[SUPREME COURT (In Banco)]

PIERCE and Others v LIQUOR LICENSING COMMISSION and Another*

Jacobs, Millhouse and Johnston JJ

7-8, 11 May, 16 October 1987

Liquor — Hotel licence — In respect of restaurant reception and catering centre — Licence condition prohibiting sales for off-premises consumption — Premises not "hotel" for purposes of Act — Issue of licence beyond power — "Locality" — Liquor Licensing Act 1985.

Roxburgh Holdings Pty Ltd applied under the *Liquor Licensing Act* 1985 for a hotel licence in respect of The Abbey Restaurant Reception Convention and Catering Centre. It sought to provide a facility where liquor could be sold without meals (thus disqualifying it from eligibility for a restaurant licence), but where meals and snacks could be consumed with liquor in premises that had an exclusive character; no accommodation or bottle sales being contemplated. Under the Act, a hotel licence was a Category A licence. Its issue was conditioned on public needs "in the locality" and, in general terms, furnished authority to sell liquor for consumption on or off the premises at stated hours daily, to provide accommodation unless exempted, to sell meals and liquor to lodgers, and so forth. The judge of the Licensing Court granted the application, exempting the applicant from providing accommodation and purporting to impose conditions, particularly prohibiting sales of liquor for off-premises consumption. The proprietors of four hotels located near The Abbey appealed to the Supreme Court against the granting of the licence, submitting that the premises were not a hotel and were not eligible for such a licence, that the licensing judge should have exercised a statutory discretion not to grant the licence, and that the "locality" requirements of the Act had been interpreted erroneously.

Held, by Jacobs and Johnston JJ, Millhouse J dissenting: That the appeal should be allowed and the licence application dismissed because the application was not in reality for a hotel licence, and the objects of the Act in creating Category A licences should not be defeated by the imposition of conditions having the effect of turning a "hotel licence" into a licence not appropriate to a hotel. A judicial attempt so to defeat the statutory scheme of licence classification and to create some new, special and unrecognised form of licence was beyond the powers conferred by the Act.

Observations by the Court on the concept of "locality" for the purposes of the Act.

Per Millhouse J — The Licensing Court is a specialist tribunal and the Supreme Court should be slow to differ from it on matters of fact particularly within its knowledge. Accordingly the acceptance by the licensing judge of expert evidence supporting the view that, in the present case, the relevant "locality" was the City of Adelaide and a substantial metropolitan area, should not be disturbed.

Buttery v Muirhead [1970] SASR 334; *Re Ingram Bros Catering Pty Ltd* [1977-1978] SALCR 476, considered.

Quaere, whether the applicant would have been entitled to a "general facility licence" under s 44 of the Act.

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*[EDITOR'S NOTE: On 19 February 1988 an application by Roxburgh Holdings Pty Ltd to the High Court for special leave to appeal was refused.]

LICENSING APPEAL

B R M Hayes QC and *J L Firth*, for the appellants.

C M Branson, for the respondent.

J R Mansfield QC and *D W Smith*, for the second respondent.

Cur adv vult

16 October 1987

JACOBS J. The relevant facts relating to this appeal are set out in the judgment of Millhouse J and need not be repeated, but I find myself unable to agree with his conclusion that the licence which is challenged is lawful and authorised by the *Liquor Licensing Act* 1985, and that therefore the appeal should be dismissed. In my opinion neither the grant of a hotel licence with respect to these premises, nor the conditions attached to the grant (with the exception of condition (2)), are authorised by the legislation, and the appeal should be allowed. I can state my reasons for that conclusion quite shortly.

While it may be true to say that a hotel no longer occupies a predominant position in the category of licensed premises, and no longer enjoys the same measure of protection from competition from other less "comprehensive" licences, as it enjoyed under earlier legislation, yet the *Liquor Licensing Act* 1985 still preserves, in quite categorical terms, classes of licences; and it sets out in some detail the particular obligations and privileges attaching by statute to each class of licence.

In addition, the classes of licences are divided into two categories. A hotel licence is in Category A, along with a retail liquor merchant's licence, a wholesale liquor merchant's licence, and entertainment venue licence and a general facilities licence. The distinctive feature of that category is that the Act, by s 63(1) still regulates the grant of a Category A licence which must be shown to be "necessary in order to provide for the needs of the public in the locality" of the proposed premises "having regard to the licensed premises already existing" in that locality. The purpose of that section — which is designed not only to regulate the disposition of licensed premises in that category by reference to need, but also to protect existing licensed premises from unjustifiable competition — will be largely defeated if the licence under consideration can be so distorted by conditions, that what is called a "hotel licence" is not in any real sense a licence for a hotel.

I entirely dissent from the proposition that it is no longer possible to describe the statutory character and characteristics of a hotel which, taken together, serve to distinguish it from other licensed premises. For the purpose of testing the present disputed grant of a hotel licence, it may help to state, by way of a summary of ss 26 and 27 of the Act, what those characteristics are:

1. Authority to sell liquor for consumption on or off the premises at stated hours on every day of the year (except Good Friday) — an authority which does not apply by statute to any other class of licence.

2. Authority to sell liquor at any time to lodgers on the premises which

(apart from certain specified club licences) is the exclusive statutory privilege of a hotel.

3. Authority to serve liquor with meals.

4. Authority to sell liquor at any time to persons attending receptions in a designated reception area.

5. An obligation to keep the premises open to the public for the sale of liquor during the statutory hours of 11 am to 8 pm (except on Good Friday, Christmas Day or Sunday) which is a statutory obligation exclusive to a hotel.

6. A statutory obligation to provide accommodation (unless exempted under s 26(3) which is again an obligation exclusive to a hotel.

7. An obligation, again exclusive to a hotel, to provide meals to lodgers (on any day) or members of the public (on any day except Sunday) between stated statutory hours.

There is, as I have said, no other class of licence which combines all these characteristics, but the premises now proposed to be the subject of a hotel licence are very different. There can be no quarrel with the decision to grant an exemption from the obligation to provide accommodation, which is expressly authorised by the Act, but the difference does not stop there. The development of the premises which has given rise to the application for a hotel licence is the proposed creation of a "plush" or "up-market" cocktail bar and lounge. It is that facility, and only that facility, for which there is said to be a relevant need or demand. More specifically there is clearly no need or demand for the sale of liquor from these premises for consumption off the premises, and indeed the licence is proposed to be granted subject to a condition prohibiting the sale of liquor for consumption off the premises. It is nothing to the point that such a condition has been imposed for the benefit and protection of the nearby hotel which is well able to cater for the relevant need or demand. 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. Reference has been made to s 50(4) of the Act, which so far as relevant provides that a condition may be imposed:

> "(a) limiting the kinds of liquor that may be sold in pursuance of a licence;
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> (b) limiting the times at which liquor, or liquor of a particular kind, may be sold in pursuance of a licence;
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> (ba) limiting the sale of liquor for consumption off licensed premises in pursuance of a licence;
>
> (c) otherwise limiting the authority conferred by a licence."

The power "to limit" however does not carry the power "to exempt". The only power to exempt is expressly to be found in s 26(3) with respect to accommodation. There have been many cases in which off-licence sales have been limited by reference to type of liquor but I know of only one case in which such sales have been prohibited (*Re Ingram Bros Catering Pty Ltd* [1977-1978] SALCR 476) in which the judge imposed such a prohibition with very serious misgivings as to his power to do so. Neither is it to the point that the applicant is said to be prepared to provide for the sale of liquor for consumption off the premises, for on that footing there is no need for a hotel licence; and to provide that service may so alter the character of

the premises as to be destructive of the case on "special need" which the applicant sought to establish.

The learned judge of the Licensing Court was aware of the problem he faced. He said it "is obvious, the applicant's premises and the operation it carries on and proposes to carry on is different in very many respects from a conventional hotel", and a little later he said, "this is not an application for a licence for a traditional hotel providing the traditional range of two or three styles of bars, counter and dining room meals and drive-in and walk-in bottle departments with (perhaps, but not uncommonly in recent times) some accommodation ...". Perhaps that is why the learned judge thought it necessary to impose a condition on the grant "preventing the use of the words 'hotel' or 'tavern' in connection with the premises"; but the very fact that he thought it necessary to impose such a condition points up the fallacy in this application. To grant it would amount to the judicial creation of a licence which is not within the class of licences that is fundamental to the statutory scheme.

Before parting with this aspect of the case, it is worth observing that certain members of the public who were called as witnesses to prove a need for this licence were quite prepared to concede that superior facilities of the kind envisaged already exist in some high class hotels — as for example the Hilton International — but they said there was a demand for the proposed premises to satisfy the needs of those who, like themselves, preferred not to avail themselves of such facilities in a hotel, the 'atmosphere' of which was "different". It was of course for the judge of the Licensing Court to evaluate that evidence, but it is something of a paradox that such a demand, if it exists, can only be met in these premises by a hotel licence; and indeed the weight of that evidence must, as it seems to me, be dubious if this "sophisticated" demand would be met by the proposed premises provided they are *not* described as a hotel and do *not* provide such hotel service as off-licence sales.

There is one other aspect of the case which calls for some comment. The learned judge, for the purposes of assessing "need" in terms of s 63(1) of the Act, was prepared to treat a very large part of metropolitan Adelaide as the relevant locality. He said:

> "The patrons whose needs the new 'tavern and cocktail bar' seeks to satisfy are, as will become plain when the question of the needs of the public are considered, mobile and affluent. The opinion of Mr Tonkin, a planning consultant called by the applicant, was that for the purposes of that section of the public the locality is covered by the City of Adelaide, the suburbs of Prospect, Walkerville, St Peters, Kensington and Norwood, Burnside, Unley and Mitcham. I think that his opinion on the point is correct and as the gravamen of the case is the proposed 'tavern and cocktail bar', in considering the matter I fix the locality accordingly."

That conclusion in my judgment involves a clear misdirection in law. It is no doubt true to say, as was said by Zelling J in *Buttery v Muirhead* [1970] SASR 334 that the concept of locality is flexible and may vary from case to case depending upon the circumstances, but in the same case Bray CJ clearly emphasised the concept of neighbourhood in the context of s 47(a) of the former Act, which in substance applies the same test as s 64(1) of the present

Act. I do not propose to attempt to elaborate or illustrate the fallacy inherent in the concept of such an expanded locality by reference to all the actual or hypothetical situations that come to mind; it is sufficient for present purposes to pose one question. Suppose the present application was granted, and an application is subsequently made for a similar facility in, say, Kensington Gardens, could it seriously be argued that The Abbey "hotel" licence in Hyde Park had any relevance to such an application? The fact that premises by reason of some special quality might attract patrons from far and wide is not in itself a true test of locality for the purpose of the relevant statutory provisions. Although a new restaurant licence is not now subject to the locality test in s 63, many of the high class suburban restaurant licences granted under the old Act, and enjoying wide patronage by reason of their quality, may not have been licensed at all if need had been determined by reference to the vast number of restaurants already licensed in the whole metropolitan area.

I would not, however, allow this appeal and refuse this licence on this ground alone, for if the application were otherwise unobjectionable it may have been able to survive a more realistic test of locality; but it cannot on any view of the matter be held to survive that test if, but only if, the licence is structured in such a way as to take it outside the class of hotel licences contemplated by the Act.

Finally, I should make brief reference to condition (3) which is expressed as a condition:

> "Providing for the hours of operation and the prices to be charged in the tavern and cocktail bar portion of the premises in accordance with the evidence advanced by the applicant."

It may be that such a vague and uncertain condition can be rendered certain when the licence is granted, but it is apparently proposed to fix *minimum* prices at a high luxury level in order to protect the custom of the neighbouring hotel, whose patrons are apparently less discriminating and less wealthy than the customers whom The Abbey seeks to attract. While it is not necessary to express any firm conclusion, I confess to the gravest doubts about the propriety of using an obligatory minimum price discrimination in order to avoid the consequences that might otherwise flow from the application of s 63(1), that is, by placing the subject premises in a non-competitive position with the nearby hotel.

It may be conceded that the present *Liquor Licensing Act* 1985 does and is designed to confer greater flexibility and wider discretionary powers on the licensing authority than its predecessor, and there may be an arguable case in the public interest for the power to license premises which have some distinctive or special characteristics which do not conform to any class of licence. But the fact is that Parliament itself has made provision for such distinctive and special cases as it deems appropriate, in the much wider class of licences now available, and the power to modify a class of licence is spelt out in the power to impose conditions by way of limiting the authority conferred by the licence, that is, the class of licence. 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.

For these reasons therefore I would allow this appeal, set aside the order of the Licensing Court, and substitute an order refusing the application.

MILLHOUSE J. This is an appeal from Judge Hume, sitting as judge of the Licensing Court. It arises out of the application pursuant to the *Liquor Licensing Act* 1985 by the second respondent, Roxburgh Holdings Pty Ltd, for a hotel licence for The Abbey on King William Road. The learned Licensing Court judge allowed the application, subject to conditions, and four objectors have appealed.

The Abbey is at present licensed as a restaurant and has been since 1982. As the learned judge says in his reasons, its formal name is "The Abbey Restaurant Reception Convention and Catering Centre" which accurately describes the uses to which the premises are put.

The Abbey was for nearly 100 years the Unley Methodist Church with its church hall behind. Since the change of use I have often thought that many of the Methodists who worshipped there may by now have turned over twice in their graves — to find that their church is an "Abbey" and, worse, that alcohol is so freely available. O tempora! O mores! However, that is by the bye.

What is a hotel? That is the question: whether the activities which the proprietor of The Abbey wants to undertake may appropriately be allowed under a hotel licence.

I should first describe what The Abbey has been since 1982 and what is now proposed. I do so by reference to the learned judge's reasons:

> "The applicant proposes general renovations throughout the building but the major alterations, about which this application is centred, relate to the original church building. The applicant proposes to build a mezzanine floor which abuts the rear or western wall of the room but is supported by columns and is free of the other walls. It will be approximately 3.6 metres above the ground floor level. Access to it will be by stairs from points near the front doors of the building. There will be access from the mezzanine directly to the toilet facilities which are on the first floor of the building adjoining the church and the church hall buildings. The mezzanine will be equipped with a low liquor servery bar, low stools at the bar and lounges with low tables. It will be set up as a cocktail bar carrying an extensive range of spirits and liqueurs and with a large range of imported beers.
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> The ground floor of this area will also be equipped with a low liquor servery/bar with stools, lounges and low tables, seating with tables, seating in booths and a grand piano. It will also have a food servery set up as a 'hot and cold carvery' with a sophisticated and varying menu providing food for extended periods.
>
> . . .
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> The operation of the applicant's business in the other areas of the premises would remain the same as it is now, for all practical purposes. The restaurant would continue to function in its present form, the reception and convention usage of the 'church hall' portion of the building would also continue with the proviso that the present stricture that liquor can only be provided to those attending such functions with or ancillary to a meal would be removed, and that for such functions

liquor could be provided with food which fell short of a 'meal' or with none."

The learned judge went on:

"The only form of licence which would authorise the sale of liquor in the circumstances proposed by the applicant, is a licence under s 26 of the *Liquor Licensing Act* 1985 — a 'hotel licence' — although, as is obvious, the applicant's premises and the operation it carries on and proposes to carry on is different in very many respects from a conventional hotel."

Having considered, as required by s 63 of the Act, the questions of "need" and "locality", the learned judge came to the conclusion that there is, in the locality which he fixed, a significant demand for the kind of facilities proposed and that the appropriate licence is a hotel licence. However, he imposed four conditions:

"(1) Prohibiting the sale of liquor for consumption off the premises.
(2) Exempting the licensee from the obligation to provide lodging.
(3) Providing for the hours of operation and the prices to be charged in the tavern and cocktail bar portion of the premises in accordance with the evidence advanced by the applicant.
(4) Preventing the use of the words 'hotel' or 'tavern' in connection with the premises."

I refer to some of the relevant sections of the Act. Sections 26 and 27 relate to the hotel licence. Section 26 authorises the licensee, among other things, "to sell liquor on the licensed premises for consumption on or off the licensed premises . . .". Section 27 makes "a hotel licence . . . subject to . . . conditions" such as keeping the "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", the provision of accommodation (but the licensee may be exempted from this obligation) and the provision of meals.

Under s 4(1) a hotel licence is classed as a "Category A licence".

Section 50 gives the Licensing Court authority to impose "such licence conditions . . . as it thinks fit". Subsection (4) reads:

"Notwithstanding any other provision of this Act, a condition may be imposed under this section—

. . .

(c) otherwise limiting the authority conferred by a licence . . . ."

Section 59 gives the court a discretion to grant or refuse an application:

"(1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers sufficient."

Section 63(1) reads:

"An applicant for a Category A licence must satisfy the licensing authority by such evidence as it may require that, having regard to the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, the licence is necessary in order to provide for the needs of the public in that locality."

Mr Brian Hayes QC who led for the appellants, the objectors (four hotels all within 2 kilometres of The Abbey) argued three matters — that the

learned judge was mistaken in the locality which he fixed for the purpose of s 63, that a hotel licence was not an appropriate licence to grant because The Abbey just is not a hotel and that the learned judge ought to have exercised the discretion given to him under the Act not to grant the licence.

In his reasons the learned judge cited what Zelling J said in *Buttery v Muirhead* [1970] SASR 334 at 352 about locality:

> "'Locality' is a word which will differ from application to application according to the type of community that is envisaged, the type of work which they do, the way in which they use common transport and other facilities, and in general whether they are a group bound together as a community having common interests. I am not to be taken as propounding a general test of 'locality' which is applicable in every case but in this type of case these are the sort of factors which go to make up a 'locality' as that word is used in ss 47(b) and 48(2)(h). It may be that the 'locality' referred to in s 48(2)(b) is a lesser area or it may simply be that the locality remains the same, but it would be impossible to substantiate the objection in most cases except within some area less than the full area of the 'locality', which is purely a question of evidence in each case and not of the meaning of the word 'locality'."

I respectfully adopt those remarks as being as applicable now as they were in 1970 when Zelling J was considering the *Licensing Act* 1967.

The learned judge accepted the evidence of a town planner, called by the applicant, as to the extent of the locality and fixed it as taking in the City of Adelaide and suburbs in an arc from Prospect in the north to Mitcham in the south.

He went on to say:

> "In the 'tavern and cocktail bar' aspect of the proposed redevelopment, the applicant submits that the furniture, fittings and fixtures, the style of decoration, the degree of personal service and the range of goods will provide an environment which has been variously described during the trial as 'plush', 'luxurious', 'elegant', 'sophisticated' and 'tasteful'. By reason of that atmosphere, high prices and subtle encouragement, it believes that it will be able to satisfy the needs of people who desire such an environment and whose needs are not met because there are insufficient premises to satisfy the demand."

The applicant had called witnesses as to the demand for the facilities proposed. The learned judge accepted their evidence and said:

> "1. . . . there is a demand within the locality as I have defined it on the part of people who never, or very rarely, patronise hotels for various reasons, for the type of facilities proposed by the applicant because they require those facilities for the consumption of liquor in a style and in an environment which, to use the words of one witness, 'reflects the level of [those] people and their business and social position'. . . .
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> 2. There is a significant demand for the same style of facilities on the part of people, only part of whose needs are satisfied by the drinking and dining facilities of other premises, and particularly, amongst the objectors by the Cremorne Hotel and the Hyde Park Tavern, that is at times those people require facilities which are more sophisticated, plusher, more luxurious, more elegant and so on than the objector

> hotels and than most other hotels and taverns in the locality, and that that demand is unmet because the facilities which provide for it are overtaxed when the demand exists or are inconveniently located. I find, by contemporary standards, that that demand is a reasonable one."

Mr Hayes attacked the extent of the "locality" fixed and argued that it should be restricted to the area of a radius of up to 2 kilometres from The Abbey in which the objector hotels are.

I cannot accept this. What is proposed is likely to attract people from all over the metropolitan area. Indeed I am surprised that the "locality" is restricted to the area it is. I should have thought that people would be attracted from the western suburbs as well, or at least from some parts of them.

In *D'Oro Distributors Pty Ltd v Superintendent of Licensed Premises* [1968] SASR 220 , Bray CJ said (at 226-227):

> "In truth the authorities show that phrases like 'needs of the public' and 'locality' in licensing legislation of this sort have received a fairly flexible and varying interpretation according to the type of licence sought and the nature of the business proposed to be carried on."

In *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458, the present Chief Justice said (at 460):

> "These needs [that is, those 'of the public in relation to licensed premises'] are not necessarily concerned with the mere availability of liquor. They may be concerned with matters of taste, convenience, preference for one type of facility over another, the manner in which liquor is displayed and served, and the type and standard of accompanying services."

Having mentioned "the public demand for liquor, as distinct from the more general concept of needs in relation to licensed premises", he went on (at 460):

> "I do not think, however, that too much can be made of the difference in meaning of the two words. It seems to me that a public demand for liquor consists of a desire by the public or a significant section of it to purchase liquor or liquor of a certain type. If that demand is not sufficiently and reasonably met, there is a need for liquor."

I shall not go into the evidence nor the way in which the learned judge reached his conclusion on "locality" and "need". I do not think he misdirected himself as a matter of law. The Licensing Court is a specialist tribunal and we should be slow to differ from it on matters of fact peculiarly within its knowledge. All I need say is that the learned judge's conclusion was certainly open to him on the evidence and he was entirely justified in it. Mr Hayes' argument on this matter fails.

I may say, though, that the real fear of the neighbouring hotels is not that the proposed facilities at The Abbey will compete with theirs but that the facilities will not be a success, and will be run down until they do compete with the other hotels. That is the reason for the third condition, as to prices, imposed by the Licensing Court.

I come now to the second matter argued by Mr Hayes: that a hotel licence for The Abbey is not appropriate because The Abbey neither is nor would it be, if these proposals come to effect, a hotel.

His argument rests on there being some plain and accepted concept of what a hotel is. If there is such a concept, it certainly was not described during the hearing and I do not know what it is. There is nothing in the Act about it. In his reasons the learned judge said:

> "This is not an application for a licence for a traditional hotel providing the traditional range of two or three styles of bars, counter and dining room meals and drive-in and walk-in bottle departments with (perhaps, but not uncommonly in recent times) some accommodation . . . ."

That is about as close as one can get to a description, certainly of what a hotel used to be. Times change and our ideas change with them. For example, at one time a hotel had to provide accommodation: that was regarded as an indispensable service. It is now impossible to define a "hotel", to set out its fundamental characteristics, or to say what activities are indispensable before an establishment is a hotel.

We have to construe an Act of Parliament and in it find what we can about a hotel. I suggest that, as the Crown Solicitor, Mrs Branson, for the Liquor Licensing Commission, said, a hotel is nothing more than a collection of the rights and obligations set out in ss 26 and 27; any premises satisfying those sections and licensed as a hotel is a hotel under the Act.

Whatever may have been the case in the past, there is now no duty on the court, or anyone else, which I can find in the Act, to protect established hotels from competition. I say that despite the remarks of Cox J in *Mick Lucas and Son Pty Ltd v Licensing Commissioner* (1987) 45 SASR 312 at 328 that ". . . the hotel licence is the centrepiece of the statutory scheme although changing conditions and public tastes have somewhat reduced its dominance, I should have thought, in recent years". I doubt, with respect to Cox J, that the hotel licence or any other licence is now "the centrepiece of the statutory scheme": there is no centrepiece in the Act. Concepts of trading in alcoholic liquor have changed so much and probably will continue to change, that the dominance of the hotel licence, whatever it may have been, has disappeared.

It was argued, particularly strongly by Mrs Branson, that an essential characteristic of a hotel is that one must be able to buy liquor at it for consumption off the premises. The learned judge has imposed the condition that there should be no such sales: it flies in the face of the concept of a hotel and therefore was beyond the power of the court to impose.

Apparently the condition was something sought by the objectors before the hearing of the application in the Licensing Court and the applicant was quite happy to agree to it. Although that does not strengthen the position in law of the applicant, it is ironic that the applicant should now be met with the argument that because of the condition not to sell for consumption off the premises then it cannot have a hotel licence at all. As a matter of fact Mr John Mansfield QC and Mr David Smith, both of whom argued for the respondent applicant, said that the applicant would be quite willing to sell for consumption away from The Abbey.

The answer to the argument, as a matter of law, lies in the construction to be given to the early words of s 26(1) and in s 50(4)(c):

> "26(1) . . . a hotel licence *authorizes* the licensee . . . .
>
> . . .

50(4) Notwithstanding any other provision of this Act, a condition may be imposed under this section—

. . .

(c) otherwise limiting the authority conferred by a licence . . . ."

Section 26(1) gives authority; s 50(4) gives power to limit authority. As well s 59(1) gives a discretion. Neither the authority in s 50(4)(c) nor the power in s 59(1) is fettered.

The learned judge has exercised the power in s 50(4) and there is nothing in the Act to say that he should not: he has done what he has power to do. That is so even if it were to detract from some fixed concept of what a hotel is or what it should provide. As I have said, though, I do not think there is now any one activity essential to the concept of a hotel: it is no more essential that a hotel sell liquor for consumption off the premises than it is for it to provide accommodation.

We were told that there are other premises licensed as hotels, the licences of which are or were subject to a condition not to sell for consumption off the premises. The sky has not fallen in because of that.

I do not accept the argument of the appellants on the second matter.

I have not, so far, mentioned ss 43 and 44 which provide for a "general facility licence". In what I think is the first judgment of this Court on the *Liquor Licensing Act* 1985, *Trop Nominees Pty Ltd v Liquor Licensing Commissioner* (unreported, No 9874, 1 May 1987), the Chief Justice describes the general facility licence:

> "The general facility licence is a new form of licence introduced into the licensing system of South Australia by the *Liquor Licensing Act* 1985. Three important points are to be noticed about the new licence. The first is that it is designed to enable the Licensing Court to prescribe 'special trading conditions', that is to say trading conditions which differ from those applicable to the other forms of licence under the Act. The purpose of the creation of the new form of licence is, as it seems to me from a consideration of the structure and provisions of the Act, to enable the Licensing Court to fashion trading conditions to meet special needs. The second point is that the licence can only be granted where the special trading conditions are necessary for one or other of the purposes specified in s 44(1). The third point is that the licence is a licence of last resort in the sense that it is not to be granted if some other licence would be reasonably adequate for the purpose."

Section 43 ". . . authorizes the licensee to sell liquor on the licensed premises— (a) at such times as are specified in the licence; and (b) subject to such conditions as are specified in the licence."

Section 44(1) provides in part that ". . . a general facility licence may be granted where special trading conditions are, in the opinion of the licensing authority, necessary for any one or more of the following purposes . . .". There follow eight placita, each setting out a separate purpose. Placitum (b) would probably be appropriate, in part — "to provide adequately for the needs of those attending receptions" — but does not help with the proposal for cocktail lounges: there is nothing in the section which contemplates that. In any case the respondent argued there are no "special trading conditions" which would justify an application for a general facility licence. However, even more decisive is subs (2):

> "A general facility licence shall not be granted if, in the opinion of the licensing authority, some other licence would be reasonably adequate for the purposes for which the general facility licence is sought."

The respondent argued — rightly, I think (and, of course, the learned judge found this) — that the only appropriate licence is the licence it sought, a hotel licence; because it is the only appropriate licence the applicant cannot be granted a general facility licence. Mr Hayes suggested, a little coyly, that a general facility licence was the one for which the respondent should apply but I cannot help wondering whether if it did, his clients would oppose that application as well and on the grounds I have just mentioned!

The final matter argued by the appellants was that the learned judge was wrong in not exercising his discretion, under ss 50 and 59, against granting a licence. I accept, however, the argument of the respondent that there was nothing in the evidence before the learned judge to justify the exercise of his discretion against the grant. Certainly the four objector hotels do not cater for the market for which The Abbey is aiming. The Hyde Park Tavern is the only one of the four the trade of which could possibly be affected by The Abbey and the learned judge found that the effect would be small: the two establishments are quite different from each other. I may say that that finding accords with my own observations and knowledge of The Abbey and the Hyde Park.

There is no other reason why the learned judge should have exercised his discretion against the respondent. That argument also fails.

The result is that I think the appeal should be dismissed.

JOHNSTON J. Roxburgh Holdings Pty Ltd applied for a hotel licence for The Abbey on King William Road. The nature and background history of the premises is set out in the reasons for judgment of Millhouse J which I have had the opportunity of perusing in draft. The Licensing Court allowed the application in the sense of granting a certificate pursuant to s 64 (the judicial promise) to the applicant. The unsuccessful objectors now appeal.

I pause to mention that the certificate which has, in fact, issued is in the form discussed by me in the recent case of *S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd* (unreported, No 31, 3 July 1987). I do not repeat what I said there.

The conditions to be attached to the licence, if and when issued, vividly show the problems and the issues thrown up by this important appeal. I set them out. The licence will be granted upon conditions:

> "(1) Prohibiting the sale of liquor for consumption off the premises.
> (2) Exempting the licensee from the obligation to provide lodging.
> (3) Providing for the hours of operation and the prices to be charged in the tavern and cocktail bar portion of the premises in accordance with the evidence advanced by the applicant.
> (4) Preventing the use of the words 'hotel' or 'tavern' in connection with the premises."

It seems to me, that there may be a question mark over the power of the Licensing Court to impose the third and fourth conditions upon a hotel licence; but, in my mind, the Licensing Court certainly has no power to issue an hotel licence subject to the first condition.

The presence of these conditions is explained by the fact that the applicant is not seeking to establish on the premises at Goodwood Road a hotel in what most people would regard as the ordinary meaning of that word. The judge described the concept which the applicant hopes to introduce. I can do no better than quote what he said, (noting that the "tavern and cocktail bar" aspect of the redevelopment to which he refers relates to the old church building and the mezzanine floor which is proposed to be added to it):

> "In the 'tavern and cocktail bar' aspect of the proposed redevelopment, the applicant submits that the furniture, fittings and fixtures, the style of decoration, the degree of personal service and the range of goods will provide an environment which has been variously described during the trial as 'plush', 'luxurious', 'elegant', 'sophisticated' and 'tasteful'. By reason of that atmosphere, high prices and subtle encouragement, it believes that it will be able to satisfy the needs of people who desire such an environment and whose needs are not met because there are insufficient premises to satisfy the demand. It has submitted that it will be an environment distinctly different from that of a conventional tavern or hotel, however luxuriously appointed.
>
> In addition to evidence of its proposal from its manager and principal director, its architect and the town planner, the applicant called a range of witnesses in support of the application concerning its various aspects: first in support of the 'convention and function' aspect of the proposal — I shall not pause for that except to say that I am satisfied that there is a clear demand for this aspect of the proposals which is not sufficiently met in the locality and that there is a demand for the consumption of liquor without food or with food 'less than a meal', at such functions; secondly to reinforce the need for the existing restaurant facility as part of the proposed complex — that presently trades successfully and is obviously needed; and thirdly in support of the 'tavern and cocktail bar' facility.
>
> . . .
>
> The evidence on the 'tavern and cocktail bar' topic called on both sides, considered in the light of what I know of contemporary habits and tastes, and of the facilities for supply of liquor in the locality as I have defined it, satisfies me:
>
> 1. That there is a demand within the locality as I have defined it on the part of people who never, or very rarely, patronise hotels for various reasons, for the type of facilities proposed by the applicant because they require those facilities for the consumption of liquor in a style and in an environment which, to use the words of one witness, 'reflects the level of [those] people and their business and social position'. As an example I refer to the three professional and business women called by the applicant, whose ages I guess to be in the middle thirties, whose business status is managerial, and who spoke of their unmet demand for facilities which did not have the character of hotel facilities and had 'elegance and style' for both business and social purposes, where they felt 'comfortable' and could go without feeling, to paraphrase the words of one, that 'it is assumed that one is going (in order) to meet a member of the opposite sex'. I am satisfied without the

slightest doubt that this is a real demand by a significant number of people in the locality, that it is a totally reasonable and realistic demand by contemporary standards and that it is unmet because the few facilities which provide for it in the locality are overtaxed at the times the demand exists. It is also clear that it is a demand which is not met and could never be met by the objector hotels, even the Hyde Park Tavern. Much improved a facility though that now is, it is a totally different creature from that which this segment of the population demands.

2. There is a significant demand for the same style of facilities on the part of people, only part of whose needs are satisfied by the drinking and dining facilities of other premises, and particularly, amongst the objectors by the Cremorne Hotel and the Hyde Park Tavern, that is at times those people require facilities which are more sophisticated, plusher, more luxurious, more elegant and so on than the objector hotels and than most other hotels and taverns in the locality, and that that demand is unmet because the facilities which provide for it are overtaxed when the demand exists or are inconveniently located. I find, by contemporary standards, that that demand is a reasonable one. As an example, businessmen such as some of those called need, on occasions, to be able to entertain in an environment in which people who are used to the 'international style' feel comfortable."

It is part of the concept that The Abbey shall not appear as a hotel in the ordinary sense, because it is the atmosphere of the hotel in the ordinary sense, including the comings and goings of people wanting to buy packaged liquor which the applicant wishes to avoid and the avoidance of which it regards as being important to the success of the project.

It is important in this case, that one's approach is not blinkered by preconceived notions of what constitutes a hotel. It is plain that the social concept of a hotel has changed dramatically over the past quarter century and this process may well continue. In particular, the serving of food (particularly other than in a formal dining room) and the provision of entertainment of one sort or another, has become a much more important aspect of hotel management as far as many hotels are concerned. There is a greater diversity of facility and service.

I approach the matter on the basis that this proposal, unusual as it may seem at first sight, does not founder because there is no provision for a front bar or a saloon bar, etc or a walk-in bottle department or a drive-in bottle department or because it has very limited provision, if any, for drinking at a bar. All those matters relate to traditional forms of selling liquor for consumption on the premises on the one hand, or packaged liquor on the other. But they are matters of form and it seems to me that there is nothing in the Act which requires a hotel licensee or would-be hotel licensee to arrange the premises in any particular way or to offer services in any particular form. Of course the interests of the public are to be taken into account and the Licensing Court has a wide discretion as to the granting or not granting of applications for licences.

But while it is true that the amendments to the Licensing Act over the last twenty years, have in part reflected and in part been responsible for many great changes in the industry, the fact of the matter is that Parliament has

stuck throughout with a system based on the existence of specific types of licences, each of which authorises certain commercial activities in relation to liquor which are set out in the Act.

Section 25 sets out the classes of licence and ss 26 and 27 deal with the hotel licence. The hotel licence is unique in the system because of the breadth of the commercial activity which it authorises, and the stringency of the obligations which it imposes on the holder of the licence. The section of the general public which is interested in buying liquor is, broadly speaking, interested in buying it for consumption at the point of purchase, traditionally in bars, lounges, cocktail lounges, etc; for consumption with meals provided on the premises, traditionally in restaurants, dining rooms, etc; and in the form of packaged liquor which can be carried away from the point of purchase and consumed elsewhere as desired. The hotel licence alone permits supply to the public in each of these ways. The hotel licence alone obligates the licensee to provide service to the public. Section 26 sets out the authority conferred by the licence; s 27 deals with the obligation of the licensee. I do not set out s 26 in full but s 26(1) provides that:

> "Subject to this section, a hotel licence authorizes the licensee—
>
> (a) to sell liquor on the licensed premises for consumption on or off the licensed premises—
>
> (i) on any day (not being Good Friday, Christmas Day or Sunday), between 5 am and midnight."

Section 27 reads:

> "(1) Subject to this section, a hotel licence is subject to the following conditions:
>
> (a) the licensee must 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) the licensee must provide accommodation for a member of the public on request;
>
> (c) the licensee must provide a meal, at the request of a lodger, on any day between 8 am and 9.30 am or between 6 pm and 8 pm;
>
> (d) the licensee must provide a meal, at the request of a member of the public, on any day (except Sunday) between noon and 2 pm or between 6 pm and 8 pm;
>
> (e) the licensee must provide a meal, at the request of a member of the public, on a Sunday between noon and 2 pm or between 6 pm and 8 pm if the licensed premises are then open for the sale of liquor;
>
> (f) if a late night permit is in force in relation to the licensed premises — the licensee must maintain the licensed premises (so far as they are covered by the late night permit) so as to ensure that they do not cease to be of an exceptionally high standard.
>
> (2) A licensee is not obliged by a condition under subsection (1) to provide a meal or accommodation at the request of a person if—
>
> (a) that person appears to be intoxicated;
>
> (b) the licensee has reasonable cause to believe that that person cannot, or will not, pay for the meal or accommodation;
>
> (c) the licensee has undertaken prior obligations to provide meals or

accommodation and is unable, by reason of those obligations, to comply with the request;

or

(d) some other proper reason exists."

Subsection (3) confers upon the licensing authority a power to exempt the licensee from the obligation to provide accommodation.

Putting together s 26(1)(a) and s 27(1)(a), it is, in my opinion, clear that it is the right and the duty of the holder of a hotel licence to keep the licensed premises open to the public for the sale of liquor for consumption on or off the premises on every day (except Good Friday, Christmas Day or Sunday) between 11 am and 8 pm. The question which arises in this case is whether the Licensing Court may by condition fundamentally alter the character of a licence; in this case whether the Licensing Court may by condition change the character of hotel licensed premises from a place to which the public can go knowing that liquor can be purchased to drink there, to drink with a meal (within the fixed meal hours) or to be taken away.

In this connection, and having regard to the first condition imposed in this case, it is not without interest to note that of the ten types of licence authorised by the Act, two only authorise in general the supply of liquor to the public for consumption off the premises (hotel licence and retail liquor merchant's licence); six others either confer no authorisation for such supply at all (restaurant licence, entertainment venue licence) or authorise such supply only in extremely limited circumstances or to an extremely limited degree (residential licence, club licence, wholesale liquor merchant's licence, producer's licence). The two remaining licence types are the limited licence which can be granted only in certain defined special circumstances and then only for one month (s 45) and the general facility licence which can be granted in limited special circumstances (s 44) but only where, in the opinion of the licensing authority, "special trading conditions are necessary" for certain purposes and subject to the provision of s 44(2) that such a licence "shall not be granted if, in the opinion of the licensing authority, some other licence would be reasonably adequate for the purposes for which the general facility licence is sought". Accordingly, the general public must for its supply of packaged liquor for consumption off the premises, look overwhelmingly to premises holding either a hotel or a retail liquor merchant's licence. But the latter is not required to be open for business on any particular day or at any particular times and the authorised hours are fewer than authorised hotel hours and do not include (subject to late shopping and/or special order) the hours of 6 pm to 8 pm when hotels are required to be open to the public for the sale of liquor.

The power to impose licence conditions is contained in s 50 which, at the date of lodging the application and also at the date of decision, read as follows:

"(1) The licensing authority may impose such licence conditions (in addition to those prescribed by this Act) as it thinks fit, including—

(a) conditions that the licensing authority thinks desirable in order to ensure that the noise emanating from the licensed premises is not excessive;

(b) conditions that the licensing authority thinks desirable in order to minimize the offence, annoyance, disturbance or inconvenience

that might be suffered by those who reside, work or worship in the vicinity of the licensed premises in consequence of activities on the licensed premises, or the conduct of those making their way to or from the licensed premises;

(c) conditions that the licensing authority thinks desirable to ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk;

(d) conditions that the licensing authority thinks desirable to prevent improper arrangements or practices calculated to reduce licence fees.

(2) [These subsections deal only with the time when a

(3) condition can be imposed varied or revoked.]

(4) Notwithstanding any other provision of this Act, a condition may be imposed under this section—

(a) limiting the kinds of liquor that may be sold in pursuance of a licence;

(b) limiting the times at which liquor, or liquor of a particular kind may be sold in pursuance of a licence;

(c) otherwise limiting the authority conferred by a licence;

(d) in the case of a licence in respect of premises situated west of 133° of longitude—

(i) varying the times at which liquor may be sold in pursuance of the licence, or the licensed premises are required to be kept open for the sale of liquor;

and

(ii) modifying the application of this Act in relation to the licence and the licensed premises.

(5) A condition may be imposed under this section—

(a) by including the condition in the licence;

or

(b) by serving on the licensee written notice of the condition."

It is plain that the power to impose the first condition which was here imposed on the licence, can be found (if at all) only in the introductory words ("impose such licence conditions . . . as it thinks fit") or in the more specific provision of subs (4)(c).

This 1985 section represents rather a drafting departure from the earlier legislation. When the licensing legislation was fundamentally changed in 1967 (following a Royal Commission) the question of the court's discretion to grant or not to grant an application and the question of conditions were dealt with in the same section (s 61) as follows:

"(1) No licence shall be renewed nor shall any application be granted as a matter of course; and upon the hearing of any application for the grant, renewal, transfer, or removal of a licence, whether objection is taken at the hearing or not, the court shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application with or without conditions upon any ground or for any reason whatsoever which, entirely in the exercise of its discretion, it deems sufficient.

(2) No compensation shall be payable to any person by reason of the refusal of the court to grant any application.

(3) The court shall have general power to waive compliance with any formalities in connection with any application upon such terms as to adjournment, costs, or otherwise, as it thinks fit."

Despite numerous interventions by the legislature, that section stood unchanged until 1982, when by Act No 36 of 1982, it was amended by striking out the words "with or without conditions" in subs (1) and adding a new subs (1a) reading as follows:

"(1a) Upon the hearing of an application referred to in subsection (1), the court may attach such conditions to the licence as it thinks fit or may, subject to this Act, revoke or vary a condition that previously attached to the licence."

In the 1985 Act, the two issues addressed by the old section (the general broad discretion to grant or not to grant and the issue of conditions) was separately dealt with. The general discretion is provided for in s 59 and the question of conditions in s 50 as partly set out above.

I respectfully agree with the remark of Jacobs J (whose draft reasons I have read) that the old s 61 was never held to authorise a prohibition (as opposed to a limitation) of the right to trade in accordance with the tenor of the licence as laid down in the Act, save and except in the case of *Re Ingram Bros Catering Pty Ltd* [1977-1978] SALCR 476. That was an extraordinary case. The premises intended to be used by the applicant had been built and set up with the intention of operating an hotel (with an exemption as to accommodation) but without first obtaining a judicial promise. The premises were intended as a golfing clubhouse. The force behind the application was the State Planning Authority which was concerned with the development of the Regency Park Recreation Reserve.

Judge Grubb found that there was no need for a facility to sell packaged liquor; that there was a need for a facility to provide liquor (with and without meals) to those attending at the clubhouse. In the very special circumstances the judge "moulded the licence" to prohibit the sale and supply of liquor for consumption off the premises. He expressed grave doubt about his power to do so. Indeed, at one stage he adjourned the hearing so that the applicant might approach the government (which was done, unsuccessfully) to amend the Act.

In my opinion, the 1985 Act certainly does not expand the power of the authority in relation to conditions and if anything narrows it. I say that, because the old s 61 was quite without qualification (in both its pre-and post-1982 form) while in s 50 of the present Act, the general words are followed by reference to very particular and limited provisions which, to put the matter mildly, do not tend to suggest an unrestricted interpretation of the general introductory words; nor does the presence of subs (4) suggest such an interpretation; within that subsection the word "limiting" occurs in all the relevant placita, and on ejusdem generis principles "limiting" in pl (c) should not be extended to include a total prohibition on one half of the first commercial activity authorised by a hotel licence, namely, "to sell liquor on the licensed premises for consumption on or off the licensed premises": s 26(1)(a).

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.

For these various reasons, I am of opinion that the first condition imposed on the proposed licence (prohibiting sale for off premises consumption) is beyond power.

I am strengthened in my view that this is the proper interpretation of s 50 by the fact that shortly after the decision under appeal was given (but obviously, I think, for reasons quite unconnected with it) Parliament further amended the legislation (Act No 108 of 1986, assented to 18 December 1986) by amending s 50, subs (4) by adding a new placitum as follows: "(ba) limiting the sale of liquor for consumption off licensed premises in pursuance of a licence."

This amendment suggests that Parliament was concerned as to whether "limitation" of supply for consumption off premises contrary to the tenor of the licence as set out in the Act was authorised by the existing subs (4); let alone the prohibition of it. (We were informed from the Bar table that the amendment was directed to the problem of sales for off premises consumption on Aboriginal lands. This may, perhaps, be of importance for the subsequent interpretation of the amendment, but I pay no attention to what was said for present purposes, and indeed it is clear that whatever the meaning of the amendment, it has no application to the present appeal.)

It follows that, in my view, the appeal must be allowed if only for the purpose of striking out of the judicial promise condition (1) "prohibiting the sale of liquor for consumption off the premises". But the question arises as to what is the proper order. Should the judicial promise stand with that condition eliminated; or should the matter go back to the Licensing Court; or should the appeal be allowed and the application struck out? The first course would be clearly wrong, since the sale of liquor from the premises would vitally concern the question which the Licensing Court judge had to ask himself when he came to the exercise of his discretion. The answer to whether the second or third alternatives is the appropriate one, is given by a certain finding made by the trial judge.

After concluding that the applicant had made out its case pursuant to s 63(1) (the needs test), his Honour went on:

> "I have one principal concern in the exercise of my discretion. It is, as at the end of the day two of three objectors who gave evidence conceded was the real basis of their objection and the third, whilst maintaining staunchly that his facilities satisfied all demands, conceded to be his real fear, that either the applicant will not achieve its objectives and be forced to drop its standards and to trade in direct competition with the objecting hotels, or that a subsequent transferee may do so."

He then went on to express his view that "all things being equal, it [the

applicant] will achieve its objectives", and that if it did, its activities would not impinge on the objector hotels to any significant extent. He then added:

> "However, if some unforeseen disaster occurs, or another less skilful operator acquires The Abbey and under the auspices of the licence trades in direct competition with the objector hotels, different considerations would apply. Indeed, it is not a need for that trade which has been proved. Whilst as a general rule conditions are undesirable, in my view, given the particular circumstances of the case, I should impose conditions to structure the operation *in accordance with the proposals of the applicant*." [My italics.]

The italicised observation by the judge is totally justified by the evidence except as to one minor matter which relates to condition (4) as to which the applicant made clear that it did not wish to use the word "hotel" in connection with the premises, but was undecided as to the word "tavern"; but otherwise, the conditions (and in particular condition (1)) was in accordance with the proposals of the applicant.

There was some suggestion in argument that condition (1) (and indeed condition (4)) were there only for the purpose of placating the objectors and to meet part of their objection. But that is not right as the following quotes from the evidence of Mr Ploubidis, the manager of The Abbey complex, who gave the principal evidence on behalf of the applicant and outlined its proposals (and did so, I might add, with skill and precision). After Mr Ploubidis had outlined the plans and indicated that his company did not want to get into areas where there was already considerable competition, he was asked (in chief):

> "Q. Is it for those sort of reasons that you don't propose selling packaged liquor for consumption off the premises? A. We are in the restaurant industry, we are certainly not in the bottle industry and have no desire in getting into that sort of business at this stage."

Later in cross-examination he was asked:

> "Q. For a customer living in the area who comes to the premises wanting to buy bottles to take home, he'll be refused? A. Yes."

(In context, nothing turns on the fact that the question envisaged a customer living in the area.)

Another answer a little later:

> "A. . . . We're seeking a licence which will permit us to serve alcohol without necessarily providing food to meet the needs of our existing clientele and the people in the area."

And later in the cross-examination:

> "Q. Again looking at the worst if it is not successful, do you intend to look at bottle sales as another area of revenue? A. Definitely not, as I said we're in the restaurant industry and not in the bottle shop industry.
>
> Q. You're not really in the hotel industry either are you? A. At the moment, no.
>
> Q. What you're seeking to do here is really a restaurant with a drinking facility? A. No.
>
> Q. You're seeking an hotel licence aren't you? A. Yes.
>
> Q. But you wouldn't regard what you're seeking to set up as being an hotel? A. No.
>
> Q. What would you describe it as? A. I describe it as a facility where

> we can cater as I said for the needs of our clientele which is on the increase in the form of being able to have an alcoholic beverage without necessarily wanting to have a meal and because of that need which is increasing quite dramatically to accommodate our existing clientele and also the market in the area and the fringe suburbs we believe that is the way to travel as far as the facility goes."

The "need" witnesses expressed their desire to see precisely this type of facility established — an extremely well set-up facility where, if they were using the other facilities of the complex for a gathering, they could afterwards come to the tavern section and have a drink in very quiet and comfortable surroundings, bringing their customers, clients along with them, having a meal or something less than a meal, or drinks only; and if they were not customers of the other part of the complex, where they could come with friends and business associates to enjoy a drink and possibly something to eat in these agreeable and quiet surroundings.

As the conditions (including condition (1)), reflect the proposals of the applicant, the proper course is to allow the appeal and dismiss the application, in the event that I am right in thinking that the first condition is beyond power.

In my opinion, the application should be dismissed because the applicant was not in reality an applicant for a hotel licence; not because its proposed operation is plainly very different from the sort of operation carried on in hotels in general or even in particular hotels; but because its contemplated operation is not one which falls within the concept of premises licensed as a hotel as that concept is delineated by the authority conferred by the licence and the obligations which go along with the licence.

In point of fact the applicant does not really want any of the ordinary licences which the statute provides. It does not want a restaurant licence (for this section of the premises) because that licence does not allow sale of liquor without meals; it does not want a hotel licence because that is liable to bring to the premises an air and an activity which will destroy the atmosphere it seeks to create. It can partly eliminate the latter problem by adjusting its prices so as to put it out of bounds for most people, but it cannot avoid the problem of packaged sales. In reality it wants to create a new sort of licence, the basic terms of which are to allow sale and supply of liquor but only for consumption on the premises with or without a meal.

The general facility licence (s 44) is a new type of licence introduced by the 1985 Act. Two of the indicia for the granting of that licence are that special trading conditions are necessary for the purpose in view and that no other licence would be reasonably adequate for the purpose. The provision is a tentative step in the direction of allowing the authority to "mould" the terms of the licence. I say nothing, of course, as to whether the purposes sought by this applicant fall within the ambit of s 44.

Jacobs J and Millhouse J have expressed conflicting views on the issue of the locality fixed by the Licensing Court judge, who accepted the view of a town planner. In reality two questions arise: the question of principle on which the planner proceeded, namely, that the relevant locality was constituted by the area from which the proposed customers would be drawn; and the fixing of the locality in the light of that principle. I must say that, as to the second, I share the view expressed by Millhouse J that, given the

principle, there is no reason to limit the locality as was done; I think there are many "mobile and affluent" people in the south-western suburbs in particular who might use such a facility from time to time and who, in fact, are nearer to it than are many included in the locality as fixed.

As to the point of principle, I think that a great difficulty exists in applying the concept of locality to a venture which deliberately sets out to be radically different from almost all premises having the same type of licence and thereby sets out not to be in competition with the other premises. Since a resolution of the problem is not necessary to the decision, I prefer not to express an opinion on it.

I would allow the appeal; set aside the s 64 certificate, and dismiss the application.

Solicitors for the appellants: *Kelly & Co.*

Solicitor for the first respondent: *C M Branson*, Crown Solicitor.

Solicitors for the second respondent: *Johnsons.*

J M BENNETT