COURT IN THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA PERRY(1), MULLIGHAN(2) AND DEBELLE(3) JJ

CWDS
Liquor licensing - general facility licence - Appeal from grant by Licensing Court of General Facility Licence for previously unlicensed premises on Norwood Parade - essence of the application that the applicant would conduct a high-class restaurant on the premises but sought the ability to serve liquor without meals in answer to what was said to be the needs of those who would frequent what it was suggested would be a "substantial tourist attraction" within the meaning of s.44(1) of the Liquor Licensing Act - held that the Licensing Court erred in finding that the premises are or would be a "substantial tourist attraction", in finding that the facility sought was necessary to provide adequately for the needs of those who might be attracted to the premises (s.44(1)(a)) in failing to find that a restaurant licence would have been reasonably adequate "for the purposes for which the general facility licence" was sought (s.44(2)), and in finding that the onus under s.63 of the Act had been satisfied - observatons as to. practicability of a proposed condition that "the premises be primarily devoted to the consumption of meals thereon" and as to the significance of planning consent being limited to "primarily for the consumption of meals on the site" warning against the threat which would be posed to the statutory scheme of classification of licences if what were essentially applications for restaurant licences were granted with the added facility to serve liquor without meals.
Liquor Licensinq Act 55.43, 44 and 62. S and A.D. Basheer Nominees Pty Ltd v Hurlev's Tea Tree Gully Pty Ltd (1987) 138 LSJS 1; Trop Nominees Pty Ltd v Liquor Licensing Commissioner (1987) 46 SASR 255; Tonslev Hotel Pty Ltd v Whelan and Ors (1982) 31 SASR 321 and Pierce and Ors v Liquor Licensing Commissioner and Anor (1987) 47 SASR 22 per Jacobs J at 23 and per Johnston J at 35-36, considered.

HRNG ADELAIDE, 13 September 1993 #DATE 13:9:1993
Counsel for appellant: Mr D. Smith
Solicitors for appellant: Clelands
Counsel for respondent: Mr B. Beazley with him
Mr Griffin
Solicitors for respondent: Ross and Mccarthy

ORDER
Application dismissed.

JUDGE1 PERRY J The appellants, who had objected to an application for the grant of a general facility licence by the respondent, appeal by leave of the Court given pursuant to s.23 of the Liquor Licensing Act ("the Act") against the grant of a certificate under s.64 of the Act in which the learned Licensing Court Judge who heard the application stated that he was satisfied that the licence sought should be granted. 2. The premises the subject of the application are situated on the corner of Edward Street and The Parade, Norwood. Their main frontage is to Norwood Parade. The premises have not previously been licensed. The site, if not the building erected on it, is of some historical significance in that its use by Louis Cann, the founder of L. Cann and Sons, as a location from which to conduct a hardware and furniture business dates back to 1893. The present building on the site, being premises as to part of which the licence was sought, was built in 1924. On any view, the architecture and

style of the building is unremarkable. Its interest lies in its long use within the one family as a hardware and furniture store. The building is of two storeys, but the respondent sought the grant of the licence for an area on the ground floor only. 3. Diagonally opposite, on the other corner of the intersection of Edward Street and The Parade, is a licensed cafe known as Cafe Buongiorno. The respondent is also the licensee of Cafe Buongiorno. On the same side as Cafe Buongiorno, but a little further north up Edward Street and away from The Parade, is a lane running off Edward Street known as Orange Lane. Large premises fronting Orange Lane and Edward Street are the site of what has come to be known as the Orange Lane Markets, best described as flea markets, which operate on Saturdays and Sundays between 10.00 am and 5.00 pm. 4. The appellant Saturno's Norwood Hotel Pty Ltd is the licensee of the Norwood Hotel, which is situated on the corner of The Parade and Osmond Terrace, one block away towards the city from the Edward Street intersection. The objector Abon Pty Ltd, is the licensee of the Maid and Magpie Hotel which is on the corner of North Terrace, Payneham Road and Magill Roads. The remaining appellants George Franzon and Robert Vincent Franzon lodged objections in their capacity as licensees of The Parade Tavern, formerly known as The Bath Hotel, which is on the same side of The Parade as the subject premises, but situated further east towards Portrush Road. 5. The principal evidence on behalf of the respondent was given by Mr Jeffrey Anderson. He is the manager of the Cafe Buongiorno. His wife, Josephine Anderson, was put forward as the proposed manager to operate the general facility licence if it was to be granted. Mr Anderson has had a long association with the operation of licensed premises of one kind or another. He had proved himself to be a successful and experienced operator of a variety of businesses, including a wine bar, a tavern, a discotheque and restaurants. 6. Mr Anderson indicated to the Licensing Court that if granted the general facility licence, he proposed to conduct what would be essentially a restaurant on the subject premises, which would be known as the Viceroy Bistro. He proposed to redecorate the premises in an architectural style which he described as "British colonial", modelled on the style of the well known Raffles Hotel in Singapore. He envisaged what he described as an "al fresco" area (a phrase which would appear to have more connection with the northern Mediterranean) which would allow people to sit on the pavement. The premises would have a capacity for 122 people inside and 60 people outside. It was intended that the food would be basically Asian, and that it would be available throughout the whole of the operating hours, as well as for lunch and dinner. 7. In its application the respondent specified suggested conditions to be imposed on the licence, which relevantly included the following:

"(i) The hours of operation shall be:-
Mondays - Wednesdays 12 noon to 2.30 am.
Thursdays, Fridays and Saturdays 12 noon to 3 am.
Sundays 12 noon to 12 midnight.
(ii) Meals must be available at all times when the premises are open.
(iii) The premises must be open for business every day of the week between 12 noon and 9 pm excluding Good Friday and Christmas Day.
(iv) The premises shall not trade or advertise under a name including any of the words, "Hotel", "Tavern", "Inn", or "Bar".
(v) ....." 8. Surprisingly, the application did not specify the most important trading condition which it sought, being a condition which explained why it sought a general facility licence rather than a restaurant licence. The application did not

indicate that the respondent sought the ability to serve liquor without meals during the whole of its hours of operation. Such a facility could not be implied in the proposed grant, as ss.43 and 44 of the Act, unlike the sections dealing with the grant of every other class of licence, leave the hours within which, and all other conditions upon which the licensee may sell liquor on the licensed premises, as matters entirely for the Licensing Court to specify in the licence. 9. To facilitate the supply of liquor without a meal, the proposal included provision for a five-and-a-half metre long bar. 10. A restaurant licence would allow the supply of liquor 24 hours a day, but only "with or ancillary to a meal" (s.31(b)). It was put to the Licensing Court by Mr Anderson that the reason why he wanted the added facility of serving liquor without a meal was because he had perceived a demand for such a facility in the course of his operation of the Cafe Buongiorno, and to quote his evidence, because - "People's habits have changed. They demand facilities that cater to their needs." From the outset, the case was presented on the basis that the operation under the proposed licence would be essentially that of a restaurant, and that the ability to serve liquor without a meal would be purely ancillary to that purpose. During the course of his opening, Mr Beazley of counsel for the respondent, informed the Licensing Court "..... People who attend those premises (Cafe Buongiorno), both those coming from Orange Lane Markets as well as other people on The Parade, come in and they ask for a drink without the need for a meal, and that is the essence of this application, and again to make it clear from the objectors' point of view, who may have some concerns about the premises, and when you hear Mr Anderson, and in particular Mr Visintin, these premises are nothing more, as it were, clearly than a restaurant, a high quality restaurant, with the ability for people really out in the street to enjoy a drink without the need for a meal, alfresco style." 11. In his evidence, Mr Anderson was asked:

"Q. ... what sort of numbers are those people at the premises of, say, Cafe Buongiorno asking for a drink without the need to have a meal.

A. It's not a vast percentage, but it does occur, we'd probably get, on weekends, 20 or 30 per day, something like this. You can tell, a lot of these people have accents, and they just don't know our licensing laws situation and they think it's like they do overseas, or other places, they just walk in and say, 'Yes, I'll have a liqueur and a coffee'." Elsewhere he said:

"Well if we're appealing to tourists and trying to bring people into the Parade, I think we should try to cater for their needs. I don't think a restaurant licence would cater for the need. It would be difficult to have people sitting outside and enjoying the ambience and the facilities they have to offer if they are forced to have a meal. I think that option should be open to people. Even thought we do want to trade - there will be food available, our emphasis is on providing the food, we do need that facility whereby people can partake of the special environment we're creating there of having your Singapore slings and your pink gins and planters punches and all those sorts of things that fit in with what we're trying to do there and I think we need to encourage more of the al fresco type situation on The Parade and I think there's a need for it." Later he said:

"We intend to pitch out prices at the lower rung of the scale to attract as many people as we can." He emphasised in his evidence that

serving alcohol only would not be "a major part of the operation":

"Q. They are almost assuredly going to come for food.

A. The major proportion would be, definitely. That evidence does not square well with his concession at the end of his cross examination:

"Q. You're not suggesting that you need this additional facility for the viability of this place, are you?

A. Yes, I do, definitely." 12. Those passages of evidence demonstrate that the case as presented seemed to oscillate between a business operation which was essentially that of a restaurant with the added facility, which would be very much secondary to the restaurant operation, of being able to serve liquor without meals, and a situation where the service of liquor without meals would be an essential part of the operation, and a substantial component in it. 13. The circumstances in which a general facility licence may be granted are set out in s.44 of the Act. Relevantly, that section provides:

"(1) Subject to sub-s.(2) a general facility licence may be granted where special trading conditions are, in the opinion of the licensing authority, necessar for any one or more of the following purposes:

(a) to provide adequately for the needs of those attracted to premises that in the opinion of the licensing authority are or will prove to be a substantial tourist attraction;

(b) .....

(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.

(3) Before granting an application for the grant or removal of the general facility licence or for variation of the condition affecting the trading rights conferred by such a licence, the licensing authority shall take into account the probable effect of the grant's removal or variation on the trade conducted from other licensed premises in the relevant locality." 14. In this case, having regard to the requirements of s.44(1), it was incumbent upon the respondent to satisfy the Court that "special trading conditions", namely, the ability to serve liquor without a meal, were "necessary" "to provide adequately for the needs of those attracted" to the premises, and further, that the premises "are or will prove to be a substantial tourist attraction". 15. In his reasons for decision, the learned Licensing Court Judge approached those aspects of the matter in the following way. 16. After quoting at length the evidence given by an architect and designer, Mr Visintin, which emphasised the detail of the proposed so-called "British colonial" architecture and fittings, the learned Judge said:

"I have found over the years that one must be wisely sceptical in these areas as often the promise of uniqueness results in somewhat of a variation upon a theme. The word unique is so often overdone in this jurisdiction. Then again, in some cases with some licensees the promise is genuine and the tourist attraction of Adelaide is considerably enhanced because of their perceptiveness. It is in this latter category that I would place this licensee and this architect. They have proved themselves often and I have the greatest faith in them producing

that which they promise. A very unique concept in South Australian terms and perhaps within the Commonwealth. Having in mind a not entirely unimportant heritage site in an area which so obviously attracts tourists of substantial numbers on a regular basis now, I have no hesitation in saying that these premises and what will be provided upon them will be particularly attractive to a substantial tourist population quite apart from a perhaps larger "local" demand. Tourists are there now mainly because of activities on Norwood Oval, activities at the Concert Hall, the Orange Lane Markets and tourist accommodation in the general area. I am in no doubt that tourists from a wider field will also be attracted to these unique and exceptional premises. In terms of Section 63 of the Liquor Licensing Act there can be no doubt in my view that "needs of the public having regard to the licensed premises already existing in the locality" is well and truly proved on the evidence. Section 44 is a little more complex but no less proved. On all of the evidence the hours and conditions sought to meet the proven demand are demonstrated to come within the term "special trading conditions are, in the opinion of the licensing authority, necessary". No other licence would be reasonably adequate for those purposes. I have considered the probable effect on other licensees in the Parade area and even outside (The Maid and Magpie Hotel). I think it will be rather minimal on the evidence. I do not accept the objectors' scenario. I think it much more likely that losses will be rather insignificant and counterbalanced by more general trade in the area because of this promised attraction." 17. He then went on to indicate that the certificate pursuant to s.64 of the Act would be granted, and that the licence would, when issued, have conditions which provide for hours of operation in the terms sought in the application, to which I have already referred, and substantially reflect the other conditions suggested in the application, but with the additional requirement - "4. The licensee is to ensure that the premises be primarily devoted to the consumption of meals thereon." 18. After indicating the basis upon which the grant would be made, the learned Judge said:

"One final matter. I would indicate that I am at this stage a little doubtful about planning consent in terms of s.62(2)(a). In light of my indications above, I would want clear evidence of planning consent before I actually grant the licence. To that extent and that extent only I would not dismiss the objections at this time." 19. If by the last sentence in that passage from the learned Judge's reasons, he was reserving the right of the objectors to be heard as to a matter going to the grant of the licence, it was inappropriate to issue the certificate under s.64 of the Act, and the certificate was probably a nullity (see S. and A.D. Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd (1987) 138 LSJS 1). However, the point was not argued before this Court, and I do not pursue it further. 20. The planning consent which had been tendered in evidence was a document headed "Planning Decision Notification" furnished by the Corporation of the City of Kensington and Norwood. That notification was said to have been given under the Planning Act and Development Control Regulations. In the notification, against the

words "nature of proposed development" appear "change use to restaurant, shop and retail showroom". The references to shop and retail showroom must be to a use of other parts of the building apart from the ground floor area the subject of the application. The reference to "restaurant", coupled with the foreshadowed condition indicated by the Licensing Judge, namely, that the premises "be primarily devoted to the consumption of meals thereon" created a situation which, for reasons which I will explain in due course, made the proposed licence in a practical sense, unworkable. Before dealing with that aspect of the matter, however, I will refer to some more basic considerations stemming from the requirements of s.43 and s.44 of the Act. 21. The requirements for the grant of a general facility licence were the subject of extended analysis by King CJ with whose judgment White J agreed in Trop Nominees Pty Ltd v Liquor Licensing Commissioner (1987) 46 SASR 255. In that case the Full Court allowed an appeal against the dismissal by the Licensing Court of an application for a general facility licence with respect to premises situated in Hindley Street, Adelaide. In the course of his judgment, King CJ said:

> "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." 22. His Honour went on to hold that premises might qualify as "a substantial tourist attraction" within the meaning of s.44(1)(a) not only because of an attraction to tourists having regard to "historic, cultural or aesthetic interest of the building or its contents", but also where the quality which attracted tourists "consists in activities carried on in the premises". As to that aspect of the matter, His Honour said:

> "Premises may be a tourist attraction because their facilities or activities are specifically directed towards the needs and interests of tourists. It seems to me, however, that premises may also be a tourist attraction simply because of their contribution to the recreational or cultural life of the city. That is not to say, of course, that all places of entertainment or culture are to be characterised as tourist attractions. The general run of places of entertainment or cultural interest may be patronised by tourists as well as local residents. The mere fact, however, that they are patronised by tourists does not of itself make them a tourist attraction. In my opinion, however, there may be premises, which by reason of the unique nature or exceptionally high standard of the facilities provided or the recreational or cultural activities

occurring in them, may make such a significant contribution to the general attractiveness of the city to those who visit it for touring purposes, as to become for that very reason a tourist attraction. The character of such premises as a tourist attraction is not lost because it is also an attraction to local residents and is patronised, even patronised in the main, by them." 23. The learned Licensing Court Judge indicated in his Reasons for Decision that he had paid "close heed to the Chief Justice's views as set out in Trop Nominees ..." However, it seems to me that the passage from the Chief Justice's judgment in that case which I have just cited, must have been misunderstood and misapplied by the Licensing Court in this case. 24. At the time the application was heard, it could not possibly be said that the subject premises were a "substantial tourist attraction". In making the grant in question, the learned Licensing Judge was obviously much influenced by the allegedly unique style of the proposed refitting and redecoration of the subject premises. But in my opinion, it was not sufficient to qualify the premises for the proposed grant simply to refit and redecorate them in the style proposed. To do so would simply be to create a high class restaurant distinguished by what one might assume to be, at least for some tastes, attractive surroundings. But as was put by Mr Beazley in opening, and as was emphasised by Mr Anderson in his evidence, the premises would remain basically a restaurant. 25. In Trop Nominees King CJ said: "The mere fact that premises are attractive to tourists is not a sufficient reason, in my opinion, for the grant of a general facility licence if they are in reality and substance hotels and their attraction to tourists consists in no more than their character and quality as hotels. Much more than that must be required." 26. In my opinion, that dictum holds good if the word "restaurant" was to be substituted for "hotels". 27. No doubt every restaurant, at least every restaurant of a high class, is in one sense an attraction to tourists: but the "tourist attraction" needed to satisfy the requirements of the Act, must have some feature, or combination of features, which distinguishes it not only from other restaurants, but from restaurants generally. In the case of the premises which were the subject of Trop Nominees, although the premises were licensed as an hotel, neither the fittings nor the activities carried on in it in any way resembled an ordinary hotel operation. 28. It must also be noted that it cannot be that the grant of the facility itself will prove to be the element which attracts tourists. There must be evidence that the premises "are or will prove to be a substantial tourist attraction" other than by reason of the grant of the "special trading conditions". 29. Of course, as was pointed out in Trop Nominees, once it is proved that the premises are or will be a substantial tourist attraction, it is the needs of all of those attracted to the premises, not just tourists, which may then be taken into account in determining whether special trading conditions should be granted. 30. In this case, the evidence that the subject premises are or would prove to be a substantial tourist attraction was insubstantial and wholly inadequate to discharge the statutory onus. As I have already indicated, the building itself could not be classed as a tourist attraction. As to Norwood Parade, an effort was made to prove that it was an attraction to tourists. That evidence was unconvincing, to say the least. It relied in part on the suggestion that large numbers of people, some of whom could properly be classified as tourists, frequented the Orange Lane Markets. 31. The manager of the Orange Lane Markets, a Mr Johnson, gave evidence. His estimate of an average of 5,000 each weekend coming through the doors of the market was not challenged. When asked where he believed the custom came from, he said:

"It comes from all over the place, we have people that are

so called 'market die-hards', they go around and check out markets all over the metropolitan area. We have other people that have heard of the markets reputation, we have a reputation as being a very friendly place, somewhere that you can bring the family, and I am aware of a lot of people coming from interstate, of some particular stalls that sell specialty goods such as reproduction and antiques - they are aware of certain traders that we have, that have very good prices and ranges of stock, so they come from quite a long way off." 32. He added that he was involved in serving food at the Markets, and was occasionally asked by patrons where they might go for a drink. In such a case, he directed them to Cafe Buongiorno or the Norwood Hotel. Asked whether he would use the premises if the licence was granted, he said:

"I definitely would, I think there is a severe lack of such a facility in that area. I am an Asian food freak myself, and there isn't any offered on The Parade at the moment.... I think it is something that would be an asset to the area." 33. As to drinking without a meal, he said: "I could envisage taking a client across to have a beer." 34. A Mr Stansfield, who runs a leather garment manufacturing business on The Parade, gave evidence that he regularly entertained clients from interstate, and sometimes took them to have a meal in the area. He, too, appears to have been attracted by the idea that the restaurant would serve Asian food. The same applies to another witness, a Mr Minervini, an accountant. Although he did not work in the area, he occasionally took people, some of them interstate, out for meals and a drink, as to which he from time to time used some of the facilities on The Parade. His evidence was that: "our interstate guests would certainly be happy to have a bit of a change and go for something Asian .... Normally we do take them out for meals ..... From time to time we may eat at a restaurant in another location or end up for a coffee or a quiet drink somewhere else". 35. The respondent also drew the Court's attention to the fact that the Norwood Oval provided facilities for a variety of sporting events, and that there was an Italian festival conducted along The Parade in November of each year. Attention was also drawn to a concert hall, described as the Norwood Concert Hall. Mr Anderson spoke of patrons of the concert hall as either coming in before or after concerts for "coffee and liqueurs".13 Mr Anderson spoke generally of perhaps 15% of his clientele at Cafe Buongiorno being interstate tourists staying in nearby motels, and that there were perhaps as many again coming from "for instance, Glenelg, Salisbury, Elizabeth, McLaren Vale". His clientele from suburban areas increased substantially, on his evidence, during the hours of the weekend when the Orange Lane Markets were open. 36. In my opinion, this body of evidence went no more than to establish that tourists are amongst those who from time to time make use of the recreational and other facilities on and near The Parade. Further, I very much doubt whether some of those who were assumed by the learned Licensing Court Judge to be tourists, were correctly identified as such within the meaning of s.44(1)(a). I doubt that people from other suburbs who spend an hour or two shopping on or near The Parade and then look for a meal or a drink should be classed as tourists: see Tonsley Hotel Pty Ltd v Whelan and Ors (1982) 31 SASR
321. Furthermore, I would not be prepared to class people who come from interstate or elsewhere to South Australia for business as opposed to recreational purposes, as tourists. 37. Even if the Orange Lane Markets could be described as a tourist attraction, it does not seem to me that the evidence of any of the other premises

around the Norwood Parade could properly be so described. I would not describe patrons of a football match as tourists, and neither would I so describe persons who come from another suburb to a function at the concert hall. A once a year festival such as the Italian festival does not make the area a tourist attraction. 38. The evidence in this case was nothing like the evidence in the Trop Nominees case, from which it was clearly proper for the Court to deduce that Hindley Street and its environs was a "tourist mecca". In contrast with the evidence in that case of substantial numbers of people coming from the Adelaide Casino and elsewhere and wishing to make use of drinking and other facilities into the early hours of the morning, Mr Anderson's evidence was that from after midnight on Thursdays, Fridays and Saturdays, which were the nights upon which he sought the ability to trade until 3.00 am, "there are a few people in the street ..... mainly people travelling home from the city or other venues going to the eastern suburbs". The relevance of the proposed premises being in an area frequented by tourists is that characterisation of the subject premises in such a case as a "substantial tourist attraction" may thereby be rendered more easy. But there was no evidence in this case which could possibly support the view that any substantial body of tourists was regularly in the area in which the subject premises are situated. No doubt tourists as well as non-tourists come and go from the area in order to enjoy such attractions as there are, but there was no evidence of amenities which would be of particular interest to tourists, as opposed to the population at large. The situation on Norwood Parade would seem to be no different from the situation in the vicinity of many other main roads around Adelaide on which there happens to be a number of restaurants, and perhaps some other facility such as an oval, or theatre, or hall. 39. Even if the respondent had, contrary to the view which I have expressed, surmounted the hurdle of proving that the premises were, or would prove to be a substantial tourist attraction, the evidence did not support the view that the needs of those attracted to the premises, which, as I have said, would not merely be the needs of tourists but would take in the need of all of those, whether tourists or locals, attracted to the premises, required the grant of the special trading conditions sought. On the contrary, it seems to me that their needs were no more than the needs of everybody attending any other restaurant in Adelaide. The occasional voiced demand for liquor without meals is a common incidence of the conduct of a restaurant business, and could not justify a grant under s.44 of the kind sought in this case. 40. Given that the nature of the proposed trading operation was to be that of a restaurant, it was clear that, quite apart from the considerations to which I have so far referred, within the meaning of sub-s.(2) of s.44 the grant of a restaurant licence "would be reasonably adequate for the purposes for which the general facility licence" was sought. 41. This leads me to consider the difficulty which the learned Licensing Court Judge felt with respect to the evidence of the planning consent, and the condition which he would have imposed on the grant obliging the licensee "to ensure that the premises be primarily devoted to the consumption of meals thereon". 42. As to the planning consent, I do not know what other evidence could have assisted the Court. The respondent tendered the formal notification of the planning decision by the appropriate body, signifying its assent to a change of use of the premises to use as a "restaurant". The learned Judge received in evidence as well a letter written by the Senior Planning Officer of the Corporation of the City of Kensington and Norwood in which he states: "I am able to confirm my previous advice that Council granted planning consent to the establishment of a restaurant (i.e. primarily for the consumption of meals on the site) at the above premises.....". The letter went on:

"The proposed general facility licence will allow for the

consumption of alcohol on the premises without the need for a meal to be consumed. I do understand that it is your client's intention to have meals available at all times when the premises are open, and that consumption of meals will be the primary function of the premises." 43. After referring to the proposed hours of operation, he further comments:

"The above prescribed use of the premises is considered to be consistent with the Planning Approval granted for a restaurant, provided that the consumption of meals remains as the primary use. If during the operation of the premises it becomes evidence that the primary function of the premises is not for the consumption of meals, it will be necessary to apply for planning approval or cease operations." 44. That letter amounted to little more than an explanation of the author's understanding of the significance of the planning consent which had been granted. The letter could not have altered the legal effect of that consent. Presumably, the consent must be read together with the definition of restaurant in the Development Control Regulations in which it is defined as follows: "restaurant means land used primarily for the consumption of meals on the site." 45. S.62(2)(a) of the Act obliged the Licensing Judge to be satisfied "that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained". 46. The evidence provided a proper basis for the learned Licensing Judge to be satisfied that relevant planning approval had been obtained for the use of the premises as a restaurant, as defined. But it was entirely possible, indeed in my view likely, that at times, if not at all times, the supply of liquor without meals could be the predominant trading activity. Significantly, Mr Anderson conceded in his evidence that if the need to do so arose, he would apply for planning approval for a further change of use to accommodate to a situation where the "primary function" was no longer the consumption of meals.17 But in the first place, it could not confidently be assumed in advance that any such application for a further change of use would be successful. Furthermore, in that event, the question arises as to the continued efficacy of the condition which the learned Judge indicated that he would impose on the grant, namely: "4. The licensee is to ensure that the premises be primarily devoted to the consumption of meals thereon." 47. The imposition of a condition of that kind, considered in the context of the Liquor Licensing Act, gives rise to practical problems which would, in my view, be insurmountable. One problem is to know over what time span the question whether or not the primary use contemplated by the condition is to be established. It might well be, if the licence were to be granted, that over the summer months drinking without meals represented the major proportion of the turnover, whereas in the winter months it might be a minor part of the business. If it was to be suggested that the trading operation should be evaluated over a twelve-months period, the question arises as to which twelve month period. It might be fashionable during a given year for patrons to do their drinking without meals on Norwood Parade, in particular at the proposed premises, but the following year perhaps, given the fickleness of fashion, they might go elsewhere. Could the holder of the licence in such a situation plead, in answer to an application to cancel the licence for breach of condition, that circumstances had changed? How would the Court be able to be sure that they would not change again? 48. The central problem is that a licensee can only in a limited way control the use which the public may seek to make of the facilities which are offered. Furthermore, the balance in the use made between

different facilities will always be a product of fluctuating public demand. The only workable conditions which can be applied to a licence are those over which the licensee has complete control, such as, for example, allowing only a given number of people in a trading area, or confining his trading to certain hours. A licence condition, on the other hand, which depends upon the level of a demand, which could not be controlled by the licensee, is not workable. 49. In my opinion, the condition formulated in this regard by the learned Judge would have been impossible to apply in practice, and should not have been contemplated. It is clear that without it, the judicial promise to grant the licence sought would not have been made. 50. I should add that although I have dealt at some length with the requirements of s.44 of the Act, in my opinion, the applicant failed to satisfy the onus under s.63 of the Act. 51. I have not paused to deal with the evidence adduced by the objectors. It is unnecessary for me to do so, given the deficiencies in the evidence led by the respondent in support of the application. The questions arising under s.44(3) do not, therefore, need to be addressed in this Court. 52. Before parting with the case, I make some general remarks about the manner in which the Licensing Court should properly approach applications for a general facility licence in premises which are, for all intents and purposes, restaurant premises. In my opinion, the Court should not yield readily to the suggestion that the proposed decor will be so unique that it will attract custom of one kind or another. In order to justify the grant of special trading conditions under s.44, there must be something of more enduring significance. In those cases in which it is proper to make such a grant, there will commonly be the presence of historically significant amenities, or entertainment or recreational facilities of an unusual kind, such as was the case in Trop Nominees. The premises in question in this case were to be operated with no live entertainment, and no facilities other than those which would normally accompany a restaurant. Although much was made of the so-called British Raj style of decor and fittings, the Licensing Court could not safely assume that as tastes of patrons change, the premises would not be refitted to some other style. Tastes and fashions are constantly changing, and it is a common feature of restaurant operations that the style of presentation, the decor, the type of food sold, and other aspects of the operation undergo successive changes in response to changing demands. 53. Here the basis of the application was the presentation of a particular decor and ambience, and there was nothing in the building itself, or in the activities to be carried on in it, which lent any credibility to the suggestion that the premises would be a "substantial tourist attraction", in the relevant sense. 54. Stripped to its essentials, the application was nothing more than a colourable attempt to obtain a restaurant licence with the added facility of being able to serve liquor without meals. The attempt to obtain that facility was made on the basis of a so-called unique and attractive get-up of the premises. If the application was to be granted in such circumstances, there would be no limit to the grant of such licences, which in turn would strike at the foundations of the statutory scheme of classification of licences. (See Pierce and Ors v Liquor Licensing Commission and Anor (1987) 47 SASR 22 per Jacobs J at 23 and per Johnston J at 35-36.) 55. Mr Beazley for the respondent, contended that the case was one in which this Court should hesitate to interfere, given the specialist nature of the jurisdiction exercised by the Licensing Court. There may be cases where recognition of the particular expertise of that Court might operate against allowing an appeal. But in this case, with respect to the learned Licensing Court Judge, he clearly proceeded upon an erroneous appreciation and application of the principles involved in the grant of a general facility licence. 56. I would allow the appeal, and quash the grant of a certificate under s.64. 57. I would substitute an order

that the application be dismissed.

JUDGE2 MULLIGHAN J I agree that the appeal should be allowed for the reasons expressed by Perry and Debelle JJ and that there should be an order dismissing the application.

JUDGE3 DEBELLE J I agree that this appeal should be allowed. I agree with the conclusion of Perry J that the evidence called in the Licensing Court was unconvincing and did not discharge the statutory onus. In reaching this conclusion, I have had particular regard to the principle that this Court will be slow to interfere with the decision of this specialist tribunal. 2. There was no feature of this proposal which justified it being a substantial tourist attraction within the meaning of s.44(1)(a) of the Act. Notwithstanding its heritage classification, there was nothing about the building in which the proposed restaurant was to be located which could be fairly described as a substantial tourist attraction. The proposal was, in truth, but a restaurant with a particular style of decor in which the respondents sought to be able to serve liquor without any obligation to serve meals. 3. The general facility licence is designed to enable the Licensing Court in the circumstances provided for in s.44(1) to fashion the trading hours and conditions attaching to the licence so as to meet particular needs and circumstances: Trop Nominees Pty Ltd v Liquor Licensing Commissioner (1987) 46 SASR 255 at 258. But while this type of licence is designed to enable the Court to prescribe trading conditions which differ from those applicable to other forms of licence under the Act, it is to be noted 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) and 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: Trop Nominees Pty Ltd v Liquor Licensing Commissioner at 258-259. If those conditions are not observed, there is a real risk of disturbing the statutory classification of licensing of which an inherent feature is the extent of obligations imposed on certain kinds of licensees: see Pierce v Liquor Licensing Commission (1987) 47 SASR 22; David Jones (Australia) Pty Ltd v Fahey (1989) 50 SASR 323, at 331; and Beachport Properties Pty Ltd v Tyncom Pty Ltd (unreported, Full Court, 1 November 1990). This application was in effect an application to sell liquor at any time of the day in a restaurant but without the obligation to serve meals. The Act does not now provide for such a licence. While the Act confers a greater flexibility and wider discretionary powers on the licensing authority than on its predecessors, those powers cannot be used to subvert the statutory scheme. It is for Parliament to determine when, if at all, it is appropriate to provide for a licence which enables a restaurant to sell liquor at any time of the day, without meals. 4. I agree with the orders proposed by Perry J.