

Northern Territory Licensing Commission

Decision

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| Premises: | Rorkes Drift Bar/Cafe |
| Licensee: | Fugitives Drift Pty Ltd |
| Nominee: | Mr M McNamee |
| Proceeding: | Application for Extension of Premises |
| Heard Before: | Mr John Withnall Ms Annette Milikins Mr Brian Rees |
| Date of Hearing: | 02 and 03 December 2002 |
| Date of Decision: | <i>Ex tempore</i> on 03 December 2002 |
| Appearances: | Mr L Silvester, for Applicant Mr A Liveris for Vicdisc Pty Ltd Mr M Grove for Top End Hotel (ex Transmedia Group P/L) Ms J Kelly for Darwin Central Nominees Pty Ltd |

By written decision handed down on 26 July 2001 the Commission refused an application by licensee Fugitives Drift Pty Ltd to enlarge its licensed premises by (in summary) converting the old Darwin Cinema auditorium into a large upmarket nightclub venue. That decision is publicly available.

On 12 June 2002 the licensee lodged a modified application in respect of the old cinema area, essentially to extend the Rorkes Drift operation as it then was, into the old auditorium area.

Again there were several objections by persons with interests in other liquor licences in the Darwin CBD. The objectors are identified in the following minutes of a pre-hearing conference that took place on 10th and 11th October 2002. These minutes also serve to delineate the nature and history of the application up to that point.

Minutes of Special Meeting And Determinations: Rorkes Drift

Meeting Date: 10 and 11 October 2002

Present:

- Peter R. Allen (Chairman)
- John Withnall
- Shirley McKerrow
- Annette Milikins
- Brian Rees

In attendance by invitation:

- H. Silvester, for Fugitive's Drift Pty Ltd
- N. Aughterson, for Vicdisc Pty Ltd and Top End Hotel (Trans Media Park Stud Pty Ltd)

- P. Barr, for Gaymark Group
- S. Porter, for Gary Coleman and Tony Coleman
- D. McConnel, assisting the Commission

Re Rorkes Drift - Application by Fugitives Drift Pty Ltd to enlarge licensed area

The Commission heard from all the above-listed representatives on the issue of whether the respective objections should be dismissed without a hearing. After also considering the written submissions in that regard, the Commission has made certain consequential determinations as hereinafter appear.

The Commission accepted the common sense submission of Mr McConnel that it first must determine the nature of the current Rorkes Drift application, which Mr Silvester primarily argued should be dealt with as a s.119 application – “material alterations”, such that objections could not be entertained in any event.

The Commission noted that it had already decided at its general meeting on 12/13 June 02 that the application was not a s.119 application, but would nevertheless consider Mr Silvester’s argument on the basis of whether it should revise that decision. It was also noted that at the general meeting on 9 Sept 02 the Commission had re-instated the lapsed in-principle approval for the “Stage 2” expansion upstairs in the old cinema foyer area (to 30 June 03), thus paving the way for Mr Silvester’s submission that the real nature of the current proposal could and should be seen to be a transfer of the upstairs approval to the development now proposed for the old cinema auditorium in lieu of the upstairs foyer.

The Commission determined that it remained unpersuaded that the application was in the nature of a s.119 application. The application involves the almost doubling of the licensed area “footprint”. The Commission accepts as a general principle that apart from the occasional minor adjustment, s.119 should not be relied on as empowering the Commission to approve renovations outside the licensed area. If the licence does not cover an area to be renovated for liquor trading, then the application must be for an in-principle licence for the new area when renovated.

Mr Silvester’s fallback position was essentially twofold; firstly, that a variation of licence is not provided for in the Act other than by way of s.33, but secondly, if the application must be taken to be an application for a fresh licence, then on a proper interpretation of s.48(1A) - and for other reasons touched on below - the objections of Vicdisc, Top End Hotel and the Colemans should not be heard, whether by way of utilising s.49(2)(a) to that end or otherwise.

The Commission reaffirmed its disinclination to utilise s.33 to implement a licensee’s application for a variation of licence except for minor and clearly uncontentious matters. The scale of the expansion of the licensed area is too big a stretch for the s.33 process, which allows for no third party input, no avenue for public scrutiny or remonstrance. Processing an application such as the present one as an application for a fresh licence is considered by the Commission to be preferable in its comparative transparency and provision for public input, in its allowance for the consideration by the Commission of community needs and wishes. The Commission agrees with Mr Aughterson that such an approach must have been intended by the Act, read as a whole, and that a purposive approach leads to the conclusion that applications for a licence must include applications for a variation of licence.

The Commission formally determined:

- to again reject the argument that the application was properly one under s.119;
- to again reject the argument that variations of licence can only be achieved by the Commission’s utilisation of the s.33 procedure;

- to reject the argument that the application is really only a matter of transferring or re-allocating the existing stage 2 in-principle approval (but see *post* in relation to the objections of Vicdisc and Top End Hotel in this context); and
- to reaffirm that the present application is to be dealt with as an application for a licence, such that Part IV of the Act is applicable to the process.

The issue thus became whether the objections could and should be now considered with a view to possible dismissal at this point.

In Mr Silvester's submission an objection that contravenes s.48(1A) is void *ab initio*. The section provides that a contravening objection "shall not be made." Mr McConnel submitted that it is s.49(2) that gives the Commission its choices as to what to do with an objection that has come to it by way of the s.48 process. S.49(2) allows for dismissal without a hearing, ergo at a meeting of the Commission, of an objection ruled to be irrelevant or vexatious or otherwise brought within subsection (a), although Mr McConnel submits it should be acknowledged as "safer" if those objectors whose objections the Commission was minded to dismiss were given the opportunity to show cause against the action proposed to be taken. Objections not dealt with by way of either s.49(2)(a) or (b), in Mr McConnel's submission, must be dealt with by way of (c): they must be heard.

Mr Silvester of course argued for the dismissal of the allegedly "commercial" objections without further ado. In so doing he criticised, inter alia, the Commission's approach to s.48(1A) as allowing control of the industry to be usurped by the money and power of existing licensees.

Mr Aughterson's response on behalf of Vicdisc and Top End Hotel was that s.48(1A) focuses on the objection itself rather than the quality or status of the objector. Objectors who are licensees may express community concerns. Their *motivation* is irrelevant, in Mr Aughterson's submission; the legislation is concerned with whether the objection has credence. Where the words of the objection do not of themselves contravene s. 48(1A), the Commission should not search "in a vacuum" for the meaning or substance of the objection.

Ms Porter referred to previous written decisions of the Commission where it had been only evidence by or on behalf of an objecting licensee that had satisfied the Commission as to the credence of the objection. An objector must be given that evidentiary opportunity, she argued; objections such as those of her clients must go to a hearing in order for their substance to be fairly determined.

In addition to the authorities handed up by counsel during the meeting the Commission also had reference to the recent NT Supreme Court decision of *Malupo v. Minister for Racing, Gaming and Licensing* handed down on 30 August 2002, and to the authorities on procedural fairness therein cited and referred to.

The Commission determined that while it has the power under s.49(2)(a) to dismiss without a hearing an objection determined to be unmaintainable under s.48(1A), the exercise of that power should be flexibly appropriate and adapted to the circumstances of the particular case. The Commission is of the opinion that if in the present case it should form a view at this stage that an objection should be dismissed, the objector should be alerted to that view and be given an opportunity to show cause against such dismissal.

The Commission then considered its present views on the respective objections.

Gaymark Group. Mr Barr persuaded the Commission that this objection should be heard. Although the Commission does not rule at this stage on Mr Silvester's submissions as to the Commission's role and powers in relation to noise emanation from licensed premises, Mr Silvester seemingly accepted that the Gaymark objection is in a different category from those he excoriates, and indicated the likelihood of helpful discussion between his client and this objector.

Gary Coleman. Ms Porter advised at the meeting that this objection had been withdrawn.

Tony Coleman. (Subsequent to the meeting but prior to any decision being formally reached on the standing of the objections, the Commission was advised that this objection too had been withdrawn).

Vicdisc and Top End Hotel. Although the Commission has not accepted for any procedural purposes Mr Silvester's view of the nature of the Rorkes Drift application being a transfer downstairs of the existing upstairs approval, nevertheless there is strength in Mr Silvester's argument that the existence of the Stage 2 approval is relevant to most of the grounds of these objections.

The additional patron capacity represented by the new proposal is little different from the additional capacity that the approved Stage 2 would have provided. In the hearing that resulted in the Commission's approval of Stage 2 and its additional capacity, the Commission heard at great length from these two objectors on the issue of community needs and wishes for any additional licensed capacity in Mitchell Street. What is now proposed by Rorkes Drift involves only minimal additional capacity over and above that which the Commission approved after full consideration of the wealth of material produced and adduced by these objectors at the previous hearing.

While the new downstairs proposal includes an open area which can be seen by the Commission to have the potential to give rise to different noise issues, in terms of *increase of capacity* and its dependent concerns of antisocial behaviour and lack of parking the Commission sees no *fresh* issues being raised by Vicdisc or Top End Hotel which can be grounded in any non-competitive role of these two licensees. The Commission is of the present view that, apart from the noise issue, these objections this time around are no more than a reiteration of the resistance of Vicdisc and Top End Hotel which has already been dealt with by the Commission in approving the expansion of Rorkes Drift's capacity to about the level now proposed. The shifting of that additional capacity downstairs has little bearing on the basis of these objections.

Nor does the Commission see the noise issue as a ground of objection maintainable by Vicdisc or the Top End Hotel. Unlike the Darwin Central Hotel, neither the Top End Hotel nor any of the Vicdisc venues can themselves be affected by any noise emanating from the expanded Rorkes Drift. The noise objections can therefore only be on the basis of "community issues". For such community-oriented objections to be maintainable by objectors who are competing licensees the Commission needs to discern an appropriate degree of altruism on the part of those licensees beyond their protection of their patch from increased competition. The Commission is unable to infer any such altruism when it comes to noise-based objections by competing licensees whose venues could not be affected by any apprehended noise from the venue under objection. In all the circumstances, the Commission cannot see the relevance of a noise-based objection on the part of Vicdisc and Top End Hotel.

(The Commission noted in passing that the Top End Hotel had raised a noise issue as a ground of its objection to the previous Rorkes Drift expansion application, but at the hearing elected not to proceed with that ground).

The Commission has formed the view that the objections of Vicdisc and Top End Hotel should be dismissed as irrelevant to the particular application.

It follows that these objectors shall have an opportunity to show cause against such dismissal.

However, the Commission is reluctant to see the hearing of the application delayed by an intervening show-cause process.

Reiterating the Commission's acceptance of the need for appropriate flexibility in its focus on procedural fairness, the Commission proposes to set a date for a hearing of the application at which the respective objections will have different standings, as follows:

- Gaymark will be a party to the hearing, if still an objector at that time, but will be limited in its evidence and cross-examination opportunities to noise issues affecting the Darwin Central Hotel. Mr Silvester will be at liberty to further seek the dismissal of Gaymark's objection at any time during the hearing;
- Vicdisc and Top End Hotel are to show cause *at the outset* of the hearing against the dismissal of their objections at that point and their consequential exclusion from the rest of the hearing. Mr Silvester will be allowed the opportunity to test the case they present on that issue. A decision on that issue will then be made by the Commission at that time before following straight on with the substantive hearing of the application. Vicdisc and Top End Hotel will remain parties to the application at least until such decision is made.

It is appreciated that such a process might be argued to put Vicdisc and Top End hotel at some disadvantage, in that they will go into the hearing not knowing whether they will need to be fully prepared to contest the application, as distinct from being prepared to argue their right to do so. On reflection, however, their situation in that regard will be little different from that which it otherwise would have been in any event. Without the Commission's requirement to show cause, they would still have had to prepare for both the substantive hearing and for an expected vigorous attack by Mr Silvester on their standing in that hearing.

What must be highlighted is the shift in onus as between applicant and objectors Vicdisc and Top End Hotel on the issue of dismissal of their objections. Now as a threshold issue at the hearing, the onus is squarely on Vicdisc and Top End Hotel to dissuade the Commission from its present intention to dismiss the objections *at that time* and thus relieve the applicant from any need to deal with their substance in the course of the case for the application.

The parties are at liberty to approach the Chairman for clarification of any aspect of the present position stemming from the foregoing determinations.

Peter R Allen
Chairman

When the matter subsequently came on for hearing on 2nd December 2002, the new owner of the Top End Hotel advised through counsel that it was not interested in pursuing the previous owner's objection, and Vicdisc through counsel also announced the withdrawal of its objection.

The application proceeded uncontested except for the noise issue, with the Gaymark Group represented by counsel Judith Kelly.

At the conclusion of expert evidence adduced by Ms Kelly, the parties advised the Commission that agreement had been reached as to a noise condition to be included in licence conditions should the application be approved. The condition took the form of a schedule of different emission ceilings for different times of different days.

Upon the Commission indicating that it approved the concept and detail of the volunteered condition, and would insert it into the applicant's licence in the event that the application should be approved, Ms Kelly withdrew from the hearing and the matter proceeded on a then totally uncontested basis.

At the conclusion of the hearing the Presiding Member delivered an *ex tempore* decision which was recorded and transcribed as follows. Some minor editing has occurred where the Presiding Member has detected small gaps or minor errors in the transcription:

Mr Withnall: Just to revert for a moment Mr Silvester, to the topic we were discussing a few minutes ago, we reiterate that we had already decided this is an application totally different from the earlier one, we agree on that. That's the earlier one that was declined for reasons which were pertinent to that application at that time.

At this stage of this hearing, not only can we see absolutely no reason not to grant this application but to be more positive, we are in fact actually persuaded to do so and we do approve it. You will get that approval in writing, as an approval in principal, when the agreed conditions are re-engrossed. A new reprint licence will issue when the premises are ready to trade in their new guise.

We haven't discussed the amount of time you will need for that approval to be current. Now that has been a sore issue on the last occasion. Is nine months enough?

Mr Silvester: My client has estimated to me that, all being well, they will commence trading by the 1st of August, prudently can we have to the 1st of September to do so?

Mr Withnall: Yes, we are not bothered by the odd month here or there; it is when we get up to years that we get edgy.

Mr Rees: It's obviously a very big job.

Mr Silvester: Yes it is.

Mr Withnall: So the request is that the approval be valid until the end of September.

Mr Silvester: Well in those terms why not make it the 31st December 2003.

Mr Withnall: That's only 13 months, isn't it.

Mr Silvester: I know that it is going to go ahead very quickly.

Mr Withnall: No, that's reasonable. We grant the approval. It is to remain alive until 31 December 2003.

Mr Silvester: Thank you Mr Chairman.

Mr Withnall: The new licence will have special conditions as to remaining true to the concept of the application.

Mr Silvester: Yes

Mr Withnall: Which your client indicated wouldn't particularly bother him. And I should perhaps formally record that it will contain the noise condition as agreed. Could you Mr Minahan, sooner rather than later, so these things don't get lost, give us the clean print of the agreed conditions?

Mr Silvester: Yes they have to be engrossed, executed by the parties under seal and that will be available in the near future.

Mr Withnall: All right. Well, that concludes this part of the matter.

Mr Silvester: Thanks Mr Chairman.

Mr Withnall: Good Luck Mr McNamee.

Mr McNamee: Thank you very much for doing that.

Mr Withnall: It stands concluded.



John Withnall
Presiding Member

Date of decision: 03 Dec 2002