Old Oat Mill [2001] SALC 15 (30 November 2001)

Last Updated: 1 November 2006

IN THE LICENSING COURT OF SOUTH AUSTRALIA

ADELAIDE

BEFORE HIS HONOUR JUDGE B. ST. L. KELLY

IN THE MATTER of the Liquor Licensing Act, 1997

and

IN THE MATTER of an Application by Woolies Liquor Stores Pty Ltd for a transfer of licence and removal from 7 Percy Street to Shop 3, 145 Commercial Street Mt. Gambier and know as **OLD OAT MILL.**

Objectors: Fidler's Liquor Store

Federal Hotel

Mt. Gambier Hotel

Park Hotel

South Eastern Hotel

Mac's Hotel

Commercial Hotel

REASONS FOR DECISION

DELIVERED ON FRIDAY 30 NOVEMBER 2001

Counsel for applicant: Mr. T. Anderson QC with Mr G. Griffin

(Griffins)

Counsel for objectors: Mr. J. Firth with Mr. P. Hoban

(Barrister) (Wallmans)

Woolies Liquor Stores Pty Ltd have been refused a Retail Liquor Merchant's Licence in Mt. Gambier twice. On 5th April 1991 I made the primary decision and as far as I know there was no appeal. Then on 27th February 1998 I granted another application but after Full Court consideration I finally refused it on the 13th November 1998. Again it went on appeal but such was dismissed.

This brief history and a perusal of the various judgements demonstrates that in Mt Gambier the public were well and adequately served with take away liquor by the existing licensed outlets. Nothing has really changed since. A view of the truly relevant licensed premises in this case coupled with the honest evidence of Mr. McMillan would confirm that statement. I am again satisfied that the public of Mt. Gambier are well served in their present take away facilities for all types of liquor.

What has all this to do with the present application? Quite a deal as it turns out. The applicant has purchased a Special Circumstance Licence and wants to remove it to premises adjacent to its large supermarket. To understand this and to appreciate the position of the various liquor sites in Mt. Gambier reference is to be usefully had to Exhibit 19. Anyway that is the applicants purpose. The licence has these conditions

"For consumption ON the licensed premises.
• Of wine by the glass and without a meal
Monday to Sunday (except Good Friday) - 9am to midnight
• Of liquor by the glass or other container without a meal
Monday to Sunday (except Good Friday) - 9pm to midnight
• Of wines by way of sample, such sample to be free of charge
Monday to Sunday (except Good Friday) - 9am to midnight
• At any time on any day with or ancillary to a meal
• At any time on any day to a person attending a reception

The Extended Trading Authorisation does not allow the sale of liquor without meals between the hours of midnight and 5am on Good Friday, the day after Good Friday or the day after Christmas Day.

For consumption of wine only OFF the licensed premises.
Monday to Sunday - 9am to midnight
Good Friday Nil"

The proposal by the applicant is to sell a very wide range of wines and to also provide a smallish café area dealing in produce gathered from the supermarket. This is all quite permissible under the terms of the licence.

The history of this licence is important. It originally emerged in 1988. The judgement of Judge Hume on the 9th June 1988 sets out the reasons for its emergence. It was originally "attached" to an old rather historic mill known as The Old Oat Mill. It was granted under legislation not now applying which was generally directed to tourist needs and tourism. It was a wide ranging proposal and whilst a copy of the original licence seems to have gone missing, no doubt it had similar conditions to those now existing.

The take away aspect of the licence was never acted upon. Indeed all that was promised never really came to fruition in any significant sense and the licence has been quite dormant for years. Even with the recent removal authorised by myself on 17th April 2000 nothing transpired except an almost immediate attempt on the part of the present licensee to sell off the licence.

I am puzzled that there was an authorisation for wine at large because by reference to Judge Hume's decision at Page 3 and I quote

"*At the first level of the main building, in a portion of the building which is partially below ground, it is proposed to install a wine cellar to house a complete (or as complete as can be obtained) collection of wines of the Padthaway - Coonawarra region. These will be displayed with promotional material about the wine region and individual wineries. Wine will be available for tasting, for sale by the glass for consumption there, and for sale to take away. There will be no other types of liquor, nor wine from any other area. Jointly with this, there will be provision of cheeses of the region for tasting, again with promotional material, and for sale for consumption there and to take away. The region is of course renowned for its production of cheese and of wine of the very highest quality.*"

it would appear that a much more limited authorisation was in contemplation. Despite that the authorisation with the wider significance came to pass.

Even a brief scanning of the judgement confirms my belief that the case was very much directed to tourist needs as the legislation then required. The licence has, of course, been converted to the present Special Circumstance Licence by virtue of new legislation.

As I have mentioned this original licence was removed by order of myself last year but the proposal included very much a tourist thrust. In that sense not entirely different from the purpose for which it was originally granted. I must say though that having heard the full and detailed argument in this case that I very much query my decision. The fact is though the decision to remove was made.

Here I mention an argument put during this case by objectors counsel. Essentially he refers to Section 62 of the Liquor Licensing Act which reads

"62. (1) The licensing authority may refuse an application for the removal of a licence to proposed premises having regard to the extent to which the proposed premises are uncompleted, but may instead, if satisfied as to the matters as to which it is required to be satisfied for the grant of the application, grant a certificate (a certificate of approval) approving the plans submitted by the applicant in respect of the proposed premises.

(2) A certificate of approval

(a) may be granted on conditions the licensing authority thinks fit; and

(b) may include a statement of conditions to which, in the opinion of the licensing authority, the licence should be subject on its removal (either in addition to, or in

substitution for, existing conditions of the licence).

(3) If

(a) a certificate has been granted under subsection (1); and

(b) the holder of the certificate satisfies the licensing authority

(i) that the conditions (if any) on which the certificate was granted have been complied with; and

(ii) that the premises have been completed in accordance with plans approved by the licensing authority on the grant of the certificate or a variation of those plans later approved by the licensing authority, the licence must be removed to the new premises and, if the certificate of approval provides for the addition or substitution of conditions, the licence then becomes subject to the new conditions in accordance with the terms of the certificate.

(4) A transaction under which the holder of a certificate of approval agrees to the transfer of the certificate for a monetary or other consideration is void unless the proposed transfer is to a close associate."

He emphasises subsections 1 and 4 thereof and submits that the effect of my order of 17th April 2000 was the granting of a certificate for removal and that by virtue of subsection (4) the transaction between the licensee and this applicant is void. Mr Anderson QC to the contrary referring to Section 60 of the Liquor Licensing Act which reads

"60. (1) An applicant for the removal of a licence to premises or proposed premises must satisfy the licensing authority

(a) that the premises to which removal of the licence is sought are, or, in the case of premises not yet constructed, will be, of an appropriate standard for carrying on business under the licence; and

(b) that the removal of the licence would be unlikely

(i) to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises; or

(ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.

(2) An application for the removal of a licence to premises or proposed premises cannot be granted unless the licensing authority is satisfied

(a) 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; and

(b) that any approvals, consents or exemptions that are required by law for carrying out of building work before the removal of the licence takes effect have been obtained; and

(c) that any other relevant approvals, consents and exemptions required for carrying on the proposed business from the premises have been obtained.

(3) The licensing authority may dispense with the requirement that an applicant for the removal of a direct sales licence

(a) satisfy the authority as to a matter referred to in this section; or

(b) submit plans."

My actual order was this

"I grant the removal with a new licence to issue restricting hours from 9am until midnight and restoring the wine only carry off condition. It will take effect upon the Commissioner being satisfied that the premises are ready to trade."

I am quite sure that I reached the requisite satisfactions under Section 60 and actually removed the licence pursuant to that Section. I note that both Sections speak of unfinished premises. I never reached a stage where I thought I might refuse the application but instead grant a certificate as envisaged by Section 62. Rather I dealt with it under Section 60. It follows that Mr. Firth's contentions on this point fail.

This case revolves around the question of the Court's discretion enshrined in Section 53 of the Liquor Licensing Act.

***"53.** (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, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).*

(2) A licensing authority should not grant an application as a matter of course without proper inquiry into its merits (whether or not there are objections to the application).

(3) A licensing authority may, on such conditions (if any) as it thinks fit, vary or waive compliance with formal requirements relating to an application."

In this regard I have been supplied with a book of relevant cases touching upon the topic in various ways. I will come to them shortly.

Before I do I simply make these observations about the case for the applicant generally. As I have said Woolworths have a large and busy supermarket. That or adjacent to it is the site of the desired removal. This essentially was the case in the previous two attempts to gain a Retail Liquor Merchant's Licence.

Let there be no mistake about it, the ability to trade in a full range of take away liquor is the purpose of this application. Whilst the project is dressed up as a wine shop/café there is no doubt in my mind that if granted then within a very short time the applicant will want to do away with the café (which is a very half hearted affair in my opinion), seek the provision of beer and spirits as well as wine and use the café area for those purposes. Nothing is clearer and Mr. McMillan very nearly conceded that scenario. Even if he had not then common sense tells me that such would be the end result. Woolworths have always wanted this ability (their applications in 1991 and 1998) and that want is plainly evident. I mention three cases on this "beer and spirits" belief of mine. Firstly Gladstone Cellars v Fricker & Others 36 SASR 22 @ 36 per King C J

"*Little evidence is needed, I suppose, to convince a court that customers generally like to be able if they choose, to make all their liquor purchases at the one outlet.*"

Then Wilman Nominees v Harvey 35 SASR 473 @ 476 per Mohr J

"During argument it was suggested that some limited form of licence could be granted so as to exclude, for example, the sale or beer. I think it can now safely be said that experience has shown that licences in that form are not desirable, and indeed to grant such restricted licences, except in the most exceptional circumstances, would be to return to a class of licence expressly abolished by the Licensing Act of 1967. There is the further factor that almost inevitably the restricted licence will generate, by its very existence, a demand for full liquor facilities so that what cannot be granted today, because of its effect on the economic well-being of full publicans' licences in the locality, will be eagerly sought in a fairly short period of time."

Finally Hills Logging Co v Shields 125 LSJS 113 @ 123 per Bollen J

"The learned acting judge considered whether he should grant a licence for the sale of wine only. But influenced by discussion on this topic in Wilman's case he decided not to do so. In the Lincoln Bottle Shop Case such a restricted licence was granted. It was not granted in Wilman's Case. In Wilman's Case King C J said (at page 475):- "Counsel for the appellant naturally pressed upon us the decision of this Court in Lincoln Bottle Shop Pty Ltd v Hamden Pty Ltd (No. 2) (supra). But the circumstances in that case, although having some similarities to the present case, were fundamentally different. As in the present case, the need which could not be satisfied was for premium wine and, as in the present case, a retail storekeeper's licence was likely to have a serious impact on the hotels. The fundamental difference was that in the Lincoln Bottle Shop case, the licence was sought in respect of premises in a country town. If some facilities were not granted, the residents would be, from a practical point of view, without access to premium wines. The Court felt impelled in those circumstances to make some provision and to grant the licence subject to the restrictive condition. The site of the present proposed licence is in the metropolitan area. Residents of the locality have access, albeit with some inconvenience, to specialist bottle shops in the city and suburbs. One such retail store, the Barossa Liquor Store, is situated only a few kilometres from the site of the proposed licence. In those circumstances I do not think that such inconvenience as might be experienced by members of the public can justify a departure from the norm established by the legislature."

The learned Judge went on to repeat what Mohr J. had to say in Wilman Nominees v Harvey (supra).

I am quite satisfied that very shortly after the opening of this proposed operation the applicant would be back seeking the provision of beer and spirits and doing away with the café turning the premises effectively into a contemporary bottle shop selling all kinds of liquor. All semblance of tourism and a "licence of last resort" referred to in the cases will have gone. So a Special Circumstances Licence originally granted for tourists and a removal likewise (though I have doubted the wisdom of my decision there) will effectively become a licence indistinguishable in practice from a Retail Liquor Merchant's Licence. This is an area where I believe a discretion is involved.

I now turn to other matters and other cases.

In Waiata Pty Ltd v Lane & Others 39 SASR 290 @ 283 - 295 King C J has this to say

"The discretion conferred upon the Court by the section is "the widest of possible discretions": Dalgety Wine Estates Pty Ltd v Rizzon. As I pointed out, however, in G. Rosetto & Co Pty Ltd v. Superintendent of Licensed Premises, the discretion must, like all judicial discretions, be exercised judicially. It must be exercised, too, for the purpose for which it was conferred and in conformity with the legislative policy disclosed by the Act. In order to determine the purpose for which it was conferred and its part in implementing the legislative policy disclosed by the Act, it is necessary to understand its place in the Act and the role which it is intended to play in the implementation of the legislative policy.

The Licensing Act, 1967, is a direct descendant of earlier Liquor Licensing Acts in this State and of earlier licensing laws in England. Licensing legislation has been founded historically upon the belief that liquor is a commodity which requires different commercial treatment from other commodities. Because excessive consumption of this particular commodity has the potential for grave individual and social harm, society through the legislature has felt the necessity to prohibit its sale and distribution except through licensed outlets. Successive Licensing Acts have evidenced a belief that society has an interest in the controlled and orderly sale, distribution and public consumption of alcoholic liquor which transcends the interests of those who seek facilities to sell liquor, their competitors and those who would desire to be their customers. The method adopted in South Australia for the control of liquor sale and distribution has been a system of licensed controlled by the Licensing Court. Historically there have been various mechanisms to protect that general public interest in the grant and location of liquor licences, which differs from and transcends the public need or demand for liquor facilities. Objections on community interest grounds are one such mechanism. Section 61 is another such mechanism. The analogue of s. 61 in the predecessor of the 1967 Act was s. 66 of the Licensing Act, 1932. That Act, however, contained two other important mechanisms for the protection of the general public interest to which I have referred. One was local option and the other memorials.

The 1967 Act abolished the local option and memorial systems. Objections on community interest grounds were provided for but the protection of the general public

interest, as distinct from the public need for liquor facilities, was left to the s. 61 discretion. When this is appreciated, it can be seen that at least one purpose, and without doubt the primary purpose, for which the discretion is conferred, is the protection of that general public interest, which is to be distinguished from the public need or demand for liquor facilities, in the number, type, location and standard of liquor outlets and in the conditions under which they are to be permitted to operate. The s. 61 discretion is the means by which the Licensing Court is enabled to promote the shaping and development of an orderly and harmonious system of liquor facilities designed not only to meet the public need for liquor facilities but also to protect the wider public interest in the preservation of the community from adverse social effects.

The language of the section enables the Court to exercise the discretion on grounds or for reasons which commend themselves to the Court and irrespective of the grounds which may be relied upon by the parties to the proceedings. These grounds or reasons include any proper principles or policies which the Court has developed for the attainment of the purposes of the Act. Such principles or policies may relate to the undue proliferation of licences or of certain types of licences. They may relate to the promotion and maintenance of a suitable balance between the various types of liquor facility available in a locality. The Court is authorized by s. 6b to inform itself in any manner in which it sees fit and that includes informing itself by reference to its own records and its own knowledge of liquor facilities which have been granted or promised by the Court and to the previous history of proceedings relating to particular premises. The Licensing Court must act judicially, but there is an unmistakeably administrative element in its task of promoting, encouraging and maintaining a system of liquor facilities to meet the public need for liquor facilities and the wider community interests."

Then in Lovell & Others v New World Supermarket Pty Ltd v Liquor Licensing Court 53 SASR @ 57 King C J said this

"The Licensing Court judge was then required to consider whether in the exercise of his discretion under s 59(1) the licence ought to be granted. The consideration that public demand for liquor cannot be met by existing facilities is clearly a strong indicator in favour of the exercise of the discretion in favour of the grant of the licence. Nevertheless there may be countervailing factors such as the maintenance of a reasonable balance of various types of facility in the industry. If it appeared that the grant of the licence would so affect other licensed premises as to leave the public less well served in the end, or would have other anti-social consequences, it might be necessary to exercise the discretion against the grant of the licence. Fairness to licensees who have invested money to improve their premises at judicial instigation and have not had a reasonable opportunity to recoup the outlay, may also be a factor in some cases."

Then Woolies Liquor Stores v Saturno & Waterloo Hotel & Others (Judgement of Full Court delivered 30th November 1990) which repeats the expressed views of King C J in "Waita" (above) and confirming them.

Then Sailmaster Tavern v Nemo Nominees (Full Court 20/10/95) Perry J says at Page 11 of his judgement

"It was after referring to such a condition imposed with respect to the hotel licence the subject of the appeal in Pierce and Ors v Liquor Licensing Commission and Anor (supra) that Jacobs J observed (7 SASR 24):
"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 an hotel licence as to fly in the face of the statutory scheme of classification of licences."
That decision serves as a reminder that the grant of any licence by the licensing authority must lie within and not outside of the framework created by the Act within which licences may be granted. The licensing authority is not entitled, by the imposition of conditions, to grant a new species of licence differing fundamentally from the characteristics of any of the licences available under the Act."

Then Beachport Properties v Tyncom & Altschwager (Full Court 1/11/90) where Perry J says

"It is inevitable that, to some extent, a proper application of the provisions of the Licensing Act, including the exercise of the s.59 discretion, will from time to time result in the refusal of a grant even when some sort of need is made out. Justification for this is to be found in the need to guard against the undue proliferation of licences and to maintain within reasonable limits, the profitability of existing licences.

As to the part which the exercise of the s.59 discretion plays in that regard, I would refer to and with respect adopt, the observations of His Honour the Chief Justice in Vandeleu and Ors. v. Delbra Pty Ltd and Anor (1988) 48 SASR 156 at p.165:
"The existence of this discretion enables the Licensing Court to refuse a licence notwithstanding that the matters required to be proved have all been made out. The court is thus enabled by the exercise of an unqualified discretion, to fashion the licensing system to meet the needs of the community and to minimise the undesirable social consequences which are thought to result from the unregulated supply of liquor. One of the important matters to be considered in the exercise of the discretion is the effect which the grant of a licence will have upon existing licensed premises. If Licensed premises are to supply their services in an orderly and dignified way and to the satisfaction of the public they must be conducted at a profit. If the grant of an additional licence will have the effect of undermining the necessary profitability of other licensed premises, the satisfaction of a particular public need may have disproportionately undesirable consequences."
(The emphasis is mine)
I would add to those observations the comment that the exercise of the discretion is of particular importance in dealing with applications for a general facility licence. Commercial pressures being what they are and given the structure of the Licensing Act, applications will often be brought in an endeavour to obtain the grant of a general facility licence for what is in substance either a hotel licence on terms less onerous than those which attach to an hotel licence, or a retail liquor merchant's licence in circumstances in which an application for such a licence would be unlikely to succeed.

If the present application had succeeded, the appellant would have received what was in substance a hotel licence, but without being saddled with the obligations attaching

to that licence and with tapered hours targeted towards the most profitable times and periods of trading.

To grant such a licence in those circumstances would clearly be contrary to the spirit and the intent of the Act. Viewed in that light, the refusal of the application, by the exercise of the s.59 discretion, was inevitable."

To not dissimilar effect per King C J at Page 3 of his judgement

"The structure of the Liquor Licensing Act rests upon the foundation of licence classification, that is to say classes of licences each having its own prescribed trading conditions. A considerable degree of flexibility has been introduced into the system by the power conferred by section 50 to impose conditions, but that power does not extend to the imposition of conditions which would change the essential nature of a licence of the relevant class, ***Pierce*** *and Others v. Liquor Licensing Commission and Another (1987) 47 SASR 22. That case emphasised the central nature of the classification of licences in the scheme of the Liquor Licensing Act. See also David Jones (Australia) Pty Ltd v. Fahey and Others (1989(50 SASR 323 per White J at p 331. It is clear from section 44(2) that general facility licences are not to be granted in a way calculated to subvert the system of licence classification which is the foundation of the licensing structure."*

There are other more recent and indeed many older cases dealing with the question of discretion but I think for present purposes I have gone on long enough. I also appreciate that most of those cases which speak of classification of licences involved applications for alteration to conditions or for a grant of a licence and not removals but I find the cases helpful in deciding this removal matter.

In the end, given the circumstances of this case and guided by the decided cases I have come to the conclusion that I should refuse this application. I am concerned with balance in Mt. Gambier and the liquor industry generally (I note there are other Special Circumstances Licences with limited take away rights in existence and potentially able to seek alteration in some way which could well affect balance and offend the intended structure of the Liquor Licensing Act resting upon the foundation of licence classification (as King C J puts it). I should also say that a removal would (potentially and almost certainly) provide the applicant with the ability to trade as a retail liquor merchant when its actual licence is governed by Section 40 of the Liquor Licensing Act which reads

*"**40.** (1) A special circumstances licence authorises the licensee to sell liquor for consumption on or off the licensed premises in accordance with the terms and conditions of the licence.*

(2) A special circumstances licence cannot be granted unless the applicant satisfies the licensing authority that

(a) a licence of no other category (either with or without an extended trading authorisation) could adequately cover the kind of business proposed by the applicant; and

(b) the proposed business would be substantially prejudiced if the applicant's trading rights were limited to those possible under a licence of some other category.

(3) A special circumstances licence does not authorise extended trade in liquor unless the licence contains an extended trading authorisation.

(4) If liquor is sold by a licensee under a special circumstances licence for consumption at a function off the licensed premises, the licensed premises of the licensee are, for the period for which the licensee supplies liquor at the function, to be regarded as including the premises at which the function is held."

I highlight subsection 2 (a). It seems incongruous to me that a removal would allow such trading without "needs" provisions applying when if the applicant were actually seeking a grant of a Special Circumstances Licence which would allow the same sort of trading it would be met with the answer - "the Retail Liquor Merchant's Licence would adequately cover the kind of business you propose." Then the applicant, if it decided to press the matter, would be faced with the "need" provisions of Section 58(2).

I also think the removal in the circumstances here would amount to an undue proliferation of take away facilities in Mt Gambier. I have mentioned my position as to the adequacy of present facilities previously. This would be the most obvious "overkill" affecting balance in the industry.

Generally I feel that this proposal if granted would be contrary to the spirit and intent of the Liquor Licensing Act as explained in the decided cases. It really circumvents the need for one who is to hold what will be in effect a Retail Liquor Merchant's Licence to meet the provisions of Section 58(2) as I have already explained.

I finally make reference to a case which did not go on appeal. It was an application seeking variation of conditions of a 1986 General Facility Licence relating to tourist needs. The Port Docks Hotel was in contemplation. The date of my judgement was 19th April 1991. I reproduce some of my discussion therein

"Under Section 44 the Court was required to be of the opinion that special trading conditions were necessary for the purpose of, in this case, providing adequately for tourists attracted to the premises in substantial numbers. The Court had to be further satisfied, among other things, that no other licence would be reasonably adequate for the purposes for which the General Facility Licence was sought. Clearly Judge Hume was so satisfied.

The condition which is the subject of complaint by this present licensee is Condition 4 which read and still reads
"Beer products sold or supplied from the bars in the licensed area will be restricted to beers other than the products of the S.A. Brewing Company Limited and Carlton United Breweries (whether on tap or in bottle or cans)".
It is the applicants case that not only is there now a proved demand on the part of tourists and general patrons for brands of beer other than those mentioned in the condition but that condition, restricting the sale of beer so as to prevent the provisions of the most popular beers in South Australia, is and was quite incongruous

and ought to be removed in any event.

On the face of it, depriving the tourists and general public of the most popular beers at these premises might seem at first slight somewhat incongruous. Yet there was a very good reason for it. Firstly the initial case was mounted very much upon the attraction of brewery products to tourists and secondly the compromise was directed to balance competing interests. On the one hand the tourists would get what they essentially wanted - i.e. on the applicants case - and the objecting hoteliers would get what they wanted - protection from competition in the sale of their "bread and butter" namely S.A. Brewing and Carlton United beers.

So, looking back, the condition is not as incongruous as this applicant would have me believe."

.....

"In the end I feel far from satisfied that the condition presently applying is incongruous. In my view the condition is a suitable one given the reasons for its imposition as discussed earlier and the passing of time since the original grant has not really greatly changed that suitability in my view having in mind the circumstances, which still apply, that essentially let to the grant of the licence. Those same circumstances are that the licence was granted for the use of tourists, primarily, who were attracted to the brewery and its products. This use continues and in a substantial way. Everyone seems agreed on that.

But if this were the only matter to be considered and no other factors were present then this desire on the part of a significant public might well justify a change. "What harm could it do in licensing terms?", might well be asked. That question is, in my view answered in the following way.

Firstly, I look yet again at historical facts. They are set out in a chronology as part of Exhibit 1. They show a "chipping away" at the original conditions although it must be conceded that those that proceeded met with success. Nevertheless the objectors saw these applications as slowly but surely leading to these premises trading in much the same way as a hotel but with none of the obligations of a hotel. Now, they say, remove this present condition 4 and to all intents and purposes with minor exceptions the General Facility Licence becomes a Hotel Licence. Or to borrow from section 44 (2) a Hotel Licence is reasonably adequate for the purposes sought. What they mean is, that if condition 4 had not been an integral part of the compromise achieved in the first place then the Court would have been forced to the view then that Section 44 (2) would have precluded the original grant.

I think it must here be stated that this present licensee does indeed seem to be headed down the "hotel track" as distinct from the "tourist track". The great bulk of the promotion is towards late night entertainment. The brochure advertising the "tourist" aspect of the premises is no longer in use. The number of brewed beers has been halved. All of this tends to support the objectors views to some extent."

.....

"In the end I have come to the view that I should refuse the application. Removal of Condition 4 will, in my view, have the effect of providing this licensee with all the "trappings" of a hotel but with none of the obligations. I think that the scheme and balance of the Liquor Licensing Act as between this type of licence and hotel licences is upset. I think if this licensee wants to, in truth, operate like a hotel then it should "nail its colours to the mast" and apply for a Hotel Licence and not achieve much the same thing via the "back door" of a variation application."

That was my way in that case of disapproving an attempt to change one form of licence into, effectively, another. Later on (22nd December 1992) I had cause to re-visit the same subject with the same premises involved but with a new licensee. In fact I assented to a change in condition. I quote from my reasons simply to demonstrate my insistence again that there should be no "grant" of a licence via the "back door." I am pleased to say that as far as I am aware no further application to vary has been made.

This time I am asked to permit sale of all types of beer (including the so called banned products) but only in cans and bottles. The provision of draught beer - the "bread and butter" of hotels - is not sought.

The reasons for the application and for the specific alteration are to be found in the evidence of Mr Aloisi as contained in the transcript. I accept him as a very truthful and trustworthy witness. He has reintroduced the real tourist attraction of these premises by re-opening the brewery. He has reintroduced the advertising of same. These were factors of concern in the other case. They are not now. In effect there has been a resurrection of the original purpose of the licence perpetrated by this licensee. One could be forgiven and perhaps justified for looking rather more kindly on this application given the clear and genuine desire on the part of this licensee to attract and keep tourists in the area and not to deliberately and solely compete with other licensees as was the obvious intent of the last application.

I believe there are good grounds for granting this application. Certainly what is sought does amount to a "chipping away" but it is not an attempt, so I find, to get an hotel licence "through the backdoor" as was the case via the previous application with its more wide ranging emphasis.

I must say this however. I think it pretty clear that this must be regarded as the very last application which could possibly hope to succeed. Any further attempt to alter ought to be by way of an hotel licence application."

In view of all of the above I refuse this application.