



CITATION: *AMIGOS LEISURE HOSPITALITY PTY LTD ATF AMEGOS LEISURE UNIT ABN 57920457600 v THE CHIEF EXECUTIVE, LIQUOR LICENSING DIVISON QUEENSLAND TREASURY* [2008] CCT LR030-08

PARTIES: AMIGOS LEISURE HOSPITALITY PTY LTD ATF AMEGOS LEISURE UNIT ABN 57920457600

V

CHIEF EXECUTIVE, LIQUOR LICENSING DIVISON

APPLICATION NUMBER: LR030-08

DELIVERED ON: 22 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 19 December 2008

DECISION OF: Mr P Favell

CATCHWORDS: *Liquor Act 1992* – variation to licence – additional conditions – review – stay.

REPRESENTATION:

APPLICANT: Mr A Herbert of Counsel

RESPONDENT: Mr D Robinson

DECISION CATEGORY CLASSIFICATION: C

NUMBER OF PARAGRAPHS: 29

REASONS FOR DECISION

Introduction

1 Amigos Leisure Hospitality Pty Ltd operates the Watermark Bar and restaurant located at 72 - 74 The Strand Townsville.

2 Amigos Leisure Hospitality Pty Ltd was the holder of liquor licence number 4116515 issued on 6 April 2006 for the premises and was licensed for the sale of liquor for consumption on or off the premises with the trading hours being between 10:00am to 12:00 midnight Monday to Sunday.

3 That licence carried with it standard conditions namely *“noise emanating from entertainment, music or related activities must not exceed 75 dB(C), fast response, when measured approximately as 3 metres from the source of the noise”* and *“speakers used to amplify entertainment, music noise, or non amplified entertainers must not be located in any outdoor area of the premises.”*

4 The licence holder, on 2 July 2007, made an application for the variation for that licence such that the variation change was to change the condition with respect to noise emanating from entertainment, music or related activities.

5 By a letter dated 7 November 2008 the office of Liquor Gaming and Racing advised that a variation of licence was granted by the Chief Executive on 31 October 2008 in respect of the premises.

6 The variation of licence included the following standard conditions:

130 *Speakers used to amplify entertainment, music noise, or non-amplified entertainers must not be located in any outside area of the premises.*

192 *All amplified entertainment, music or related activities at the premises must be conducted through a sound limiting device at all times.*

193 *The sound limiting device is restricted to the licensee, nominee, manager and to the person in charge of the premises at the time the entertainment is conducted.*

194 *The sound limiting device is to be located in a lockable enclosure, which is to be locked closed at all times except for inspection or maintenance work on the device.*

250 *Noise emanating from the premises, including amplified or non-amplified noise and patron noise must not exceed 86 dB(C), fast response, when measured approximately 3 metres from the primary source of the noise.*

7 It also contained the following specific conditions:

30318 *All use of the outdoor area adjoining the main bar must cease at 10:00pm whenever amplified entertainment is being conducted over 75 dB (C).*

30319 *The glass bi-fold doors leading to the outdoor area must be closed at 10:00pm to the close of trading.*

30320 *A management plan must be maintained with the strategies for the ordinary dispersal of patrons, the types of entertainment that can be controlled by a limiting device and control of smokers on the footpath.*

8 The effect of the variation was to add new conditions to the licence and to vary the sum of the existing conditions.

9 The licensee, by an application for review dated 2 December 2008, sought to review the imposition of condition 250 namely *“noise emanating from the premises including amplified or non-amplified noise and patron noise must not exceed 86 dB(C), fast response, when measured approximately 3 metres from the primary source of the noise”* and the imposition of condition 30319 namely *“the glass bi-fold doors leading to the outdoor area must be closed at 10:00pm to the close of trading.”*

10 The licence holder based his objection on what it said was a failure by the decision maker to take proper account of expert evidence.

11 The applicant licensee contended:

1. In imposing the noise limit of 86 dB(C) on the licence of Watermark, the respondent has failed to take proper account of uncontroverted expert evidence.
2. An expert report was prepared by acoustic engineers Max Winders & Associates to investigate the impact of the applicant’s business on the amenity of local residents and guests.
3. This report recommended that the noise limit for internal amplified entertainment for the venue must not exceed 89 dB(C), fast response, when measured approximately 3 metres from the primary source of the noise.
4. The decision maker has imposed a lower noise limit than the proposals contained in the expert report recommended, without any cogent reason for doing so.
5. A modest increase in the noise limit from 89 dB(C) to 90 dB(C) will not affect the sleep of residents nor the quiet enjoyment of their homes because:
 - there is no amplified noise emitted from the outside the building envelope of the venue;
 - there is no amplified noise inside or outside after 10:00pm;
 - patron noise is well below 89 dB(C); and
 - noise which comes from the venue is significantly reduced in its likely impact on nearby residents by a glass canopy over the outside bar seating area, the incline slope of the outdoor area, and the styling of furniture in the outdoors area.
6. The condition was imposed under the mistaken belief on the part of the respondent that the condition was agreed by the applicant, when it was not so agreed, and the condition was not subject to a proper assessment as to the merit or otherwise of the proposal.
7. The condition is unfair and unreasonable, in that it has the likelihood of severely affecting the viability of the applicant’s existing business, with no, or no sufficient commensurate effect on the amenity of the surrounding area.
8. The condition is unwarranted, in that there is no, or no sufficient, effect on the amenity of the neighbourhood caused by the existing and proposed operation of the applicant’s business to justify the imposition of such a condition.

9. The condition has no necessary relevance or proportionality to the sound level increase sought in the applicant's application, as it is expressed to apply every evening and irrespective of whether or not any particular noise level is generated or exceeded within the applicant's premises.

12 The applicant licence holder contended with respect to both conditions which it seeks to have reviewed, the following:

1. *The decision maker lacked undue emphasis on objections which:*
 - (i) *have been discredited on numerous occasions; and*
 - (ii) *were made by a resident who entered into occupation of his premises in the full knowledge of the location and nature of the applicant's business, and has subsequently sought to limit the operation of the applicant's existing business in a tourist precinct to an appropriate extent.*
2. *The decision maker has not properly assessed or understood the minimal impact that the proposed conditions would have on the local community, by reference to the factors specified in section 116 of the Act.*

13 The application set out two conditions which the applicant sought to have substituted:

1. *Standard condition 250 be replaced with the following condition:*

Amplified noise emanating from the premises must not exceed 86 dB(C), fast response, when measured approximately 3 metres from the primary source of the noise.
2. *Special condition 30319 be replaced with the following condition:*

The glass bi-fold doors leading to the outdoor area must be closed at 10:00pm until the close of trading, whereby only the doors immediately in front of the bar may remain open.

14 The applicant licence holder, on Friday 19 December 2008, sought a stay in respect of the decision of the Chief Executive, the subject of the application for review. At the outset, the solicitor for the Chief Executive sought to have Mr Peel included as a party in the hearing. It was submitted on behalf of the Chief Executive that Mr Peel was an objector who was entitled under the *Liquor Act 1992* and the *Commercial and Consumer Tribunal Act 2003* to be a party. Upon hearing the solicitor for the Chief Executive it became apparent that the Chief Executive sought to call Mr Peel and he was not called to give evidence and it was agreed that, rather than make an order that he be a party at this time, that he give evidence, or at least remain on the telephone link throughout the hearing. As matters progressed Mr Peel wasn't called to give evidence but was allowed to listen to the proceedings and to make comments.

15 During the course of submissions, Mr Herbert on behalf of the applicant indicated that the applicant was prepared to give a number of undertakings, these being:

1. The applicant would agree that the bi-fold doors, shown in photograph 1 of exhibit 1, be closed as they are shown in photograph 2 of exhibit 1, that is that the 7 doors immediately in front of the bar area be allowed to remain open;

2. That the sound level drop from a permitted 86 dB(C) to 85 dB(C); and
3. There being no amplified music above 75 dB(C) after 10:00pm.

16 Jamie Fitzpatrick is the manager and director of Amigos Leisure Hospitality Pty Ltd. He swore (exhibit 3) that the Watermark does not have any live entertainment, jukebox or other amplified noise besides background music. The front entry to the bar area of Watermark is a wall of glass bi-fold doors which faces into The Strand, a waterfront street popular with tourists. There is a separate bar and restaurant area in the Watermark each of which has its own street frontage which when closed consists of a link of bi-fold doors. The two areas are separated by a corridor which is common property of the body corporate. In front of the bi-fold doors is an outdoor deck area for patrons, including tables and chairs, which is part of the licensed area. The bar and an indoor seating area are behind the line of the bi-fold doors.

17 Mr Fitzpatrick swears that the imposition of the new conditions, including condition 30319, is causing irreparable damage to the business of the Watermark because, with the doors closed, the premises appear to be tightly closed for business, and that appears to prevent patrons from seeing or understanding that the bar is open for business. He said that the door closure also physically prevented entry to the premises directly from the street and required patrons to realise the true situation to enter the common entrance of the Watermark building and enter the bar from the internal door within the building. He said that the imposition of the condition on 14 November 2008 has meant Watermark has experienced a continuing decline in revenue between 9:00pm and midnight. He swears that, in order to close the doors, it was necessary to move the patrons away from the front of the bar at 1:00pm. He said that despite the constant exclamations that they were not closing, they found that the need to close the doors is gravely impacting on the good nature of the customers and the ambience of the premises and the customers quickly leave the premises.

18 He said that, as a result of having to close the doors, they have received anonymous phone call complaints during the day.

19 Mr Fitzpatrick swears that patron visitation after 10:00pm has dropped 70 percent and the applicant is finding it increasingly difficult to encourage patron numbers from its own restaurant after 10:00pm. He said that in recent weeks turnover levels between 11:00pm to midnight have been as low as \$300.00 to \$500.00 on weekend nights and are constantly as low as 1 percent of daily turnover. He conservatively estimates his loss in turnover in the vicinity of \$3,000.00 per week.

20 Condition 250 imposed a noise limit of 86 dB(C), fast response, when measured approximately 3 metres from the primary source of the noise. On 27 June 2007 an expert report was commissioned from Max Winders and Associates. They are consulting engineers and environmental scientists and that report is exhibited as exhibit A. The testing for the operation of the report was undertaken between 11:00pm and midnight. The report set out decibel levels at various points and with the doors fully closed, fully open and partially open. The engineer who prepared the report said that the allowable internal and purported entertainment noise level only increased by one decibel by fully closing the glass bi-fold doors rather than having them remain partially open to permit access to the bar.

21 In making the application for a stay of condition 30319, Mr Fitzpatrick proposed an interim measure of the noise limit of 85 dB(C), fast response when measured approximately 3 metres from the primary source of the noise. He said that reduced noise

limit is below the level recommended by the expert report for the scenario where the doors are fully open and it is also equal to the “closed door” result proposed by the conditions imposed by the respondent, but can be achieved with the doors partially open pending the outcome of the appeal.

22 During the course of argument, Mr Herbert, on behalf on the applicant, indicated that his client would agree, as a condition of the stay, to a condition that there would be no amplified music above 75 dB(C) after 10:00pm. Mr Robinson was unable to obtain specific instructions when that indication was given by Mr Herbert, but declined to offer more by way of opposition on the application and participated in the formulation of conditions for the stay and directions.

23 In my opinion, it is important to note that, with the doors partially open, by allowing 7 bi-fold doors in front of the bar to be opened, the difference in the decibel rating is only 1 and the applicant was prepared to reduce the noise emanating from the present premises such that it did not exceed 85 dB(C).

24 During the course of the application I was provided with a folder containing various materials. It has been marked as exhibit 2. Mr Robinson drew my attention to the objections by Mr and Mrs Peel. Part of the objection by Mr and Mrs Peel was a concern that *“the quiet and good order of the locality concerned would be lessened due to the fact that the licensed premise does not have the ability to contain noise levels.”* My attention was also drawn to an investigation file with respect to an inspection of 16 March 2008. At that time sound level recordings were taken which in part exceed the conditions imposed. However as Mr Herbert pointed out the readings were in respect of the noise emanating from the venue not just noise with respect to amplified entertainment.

25 The relevant provision of the *Commercial and Consumer Act 2003* is section 103. It gives the power to impose the stay as follows:

“103 Stay of operation of decision

- (1) *Subject to the provisions of an empowering Act, the tribunal may make an order staying the operation of a decision in relation to which an application for review has been made to the tribunal.*
- (2) *The tribunal may make the order on the application of a party to the review proceeding or on its own initiative.*
- (3) *In making the order, the tribunal—*
 - (a) *may require any undertaking, including an undertaking as to costs or damages, it considers appropriate; and*
 - (b) *may make provision for the lifting of the order if stated conditions are met.”*

26 The principles to be applied in the application for a stay are that there is a serious question to be tried and the balance of convenience favours a stay. (*KC Parksafe Brisbane Pty Ltd v Cairns City Council* [1997] 1 QdR 497; *Fame and Fever Nightclub v The Chief Executive, Liquor Licensing Division & Anors* [2004] CCT T005-04).

27 I am satisfied that the material established there is a serious question to be tried and I am satisfied that the balance of convenience given the indication of appropriate undertakings will favour the granting of a stay on conditions.

28 Accordingly I order that the decision of the Chief Executive dated 31 October 2008 be partially stayed on conditions. The conditions which are altered as a part of the stay order are Standard Condition 250, Conditions 192-194, and Specific Conditions 30319 and 30318.

29 Accordingly the orders are:

1. The variation of licence condition granted by the Chief Executive on 31 October 2008 in respect of a number of conditions, that being the operation of the specific Condition 30319, is stayed pending the outcome of the review application.
2. The stay is granted on the following conditions:
 - (i) that there be a specific condition that the glass bifold doors leading to the outdoor area must be partially closed at 10:00pm until the close of trading such that the seven doors immediately in front of the bar area are allowed to remain open after 10:00pm until closing time and the remaining doors are to remain closed;
 - (ii) that the noise emanating from the premises including amplified or non amplified noise and patron noise must not exceed 85 dB(C), fast response, when measured from approximately 3 metres from the primary source of the noise;
 - (iii) that there shall be no amplified music above 75 dB(C) past 10:00pm;
 - (iv) the sound limiting device referred to in conditions 193 and 194 be set at 85 dB(C) prior to 10:00pm and 75 dB(C) after 10:00pm;
 - (v) access to the sound limiting device referred to in condition 193 and 194 be permitted to allow it to be reset as set out in condition (iv).

MR P FAVELL
MEMBER
Commercial and Consumer Tribunal