

FACAC PTY LTD v TALBOT HOTEL GROUP PTY LTD & ANOR
[2001] SASC 445

Full Court: Doyle CJ, Martin and Besanko JJ

1 DOYLE CJ: This is an appeal by leave against a decision of the Licensing Court.

2 The Judge of the Licensing Court refused an application for the grant of a special circumstances licence under s 40 of the *Liquor Licensing Act 1997* (SA) (“the Act”). The applicant sought the licence to enable it to operate what is commonly called a wine bar. The Judge said that the proposed business could be conducted pursuant to a hotel licence with the grant of exemptions from certain obligations under the Act, and with an authorisation for extended trade. The Judge held that because the grant of a hotel licence would enable the applicant to trade as proposed, s 40 of the Act did not authorise the grant of the special circumstances licence.

3 The appeal turns on the meaning of s 40, and whether the Licensing Court could properly grant a hotel licence for the proposed business.

The proposed business

4 The premises are in Gouger Street, Adelaide. They are near the Courts and the Central Market. There are many restaurants in the immediate vicinity, and one hotel. There is a retail storekeeper’s licence in the Central Market.

5 The premises appear to be about the size of many of the restaurants in the locality. As proposed, there would be a bar and lounge chairs and tables, a store and toilets. Customers could consume liquor at the bar or while seated.

6 The applicant would sell higher quality wines and beers by the bottle and by the glass, but for consumption on the premises only. Spirits also would be sold. There would be no sales of liquor for consumption off the premises. Light snacks would be provided. The food would not be sufficiently substantial to be described as a meal.

7 The applicant wishes to be authorised to sell liquor seven days a week from 9am until 3am the following morning. However, the applicant wishes to be at liberty to decide when it will sell liquor, and so wishes to be exempted from the obligation to keep the premises open for the sale of liquor during the hours specified in the Act.

8 There was no suggestion that there are any premises trading in this way in the locality. There are a number of similar businesses in Adelaide. As I have said, they are usually called wine bars, reflecting the fact that wine is the main type of liquor sold in such premises.

The special circumstances licence

9 The Act provides for eleven classes of licence: s 31(2). Most classes are designated by a name that suggests a recognisable kind of business e.g. hotel licence, restaurant licence, retail liquor merchant's licence. I summarised this aspect of the Act in my reasons in *Australian Wine Traveller Pty Ltd v Liquor Stores Association Inc* [2000] SASC 139;(2000) 77 SASR 15 at [17]-[22].

10 There are two classes of licence that are not so designated, the special circumstances licence and the limited licence. The limited licence can only be granted "for a special occasion or series of special occasions." It can be put to one side.

11 The special circumstances licence is provided for by s 40, which provides as follows:

"Special circumstances licence

40. (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."

It was common ground that the only other class of licence under which the applicant might be able to conduct the proposed business is a hotel licence. It was because the Judge concluded that the applicant could conduct the proposed business under a suitably tailored hotel licence that he refused the application.

The hotel licence

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

“Hotel licence

32. (1) A hotel licence authorises the licensee-

(a) to sell liquor on the licensed premises for consumption on or off the licensed premises on any day (except Sunday, Good Friday and Christmas Day) between 5 am and midnight; and

(b) to sell liquor on the licensed premises for consumption on or off the licensed premises on a Sunday (not being Christmas Day) between 11 am and 8 pm or if the Sunday is New Year's Eve, between 11 am and midnight; and

(c) to sell liquor on the licensed premises for consumption on or off the licensed premises on Christmas Day between 9 am and 11 am; and

(d) to sell liquor on the licensed premises for consumption on or off the licensed premises on New Year's Day between the hours of midnight and 2 am (in addition to the hours authorised under paragraph (a) or (b)); and

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

(f) 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

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

(h) if an extended trading authorisation is in force-

(i) to sell liquor for consumption on the licensed premises in accordance with the authorisation; and

(ii) subject to any conditions of the authorisation excluding or limiting the authority conferred by this subparagraph-to sell liquor on a Sunday (not being Christmas Day) for consumption off the licensed premises between 8 am and 11 am and between 8 pm and 9 pm; and

(i) 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 trading hours fixed by or under a

preceding paragraph for the sale of liquor for consumption off the licensed premises).

(2) 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 11 am and 8 pm;

(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 6 pm and 8 pm, 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.”

13 The hotel licence continues to be the class of licence with the most extensive trading rights. But the provisions of the Act relating to the hotel licence, and to other classes of licence, reflect a trend over some 30 years towards a more flexible scheme for regulating the sale of liquor.

14 The holder of a hotel licence is no longer required to provide accommodation for lodgers. The only obligation imposed on the holder of such a licence is, as s 32(2) provides, to be open for the sale of liquor between 11am and 8pm and to provide a meal on request during the specified hours.

15 I mention here that, in my opinion, it is implicit in s 32(2)(a) that a hotel will be open for the sale of liquor for consumption on the premises *and* off the premises. I consider that it is an obligation of a hotel licensee to have liquor available for sale in both ways.

16 But even these obligations can be lessened. As s 32(3) provides, the obligatory hours (as I will call them) can be reduced. However, the provision contemplates that they 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. Obviously enough, no-one would obtain a licence and then keep the premises closed. The point I make is that 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. Finally, under this head, it is clear that the obligation to provide meals can be wholly removed.

17 Thus, the Act contemplates premises suitable for the grant of a hotel licence as including those in which there will be no accommodation for lodgers, from which no meals will be provided, and from which liquor is sold to the public during hours less than the obligatory hours. This is how some older hotels traded in the past (in breach of earlier legislation) and probably do still trade, and, no doubt, how some of the newer hotels trade.

18 The applicant seeks to go two steps further. It wishes to have no obligatory hours at all, although I suspect it would settle for a limited range of obligatory hours on the best trading days. It also wishes to have no obligation to sell liquor for consumption off the premises.

19 The Judge treated the latter point as a matter for the applicant’s choice. I do not accept that. The obligation to be open for the sale of liquor implies, as I have said, the sale of liquor for consumption on and off the premises. A complete refusal to sell liquor for consumption off the premises would be a breach of that obligation. That is not to say that a hotel licensee must promote sales of liquor for consumption off the premises. It is merely to say that the Act envisages that a hotel will provide for the sale of liquor for consumption on and off the premises, subject to the grant of an exemption by the Court.

The Judge’s approach

20 The Judge said that he could grant a hotel licence to the applicant with an exemption from the provision of meals, with an extended trading authorisation (to cover trading from midnight to 3am), and with a complete exemption from the obligatory hours. This would leave the applicant free to trade when it saw fit

from 9am to 3am the following morning. As I said, he treated the sale of liquor for consumption off the premises as a matter for the applicant's choice.

21 As such a licence would enable the applicant to trade as it proposed, he concluded that s 40(2) prohibited him from granting the licence sought.

22 The result is that the applicant must apply for a hotel licence, and as required by s 58(1) of the Act must prove that "the licence is necessary in order to provide for the needs of the public in that locality." There is no need to prove a need for the grant of a special circumstances licence. Whether the applicant could prove the grant of a hotel licence is necessary to meet the needs of the public in the locality is open to doubt: see *Angler's Hotel/Motel v Taranto (1980) Pty Ltd* (1996) 188 LSJS 321 at 324-235.

The appeal

23 Mr Firth, counsel for the appellant (which was the applicant below), advanced two submissions.

24 The first is that in considering for the purposes of s 40(2)(a) whether a licence of another category "could adequately cover the kind of business proposed by the applicant", the Court should not take account of the possible grant of exemptions under the Act. Without an exemption, a hotel licence would not adequately cover the proposed business. His second submission is that the Court could not or should not grant a hotel licence so extensively tailored to fit the proposed business as the Judge contemplated, and accordingly the Judge's reason for refusing to grant a special circumstances licence was misconceived.

25 There is an odd aspect to the first submission. The terms of s 40 suggest that it is concerned with situations in which other classes of licence authorise trading which is not sufficiently extensive for the purposes of the proposed business. Here, the appellant wishes to be freed of the obligations attaching to a hotel licence. The appellant's complaint is not that the rights attaching to a hotel licence are not wide enough to cover the business proposed, but that the applicant does not wish to be obliged to exercise all, indeed any, of the rights that attach to a hotel licence.

26 However, I consider that s 40 should be read flexibly. It is a kind of "catch all" provision. I consider that s 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 However, I do not accept Mr Firth's submission that for the purposes of s 40 the Court confines itself to a consideration of the suggested class of licence (the reference in s 40(2)(a) to a category of licence must be to a class of licence), ignoring such powers as the Court may have to grant exemptions or, by the

imposition of conditions, in some other way to affect the rights and obligations attaching to the licence. In particular, by s 40(2)(b) the Court must consider the trading rights that are “possible” under the suggested class of licence. That indicates that the Court must consider the powers the Court can exercise to shape or mould trading rights available under the suggested class of licence.

28 Accordingly, to this extent the Judge’s approach was correct.

29 But the question remains of whether it would be within power, or a proper exercise of the Court’s discretion, to grant a hotel licence on the basis envisaged by the Judge. That is the main issue.

Tailoring a licence

30 In *Pierce v Liquor Licensing Commission* (1987) 47 SASR 22 the majority took the view that the Licensing Court could not exercise its power to impose conditions on a licence in such a way as to change the essential character of the licence. Jacobs J said (at 23) that it was still:

“... possible to describe the statutory character and characteristics of a hotel which, taken together, serve to distinguish it from other licensed premises.”

He then summarised those characteristics as they were under the *Liquor Licensing Act* 1985, the Act with which he was concerned. Then he said (at 24):

“There is in my opinion 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.”

To some extent his reasoning rested on the fact that, under that Act, the power to impose conditions was expressed as a power to limit the kinds of liquor that could be sold, the times at which liquor could be sold, and the sale of liquor for consumption off the premises. He made the point that it was a power to limit, not a power to exempt. But his reasoning also rests on the notion that the Act identifies classes of licences, and a licence of a particular class cannot be tailored or moulded so that it no longer belongs to that class. Johnston J reasoned to a like effect. He said (at 39-40):

“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 pre-eminent 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.”

Millhouse J dissented. The majority view was approved in *Beachport Properties Pty Ltd v Tyncom Pty Ltd & Ors* (Full Court of the Supreme Court, unreported, 1 November 1990) by King CJ, with whom Legoe J agreed. Perry J made no comment on this point.

31 These views have to be applied with some caution to the Act. The Act gives the Licensing Court greater power to mould a licence, including a hotel licence, than did the 1985 Act and earlier Acts. In particular, Parliament has now provided that the Court may exempt a licensee from obligations: s 32(3). I have already stated my views as to the scope of the exempting power. As I said earlier, there is now no obligation to provide accommodation, and it clear that the Court can wholly exempt from the power to provide meals. The obligatory hours may be reduced.

32 Nevertheless, I consider that the Act is still based on the fundamental concept of licence classes, nine of the eleven classes being for a business of a well-known type as I said in *Australian Wine Traveller*. But I accept that the characteristics of each class and the boundaries between each class are less clear than they were in the past. The Act permits licences to be shaped or moulded to a greater extent that 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.

33 Just how far the Court can go in a given case will depend upon the circumstances of the particular case, and will require the Court to make what will sometimes be a difficult judgment.

34 But in my view the applicant’s proposal goes to a point to which the Court cannot go. The hotel licence envisaged by the Judge would wholly exempt the applicant from the statutory conditions found in s 32(2), contemplating that the applicant would trade when it chose, provide no meals, and when trading would sell no liquor for consumption off the premises. To my mind that would go beyond the power to grant an exemption. The Court would have departed from the fundamental statutory concept of a hotel licence.

35 In saying that I do not mean that the statutory concept of a hotel is the concept of a hotel as it was in the past. When I refer to the statutory concept of a hotel licence I mean the concept embodied in s 32 of the Act.

36 Accordingly, the hotel licence contemplated by the Judge could not have been granted to the applicant, and in that respect the Judge erred.

Disposition of the application

37 It follows that the Judge should have held that a hotel licence could not be granted in the terms envisaged by the Judge.

38 But it does not follow that the application for a special circumstances licence had to be granted.

39 Having regard to s 32 of the Act, the applicant could be granted a hotel licence and exempted from the obligation to provide meals. I think, with some hesitation, that the applicant could be exempted from the obligation to keep the premises open for the sale of liquor for consumption off the premises. Although this is not an exemption to be granted lightly, I would not go so far as to say that it could not be granted. Whether it should be granted is another matter. That would require the Court to consider whether it would be appropriate to require the applicant to sell liquor for consumption off the premises, even if no part of the premises was devoted to that business, and if such sales were made only in response to a specific request for them. It also lay within the power of the Judge to grant an exemption from the obligatory hours to the extent considered “appropriate in the circumstances of [the] particular case.”

40 Accordingly, what the Judge had to consider was whether, without going as far as he contemplated, a hotel licence could be granted for the proposed business conferring trading rights, by means of appropriate exemptions, that would not produce the result that “the proposed business would be substantially prejudiced.” If the Judge concluded that that situation could be produced, then he should have refused to grant a special circumstances licence. If he considered that it could not, it did not follow that he had to grant the special circumstances licence, but the way was open for him to do so.

41 In short, the case requires further consideration. It is not capable of a simple answer. Section 40 requires the Judge to consider whether he could properly grant a hotel licence in a form which would mean that the proposed business would not be substantially prejudiced if conducted under that licence.

42 What this serves to emphasise is a feature of the Act that is sometimes overlooked. 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.

43 The question for the Judge is not whether he 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 a special circumstances licence. The applicant cannot create a basis for the grant of a special circumstances licence by the simple expedient of demanding trading rights that cannot be accommodated under a hotel licence.

44 In making these observations I am not indicating how the Judge should decide the matter. I am endeavouring to explain the basis upon which the application should be approached.

45 Accordingly, it follows that the appeal should be allowed and the matter should be remitted to the Judge for further consideration in the light of these reasons.

General observations

46 During the argument I thought that the Court was confronted with a stark choice. The choice was to decide which class of licence is to accommodate the businesses that do not easily fit in to a business of a well-known type. The choice seemed to be between dealing with applications in respect of such businesses as applications for a hotel licence with exemptions, or as applications for a special circumstances licence. On reflection, I realise that the concept of a hotel licence is more flexible than it used to be, although limits to the Court's power to grant exemptions still remain.

47 The end result is somewhat untidy, but in my opinion there is no escape from it. The hotel licence is more flexible than it was, and it can accommodate a greater range of businesses than it would have accommodated in the past. It is not possible to draw an arbitrary line between businesses that can be conducted under a hotel licence and businesses that can be conducted under a special circumstances licence. The Court will have to proceed case by case.

48 Nor is it for applicants to, as it were, define themselves as outside the scope of a hotel licence. The Court must consider whether requiring an applicant to trade under such a licence will substantially prejudice its proposed business.

49 There is another point to be made. 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 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.

50 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.

51 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.

Conclusion

52 I would allow the appeal, set aside the decision refusing the application, and remit the application to the Licensing Court for further consideration.

53 MARTIN J: I agree with the orders proposed by the Chief Justice for the reasons he has given.

54 BESANKO J: I agree with the orders proposed by the Chief Justice for the reasons he has given.