

LICENSING COURT OF SOUTH AUSTRALIA

GALLERY ON WAYMOUTH

JURISDICTION: Application for variation to Licensed Conditions

FILE NO: 2036 of 2014

HEARING DATES: 4, 5 and 6 June 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 14 July 2014

An application to vary the conditions of a special circumstances - Applicant agrees to conditions restricting dancing and requiring patrons to be seated whilst drinking liquor in a rooftop area - Applicant makes application to vary these before trading under the new conditions - Condition regarding dancing is confusing and no one objects to its variation - Variation granted -The condition requiring patrons to be seated whilst drinking liquor in the rooftop area is practically unworkable - There is however a sense of unfairness that the objectors have had to incur legal fees in participating in these proceedings which might have been avoided had the applicant outlined its concerns about the condition in question and had attempted to continue with negotiations - The Court also has a concern that the removal of the condition might enable this Area to effectively trade as if it is a bar which would be contrary to an undertaking given by the applicant at conciliation that the premises would not trade as a bar - The Court would only be prepared to allow the application if the applicant gives an undertaking to pay the objectors' reasonable costs on a party/party basis and it puts forward to the Court's satisfaction suitably worded draft conditions that make it clear that the Area in question is not able to trade as a bar - Liquor Licensing Act 1997

The Gallery Bar [2010] SALC 1

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC with Mr P Kelly

Respondent: Mr J Firth with Mr C McEwen

Solicitors:

Applicant: Norman Waterhouse

Respondent: Wallmans

- 1 The Court has before it an application by Gallery on Waymouth Pty Ltd to vary the conditions of its licence. It holds a special circumstances licence in respect of premises known as Gallery on Waymouth.

History of the licensed premises and other relevant matters

- 2 The premises started as licenced premises in April 1997 when it was the subject of a general facility licence. The premises were then known as F.A.D., an acronym for Food Art Design.
- 3 In May 1999 that licence was converted to a special circumstances licence. Entertainment consent was added in 2007.
- 4 The applicant assumed ownership of the licence in July 2009. Upon acquisition the licence was suspended whilst the applicant undertook substantial renovations. It changed the name of the premises to Gallery on Waymouth and developed a business plan to run the premises as an integrated Café and Art Gallery. It issued an application seeking approval of the alterations to the premises and redefinition of the trading area as well as variations of the trading hours, entertainment consent and an extended trading authorisation. This culminated in proceedings in this Court that were heard and determined before Judge McIntyre in 2010.
- 5 In respect of the proposed business plan Her Honour recorded as follows:

“Mr Waltham referred to the licensee’s business plan indicating that it was proposed to operate the whole of the premises as a café/art gallery. Mr Waltham stressed that the licensee’s intention was to have a very flexible space in which to display art. All staff would be trained to serve not only food and drink but also to discuss and sell the art. He described the business model as clearly stating the licensee’s intention to operate the business to enable the target market to view and purchase art.

Mr Waltham said that food will be available at all hours of trading consistent with the existing licence. It will be café style food prepared in the kitchen on the ground floor and sent to the other two floors by way of a dumbwaiter. The earlier opening hours were sought to enable business people in the area to stop in for coffee or breakfast en route to their business premises. The licensee particularly seeks to attract local business people who have money to spend on artwork.

On the ground floor there will be tables and chairs at all times, the first floor will have tables and chairs which can be removed for functions and the rooftop area will have tables and chairs which can also be removed. There are also three tables to be placed on the footpath. Mr Waltham stressed the need for flexibility in the set up of the premises in order to maximise the use of the space. He said

that there was not a great deal of storage on the premises so that the furniture will have to go from floor to floor.

It is proposed to have art on display at all times. The licensee has purchased art hanging equipment and specialised lighting. On the rooftop it is proposed to display mosaics, sculpture and projected art.

The art exhibitions will be professionally curated and the art will be on sale. Some of the art will be purchased by the licensee for sale and some will be sold on consignment. The licensee has commenced sourcing the art that will be displayed at the venue.

Mr Waltham denied that the premises were being set up as a bar or night club. He said he would have set it up differently if that was the case with the bars taking a more prominent role. When the licensee took over the premises the ground floor had a bar running length ways in the premises. This has been relocated to the back of the ground floor to provide greater flexibility to display the art work. He further said that the premises were, in his view, too small to operate effectively as a bar or nightclub. Whilst it is intended that people be able to buy drinks, the business model is an art gallery café.”¹

- 6 It was argued in opposition to the application that what was proposed was a facility that was in truth no more than a bar with art on the walls and that that made it no different to many hotels and cafés around metropolitan Adelaide. It was submitted that there was no particular relationship with the proposed bar or function room and the functions intended to be conducted there with the display of art. It was contended that the rooftop area proposes to serve liquor to people sitting or standing as they choose until the early hours of the morning. It was said that the only difference between this and a hotel beer garden will be the existence of an as yet unspecified or identified number of pieces of sculpture and/or graphic art.
- 7 Her Honour rejected these submissions and accepted the applicant’s evidence. She said:

“I do not agree with these submissions. The existing licence requires the overall premises to operate as a licensed café and art gallery. The variations, alterations and redefinition of trading area proposed by the licensee do not in my view affect that.

There are clear points of difference between what is proposed for these premises and hotels and restaurants that may have art displayed or even for sale on the walls. These points of difference include the appointment of an experienced art curator to curate the

¹ *The Gallery Bar* [2010] SALC 1 at paras 24-9.

exhibitions at the gallery, the installation of specialised art hanging equipment and lighting for the purpose of displaying the art, the training of the staff to display, discuss and sell art and the stated intention to hold regular and changing exhibitions.

It appears clear that a great deal of thought has gone into the set up of the premises as a whole in order to best display the art. The objectors were somewhat critical of the plans for the rooftop area. The rooftop area plainly cannot be used to display paintings given that it is open air. I do not however consider that the failure to specify precisely what will be displayed in this area is fatal to the application. It was clear that both Mr Waltham and Mr Stephens had given some thought to the display of different types of art in the rooftop area such as mosaics, sculpture and projections. I also note the evidence of Ms Verschoor that she has seen a similar outdoor area at the Museum of Modern Art in New York.

The fact that functions held at the premises may not have as their specific purpose a relationship between art, the function does not derogate from the operation of the premises as an art gallery. Functions at the Art Gallery of South Australia or at the South Australian Museum do not derogate from the operation of those premises as art gallery or museum. Alcohol and food are not inimical to the exhibition, appreciation, sale and purchase of art and indeed this was contemplated by the existing licence conditions. The art work will remain on display and for sale. As Mr Waltham said, such functions might well bring a different demographic to appreciate and purchase the art. Further, it is clear that nothing in the current license prevents the holding of functions provided that the premises are set up as an art gallery at all hours of trading. The suggestion appeared to be that this condition requires the premises to be open to all comers at all hours of trading. I do not accept that this is necessary to satisfy that condition.”²

- 8 The Court ultimately granted the applicant essentially what it sought. It obtained approval to conduct the licensed premises in four areas, being the ground floor, with a certified capacity of 70 patrons, the first floor, with a certified capacity of 60 patrons, the rooftop area, with a certified capacity of 50 patrons, and an outdoor café along the front in Waymouth Street, with a certified capacity of nine patrons.
- 9 The Court stipulated that the premises had to operate as a licensed café and art gallery at all times and that there had to be adequate signage and literature on the premises advertising that fact. It stipulated that food had to be available during all hours of trading; that noise from the premises, including live or recorded entertainment, singing, patron noise or similar, when assessed at the nearest noise sensitive location had to be less than 8dB(A) above the level of background noise in any octave band of the

² Ibid at paras 39-42

sound spectrum; that no loudspeakers could be placed on or in the fascia of the premises, or on the pavement adjacent to the premises and no music will be played in area 4 - the footpath café; that loudspeakers had to be directed away from any entrance to or exit from the premises and be directed into the premises proper; that when music was being played in the roof garden area, it had to be at a level no greater than 65dB(A); that when music was being played in the ground and first floor areas it had to be at a level no greater than 88dB(A) and all external doors were to be closed; there was to be no amplified loud music, but acoustic performances and DJs were permitted.

- 10 The applicant traded at the premises in accordance with the new conditions. And thus it remained until 2012. At that time an opportunity presented itself for the premises to be extended by joining them to adjacent premises that had become available. This led to an application for the redefinition of the premises. In essence the applicant sought to substantially increase the size of the first floor and rooftop areas. The application drew interventions from the Commissioner of Police and the Adelaide City Council and an objection from Denma Pty. The Commissioner for Liquor and Gambling conducted a conciliation conference. The applicant, the intervenors and the objector reached agreement as to various conditions resulting in the interventions and objection being withdrawn. The Commissioner then proceeded to grant the application. The certified capacities for the first floor and rooftop were increased to 180 patrons for each area. The extended trading authorisation was varied to permit trade in all areas to 1.00am on Mondays, 3.00am on Thursday, Friday and Saturday and midnight on Sundays. The following conditions were also included:

- “
 - There shall be no dance floor set up in the premises at any time.
 - The Licensee (or any other person for or on behalf of the Licensee) will not promote the premises in any way whatsoever (either at the premises –including by way of any art display – or in any external or online advertising or promotion) as a bar, lounge bar, lounge, tavern, inn, hotel, beer garden (or incorporating a beer garden), club, nightclub or karaoke bar.
 - Area 3 [the rooftop area] shall operate in a café style configuration through the placement of tables and chairs evenly spread throughout the area. No person shall consume liquor in this area unless that person is seated. This condition shall not apply when a private pre-booked function is being held or a bona fide exhibition launch or opening is being held in this area.”

- 11 As a result the applicant proceeded with the renovations and the licence was suspended until 8 December 2013. On 1 October 2013, at a time before the applicant had traded under the agreed conditions, it made an application to the Commissioner for Liquor and Gambling to be relieved from some of the obligations imposed by the conditions of the licence. In particular it wished to be relieved of the blanket prohibition in respect of dancing³ and the requirement that at times patrons in the rooftop area have to be seated whilst consuming liquor⁴.
- 12 This application drew the intervention of the Commissioner of Police and the Adelaide City Council and objections from Denma Pty, Allegra Hotel Pty Ltd, the proprietor of Rendezvous Grand Hotel Adelaide, and Waydale Holdings Pty Ltd, the proprietor of Treasury on King William. Thereafter the various parties conducted negotiations and agreement has been reached on some issues. The parties agree that the condition regarding dancing should now read as follows:

“There is to be no dance floor set up in the premises at any time except during private pre-booked functions held in Areas 1 and 2 [the ground and first floors], when a dance floor is permitted in those areas.”
- 13 I am prepared to vary that condition in those terms.
- 14 The issue still in dispute is whether the applicant should be relieved of the condition that requires patrons to be seated whilst consuming liquor in the rooftop area. The police and the council have no objection. Allegra has since withdrawn its objection. Denma and Waydale persist with theirs.

The evidence

- 15 Photographs of the premises were tendered in evidence. And the Court, in the company of the party’s solicitors, inspected them. They comprise of three floors, situated in the north east of Waymouth Street. The entrance is from an adjacent lane abutting Waymouth Street. The ground floor comprises of a small area in which some artwork is hung. The first floor is a larger area which also houses hung artwork. The second floor is a large area that comprises of two sections. The first, in the north, contains a well-stocked bar to the east surrounded by some tables and chairs. It has an open roof that can be closed. The wall to the west is partially open and can be sealed by a plastic blind. It overlooks a blank wall of an adjacent building. The south opens up to an open area which has semi-permanent furniture comprising of tables and chairs. There is a limited amount of artwork in this area comprising mainly of some

³ This was a condition imposed by Judge McIntyre.

⁴ This was a condition agreed to at conciliation relating to the more recent application.

sculptures. There is a projection facility in the northern area that displays art electronically on the wall of the adjacent building. Overall it is a very attractive facility. The open area on the second floor is a particularly alluring and funky area. It is hardly surprising that it is proving to be a very popular venue. Its turnover has doubled since the renovations have been completed.

- 16 Mr Waltham, a director of the applicant, gave evidence about the activities conducted at the premises. He said that the ground floor is used as an exhibition space predominately for local artists. He said it conducts a monthly exhibition there starting at the beginning of each month with a turnover of the exhibits. He said that this area is also used as a function room, with the functions varying from birthdays to corporate meetings.
- 17 He said that the artists and their work are promoted on its web site and through social media such as Facebook and the like. He said that it also encourages the actual artist to advertise. He said that on the opening of each new monthly exhibition it conducts an opening night function at which the artist attends. He described it as a “Meet the Artist Night” where people will come and talk to the artist about the art and view it and that that usually leads to a reasonable amount of sales on that night.
- 18 He said that it would be safe to say that at the opening night there would be 30 to 40 people at any one time in the room, with a turnover of between 70 to 150 people throughout the course of the night.
- 19 He said that the first floor area is used in essentially the same way as the ground floor, mainly as a function space, conducting functions ranging from small lunches, corporate meetings, to birthdays and the like.
- 20 He spoke of the projection used in the rooftop area. He said it was conducted by a company called Illuminart. He said that they project moving images like sails and dolphins. He described it as projected movement art that was basically a light show whereby the wall upon which the light is projected is akin to a computer screen and someone has designed a screen saver which is just exquisite and ever-changing. He said that they are local artists who are passionate about this form of media. He said that they are terrific.
- 21 He then spoke of the rooftop area. He said that the premises are closed on Monday and Sunday and open from Tuesday through to Friday for lunch and stay open through to the evening, and on Saturday it is open from 3.00pm. He said that the lunch hours were from 12.00 till 3.00pm, and that dinner from 5.00pm till around 9.30pm on an early week night, and then till 10.00ish on Friday and Saturday, depending on how trade is going.

- 22 He said that the applicant engages a full-time chef who is the head chef, and under him are about four or five casuals as well as kitchen hands, all of whom do prepping for cooking. During the main meal times it serves tapas type meals as well offerings of more traditional main courses. Outside the main meal hours it offers things like antipasto plates, dips, house roasted nuts, chips, and the like. Food is transported to the rooftop area via a dumb waiter.
- 23 He said that during meal hour the majority of patrons are having food. He said that even outside of these hours a fair portion of the applicant's turnover is based around food.
- 24 He said that in conformity with the condition requiring the rooftop to operate in a café style configuration through the placement of tables and chairs evenly spread throughout the area the applicant engaged designers, and that the area can seat the 180 patrons permitted by the certified capacity.
- 25 He said that the drinks served at the premises are considerably dearer than comparable drinks he sells at a hotel that he also has an interest in.
- 26 He agreed that the premises were advertised as "The Gallery".
- 27 He acknowledged that in a brochure produced by the Australian Institute of Management in respect of an event at the premises, held on 21 May 2014 refers to part of the premises as a stylish rooftop bar.
- 28 Through him a USB depicting film taken at the rooftop of the licensed premises in May 2014 was tendered into evidence. It revealed that loud contemporary music was being played and that some patrons were consuming liquor whilst standing.
- 29 He agreed that on occasions patrons needed to queue in the laneway outside of the premises before being permitted entry.
- 30 He acknowledged that security was present in the rooftop area when it was trading and that part of their duties was to control crowd behaviour.
- 31 He accepted that the premises offered a specialist range of vodkas. He accepted that within the rooftop area patrons had access to a number of high tables and stools, or dry bars which did not lend them to eating in contrast to lower tables which would encourage café dining when seated.
- 32 He explained why he wants the condition varied. He said that patrons often moved away from a chair and consumed liquor and that it seemed ridiculous having to tell them to sit down. He said "I can't think of a better word other than 'nagging'; you're nagging your customer to sit

down, when they're about to sit down anyway, so we're so paranoid about getting caught out in it that we don't allow it to happen."⁵

33 He explained why it was that he agreed to the condition in the first place:

"We obviously had a timeline to have that done, and we were backed into a corner where if we didn't agree to it we'd have to go to court; we couldn't afford the court process, we wouldn't afford the delays, the rest of it, so we foolishly agreed to it without - we thought we'd be able to put the fire out, so we thought we'd agree to it and then we'll stuff the place with so much furniture that the customers won't have a choice but to sit down, and we've done that. We fixed 99 per cent of, I think, the objector's problem, but the 1 per cent is where we're getting caught out and the 1 per cent is the bit that we're in fear of being prosecuted and I wish, at the time, that we had - conciliation had more time, with both parties actually there to come to this agreement, because I'm sure that if this agreement was actually put, that we'd have a furniture layout, that that's something that may have actually been agreed to."⁶

The applicant's case

34 The applicant's case is based upon the simple premise that the condition regarding seating is unworkable.

35 Mr Roder SC, counsel for the applicant, submitted that the condition imposes an unworkable restraint on the applicant and on the members of the public. He said that the premises and in particular the rooftop, is a beautiful area, where people should be entitled to go about their business, have a meal, have a drink, without being tapped on the shoulder and rebuked for temporarily standing whilst drinking liquor. He rhetorically asked:

"What is the logic that someone sitting in the same group, someone who's drinking a soda water can stand up at this table whilst someone who's sitting in the same group who is drinking a glass of wine is seated or that person can get up from his table and stand and talk as long as he leaves the glass on the table and then has to sit down again and drink again. I mean, it sounds like it gets back to the kind of absurdities that were prevalent in the 90s and led to things like meal tickets and all of this sort of silliness."⁷

The objectors' case

⁵ Tr 59

⁶ Tr 60

⁷ Tr 122

- 36 The objectors contended that the style of business being run by the applicant is very different from what the Court first granted, and is very different from the picture that Judge McIntyre was given.
- 37 It was submitted that it was significant that the signage at the premises is simply the word “Gallery” and that there is no mention of “Art Gallery” or “Licensed Café.”
- 38 Mr Firth said that when the Court last dealt with this matter there was no rooftop area, let alone a large one with the big bar; there was no side entrance with direct access to the rooftop; there were no DJs with loud music, and regular DJs at that on the evidence; no security guards were necessary or queues to prevent over-crowding of the large capacity now operating; no specialist range of vodka’s or jugs of cocktails and choice of lots of high tables and stools, or dry bars instead of the lower tables which would encourage café dining seated.
- 39 He said that putting functions to one side, the premises trade daytime and night, Tuesday to Friday, and Saturdays 3pm till late; the local artist gallery is shut at night at 5pm; that there are no staff in the premises except for security until you reach the rooftop; the ability to order a meal and hot food is gone by about 10pm at night and sometimes earlier than that; that most of the trade overall, even with functions, comes from the rooftop; and that the predominant source of income for the premises comes from liquor sales.
- 40 He submitted that what now exists is no more than a big rooftop bar with a big liquor server, and that people are going to the premises specifically to drink rather than to look at art or to be seated whilst eating food. He said: “Be it a restaurant, be it a licensed café, people shouldn’t be standing up and drinking, giving the impression it’s a public bar.”
- 41 He submitted that if the applicant wants to trade as it is now it should seek a hotel licence and establish that it is needed. He said that it should not be permitted to achieve a de facto hotel licence under the guise of premises describing itself as a café/art gallery. He argued that rather than deleting conditions, the Court, in the exercise of discretion, should be looking at imposing some other conditions that restrict it to what it should be.
- 42 As to the submission that the condition is unworkable he said that difficult as compliance with the condition might be it is a common one and that it is just a matter of management and policing and enforcing.
- 43 He said that the applicant agreed to it and it should be bound by that agreement. He submitted that the Court should be concerned that this application was made after the applicant volunteered and agreed to conditions to stop the objectors arguing against the expansion of the

premises and the increase in capacities, and then, before it had even started trading with the new conditions, and having tried to make them work, it sought to be relieved of them.

Consideration

- 44 I commence by observing that Mr Waltham was a credible witness. I accept his evidence. I find that the nature of the business that the applicant conducts at the premises is as he describes. I find that he has endeavoured to conduct the business in the manner that he described to Judge McIntyre in 2010.
- 45 I deal now with the complaint about the alleged change in the nature of the applicant's business. My difficulty with that submission is that it fails to reflect the effect of the order of this Court in 2010. The breath of the special circumstances licence that the applicant already has is sufficient to enable patrons to attend at the premises for the sole purpose of consuming liquor. There is no requirement that they have to be there to look at art or to consume food. As I put to Mr Firth in argument, once they were given a special circumstances licence, with the only restriction that it was a licensed café and art gallery and the only requirement was to have food available as opposed to meals, it was always capable of running, effectively, as a drinking venue. It is too late for the objectors to be complaining about this now.
- 46 I find that the business conducted at the premises conforms to the conditions of the licence. It comprises of an integrated Café and Art Gallery.
- 47 The real issue is whether, and if so how, the applicant should be able to resile from the agreement it reached leading to the condition in question.
- 48 This Court has as its overriding focus the public interest. This is a challenging case that concerns two aspects of the public interest that point in opposite directions.
- 49 On the one hand, it is in the public interest to expect licensees and would be licensees to act in good faith in their negotiations with objectors and intervenors and to faithfully accept and honour conditions imposed upon a licence that they agreed to in those negotiations. The practice of agreeing to conditions to get around the legitimate complaints made by others only to resile from them once the licence has been granted is not one that the Court should condone.
- 50 On the other, it is not in the public interest to subject a licensee or members of the public to a condition that is practically unworkable.

- 51 It is true that a condition requiring patrons to be seated whilst drinking liquor is a common one. In prescribed circumstances it must apply in connection with the consumption of liquor at a restaurant⁸. It is a routine condition insisted upon by councils in connection with alfresco dining and the licensing of areas on footpaths.
- 52 However, I am permitted to know from my dealings in the disciplinary jurisdiction of this Court, that such conditions are very difficult to police. Moreover, it is one thing to police such a condition in a confined area on a footpath or in connection with a restaurant licence where prima facie the alcohol is supposed to be ancillary to a meal. It is another thing altogether to try and police such a condition in an area with a capacity of 180 people in a venue, the conditions of the licence of which, contemplate that people can come there to drink and only to drink. I find that the condition is in this case practically unworkable.
- 53 I regard this as truly exceptional case. On balance my tentative view is that the public interest to relieve the licensee and members of the public from a condition that is practically unworkable holds sway.
- 54 I am however concerned that the objector, Denma, was entitled to assume that following the conciliation conference at which the applicant agreed to the condition in question that it would be relieved of the need to further engage lawyers in respect of this matter. It is all very well for Mr Waltham to say he wished he had more time. He was the one with the time imperative. Had he raised this issue at conciliation there is a reasonable possibility that the parties could have reached a mutually acceptable agreement. By taking the path that it did, it more or less invited Denma to object. Denma was perfectly justified in seeking the applicant to be held to its agreement. Although Waydale did not participate in the conciliation, it too was justified in objecting. There is to my mind a sense of unfairness that they have had to incur legal fees in participating in these proceedings which might have been avoided had the applicant outlined its concerns about the condition in question and had attempted to continue with negotiations.
- 55 Although I have found that the condition regarding being seated whilst drinking liquor is practically unworkable, there is considerable force in the submission made by the objectors that having effectively given an undertaking at the conciliation that the premises would not trade as a bar, steps should be put in place to ensure that that undertaking is honoured.
- 56 I am concerned that the removal of the requirement that patrons do not have to be seated whilst consuming liquor could lead to patrons standing at the bar to drink and that much of the rooftop area would become

⁸ Section 34(1)(c) of the Act.

indistinguishable from a bar. That would be contrary to the spirit of the negotiations conducted at the conciliation conference. It would be contrary to what Mr Waltham told the Court was the nature of the business that the applicant wishes to conduct.

- 57 I feel compelled to act upon these concerns. I would therefore only be prepared to allow the application if two conditions are fulfilled. First, I would require the applicant to give an undertaking to pay the objectors' reasonable costs on a party/party basis. Second, I would require it to put forward to the Court's satisfaction suitably worded draft conditions that make it clear that the Area in question is not able to trade as a bar.
- 58 I adjourn further consideration of this application to a date to be fixed.