

LICENSING COURT OF SOUTH AUSTRALIA

MAJESTIC ENTERTAINMENT PTY LTD T/AS THE CURIOUS SQUIRE

JURISDICTION: Application for a Special Circumstances Licence

FILE NO: 7877 of 2015

HEARING DATE: 16 November 2015

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 16 November 2015
Reasons published 18 November 2015

CATCHWORDS:

An application for a special circumstances licence - Whether the applicant's business model could operate effectively under a restaurant or hotel licence - Held that it could not - Whether the business would be substantially prejudiced if its trading rights were limited to those possible under such a licence - Held that it would - Whether the Court should exercise its discretion to refuse the licence - Held that it should not - Whether the business that the applicant proposes to conduct at the premises is likely to produce noise that will unduly disturb those who reside in the vicinity of the premises - Held that subject to the imposition of agreed conditions that it will not – Ss, 32, 34, 40, 44, 53, 56, 57 and 69 Liquor Licensing Act 1997.

The Curious Squire [2014] SALC 23

Little Miss Miami and Little Miss Mexico [2014] SALC 41

Gallery on Waymouth [2014] SALC 30

Facac v Talbot Hotel Group Pty Ltd and Another [2001] SASC 445

REPRESENTATION:

Counsel:

Applicant:	Mr J Firth
For the Adelaide City Council:	Mr D Mazzachi
For the Resident Objectors:	Mr J Roberts
For the Intervenor:	Brevet Sergeant K Phillis
Solicitors:	
Applicant:	Duncan Basheer Hannon
For the Adelaide City Council:	Norman Waterhouse
For the Resident Objectors:	N/A
For the Intervenor:	Commissioner of Police

- 1 This is an application for a special circumstance licence with extended trading authorisation¹ and entertainment consent by Majestic Entertainment Pty Ltd in respect of premises known as the Curious Squire.
- 2 In order to succeed, the applicant must satisfy the Court that:
 - it being a Corporation, each person in a position of authority is a fit and proper person to do so;²
 - the premises will be of sufficient standard;³
 - the operation of the licence would be unlikely to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity, and prejudice to the safety or welfare of children attending education facilities in the vicinity of the premises;⁴
 - any approvals, consents or exemptions required to permit the use of premises for the sale of liquor have been obtained;⁵
 - any other relevant approvals, etc, to carry on the proposed business have been obtained;⁶
 - it satisfies the pre-requisites for the grant of a special circumstances licence;⁷
 - that the application warrants the favourable exercise of the Court's discretion;⁸ and
 - it satisfies the pre-requisites for the grant of an extended trading authorisation.⁹
- 3 The application originally drew objections from numerous residents residing in the vicinity of the premises, the Commissioner of Police and the Adelaide City Council.

¹Pursuant to s40(1) of the *Liquor Licensing Act 1997* Act, which relates to special circumstances licences, the primary hours permitting the sale of liquor are between 5 am and midnight on Monday to Saturday and between 11 am and 8 pm on a Sunday. To trade as licensed premises beyond these hours an extended trading authorisation is required.

² Section 56

³ Section 57(1)(a)

⁴ Section 57(1)(b)(i)

⁵ Section 57(2)(a)

⁶ Section 57(2)(c)

⁷ Section 40

⁸ Section 53

⁹ Section 44

- 4 As a result of negotiations between the parties the objectors have withdrawn their objections subject to the following conditions being inserted into the licence should it be granted.

The proposed conditions

1. The authorisation issued by the licence is for the sale of liquor in accordance with Section 40 of the *Liquor Licensing Act 1997* (“the Act”) and the following conditions of the licence for consumption of liquor on the licensed premises.
2. The premises shall operate as a restaurant and bar at all times.
3. The premises shall not advertise and promote its business as that of a hotel or tavern.
4. Beer sold and supplied at the licensed premises shall be predominantly craft or imported beer.
5. There shall be no obligatory days or hours of trading.
6. The hours of operation shall be as follows:
 - 6.1 Area 1 (indoor area) and Area 2 (lower outdoor area):
Sunday to Thursday except days preceding public holidays: 7.00am to 12 midnight.
Friday, Saturday and days preceding public holidays: 7.00am to 2.00am the following day.
 - 6.2 Area 3 (upper outdoor area) 7.00 am to midnight every day. This area shall have a maximum capacity of 30 persons at all times and shall be closed for use by patrons at midnight on every night.
 - 6.3 Area 4 (footpath) 8.00 am – 10.00 pm every day.
7. The patron numbers shall be limited to the following:
 - Area 1 - 113 persons.
 - Area 2 - 65 persons.
 - Area 3 - 30 persons.

The overall capacity of those areas must not exceed 200 persons at any time.
8. Access into Area 3 will be prevented by way of a physical barrier outside the hours permitted by Condition 6.2 above.
9. In these conditions the following defined terms apply:

- 'Background music' means music played at a level such that patrons can talk without the need for raised voices and, in any case, at a level not exceeding 75dB(A) internally within Area 1 and 65dB(A) externally in Areas 2 and 3.
 - 'Elevated music' means music played at levels higher than those permitted for 'background music', including any live music, DJ or performance and must be limited to 87dB(A) internally.
10. Elevated music' may be played in Area 1 until:
- 10.30pm -Sunday and Monday;
 - 11.00pm - Tuesday;
 - 11.30pm - Wednesday and Thursday; and
 - 12 midnight - Friday and Saturday and days preceding public holidays.
11. Background music may be played in Areas 1, 2 and 3 at any time those Areas are open for business.
12. Any entertainment that does not otherwise fall within the definition of background music or elevated music shall cease at:
- 12.1 10.30pm on Sunday and Monday;
- 12.2 11.00pm Tuesday;
- 12.3 11.30pm Wednesday and Thursday; and
- 12.4 12.00 midnight on Friday and Saturday and days preceding Public Holidays.
13. The O'Connell Street windows and doors are to be closed (other than for access) in the following circumstances:
- When elevated music is being played; and/or
 - After 10pm on any night.
14. A noise limiting device shall be installed on the audio system to control the sound output within the following limits:
- Background music within Area 1 – 75dB(A).
 - Background music within Areas 2 and 3 – 65dB(A).

- Elevated music within Area 1 – 87dB(A) with spectral content controlled via the noise limiting device to levels outlined in the Sonus Acoustic Report, S4190C2 dated December 2013.
15. Measurement for the purposes of condition 14 in respect of Area 1 shall take place at the doors to the outside (O'Connell Street).
 16. The noise limiting device must be in operation at all times when the premises are open for business and using the development plan consent granted on 2 March 2015. All amplified music (whether recorded or live) must be played through the device, with the exception of a single fold-back speaker used during live performance.
 17. 17.1 There shall be not less than one crowd controller present from 8pm on Friday and Saturday nights until such times there are less than 100 patrons present at the premises

17.2 The crowd controller(s) shall ensure that patrons in occupation or use of the premises do not cause undue disturbance as they arrive and/or depart the premises, to the reasonable satisfaction of the Corporation of the City of Adelaide.
 18. There shall be no loudspeakers placed outside on the O'Connell Street frontage, awning or footpath at any time.
 19. Noise from the premises such as music and patron noise, when assessed at the nearest existing noise sensitive location, shall be less than 8dB(A) above the level of background noise in any octave band of the sound spectrum. Such noise levels shall be to the reasonable satisfaction of the Corporation of the City of Adelaide at all times
 20. Food from a Menu must be available at all times when the premises are open for business.
 21. Garbage or refuse (including empty bottles and cans) is not to be available for collection by waste disposal or similar contractors (other than operators employed by or organized by the Corporation of the City of Adelaide) between the hours of 10.00pm and 7.00am of the following morning
 22. No garbage or refuse (including empty bottles and cans) is to be moved from inside the premises to outside storage bins between the hours of 10.00pm and 7.00am of the following morning.
 23. There shall not be a dedicated dancing area set up in the premises at any time, except during private pre-booked

functions (that are closed to the general public) held in Area 1, when a dance floor is permitted in that area.

24. The licensee shall not operate or promote the premises as a night club at any time.
25. Subject only to condition 26, the licence authorises sale and supply of liquor for consumption only on the licensed premises.
26. It is lawful for a person:
 - 26.1 to bring liquor on to the premises, with the consent of the licensee, intending that it be consumed with or ancillary to a meal provided by the licensee on the premises and later to take from the premises the unconsumed portion of liquor so brought on to the premises in the container in which it was brought on to the premises; and
 - 26.2 if a bottle of wine has been purchased on the premises by a person intending that the wine be consumed with or ancillary to a meal provided by a licensee on the premises, to take from the premises the unconsumed portion of wine so purchased in the bottle in which it was purchased.
27. The conditions imposed by way of this licence for areas 1, 2 and 3 shall be subject to a 12 month trial period from the date of this licence, during which time the parties to the application for this licence have liberty to apply. If no such application is made the conditions shall become permanent.
28. Under Section 69 of the Act the authority conferred by the licence is extended so that the licensee is authorised to sell and supply liquor in an area adjacent to the licensed premises for consumption in that area, as outlined in red on the deposited plan and shown as Area 4.

The authority is granted subject to the following conditions:

- 28.1 The authority shall lapse and become of no effect if the outdoor permit issued by the Corporation of the City of Adelaide lapses or is cancelled, withdrawn, revoked or transferred.
- 28.2 The operating hours of Area 4 are as follows:-

Monday to Sunday 8.00 am to 10.00 pm.
- 28.3 Area 4 may contain no more than 7 removable tables and 14 removable bench seats.

- 28.4 Liquor may only be sold or supplied for consumption by a patron whilst seated at a table within Area 4.
- 28.5 The licensee shall maintain a clear path across the front of the premises for pedestrian traffic.
29. The approval for extension of trading area for Area 4 is for a trial period expiring on 30 June 2016. The Parties to Order No. 195375 dated 21 September 2015 have liberty to apply to the Liquor and Gambling Commissioner at any time during the trial period to have a conciliation conference or refer the application to a hearing before the Commissioner or Licensing Court.

The proposed premises and surrounding areas

- 5 The premises are situated at 10 O'Connell Street in what might be described as the south eastern corner of the O'Connell Street precinct.
- 6 I dealt with the premises at some length in dismissing an application for disciplinary action taken against the applicant.¹⁰
- 7 I take the following description from that judgment.
- 8 The premises are relatively isolated. To the immediate south is a park which adjoins the Women's and Children's Hospital, some distance away. To the north are other commercial premises. To the east is O'Connell Street, which at that point is a four lane road and on the other side of the road is the Hotel Adelaide. To the west are an apartment block and other residences.
- 9 The premises are currently divided into three areas for licensing purposes. Area 1 to the north, Area 2 in the middle and Area 3 to the south.
- 10 Area 1 is rectangular in shape. It is an enclosed structure that is within the Brougham Plaza. The southern wall of Area 1 is generally made of glass with bi-fold glass doors leading into Area 2, which is immediately south of Area 1. Its proposed capacity is 113 persons. There is a service window between Areas 1 and 2. Area 2 has a vergola roof. This is a structure like a pergola that has the capacity to be changed into essentially a solid roof. It is bounded to the west by a fence comprising of iron pickets. Its proposed capacity is 65 persons. It appears that Areas 2 and 3 were once part of the courtyard/yard of that building. The southern boundary of Area 2 is marked by a set of steps that lead into a raised area delineated as Area 3. The western boundary of Area 3 comprise of a solid elegant bluestone fence. As with Area 2 there is no structure on the eastern boundary of Area 3. The southern boundary also

¹⁰ [2014] SALC 23 *The Curious Squire*

comprises of a solid elegant bluestone fence. Its proposed capacity is 30 persons. The overall capacity of the 3 areas is not to exceed 200 persons at any time.

- 11 Area 4, which is not presently licensed, is an outdoor area on O’Connell Street. It is proposed that it will comprise of no more than 7 removable tables and 14 removable bench seats.

The history of the licence

- 12 On 23 February 1996 this Court granted the then proprietors of the premises a general facility licence which was later reconfigured as a special circumstances licence.
- 13 The licence changed hands on 19 August 2010 and the then occupants of the premises made an application for a restaurant licence so as to conduct the business of a restaurant from the premises. The Corporation of the City of Adelaide intervened in that application and the Commissioner for Liquor and Gambling conducted a conference between the parties culminating in the grant of the licence with an extended trading and entertainment consent on certain agreed conditions. These included a condition that “The prime use of the premises shall be that of a restaurant with any entertainment being ancillary to that prime use.”
- 14 The licence was then removed to premises in Norwood, where it traded as a restaurant under the name of Sparrow.
- 15 The licence was then removed back to the present premises and was subsequently acquired by the applicant. It was the applicant’s intention upon acquisition to trade under a special circumstances licence. It planned and altered the premises in late 2012 with that intention firmly in mind and commenced steps to apply for such a licence.
- 16 Because of considerable delay in getting to the point of this application as a result of difficulties obtaining the requisite planning approval, the applicant has traded at the premises under a restaurant licence.

The grounds upon which the application is based

- 17 The applicant’s case is that it has traded under a restaurant licence reluctantly and that its trade has suffered as a result. Many of the prospective patrons only want to use the premises to consume liquor (ie not with a meal) and that they do not wish to be required to sit whilst consuming liquor. The applicant has found it difficult to enforce this. It has attracted the attention of the police. It has resulted in the loss of business.
- 18 Areas 2, 3 and 4, being outdoor areas, can be affected by adverse weather conditions. The applicant wants to have flexible trading hours and days

of operation so as to not be open if the circumstances are such that limited trade would occur.

- 19 Presently it conducts a lot of private functions. If it was to conduct a private function in Area 1, members of the public would not have access to Areas 2 and 3 because they can only be accessed by entry from Area 1.
- 20 The applicant intends to focus its liquor trade on the full range of James Squire beers. It does not intend to sell commercial or mainstream beers on tap. It does not wish to sell liquor for take away consumption. There is insufficient storage to make that viable. It recognises that the locality is well serviced for takeaway liquor.

Consideration

- 21 On the face of it each person in a position of authority in the applicant is a fit and proper person to do so.
- 22 Having viewed the premises I am satisfied that they are of sufficient standard.
- 23 I find that all approvals, consents or exemptions required to permit the use of premises for the sale of liquor have been obtained and all other relevant approvals, to carry on the proposed business have been obtained.
- 24 I now turn to consider whether the application for a special circumstances licence has been made out.
- 25 As I explained in *Little Miss Miami and Little Miss Mexico*¹¹ a determination as to whether a special circumstances licence should be granted involves a consideration of a series of tests and if the application fails at any one along the way it must fail.
- 26 First, the various categories of licence provided for by the Act must be considered and a determination must be made as to whether any would fit the proposed business model.
- 27 In connection with that exercise the Court must consider its power to grant exemptions. If, with appropriate exemptions, a particular type of licence would fit the applicant's business model, the application for a special circumstances licence fails.
- 28 Next, the Court must determine whether the applicant's business model would be substantially prejudiced if it were forced to trade under an existing category of licence, with or without appropriate exemptions. Unless there is, the application for a special circumstances licence fails.

¹¹ [2014] SALC 41

- 29 Finally the Court must determine whether in the Court's discretion it should grant a special circumstances licence.
- 30 The applicant's proposed business model contemplates that there will be no sale of liquor for off licence consumption; the hours of trading will be restricted; although food available will available its business model contemplates many patrons attending the premises to consume alcoholic beverages other than with a meal and not seated at a table; it does not contemplate the provision of food as the prime focus of the business.
- 31 It is plain that only two categories of licence could potentially fit the applicant's proposed business model, a restaurant licence or a hotel licence.
- 32 Section 34 of the Act deals with restaurant licences.

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

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

- 33 The applicant's business model contemplates supplying liquor to patrons who will not be consuming food. It would not fit that model to require those patrons to be seated at a table when consuming liquor. The Court has no power to grant the holder of a restaurant licence an exemption from that requirement. Thus a restaurant licence would not adequately cover the kind of business proposed by the applicant.
- 34 In *Gallery on Waymouth* I made the following observations about a condition requiring patrons to be seated whilst drinking liquor in a venue not dissimilar to that under consideration here. I said:

“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 restaurant. It is a routine condition insisted upon by councils in connection with alfresco dining and the licensing of areas on footpaths.

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.”¹²

35 These observations are apposite here. I find that to require the applicant to trade under a restaurant licence and be subject to the mandatory conditions applying to such a licence would result in it being substantially prejudiced.

36 The hotel licence is provided for by s 32 of the Act, which provides as follows:

“32—Hotel licence

(1) Subject to this Act, a hotel licence authorises the licensee—

- (a) to sell liquor on the licensed premises for consumption on or off the licensed premises—
 - (i) on any day (except a Sunday, Good Friday and Christmas Day) between 5am and midnight; and
 - (ii) on a Sunday (not being Christmas Day or New Year’s Eve) between 11am and 8pm; and
 - (iii) if New Year’s Eve is on a Sunday, on that Sunday between 11am and midnight; and
 - (iv) on Christmas Day between 9am and 11am; and
 - (v) on New Year’s Day between midnight and 2am; and
- (b) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption on the licensed premises during the whole or any part of the following hours as is specified in the authorisation:
 - (i) on any day (except a Sunday, Good Friday, the day after Good Friday, Christmas Day and the day after Christmas Day) between midnight and 5am;
 - (ii) on a Sunday (not being Christmas Day or the day after Christmas Day) between midnight and 5am

¹² [2014] SALC 30 at pars 51 and 52

and between 8am and 11am and between 8pm and midnight;

(iii) if the day after Christmas Day is a Sunday, on that Sunday between 8am and 11am and between 8pm and midnight;

(iv) on Good Friday between midnight and 2am;

(v) on Christmas Day between midnight and 2am; and

(c) if an extended trading authorisation is in force, to sell liquor on the licensed premises for consumption off the licensed premises during the whole or any part of the hours between 8am and 11am, and between 8pm and 9 pm, on a Sunday (not being Christmas Day) as is specified in the authorisation; and

(d) to sell liquor at any time on the licensed premises to a lodger for consumption on or off the licensed premises; and

(e) to sell liquor at any time in a designated dining area to a diner for consumption in that area with or ancillary to a meal provided by the licensee in that area; and

(f) to sell liquor at any time in a designated reception area to a person attending a reception for consumption in that area; and

(g) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only during the hours that the licensee is authorised to sell liquor on the licensed premises to a person other than a lodger for consumption off the licensed premises).

(2) Subject to this Act, a hotel licence is subject to the following conditions:

(a) a condition requiring the licensee to keep the licensed premises open to the public for the sale of liquor on every day (except Good Friday, Christmas Day or Sunday) between 11am and 8pm;

(b) a condition requiring the licensee to provide a meal, at the request of a member of the public, between noon and 2 pm, and between 6pm and 8pm, on any day on which the licensed premises are open to the public for the sale of liquor.

(3) However—

- (a) the licensing authority may exempt a licensee from the obligation to keep the licensed premises open for the sale of liquor to an extent the authority considers appropriate in the circumstances of a particular case; and
- (b) a licensee is not required by a condition under this section to provide a meal for a person if—
 - (i) the person appears to be intoxicated; or
 - (ii) the licensee has reasonable grounds to believe that the person cannot or will not pay for the meal; or
 - (iii) the licensee cannot comply with the request because of prior obligations to provide meals for others; or
 - (iv) there is some other proper reason for not complying with the request; and
- (c) the licensing authority may exempt a licensee from the obligation to provide meals wholly or to a specified extent.”

37 The attributes of a hotel licence were considered extensively in *Facac v Talbot Hotel Group Pty Ltd and Another*.¹³ Doyle CJ noted that a hotel licence can be the subject of numerous exemptions. It no longer requires the provision of accommodation for lodgers or the provision of meals. The requirement that it trade over specified hours can be ameliorated. It might be possible to obtain an exemption from the obligation to sell liquor for consumption off the premises.

38 On the face of it, the Court could grant a range of exemptions that could accommodate the applicant’s business model. But the exemptions are not to be looked at individually. They must be looked at collectively and the end result must have sufficient characteristics of a hotel as contemplated by the Act as to be one.

39 Although the applicant, if it sought a hotel licence might persuade the Court to exempt it from selling take away liquor, I very much doubt that it would permit it to limit its trading hours as proposed.

40 I find that a hotel licence, even with exemptions, would not adequately cover the kind of business proposed by the applicant.

41 I now turn to the issue of prejudice.

¹³ [2001] SASC 445

- 42 Based on the Court's view of the premises I find that the outdoor areas of the premises are best suited to mild weather. I doubt that they would attract much interest on a cold wet night in winter or a very hot day. In light of Mr Tropeano's evidence I find that for the venue to be open for trading for the sort of hours expected of a hotel would result in it losing money.
- 43 I accept that when the premises are being used for a private function in Area 1, because of the layout of the premises, it would be very difficult for the rest of the premises to be open to the public.
- 44 Accordingly, I find that to require the applicant to conduct its proposed business by the use of a hotel licence, which would require it to trade for much longer hours than contemplated, and which would deny it the opportunity to use Area 1 for private functions, would a result in the proposed business suffering a degree of prejudice that would be real and of substance. I find that it would be substantially prejudiced.
- 45 I now turn to the issue of discretion.
- 46 The discretion conferred by s 53 must be exercised for a purpose consistent with the Act. But it is very broad and if I were to find the slightest hint of contrivance in connection with this application I would be minded to exercise the discretion to refuse the application.
- 47 I did not get the sense that the business model was contrived. The premises were originally licenced as a general facility licence which was later reconfigured as a special circumstances licence. It was always the intention of the applicant to trade in this way. It has only been trading under a restaurant licence reluctantly.
- 48 In trading in that way the premises have attracted the attention of the police in connection with disciplinary action because the business in its present form do not look and feel like a conventional restaurant. I can understand why the applicant's patrons would feel frustrated when purchasing alcohol without a meal and being compelled to sit when drinking liquor.
- 49 When this application first came before the Court there were a large number of resident objectors. They were clearly concerned about issues such as noise and general disturbance. These are matters relevant to the general exercise of discretion and to the application for extended trading authorisation.
- 50 However in light of the negotiations and the applicant's agreement to be subject to the conditions set out herein, theirs and the Court's concerns have been allayed.

- 51 I find that the operation of the licence is unlikely to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity, and prejudice to the safety or welfare of children attending education facilities in the vicinity of the premises.
- 52 I find that the application satisfies the pre-requisites for the grant of an extended trading authorisation and entertainment consent.
- 53 I am not persuaded that the Court should exercise its discretion and refuse the application.
- 54 I grant the application subject to the conditions that have been agreed.
- 55 I impose a further condition.
- 56 The reason why a hotel licence would not suit the proposed business is because of the unique characteristics of the premises. I would be concerned about any attempt to remove the licence to premises that did not share similar attributes. A special circumstances licence is just that. It is “special”. Any application to remove the licence is to be made to the Court and subject to the approval of the Court.