

CITATION: *Australian Hotels Association (Tasmanian Branch) v Licensing Board*
[2006] TASSC 19

PARTIES: AUSTRALIAN HOTELS ASSOCIATION
(TASMANIAN BRANCH)
v
LICENSING BOARD

TITLE OF COURT: SUPREME COURT OF TASMANIA

JURISDICTION: ORIGINAL

FILE NO/S: M255/2005

DELIVERED ON: 7 April 2006

DELIVERED AT: Hobart

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JUDGMENT OF: Tennent J

CATCHWORDS:

Liquor Law – Licensing – Application for new licence – Hearing of application – Powers of licensing authority – Review of decision of licensing board - Restriction on grant of licence in connection with the activities of a supermarket.

Judicial Review Act 2000 (Tas).

Liquor Licensing Act 1990 (Tas), s25A.

Acts Interpretation Act 1931 (Tas), ss8A and 8B.

Burswood Management Ltd & Ors v Attorney-General (CTH) & Anor (1990) 94 ALR 220; *Executive Director, Public Health & Anor v Woolworths Ltd & Ors* [2002] WASCA 108, referred to.

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REPRESENTATION:

Counsel:

Applicant: S B McElwaine

Respondent: No appearance

Third Party: L Bryant

Solicitors:

Applicant: S B McElwaine

Respondent: No appearance

Third Party Simmons Wolfhagen

Judgment Number: [2006] TASSC 19

Number of paragraphs: 34

**AUSTRALIAN HOTELS ASSOCIATION (TASMANIAN BRANCH)
v LICENSING BOARD**

REASONS FOR JUDGMENT

**TENNENT J
7 April 2006**

1 This is an application pursuant to the *Judicial Review Act 2000* ("the Review Act") to review a decision of the Licensing Board ("the Board") made 16 August 2005.

2 Ian Tanner, an employee of Woolworths Ltd, made an application to the Board under the *Liquor Licensing Act 1990* ("the Act") on behalf of that company trading as BWS - The Cheaper Liquor Co for an "off-licence" in respect of premises at Kingston Town Shopping Centre at Kingston. The application was granted and it is that decision which is the subject of review.

3 The application has been brought by the Australian Hotels Association (Tasmanian Branch) ("the AHA"). The Board submitted to the jurisdiction of the Court. In practical terms, the argument was between the AHA and the applicant for the licence, who, for the purpose of this decision, I will refer to as the respondent.

4 The grounds of review were as follows:

"(a) The Respondent erred in law in its interpretation of Section 25A of the Liquor Licensing Act 1990;

(b) The Respondent erred in law in its application of Section 25A of the Liquor Licensing Act 1990 to the facts as found by it in the decision;

(c) The Respondent directed the Commissioner for Licensing pursuant to the decision to grant an off licence to Ian Tanner in respect of the premises identified on a plan at the Kingston Town Shopping Centre pursuant to Section 214(1)(a)(i) of the Liquor Licensing Act 1990 when such direction was made contrary to Section 25A of the Liquor Licensing Act 1990; and

(d) The decision was not authorized pursuant to the provisions of the Liquor Licensing Act 1990 in that upon the facts as found by the Licensing Board in the decision the application made to it was for the grant of a liquor licence in connection with the activities of a supermarket contrary to Section 25A of the Liquor Licensing Act 1990."

5 The Act, s25A, provided:

"The Board must not direct the grant of a liquor licence in connection with the activities of a supermarket."

6 The applicant did not dispute findings of fact made by the Board and summarised those relevant as follows:

"• The applicant for the licence, Mr Tanner, is and has been an employee of Woolworths Limited;

• Application was made by Mr Tanner to establish a BWS liquor outlet internally within the Kingston town shopping centre;

- The proprietor of the business will be Woolworths Limited;
- Woolworths Limited is the proprietor of a large number of liquor outlets throughout Australia, which trade under various names;
- BWS is not a legal entity separate from Woolworths Limited;
- Woolworths Limited is the proprietor of a supermarket within the Kingston town shopping centre;
- The applicant was already personally responsible for 220 liquor outlets in Victoria and Tasmania as an employee of Woolworths Limited;
- Woolworths supermarkets and BWS liquor stores have cross marketing and promotional activities which would be employed at the intended BWS liquor store;
- Woolworths supermarkets have a customer loyalty program, which includes the provision of 'shopper docket' and loyalty points, redeemable at any BWS outlet;
- The applicant is the liquor licensing manager for Woolworths Limited and resides in Victoria;
- Woolworths Limited will be the common employer for the supermarket and BWS employees;
- There will be co-promotion of products through advertising and catalogues as between the supermarket and the BWS liquor store;
- Liquor and supermarket goods have been and will be advertised together;
- The financial results of the Woolworths Limited liquor business is reported as part of its supermarket trading activities;
- Customers would be entitled to earn 'frequent shopper' points by purchases from the supermarket, redeemable in purchase in the BWS liquor store and vice versa;
- The lessee of the BWS liquor outlet will be Woolworths Limited which is also the lessee of the supermarket;
- The proposed BWS liquor outlet is to be situate approximately 50 metres from the existing Woolworths supermarket and within the confines of the same shopping centre."

7 The focus of this review was an argument that s25A had been incorrectly interpreted by the Board and that, as a consequence, the section was incorrectly applied to the facts as found.

Interpretation – generally

8 The *Acts Interpretation Act* 1931 ("the Interpretation Act") contains a number of relevant provisions.

9 Section 8A(1) provides:

"(1) In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object."

This applies whether or not the purpose is expressly stated in the legislation. It was agreed there was no express purpose or object stated in the Act.

10 Section 8B permits consideration of extrinsic material in the interpretation of legislation:

- "(a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision."

11 Section 8B(2) provides that in determining whether extrinsic material should be considered and the weight to be given to such material, regard is to be had to the "desirability of a provision being interpreted as having its ordinary meaning".

12 The terms "extrinsic material" and "ordinary meaning" are defined in s8B(3). Extrinsic material for the purpose of this review includes "the speech made to a House of Parliament by a member of the House in moving a motion that the Bill be read a second time". Ordinary meaning is defined as "the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose or object of the Act".

What is the ordinary meaning of s25A?

13 Counsel for the applicant submitted that in the absence of definitions of the words "activities" and "supermarket" in the Act, regard could be had to the *Macquarie Dictionary* definitions which he set out in his submissions. He submitted, having regard to those definitions, that the phrase "activities of a supermarket", in its ordinary meaning, could not be confined to the physical conduct of a supermarket business, but must extend to all the principal and incidental business of a supermarket.

14 As a consequence, the ordinary meaning of the phrase "in connection with the activities of a supermarket" therefore did not confine such activities to the physical conduct of the supermarket, but extended them to all of the principal and incidental business of a supermarket. It was submitted that the Board had concluded that simply because there was a physical separation between the premises of the supermarket and the proposed liquor outlet, the prohibition in s25A did not apply. This, it was submitted, was contrary to the ordinary meaning of the words of the section.

15 Counsel for the respondent submitted that adopting the ordinary meaning of the words in s25A, the section prohibited the Board from directing the grant of a licence where the grant would be "in connection with the activities of a supermarket". He submitted that that phrase limited the scope of the provision and that had Parliament intended to prevent a supermarket operator from applying for a liquor licence, it would have said so. It did not, nor did it indeed seek to leave the scope broad by using the phrase "in connection with a supermarket". Instead, it used the phrase "in connection with the activities of a supermarket". Counsel submitted the "activities" of a supermarket were necessarily narrower in scope than all things connected to its operation such as its corporate structure, corporate identity, location or surroundings. The word "activities" generally spoke of some sort of action or conduct. The Act referred specifically to the activities of a supermarket, not the activities of its customers. The activities of a supermarket were more properly confined to its purchasing, display, packaging and sale of goods to customers and the management of staff at the particular premises.

Purpose of the Act and use of extrinsic material

16 Counsel for the applicant submitted that the phrase "in connection with" was extremely broad and should be read by reference to the context in which it appeared and the purpose of the Act.(see *Burswood Management Ltd & Ors v Attorney-General (CTH) & Anor* (1990) 94 ALR 220). That purpose, he submitted, was obvious from the construction of the legislation and was to control the issue of liquor licences, the conduct of licensed premises and the sale of liquor. In that context, Parliament had prohibited the grant of a licence in connection with the activities of a supermarket. In doing so, Parliament did not expressly provide that prohibition was confined to the physical conduct of a supermarket in conjunction with a liquor outlet.

17 There can be no argument that Parliament did not expressly state that the prohibition in s25A only operated to prevent the sale of liquor *in* supermarkets. Further, counsel for the applicant may very well be right in his characterisation of the purpose of the Act. However, in this case we are dealing with the interpretation of s25A which was introduced by an amending bill in 1995. It is necessary, in those circumstances, to have regard to the purpose for which that amendment was made.

18 Counsel for the applicant submitted that the Board's apparent construction of the section, that it only applied where there was a physical connection between the supermarket and the proposed liquor outlet, was inconsistent with Parliament's intention, as shown in the second reading speeches to Parliament when the amending Bill was introduced. Counsel took the Court to a number of passages which appear in those speeches.

19 The legislation was introduced by the then Minister for Tourism, Mr Peter Hodgman. He said:

"The purpose of this bill is to remove the ability for a liquor licence to be granted to a supermarket. ... As I said in this House on 20 June 1995, the Government's view on the question of liquor in supermarkets has been carefully considered over a long period of time. The Government is strongly opposed to the sale of liquor in supermarkets.

... The bill contains sound policy It removes the prospect of sale of liquor in supermarkets which, in the Government's opinion, is not in the interests of the community and which would certainly erode the business and existing retail outlets for liquor."

20 The Bill was introduced in the climate of an application by Purity Supermarkets for a licence to sell wine in its supermarkets. The Parliamentary debate in both Houses, as evidenced by the speeches referred to by both counsel, focused on the object of preventing the sale of wine in supermarkets like any other grocery items.

21 Section 25A, in its original form, has remained in force without variation since 1995, notwithstanding other legislative changes which have changed the landscape in which liquor is sold to the public.

22 In summary, counsel for the applicant submitted that the prohibition contained in s25A should not focus on premises, but on the activities of the entity. He submitted those extended beyond its location. The Board had erred in law in confining the operation of the section as it did and failing to apply the broader test to the facts before it.

Ground (a)

23 The applicant did not identify in its written application the error in interpretation for which it contended. However, it was apparent from counsel's submissions, both written and oral, that the error contended for was the interpretation placed on s25A by the Board in pars78 and 79 of its decision. There the Board said:

"78 ... That the Board must not direct the grant of liquor licence in connection with the activities of a supermarket is clear. What this phrase means is less than clear. In simple cases there will be no difficulty. If Woolworths applied via a nominee for a licence within the confines of an existing supermarket that would trigger the section of the Act.

79 It is apparent that the Government did not intend to prevent any company that runs a supermarket from gaining a new licence otherwise, it would, absent any constitutional issues, have stated so in s 25A. In any event the Act does not say that. We consider the section was drafted widely in order to prevent causal circumvention of the specific intention. That specific intention being to prevent supermarkets generally from having as a component of their day to day affairs the sale of liquor."

24 Counsel for the applicant submitted the Board, in effect, rewrote the provision using words Parliament did not. He also submitted that the Board's reference in the first sentence to a company holding a licence, which of course one could not, was evidence the Board made an error at the start, causing it to err in its interpretation. It was also submitted that reliance on (and the incorrect citation of) *Executive Director, Public Health & Anor v Woolworths Ltd & Ors* [2002] WASCA 108 led the Board into error because that case dealt with a different issue and was irrelevant.

25 With respect, none of these submissions has any merit. The Board, in those paragraphs, expressed its interpretation of the meaning of s25A. That interpretation was, in my view, clearly open to it. The ordinary meaning of the words of s25A allowed for the construction that the phrase "activities of a supermarket" referred to the day to day physical activities of the supermarket being considered and did not extend to elements which I might describe as further up the chain, such as its corporate structure and overall ownership. Were it to be interpreted as including such things, no supermarket owner could seek a licence at all. There was nothing in the legislation which supported that interpretation.

26 The reference in the first sentence of par79 to a company holding a licence was no more than, at worst, inelegant phrasing, and had no demonstrated adverse effect on the reasoning process whatsoever. As to the third submission, the Board accepted, with the opening words of par82, that the case to which reference was made was not a direct analogy. Again there was no demonstrated adverse effect on the Board's reasoning by reference to that case.

27 The Board is a specialist board with, as was submitted by counsel for the respondent, a background in the type of matters presented to it in this case. It clearly reached a conclusion as to the interpretation of the section and then referred to the balancing of factors it had to undertake, identifying some of those factors in par86.

28 Ground (a) must, in all the circumstances, fail.

Ground (b)

29 This ground is predicated on the Court finding that the Board erred in its interpretation of s25A. I have found it did not. Counsel submitted that the issue of physical separation should not have been given the weight that it was given and that the Board, applying s25A correctly to the facts as found, could not possibly have concluded other than the proposed licence was "in connection with the activities of a supermarket".

30 I accept that the Board could make that finding having regard to its interpretation of s25A. It accepted there were linkages between the existing supermarket and the proposed liquor outlet, but also that there were aspects of separation which it set out. It clearly accepted that the primary focus of the section had been to prevent the sale of alcohol in supermarkets, that "activities" of a supermarket related to the day to day activities of a supermarket as I have already set out and that this application did not come within that parameter. It also accepted that the aspects of physical separation it noted were additional factors to be considered.

31 In my view the Board has correctly applied its interpretation to the facts as found.

32 This ground must also fail.

Grounds (c) and (d)

33 Having regard to the findings already made, these grounds must fail.

Order

34 The application to review is dismissed.