

LICENSING COURT OF SOUTH AUSTRALIA

THE MILL AT MIDDLETON

JURISDICTION: Special Circumstances Licence

FILE NO: 594 of 2011

HEARING DATES: 7 April 2011

JUDGMENT OF: His Honour Judge B Gilchrist

DELIVERED ON: 17 May 2011

The applicants seek a special circumstances licence to enable them to sell for consumption on and off premises premium wines through a venture that is focussed towards educating customers about wines - Requirements for a special circumstances licence considered - Applicants must prove that the use of an existing class of licence would produce a result that the proposed business would be substantially prejudiced - A restaurant licence would enable the applicants to achieve much of what they wish - Insufficient evidence that the proposed business would be substantially prejudiced if the business operated under this licence such that a necessary prerequisite to grant a special circumstances licence has not been met - Application refused - Ss 40 and 104(2) Liquor Licensing Act 1997

Facac v Talbot Hotel Group Pty Ltd and Another (2001) 80 SASR 580

REPRESENTATION:

Counsel:

Applicant: Ms R Kentish

Respondent: Mr J Firth

Solicitors:

Applicant: N/A

Respondent: Piper Alderman

- 1 This is an application for a special circumstance licence made by Rosalie Kentish and Sam Harrison as trustees for the Harrison Kentish Trust.
- 2 The applicants seek the licence in respect of premises known as The Mill at Middleton. The applicants are the holders of a restaurant licence in connection with those premises. They also hold a producers licence that enables them to sell their own wine from these premises.
- 3 The applicants seek the licence to enable them to sell and supply, for consumption on an off the premises, other wines. They wish to establish a specialised boutique selling small batch high quality wines from Australia and wines from around the world with a view to educating customers about wine styles, wine making and food and wine matching.
- 4 In conformity with this, they propose a condition that restricts the sale of wine for consumption off the premises to bottles of wine with a minimum sale price of \$20 and which have either been imported or have been sourced from boutique Australian producers as defined by the Association of Australian Boutique Wine Makers Incorporated as “Wine which has been made by an independently owned wine company that producers no more than a total of 250 tonne under its own label each year”.
- 5 An objection to the proposed licence has been made by DR & RM Harding Pty Ltd that operates the Middleton Tavern at Middleton, a largish Hotel with a reasonably extensive bottle shop that is about 500 metres north of the Mill.
- 6 For the application to succeed the Court needs to be satisfied that the prerequisites for the grant of a special circumstances licence have been met. If so, the Court, as the licensing authority, will then have to consider, in the exercise of its discretion, whether it is appropriate to grant the application.

A Special Circumstances Licence

- 7 The nature of and circumstances permitting the grant of a special circumstance licence are prescribed by s 40 of the *Liquor Licensing Act 1997* in the terms following:
 - “(1) A special circumstances licence authorises the licensee to sell liquor for consumption on or off the licensed premises in accordance with the terms and conditions of the licence.
 - (2) A special circumstance licence cannot be granted unless the applicant satisfies the licensing authority that –

- (a) a licence of no other category (either with or without an extended trading authorisation) could adequately cover the kind of business proposed by the applicant; and
- (b) the proposed business would be substantially prejudiced if the applicants trading rights were limited to those possible under a licence of some other category.”

8 This provision was the subject of a detailed examination by the Full Court of the Supreme Court of South Australia in *Facac v Talbot Hotel Group Pty Ltd*. There Doyle CJ made some observations that are particularly pertinent to this case. He said:

“An object of the Act is to regulate ‘the sale, supply and consumption of liquor for the benefit of the community as a whole’: s 3. While the Act is premised on licensed holders finding it in their financial interest to supply liquor to the public, it also creates structures and classes of licence to enable that to be done. **Sometimes an applicant must accept that the applicant will not be able to trade in the precise manner that best suits the applicant.** The applicant may have to trade in a way that reflects the legislature’s judgment in general terms, and the Court’s judgment in particular terms, as to the benefit of the community. The applicant may be faced with choosing between trading under a licence which will carry certain obligations it would prefer not to have, and not trading at all.”

9 Then later he said:

“To assist the Licensing Court I add that there is a discernable statutory policy that s 40 should be used to accommodate what I might call non-standard or anomalous types of business. **But the Licensing Court must also bear in mind that s 40 is not to be used simply to create a licence to meet an applicant’s wishes. If an existing class of licence will fit the proposed business, s 40 should not be used, unless the use of the existing class of licence would produce a result that ‘the proposed business would be substantially prejudiced.’** The special circumstances licence is not, as I have said, to be created simply to meet an applicant’s wishes and proposal. The Court must consider whether another class of licence can and should be granted, even if requiring the applicant to trade under that licence imposes obligations that the applicant would rather not have, and even if that means that the applicant must prove a need for the grant of the licence.” (emphasis mine)¹

¹ (2001) 80 SASR 580 at 587 and 588

The Applicants' case

- 10 The applicants conducted their case through the evidence and advocacy of Ms Kentish. She described their passion for wine. She said she had published articles about wine marketing and wine makers. In 2008 she received the Bushing Queen, an award for the best wine in the McLaren Vale Region. She has produced multiple award winning wines. In 1997 she and Mr Harrison purchased a vineyard in McLaren Vale and began producing their own wine in 2001. In 2006 they sold the vineyard and purchased the Mill. However, they continue to make their own wine, which they sell under their producer's licence.
- 11 The Mill is a historic heritage listed stonewall building of cultural significance. Upon purchasing the building the applicants with another business partner applied for a restaurant licence and dedicated two rooms in an area of the garden with a view to showcasing their wine and wine from small productions and boutique wineries along with regional food.
- 12 In 2008 they closed the restaurant because they could not personally and financially sustain it. Ms Kentish explained the position as follows:

“In 2008 I closed the restaurant for a break and to re-evaluate a personally and financially sustainable approach; a business plan in other words, to showcase my wine and those selected wines that have been so popular during the life of the restaurant, and this is the key point and the basis for my current application for a special circumstance licence, that the local community and the tourist community, who regularly attended my restaurant during this time, were very keen to learn more about the wines that I presented by the glass - and for sale on premise - with their meal. They loved to hear my knowledge about wine. They wanted to learn about, and buy, these wines to take home with them. So as you can see, your Honour, for the last 15 years I have totally committed my life to growing grapes, making and selling wine, and educating people about wine. I clearly live and breathe it.”
- 13 What remains at the Mill are the tastings and sales of their own wines conducted at limited times through their producers licence.
- 14 Ms Kentish described the proposed venture as follows:

“There is no business in the lower Flerieu Peninsula that proactively promotes and educates people in safe consumption of alcohol, the fascinating comparison of varieties, the education of flavour, texture, the beauty of learning about such a uniquely variable product. We believe that with our proposed business plan and drawing on the resources of trainers such as Gill Gordon Smith from Fall from Grace, who is a qualified WSCET Wine educator, that we can provide a sustainable and sound business and wine

education in the region. People come down to the South Coast to relax, take a break; they're open to learning about wines. They're open to taking the time to develop their knowledge of understanding of wine varieties and the industry. It's a historic building with a family run business operating in parts of its ground floor. It's a sensible use of it as a historic building. A business of this calibre is good for locals and for tourists; and it attracts people in the region who are keen to learn and spend money in the region, benefits all businesses in the region."

Analysis

- 15 The first matter that s 40(2)(a) requires me to consider is whether a licence of some other category could adequately cover the kind of business proposed by the applicants.
- 16 Ms Kentish conceded that the restaurant licence that the applicants possess is broad and is not limited to the supply of liquor with meals. It also enables the sale of liquor without meals to customers who sit down to have a drink or who attend a function at which food is provided.
- 17 It follows from this that provided the applicants conducted the business such that supply of meals was at all times the primary and predominant service provided they could achieve in large measure what they wish. They could sell for consumption on premises a wide variety of wines with the focus on education that they wish to pursue and the customers would not be compelled to consume a meal to participate in that venture.
- 18 The major restriction would be the applicants' inability to sell wines other than their own to take away for consumption off licence.
- 19 However it must be noted that pursuant to s 104(2) of the Act if a bottle of wine has been purchased on the licensed premises by a person intending that the wine be consumed with or ancillary to a meal provided by the licensee on the premises, that person can take from the premises any unconsumed portion of the bottle of wine. Thus the applicants' restaurant license, if the consumption of wine were in combination with the supply of food, would also permit some limited form of take away.
- 20 Accordingly I find that a restaurant licence could adequately cover the kind of business proposed.
- 21 In light of this, the next issue for consideration is whether, if the applicants' trading rights were limited to those possible under a restaurant licence, its proposed business would be substantially prejudiced.
- 22 Ms Kentish said that this restriction to sell take away liquor was an issue because she believed "that people would be very frustrated to try wines

and not actually be able to take those wines away and have that with their dinner that night, or share it with a friend”. No evidence was called to back up this assertion.

- 23 She also said that the venture would not be financially viable unless people could buy the wines that they liked and take them away.
- 24 In the course of her evidence, Ms Kentish was asked:

“Q. Have you done anything in the way of preparation of a business plan, a feasibility study, a projected level of sales of profit, that sought of thing for what you’ve got in mind or is it just a concept.

A. No. We’ve spent some time with our accountant and we are actually in the process at the moment – I don’t have anything finished to show the Court, but we definitely – this is not some conceptual idea really. We see it as a really key part of what we would like to provide and we’ve been working on modelling for the last couple of years.”

- 25 That is the sum of the evidence before the Court regarding the lack of financial viability if take away is not available.

Conclusion

- 26 The applicants’ restaurant licence already permits them to conduct the tasting and education of customers about wine styles, wine making and food and wine matching that they wish to undertake. It also permits, in certain circumstances, a limited form of take away.
- 27 Unless it could be shown that the proposed business would be substantially prejudiced if the applicants’ trading rights were limited to those possible under their restaurant licence the application must fail.
- 28 At the moment all I have is Ms Kentish’s belief about patron’s frustration and her assertion about the business’s lack of financial viability if its trading is limited to that which would be achievable under a restaurant licence. In my view more than this is required to make the positive finding of substantial prejudice. The state of the evidence is such that I am not able to make that finding. It follows that a necessary prerequisite to the granting of a special circumstances license has not been met. Thus a consideration of the Court’s discretion does not arise. The application is refused.