affront to this Court's mission to provide the timely resolution of these types of matters to countenance further indulgence three years after a noise complaint was lodged.

Summary and conclusions

- 35 In summary, the delay is great. Although the complaint is arguable, it is not without its difficulties. Its dismissal does not preclude the lodgment of a later complaint about excessive noise. The continued prosecution of the

complaint is oppressive to the hotel. Having regard to the interests of justice generally, it is time to bring this matter to an end.

- 36 The grounds in support of the application to strike out the complaint have been made good. The complaint is dismissed. The hotel has liberty to apply on the question of costs.