Licensing Board of Tasmania

In the matter of an application for
a Special Licence by **Kenneth John Davies**

In the matter of premises known
as '**Davies Grand Central Station'**,
Wellington St, Launceston.

DECISION

HEARING

These applications were lodged with the Commissioner for Licensing in 2000. They were advertised and signposted. They were heard before the Board at Launceston on the 15th November 2000.

They relate to two separate components of the one application, but for present purposes, they have been treated as somewhat separate applications: the components are:

1. Authority for sale of liquor for consumption on the premises to persons partaking of a meal (the standard 'restaurant' special licence – guideline 5.1, deriving from guideline 1991/4.5.1);
2. Authority for sale of Tasmanian wine and Tasmanian beer for consumption off the premises (partly relevant to the standard 'Tasmanian & Local Wines special licence' category guideline 5.7, and partly relevant to the Board's general discretion to grant special licences under s11 of the Liquor and Accommodation Act 1980 but where no particular guideline [reference s17 of the Act] is relevant).

Substantial documentation was lodged by the Applicant, and also by the respondents to the application (generally objecting to the proposal). The

application generated some public interest, being unusual in the context of the application's second component to sell liquor, both wine and beer, of Tasmanian origin, from the premises, which are used presently (and are intended to continue to be used) for sale of petrol (a service station) and sale of grocery and household products (from a store variously described by the opposing parties as 'a convenience store' or a 'supermarket'), and a delicatessen.

The Board takes account of all the documentation lodged.

The components of the applications were heard together. Much of the material of each component was relevant to the general principles to be considered in regard to the question of the grant of both components.

The application followed closely after the application by the *Lipscombe Larder* for a licence to sell Tasmanian wines. That application was granted. The differences between this present application and the Lipsombe matter are:

- Lipscombe is a smaller retail shop. It does not sell petrol, and does not have space for a 'restaurant' (to provide food and drink for customers for consumption on the premises);
- Lipscombe was solely for authority to sell Tasmanian wine;
- Davies is reported to be a significant seller of petrol; one of the top 10 in the country;
- Davies' retail grocery and household product lines are somewhat more and occupy a larger area than in Lipscombe;
- Davies delicatessen is not as specialized as Lipscombe, however in the Launceston district, it is probably the most specialized such store/convenience store/corner shop/delicatessen. It is not as significant or integral a component of the overall Davies business of the Lipscombe situation. Lipscombe may be described as a delicatessen first, with add ons. That is not the case with Davies. This should not be taken as indicating that the Davies operation in this component is

any the less a delicatessen, principally it is different, and obviously is of significance in meeting the local Launceston needs ;

- Davies seeks to sell beer; nominated as “Tasmanian beer”, although a more precise definition of that was not given (there is no significant purely Tasmanian brewery, given that the Hobart brewery is owned by CUB, and the Launceston brewery is owned by San Miguel of the Philippines);
- Lipscombe has been determined by the Board *not* to be a supermarket within the meaning of s25A of the Act, whilst that has yet to be determined on the present application.

During the hearing, evidence was given by the applicant, Mrs Lynne Davies, Mr Sam Richardson – put forward as an expert in supermarkets, or more precisely, an expert in the meaning of the word *supermarket*.
Counsel for the applicant, Mr Ian Duncan, put submissions forward. Those opposing the application at the hearing were: Mr Sam McQueston (licensed premises operator: Jimmy’s Liquor) represented by Ms Melanie Kerrison (solicitor) and Mr Michael Brett, counsel; Mr Daniel Leesong and Ms Susan Butterworth on behalf of the Australian Hotels Association (Tasmanian Branch), and a number of hotel owners or operators: Messrs Greg Saunders (Rocherlea Tavern), Daniel Halliday (Pindari Cellars), Robert and Fiona Jones (TRC Hotel) and Don McQueston (TRC and KM owner).

THE APPLICATIONS

The first issue to determine is whether the premises is a supermarket, and if so, then the Board is not authorised by the Act to direct the grant of a liquor licence (in association with the activities of a supermarket).

In *Lipscombe* we said:

- S25A of the Act: the premises is not a supermarket. A supermarket is not defined in the Act. The Macquarie Dictionary 3rd Edition 1997, which was put together taking account

of Australian experience, and circumstances, and which must be assumed to have relied on the understanding at the time (1995) when the definition-less "supermarket" word was put into the Act, says that a supermarket is *a* ***large, usually self service retail store or market selling food and other domestic goods.***

- Lipscombe Larder ((LL) is not "large".
- Whilst LL sells food and other domestic goods, it is also a delicatessen, and a patisserie, and does not fit within the ordinary understanding of what a supermarket is.
- Going to the discussion surrounding the parliamentary debates is acceptable, but not paramount. What the members said is relevant but not determinative. The Board disagrees with any indication to be obtained from Hansard discussions that LL is a supermarket.
- Ultimately, consideration of what is a supermarket is a matter of fact, based on a word of either precise meaning (in which case LL is not a supermarket) or imprecise meaning (in which case LL deserves the benefit of the doubt - employing s216 and the positive obligation on the board to make a decision which best promotes social and economic growth: that is, let the business open up).
- As to the general discretion, and the guidelines: That the shop operated with a permit to the same effect as the licence applied for, and did not cause disruption to the hospitality industry, for a number of years, is indicative, and evidence, that the licence grant would not be contrary to s216.
- 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.

We think that in the context of premises which sell groceries and household goods, Davies Grand Central Station (although the name implies ‘large’) is not ‘large’ within the dictionary definition of ‘supermarket’. It is easy to picture that which is large in this context: the average Coles and Woolworths retail centre, referred to by those owners/operaters as ‘supermarkets’ are clearly ‘large’. So far as this application is concerned the Board determines that DGCS is not large, and on that basis, is not a supermarket. This is more accentuated, when consideration is given to the other services provided: sale of petrol (not normally a function of a supermarket), and that the sale of grocery and household goods lines is evidently (from inspection and the evidence) not the predominant purpose of the composite business carried on at the premises.

There was evidence put forward to the effect that discussions by members of parliament (at the time of the introduction and second reading of the amending legislation which introduced s25A) was to the effect that DGCS was a supermarket. Whilst we take account of the discussions in parliament, they do not provide any more than separate parliamentarians’ views on whether DGCS is a supermarket (see Hansard Thursday 21st September 1995, part 2,

pages 47 to 102, in particular, an exchange between Mr Cornish and Mr Polley on page 2 after the bill was introduced by the relevant Minister, Mr Peter Hodgman). We were advised that in that exchange the reference to 'El Centro' (as to which both Messrs Cornish and Polley asserted was a supermarket) was intended by them to be a reference to DGCS.

Whether that is the case or not, and accepting for the purposes of this application that it is the case, we are nevertheless of the view that DGCS is not on the evidence, a supermarket.

Mr Richardson gave evidence for the applicant. He was introduced as an expert in supermarkets. His evidence was to the effect that DGCS was not a supermarket. He said so, because, in his opinion, a significant breadth of product range defines a supermarket, by being part of a 'banner store' (that is, operating under particular grouping – eg Coles, Value Plus, Four Square, Fabulous etc), and price competitiveness and regular weekly specials on selected product items. These criteria, we were told are not satisfied by DGCS.

Mr Richardson is evidently expert in managing businesses providing wholesale products to supermarkets. The information he provided assisted in improving the Board's understanding of the supermarket business, and in defining common attributes of some types of supermarkets. As we have determined that the premises is not a supermarket based on an acceptance of the dictionary definition and application of the evidence to that, we do not need to go further and determine whether Mr Richardson's proposition is correct. The rule regarding expert or opinion evidence is set out in *Cross on Evidence, Australian Edition (looseleaf), Butterworths, para 29005.* We are inclined to the view that Mr Richardson's opinion, whilst useful as providing factual information to the Board, is not opinion evidence in the strict sense admissible, and hence the weight to be given to it is less than expert evidence in the strict sense.

To paraphrase *Cross:*, *'the expert will not be permitted to point out to the [determiner of facts] matters which the [determiner] could determine for themselves or to formulate the expert's empirical knowledge as a universal law'.*

So, the premises are not a supermarket, and hence the Board must determine the application on the usual principles of discretion and in accordance with the guidelines, and s216 of the Act.

THE OBJECTIONS

The Board will decide the matter on the basis of the evidence provided, and consideration of s216[1] of the Act and the Guidelines. That is, we will determine whether the warrant, which would be granted with the special licence, is indeed appropriate (in that context) given the overall operations of the applicant in the premises, and the market he seeks to serve.

It is not necessary for us to recite the numerous licensed premises in the relevant locality, suffice to say that the maps (with licensed premises highlighted) presented at the hearing are clear.

S 216 of the Act directs our attention to the hospitality industry, and whether the grant of the licences applied for would contribute to the orderly development of the hospitality industry.

[1] Section 216 reads:

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 RESTAURANT LICENCE

This component of the application can be treated separately. The Board has said on many occasions, and it is generally accepted in the hospitality industry, that provision of liquor in conjunction with the provision of a meal is unobjectionable; it does not contribute to liquor abuse, it does not disrupt the orderly development of the hospitality industry for further such licences to be issued (provided the premises is structurally suitable in a planning sense, and provided the applicant is a fit and proper person to hold a licence), and do not adversely impact on the social and economic growth of Tasmania. This is generally taken to be a 'res ipsa loquitor' situation.

The only unusual feature about this application in the restaurant component, is the fact that petrol is supplied (via bowsers) outside the premises as part of the same business.

What are the arguments against the supply of liquor from premises which also sell petrol? What are the arguments in favour?

We can see the arguments in favour;

- from an economic sense, it is efficient for premises in existence to provide and supply the market with some degree of diversity. To require that there be separate shops for the vast array of products available, creates waste in infrastructure.
- people come to petrol stations when they are away from home or on a journey, many of them require food, and many people like to consume liquor in conjunction with food. To refuse to permit such premises to be able to supply liquor will unreasonably interfere with free trade, and efficient delivery of services, and will restrict competition, without there having been demonstrated that there is a public interest in imposing this impediment to competition.
- the argument against sale of liquor from petrol stations for consumption off premises is a different issue from that raised in this application, as it

may involve significantly more extensive issues regarding the orderly provision of liquor supply services, and hence s216 issues of orderly development, which are not raised in a simple restaurant licence application. Consideration of the 'need' for such a licence is relevant in the off licence context, but is not generally relevant in the restaurant licence context (see guideline 3 and the definition of "interests and concerns of the community" in the guidelines, and compare that with guideline1991/4.5.1 – now guideline 5.1).

- suggestions that the licence if granted would lead to liquor abuse are met in the evidence of the applicant in the application documents (see para 5.4-5.6); the Board concludes there is no likelihood in fact of liquor abuse arising in the circumstances of this component of the application;
- the argument that sale of liquor from petrol stations will lead to a greater incidence of drink driving is erroneous. Many, if not most liquor outlets (be they for consumption on or off premises) are accessible to drivers, provide car parks, encourage people to drive to and away from them. The link between providing the opportunity to the public to buy petrol and also providing the opportunity to buy liquor (in this case limited to liquor for consumption in conjunction with a meal), should not disentitle the proprietor from having his application considered on the merits of the service to be provided.

On the other hand, general issues regarding sale of liquor from petrol stations have been raised, and the nub of these objections is as follows:

- liquor is readily available from 'traditional' outlets, and extending the range of premises from which liquor can be supplied – whether for consumption on or off premises- (for example, to corner shops, convenience stores, and petrol stations) will provide a precedent for a significant extension of the number of available outlets and hence the overall availability of alcohol. For reasons of containing or limiting the prospect of liquor abuse arising due to a surfeit of outlets, petrol stations should not be licensed at all;

- selling liquor in conjunction with premises to which people will usually drive (the link between buying petrol, then buying liquor) is likely to contribute to liquor related harm, because people will be more likely to drink in association with driving – a bad mixture;
- objection has been accepted at a political level, in a determination of perceived public interest, in Western Australia, where a provision of the Liquor Licensing Act for that State prohibits sale of liquor in certain circumstances from petrol station properties.

It should be noted that the WA government, in legislating against sale of liquor from petrol stations sites, limited the prohibition to preventing the grant of a licence that would authorize the sale of packaged liquor from any premises if there is a petrol station on the premises and the premises are:

(1) in the metropolitan area; or

(2) in, or within a prescribed distance outside, a country townsite in which there is a packaged liquor outlet.

Note, therefore, that there is no impact or aspect to that government's legislative reaction to the petrol station question which relates to granting of restaurant licences. (Refer WA Hansard, 14th June 2000 and 27th June 2000).

Our conclusion on this aspect of the application is that, on balance, and in our discretion, the evidence indicates that the application is genuinely founded on the basis that liquor will only be sold for consumption on the premises as an adjunct to meals. That is, so far as consumption on the premises is concerned, it will only be in conjunction with meals, and not either on an unrestricted basis, or restricted by other criteria.

On that basis, the Board considers it appropriate to direct, and does so direct, the Commission to grant to the applicant a special licence, with the usual conditions associated with the restaurant category.

TASMANIAN WINES AND BEER

This second component is joined. The Board considered splitting it into two components, but the application appears to us to be together, and there was no request to sever the wine component from the beer component.

The purpose of the Tasmanian Wines guideline, in context of s216, is to promote the Tasmanian wine industry in suitable settings in the State where other Tasmanian products or services of a tourist or hospitality nature are available. Some places are evidently suitable: for example, the "Naturally Tasmanian" Shop, Salamanca Place, Hobart. Some places, whilst providing goods and services, which might or will certainly be used by tourists, are not of their nature specialist providores, and hence do not meet the intention of this guideline. Lipscombe Larder (supra) meets that criteria.

The present premises might be considered to meet the criteria, but there are two objections to that:

- it is more of a general store and provides general goods and services, rather than having that 'specialist' component which has generally characterized the applications under guideline 5.7 (although this must be tempered by the reality that its deli section has a lot of gourmet take home and ready to cook meals, of a standard that no other premises in Launceston has reached.
- it is linked, in any event, to the sale of Tasmanian beer. There has not been any recognition in the Act or the Guidelines that the Tasmanian beer industry (either in the production or the consumption) requires special treatment in the same way that the Tasmanian wine industry has been treated in the guidelines.

The Board has concluded that there is no part of the application or component of the evidence which justifies a decision to extend in this case (which would have general ramifications) the sale of liquor in the nature of beer from

convenience stores/petrol stations/delicatessens or combinations of such premises, or like premises.

The Board's decision in *Hong Kong Diner* (22nd July 1999) is apposite: [extracts]"

The framework of the Liquor and Accommodation Act 1990 is to provide for particular licence categories: for example the on-licence, general licence, and off-licence categories.

The latter, off-licence, is covered by a particular requirement that no less than 9 litres be sold. Whilst this restriction has been criticised in the National press in recent times, it remains the law.

The guidelines should not be employed to subvert the overall intention of the Act. They should be interpreted in a manner to support the s216 criteria, and the licence structure.

The exception established by guideline 5.7, whereby off sales is authorised in single bottles sale, is not intended to be an indirect method of avoiding the restrictions imposed by s9 of the Act. It is a special licence category, designed to assist in the economic and social development of Tasmanian industry and provision of tourist services.

Should guideline 5.7 be used to enable a restaurant to sell single bottle sales of Tasmanian wine, the structure of the s9 limitation would be subverted, and the criteria in s216 of facilitating the orderly development of the hospitality industry would not thereby be pursued. Whilst a 'floodgates' argument is not attractive, the reality is that if the Hong Kong Restaurant were to be permitted to sell single bottles of wine for consumption off the premises, there would be no justification for refusing that authority to almost every restaurant. That would not be consistent with the apparent intent of the licence structure around s9 of the Act, nor (unless there was substantial additional evidence in support of the proposition) in accordance with the obligations of the Board stated in s216.

It may be that the proprietors of the Hong Kong Restaurant are asked from time to time, by tourists, for single (or more) bottles of Tasmanian wine, for off premises consumption. This does not thereby justify direction for a grant of such a licence authority.

The evidence was to the effect that local hotels do provide a wide range of Tasmanian wines (particularly the Valern Hotel), so there is no justification in going outside the existing guidelines, as an exception, to cater for an otherwise unsatisfied demand.

The Board is entitled to deviate from its own guidelines where it is in the public interest to do so. In this case it is not demonstrated that the public interest would be served by, in effect, creating a new special licence sub-category authorising restaurants to sell Tasmanian wine for consumption off the premises.

Perhaps that day will come, when (and if) the liquor sale industry is more deregulated than it is at present. The Board however is guided by the objects of the Act, the framework of s216, and the guidelines already set down.

In this instance the Board directs the grant of a special licence (restaurant) but directs that the ancillary proposal of authority to sell Tasmanian wine for off premises consumption not be granted.

[end of extract].

Now, in the present context, the issue is sale of beer in petrol stations etc, not sale of Tasmanian wine in restaurants. By application of the same logic, we determine that there is no case made out for the sale of Tasmanian beer (however that may be defined – on the basis of evidence before us) from Davies Grand Central Station, predominantly a petrol station, convenience store, delicatessen, and restaurant.

This leaves the question of Tasmanian wines. We have found that the application as put forward intertwined the beer and wine issue as one. We find it difficult to separate them, and indeed, whether the application permits a severance on that issue. It may be unfair to the objectors to do so, or unfair to the applicant, in that they might have lead more evidence on that ground alone, or put forward their application quite differently in the event that the only issue to be considered was the Tasmanian wines issue.

On that basis we are unable to determine to direct the grant of the Tasmanian wines component of the application, given procedural fairness issues. We feel those issues would best be cured by a fresh application on that ground alone, if the applicant wishes to proceed with that component. To that extent we determine the application by refusing the application. Of course, the applicant may apply again, reframing the application more along the lines of the traditional Tasmanian wines type of application. Whether their intentions and the manner and style of their business would meet the criteria and satisfy the Board in regard to its overall discretion would be the issue in such further application.

CONCLUSION

In conclusion, in taking account of the interests and concerns of the community, in the context of the meaning and intent of s216 of the Act, and the licence structure in the early sections of the Act, the Board has:

- Taken account of representations made in the course of the hearing;

- Taken regard to the extent to which businesses carried on under licences and permits in the area to which each application relates are satisfying the need intended to be satisfied by the applicant (in this regard, we feel there is adequate service provided by such other businesses, such that the grant of the application(s) is not appropriate in the Board's discretion);
- Determined whether the grant(s) are likely to have an adverse effect on the interests of the community as a whole and also the interests of the community in the area (in this regard we do not feel the grant would have such adverse effect that this criterion is critical to the application).

The application so far as a restaurant licence is concerned is accepted and the Board directs the Commissioner to grant a special licence (restaurant). So far as concerns the application to sell Tasmanian beer and wine, that component is refused. The Board determined that, for the purposes of s25A of the Act, the premises are not a supermarket.

Dated: 11th January 2001

PA Kimber, Presiding Member

WF Morris, Member

L Finney, Member

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