

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Civil)

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BOTTEGA ROTOLO P/L v SATURNO'S COLONIST TAVERN P/L & ANOR

[2008] SASC 6

Judgment of The Full Court

(The Honourable Justice DeBelle, The Honourable Justice Bleby and The Honourable Justice Layton)

17 January 2008

LIQUOR LAW - LICENSING - LICENSING TRIBUNALS GENERALLY - REVIEWS, APPEALS AND CASES STATED

LIQUOR LAW - LICENSING - APPLICATION FOR NEW LICENCE - APPLICATION AND NOTICE THEREOF - SOUTH AUSTRALIA

Appeal against a decision of a judge of the Licensing Court refusing the appellant's application for a special circumstances licence – appeal unopposed – appellant operates a business selling fine food and a very specialised range of Italian wines – appellant the holder of a wholesale liquor merchant's licence – discussion of the circumstances in which a special circumstances licence may be granted – s 40, Liquor Licensing Act 1997 (SA) – discussion of the history of liquor licensing legislation – consideration of the nature and appropriateness of a retail liquor merchant's licence – whether such a licence could adequately cover the business of the appellant – whether appellant's proposed business would be substantially prejudiced if appellant's trading rights limited to a retail liquor merchant's licence – consideration of "trading rights" – whether discretion should be exercised to grant special circumstances licence – Held: appeal allowed – order of the Licensing Court set aside – order that a special circumstances licence be granted – question of the conditions on which the licence should be granted remitted to the Licensing Court for consideration.

Liquor Licensing Act 1997 (SA) ss 3, 4, 27, 32, 37, 40, 48, 53, 58; *Liquor Licensing Act 1985 (SA)* ss 26, 37, 38, 43, 44, 51, 63; *Licensing Act 1967 (SA)* ss 19, 22, 47, 61, referred to.

Carjay Pty Ltd v Target Cellars Pty Ltd (1972) 3 SASR 484; *Australian Wine Traveller Pty Ltd v Liquor Stores Association Inc* (2000) 77 SASR 15; *Dalgety Wine Estates Pty Ltd v*

On Appeal from LICENSING COURT OF SOUTH AUSTRALIA (JUDGE RICE) APPLICATION NO. 76684

Applicant: BOTTEGA ROTOLO PTY LTD Counsel: MR J F COSTELLO - Solicitor: WALLMANS LAWYERS

Respondent: SATURNO'S COLONIST TAVERN PTY LTD No Attendance

Respondent: SATURNO'S NORWOOD HOTEL PTY LTD No Attendance

Hearing Date/s: 05/09/2007

File No/s: SCCIV-07-136

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Rizzon (1979) 141 CLR 552; *Bay Hotel Motel Pty Ltd v Broadway Hotel Pty Ltd* [1965] SASR 249; *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd* (2002) 81 SASR 337; *Pierce v Liquor Licensing Commission* (1987) 47 SASR 22, applied.
Facac Pty Ltd v Talbot Hotel Group Pty Ltd (2001) 80 SASR 580, discussed.
David Jones (Australia) Pty Ltd v Fahey (1989) 50 SASR 323; *Kiley v De Angelis & Pope* [1968] SASR 419; *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) SASR 458; *D'Oro Distributors Pty Ltd v Superintendent of Licensed Premises* [1968] SASR 220, considered.

WORDS AND PHRASES CONSIDERED/DEFINED

"Special circumstances"

"Trading rights"

**BOTTEGA ROTOLO P/L v SATURNO'S COLONIST TAVERN P/L &
ANOR
[2008] SASC 6**

Full Court: Debelles, Bleby and Layton JJ

1 **DEBELLE and BLEBY JJ.** The appellant is the holder of a wholesale liquor merchant's licence issued under the *Liquor Licensing Act 1997* (SA) ("the Act"). The licence authorises the appellant to sell liquor to the public provided that the purchase is not less than 4.5 litres of liquor. The minimum purchase must effectively be six bottles of a normal sized bottle containing 750 millilitres.

2 The appellant applied to the Licensing Court for the grant of a special circumstances licence to enable it to sell wine in single bottles. It intends to retain its wholesale liquor merchant's licence which it will operate from a separate part of its premises. Objections were lodged by the holders of hotel licences for three hotels in the locality, the Norwood Hotel, the Colonist Tavern and the Oriental Hotel. A judge of the Licensing Court refused the application. The appellant has appealed to this court against the decision.

The appeal is unopposed

3 Before the hearing had commenced in the Licensing Court, the licensee of the Oriental Hotel had withdrawn its objection upon the appellant agreeing to certain conditions for the conduct of the special circumstances licence. The appellant agreed to the conditions which were in these terms:

1. To sell liquor produced in Italy (other than beer) between 9.00 am and 7.00 pm (inclusive) Monday to Saturday (inclusive) for consumption off the licensed premises.
2. The liquor for sale be displayed in the present wine display room or, should the premises be redeveloped then a similar size room.
3. The range of liquor to be no greater than 100 products at any one time.
4. Liquor for sale be premium quality.
5. The retail sale of liquor not to predominate over the style and nature of the business at any one time.
6. To sell liquor at any one time through a direct sale transaction.
7. To sell or supply liquor by sample for consumption on the licensed premises.

After allowing for solecisms and for the vagueness of some of the conditions, it is apparent that the intention is that the appellant will sell only liquor produced in Italy other than beer which has been produced in Italy. It will limit its range of

Italian liquor to 100 individual products at any one time. The licence will also permit direct sales transactions which are defined by the Act to mean liquor ordered by the purchaser by mail, telephone, facsimile transmission or internet or other electronic communication and where the liquor is delivered to the purchaser at some place other than the place where the liquor has been stored: see definition of “direct sales transaction” in s 4 of the Act.

4 The other two objectors maintained their objection. After the Licensing Court had delivered its decision, those objectors transferred the hotel licences they held. Neither transferee wishes either to prosecute the objection or to make any submission on the appeal. The appeal is, therefore, unopposed.

5 The fact that the appeal is unopposed does not necessarily have the consequence that the appeal will be allowed. A special circumstances licence is not to be granted save for good and appropriate reasons. Although there was a contradictor in the Licensing Court, no contradictor to the appellant’s submissions appeared on the hearing of this appeal. In that situation, this Court must, therefore, closely scrutinise the proposal to ensure that it is not persuaded to allow the appellant’s appeal on grounds which are not justified upon the proper application of the provisions of the Act.

6 In any event, the question whether a licence should be granted under the Act does not depend on whether the application is or is not opposed. There are several reasons why that is so. First, the applicant is required to satisfy the requirements of the Act. Secondly, there is a public interest in the number and type of licences which are granted and in the hierarchy of licences established by the Act: s 53(1a) of the Act. Thirdly, s 53(2) of the Act provides that a licensing authority should not grant an application as a matter of course without a proper inquiry into its merits whether or not there are objections to the application. Although s 53(1a) and s 53(2) will, as a general rule, apply only on the hearing of an application for a licence, both provisions also operate on an appeal. On the hearing of an appeal, the Supreme Court has the power, among others, to make any order or decision that should have been made in the first instance: s 27(5) of the Act. When exercising that power, the Court is bound to have regard to those provisions which govern the licensing authority. In other words, this Court must act within the scope and ambit of the Act. It is effectively the licensing authority. The appellant must, therefore, satisfy this Court that the judge of the Licensing Court has erred and that it is entitled to the licence it seeks.

The appellant’s business

7 The appellant operates a business selling food and wine. It describes its business as “fine food and wine merchants”. More than 80 per cent of its sales of food and wine are wholesale and mainly to hotels and restaurants. The appellant conducts its wholesale business from the rear of its premises, where orders for food and wine are packaged and despatched. The appellant has a small number of delivery vehicles.

8 Ms Hassan is a director of the appellant. She has been selling fine foods for a number of years. The business moved to its present location in about 2001. The business has a number of components. It specialises in cheeses produced both overseas and within this country. It has one of the most comprehensive ranges of cheese in Australia. The appellant stocks an extensive range of imported foods, many of them exotic. A fuller description is contained in the reasons of the Licensing Court judge. The business also includes a cooking school which is conducted on the premises. Classes are conducted twice a week during school term time. The appellant also sells imported cooking utensils and equipment and cookbooks.

9 The appellant stocks a range of Italian wines. It has about 100 lines. It has succeeded in introducing these Italian wines into restaurants. Restaurant patrons who enjoy those wines are frequently referred to the appellant's premises where they are then informed that they must buy at least six bottles of wine. Similarly, patrons of the cooking classes and other customers who seek to purchase wine are informed that they must purchase a minimum of six bottles. The obligation to purchase the minimum quantity discourages some potential purchasers, especially as some of the wines are relatively expensive.

10 The appellant's stock of Italian wines is limited to about 100 lines and is arranged by region and not variety. The appellant seeks to stock Italian wines that are not normally available. As already mentioned, the appellant is content to submit to the condition that it sells only liquor (other than beer) produced in Italy and to the other conditions listed above.

11 Ms Hassan described the appellant's business as a marriage of food and wine. She said:

Quite simply I was referring to the style of food we represent. The quality of food we represent is completely reflected in the style of wine and the style and quality of wine that we represent so a marriage of food and wine being, our clientele come to us looking for the total experience, the uniqueness of the food is then married with the uniqueness of the wine.

The judge in the Licensing Court accepted that evidence. He said:

There is no doubt that Bottega Rotolo is a purveyor of fine food and special Italian wines. I accept Ms Hassan's evidence that the range and quality of food is unrivalled in this State. I also accept that the range of Italian wines is very specialised with a view to displaying quality varieties from diverse regions of Italy. The business strives to sell quality, if not the best, of foods, particularly cheeses. It strives for excellence. It very much promotes the marriage of food and wine, with specialist advice available.

He accepted the evidence that the range and quality of food is unrivalled in this State, that the range of Italian wines is very specialised, and that the business strives for excellence. There can be little doubt that Bottega Rotolo is a high quality food and wine store albeit intending to limit its retail sales of wine to Italian wine.

Special circumstances licence

12 The special circumstances licence is prescribed by s 40 of the Act, which provides:

- (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.

Nothing in this appeal turns on the terms of either subsection (3) or (4).

13 As is apparent, s 40 does not specify the circumstances in which the licence might be granted. All that is prescribed is:

- that the licence authorises the sale of liquor for consumption both on or off the licensed premises: s 40(1); and
- that the licence cannot be granted unless the applicant establishes two things: first, that no other kind of licence under the Act could adequately cover the kind of business proposed by the applicant and, secondly, that 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: s 40(2).

By its terms, s 40(1) provides for an extremely flexible form of licence for the sale of liquor for consumption on or off the premises. Subject to subsections (3) and (4), the nature and effect of the licence will almost entirely be moulded by the terms and conditions upon which it is granted. The discretion to grant the licence and the terms and conditions that may be imposed are only limited by ss 53(1) and (1a) of the Act. We refer later to the width of that discretion.

- 14 The application of s 40(2) of the Act depends upon an analysis of the type of business proposed to be conducted if the special circumstances licence were granted. Where there is an existing business, the nature of the business proposed will not be the same as the existing business because the very purpose of seeking the licence is to enable the nature of the existing business to change. However, the nature of the proposed business will be informed, in this case to a large extent, by the nature of the existing business and by evidence as to the type of liquor sales that will be made if a special circumstances licence is granted.

A new and wider licence

- 15 Some slight assistance as to the circumstances in which a special circumstances licence might be granted is gained from an examination of the history of the liquor licensing legislation and, in particular, a comparison of the Act with its predecessor, the *Liquor Licensing Act 1985*. (In these reasons, we will refer to the *Liquor Licensing Act 1985* as “the 1985 Act” and the *Liquor Licensing Act 1997* as “the 1997 Act”). As liquor licensing legislation is Parliament’s assessment of both the needs of the community and appropriate forms of regulation of the sale of liquor, it is appropriate to have regard to the second reading speeches introducing the Bill which became each Act.

- 16 In a sense, the statutory predecessor of the special circumstances licence was the general facility licence which was introduced as a form of liquor licence by ss 43 and 44 of the 1985 Act. We have qualified the previous sentence by the expression “in a sense” because, on our reading of the second reading speeches introducing each the 1985 Act and the 1997 Act, the special circumstances licence is intended to provide for a wider variety of circumstances than the general facility licence. Both licences form part of what was intended to be a more liberal approach to the terms and conditions on which liquor is sold.

- 17 When introducing the Bill which became the 1985 Act, the Minister said:

In general terms the emphasis has been on a ‘freeing up’ of the conditions under which alcoholic beverages may be sold and consumed, reducing the complexity of applying for a licence and providing for a simplified and more streamlined procedure for the making of complaints by aggrieved parties. Special regard is given to the tourist and entertainment industries and the relationship between these sectors and the liquor industry. This is reflected in the more flexible approach to licensing and the new categories of licence which the Bill proposes.

The general thrust of the Bill is to replace the existing confused and convoluted Act with a simplified piece of legislation which more accurately reflects the current realities of trading. It is expected that this will encourage and cater for a more imaginative approach to the retail sale of liquor in the future. It is hoped that licensees will make full use of the more flexible approach outlined in the Bill and respond by looking to the future with new concepts of licensed premises. The end of the six o’clock swill in 1967 heralded a new era in social habits of South Australians, and it is the Government’s hope that this Bill will have a similar effect in bringing about a greater scope and sophistication between now and the turn of the century.

The Minister then briefly described each kind of licence prescribed by the 1985 Act. When referring to the general facility licence, the Minister said:

There are two other catch-all type licences which the Bill introduces. One is the new category of a general facility licence which is designed for a variety of circumstances which cannot easily be catered for by any other single licence, and where specific conditions would be imposed by the licensing authority. Again, it allows, like most of the other licence categories, for a degree of flexibility and entrepreneurial flair to be accommodated. A general facility licence, for example, would be available for the major sporting headquarters in South Australia – Football Park, Morphettville Racecourse and Adelaide Oval. It would also provide authority for a range of activities offered at convention centres, reception houses and historic buildings.

It must also be noted that the 1985 Act preserved in s 38 the obligation on an applicant for a retail liquor merchant's licence to prove the need for such a licence. That Act also provided that a person should not hold both a wholesale liquor merchant's licence and a general facility licence: s 51(2) and (3).

- 18 When introducing the Bill which became the 1997 Act, the Treasurer said the Bill “represented a major new policy initiative” of the then Government. Like the 1985 Act, the Bill followed a review of liquor licensing laws in this State. The general facility licence was repealed and the special circumstances licence was introduced into the Act in its stead. The Treasurer described the special circumstances licence in these terms:

[T]he creation of a special circumstances licence which is only to apply in circumstances where a licence of no other category could adequately cover the kind of business proposed by the applicant and where 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.

It is apparent that the Treasurer did little more than give a summary of the effect of s 40. Although there is nothing else in the second reading speech which throws any light on the circumstances in which the special circumstances licence should be granted, a comparison of s 44 of the 1985 Act and s 40 of the 1997 Act demonstrates that the special circumstances licence is intended to have a wider operation than the general facility licence.

- 19 Section 44 of the 1985 Act was expressed in these terms:

- 44(1) Subject to subsection (2), a general facility licence may be granted where special trading conditions are, in the opinion of the licensing authority, necessary for any one or more of the following purposes:
- (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) to provide adequately for the needs of those attending receptions;

- (c) to provide adequately for the needs of patrons of a cinema or other theatre at which cinematographic or theatrical entertainment of a high standard is provided;
 - (d) to provide adequately for the needs of passengers in a ship, train, vehicle or aeroplane;
 - (e) to enable a mining or construction company or authority that is undertaking a project in a remote area to provide adequately for the needs of its employees working in that area;
 - (f) to enable the following sporting authorities to provide adequately for the needs of those attending sporting events and other functions at the following sporting grounds:
 - (i) the South Australian National Football League – in respect of Football Park;
 - (ii) the South Australian Cricket Association – in respect of Adelaide Oval;
 - (iii) the South Australian Jockey Club – in respect of Morphettville Race Course;
 - (g) to enhance the use of premises that are of national, historic or architectural significance and have at some time in the past been licensed as a hotel;
 - (h) to enable tertiary educational institutions to provide adequately for the needs of students, staff and visitors.
- (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 a general facility licence, or for variation of a condition affecting the trading rights conferred by such a licence, the licensing authority shall take into account the probable effect of the grant, removal or variation on the trade conducted from other licensed premises in the relevant locality.

Section 44 required an applicant for the general facility licence to establish the need for the licence. That requirement was expressed in the opening words of subsection (1) of s 44. The extent to which need had to be proved was examined in *David Jones (Australia) Pty Ltd v Fahey* (1989) 50 SASR 323. By contrast, the 1997 Act does not require the applicant to establish the need for a special circumstances licence. The absence of an obligation to prove need is consistent with the objective in the 1997 Act to encourage a competitive market for the supply of liquor: s 3(1)(e) of the 1997 Act.

20 Another important difference between the general facility licence and special circumstances licence is a corollary of the fact that an applicant for a special circumstances licence is not required to prove a need for that licence.

Section 44(3) of the 1985 Act required the licensing authority to take into account the probable effect of the grant of a general facility licence on other licensed premises in the relevant locality. No such requirement exists in the case of a special circumstances licence.

21 In addition, a review of subsection (1) of s 44 discloses that the general facility licence had an emphasis upon sales of liquor for consumption on the licensed premises. Only paragraphs (e), (g) and (h) might be said to contemplate sales for consumption off the licensed premises although in *David Jones (Australia) Pty Ltd v Fahey* this court held that s 44(1)(a) authorised the grant of a general facility licence to a large department store to sell liquor for consumption off the premises. By contrast, s 40 of the 1997 Act expressly states that the special circumstances licence authorises the sale of liquor for consumption either on or off the licensed premises.

22 There is one other difference between the 1985 Act and the 1997 Act in respect of the holder of a wholesale liquor merchant's licence. The requirement in s 51 of the 1985 Act that a person who holds a wholesale liquor merchant's licence should not at the same time also hold a general facility licence no longer exists. The fact that the appellant already holds a wholesale liquor merchant's licence is, therefore, not a bar to its application for a special circumstances licence.

23 In our view, the absence of any obligation to prove need for a special circumstances licence, the absence of any obligation of the licensing authority to have regard to other premises in the locality, and the unqualified ability of the licensing authority to grant a special circumstances licence authorising the sale of liquor for consumption on or off the licensed premises together mark a significant relaxation of earlier restrictions in liquor licensing legislation in this State in respect of licences authorising the sale of liquor for consumption off licensed premises.

“Special” does not mean “exceptional”

24 The use of the phrase “special circumstances” does not provide a great deal of assistance in determining the circumstances in which the licence should be granted. The primary meaning of the adjective “special” refers to a distinct or particular character or quality of an individual thing or instance. The adjective can also specify that which is exceptional or extraordinary. See the *Oxford English Dictionary* and the *Macquarie Dictionary*. In other contexts, the phrase “special circumstances” has acquired a definite and restricted meaning and has been interpreted to mean something unusual, abnormal or atypical: *Carjay Pty Ltd v Target Cellars Pty Ltd* (1972) 3 SASR 484 at 493. However, for the reasons which follow, it does not have that meaning in this context nor does it mean extraordinary or exceptional. Had that been the intention, s 40 would have been expressed in different terms. Such a meaning is entirely inconsistent with the terms of s 40 in that the licence is to be granted in circumstances where no

other licence could adequately cover the kind of business proposed by the applicant. The intent of s 40 is to provide for a distinct or particular kind of business selling liquor where the Act does not contain another category of licence that could adequately cover that business and where that business would be substantially prejudiced if the applicant's trading rights were limited to those possible under a licence of some other category.

A “catch all” licence

- 25 For these reasons, we respectfully agree with Doyle CJ in *Australian Wine Traveller Pty Ltd v Liquor Stores Association Inc* (2000) 77 SASR 15 at [25] when he said that Parliament must have envisaged a flexible licence because the licence permits the sale of liquor for consumption on or off the licensed premises, and with his observation at [27] in that case that Parliament envisaged the grant of a licence under s 40 for a business that is involved in selling liquor in a manner that is not permissible under another licence. Section 40 is a kind of dragnet provision intended to provide a means by which the licensing authority may grant a licence authorising the sale of liquor for consumption on or off the licensed premises in circumstances for which a licence provided by the Act does not cater. It is a kind of “catch-all provision”: *Facac Pty Ltd v Talbot Hotel Group Pty Ltd* (2001) 80 SASR 580 at [26].

A wide discretion

- 26 The licensing authority is invested with a wide discretion to grant an application made under the Act. Section 53 spells out the discretionary powers of the licensing authority in some detail. For present purposes, it is sufficient to refer only to subsections (1) and (1a) which are in these terms:

- (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).
- (1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.

That discretion is expressed to be an “unqualified discretion”. The discretion is the widest of possible discretions: *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552 per Stephen J at 566 and per Mason J at 572. Notwithstanding that it is unqualified, that discretion must be exercised within the scope and ambit of the Act: *Bay Hotel Motel Pty Ltd v Broadway Hotel Pty Ltd* [1965] SASR 249 at 261; *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd* (2002) 81 SASR 337 at [28]. It will have been noticed that s 53(1) expressly directs the licensing authority not to take into account the economic effect of the grant of the licence on other licensees in the locality. That is in marked contrast to provisions such as s 48(2)(i) of the *Licensing Act 1967*. It is also entirely consistent with the fact that the 1997 Act contains no provision like s 44(3) of the 1985 Act requiring

consideration of the effect of the grant of a general facility licence on other licensed premises.

The licensing régime

27 One material consideration in the case of an application for a special circumstances licence where the applicant seeks to sell liquor by retail for consumption off the licensed premises is the hierarchy of licences provided by the Act and the scheme of the Act in relation to the retail sale of liquor. That hierarchy of licences was reviewed by Doyle CJ in *Australian Wine Traveller Pty Ltd v Stores Association Inc* at [16] to [23]. We respectfully agree with that review.

28 The appellant seeks a licence which will enable it to sell liquor by retail for consumption off the licensed premises. The *Liquor Licensing Act 1997* provides six categories of licence which authorise retail sales of a single bottle of liquor for consumption off the licensed premises. They are the hotel licence, the residential licence, the retail liquor merchant's licence, the club licence, the producer's licence and the direct sales licence. Four of those categories, the residential licence, the club licence, the producer's licence and the direct sales licence can only be granted in prescribed circumstances and may be put to one side.

29 Since 1967, an applicant for either a hotel licence (formerly called a publican's licence) or a retail liquor merchant's licence, (formerly called a retail storekeeper's licence) could only obtain the grant of such a licence if the Licensing Court was satisfied that there was a need for that licence. They are the only two kinds of licence for which the *Liquor Licensing Act 1997* requires the applicant to establish a need for the licence.

30 The task of proving need for either a hotel licence or a retail liquor merchant's licence has been expressed in different terms from time to time. In addition, there was a difference between the need to be demonstrated for an hotel licence and the need for a retail liquor merchant's licence. It is unnecessary to note the detailed history of the development of these provisions. It is sufficient to refer to ss 19, 22 and 47 of the *Licensing Act 1967*, ss 26, 37, 38 and 63 of the *Liquor Licensing Act 1985*, and ss 32, 37 and s 58 of the *Liquor Licensing Act 1997* and to note that what the Act now requires to be proved is less burdensome than in previous legislation. The evidentiary burden upon the applicant for an hotel licence or a retail liquor merchant's licence is now expressed respectively in s 58(1) and s 58(2) of the *Liquor Licensing Act 1997*. An applicant for a retail liquor merchant's licence must satisfy the Licensing Court that the licensed premises already existing in the locality in which the proposed premises will be situated do not adequately cater for the public demand for liquor for consumption off licensed premises and that the grant of the licence is necessary to satisfy that demand: s 58(2) of the Act. We will return to the question of need.

The requirements of s 40(2)(a) of the Act

31 It is convenient to make some general observations on the effect and requirements of s 40(2) of the Act in light of that review of the licensing régime established by the Act. Section 40(2)(a) requires the applicant to satisfy the licensing authority that a licence of no other category could adequately cover the kind of business proposed. It is plainly necessary to identify the licence or licences of some other category that need to be considered. As is apparent from the earlier review of retail liquor merchant's licences, the only licence relevant for consideration in respect of this application is a retail liquor merchant's licence under s 37 of the Act. It will be necessary in due course to consider the nature of that licence and the matters to be established to satisfy the licensing authority that the licence can be granted.

32 As a general rule, s 40(2)(a) of the Act will be satisfied if the applicant establishes that the proposed business is of the kind that prevents the applicant from complying with the obligations of the retail liquor merchant's licence or if those obligations could not be modified by appropriate conditions to accommodate the needs of the proposed business. However, the mere fact that an applicant does not wish to trade with all the benefits of the retail liquor merchant's licence does not have the consequence that that licence could not adequately cover the applicant's business.

33 We respectfully agree with Doyle CJ in *Facac* at [26] when he observed that "s 40(2) can be read as meaning that a licence of a particular class does not adequately cover a proposed business if the suggested licence carries with it obligations that make it impractical to operate the proposed business". Whether another category of licence may adequately cover the business involves consideration of the trading rights that are "possible" under the suggested class of licence and that "[t]hat indicates that the Court must consider the powers the Court can exercise to shape or mould trading rights available under the suggested class of licence": *Facac* at [27] per Doyle CJ. The intent of s 40(2)(a) is that an applicant must demonstrate that a licence of another category cannot be tailored by appropriate conditions to enable the applicant to conduct its business.

34 Paragraph (b) also requires consideration of the utility of another kind of licence. In *Facac* at [51] Doyle CJ referred to the fact that s 40 provides for a business which does not fit within the régime provided by the Act:

[T]here is a discernible statutory policy that s 40 should be used to accommodate what I might call non-standard or anomalous types of business. But the Licensing Court must also bear in mind that s 40 is not to be used simply to create a licence to meet an applicant's wishes. If an existing class of licence will fit the proposed business, s 40 should not be used, unless the use of the existing class of licence would produce a result that "the proposed business would be substantially prejudiced". The special circumstances licence is not, as I have said, to be created simply to meet an applicant's wishes and proposal. The Court must consider whether another class of licence can and should be granted, even if requiring the applicant to trade under that licence imposes

obligations that the applicant would rather not have, and even if that means that, the applicant must prove a need for the grant of licence.

It is not entirely clear what Doyle CJ meant by the clause “the Licensing Court must also bear in mind that s 40 is not to be used simply to create a licence simply to meet an applicant’s wishes”. If the purpose of those remarks is to emphasise the requirements of s 40 that a special circumstances licence will not be granted if a licence of another category (appropriately tailored if necessary) will adequately cover the kind of business proposed, we respectfully agree with them. The Act does not intend that the special circumstances licence should be a means by which to circumvent the scheme of the Act and the obligations attached to each form of licence. However, if the intent of that passage is to suggest that s 40 imposes some kind of obligation to establish the need for the licence, we respectfully disagree. There will be an obligation to establish need only if, on analysis, the business of the applicant is, in truth, that of an hotel or a retail liquor merchant’s licence. In *Facac* the issue was whether the proposed business should be the subject of a hotel licence. The Chief Justice formulated the appropriate question to be asked in these terms at [43].

The question for the judge is not whether he can or should grant a hotel licence in the form, or with the rights and obligations, that the applicant wants. It is whether a hotel licence, with appropriate exemptions, would enable the applicant to trade in a way that did not substantially prejudice its proposed business. If it would, then the applicant cannot be granted a special circumstances licence. The applicant cannot create a basis for the grant of a special circumstances licence by the simple expedient of demanding trading rights that cannot be accommodated under a hotel licence.

In most cases, it will be the obligations imposed by the alternative licence which would substantially prejudice an applicant’s trading rights.

35 In this case, the issue for consideration is whether, if the applicant’s trading rights were limited to those possible under a retail liquor merchant’s licence with appropriate conditions, its business would be substantially prejudiced.

The retail liquor merchant’s licence

36 We turn to consider the nature and obligations of the retail liquor merchant’s licence and what must be established to obtain the grant of that licence.

37 Section 37 of the Act prescribes the terms and conditions of the licence:

Retail liquor merchant’s licence

37. (1) A retail liquor merchant’s licence authorises the licensee—

- (a) to sell liquor on the licensed premises on any day except Good Friday and Christmas Day between the hours of 8 am and 9 pm, or over a continuous period authorised by the licensing authority, for consumption off the licensed premises (but a period authorised by the

licensing authority must begin no earlier than 5 am, must end no later than midnight, and must not exceed 13 hours); and

- (ab) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only between the hours of 8 am and 9 pm and not on Good Friday or Christmas Day); and
 - (b) to sell or supply liquor by way of sample for consumption on a part of the licensed premises approved for the purposes by the licensing authority.
- (2) It is a condition of a retail liquor merchant's licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.

Exceptions—

- 1 Goods may be sold in the same premises if they are of the kind normally associated with, and incidental to, the sale of liquor (eg glasses, decanters, cheeses and pates).
- 2 The licensing authority may grant an exemption from the above condition if satisfied that the demand for liquor in the relevant locality is insufficient to justify the establishment of separate premises or there is some other proper reason for granting the exemption.

The licence is essentially permissive. It enables the sale of packaged liquor during a wide range of hours. The actual trading period may be selected by the licensee within the hours authorised by the section or by the Court in accordance with the requirements of s 37(1)(a). Unlike the hotel licence governed by s 32 of the Act, there is no minimum requirement for the number of hours that the licensee must remain open for business.

38 Section 58(2) of the Act prescribes what must be established to obtain the grant of the licence:

- (2) An applicant for a retail liquor merchant's licence must satisfy the licensing authority that the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.

An applicant must establish first that existing licensed premises in the locality do not adequately cater for the public demand for packaged liquor and, secondly, that the retail liquor merchant's licence is necessary to satisfy that demand.

39 Section 58(2) does not refer to demand for liquor of a particular type. Liquor is widely defined in s 4 of the Act. It includes any beverage which at 20° celsius contains more than 1.15% alcohol by volume and any substance declared

by regulation to be liquor for the purposes of the Act. The clear implication of s 37 and s 58(2) is that the liquor to be sold under a retail liquor merchant's licence is a reasonably broad or representative range of liquor products. Nevertheless, an applicant for a grant of that licence who does not intend to sell the full range of available liquor will not necessarily be prevented from being granted a licence. It would not be possible for any licensee to be able to carry the complete range of all available liquor products. On the other hand, for the reasons that follow, if the applicant intends to carry an extremely limited range of liquor, the grant of a retail liquor merchant's licence would be unlikely. In order to establish the need for the licence, the applicant must, as a general rule, demonstrate that there is a need for liquor of all kinds and that the application will satisfy that need by carrying a comprehensive range of beers, wines and spirits.

40 What then is the position of an applicant, like the appellant, who has no desire to carry the full range of liquor products but who wishes to satisfy the particular needs of a niche market and no more? Such an applicant may well demonstrate a strong public demand for that particular type or range of liquor and that that demand is not adequately catered for by existing licensed premises in the locality. However, that will not satisfy the much broader requirements of s 58(2). Generally speaking, the requirements of s 58(2) cannot be satisfied by applying for a retail liquor merchant's licence merely to satisfy a particular and confined niche in the liquor market. Under s 58(2) it is the demand for packaged liquor generally that must be considered, not merely the demand for a particular type or range of packaged liquor.

41 The conclusion that the licensing authority cannot merely consider demand for a particular variety of liquor has some support from changes to the licensing legislation since 1967 relating to conditions imposed on the grant of a retail liquor merchant's licence or its predecessor, the retail storekeeper's licence.

42 Section 22(1) of the *Licensing Act 1967* ("the 1967 Act") specifically provided that the Licensing Court could "grant, renew or remove a retail storekeeper's licence subject to such conditions as the Court, on the application of a person applying for such a licence, or of its own motion, thinks fit". Such conditions were not infrequently imposed. In *Kiley v De Angelis & Pope* [1968] SASR 419 it was held that the Licensing Court was authorised by s 22(1) of the 1967 Act to impose conditions relating to the types of liquor that could be sold under a retail storekeeper's licence. In *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No.2)* (1981) 28 SASR 458 the power conferred by s 22(1) was exercised to restrict the type of liquor sold under the licence in question to wine, cider, mead and perry: *Lincoln Bottle Shop* at 464 per King CJ, at 471 per Mitchell J, and at 471 per Williams J concurring.

43 There was a general power under s 61 of the 1967 Act to grant or refuse an application for a licence "with or without conditions upon any ground or for any

reason whatsoever which, entirely in the exercise of its discretion (the court) deems sufficient". However, it was specifically held in *D'Oro Distributors Pty Ltd v Superintendent of Licensed Premises* [1968] SASR 220 at 228-229 that s 61 did not authorise a condition restricting the type of liquor that could be sold under a retail storekeeper's licence: see also *Kiley v De Angelis and Pope* [1968] SASR 419 at 430. The imposition of such a condition under the general provisions of s 61 would not be possible because it would so change the nature of the licence as to undermine the statutory scheme. The only source of power to impose such conditions was s 22(1).

44 Under the *Liquor Licensing Act 1985* the equivalent licence was the retail liquor merchant's licence prescribed by s 37 of that Act. However, s 37 of the 1985 Act no longer contained any power to grant such a licence on conditions. There was a general but limited power to impose conditions under s 50 of that Act, but not such as could restrict the type of liquor sold under a retail liquor merchant's licence.

45 Significantly, s 37 of the present Act contains no power to impose conditions upon the grant of a liquor merchant's licence in the manner provided by s 22 of the 1967 Act. While s 53 of the Act confers a wide general discretion similar to that expressed in s 61 of the 1967 Act, it does not contain any general power to impose conditions. Even if there were such a general power, a decision purporting to restrict the sale of liquor by the holder of a retail liquor merchant's licence to certain classes of liquor would qualify the right conferred by the Act to sell any type of liquor that the licensee wished. The essential character of the licence cannot be changed through the exercise of a general power to impose conditions: *Pierce v Liquor Licensing Commission* (1987) 47 SASR 22.

46 For these reasons, it is not, generally speaking, possible for an applicant for a retail liquor merchant's licence to seek nor for the licensing authority to impose a condition on the grant of the licence that the sale of liquor be restricted to a particular type of liquor. Equally, it would not be possible for an applicant, in attempting to discharge the onus imposed by s 58(2) of the Act, to show merely a demand for a restricted type of liquor in support of an application for that licence. That is not the test contemplated by s 58(2). If a retail liquor merchant's licence is granted, it will necessarily be unrestricted. Even if the applicant expressed the intention of selling only a very limited range of liquor, a subsequent holder could exploit the licence to the full by selling any type of liquor.

47 The other significant feature of s 37 of the Act which governs the nature of a retail liquor merchant's licence stems from the conditions specified in subsection (2). In the first place, the licensed premises must be devoted entirely to the business conducted under the licence, that is to say, the business permitted by the licence. In the second place, the premises must be physically separate from premises used for other commercial purposes. There are very limited exceptions. The first exception does not require permission of the licensing

authority. It enables a very limited range of goods other than liquor to be sold in the same premises. The second enables the licensing authority to grant an exemption if satisfied that the demand for liquor in the relevant locality is insufficient to justify the establishment of separate premises or there is some other proper reason for granting the exemption. The typical application of that exemption is the case of a general store in a small country town with no other liquor outlet.

48 The effect of these provisions is to ensure, so far as possible, that the retail selling of packaged liquor remains exclusive of other commercial activities by ensuring that premises are solely dedicated to that purpose and that no other business can be conducted from the same premises.

49 To summarise the various provisions of the Act on the nature and purpose of a retail liquor merchant's licence:

- It enables the retail sale of the full range of available packaged liquor.
- While the Act specifies the maximum trading hours available, the licensee is not required to trade for a minimum number of hours. In this regard it is to be contrasted with the hotel licence. However, an applicant who did not intend to trade for at least the greater part of the permitted hours might have difficulty in establishing a need for the licence.
- It is not intended to accommodate the sale of a very limited and specialised range of liquor, however poorly supplied that range may be in the locality.
- As the Act does not permit the imposition of conditions that change the nature of the licence, the licensing authority is not able to impose a condition limiting the kind of liquor that may be sold under the licence to a restricted or narrow range.
- With certain very limited exceptions, the business carried on under a retail liquor merchant's licence must be exclusive of any other business carried on in the same premises, and the licensed premises must be physically separate from premises used for any other commercial purpose.

A retail outlet

50 The appellant seeks authority to sell wine by retail albeit limiting its retail sales to sales of Italian wines. The appellant's case can be reduced to the following essential facts:

- The appellant operates a high quality food and wholesale liquor business.

- The appellant has in the past sold liquor in wholesale quantities.
- Retail sales of liquor have been made to persons who are willing to purchase the minimum quantity required, namely, six bottles each containing 750 millilitres.
- Some of the appellant's customers prefer not to purchase liquor in the minimum wholesale quantity.
- Customers who seek to purchase Italian wines are directed to the appellant's store but are disappointed when they learn that they must buy at least six bottles.
- The appellant is prepared to limit the liquor it sells to 100 lines of Italian liquors, excluding beer.
- The Italian liquor comprises wines from some but not all wine producing regions in Italy.

There is no evidence that any other retail outlet in metropolitan Adelaide specialises in the sale of Italian wine. The Norwood Hotel is but a short distance from the appellant's premises. Although it sells a range of Italian liquor, particularly Italian wines, it does not purport to specialise in those wines.

The application of s 40(2) to the appellant

51 The first matter that s 40(2)(a) requires to be considered is whether a licence of some other category could adequately cover the kind of business proposed by the appellant. Given the nature of the business proposed by the appellant, it is at once apparent that a retail liquor merchant's licence is quite inappropriate. The appellant does not intend to supply a wide range of liquor and has no desire to do so. It only wishes to sell and supply a specialised and limited variety of liquor, namely, high quality table wines imported from certain regions of Italy. It is the only specialised supplier of that limited range of liquor in the metropolitan area of Adelaide. The retail demand for that limited range is not confined to one relatively small locality but extends across the metropolitan area. It is a different kind of demand from that necessary for the grant of a retail liquor merchant's licence, namely, a demand for liquor generally in a particular locality. The desire of the appellant to confine its sales to that very limited range cannot be accommodated by a condition imposed on the grant of a retail liquor merchant's licence.

52 In addition, the nature of the business intended to be conducted by the appellant under the licence cannot be accommodated under the requirements of a retail liquor merchant's licence. The essential nature of the appellant's business is the integration of food and its preparation with high quality Italian wine. Under a retail liquor merchant's licence the appellant would be precluded from

conducting its present business from the same premises. It is a highly specialised business catering to a very particular but geographically widespread market. It would be required to operate a distinct retail liquor business as a separate business entity and in separate premises. In short, it could not operate its proposed business under a retail liquor merchant's licence.

53 The appellant therefore satisfies the requirements of s 40(2)(a) of the Act in that the only other relevant licence, a retail liquor merchant's licence, could not adequately cover the kind of business proposed by the appellant.

54 We have already noted that a retail liquor merchant's licence cannot be granted for the purpose of selling only a very limited range of liquor. No exemption can be granted to permit only the sale of the limited range sought to be sold by the appellant. The obligation of the appellant, if it held a retail liquor merchant's licence, to maintain separate premises and a separate business for the sale of its liquor would severely prejudice not only the business proposed by the appellant but its existing business. It can and does sell a range of imported wines under its present wholesale liquor merchant's licence and the Act contains no prohibition restricting the holder of that licence from selling both food and wine from the same premises. The only restriction is as to the quantities of liquor it may sell. To require physically separate premises for the purpose of selling smaller quantities of the same liquor would obviously create severe prejudice. The appellant would be unable to sell its existing range of cheeses and imported foods, cooking utensils, equipment and cookbooks from the same premises from which it sells retail packaged liquor. The anomaly would be complete by its ability to continue to sell the same liquor in larger quantities under its wholesale liquor merchant's licence from the same premises at which it sells its food and other goods. Without any ability to limit the range by the imposition of a condition on the grant of a retail liquor merchant's licence, the appellant would be obliged to carry a much wider range of liquor products than it wishes and which its customers would require.

55 In all these circumstances, the appellant's proposed business would be substantially prejudiced if its trading rights were limited to those possible under a retail liquor merchant's licence. The appellant, therefore, satisfies the requirements of s 40(2)(b) of the Act.

Should the licence be granted?

56 Essentially, the issue on this appeal is whether it is consistent with the scope and object of the Act to grant a special circumstances licence to a person authorising that person to sell a particular kind or type of packaged liquor by retail. The Licensing Court has granted a special circumstances licence to some persons permitting them to sell wines produced from grapes grown organically. That fact does not necessarily justify the appellant being granted a special circumstances licence permitting the sale of Italian wine only.

57 The appellant's application raises questions of real significance for the proper administration of the régime established by the Act. On the one hand, regard must be had to the fact that the Act establishes a hierarchy of licences which includes six kinds of licences intended to enable the retail sale of liquor for consumption off the licensed premises. On the other hand, the Act expressly provides for a special circumstances licence which permits the sale by retail of liquor for consumption off the licensed premises. The Act contains no licence which authorises the holder to sell wine from a particular region. The business which the licensee will conduct is of such a specialist kind that it falls outside the scope of the retail liquor merchant's licence. The business is not only of a specialist kind but also is limited in the range of stock available for sale. Another consideration is that the public demand for a business of the kind which the appellant proposes differs from that of the usual kind of retail liquor merchant's licence. The demand which the appellant seeks to serve is a demand stemming from customers throughout the metropolitan area who seek to be able to choose from a wide range of Italian wine. No other kind of licence permits the licensee to limit its sales to the sale of wine from one particular region. The grant of a special circumstances licence authorised in the sale of liquor of a particular kind does not disturb the hierarchy of licences nor does it interfere with the rationale which underpins that hierarchy.

58 It is a very material consideration that the appellant's business is limited to the sale of wines from one region, namely, Italy. Different considerations might obtain if an applicant applied for a special circumstances licence to sell wine from more than one region or from, say, all over Australia. The reason for distinguishing between an applicant selling wines from a national region such as Italy and an applicant selling wines from all over Australia lies only in the fact that the cost of freight and other considerations are likely to result in a business selling Italian wines being of a smaller size with a more limited stock than one selling Australian wines. A business selling wines from more than one region might be so large as to be in a reality that of a retail liquor merchant's licence so that the applicant would be required to apply for a retail liquor merchant's licence with appropriate conditions limiting its sales to sales of wine. There is no proposition of universal application. Each case will have to be considered on its own facts and circumstances with particular regard to the nature of the business and the range of wines or other liquor to be sold.

59 The Licensing Court judge believed that a retail liquor merchant's licence was suitable for the appellant's needs. He characterised the appellant's application in these terms:

47 On the other hand, further discussion by Doyle CJ in *Facac's case* (*supra*) provides additional guidance on the operation of s 40. It was emphasised that s 40 is not to be used simply to create a licence to meet an applicant's wishes. Further, this Court must consider whether another class of licence can and should be granted "...even if requiring the applicant to trade under that licence imposes

obligations that the applicant would rather not have, and even if that means that the applicant must prove a need for the grant of the licence” (para 51).

48 Those considerations are [retail liquor merchant’s licence] very compelling in this case. The applicant does not want the obligations of a RLML, particularly the hours of trading and that it must be from separate premises. To grant the application would be to mould or create a licence to meet the applicant’s wishes. Further, a RLML would require proof of public demand in the locality not otherwise catered for.

49 It should not be overlooked that the Act now provides for limited classes of licence and that applicants are restricted to that class. To grant this licence would be to mould a hybrid when, in reality, a RLML would be adequate. Further, under such a licence, the applicant’s proposed business would not be substantially prejudiced if her trading rights were limited to such a licence.

The judge erred in finding that the appellant objected to the hours of trading of a retail liquor merchant’s licence. It had no objection to that but it is not necessary to stay with that question. It is unnecessary to deal further with the question of the requirement for separate premises. The judge erred in concluding that the applicant should apply for a retail liquor merchant’s licence. For the reasons above, it is not possible to tailor that licence to limit sales to sales of, say, Italian wines. There is, in short, a licence of no other category which could adequately cover the kind of business proposed by the appellant. It is appropriate to grant it a special circumstances licence.

60 It should not be assumed from this decision that anyone who wishes to sell a limited range of packaged liquor will be entitled to be granted a special circumstances licence. The ability to obtain a grant of a special circumstances licence will depend on a number of circumstances including the range of liquor to be sold. Likewise, it should not be assumed that a special circumstances licence enabling the sale of packaged liquor is but a stepping-stone to a full retail liquor merchant’s licence or that it can be extended to become a thinly disguised retail liquor merchant’s licence. Its substantial advantage is that a licensing authority, by the imposition of conditions, can mould the licence to suit the special circumstances shown to exist.

Conclusion

61 For these reasons, we would allow the appeal. We would set aside the order of the Licensing Court and order that a special circumstances licence be granted to the appellant.

62 It is necessary that consideration be given to the conditions on which the licence should be granted. The appellant agreed to the conditions proposed by the Oriental Hotel and should be bound by them. Reference has already been made to the fact that the present form of the conditions is unsatisfactory. The conditions should be amended so that their meaning is clear and they are capable of being enforced, whilst being consistent with what the appellant has agreed.

There are questions as to the meaning of “premium quality” in proposed condition 4 and of the expression “no greater than 100 products at any one time” in the proposed condition 3. Other questions are whether the proposed condition 2 is necessary, and the meaning of the expression “not to predominate” in proposed condition 5. The question of whether conditions should be imposed is a matter more appropriate for the Licensing Court. These and any other conditions which the Licensing Court might seek to be imposed should be considered by the Licensing Court on the matter being remitted to it. For those reasons, this Court should do no more than order that a special circumstances licence be granted to the appellant on terms and conditions imposed by the Licensing Court.

LAYTON J:**Introduction**

63 The appellant operates a business from premises at 7 Osmond Terrace, Norwood, and is presently the holder of a Wholesale Liquor Merchant's Licence ("WLML") under the *Liquor Licensing Act 1997* (SA) ("the Act"). The WLML permits it to sell liquor to the public provided that members of the public purchase not less than 4.5 litres of liquor, being effectively six normal sized wine bottles. The appellant applied to the Licensing Court for the grant of a Special Circumstances Licence ("SCL") to enable the business to sell wine in single bottles.

64 Objections were lodged by the licensees of other licensed premises, namely Saturno's Norwood Hotel Pty Ltd and Saturno's Colonist Tavern Pty Ltd as well as Lassaters Management (SO) Pty Ltd, the latter being licensee of the Oriental Hotel. The objection on behalf of the Oriental Hotel was withdrawn on 11 October 2006 upon the appellant's acceptance of certain conditions for the conduct of the SCL. The remaining two objectors were represented by one counsel with Saturno's Norwood Hotel Pty Ltd as the licensee of the Norwood Hotel being the main objector as it had a bottle shop. In short, the objectors argued that the appellant should be applying for a Retail Liquor Merchant's Licence ("RLML") and that an SCL should not be granted as an RLML would adequately cover the business.

65 The conditions agreed between the Oriental Hotel and the appellant in respect of the application for an SCL were as follows:

- 1 To sell liquor produced in Italy (other than beer) between 9.00am and 7.00pm (inclusive) Monday to Saturday (inclusive) for consumption off the licensed premises.
- 2 The liquor for sale be displayed in the present wine display room or, should the premises be redeveloped, then a similar sized room.
- 3 The range of liquor to be no greater than 100 products at any one time.
- 4 Liquor for sale be premium quality.
- 5 The retail sale of liquor not to predominate over the style and nature of the business at any one time.
- 6 To sell liquor at any one time through a direct sale transaction.
- 7 To sell or supply liquor by sample for consumption on the licensed premises.

The Judge's decision

66 After hearing evidence and submissions, the Judge concluded that the criteria for the SCL had not been met. The Judge's reasoning for this decision is essentially contained in paragraphs [44]- [52] of His Honour's reasons:

- 44 There is no doubt that Bottega Rotolo is a purveyor of fine food and special Italian wines. I accept Ms Hassan's evidence that the range and quality of food is unrivalled in this State. I also accept that the range of Italian wines is very specialised with a view to displaying quality varieties from diverse regions of Italy. The business strives to sell quality, if not the best, of foods, particularly cheeses. It strives for excellence. It very much promotes the marriage of food and wine, with specialist advice available.
- 45 The application for the SCL relies upon the words of Doyle CJ in *Facac's* case (*supra*) (para 26) to the effect that s 40 of the Act should be read flexibly. Further, that "...a licence of a particular class does not adequately cover a proposed business if the suggested licence carries with it obligations that make it impractical to operate the proposed business" (emphasis in original).
- 46 As I understand the argument, based on Ms Hassan's evidence it is impractical to operate her business with the obligations of a RLML. Obviously such a licence would carry with it additional administrative costs, but the real difficulties are that it would have to operate in separate premises and the marriage between food and wine would be destroyed. Products sold in conjunction with such a licence must complement the wine, but many of her products are not complementary to wine.
- 47 On the other hand, further discussion by Doyle CJ in *Facac's* case (*supra*) provides additional guidance on the operation of s 40. It was emphasised that s 40 is not to be used simply to create a licence to meet an applicant's wishes. Further, this Court must consider whether another class of licence can and should be granted "...even if requiring the applicant to trade under that licence imposes obligations that the applicant would rather not have, and even if that means that the applicant must prove a need for the grant of the licence" (para 51).
- 48 Those considerations are very compelling in this case. The applicant does not want the obligations of a RLML, particularly the hours of trading and that it must be from separate premises. To grant the application would be to mould or create a licence to meet the applicant's wishes. Further, a RLML would require proof of public demand in the locality not otherwise catered for.
- 49 It should not be overlooked that the Act now provides for limited classes of licence and that applicants are restricted to that class. To grant this licence would be to mould a hybrid when, in reality, a RLML would be adequate. Further, under such a licence, the applicant's proposed business would not be substantially prejudiced if her trading rights were limited to such a licence.
- 50 It also should not be overlooked that the transitional provisions that operated upon the introduction of the Act, particularly s 3(10), demonstrate that Parliament intended to limit the number of SCLs. Further, the terms of s 40 confirm that a SCL is not to be granted in other than quite unusual circumstances, this not being one of them.

51 During the course of the hearing I was supplied with a copy of SCLs that were granted on other applications. Without knowing the precise circumstances that led to the grant of those licences, it is difficult to know what type of precedent was being set. There is no doubt there is a proper place for SCLs in some cases. However, in this case, the criteria of s 40 have not been met.

52 As I understand the argument, based on Ms Hassan's evidence it is impractical to operate her business with the obligations of a RLML. Obviously such a licence would carry with it additional administrative costs, but the real difficulties are that it would have to operate in separate premises and the marriage between food and wine would be destroyed. Products sold in conjunction with such a licence must complement the wine, but many of her products are not complementary to wine.

Grounds of Appeal

67 The appellant complains that the Judge erred in three major respects:

- 1 Erred in law as to the meaning and application of "trading rights" as referred to in s 40(2) of the Act, being the section related to SCL.
- 2 Erred in law as to the interpretation and application of the observations of the Court in *Facac Pty Ltd v Talbot Hotel Group Pty Ltd*.¹
- 3 Erred in relation to certain findings of fact and failed to make other findings of fact, which errors affected the Judge's conclusion that the application for an SCL should be rejected.

68 The previous objectors chose not to be heard on this appeal and therefore the appeal is uncontested. However, the appellant is still obliged to make out its case on this appeal.

Uncontested facts on appeal

69 The Judge essentially relied on the evidence of Ms Hassan, who was the Director and shareholder of the corporate licensee of WLML and is the person who runs the appellant's business. The business is a blend of a number of components. In part, it specialises in foods, particularly high quality exotic foods, mostly imported, as well as the very best cheeses sourced internationally and locally. There is an extensive range of condiments, both local and imported, which include pastas, biscuits, tin fruit, oils, vinegars, pastry cases, teas, coffees, sugars and salts. In addition, the business sells imported cooking equipment and utensils and cookbooks. The business provides a cooking school which conducts classes a minimum of twice a week during school term with resident chefs. Further, the business has a wholesale aspect which sells to restaurants and hotels, as well as a retail aspect for the general public.

70 There is also the WLML side of the business which consists of a very specialised range of Italian wines. These Italian wines are selected by Ms Hassan

¹ (2001) 80 SASR 580.

on trips to Italy and represent the best of the regions and the varieties. The wine is at the more expensive end, ranging between \$50 to \$80 per bottle. As required by the WLML, the business sells 90 per cent of its gross product by way of wholesale and up to 10 per cent retail. The latter includes the requirement that the liquor sold must be at least 4.5 litres, being six bottles, standard in volume. Some Italian wine varieties are chosen specifically to complement the foods in Australia generally, as well as the specific condiments and foods that are sold through the business. The business also offers specialised advice about the wines and the matching of food and the wine.

71 Ms Hassan gave evidence that the business was a marriage of food and wine. His Honour accepted this evidence and stated at paragraph [31]:

31 Quite simply I was referring to the style of food that we represent. The quality of food we represent is completely reflected in the style of wine and the style and quality of wine that we represent so a marriage of food and wine being, our clientele come to use looking for the total experience, the uniqueness of the food is then married with the uniqueness of the wine.

72 In addition, the Judge specifically found at paragraph [44]:

44 There is no doubt that Bottega Rotolo is a purveyor of fine food and special Italian wines. I accept Ms Hassan's evidence that the range and quality of food is unrivalled in this State. I also accept that the range of Italian wines is very specialised with a view to displaying quality varieties from diverse regions of Italy. The business strives to sell quality, if not the best, of foods, particularly cheeses. It strives for excellence. It very much promotes the marriage of food and wine, with specialist advice available.

73 The evidence of Ms Hassan, also accepted by the Judge, was that patrons to her shop, as well as those who attended the cooking class, often wished to purchase a bottle of wine but they were confronted with having to buy at least six normal sized bottles of wine. It was this aspect which was sought to be remedied by the application for a SCL.

74 In order to appreciate the appellant's arguments before the Licensing Court, it is necessary to set out the relevant portions of the Act.

The legislation

Special circumstances licence

75 The relevant provisions for obtaining an SCL are contained in s 40 (1) and (2) of the Act which provides as follows:

40—Special circumstances licence

- (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.

76 The objectors in this case argued that the SCL should not be granted because an RLML licence would adequately cover the kind of business proposed by the appellant.

Retail liquor merchant's licence

77 The relevant provisions in relation to obtaining an RLML are as follows:

37—Retail liquor merchant's licence

- (1) A retail liquor merchant's licence authorises the licensee—
- (a) to sell liquor on the licensed premises on any day except Good Friday and Christmas Day between the hours of 8 am and 9 pm, or over a continuous period authorised by the licensing authority, for consumption off the licensed premises (but a period authorised by the licensing authority must begin no earlier than 5 am, must end no later than midnight, and must not exceed 13 hours); and
 - (ab) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only between the hours of 8 am and 9 pm and not on Good Friday or Christmas Day); and
 - (b) to sell or supply liquor by way of sample for consumption on a part of the licensed premises approved for the purposes by the licensing authority.
- (2) It is a condition of a retail liquor merchant's licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.

Exceptions—

- 1 Goods may be sold in the same premises if they are of the kind normally associated with, and incidental to, the sale of liquor (eg glasses, decanters, cheeses and pates).
- 2 The licensing authority may grant an exemption from the above condition if satisfied that the demand for liquor in the relevant locality is insufficient to justify the establishment of separate premises or there is some other proper reason for granting the exemption.

78 Section 58(2) of the Act is also relevant and states that:

58—Grant of hotel licence or retail liquor merchant's licence

...

- (2) An applicant for a retail liquor merchant's licence must satisfy the licensing authority that the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.

Appellant's arguments before the Licensing Court

79 The appellant contended that an RLML could not adequately cover its business and that it would be substantially prejudiced if its trading rights were limited to an RLML. The Judge summarised Ms Hassan's evidence on this topic as follows:

32. Dealing with the requirements of a RLML, Ms Hassan said that would produce a number of problems for her. First, there was the requirement of the physical separation of the premises for the conduct of such a licence. Secondly, it would need to be separately staffed (with a separate till). Thirdly, there would be no retail frontage. ...

80 The Judge indicated that:

46. ...based on Ms Hassan's evidence it is impractical to operate her business with the obligations of a RLML. Obviously such a licence would carry with it additional administrative costs, but the real difficulties are that it would have to operate in separate premises and the marriage between food and wine would be destroyed. Products sold in conjunction with such a licence must complement the wine, but many of her products are not complementary to wine.

81 Throughout the Judge's discussion, in particular at paragraph [46], His Honour impliedly appears to accept Ms Hassan's evidence as to the practical difficulties she would experience in operating her business, having regard to the obligations of an RLML. Nonetheless, for reasons which he articulates in paragraphs [47] to [51] of his reasons, as set out above, he rejects the application.

Appellant's arguments on appeal

82 The appellant's primary complaint is that the Judge erred in his interpretation of "trading rights" under s 40(2)(b) of the Act, and then wrongly applied this interpretation to the facts before him which ultimately lead to his rejection of the application.

83 Before an SCL can be granted pursuant to s 40, an applicant must satisfy the licensing authority of both conditions in sub-section 2(a) and sub-section 2(b), namely that a licence of no other category - in this case an RLML - "could adequately cover" the kind of business proposed by the applicant and that the proposed business would be "substantially prejudiced" if the applicant's "trading rights" were limited to those possible under, in this case, an RLML.

84 The appellant submitted, and I agree, that the "trading rights" in relation to an RLML comprise not only the "authorisations" set out in s 37(1) of the Act, but

also the mandatory conditions and exemptions set out in s 37(2) of the Act.² However, when the Judge considered the “trading rights” of an RLML, he focussed his attention on the authorisation as to hours of trading in s 37(1) and did not appropriately address the mandatory conditions and exemptions contained in s 37(2) of the Act. It was submitted that this error was exemplified in paragraph [48] of the Judge’s reasons, where His Honour concluded:

48 ... The applicant does not want to obligations of a RLML, particularly the hours of trading and that it must be from separate premises. To grant the application would be to mould or create a licence to meet the applicant’s wishes.

85 This conclusion appears to relate back to a portion of the cross-examination of Ms Hassan by counsel for the objectors, as set out at some length by the Judge in paragraph [33] of his reasons:

33. Ms Hassan also gave this evidence when questioned by Mr Howard, who appeared for the objectors (p 70):

MR HOWARD: ... Would not a Retail Liquor Merchants licence provide all the trading rights that you would need to enable the sale of Italian wines and indeed other wines, if you chose to do so?

MS HASSAN: It would severely prejudice the rest of my business, because I sell so many products that are not complementary to wine under that Act.

MR HOWARD: I am sorry, I don’t follow. Would you like to explain that a little more?

MS HASSAN: As far as I understand, if I was to apply for a Retail Liquor Merchants licence, it would have to be in a separate area and any other products sold would have to be complementary to wine. I have many products, as you’ve seen, that are not complementary to wine.

MR HOWARD: I see.

MS HASSAN: Cookbooks, cooking equipment.

MR HOWARD: Leaving aside any physical difficulties that might exist because of the manner in which your premises are currently laid out, and responding specifically to the question of trading rights, the hours at which you may be open, products which you are able to sell, is it not the case that a Retail Liquor Merchants licence would give you the trading rights that you require?

MS HANNAN: No, because it does not allow me to sell the products that I currently sell. [emphasis added]

86 Mr Howard’s question to Ms Hassan inappropriately limited the “trading rights” to the authorisation of hours as contained in s 37(1)(a) and (b) and inappropriately excluded the mandatory conditions and exemptions, being the concerns expressed by Ms Hassan. I agree with the submission that this limited approach appears to be reflected in paragraph [48] of the Judge’s reasons.

² *Facac Pty Ltd v Talbot Hotel Group Pty Ltd* (2001) 80 SASR 580, 585, [26]-[27], [40].

87 Further, the Judge erred in finding that the appellant did not want the obligatory hours. Ms Hassan's evidence as reproduced in paragraph [33] of the Judge's reasons above indicate that the trading hours were not the problem for the business. In her view it was the other features of "trading rights" which were the problem. That is, the mandatory conditions and the exemptions set out in s 37(2) of the Act.

88 When concluding that the requirements of s 40(2) were not fulfilled, the Judge did not make any specific finding adverse to Ms Hassan's evidence as to the impracticality of operating her business, nor the substantial prejudice she would suffer because of the mandatory conditions and the exceptions in s 37(2). Further, there was no discussion or finding that Ms Hassan could in fact operate her business from two separate premises and that she would not be "substantially prejudiced" by it. There was no consideration to the nature of the goods sold and the extent to which if they were obliged to be associated with an incidental to the sale of liquor, how that would affect her business if the premises were not separate. Instead, in paragraph [46] of his reasons, the Judge appears to accept these as problems.

89 In my view, the Judge's approach and reasoning and his limited interpretation of "trading rights" amounts to an error of law which infected his ultimate decision to reject the application.

90 In addition to these difficulties, the Judge acknowledged that an RLML would require proof of need for liquor generally in the locality that could not otherwise be catered for. This would be in itself a significant impediment to obtaining an RLML. The appellant's premises are situated close to the intersection of Osmond Terrace and Magill Road and are separated only by a laneway from the Oriental Hotel, which is at that intersection. The Norwood Hotel is about 400 metres south along Osmond Terrace. The Colonist Tavern is about 300 metres south of the Norwood Hotel. The Norwood Hotel has the largest bottle shop of the hotels close to the appellant's premises and stock some 4000 wines, which includes a range of Italian wines. In addition, there is the Avenues Tavern at the intersection of Stephen Terrace and Payneham Road, Stepney. There are two retail liquor merchants trading under the name of "Dan Murphy", one at Marden and the other at St Peters and a further outlet on Portrush Road. There is also a retail liquor outlet on Walkerville Terrace, Walkerville. Bearing in mind the proximity of other licensed premises, some of which also sell Italian wine, the appellant may be in some difficulty in satisfying a licensing authority under s 58(2) that "the licensed premises already existing in the locality ... do not adequately cater for the public demand for liquor ... and the licence is necessary to satisfy that demand."

91 In summary, I consider that the Judge erred in his limited interpretation of "trading rights", and as a consequence erred in his application of s 40(2) to the facts in the case. This error was compounded by what appears to be a

misapplication of the Full Court decision of *Facac Pty Ltd v Talbot Hotel Group Pty Ltd*³ (“*Facac*”).

The Facac case

92 *Facac* was concerned with an application for an SCL for a wine bar. A Judge of the Licensing Court refused the application as he was of the opinion that the business could be conducted under a Hotel Licence. The applicant appealed to the Full Court.

93 The applicant’s reason for the application for an SCL was to enable them to sell liquor seven days a week from 9.00am until 3.00am the following morning, to be at liberty to decide when it will sell liquor, as well as seeking to be exempted from the obligation to keep premises open for the sale of liquor during the hours specified in the Act. The case therefore concerned “trading rights” in relation to authorisation under the Hotel Licence.

94 In the course of his reasoning, Doyle CJ, (with whom Martin and Besanko JJ agreed), indicated that the appellant was not only seeking that there be no obligatory hours at all, but also that there was no obligation to sell liquor for consumption off premises.⁴ In effect, the appellant’s complaint was not that the rights attached to a Hotel Licence were not wide enough to cover the business proposed, but that the appellant did not wish to be obliged to exercise all or, indeed, any of the rights that attached to a hotel licence.⁵

95 It was in this context that the Chief Justice said:⁶

[43] The question for the Judge is not whether he can or should grant a hotel licence in the form, or the rights and obligations, that the applicant wants. It is whether a hotel licence, with appropriate exemptions, would enable the applicant to trade in a way that did not substantially prejudice its proposed business. If it would, then the applicant cannot be granted a special circumstances licence. The applicant cannot create a basis for the grant of a special circumstances licence by the simple expedient of demanding trading rights that cannot be accommodated under a hotel licence.

....

[51] ...the Licensing Court must also bear in mind that s 40 is not to be used simply to create a licence to meet and applicant’s wishes. If an existing class of licence will fit the proposed business, s 40 should not be used, unless the use of the existing class of licence would produce a result that “the proposed business would be substantially prejudiced”. The special circumstances licence is not, as I have said, to be created simply to meet the applicant’s wishes and proposal. The Court must consider whether another class of licence can and should be granted, even if requiring the applicant to trade under that licence imposes obligations that the applicant would rather not have, and even if that means that the applicant must prove a need for the grant of the licence.

³ (2001) 80 SASR 580.

⁴ *Facac Pty Ltd v Talbot Hotel Group Pty Ltd* (2001) 80 SASR 580, 584, [18].

⁵ *Ibid* 585, [21].

⁶ *Ibid* 587-8, [43], [51].

96 In the present case, the Judge referred to [51] of *Facac* and then stated that he found those conditions very compelling in this case.⁷

97 The factual circumstances of *Facac* are very different to those in the present case. In *Facac*, the business had not yet begun and the Full Court concluded that the appellant appeared to be creating a situation such that the trading rights being sought for the proposed business could not be accommodated under a Hotel Licence. It was an attempt to try and circumvent a Hotel Licence and use the SCL to meet its own convenience. By contrast, such contrivance does not exist in this case. This was not a new proposal for a first time licence, it was an already existing business that has been trading for some time using a WLML. The appellant was only seeking to change its existing business so that it could sell single bottles rather than the limit of 4.5 litres. There was no suggestion of the change being sought so that it was unable to comply with RLML trading rights and therefore justify an SCL. The appellant was not seeking to “mould a hybrid” as the Judge found in this case.⁸

98 Having found that the Chief Justice’s observations in *Facac* were inapposite to the circumstances of this case, I consider that that the Judge erred in his use of that case.

Conclusion

99 Given that the appellant has made out each of its grounds of appeal, the appeal should be allowed and the decision of the Licensing Court be set aside.

100 Having regard to the evidence expressly accepted by the Judge which included by implication, the significant problems the appellant would encounter in complying with the trading rights on an RLML, I consider that this is an appropriate case in which this Court should substitute its own judgment.

101 Ms Hassan’s evidence is that it is impractical for the business to operate with the obligations of RLML because the licensed premises under an RLML must be devoted entirely to the selling of wine and must also be in physically separate premises. Further, the statutory exceptions would not assist in this case. The goods which the business was selling were not all of a kind “normally associated with and incidental to the sale of liquor” referred to in Exception 1. The appellant’s business included the selling of utensils and cookbooks and also providing cooking lessons in the premises. Exception 2 was of no assistance to the appellant as a Licensing Court could not be satisfied that the demand for liquor in the “relevant locality” was “insufficient to justify the establishment of separate premises”. The appellant’s premises were in the metropolitan area with three hotels in very close proximity, and that circumstance excluded the application of this Exception. In short, an RLML licence could not “adequately cover” the appellant’s business and, further, the business would be “substantially

⁷ See paragraph [48] of the Judge’s reasons above.

⁸ See paragraph [49] of the Judge’s reasons above.

prejudiced” if it was required to fulfil those mandatory conditions, even with the exceptions.

102 In addition, the requirement for separate premises would substantially prejudice the appellant’s business and undermine its fundamental concept as being a marriage of wine and food.

103 There is still a further aspect to be considered under Exception 2 of s 37 of the Act. Exception 2 refers to “or there is some other proper reason for granting the exemption”. This exception must be interpreted in its context. This context must begin with the clear intention expressed in the legislation for an RLML, being for licensed premises which are devoted entirely to the business conducted under the licence and being physically separate from premises used for other commercial purposes. The generally expressed exceptions must also be read in the context of somewhat narrowly expressed specific exceptions.

104 In the present case, the mandatory conditions in 37(2) are not fulfilled, having regard to the way in which the appellant’s business is conducted. For reasons discussed above, the specific exceptions do not assist. There are therefore two major respects in which the appellant’s business does not comply with the trading rights of an RLML. In my view, if the expression “or there is some other proper reason for granting the exemption” was to include an exemption from the need for the appellant to have separate premises and could enable it to sell goods which go well beyond that which is associated with or incidental to the sale of liquor and is the predominant business of the appellant, this would produce a hybrid RLML. The focus of such a business goes well beyond that for which an RLML expressly provides. It would be tailoring a licence which would be departing from the fundamental statutory concept of RLML, being a type of fashioning which the Chief Justice in *Facac’s* case indicated should be rejected.

105 In my view, the appropriate order should be to grant an SCL. This is an application which totally fulfils the objects of the Act, notably s 3(1)(b), (c) and (d). The application fits well within the examples of the special licences indicated in Exhibit A4. It also meets a niche market, and the conditions agreed to with the Oriental Hotel, would not inappropriately impede competition in the area. The precise expressions to be used in the terms and conditions of the SLC need to be subject of further submissions before the Licensing Court.

Orders

106 For these reasons, I would make the following orders:

- 1 Appeal allowed.
- 2 The order of the Licensing Court be set aside and in its place a special circumstances licence be granted to the appellant.

- 3 The matter be remitted to the Licensing Court for consideration and determination of the conditions of the licence.

107 Following the completion of these reasons for decision, I have had the opportunity of reading the reasons of DeBelle and Bleby JJ. In relation to order 3 as I have proposed, I respectfully agree with their Honours' observations as to the need for the Licensing Court to clarify the conditions of the special circumstances licence, having regard to the conditions already agreed by the appellant with the Oriental Hotel.