# YOUNG STREET (NO 172) v BARNABIT PTY LTD and ORS No. SCGRG 95/2181 Judgment No. 5541 Number of pages - 14 Liquor law [1996] SASC 5541 (3 April 1996)

COURT IN THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA DOYLE CJ(1), MILLHOUSE(2) AND WILLIAMS(3) JJ

CWDS
Liquor law - licensing - application for new licence - Hearing of Application - powers of Licensing Authority - exercise of discretion under Liquor Licensing Act-competing applications for a hotel licence - considerations of public interest-no basis to remit matter for rehearing. Liquor Licensing Act 1985 s59, referred to. Sailmaster Tavern v Nemo (20 October 1995 Judgment No.5266 unrep.), applied. Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205; Pearce v Liquor Licensing Commission (1987-88)47 SASR 22, considered. (per Doyle CJ) Tonsley Hotel v Whelan (1982) 31 SASR 321; Waiata v Lane (1985) 39 SASR 290; Stewart v Liquor Licensing Commission (1987) 137 LSJS 379; Lincoln Bottle Shop v Hamden Hotel (No. 2) (1981) 28 SASR 458, applied.

HRNG ADELAIDE, 4 March 1996 #DATE 3:4:1996 #ADD 20:5:1996

Counsel for appellant: Mr B Beazley with him Mr G Griffin

Solicitors for appellant: Phillips Fox

Counsel for respondent: Mr S Walsh QC with him Mr J Firth

Solicitors for respondent: Kelly and Co

ORDER
Appeal allowed.

JUDGE1 DOYLE CJ This is an appeal against a decision of the Licensing Court.

2. The Court had before it two applications for the grant of an hotel licence. The sites, the subject of the two applications, were not far apart, and were both within the one locality. The locality is part of the general area of Seaford, a suburban area some distance south of Adelaide and on the coast.

3. Each application attracted certain objectors. Each applicant also objected to the other's application. Both applications were heard together by the Licensing Court.

4. By its decision the Licensing Court refused the appellant's application and granted the respondents' application. The appellant claims that those decisions should be reversed. The appellant claims that its application should have been granted and that the respondent's application should have been refused. Alternatively, it claims an order that both decisions be set aside and that the matter be remitted for further

consideration by the Licensing Court.

5. The appeal relates to the proper exercise of the very wide discretion granted to the Licensing Court by section 59(1) of the Liquor Licensing Act 1985 ("the Act") which provides:

> "(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, that the licensing authority considers sufficient."

6. The circumstances may be stated quite briefly. On the hearing of the appeal there was no challenge to the factual findings made by the Court. The Judge found that the evidence established a need for the grant of an hotel licence in the locality. There were other licensed premises in the locality, but they did not meet the need which had been established. The only other licensed premises in the locality referred to in evidence were two retail bottle shops, each the subject of a retail liquor merchant's licence. There were no hotels within the locality as found by His Honour. The nearest hotel was at Port Noarlunga, some four kilometres from the proposed sites and, as His Honour found, in a different locality.

7. But His Honour found that only one licence could properly be granted. He found that the grant of two licences would amount to an "unacceptable proliferation of licences" in the locality. That finding was not challenged.

8. It was obvious, then, that a choice had to be made, and it was the grounds upon which and the manner in which this choice was to be made which were the subject of the appeal.

9. As I have already mentioned, the two sites were quite close to each other. The appellant's was on open land. The respondent's, a short distance to the north, was in the corner of a car park which was part of the Seaford Shopping Centre, a district shopping centre servicing the locality and, no doubt, a wider area.

10. His Honour found that both proposed premises were "of good contemporary standard", and could not be subjected to any particular criticism. His Honour noted that the respondent had more expertise in the hotel industry and might have a slightly more convenient site (being in the district shopping centre) but clearly did not regard these matters of being of great significance. His Honour made a clear finding, which he said was not made "on a marginal basis", that most people in the locality wanted the full range of hotel services with the exception of accommodation. The appellant's proposal envisaged the provision of the full range of hotel services, other than accommodation, but neither appellant nor respondent proposed to offer accommodation. On the other hand, the respondent's proposal did not include a front bar or beer garden (both of which were features which His Honour found the relevant public wanted) and did not have a drive-in bottle department. The respondent proposed to make only limited sales of bottled liquor to be taken away from the premises, such liquor being sold "over the counter" inside the hotel itself.

11. On that basis His Honour found, and the respondent did not challenge the finding, that the appellant's proposal "... will meet needs rather better than the Seaside Inn"

(the name of the respondent's premises). In terms of considering who would provide what the public wanted, His Honour came "... down on the side of the Seaford Rise Tavern (the name of the appellant's premises) as having the ability to provide full traditional hotel services". In the respects indicated the respondent's proposal would not cater for the full needs of the community "... and is thus unable to meet the entire needs of a significant and substantial section of the community under discussion."

12. His Honour then turned to consider the impact of the grant of a licence upon objectors representing other licensed premises. He put to one side the Port Noarlunga Hotel, because he was satisfied that the public interest did not require his intervention because any impact on the profitability and hence the services provided would be quite minor.

13. I have already mentioned that there were two retail liquor merchant's licences in the locality. One of them was in the same shopping centre as the proposed site for the respondent's premises. The other was about 2.8 kilometres away. Both of these businesses were held by the same company. As to the one which was further away, His Honour found that the grant of the appellant's licence would have no significant effect on its profitability and, accordingly, he said "I could thus not be reasonably called upon to protect this business in the public interest".

14. The picture was different when he turned to consider Seaford Cellars, the liquor store situate in the shopping centre. He found that the grant of the appellant's proposal would have a very significant impact on the profitability of that licence, and that was because of the impact of take away liquor sales from the appellant's premises. In addition he took into account the impact of some further loss of sales likely to result from improved bottle facilities at the Port Noarlunga Hotel. His Honour concluded that the grant of the applicant's proposal would result in the Seaford Cellars becoming unprofitable and the licence being "lost" to the public. His Honour made a clear finding to that effect, and on appeal there was no attempt to challenge that factual finding.

15. Although His Honour did not spell this out, it was implicit in his approach that the respondent's proposal would have no significant impact on the licence at Seaford Cellars because bottle sales were such a limited part of its proposed trade.

16. His Honour was therefore in the position that the grant of the appellant's proposal would result, on his findings, in the cessation, at some unspecified time, of the licence in respect of the premises known as Seaford Cellars. This was a licence which he found was necessary to meet the needs of the public in the locality. Once again, although His Honour did not spell it out, there is no reason to doubt that His Honour here had in mind the fact that Seaford Cellars was situate in a large shopping centre, a centre likely to expand in the future and to continue to service the locality, and that he also had in mind the well known desire of a significant portion of the population to be able to purchase liquor to take away from licensed premises which are not part of an hotel.

17. His Honour was satisfied that the loss of this licence would not be in the public interest. He so found expressly.

18. His Honour went on to refuse the application by the appellant, and to grant the application by the respondents. He did so despite his earlier recognition that the appellant's proposal met all of the public needs in the locality. His reason for doing this was expressed as follows: "By granting this application, whilst it will not meet every need, a balance in the industry is held ensuring that very nearly most liquor facilities are available to the public in this growing area."

19. The appellant criticised His Honour's conclusion and criticised his approach. There were two main points to the criticism. The first criticism was that His Honour posed for himself, but never answered, the question of what it would be appropriate to do if the only choice was between granting the appellant's application and refusing it. The second criticism was that His Honour confused the public interest in the availability of the premises at which liquor could be obtained and the profitability of particular premises or businesses.

20. In my opinion the first criticism fails. The fact of the matter is that His Honour had before him two applications, and it was not necessary for him to decide what he would have done if the only application before him had been that of the appellant. It was not necessary for him to decide what he would have done in that situation. Moreover, in my opinion, the fact that in that situation he might have chosen to grant the appellant's application does not mean that his decision to take a middle course, when there was a middle course available, was an incorrect decision.

21. In my opinion the second criticism also fails. It is true that on a number of occasions in the course of his reasons His Honour referred to the profitability of various licensed premises. But to my mind it is quite clear that in doing so His Honour was referring to profitability only as a matter of intermediate relevance. Its relevance is that if premises cease to be profitable then they may cease to provide facilities of an adequate standard or, at the worst, cease to exist altogether. Having read his reasons as a whole I can see no basis for a suggestion that His Honour thought that it was his function to preserve profitability as such. In my opinion there is no reason to think that His Honour overlooked the fact that the critical issue was the public interest.

22. Accordingly I would reject these criticism of His Honour's reasoning.

23. In so concluding I have not found it necessary to refer to the numerous decisions of this Court dealing with the width of the discretion confided to the Licensing Court or with its role as an expert Tribunal. Section 59(1), which I have already set out, makes it quite clear that the discretion which the Court has is extremely wide. Time after time this Court has said that an important matter in the exercise of the discretion is the achievement of the objects of the Act, one of them being the provision of liquor facilities which meet the public need in a way which is most conducive to the public welfare. The Court has also referred to the maintenance of a suitable balance between the various types of liquor facility available in a locality. The Court has also made it plain that, when considering the public interest, it is relevant to consider whether the grant of an application would put established licensees out of business, or cause them serious loss, with a consequential adverse affect upon the public interest. I refer to the decisions of this Court in Tonsley Hotel v Whelan (1982) 31 SASR 321 esp at 326, Waiata v Lane

(1985) 39 SASR 290 at 294-295 and Stewart v Liquor Licensing Commission (1987) 137 LSJS 379 at 379-380, 382 and 386. I refer to these decisions simply as convenient statements of the relevant principles. There are many other decisions to which I could refer.

24. Nor do I find it necessary, as I have already said, to refer to decisions of this Court which emphasise that appropriate allowance must be made for the knowledge and expertise of a specialist Tribunal such as the Licensing Court, which is in a special position because of its ongoing supervision of liquor licensees.

25. In my opinion His Honour was entitled to conclude that a middle course was the appropriate course to follow, and that is what he did. He was entitled to so conclude even though, as the appellant rightly pointed out, His Honour's decision might have the effect of deferring even further into the future the prospect of a licensee in the locality providing the full range of hotel facilities. The decision might have that effect simply because the grant of yet another licence in the locality might make it all the more difficult to justify the grant of a full hotel licence, and provide yet further material in support of an argument that the discretion against a grant should be exercised to protect the increased number of existing licensees. To my mind this is a matter which is very much within the specialist knowledge and judgment of the Licensing Court. His Honour was clearly aware of the point. He alluded, at the very end of his judgment, to the fact that whether full facilities could be provided was a matter for the future. Although he did not elaborate, there is no reason to think that he was unaware of this particular problem, and in my opinion, there is no basis for this Court to interfere with his decision in that respect.

26. But there is a further point to be considered. The appellant complained that His Honour did not give the appellant the opportunity to vary its proposal to exclude a drive-in bottle department, and thereby, by significantly reducing take away liquor sales, remove the basis for the exercise of His Honour's discretion against the appellant. The appellant pointed out that in his evidence one of the directors and shareholders of the company which held the two retail liquor merchant's licences in the locality gave evidence that if the applicant's proposal did not include "the drive through and the bottle shop" he would not be concerned about it. Hence, the appellant argued, there was an approach which would have better served the public interest. That approach would have been to allow the appellant to vary its proposal. That would mean that the public would still get the facilities which the appellant would provide and the respondent would not provide - a front bar and beer garden - and the public interest in the continuation of the licence in respect of Seaford Cellars would not be jeopardised.

27. There is no indication in the judgment that His Honour considered this alternative. On the other hand, in fairness to His Honour, it has to be said that the appellant did not specifically put forward the alternative. A witness for the appellant did say in evidence that the appellant's business would be viable without a drive-in bottle department, and it is reasonable to infer that the purpose of that evidence was to lay the basis for an alternative proposal, but the matter was taken no further in evidence. Apart from a glancing reference to the need to consider some other minor changes to the proposal, the appellant's witnesses did not develop an alternative proposal in any detail. During the closing submissions counsel for the appellant made a brief

reference to the Court's power to impose a condition prohibiting take away sales. That is a different issue. Counsel did not put any submission relating to an alternative proposal.

28. Nevertheless, the appellant argued that it was incumbent upon His Honour to consider this alternative, and that because His Honour had failed to do so the decisions made should be set aside and the matter should be remitted to the Licensing Court for further consideration.

29. In answer to this the respondent made a number of points. The first was that upon which I have already touched - that at the hearing the appellant had not been forthcoming with an alternative proposal, and that it was not incumbent upon His Honour to encourage the appellant to do so or to call upon it to do so. The respondent also made the point that, had His Honour considered the matter, he might well have taken the view that the alternative was not appropriate because of the complications which might arise and because of delays which it might cause.

30. The answer to the last point, in my opinion, is that if His Honour took the view that for any of these reasons the matter should be decided on the proposals as they stood so be it, but the complaint is that His Honour does not appear to have considered the possibility of varied proposals. The respondent made the further point that the respondent also should be given the opportunity to consider modifying its proposal, and it may well be that that is correct, even though that would give rise to some complications.

31. The respondent also argued that this Court had set its face against the imposition of conditions upon the grant of an hotel licence. In my opinion that submission is not to the point. The Court has indicated that generally conditions should not be imposed restricting the kinds of liquor which could be sold: Nepeor v Liquor Licensing Commissioner (1987) 46 SASR 205 at 221. But that is not suggested here. The Court has also made it clear that it is not a proper exercise of the discretion to impose conditions which in effect create either a new category of licence or transform a licence appropriate to a particular class of licensed premised into a licence not appropriate to that class of licensed premises: Pierce v Liquor Licensing Commission (1987) 47 SASR 22. But, once again, that is not in issue here. The respondent's own proposal did not include a drive-in bottle department. It cannot be said that the grant of an hotel licence in respect of premises not providing a drive-in bottle department is an inappropriate exercise of the Court's powers. Many hotels do not provide such a facility, especially old hotels.

32. An example of how far the Licensing Court and this Court have been prepared to go on occasions is provided by Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd and Ors (No 2) (1981) 28 SASR 458. In that case the grant of a retail liquor merchant's licence was conditioned by a limitation preventing the sale of beer or spirits. The circumstances in that case were exceptional, but the case illustrates the point that the discretion is a wide one and does enable the Court to mould its grant to accommodate the circumstances of the case and the requirements of the public interest.

33. In my opinion, there is no doubt that the Licensing Court had power to indicate to

the appellant that it would grant an application in respect of premises which did not provide a drive-in bottle department but would refuse an application in respect of premises which did provide a drive-in bottle department.

34. The real question in the present case is whether the Licensing Court should have addressed that possibility and allowed the parties to make submissions on it. On the one hand it could be said that it was for the parties to put their respective cases forward, and if the appellant did not put forward such an alternative and develop a submission in relation to it, then it was not incumbent upon the Judge to consider it. This is a persuasive submission, and I am conscious of the need to avoid creating a situation in the Licensing Court in which the parties can hold back and then later complain that the Judge did not explore something with them.

35. On the other hand, this was surely an exceptional case. The Court was hearing rival applications for sites in close proximity. The Court found a need for the grant of a licence with a full range of facilities. The only obstacle to the grant was the public interest in the maintenance of existing liquor outlets in the locality. The course which the Court followed meant that the public was deprived of facilities which the appellant was willing and able to provide, and it seems that there may have been readily available an approach under which some of those facilities (the front bar and beer garden) could be provided to the public.

36. The final decision being made by the Judge was one based entirely on the public interest, being an exercise of the wide discretion which he had under the Act. It seems to me that under those unusual circumstances, notwithstanding the fact that the present appellant is open to criticism for not being more forthcoming before the Licensing Court, it was nevertheless incumbent upon the Licensing Court Judge to consider the public interest from all relevant aspects. In my opinion a complete consideration of the public interest required him to consider whether the public interest would be better served by the grant of a licence to the appellant for premises which did not include a drive-in bottle department.

37. It follows that, in my opinion, the discretion of the Judge miscarried because he did not consider this possibility. In my opinion the decision refusing the appellant's application should be set aside as should the decision granting the respondent's application. Such a decision by this Court will enable the Licensing Court to consider further what the public interest in the locality requires.

38. I wish to make it clear that it is not my purpose to imply that the decision of the Licensing Court should be one in favour of the appellant's proposal but without a drive-in bottle department. The decision to be made is a decision in the public interest taking into account all matters considered relevant by the Licensing Court Judge. There might be good reasons why the Judge might still adhere to his original decision. My decision is simply that an important aspect of the public interest has not been considered by the Judge in arriving at the decision which he made, and it is for that reason that the decisions made should be set aside and the matter further considered by the Licensing Court.

39. Accordingly, as I have indicated, I would allow the appeal, set aside the refusal of the appellant's application and the grant of the respondent's application and direct that

each application be further considered by the Licensing Court in the light of these reasons.

JUDGE2 MILLHOUSE J Whenever I have the misfortune to have to consider the Liquor Licensing Act I am struck by its futility and artificiality. It has happened again in this appeal. Counsel talked, in justification of facilities to be provided, of families walking in thongs up from Moana Beach to use the facilities of one or other of these proposed hotels. How unreal] It is a pretty long walk - more than half a kilometre I should say - and up a steep hill] Imagine that on a hot summer's day] If the family did make it they'd all certainly need a good stiff drink when they got there] That such submissions should have to be put to a court trivializes the legal system.

2. I know the local Seaford area but have not the slightest personal interest in whether any licence be granted or, if one be granted, which one. I have said what I have said merely to emphasise my view that the present licensing system in this State is absurd, expensive and an anachronism. It would be better if the whole Act were repealed and competition left to decide where and what kind of premises for selling alcohol there should be, rather than the decision being made in legal proceedings by a judge, even a specialist and however expert and experienced he may be. At most, perhaps there should be some supervisory authority to make sure that premises are clean and orderly.

3. Having got that off my chest I come to this appeal. The Chief Justice has set out the facts sufficiently and I need not repeat them.

4. The learned licensing court judge thought there were,
> "..... two major considerations in this case. A crucial one being 'who should 'qualify' for a grant of licence?' No less crucial - 'what affect (sic) will the grant of the licence have upon other licensed premises in and about the locality?'"

5. He went on to consider each separately. As to the first he was with the appellant:-
> "I thus come down on the side of the Seaford Rise Tavern as having the ability to provide full traditional hotel services. My impression is that these services will be of good quality and will meet the needs of the subject population. I do not make this finding on a marginal basis. I think the Seaside Inn project lacks a drive in bottle outlet for those seeking liquor outside retail bottleshop times and lacks a good front bar for those looking for cheaper prices and a more relaxed atmosphere. They should, in my opinion, have that ability. The Seaside Inn will not cater for it and is thus unable to meet the entire needs of a significant and substantial section of the community under discussion."

6. He then tackled, "the more difficult question - the second, what will be the affect (sic) on other licensed premises particularly the Port Noarlunga Hotel and the two bottleshops, Seaford Cellars and Cliff St Cellars?"

7. His conclusion was that because the appellant had proposed including drive-in facilities and the respondent had not, that granting the application of the respondent would mean the probable survival of the bottle-shop, Seaford Cellars: that was in the public interest. He therefore granted the license to the respondent and refused the appellant.

8. Under s59(1) of the Act, "... the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers sufficient."

9. It is a grave thing for the Full Court to interfere with the exercise by the licensing court judge of so wide and unfettered a discretion. Yet I think in this case we should.

10. Judge Kelly considered the impact on Seaford Cellars of the proposed hotel of the appellant and of the rejuvenated Pt Noarlunga Hotel. He said:-

> "... very clearly the public interest is involved because this business with relatively small borrowing would become quite heavily unprofitable and be forced, whoever was its operator, to close its doors. The public interest would be well and truly there and I would be reasonably called upon, in the exercise of my discretion, to prevent the inroads of this new hotel upon that business. .....
>
> The end result is simply that this bottleshop, whoever might 'run it', becomes quite unprofitable and will be 'lost' to the public. That is certainly not in the public interest."

11. The learned judge then turned to what, apparently, reading his reasons, he regarded as the only alternative:-

> "If there were no alternative my task would be even more difficult i.e. balancing the clear need for full hotel facilities against the need for a retail bottle outlet. But there is an alternative in the form of the other applicant the Seaside Inn."

12. In doing so I think Judge Kelly was in error. There is another alternative which he seems to have overlooked. The Chief Justice raised it with counsel during argument - grant the application of the appellant without the drive-in bottle department.

13. The idea was just touched on during the Licensing Court hearing. For example, a witness, Mr Colin McKee, had been asked whether the "premises (would be) viable without the need for a drive-in bottle department?" to which he replied, "Yes, they would be, yes."

14. It doesn't seem to have been taken much further. The learned judge does not mention it in his Reasons: rather from the passage last quoted he seems to have overlooked it. Yet it certainly is another alternative.

15. The idea was put to Mr Stephen Walsh QC for the respondents. With respect to

Mr Walsh I found his rebuttal of it unconvincing. If the public interest is the paramount consideration and if the public interest would best be served by the appellant having the licence but without the drive-in sales, so as to preserve the business of Seaford Cellars as well, then I think that the learned judge should at least consider the idea, whatever may be any procedural objection.

16. In short, in not considering this idea I think the learned judge's discretion miscarried. The application should be remitted to the Licensing Court for the learned judge to consider whether or not to grant the application of the appellant provided the hotel did not have a drive-in bottle department and then to come to a fresh conclusion.

17. The appeal should be allowed for that purpose.

JUDGE3 WILLIAMS J I differ from the opinion of the majority in only one respect. I am not persuaded that there are grounds upon which this Court should set aside the decision of the Licensing Court which is the subject of this appeal.

2. A very experienced Licensing Court Judge identified the various factors which he considered to be relevant with respect to two competing applications for hotel licences in the Seaford locality and the objections thereto. He then balanced the various aspects of the public interest in the exercise of the wide discretion conferred by the Liquor Licensing Act.

3. Having on the evidence made the assessment that only one licence should be granted, His Honour then considered the merits of the applications. The learned Licensing Court Judge decided that the appellant's proposal for the Seaford Rise Tavern (which included a significant bottle outlet) would have an effect upon a neighbouring bottle shop which would be contrary to the public interest; the court was entitled to have regard to the effect of undue competition and economic waste as one aspect of the public interest. The Licensing Court Judge eventually preferred the application which the present Respondent Barnabit put forward for the Seaside Inn, the plans for which did not include a drive-in bottle outlet. The decision of the Licensing Court was that the proposed Seaside Inn without drive-in bottle shop, front bar or beer garden was to be preferred to the proposed Seaford Rise Tavern which provided all these last mentioned facilities. The court's decision was made against the background of the economic conditions prevailing in a "growing area" (as the court described it).

4. Whilst it was open to the Licensing Court Judge (acting on his own initiative) to have investigated the possibility of modifying the plans for the Seaford Rise Tavern so as to exclude the drive in bottle outlet, I do not consider that he was obliged so to do. I can see no error in principle in the way in which the Licensing Court Judge conducted the proceedings and reached his conclusion. Indeed, I can see good reason why a Licensing Court Judge might be reluctant to suggest to a party an alternative method of presenting its application and conducting business - particularly if such a change were perceived as having a significant effect upon the projected accounts, the method of operation (including the marketing strategy), staffing levels, the future planning of an hotel and its architectural layout.

5. In Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205, the

Supreme Court quashed the decision of a Licensing authority on the ground that the principles of natural justice had not been observed. In the present case I have not been able to discern any principle which similarly might provide the basis for remitting the matter for further hearing. People of business (with the assistance of experienced counsel) have submitted detailed applications, presented their evidence and made their submissions in full knowledge of the issues; that fact weighs heavily with me.

6. The procedures of a Licensing Court hearing (particularly where there are multiple parties and interests) must be moulded in order to achieve personal justice between those directly involved - whether as applicant or objector. The preservation of this element of justice may sometimes require that a party be not permitted arbitrarily to invoke change in the procedural ground rules so as to obtain a supplementary advantage. I consider that in the present case considerations of this nature - which themselves have a public interest component - would have entitled His Honour, in the course of his deliberations, to dismiss from his mind the possibility of a late amendment; I do not consider that there was a need to justify such decision by reasons in this case.

7. Mr McKee, a director of the appellant company, was cross-examined in the Licensing hearing as to the viability of the appellant's project without its drive-in facility. Mr McKee acknowledged circumstances in which an increase in poker machines in terms of his proposal, from thirty to forty machines, would be financially beneficial. In the same context, he indicated that these adjustments could be made by increasing the size of the gaming parlour to accommodate forty machines at the expense of the front bar which, in concept, was of generous proportions. Mr McKee acknowledged that in the absence of a takeaway bottle outlet the viability of his company's project was dependent upon gaming machines.

8. This material may be considered alongside the address of the appellant's counsel before the Licensing Court; relevantly, those remarks were paraphrased on behalf of the appellant during the hearing of this appeal as follows:-

> "... if the issue of takeaway liquor (be) potentially fatal
> to (the appellant's) case, then the drive-in could be
> deleted."

9. At this point, therefore the appellant can be seen as being on notice of a problem with its application which it might wish to address in light of the state of Mr McKee's evidence.

10. Bearing in mind the perceived financial effect of a drive-in hotel facility upon the neighbouring bottle shop, I am led to the conclusion that the significance of the hotel drive-in service as part of the plan should not be under- estimated in terms of all the factors which I have enumerated - from the financial projections to the architectural arrangements. The abandonment of the drive-in facility would not be inconsequential in terms of the original proposal. It is not surprising to me that the appellant did not seek, as part of its case, to make a modification to its formal proposal; upon my reading of the evidence, such a course would have inevitably thrown up the problems associated with the reopening of a hearing involving multiple interests. I can see why the appellant would be slow to reconstruct its case but I do not consider that it can improve its position by seeking to transfer to the court a responsibility for issuing an

invitation to modify the Seaford Rise proposal. On this appeal, the appellant submitted that the Licensing Court should have "nailed its colours to the mast on a very important topic which directly affects the public interest ...". I disagree. In my opinion, the learned Licensing Court Judge was entitled to assess the competing business proposals as presented without offering a party the opportunity to put forward something which was substantially different from that which was contained in its original application.

11. I recognise that even in cases where there are formal pleadings, it is sometimes necessary to allow late amendments, and occasionally to do so even after final addresses, (for example, in order to bring the pleadings into line with the findings of fact). A sense of fairness demands this and a system of justice should be able to accommodate such temporary inconvenience in the interests of achieving ultimate justice in the case. However, there are some cases where fairness - either to the individual litigant or to the community generally - demands that the parties be not allowed to stray from the position which they have originally taken and maintained throughout the hearing of evidence; in my opinion this case falls into this lastmentioned category even although there are no formal pleadings. The cost of achieving justice is not inconsiderable; in my opinion there are policy grounds for imposing on parties a reasonable discipline in the presentation of their cases.

12. I adopt the language of Perry J in expressing the reasons of the Full Court of this Court in Sailmaster Tavern v Nemo (20 October 1995 - Judgment No.S5266) at 9-10:

> "It will sometimes be the case that in granting an hotel licence, the court will be aware that it will not be adequate to answer every aspect of the demonstrated need within the locality with respect to which it is issued. But that it will not cater for all of the unmet need within the locality should not prevent the grant of an hotel licence if the need which it will meet is sufficient otherwise to justify the grant."

13. In my view the appellant has no right to expect that it should be given the opportunity to amend its proposal and I do not think that the Licensing Court Judge was required to give reason for not affording such an indulgence. The appellant has not demonstrated to me any reason to interfere with the exercise by the learned Licensing Court Judge of a discretion (expressed in the wide terms of s59 of the Liquor Licensing Act) to issue the certificate in question.

14. Since the hearing of this appeal I have seen an extract from the transcript of the closing addresses of counsel before the Licensing Court. In support of the proposal for Seaford Rise Tavern, counsel made a submission with regard to the position of the bottle shop as it might affect the hotel licence application:

> "...certainly the public cannot be deprived of a full range of facilities because of that. If I am wrong on that and in my respectful submission I am not, but if I am wrong then Your Honour has the power under s52 to impose a condition about not selling take-away or otherwise, and Your Honour is aware that my clients premises will be viable without it ..."

15. Counsel for Barnabit described this submission as a "throwaway line or an afterthought, the possibility of Your Honour granting the application (to the present appellant) with a condition about no take-away ..."

16. In the same context Barnabit's counsel referred to the ratio in Pearce v Liquor Licensing Commission (1987-88) 47 SASR 22 (where the majority expressed the view that a condition prohibiting sale for off premises consumption to be beyond power).

17. His Honour immediately responded: "It is probably a submission made just to annoy you, I think"

18. In my opinion the Licensing Court Judge in the course of debate sufficiently disposed of the submission which had been made to him by the present appellant.

19. I would dismiss the appeal.