Licensing Board of Tasmania

In the Matter of an Application for
a Variation of Special Liquor Licence, under the
Liquor & Accommodation Act 1990, to permit
sale of Tasmanian Wine for off-sales
(guideline 5.7)

In the matter of an Application by
Kenneth John Davies
relating to premises at
Wellington St, Launceston
known as Davies Grand Central Station.

DECISION OF THE LICENSING BOARD

Hearing: 8th March 2001. Decision: 4th April 2001.

INTRODUCTION

The Applicant applied for a special licence in 2000 to permit sale of liquor in premises at 86-96 Wellington St, Launceston. He sought authority for sale in the restaurant part of the premises to patrons partaking of a meal, and for sale of "Tasmanian wines and beers" for off premises consumption.

The Board directed a licence be granted for the restaurant component and rejected the wines and beers off sales part of the application. A written decision was delivered on the 11th January 2001.

The basis for the refusal of the off licence component was that, on the grounds set out in the *Hong Kong Diner* decision (22nd July 1999) there was no persuasive proposition advanced for extending the historical (and Guideline/policy reinforced) position that beer is not available for off-premises consumption from restaurant premises. As sale of wine and beer was advanced in that application in an intertwined manner, the Board felt bound to reject that component of the application. That was principally for procedural fairness issues. Sale of Tasmanian wine alone for off premises consumption was not part of the application, and the respondents or objectors (of whom there were a number) had not specifically directed their attention to that.

In addition, although unstated, it appears that there was some component of misgiving about extending the off-licence provisions by Board edict, rather than by Guideline review, when there was no overall public policy justification established by the Applicant for so doing. The Off-Licence Guideline (guideline 3) states that the Board will not direct the grant of an off licence unless…'*the premises intended to be used are self contained, in that the sale of liquor will not form part of any other retail business'.*

Clearly the Tas Wines guideline is an exception to the general off licence sales limitation as that former guideline (5.7) requires that it be the intention of the applicant

to sell only Tasmanian wine and '*as an adjunct to the primary purpose of the licensee to be carried on at the licensed premises …relating to provision of hospitality and tourist services or the sale of hospitality or tourist goods on the licensed premises'.*

The Board decision in *Lipscombe Larder, 15th December 2000,* is relevant in dealing with a somewhat analogous situation where a specialist delicatessen, providing additional services, seeks to have authority to sell Tasmanian wines.

ACT & GUIDELINES: POLICY

Section 216 of the Liquor and Accommodation Act 1980 sets out the overall policy to be taken into account by the Board:

Policy to be followed when considering an application for a licence or permit

216 (1) When considering an application for a licence or permit the Commissioner or the Board shall make a decision which, in the opinion of the Commissioner or the Board, will best aid and promote the economic and social growth of Tasmania by encouraging and facilitating the orderly development of the hospitality industry in the State.

(2) While, in coming to that decision, the Commissioner or the Board may have regard to any legitimate interests and concerns of any section of the community the Commissioner or the Board shall have greater regard for the legitimate interests and concerns of the community as a whole.

The relevant Guidelines have been referred to in the Introduction above.

THE APPLICATION

A booklet of written material was provided by the Applicant in support of his application. In addition, the written material supplied at the earlier hearing (when the substantive licence was sought) was also relied upon.

Evidence in support was presented at the hearing on the 8th March 2001 from the Applicant and his partner in the business, Mrs Lynne Davies, and the vigneron at the Rotherhyde winery, Gravely Beach, Mr John Vincent. Submissions were advanced by Counsel, Mr Ian Duncan.

Three procedural issues arose:

First:
Mr Hattie from the Examiner attended as an observer. There was some concern expressed indirectly, after the hearing, at the hearing having been open to the public. There was no mention of this during the hearing. To assist other applicants and potential objectors and witnesses, the Board notes s213 of the Act which states that *hearings may, at the Board's discretion, be held either in public or private*. We can not see any justification to have made the present hearing in private, or specifically to

exclude the press. However, if any party or witness wishes to submit that a particular hearing be in private, then the Board will hear that application and decide on it, in the Board's discretion. Without an application to close a hearing, it should be presumed the hearing will be in public.

The Board's processes are and should be transparent, open to view and (should it be desired) criticism. To do otherwise can create the spectre or perception of bias, when none should come to mind.

The Board has held a closed hearing on one occasion in the last 10 years, when the Commissioner's determination on an individual applicant's fitness to hold a licence was under appeal, and it was felt appropriate to give that individual a right to privacy.

Second;
After the close of the hearing we became aware that some material presented to us by the Applicant had, at the request of the Applicant, not been made available to interested parties when they requested copies of documents from the Commissioner's file. That issue should have been raised at the hearing, and dealt with along appropriate confidentiality procedures, however it was not raised. It is for the Applicant to decide what the Board is to be provided by way of evidence, and procedural fairness dictates, generally, that anything provided to the Board and evidence submitted at the hearing be open and available for the public (whether they wish to support or oppose the application, or stand by struck with inertia). Managing the repercussions of having discovered this material was kept confidential became a sidetrack which has delayed the conclusion of this matter. One objector, the AHA, who had sought to inspect the Commissioner's file before the hearing, was offered the opportunity to have the hearing re-convened to ensure procedural fairness was not in doubt.

Finally, there was expressed some concern at one of the objectors having inspected witness statements held by the Commissioner and then having sought to interview and extract witness statements from those witnesses (submitted for the Applicant). Again, at face value that is entirely proper. There is 'no property in a witness', and if a person wishing to test the evidence of an applicant wishes to seek to interview and discover more information from a person who has submitted a witness statement, that can only assist the process of providing relevant material to the Board. Indeed, it may be of more concern that a person submitting him or herself as a witness is not willing to discuss their witness statement or intended evidence with another interested party, and failure to co-operate may indicate a bias in the witness, lack of helpfulness, and may reduce the weight of the person's evidence. The rule in *Browne v Dunn* may apply.

The Application:

The Board takes account of the written submissions.

We have already determined (January 2001 decision) that the premises are not a supermarket for the purposes of the Act, and direction to grant a licence is not

prohibited.

As in the *Lipscombe Larder* decision, should this application be granted:

"Further as to the general discretion: this decision is not a precedent for every corner shop to have a take away liquor licence for Tasmanian wine. It is a determination that LL is somewhat unique or distinctive as a provider of hospitality and tourist goods and services, which is not replicated in the ordinary corner shop or convenience store situation. Most such shops would not reach the same quality position of provision of such goods and services, such that the guideline would be satisfied."

This statement is equally applicable to the Davies Grand Central Station. Elements of this are:

- Hospitality is the act of being hospitable: in the guideline the Board will look favourably on an application where sale of Tasmanian wine will be as an adjunct to provision of hospitality goods or services. Hospitable means offering welcome and entertainment to strangers, guests and visitors. The services provided at DGCS are hospitable: they include provision of motor car service and petrol supplies, the delicatessen, the restaurant, the provision of food and other supplies, and the manner of provision of such services (provision of personal service at the driveway, in the store, and in the deli and café areas).
- Tourist specific information and goods are provided in addition to the extensive range of food, fuel and services.
- The Applicant perceives a market for the particular service intended to be provided under the authority of the variation sought; we have commented in many decisions to the effect:
  an entrepreneur's perception that there is a need is often a good and substantial guide to whether or not there is in fact a "need" for the service. (eg Point Arthur Tavern decision, 29th October 1998)

A list of other tourist goods and services provided by the Applicant and to which the sale of Tasmanian wine as an adjunct, is set out in pages11 and 12 of the application document. The Board accepts that the Applicant's intention is to provide liquor in the form of Tasmanian wine, for consumption off the premises, only as an adjunct to the continuing provision of these tourist goods and services.

Mr Vincent gave evidence that the Tasmanian wine production industry can benefit from greater availability of its produce in Tasmania. Whilst there was considerable evidence of availability in the hotels in the area, that does not indicate that the Board should, in an anti-competitive vein, refuse the direction to grant this licence because other premises provide similar or the same produce.

The real criterion in this regard is whether the need for the present premises to have a licence is insignificant because granting the licence would result in an overall reduction in services of the nature intended to be provided.

As stated in *The Fox Hunters' Return decision 15th December 1995:*

"This situation has been recognised as relevant in the analogous planning area, in the High Court case *Kentucky Fried Chicken Pty Ltd v Gantidis 1977 140 CLR 675*, and we paraphrase from that decision:

> *"If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that is a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses is at one and the same time also threatened by the new competition afforded by that new development. But the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, is not a relevant town planning consideration."*

We adopt this statement, by analogy, to the present situation, as a proper consideration in the Board pursuing our obligations under s216."

REPRESENTATIONS AGAINST THE PROPOSED LICENCE

Evidence opposing the application was advanced by a number of local hoteliers (either operators of businesses, or freehold owners) and the Australian Hotels Association (Tasmania Branch) by Mr Leesong, State Director, and Ms Susan Butterworth.

The submission which needs consideration is '*whether the direction to grant the licence applied for will contribute to the orderly development of the hospitality industry'* (vide s216 the Act).

In our view it will. Whilst premises like the Wursthaus, Lipscombe Larder, Mundy's, and Davies GCS contribute to the hospitality industry, and perceive that there is benefit in meeting the demands of customers for Tasmanian wine for consumption off the premises, that perception results in a positive contribution to the Tasmanian wine industry, to the availability of good Tasmanian produce in a pleasant and appropriate environment, and on the basis of evidence at this hearing, there is no indication that the grant of the licence would contribute to harm associated with consumption of liquor, or reduce the services available overall to the public.

On that basis the interests of the community as a whole and also the interests of the community in the particular area or positively supported by the grant of the licence.

Some distinction was drawn between the other licensed premises selling Tasmanian wine under authority of the same licence type, and the Davies GCS. Whilst those differences can be underlined, the reality is that they are not so great or significant as to require the Board to refuse to direct the grant in this occasion. Diversity in provision of liquor services is to be encouraged. It contributes to an interesting and stimulating social fabric, and meets current community perceptions of the stance which regulating authorities should take in considering permitting new businesses (or in this instance, an

extension to an existing business) to proceed. That co-incides with the requirements for consideration by the Board in s216 of the Act, and the Guidelines.

This is not a *Hong Kong Diner* situation, where the grant of such a licence will indicate that every corner shop or restaurant should have a similar licence. That is not what the Act and Guidelines would presently permit.

CONCLUSIONS & DECISION

We have determined that the application meets the policy required to be adhered to by the Board as set out in s216 of the Act, and the requirements set out in the Guidelines. We do not consider the grant of the licence would give rise to any adverse effects, particularly by contributing to or increasing harm associated with the abuse of liquor. On the contrary, the licence is likely to sensibly and positively link the sale of fine Tasmanian product with the provision of tourism and hospitality goods and services in such a way as will make wine available in a mature and appropriate manner.

It is most unlikely that there will be any adverse impact on the community by the grant, by any resultant diminution of overall services (in the *Kentucky (supra)* sense).

The application is supported by grape growers and vignerons (see supporting evidence from a number of vineyard owners/operators and vignerons).

This variation application is, within the context of the Act, an application for a special licence incorporating the existing restaurant licence with a Tasmanian wines off-licence authority.

The Board directs the grant of the licence replacing the existing restaurant licence, but on the same conditions as that licence (liquor to be sold for consumption on the premises in conjunction with meals) and Tasmanian wines may be sold (except for tastings) only for consumption off the premises and only as an adjunct to the primary purpose of the licensee to be carried on at the premises which primary purpose relates to the provision of hospitality and tourist services and the sale of hospitality or tourist goods on the licensed premises.

Dated: 4th April 2001.

PA Kimber	**W Morris**	**L Finney**
Presiding Member	**Member**	**Member**

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