

IN THE LICENSING COURT OF SOUTH AUSTRALIA

ADELAIDE

BEFORE HIS HONOUR JUDGE SOULIO

IN THE MATTER

1997

of the Liquor Licensing Act,

and

IN THE MATTER

of an Application for a Special
Circumstances Licence by Pivot
Investment Group Ltd in respect of
premises to be situated at 9/21
Gouger Street Adelaide and known as
Spoon, by Aramis Vineyards.

REASONS FOR DECISION

DELIVERED ON FRIDAY 27 MARCH 2009

**Counsel for the Applicant:
Solicitor for the Applicant:**

**Mr J Firth
Mr T Swaine**

**Counsel for the Intervener:
Solicitor for the Intervener:
(Liquor and Gambling Commissioner)**

**Ms S Geyer
Crown Solicitor**

Pivot Investment Group Limited has applied for a Special Circumstances Licence. The applicant proposes to establish a business, "Spoon, by Aramis Vineyards", in newly constructed commercial premises at 9/21 Gouger Street Adelaide South Australia. It is plain that the wider area known as the Gouger Street precinct including Grote Street is a well established tourist area comprising a great variety of quality restaurants and indeed hotels.

Background to the Application

The application for a Special Circumstances Licence ("S.C.L.") is made pursuant to s40 of the Act which relevantly provides:

- (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 circumstances 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 applicant's trading rights were limited to those possible under a licence of some other category.
- (3) A special circumstances licence does not authorise extended trade in liquor unless the licence contains an extended trading authorisation.
- (4) If liquor is sold by a licensee under a special circumstances licence for consumption at a function off the licensed premises, the licensed premises of the licensee are, for the period for which the licensee supplies liquor at the function, to be regarded as including the premises at which the function is held.

Initially the licensees of two local hotels, the Prince Albert Hotel and the Talbot Hotel, lodged objections. The Adelaide City Council and the Police Commissioner intervened in the application. The matter was then listed before the Liquor and Gambling Commissioner ("the Commissioner").

Pursuant to s17(1)(b) of the *Liquor Licensing Act 1997* (“the Act”) the Commissioner proceeded to conciliate as between the applicant, the objectors and interveners. In December 2008 all parties to the conciliation agreed upon a set of licence conditions. As part of the agreement a concept document for the proposed premises was to be included in the conditions for the conduct of the S.C.L.

Following that agreement, the objecting and intervening parties withdrew their respective objections and interventions.

Section 17(1)(b)(i) of the Act provides that:

If the differences between the parties are resolved by conciliation, the Commissioner must determine the matter so as to reflect the agreement reached by conciliation; ... (my emphasis).

On 9 January 2009 the Commissioner referred the matter for hearing and determination to this Court, pursuant to s21 of the Act, and lodged a notice of intervention.

The Commissioner did not accept that s17(1)(b)(i) required him to simply grant the application whenever the parties reached an agreement. He concluded that he, nonetheless, must assess the application in accordance with the requirements of the Act. In doing so he came to the view that the Court should determine whether the applicant had satisfied s40(2) of the Act. In my opinion the Commissioner’s construction of s17(1)(b)(i) of the Act is plainly correct. That construction is entirely consistent with s53(2) of the Act.

The Act obliges both the Commissioner and the Court to have regard to the public interest, and notwithstanding any agreement, an applicant must satisfy the requirements of s40(2) of the Act.

Having embarked upon the conciliation it was entirely appropriate for the Commissioner to refer this application to the Court for determination. The Commissioner was plainly alive to the legislative concerns which led to the enactment of s40 of the current Act. As is evident from recommendations in the *Anderson Report* which led to the enactment of the current legislation, and in particular the transitional provisions therein, Parliament was concerned about premises which could, with some exemptions, trade under a Hotel Licence or Restaurant Licence but had been granted wider conditions under a General Facilities Licence.

Onus

The applicant has the onus of satisfying the test in s40(2) of the Act. The intervener's contention that a licence of an existing category could adequately cover the proposed business is merely the corollary of the applicant's position.

Counsel for the Commissioner concentrated her arguments upon the proposition that a Hotel Licence could adequately cover the business proposed by the applicant, and that the proposed business would not be substantially prejudiced if the applicant's trading rights were limited to those possible under a Hotel Licence.

Whilst the argument was put on that basis, it is still necessary to give consideration to whether any other type of licence would adequately cover the business proposed.

The Hearing

The matter proceeded as a full hearing before me. The applicant was represented by Mr Firth of counsel. The only remaining intervener/objector was the Commissioner himself, represented by Ms Geyer.

The only witness to give oral evidence was the applicant's principal Mr Leonidis Flourentzou. His evidence was supplemented by affidavits.

The Proposed Business

The nature of the proposed business is described in the agreed conditions and the concept document, and set out in the evidence and affidavits of Mr Flourentzou.

The proposed agreed conditions included the following:

1. The prime use of the premises shall be that of a Restaurant and wine tasting and wine promotion facility with any entertainment being ancillary to that prime use and such entertainment is only to be provided at the licensed premises in accordance with Condition 11.
4. Subject to Condition 8 below the licence shall authorise the sale and supply of liquor to, and the consumption of liquor by, the general public for consumption on or off the licensed premises only during the following hours, namely:

Monday to Thursday 8:00am to 11:00pm

Friday 8:00am to midnight

Saturday and Sunday 8:00am to 4:00pm

The sale and supply of liquor through direct sales transactions shall also be authorised only during those hours.

5. Liquor can only be sold, supplied and consumed pursuant to the licence in accordance with the "Spoon, By Aramis Vineyards Concept" as set out in the Concept document annexed to this licence, and including the limitations on the quantity, style and quality of the liquor involved appearing in the indicative liquor list forming part of that Concept document.
6. Without limiting Condition 5, the licensee will only be permitted under this licence to sell liquor of a premium, boutique or collectable nature for consumption on or off the premises.
7. Without limiting Condition 6, the licensee shall not be permitted to sell under this licence (whether for consumption on or off the licensed premises):

- a) Australian Beer, except boutique Australian beer which will shall mean beer brewed other than by Fosters, Lion Nathan, SA Brewing Co, Coopers, or subsidiaries of those companies;
 - b) Tap beer;
 - c) Ready to drink products including but not limited to coolers, cruisers and premix drinks;
 - d) Cask wines;
 - e) Flagon wines or other alcohol in flagons;
 - f) Bulk liquor but this does not include Magnums, Jeroboams, or Imperials; and
 - g) Spirits of the size 750ml priced under \$60.00 at the time of the grant of the liquor licence and as adjusted annually thereafter for the movements in the Consumer Price Index.
8. Notwithstanding Condition 4 above, the licence shall authorise the sale, supply and consumption of liquor for consumption on or off the premises by those attending a genuine pre-booked private function during the following hours:
- 8.1. On any day of the week between 8:00am and 12 midnight;
 - 8.2 On any day of the week after 12 midnight only if the function is specifically authorised by a limited licence granted pursuant to Section 41 of the Act.
9. Liquor for sale off the licensed premises shall not be on display at the premises or advertised in the media other than on the licensee's website or Aramis Vineyard wines produced under Producer's Licence No. 50808262.

Mr Flourentzou, the principal of the applicant is a director of Megalo Property Holdings Pty Ltd, ("Megalo") which holds a Producer's Licence and a Wholesale Liquor Merchant's Licence. Megalo operates Aramis Vineyards, a maker of premium red wine with some 26 hectares of vineyards in the McLaren Vale region.

The proposed business will combine a wine bar, a fine dining restaurant, and a "cellar door" and wine promotion facility. The premises will be generally available for private functions.

It is proposed that the wine bar will offer a limited range of premium liquor and liquor of a boutique or collectable nature.

It is proposed that a limited range of high quality liquor be available for sale by the glass or the bottle for consumption on the premises and by the bottle for consumption off the premises.

The cellar door will offer tastings of Aramis Vineyards wines including special release tastings, and will offer a range of other premium and boutique wines for tasting and purchase. Tastings will be conducted with the wine maker present on occasions. The business will also host wine master classes accompanied by fine food.

The restaurant will be open for breakfast, lunch and dinner and the restaurant's menu will be dependent upon seasonal local produce.

A significant feature of the proposed business according to the evidence of Mr Flourentzou, which evidence I accept, is the provision of a facility for private functions such as birthday dinners, christenings or Name Day functions, and wedding receptions. Customers requiring the use of the premises for such functions will be derived in large part from within the Greek community of Adelaide, where the principal and his family are well known. Customers for work functions and for wine master classes accompanied by food, will be derived locally having regard to the fact that the proposed business is located in the heart of the legal precinct. The premises will be closed to the public whenever a private function is held.

Mr Flourentzou bases his assessment of the appeal of the proposed premises for private functions on a number of factors including:

- that the business will be located in a new building and will have a new fit-out;
- that the general public will be attracted to a new and different style of venue for private functions;

- that private functions that include wine tasting and wine education are, and will be, popular; and
- that the size of the premises particularly lends itself to private functions.

Mr Flourentzou said that the holding of private functions at the premises will be a profitable aspect of the business, and is therefore an important part of the business plan. A premium will be charged to the hirer to hire the whole of the premises, thereby closing them to the general public. The business will offer food and wine packages for private functions that provide larger profit margins than profit margins obtained while the premises are open for normal trade to the general public. He said, and I accept, that if he is unable to hire the premises for private functions at any time on any day of the week, the profitability of the business will be significantly reduced, as will his ability to offer a broad fine food and wine experience to patrons.

Mr Flourentzou proposes to model the business on a complex of premises in Spring Street Melbourne; the City Wine Shop, the European, the Melbourne Supper Club and the Siglo Bar, but most particularly the City Wine Shop which is a relatively small venue offering meals, and wine for consumption both on and off premises.

There is no intention to have mainstream liquor lines as can be seen from conditions 5, 6, and 7. There would be no supplies of mainstream liquor such as discount wine, cask wines, beer, or ready mixed drinks which form an important part of the hotel off licence trade.

Liquor will be presented for sale, not on display as in a bottle shop, but by way of a drinks list. Whilst liquor is intended to be sold with or without meals, a range of meals will be available at all times that the premises are open to the public.

The Premises

The premises are very small occupying a total of 69 square meters in area, including the outdoor footpath area of some 20 square meters. The maximum capacities are fixed at 35 people in the main area, 12 people in the foyer area, and 20 people on the outside footpath area. There is no cold room. There is no display refrigeration.

The Applicant's Case as to the Test in S40 of the Act

The applicant's contention is that the imposition of the statutory obligations which are imposed on the holder of a Hotel Licence¹ would make it impractical for the applicant to conduct what is an essential part of the business, namely the hosting of private functions, and the offering of tastings and wine master classes, both accompanied by food, on a private basis.

As I have said, the premises are very limited in area, and the geography is such as to make it impossible to set aside an area for a private function while still maintaining a service to the public. I accept that the premises would have to be closed to the public during any private function.

The applicant contended that the modifications which would need to be made to an existing category of licence, namely a Hotel Licence, to enable it to cover the business, would mean that it was not a Hotel Licence at all.

The applicant relied on a number of propositions derived from decisions based upon predecessor legislation in making that contention.

¹ *Liquor Licensing Act 1997 s32(2).*

The Case Law

There is no power in the Act to impose by way of condition an exemption which so distorts a Hotel Licence as to fly in the face of the statutory scheme of classification of licences.² The purpose of the section relating to the category of licences which includes Hotel Licences would be largely defeated if the licence could be so distorted by conditions, that what is called a "Hotel Licence" is not in any real sense a licence for a hotel.³

In *Pierce & Ors v Liquor Licensing Commissioner & Anor* the Court held that:

To create a special class of "hotel licence" for what is in effect a cocktail bar and lounge in conjunction with a restaurant is to travel outside the ambit of the Act and the statutory discretions.⁴

As Johnston J said:

In my view the argument is good against the fundamental "remoulding" of any type of licence, but is particularly strong in relation to the hotel licence, because such a fundamental recasting of s 26 — the authority section — affects the operation of s 27 — the obligation section. The obligations cast upon the hotel licence are the justification for the preeminent position which that licence occupies in the scheme of the legislation. Any fundamental recasting of the obligations which go with the licence (whether achieved by a condition directly relating to obligations or a condition operating on obligations by way of eliminating part of the statutory authority) must seriously undermine the basis for the special position of the hotel licence.⁵

Similarly it would be inappropriate, for example, to grant a Retail Liquor Merchant's Licence subject to a condition excluding the right to sell certain types of liquor, as to grant such a licence would be to return to a class of licence expressly abolished by the *Licensing Act of 1967*.⁶ The Licensing Court should attach weight, in

² *Pierce & Ors v Liquor Licensing Commissioner & Anor* (1987) 47 SASR 22 at p 24 per Jacobs J.

³ *Ibid* at p 23.

⁴ (1987) 47 SASR 22 at p 26 per Jacobs J.

⁵ *Ibid* at pp 39-40 per Johnston J.

⁶ *Wilman Nominees Pty Ltd v Harvey & Anor* (1994) 35 SASR 47 at p 476 per Mohr J.

the exercise of its discretion, to the consideration that the statute contemplates that such a licence should ordinarily authorise the sale of all kinds of liquor.⁷

In *Swanport Bottle Shop Pty Ltd v Bridgeport Hotel Pty Ltd*,⁸ King CJ held, to similar effect, that to adopt a policy of restricting a retail liquor merchant from selling kegs would be to adopt a policy which runs counter to the ordinary tenor of the licence as prescribed by the Act.

A condition restricting the type of liquor or the type of package which may be sold, which of its nature modifies the normal incidents of the licence, is to be distinguished from a condition seeking to regulate the mode of operation of the premises for the purpose of ensuring that it performs the function in the licensing system which the Act contemplates.⁹ Granting a licence restricted in that manner would result in the public being deprived of a facility which the ordinary incidents of the licence would permit them to have.¹⁰

The grant of any licence by the licensing authority must lie within and not outside of the framework created by the Act within which licences may be granted. The licensing authority is not entitled, by the imposition of conditions, to grant a new species of licence differing fundamentally from the characteristics of any of the licences available under the Act.¹¹

I bear in mind that the views expressed in cases such as *Pierce*, decided under predecessor legislation, have to be applied with some caution to the present Act which

⁷ Ibid per King CJ at p 475.

⁸ (1987) 47 SASR 449 at p 451.

⁹ Ibid at p 451 per King CJ.

¹⁰ Ibid at p 452.

¹¹ *Sailmaster Tavern & Ors v Nemo Nominees* SASC S5266 Full Court Supreme Court 20 October 1995 at p 11.

gives the Licensing Court greater power to mould a licence, including a Hotel Licence, for example by exempting a licensee from obligations, than did the 1985 Act and earlier Acts.¹²

As Doyle CJ said of the current legislation in *Facac Pty Ltd v Talbot Hotel Group Pty Ltd & Anor*:¹³

The Act permits licences to be shaped or moulded to a greater extent than was possible under the former Act, and contemplates licences being shaped so as to permit trading in a way that would not have been consistent with the scheme of the previous Act.

The Features of a Special Circumstances Licence

In *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd & Anor*¹⁴ the Full Court of the Supreme Court recently identified the significant features of an S.C.L., affirming that:

- Section 40(1) provides for an extremely flexible form of licence for the sale of liquor for consumption on or off the premises.
- The nature and effect of an S.C.L is one almost entirely moulded by the terms and conditions upon which it is granted.¹⁵
- The S.C.L. differs from the predecessor General Facility Licence, in that there is no requirement to establish need given the object in s3 of the Act to encourage a competitive market for the supply of liquor.¹⁶
- There is no requirement to take into account the probable effect of the grant of a S.C.L. on other licensed premises in the relevant locality.¹⁷
- The intent of s40 is to provide for a distinct or particular kind of business selling liquor where the Act does not contain another category of licence that could adequately cover that business and where that business would be substantially prejudiced if that applicant's trading rights were limited to those possible under a licence of some other category.

¹² *Facac Pty Ltd v Talbot Hotel Group Pty Ltd & Anor* (2001) 80 SASR 580 at para 31 per Doyle CJ.

¹³ *Ibid* at para 32.

¹⁴ (2008) 100 SASR 1.

¹⁵ *Ibid* at para 13.

¹⁶ *Ibid* at para 19.

¹⁷ *Ibid* at para 20.

- Further the term “special circumstances” does not signify circumstances that are exceptional or extraordinary, unusual, abnormal or atypical.¹⁸

The S.C.L is intended to have a wider operation than the predecessor General Facility Licence.¹⁹ The absence of an obligation to prove need in relation to an S.C.L is consistent with the objective stated in s3(1), to encourage a competitive market for the supply of liquor.²⁰

As the Court said in *Bottega Rotolo*:

In our view, the absence of any obligation to prove need for a special circumstances licence, the absence of any obligation of the licensing authority to have regard to other premises in the locality, and the unqualified ability of the licensing authority to grant a special circumstances licence authorising the sale of liquor for consumption on or off the licensed premises together mark a significant relaxation of earlier restrictions in liquor licensing legislation in this State in respect of licences authorising the sale of liquor for consumption off licensed premises.²¹

As to the approach to be taken in considering an application each case must be considered on its own facts and circumstances with particular regard to the nature of the business and the range of wines and other liquor to be sold.²²

I bear in mind the observation made in *Bottega Rotolo* that:

It should not be assumed from this decision that anyone who wishes to sell a limited range of packaged liquor will be entitled to be granted a special circumstances licence. The ability to obtain a grant of a special circumstances licence will depend on a number of circumstances including the range of liquor to be sold. Likewise, it should not be assumed that a special circumstances licence enabling the sale of packaged liquor is but a stepping-stone to a full retail liquor merchant's licence or that it can be extended to become a thinly disguised retail liquor merchant's licence. Its substantial advantage is that a licensing authority, by the imposition of conditions, can mould the licence to suit the special circumstances shown to exist.²³

¹⁸ At para 24.

¹⁹ *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd & Anor* (2008) 100 SASR 1 at para 18.

²⁰ *Ibid* at para 19.

²¹ *Ibid* at para 23.

²² *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd & Anor* (2008) 100 SASR 1 at para 58.

²³ *Ibid* at para 60.

The Intervener's Case

The intervener submitted that a Hotel Licence is more flexible than it was, and can accommodate a greater range of businesses than it would have accommodated in the past. It said that a Hotel Licence, with appropriate conditions and exemptions from obligations, could be moulded so as to cover the proposed business, and would enable the applicant to trade without substantial prejudice to its proposed business.

The intervener contended that given the Court's wide power to fix hours during which the premises must be open to the public the Court could, in the present case, specify a condition that the business be open to the public during the prescribed hours, other than when the premises were being used for a private function.

Can an Existing Category of Licence Adequately Cover the Proposed Business?

The question, when considering whether the proposed business could be adequately covered by a Hotel Licence, is not whether the Court can or should grant a Hotel Licence in the form, or with the rights and obligations, that the applicant wants. It is whether a Hotel Licence, with appropriate exemptions, would enable the applicant to trade in a way that did not substantially prejudice its proposed business. If it would, then the applicant cannot be granted an S.C.L. The applicant cannot create a basis for the grant of an S.C.L. by the simple expedient of demanding trading rights that cannot be accommodated under a Hotel Licence.²⁴

It is true that the licensing authority may exempt a licensee from the obligation to keep the licensed premises open for the sale of liquor to the extent the authority

²⁴ *Facac Pty Ltd v Talbot Hotel Group & Anor* (2001) 80 SASR 580 at para 43.

considers appropriate in the circumstances of a particular case, and may exempt a licensee from the obligation to provide meals wholly or to a specified extent.²⁵

However, the provision contemplates that the hours may be reduced, not eliminated entirely. Despite the use of the word ‘exempt’, the manner in which the power to exempt is expressed, and the contrast with the power to exempt from the obligation to provide meals, implies that the Court cannot wholly remove the obligation to be open for the sale of liquor. A licence is to be granted only in respect of premises that will be open for the sale of liquor to the public. The Court has a wide power to fix the hours during which those premises will be open, but it is part of a concept of a hotel that the Court will determine when it must be open, and will ensure that it does provide an appropriate service to the public.²⁶

A condition which exempts the holder of a licence from the obligation to remain open for the sale of liquor when private functions are being held, has the effect that members of the public attending at the premises for the purpose of purchasing liquor may well attend on occasions only to find that the premises are closed to the public. That in my view would be inconsistent with the statutory obligation to maintain either the prescribed hours, or reduced but certain hours, and further indicates that the proposed business is simply not that of a hotel. Whilst there obviously can be no standard definition of what is a hotel, and the operation of a hotel has no doubt changed over time, in my view this business, on these premises, is simply not a hotel, and cannot properly operate under a Hotel Licence.

²⁵ *Liquor Licensing Act 1997* s32(3).

²⁶ *Facac Pty Ltd v Talbot Hotel Group & Anor* (2001) 80 SASR 580 at para 16.

The restrictions which would be required to be placed upon a Hotel Licence in the present case, to meet the concerns of the objectors, and to enable the business to operate as proposed, would so distort a Hotel Licence as to fly in the face of the statutory scheme of classification of licences.

I bear in mind that the fact that an applicant does not wish to avail itself of the benefits of a Hotel Licence does not of itself mean that such a licence could not cover the proposed business. However here the obligations imposed by a Hotel Licence would make it impractical to operate the proposed business, and in particular the proposed aspect of the business relating to the provision of a facility for private functions, and the provision of wine master classes. To tailor conditions for the proposed business by extensively modifying a Hotel Licence, would result in the business operating under that which is not in fact a Hotel Licence at all.

Section 40(2) can be read as meaning that a licence of a particular class does not adequately cover a proposed business if the suggested licence carries with it obligations that make it impractical to operate the proposed business.²⁷

In the event that the business were to operate under a Hotel Licence, and be required to be open for the supply of liquor at all times, I am of the view that the proposed business would be substantially prejudiced as the ability of the applicant to close the premises for private functions and wine classes, on a regular but ad hoc basis, would be severely compromised. That aspect of the applicant's business is an important part of the proposed business.

²⁷ Ibid at para 26.

I cannot conclude otherwise but that the proposed business would be substantially prejudiced if the applicant's trading rights were limited to a Hotel Licence, and the obligations upon the applicant were those attaching to a Hotel Licence.

It is apparent that the proposed business will be a wine bar which serves restaurant meals. The premises are set up to operate primarily as a wine bar. It cannot operate under a Restaurant Licence. A Retail Liquor Merchant's Licence does not adequately cover the proposed business, for the same reasons as outlined by the Full Court in *Bottega Rotolo*.²⁸

That disposes of the intervention by the Commissioner. I find that a Hotel Licence would not adequately cover the proposed business. Further, I find that no licence of any other category would do so.

Should the S.C.L be Granted?

By its terms, s40(1) provides for an extremely flexible form of licence for the sale of liquor for consumption on or off the premises. Subject to ss (3) and (4), the nature and effect of the licence will almost entirely be moulded by the terms and conditions upon which it is granted. The discretion to grant the licence and the terms and conditions that may be imposed are only limited by s53.²⁹

I accept that the applicant is genuine in its proposal, and is not endeavouring to "mould a hybrid" nor attempting to "circumvent a Hotel Licence and use the S.C.L. to meet its own convenience".

²⁸ At para 49.

²⁹ *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd & Anor* (2008) 100 SASR 1 at para 13.

This type of business is the very thing that an S.C.L. is designed to accommodate. My major concern in considering the application is the aspect of the business which involves the sale of liquor for consumption off the premises. The fact that the business will involve the cellar-door sales of the proprietor's wines and other very high quality wines alleviates that concern. However there was little or no evidence as to the basis upon which it was intended to sell spirits or premium beers and it seems to me, that there is no justification for an entitlement to sell spirits or beer, even restricted to premium spirits and boutique beer, for consumption off premises.

Discretion

This Court has an unqualified discretion to grant or refuse an application for an S.C.L. but the discretion must be exercised within the ambit of the Act.³⁰ In considering the question, I am required to be satisfied that the grant of the application would not be contrary to the public interest.³¹

Although an S.C.L. is a catch-all licence,³² the Act does not intend that the S.C.L. should be a means by which to circumvent the scheme of the Act and the obligations attached to each form of licence.³³

In *Facac* Doyle CJ said:³⁴

The Court has a very wide discretion under s 53 of the Act. The Court might take the view that the grant of a hotel licence with no obligation to sell liquor for consumption off the premises, no obligation to serve meals, and very limited obligatory hours, would create an undesirable precedent, possibly leading to the creation of a new species of hotel, in effect the wine bar. The

³⁰ *Bay Hotel Motel v Broadway Hotel Pty Ltd* [1965] SASR 249 at 261; *Liquorland (Australia) Pty Ltd v Lindsay Cove Pty Ltd* (2002) 81 SASR 337 at para 28.

³¹ *Liquor Licensing Act 1997* s53(1a).

³² *Facac Pty Ltd v Talbot Hotel Group & Anor* (2001) 80 SASR 580 at para 26.

³³ *Bottega Rotolo Pty Ltd v Saturno's Colonist Tavern Pty Ltd & Anor* (2008) 100 SASR 1 at paragraph 34 per DeBelle and Bleby JJ.

³⁴ *Facac Pty Ltd v Talbot Hotel Group & Anor* (2001) 80 SASR 580 at para 49.

Court might conclude that for that reason it can and should refuse to grant a hotel licence in such a case. If that was its approach, that might result in the Court refusing to grant a hotel licence in such cases, and to deal with such businesses as appropriately the subject of a special circumstances licence. However, it is important to emphasise that the Court could not in this respect simply adopt a rule of thumb. It may be that in the end it comes back to the point I have already made — that the power to grant exemptions cannot be used to depart from the statutory concept.

As I said, cases like the present one will have to be dealt with case by case, with a careful eye to the statutory policy.

It is trite that an applicant for an S.C.L. does not have to prove need for the licence. This position is in contrast to an applicant for a Hotel Licence. I am particularly conscious of the risk of the creation of an undesirable precedent as noted by the Chief Justice in *Facac*. I repeat however that the present application is most unusual and genuinely fills a gap in the provision of liquor in what is a tourist area in Gouger Street.

In determining the application I must also have regard to the objects of the Act.³⁵

The applicant's submission was that the granting of the application would not be contrary to the public interest, given that the proposed business would provide diversity to the locality; promote and educate patrons in relation to fine or premium liquor; offer a style of premises to the public that are not otherwise available within the locality; and could not be used or advertised as a nightclub, dance club, karaoke bar or a similar venue. I accept that submission and do not consider that the grant of the application would be contrary to the public interest. Further, I consider that the grant of the application is consistent with the objects of the Act stated in s3(1).

³⁵ *Liquor Licensing Act 1997 s3(2).*

Conditions

I turn to consider whether the proposed Conditions are appropriate. As part of the applicant's case I was presented with the Conditions imposed on the S.C.L. granted to Vincent's. Some of the conditions imposed there, as here, are capable of a range of interpretations. Conditions should be expressed clearly in terms which enable them to be enforced. An S.C. L. is by its very nature limited to the express conditions of the licence. It is therefore incumbent on every applicant for an S.C.L. to be quite specific about those conditions. In this case there was some general evidence about a "limited range" of wines. Such expressions are of limited assistance to the Court. It is necessary for the applicant to refine the expression of the conditions.

In addition, I see no warrant for granting to the applicant an ability to sell liquor for consumption off the premises that is greater than that accorded to the holder of a Hotel Licence. I would restrict the sale of liquor for consumption off premises to the hours set out in the proposed Conditions 4 and 8.1 only, with no sales after midnight on any day.

Further, the concept, as I have already described, is really that of a wine bar. Whilst it is appropriate to permit the consumption of spirits and beer on the premises, there is no evidence to justify the right to sell spirits or beer for consumption off premises, and I would amend the proposed Condition 7 to reflect that.

I consider it appropriate to grant the application for a Special Circumstances Licence with extended trading authorisation and entertainment consent. However as the application was made on a slightly different basis to that which I would grant, and as I have some concerns as to the terms in which some of the proposed conditions are

expressed, I will hear further from the parties as to the precise terms of the conditions to attach to the licence.