

Hotel Eyre [2015] SALC 27

LICENSING COURT OF SOUTH AUSTRALIA

HOTEL EYRE

JURISDICTION: Referral to the Court of Application to Vary Security
Conditions on the Licence

FILE NO: 7176 of 2014

HEARING DATE: 26 March, 9 April and 8 May 2015

JUDGMENT OF: His Honour Judge WD Jennings

DELIVERED ON: 8 May 2015
Reasons published 9 June 2015

REPRESENTATION:

Counsel:

Complainant: Brevet Sgt K Phillis

Respondent: Mr W Woehlert

Solicitors:

Complainant: Commissioner of Police

Respondent: Australian Hotels Association (SA Branch)

- 1 The application before the Court by the Hotel Eyre Pty Ltd, which operates the Eyre Hotel in Whyalla, is to vary a condition in its licence to allow it, in the event that security officers (or crowd controllers) are not available to attend on certain occasions to replace them with the same number of drink marshals.
- 2 The application could not be resolved at conciliation and is opposed by the Commissioner for Police.
- 3 The current conditions of the licence require the licensee in Area 2 to have a minimum of two licensed security officers from between certain hours and when Areas 1, 2 and 7 are operating together there is a requirement for 3 licensed security officers.

The evidence

- 4 Mr Woehlert for the licensee called Mr Scott Matthews. His evidence was:
- 5 He is part of the Matthews Hotel Group which built the Hotel Eyre which has been operating for over 50 years. It has recently been substantially renovated.
- 6 It has a DJ on Saturday nights and caters for between 200-400 people on Saturday nights.
- 7 The Hotel is in regular contact with the police and no concerns have been raised by them concerning the operation of the Hotel.
- 8 There have been problems sourcing crowd controllers. A contractor that they had used for that purpose has now pulled out of Whyalla. Since then they have to source their own. There are only four or five people that they can use and often they will ring at short notice to say they are unavailable to attend.
- 9 It is not financially worthwhile for crowd controllers to come from Adelaide.
- 10 The current manager of the hotel has a security licence and the assistant manager is in the process of obtaining a licence.
- 11 The implications of having to shut the Hotel's doors with potentially 300 people present if crowd controllers do not turn up would be significant. There would be "minimal risk" if trained responsible persons were able to perform the role of crowd controllers. They have between eight to ten responsible persons. It is only proposed to use the responsible persons in the event that crowd controllers were not available. If responsible

persons performed the role of a crowd controller it would be cheaper but there is a balance “to keep your business surviving in the future ... and give security and a harmonious environment to the patrons”.

- 12 **Mr Carl Church** has been the manager of the Hotel for 3 years. He is a licensed crowd controller. He has developed a management plan for the Hotel (Ex A3). He participates in the licensing accord process in Whyalla.
- 13 The Hotel has a condition on its licence requiring a 1am “lock-out” and also a condition that requires monthly meetings with the police to discuss its late night trading obligations. No-one from the police has risen with him any concerns about the management of the Hotel.
- 14 They have a Scantek ID security machine to ensure no barred persons can enter the premises.
- 15 He confirmed that the security company that previously provided crowd controllers no longer operates in Whyalla so they now have to employ their own security. They advertise locally. They have problems in securing the requisite numbers as required by the conditions of the licence: there is competition for the limited number of security people from football clubs, birthday parties etc.
- 16 If a crowd controller does not turn up he has to take on the role and pass on the role of duty manager to someone else (more junior).
- 17 Members of motor cycle gangs do not now regularly frequent the Hotel. There are hotel bans on some of them. There are currently some 50 hotel barrings. There are approximately 5-6 police barrings. There has been an expectation that following various incidents the police would issue police barring notices but that has not happened.
- 18 The purpose of this application is to enable the Hotel to comply with its licence conditions and provide a safe venue. The application is not to cut costs. He thought he had a good relationship with the local police but based on the content of the affidavit of Matthew McDonnell that has changed.
- 19 Brevet Sergeant Phillis called the following witnesses:
- 20 **Sergeant Lindsay Anderson** is stationed at Whyalla and gave evidence via video link. His duties involve the investigation of complaints of criminal activities and issues involving licensed premises.
- 21 He recalls an incident which he described as a “large brawl” at the Hotel Eyre on 14 December 2014. It involved up to 25 people fighting from the

front door of the Hotel and onto the roadway. It occurred between 1am and 2am. Hotel security staff were present.

- 22 He said the Hotel itself “looks pretty good” and was a “fairly well-maintained place”. It has been renovated. He said the Hotel management was co-operative and “willing to assist” the police. In the main the security staff at the Hotel were good but on occasions were undermanned.
- 23 He has attended the Hotel a few times in relation to outlaw motor cycle gangs when fights have broken out. The security staff at the Hotel are locals and normally can diffuse difficult situations. He did not think it would be a wise thing to change the licensed conditions to lessen the number of crowd controllers. He was not aware that the Hotel was having problems securing crowd controllers. Apart from the serious incident on 14 December 2014 he does not think there were many others involving the Hotel in the last six months.
- 24 **Senior Constable Matthew McDonnell** has been based in Whyalla for 7 ½ years.
- 25 In his role as crime prosecution officer he liaises with Hotels and licensed premises including the Hotel Eyre. The Hotel is the most popular hotel in Whyalla. The biggest nights are Saturday into Sunday. He is aware they have a lock-out policy that starts at 1am. He feels the management of the Hotel could be improved and the security people he has spoken to do not have any confidence in the management. He was not aware Mr Church was a licensed crowd controller.
- 26 **Brevet Sergeant Shaun Blundell** is a field intelligence officer based at the Licensing Enforcement Branch. He compiled a statement/affidavit (Ex R1) based on police incident and apprehension reports associated with the Hotel Eyre: in it he deposed to some 19 incidents from 2 February 2014 to 29 March 2015 which involved the Hotel plus some specific incidents relating to outlaw motor cycle gangs.
- 27 **Senior Constable Marshall Morley** filed an affidavit in which he deposed to an incident on 29 March 2015 involving a security guard and a member of the outlawed motor cycle gang. He said the other security guards handled the incident well and then Mr Church intervened.

The submissions against the application

- 28 In opposing the application the police contended that the responsibilities and duties of an authorised person, including a responsible person, are so numerous and onerous that it would be inappropriate to have them assume the additional responsibility of a crowd controller.

- 29 They submitted that the role of crowd controllers is more onerous in the sense that they have specific training and are subject to the *Security Investigations Act Regulations of 2011*. As such, they are subjected to breath testing, as in an alcotest, and can be subjected to urine analysis to detect whether or not somebody is under the influence of a drug. They said that this was significant as within the licence industry as a whole, and with the general community, there are serious concerns regarding the use of illicit substances.
- 30 Whist they accepted that the respondent had put in place a very detailed management plan in connection with its proposal they queried whether the applicant's proposal was workable in practice.
- 31 They submitted that the evidence established that there had been incidents at the applicant's premises that indicated a need for authorised crowd controllers.
- 32 They referred to judgments of this Court that emphasised in connection with disciplinary proceedings and a failure to comply with conditions regarding crowd controllers that "effective crowd control is non-negotiable because the potential for a lack of effective crowd control to compromise public safety is self-evident".
- 33 They submitted that in light of evidence indicating that outlaw motorcycle gangs had frequented the applicant's premises the Court should consider, pursuant to section 43 of the Act, imposing some conditions regarding outlaw motorcycle gangs not attending, ie a condition on the licence to keep outlaw motorcycle gangs away from the venue.
- 34 I can deal with that submission immediately. It was not raised until closing submissions and in my view it is not appropriate for the Court to deal with it for that reason.

Consideration

- 35 Section 43 of the Act grants the Court a general power to impose conditions on a licence. In general terms these are focussed towards ensuring that the noise emanating from the licensed premises is not excessive; minimising offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises, or to minimise prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises, resulting from activities on the licensed premises, or the conduct of people making their way to or from the licensed premises; preventing offensive behaviour on the licensed premises (including offensive behaviour by persons providing or

purporting to provide entertainment (whether live or not) on the licensed premises); protecting the safety, health or welfare of customers and staff (or both); protecting the public interest; ensuring that the nature of the business to be conducted under the licence conforms with representations made to the licensing authority in proceedings for the grant of the licence or other proceedings under this Act; ensuring public order and safety at events expected to attract large crowds; preventing the consumption of liquor sold for consumption off the licensed premises in the vicinity of the licensed premises; and ensuring compliance with the objects of this Act.

- 36 Whether and if so what conditions are imposed is to be determined by reference to what is reasonable in the circumstances of a particular case. The Court will need to identify the risk of things like the noise emanating from the licensed premises being excessive; of the premises causing offence, annoyance, disturbance or inconvenience to people who reside, work or worship in their vicinity, of them causing prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises etc.
- 37 Having identified a relevant risk and the probability of its occurrence, it will then have to consider what would be a reasonable response, which in turn will involve a consideration of factors such as the expense, difficulty and inconvenience of taking alleviating action.
- 38 In evaluating the magnitude of the risk and what response is reasonably required the Court needs to be mindful of what could reasonably be expected of the activities of hotels. In *Hackney Tavern Nominees Pty Ltd v McLeod* the Full Court of the Supreme Court accepted Judge Kelly's observations about that when he said:

"Any resident who lives nearby a hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises. From time to time one or more of the patrons might be expected to be noisier than others—calling out, even yelling and screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents. ... Disturbance such as loud talking, swearing, perhaps even the odd screaming, perhaps even a fight or two, even on a relatively regular basis might not in many cases be classed as undue. As I have said, people who live in the vicinity of a hotel must accept some disturbance."¹

¹ (1983) 34 SASR 207 at 213

- 39 Whilst the evidence establishes that there has been the occasional disturbance at the applicant's hotel, it does not appear to have been extraordinary. By reference to the judgment of the Supreme Court in *Hackney Tavern Nominees Pty Ltd v McLeod* it has been within the bounds of what could reasonably be expected of the activities of a hotel.
- 40 I think it is significant that Mr Church understood that the management of the hotel had a good relationship with the local police. I accept that evidence. The contrary evidence of Senior Constable McDonnell is based upon hearsay, relying apparently of what he was told by "the security people".
- 41 I think on balance the evidence supports a finding that the applicant's premises are well managed and I so find.
- 42 I accept that crowd controllers are specifically trained and are subject to tighter constraints than other persons authorised under the Act. There is, however, no evidence that suggests that there have been any issues with the applicant's staff concerning illicit substances or being under the influence of alcohol whilst at work. It is notable that the late night code of practice requires a drink marshal who has to be a responsible person be engaged after certain hours. I think it likely that they can effectively monitor and manage crowds.
- 43 In all of the circumstances of this case and based on the evidence of Mr Matthews and Mr Church, which evidence I accept, on the face of it the proposal that they have suggested seems like a proportionate response to the risk of disturbance.
- 44 I am satisfied that it is appropriate that the application to vary conditions of the licence be granted.
- 45 The new condition is:

"5. In the event contracted security officers, required by conditions 3(C) or 4(B), do not present at the licensed premises, or having commenced working leave before the completion of their designated completion time, the licensee may replace the security staff with the same number of drink marshal(s), behaving in accordance with the *Late Night Code of Practice*, part 3, section 10, subparagraphs (1) to (4).

On each occasion when a responsible person is designated to perform the role of drink marshal in accordance with this condition the responsible person's details must be entered into the register maintained in accordance with Regulation 11(4) of the *Security and Investigations Industry Regulations 2011*.

The register must be produced to an authorised officer within the meaning of section 122 of the *Liquor Licensing Act 1997* on request.

Where the licensee utilises a drink marshal in accordance with this condition notice is to be given to the on-duty Patrol Sergeant of Whyalla Police on telephone number 0439 854 557 as soon as is practicable following the advice that a security officer is unable to attend or has left the premises before completing his or designated completion time.”

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- 46 I accept that the risk of disturbance may in time prove to be more of a factor than I have assumed. I therefore propose varying the conditions on an interim basis for one year, granting liberty to apply such that if the police have a legitimate basis for calling the matter back on they can do so at short notice.
- 47 The matter will in any event be reviewed by the Court at the expiration of one year.