
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CORAM : KENNEDY J
PIDGEON J
MURRAY J

HEARD : 16 DECEMBER 1998

DELIVERED : 20 APRIL 1999

FILE NO/S : APPEAL FUL 5 of 1998

BETWEEN : RINTAG PTY LTD
SALMON POINT HOLDINGS PTY LTD
MUSICAL INVESTMENTS PTY LTD
BLUEWATER ASSET PTY LTD
PARKS AUSTRALIA PTY LTD
Appellants

AND

WEST COAST HOSPITALITY PTY LTD
Respondent

Catchwords:

Liquor Licensing - Application for special facility licence for premises offering a variety of facilities currently operating under a tavern licence and extended trading permit - Application granted over objections by holders of cabaret licences - Circumstances justifying grant discussed - Appeal dismissed

Liquor Licensing Act 1988 (WA) s46, s74, s83

Representation:

Counsel:

Appellants : Mr C J L Pullin QC & Mr S G Scott
Respondent : Mr W S Martin QC & Mr D J Williams

Solicitors:

Appellants : Stables Scott
Respondent : Talbot & Olivier

Case(s) referred to in judgment(s):

Trop Nominees Pty Ltd v Liquor Licensing Commissioner (1987) 46 SASR 255

Case(s) also cited:

Hay Properties Pty Ltd v Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496;
20 July 1998

Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380

Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd; unreported; FCt SCt of WA;
Library No 980601; 19 October 1998

Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241

Library Number : 990194

KENNEDY J:

I have had the benefit of reading in draft the reasons to be published by Murray J. I am entirely in agreement with those reasons and would therefore dismiss the appeal.

PIDGEON J:

I agree with the reasons to be published by Murray J.

MURRAY J:

The respondent operates premises on the corner of Lake and James Streets in Northbridge, a well-known entertainment district in Perth, north of the railway line. There are a number of facilities of different types included in the premises. They operate together under a tavern licence issued under the *Liquor Licensing Act 1988 (WA)* s41. By that section the licence is identified as a type of hotel licence where accommodation is not offered. Under the licence the trading hours are limited to those specified in the Act s97(2)(a), ie between 6am and 12 midnight. However, there is an extended trading permit in existence, issued under s60(2) to apply whilst the licence remains in force. Except on Sundays, under s60(4), the extended trading permit extends the permissible trading hours to authorise the sale and supply of liquor for consumption on the premises between 12 midnight and 1am for the premises generally. However, in relation to the restaurant

facility where the sale and supply of liquor occurs ancillary to a meal in a portion of the premises known as the Vinous Restaurant, the hours are further extended from 1am to 6am.

The premises have undergone very extensive refurbishment. The precise nature of those works need not be mentioned here, but as a result the premises include not only the Vinous Restaurant, but also a bar area known as Redheads and comprising a lounge and associated courtyard bar. In addition, on the corner of Lake and James Streets, there is an area known as the James Street Pavilion, which is a dining area in the form of a large food hall, offering meals of 10 different kinds which may be consumed with alcoholic beverages. The James Street Pavilion and the Vinous Restaurant have associated with them in both James Street and Lake Street, licensed al fresco areas. On the first floor is a lounge bar known as the Ozone Bar which offers entertainment, mainly musical groups and comedians.

Following the completion of the renovations to which I have referred the respondent applied for a special facility licence in respect of the whole premises. The effect of that licence, if granted, would be to replace the existing tavern licence and extended trading permit. It would make one addition to the presently permitted trading hours to allow the Redheads lounge and courtyard bar to trade from 1am to 6am, bringing it into line with the trading hours permitted to the Vinous Restaurant in respect of days other than Sunday, subject to the condition that whenever those areas of the premises were open for trading, the kitchen was to be operating and meals were to be available to patrons to be served in the areas concerned.

Section 46(1) and (2) provide as follows:

- "(1) The licensing authority may grant a special facility licence to provide for the needs of persons of a particular class or in particular circumstances, or for a particular purpose.
- (2) The licensing authority shall not grant a special facility licence-
 - (a) where a licence of some other class would be reasonably adequate for the purpose; or
 - (b) unless conditions are imposed so as to ensure that, so far as is practicable, liquor is not sold for purposes other than those purposes which, in the opinion of the licensing authority, necessitated the grant of a special facility licence,

and a condition shall not be imposed, varied or cancelled on the application of the licensee unless the licensing authority is satisfied at the time of that application that the matter should still be dealt with by way of a special facility licence."

The purposes for which a special facility licence may be granted include those set out in subs(5). More recently than the proceedings before the Liquor Licensing Court with which this appeal is concerned, those purposes were extended by the specification of purposes relevant to the Act s46(3)(a), which deals with the licensee's trading obligations, under the *Liquor Licensing Regulations 1989*, reg 9A. The various purposes need not be set out with any particularity. They concern types of premises and classes of persons, eg a works canteen or the like, a theatre, cinema or ballroom, reception centre, passengers travelling, being about to travel or who have travelled on private or public transport, tourism purposes, post-secondary or tertiary educational institutions, sports promotions, food halls, caterers and a number of others. The variety is wide and made even more so by the terms of s46(6), which provides that nothing in subs(5) precludes the licensing authority from granting a special facility licence for a purpose to which that subsection does not refer.

Before the Liquor Licensing Court the respondent relied faintly and unsuccessfully upon the tourism purpose under s46(5)(h). More generally, it relied upon s46(6) and the proposition that a special facility licence was required to provide for the needs of the various persons who patronised, or would wish to patronise, the various facilities offered by the respondent during the extended trading hours sought, and upon the proposition that to satisfy those needs no other class of licence would be reasonably adequate.

In the Liquor Licensing Court, Greaves J identified the respondent's case as being that a broad cross-section of the population, particularly younger persons, should not only have access to the variety of different facilities at the licensed premises until 1am, but thereafter until 6am, late diners and others should have the opportunity on the same premises to dine and consume alcoholic beverages, not only in the Vinous Restaurant for which little demand had been identified after midnight, but more particularly in the Redheads lounge and courtyard bar. No other premises, the respondent contended, would offer such facilities in the Northbridge area, including premises of the type operated by the appellants.

The appellants are objectors to the respondent's application. They all hold cabaret licences in the Northbridge area. In short, they are nightclubs authorised under s42 to sell

liquor for consumption on the licensed premises ancillary to continuous entertainment by live artists or recorded music presented by a disc jockey. There is no obligation to provide food. Under s97(2)(c) their permitted hours are 6pm to 6am on other than Sundays and special holidays. Their objections relied upon grounds permitted by s74(1)(a) that the grant of the application would be contrary to the public interest, (d) that the grant of the application was not necessary in order to provide for the requirements of the public, and (j) that the grant of the application would otherwise be contrary to the Act.

The case of the objectors, stating it generally, was that the applicant's existing trading hours under its tavern licence and associated extended trading permit were reasonable and adequate. The tavern licence was appropriate and the application for a special facility licence should not be permitted to succeed where its effect, if not its stated purpose, would be to replicate for the Redheads facility and Vinous Restaurant the hours permitted under a cabaret licence without the need to provide live entertainment. It was argued that the application was merely a device effectively to absorb into the tavern licence a general extended trading permit. That, it was argued, was a distortion of the scheme of the Act under which the requirements of the public for liquor and related services were to be met by a system of licence classification which ought generally to be adhered to.

It was submitted that persons who wanted to continue their evening other than in the Vinous Restaurant after 1am were perfectly able to do so by leaving the other areas of the respondent's premises and going the short distance to any of the various nightclubs operated by the appellants. In the end, the answer of Greaves J to that proposition was his opinion that the appellants' premises "do not provide the facilities of the size and nature offered by this applicant together with the convenience of remaining on the same premises to eat and drink, if members of the public so wish."

No question arose of the validity of the grounds of objection and so the application fell to be determined by the Liquor Licensing Court under s38(1) which imposes an onus upon an applicant to satisfy the licensing authority that having regard to the nature of other licensed premises, their distribution, services and operation within the area affected by the application "the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services". Greaves J proceeded to deal with the matter upon this basis, correctly directing himself that the respondent would discharge the onus upon it on the balance of probabilities. His Honour heard evidence directed to the issues raised by the cases for the applicant and objectors.

He concluded that "it is a significant section of the public which resorts to Northbridge for liquor and related services and which, traditionally, gets younger as the night gets later." Whilst he appreciated that such persons would patronise cabaret premises after 1am, he said the applicant's proposal "offers the section of the public relied upon the convenience of restaurant and bar facilities in the one premises." His Honour continued:

"In the present case, I have no difficulty in concluding that a significant section of the public relied upon has a subjective requirement to purchase liquor at these premises during the proposed hours both before 1.00 am and after 1.00 am. They do so now at the existing cabaret premises between 6.00 pm and 6.00 am or part thereof. The subjective evidence for the applicant suggests that members of this section of the public patronising the applicant's premises until 1am may find it convenient to continue to do so afterwards. I have no difficulty in so concluding on the balance of probabilities, given the range of facilities which this applicant proposes to offer to the public as described. It is no answer to that convenience that customers of these premises may leave and go to cabaret premises after 1.00 am. In my opinion, it is that convenience which makes the requirements of this section of the public at this hour of the morning objectively reasonable. It offers restaurant and bar facilities with the personal security of not leaving the premises and makes no call for the use of a motor vehicle. In my opinion, the requirements of this section of the public which have been identified are special needs which enable the Court to fashion trading conditions which differ from those applicable to other forms of licence under the Act."

It followed in his Honour's view, that other forms of licence, such as those held by the appellants, would not suffice to meet those reasonable needs. Nor would they be met under a tavern licence with an extended trading permit because such a permit "does not offer the same security of tenure to the licensee." The Court granted the special facility licence in the terms sought.

An appeal against that decision must, pursuant to s28(2), involve a question of law. Hence, as is common in such cases, a number of the lengthy grounds of appeal challenge findings made by Greaves J, which are said to be without, or without a sufficient, evidentiary basis. Without setting them out, I refer particularly to grounds 1 and 4-7 inclusive. In my opinion, these grounds are misconceived. There was clearly evidence which was capable of supporting the central findings made. I say nothing about the strength of the case of the applicant, but it should not be overlooked that in the course of running, counsel for the respondents said they were putting the applicant to proof, rather than relying affirmatively on their grounds of objection.

In my opinion, the evidence led for the applicant was capable of establishing the subjective requirements of members of the public attending the Northbridge area for liquor and related services, and the reasonableness of those needs in the context of the facilities already available in the affected area was a matter for his Honour. There was in my opinion, evidence to support his conclusion that the existing licence structure and the other premises in the affected area were not capable of supplying the requirements which his Honour held to be reasonable.

Further, the grounds suggest his Honour erred in concluding that a special facility licence was justified because no licence of some other class would be reasonably adequate for the purpose identified. The grounds put it that what was sought in truth was a more broadly based tavern licence with extended trading hours, and it is contended that where that is so it is the clear intent of the Act that a special facility licence should not be granted. So much may be accepted as being the statutory scheme, but in my view the proposition that a tavern licence with an extended trading permit might suffice, cannot be maintained. As has been seen, a tavern licence is a form of hotel licence. Of itself, it requires no provision of food and, as has been seen, the respondent's proposal was that this special facility licence should be subject to the condition that during the whole of any period of trading during the hours stipulated, meals should be provided as required by patrons in the whole of the area to be open until 6am. Further, it was only the addition of the extended trading permit to the tavern licence which would permit the extension of hours to that time.

In my opinion, regard may not be had to an extended trading permit issued under s60 for the purpose of considering, pursuant to s46(2)(a), whether a licence of some class other than a special facility licence would be reasonably adequate for the purpose for which that licence is sought. A permit under the Act is not a licence. Section 60 makes it clear that it is an accretion upon a licence to which the permit relates, the conditions of the permit taking effect as conditions of the licence. Under s60(2), subject to the terms of the permit, it has effect whilst the licence to which it relates remains in force. Nor would a cabaret licence do the same job, because it requires entertainment of a particular kind, does not require the provision of meals if sought by patrons, and does not permit trading before 6pm.

It seems to me that the question which is determinative of the appeal is that raised in argument and related to, but difficult to fit into, a number of the grounds of appeal, that the particular purpose justifying the grant of a special facility licence identified by

Greaves J, did not fall within s46(1) because it did not relate to "the needs of persons of a particular class or in particular circumstances" and was not "a particular purpose" within the meaning of that subsection. The particular matters identified by his Honour were that after 1am a significant portion of the general public resorting to Northbridge for liquor and related services might wish to have access to liquor together with the capacity to purchase a meal in comfortable, convivial surroundings outside the noisy nightclub or cabaret scene. And if they were enjoying such a facility before 1am they may wish to continue to do so thereafter, without having to leave the premises. All of that was to be seen, his Honour thought, in the context of premises offering not only such facilities, but a wider range of facilities during the day and the earlier part of the night; in other words, over an extended period of time. His Honour identified those as reasonable requirements and special needs necessitating the grant of a special facility licence rather than a licence in some other form.

Such a licence was considered by the Full Court of South Australia in *Trop Nominees Pty Ltd v Liquor Licensing Commissioner* (1987) 46 SASR 255. The relevant provision of the South Australian Act was s44, providing for a general facility licence which, however, might be granted "where special trading conditions are, in the opinion of the licensing authority, necessary" for any one or more of a number of designated purposes. That section and our s46 are not the same, but the parallels between them are made clear in the passage from the judgment of King CJ at 258 which was quoted by Greaves J in this case:

"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 s44(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."

In other words, I think it is the case that, consistently with the object of the Act stipulated in s5(c) "to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand", the special facility licence is one the use of which is

justified under the Act where no other licence would be reasonably adequate to cater for a purpose identified as comprising the needs of persons of a particular class, or in particular circumstances, for liquor and related services, or where the licence is required to cater for some other identified particular purpose which may not adequately be provided for by a different form of licence. In that way, I suppose it may be useful to refer to the special facility licence as a licence of last resort, provided that description does not carry the connotation that the application for such a licence should only rarely be granted. The only requirement for any special quality within the special facility licence is, in my opinion, that it is designed to meet needs or provide for a particular purpose which may not reasonably adequately be met or provided for in any other form of licence for which the Act provides.

The diversity of the purposes for which a special facility licence may be granted as set out in s46(5) and as extended even further in their mention in reg 9A, gives the flavour of the provision, and to my mind the provision in subs(6) that nothing in subs(5) precludes the licensing authority from granting a special facility licence for a purpose to which that subsection does not refer, reinforces the view that the terms of s46 should not be read restrictively. In a real sense, the section is a "catch-all" type of provision, designed to enable the Liquor Licensing Court, as the specialist tribunal which it is, to use this form of licence to cater for particular needs and circumstances, or a combination of such needs and circumstances, which are unable to be met by another form of licence provided for in the Act.

In my respectful view, Greaves J committed no error in his approach to this section when he expressed the opinion quoted above that "the requirements of this section of the public which have been identified are special needs which enable the Court to fashion trading conditions which differ from those applicable to other forms of licence under the Act." I would dismiss the appeal.