

LICENSING COURT OF SOUTH AUSTRALIA

THE PALACE

JURISDICTION: Section 43

FILE NO: 2239 of 2013

HEARING DATE: 14 August 2013

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 29 August 2013

An application is made by the Commissioner of Police pursuant to s 43 of the Liquor Licensing Act 1997 seeking the imposition of certain conditions in respect of two venues operated by the Palace Gallery Pty Ltd - Application has been referred to the Court by the Commissioner for Liquor and Gambling - The respondent makes an application to summarily dismiss - It asserts that it is an abuse of process and in any event is doomed to fail - The respondent contends that what is sought are sanctions appropriate upon a finding that disciplinary action should be taken and that in conformity with Crown Inn Hotel (No 2) that is the appropriate means by which to pursue the matter - Submission rejected - What is involved is a proper characterisation of the application - The conditions sought to be imposed are not in the nature of sanctions in the nature of some form of rebuke upon the licensee. They are conditions focussed upon improving public safety - Crown Inn Hotel (No 2) distinguished and not applied - The threshold test to make out a plea that an application is doomed to fail is very high - Here the evidence if accepted might support the claim that the conditions are reasonable and necessary - Application for summary relief dismissed - S 43 Liquor Licensing Act 1997

Crown Inn Hotel (No 2) [2011] SALC 92

Webster v Lampard [1993] HCA 57; (1993) 177 CLR 598

REPRESENTATION:

Counsel:

Applicant: Sergeant A Heffernan

Respondent: Mr D Edwardson QC with Mr J Firth

Solicitors:

Applicant: Commissioner for Police

Respondent: Duncan Basheer Hannon

- 1 This is an application made by the Palace Gallery Pty Ltd (the licensee) to summarily dismiss an application made by the Commissioner of Police pursuant to s 43 of *the Liquor Licensing Act 1997* that has been referred to the Court by the Commissioner for Liquor and Gambling.
- 2 In order to deal with the summary application, which asserts that the primary application is an abuse of process and is in any event doomed to fail, it is necessary to set out in some detail the nature of the primary application and the evidence filed in support of it.

An application seeking the imposition of various conditions

- 3 On 17 January 2013 the Commissioner of Police filed with the Commissioner for Liquor and Gambling an application seeking the imposition of various conditions upon the licensee's licence, being a Special Circumstances Licence that it uses in connection with two venues that it operates in Hindley Street, The Palace and Red Square.
- 4 The Palace is an adult entertainment venue. Red Square is a night club.
- 5 In summary the application seeks conditions requiring the licensee to install and maintain CCTV and to produce visual recordings made thereon upon request; to restrict access to the venues after 2.00am; to restrict the provision of free or discounted liquor after midnight; to limit the quantity and nature of alcoholic beverages sold after midnight; to require temperate or polycarbonated glassware to be used after midnight; to limit the times when liquor can be sold or supplied for consumption in licensed outdoor areas; to impose obligations upon the licensee regarding queuing; to require the licensee to have a scanning facility that enables the taking of images of evidence of age and to require it to use that facility for all patrons entering the venues after midnight; to engage the services of a drinks marshal who is to monitor the venues from midnight onwards on the lookout for behavioural related issues that might affect the safety and welfare of patrons; to require the licensee to have a metal detector and to apply that detector to all patrons entering the venues after 9.00 pm; and to require the licensee to prevent members of outlaw motorcycle gangs and other gangs and their associates from entering or remaining within the venues.
- 6 The application is supported by two affidavits, one from Senior Constable Fullston and another from Sergeant Beaumont.
- 7 In his affidavit Senior Constable Fullston asserts that as part of his duties he has extensive contact with licensed premises within the CBD of Adelaide and that he frequently visits them to ensure their compliance with the Act. He says that he has investigated The Palace and Red Square.

- 8 He says that The Palace serves shots and shooters, it serves patrons with multiple alcoholic drinks, it has drinks specials at certain times, offers free entry to females at certain times and it offers liquor packages.
- 9 Although he understood that the licensee had a policy of preventing members of outlawed motor cycle gangs from gaining entry to The Palace he asserts that he is personally aware that for a time members and associates of a particular gang had visited the venue.
- 10 He says that he has had regard to a report prepared by the Liquor Enforcement Branch for the period between 1 May and 31 October 2012. He says that over that six month period the venue had the highest record of alcohol related incidents in the State and that there had been an increase in the number of incidents.
- 11 He says that there had been a number of serious incidents of assault in, outside and in the vicinity of the venue. He says that some had involved assaults by staff in removing patrons from the venue. He says that some involved assaults by non security personnel from the venue.
- 12 He says that in pursuing investigations about these incidents the police had frequently sought CCTV footage and that the licensee had not been candid in relation to those requests, nor had it assisted the police in identifying a staff member who was accused of assaulting a patron.
- 13 He says that on another occasion the police were investigating a serious assault allegedly concerning a member of security from Red Square and a patron and that the licensee had, subsequent to being informed that CCTV equipment was to be the subject of a search warrant, removed from the CCTV critical portions that contained footage of the incident.
- 14 He says that over the 12 month period from January to December 2012 there had been a number of minor assaults and a few serious assaults. I understood this to be in connection with Red Square.
- 15 He then records information about these assaults that he asserts he obtained from the SAPOL computer system.
- 16 These included alleged assaults between patrons at Red Square on 10 January 2012, 11 February 2012, 18 February 2012, 14 April 2012, 17 June 2012, 14 July 2012, 28 July 2012, 4 August 2012, 19 August 2012, 26 August 2012, 16 September 2012, 29 September 2012, 4 November 2012 and 22 December 2012.
- 17 They included alleged assaults by security or staff upon patrons in and about the Red Square on 31 March 2012, 22 April 2012, 25 April 2012, 10 June 2012, 16 June 2012, 4 August 2012, 11 August 2012, 12 August 2012, 24 August 2012 and 29 December 2012.

18 He concludes by saying:

“There are several factors which contribute to the levels of incidents that are currently occurring at the premises which include its extensive trading times, the extensive outdoor area which currently does not cease operating and the constant mixing of pedestrians and patrons from Red Square on the footpath in front of the venue. Loud music audible on Rosina Street encourages members of the public to loiter in the area either waiting to enter or re-enter the premises.”

19 In his affidavit Sergeant Beaumont states that he is a member of the Liquor Enforcement Branch. He says that in August 2012 the Branch’s management were becomingly increasingly concerned about drunkenness and violent behaviour within the Adelaide CBD, and in particular the Hindley Street and Light Square precinct. He describes a groundswell of public concern following a stabbing that occurred following an altercation at a nightclub in Light Square on 4 August 2012.

20 He says that the Branch’s management was aware of a similar groundswell of public concern about drunkenness and violent behaviour in Kings Cross, Sydney that was heightened following a “king hit” death of a young man there on 7 July 2012.

21 This presumably caused him to secure a report prepared by the New South Wales Police that concludes with the following:

“The data concerned in the preparation of this report is persuasive on the risk of alcohol related harm and disturbance of the good order or amenity within the precinct and provides a proper basis for the Director General to consider an appropriate regulatory response to mitigate the ongoing risk.”

22 Sergeant Beaumont then provides a copy of a press release from the Honourable Barry O’Farrell MP, the Premier of New South Wales, wherein he announced the imposition of a range of new conditions on the various licensed premises operating in Kings Cross. These included: prohibiting the sale of shots, doubles and bottled or canned pre-mixed drinks that have a high alcohol content and limiting a patron to purchasing no more than four drinks after midnight; requiring a Responsible Service of Alcohol marshal to be on duty after 11.00pm; not selling alcohol in the hour before closing; banning glassware after midnight; and requiring licensees to maintain a digital CCTV at the licensed premises, the footage of which must be provided to authorities upon request.

23 Sergeant Beaumont makes reference to a serious assault in Currie Street on 26 August 2012. He then refers to an interview conducted on 5 September 2012 with Dr Bill Griggs from the RAH wherein Dr Griggs

made a plea to stem the incidence of alcohol fuelled violence and spoke of the doubling of assault victims presenting at the RAH over the period from 2005 to 2010.

- 24 He records statistical information provided by the Hindley Street Uniform Tactical Team for the period from 1 August to 8 November 2012.
- 25 This records the issue of 314 expiation notices for possessing or consuming alcohol in a dry zone, 156 expiation notices for disorderly behaviour in the vicinity of a licensed premises, 118 arrests or reports for street offences, 69 arrests for urinating in a public place, 22 arrests for assault and 26 expiation notices issued for pedestrian related offences.
- 26 He records a document released by the New South Wales Bureau of Crime Statistics and Research in 2009 that records a 29% decrease in the number of assaults in Newcastle, New South Wales, following the imposition of restricted trading conditions on 14 licensed premises there in 2008.
- 27 He describes a recurring problem with the suitability of CCTV in many of the venues in Hindley Street and of the fact that the difficulty that police have in accessing CCTV was impeding their investigations of serious assaults.
- 28 He expresses his opinion that restricted access to venues is necessary to minimise the risk to patrons and to minimise the risk of grossly intoxicated persons gaining entry and re-entry into licensed premises; that the promotion and consumption of shots after midnight significantly increased levels of intoxication; that the use of glassware in venues created a very dangerous environment; that queuing outside of the venues was “disgraceful” and patrons vomiting and urinating in the streets was disgusting and was an environmental hazard; that ID scanning is a necessary and appropriate condition to be imposed upon each venue as it could provide a very good aid to police, licensees and patrons in the event of a serious incident at a particular venue; that the appointment of a drinks marshal would decrease the risk to patron safety and that the presence of outlawed motor cycle gangs and their associates in licensed venues created a serious risk to members of the public using the licensed premises.

The licensee contends that the application should be dismissed

- 29 As indicated earlier the licensee contended that the primary application should be dismissed on one of two bases.
- 30 The licensee submitted that the primary application is an abuse of process because the appropriate means by which the police should

attempt to seek the imposition of these conditions is through the successful prosecution of an application for disciplinary action.

- 31 This submission relies primarily upon the decision of this Court in *Crown Inn Hotel (No 2)*¹. In that case the Commissioner of Police issued an application under s 43 of the Act seeking amongst other things an order that a particular person not be employed in any capacity at the licensed premises and that he not attend or be at the licensed premises. The application for the imposition of these conditions was based upon the alleged misconduct of that person.
- 32 The argument advanced by the respondent in *Crown Inn Hotel* was that Part 8 of the Act contains a specific and exhaustive code in relation to the taking of disciplinary action; the conditions that the Commissioner of Police sought in respect of alleged misconduct were, when properly characterised, sanctions that the Court might be expected to impose in connection with disciplinary proceedings issued under Part 8 of the Act; and that that was the appropriate means by which the matters should proceed.
- 33 The Court essentially agreed with this. The ratio of the case is as follows:
- “...the provisions contained in Part 8 of the Act dealing with disciplinary action reflect Parliament’s intention that where disciplinary action is thought to be appropriate, that this and only this, is the procedure that should be taken. It follows that any other general provisions in the Act, and in particular, s 43, should be construed in such a way as to yield to that construction.”²
- 34 The case does not stand for the proposition that whenever the conduct relied upon by the Commissioner of Police in connection with an application under s 43 could support an application for disciplinary action; the pursuit of an application under s 43 constitutes an abuse of process.
- 35 Indeed, it might be expected that conduct capable of supporting an application for disciplinary action will frequently underpin an application made under s 43. This becomes clear when the types of conditions that a licensing authority might impose, as provided for by s 43(1), are considered. They include things such as imposing conditions to prevent excessive noise emanating from the licensed premises, minimising offensive noise and disturbance to persons in the vicinity of licensed premises, preventing offensive behaviour on licensed premises, and protecting safety and welfare of customers and staff.

¹ [2011] SALC 92

² *Crown Inn Hotel* [2011] SALC 92 at para 20

- 36 It might be expected that to persuade the licensing authority that it is necessary to impose these sorts of conditions, the entity seeking the imposition of the conditions would need to prove the fact that excessive noise has been emanating from the licensed premises or that patrons have been behaving offensively at the licensed premises or that the safety and welfare of customers and staff has been compromised. Proof of any of these facts would go a long way to establishing that disciplinary action against the licensee was appropriate. If the entity seeking the imposition of these conditions in such circumstances could only do so through the prosecution of disciplinary proceedings, s 43 would have little work to do. I would therefore not construe the relevant provisions in that way.
- 37 In my view ultimately what is required is a characterisation of the true nature of the application. If it is disciplinary, then disciplinary action is the appropriate course.
- 38 In *Crown Inn Hotel* what was plainly being contended, insofar as it concerned the individual named, was that he was guilty of misconduct and the protection of the public demanded that he should be the subject of a strong sanction barring him from the licensed premises. The proper characterisation of that application was that it was seeking the imposition of disciplinary action against him. Hence the Court held that that was the path that the police had to follow.
- 39 Whilst it is true that some of the evidentiary material that the police intend to rely upon here could support the taking of disciplinary action against the licensee and that some of the conditions sought will be onerous to comply with, I think it is plain that the imposition of sanctions as a form of rebuke upon the licensee, is not the focus of the primary application. Unlike the situation in *Crown Inn Hotel* the conditions sought to be imposed appear to have as their focus no more than improving public safety.
- 40 Thus the facts here are readily distinguishable from those in *Crown Inn Hotel*.
- 41 In short, I do not think it can be said that the proper characterisation of the primary application is that it is seeking the imposition of disciplinary action against the licensee. Accordingly, I do not think that the pursuit of the primary application can be said to be an abuse of process.
- 42 I now turn to deal with the submission that the primary application should be dismissed because is doomed to fail.
- 43 Mr Edwardson QC, for the licensee, contended that the information provided by Sergeant Beaumont about Kings Cross and Newcastle is nothing more than historical background and an explanation as to what is motivating the application and that it should be pushed to one side.

- 44 Next he said that all that is left are some police statistics in relation to arrests and alleged offences in the city of Adelaide, none of which relates specifically to the conditions that are sought. Hence, he said that this material is completely irrelevant and that it follows, to use his words, that this is going nowhere.
- 45 The threshold test to make out a plea that an application is doomed to fail is very high. In *Webster v Lampard*, Mason CJ and Deane and Dawson JJ, stated the principles which govern such applications as follows:
- “It is important to note at the outset that the issue before the learned Master on the application for summary judgment was not whether Mr and Mrs Webster would probably succeed in their action against Sergeant Lampard. It was whether the material before the Master demonstrated that that action should not be permitted to go to trial in the ordinary way because it was apparent that it must fail. The power to order summary judgment must be exercised with ‘exceptional caution’ *General Steel Industries Inc. v. Commissioner for Railways (N.S.W.)* and ‘should never be exercised unless it is clear that there is no real question to be tried’ *Fancourt v. Mercantile Credits Ltd.*”³ (footnotes omitted)
- 46 It follows that if the police have demonstrated an arguable case the primary application must be permitted to go to trial.
- 47 The affidavit of Senior Constable Fullston provides opinion evidence about what he regards as factors contributing to the levels of incidents of assault that are occurring in and around the venues operated by the licensee. It provides some evidence as to why he has formed that opinion.
- 48 The affidavit of Sergeant Beaumont provides opinion evidence of the state of affairs in Hindley Street, of the risk that that state of affairs poses to the public and of the measures that he thinks are necessary and reasonable to ameliorate those risks. It too provides some evidence as to why he has formed those opinions.
- 49 The factors identified by Senior Constable Fullston and Sergeant Beaumont and the measures suggested by Sergeant Beaumont are potentially relevant to the issue as to whether it is necessary to impose the various conditions sought.
- 50 Whether the officers are qualified to express those opinions and if so, whether those opinions are correct, will no doubt be pursued at trial. Even if they are correct, it remains to be determined whether they are

³ [1993] HCA 57; (1993) 177 CLR 598 at p 602, 603

sufficient to warrant the imposition of all or indeed any of the proposed conditions.

- 51 For now, in my view it cannot be said that the evidence is so patently lacking in probative value, relative to the relief sought, that the application must fail. That conclusion is sufficient to defeat the plea for summary judgment.

Conclusion

- 52 For these reasons the application to dismiss the application is refused. I will now hear from the parties as to the future conduct of the application.