

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CITATION : LIQUORLAND (AUSTRALIA) PTY LTD -v-
AUSTIE NOMINEES PTY LTD [2000] WASCA 105

CORAM : MALCOLM CJ
WALLWORK J
ANDERSON J

HEARD : 10 FEBRUARY 2000

DELIVERED : 19 APRIL 2000

FILE NO/S : FUL 80 of 1999

BETWEEN : LIQUORLAND (AUSTRALIA) PTY LTD
Appellant (Objector)

AND

AUSTIE NOMINEES PTY LTD
Respondent (Applicant)

FILE NO/S : FUL 82 of 1999

BETWEEN : BERBAR NOMINEES PTY LTD
GOLDSOUTH PTY LTD
M L WORDSWORTH PTY LTD
Appellant (Objectors)

AND

AUSTIE NOMINEES PTY LTD
Respondent (Applicant)

Catchwords:

Liquor law - Liquor store business - Licensing - Appeal from Liquor Licensing Court - Test to be satisfied before liquor store licence may be granted - Reasonable requirements of public for liquor - Relevant public - Persons passing through affected area along highway

Legislation:

Liquor Licensing Act 1998, s 38(2)(b), s 38(2)(b)(a)

Result:

Appeals allowed
Decision to grant conditional licence quashed

Representation:

FUL 80 of 1999

Counsel:

Appellant (Objector) : Mr C L Zelestis QC & Mr P D Evans
Respondent (Applicant) : Mr C J L Pullin QC & Mr M H Zilko

Solicitors:

Appellant (Objector) : Freehill Hollingdale & Page
Respondent (Applicant) : Jackson McDonald

FUL 82 of 1999

Counsel:

Appellant (Objectors) : Mr M J Buss QC & Ms S J Eckert
Respondent (Applicant) : Mr C J L Pullin QC & Mr M H Zilko

Solicitors:

Appellant (Objectors) : G D Crocket & Co
Respondent (Applicant) : Jackson McDonald

Case(s) referred to in judgment(s):

Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405

Case(s) also cited:

Charlie Carter Pty Limited v Streeter and Male Pty Ltd (1991) 4 WAR 1

Explorer Cruise Lines Pty Ltd v Burundi Holdings Pty Ltd, unreported; FCt SCt of WA; Library No 930625; 24 September 1993

Halsom Nominees Pty Ltd v Winthrop Cellars Pty Ltd, unreported; FCt SCt of WA; Library No 940563; 12 October 1994

In the matter of Coles Myer Limited, unreported; FCt SCt of WA; Library No 920085; 24 February 1992

Laveson Pty Ltd v Prosser Automotive Engineers Pty Ltd & Ors [1999] WASCA 285

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458

Liquorland (Australia) Pty Ltd v Hawkins (1997) 16 WAR 325

Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205

Politis v Federal Commissioner of Taxation (1988) 16 ALD 707

South Eastern Hotel Pty Ltd v Woolies Liquor Stores Pty Ltd (1998) 71 SASR 402

Woolies Liquor Stores Pty Ltd v Carlton Investments Pty Ltd (1998) 73 SASR 6

1 **MALCOLM CJ:** In my opinion, these appeals should be allowed for the
reasons to be published by Anderson J. I wish only to add a few
comments of my own.

2 At the heart of the decision by the learned Judge is an assumption
that persons travelling by motor vehicle along Stirling Highway between
Perth and the western suburbs and Fremantle beyond Nedlands,
Claremont and Cottesloe, being "the affected area", who were not
residents of the affected area, but were simply passing through, had a
reasonable requirement to obtain liquor in the affected area.

3 This decision was made notwithstanding that the learned Judge
found that the range of liquor available at existing premises within the
affected area, the standard of those premises and the standard of service at
them could provide for the reasonable requirements of that component of
the public which was resident in the affected area, without occasioning to
that component any substantial difficulty or inconvenience.

4 So far as those persons passing through the affected area were
concerned, his Honour found that the reasonable requirements of such
persons could not be provided for by licensed premises already existing in
the affected area. The only evidence led in relation to those requirements
was that traffic meters of the Main Roads Department measured an annual
weekday traffic count of about 33,000 vehicles per day. There was no
other evidence of the number of people passing through the affected area
within the meaning of s 38(2)(b) of the *Licensing Act 1998*.
Section 38(2)(b) of the Act provides that in taking into account the
matters referred to in s 38(1), the Licensing Authority, in considering
what the requirements of the public shall be, is required by s 38(2) to have
regard to:

- "(a) The population of, and the interest of the community in,
the affected area;
- (b) the number and kinds of persons residing in, resorting to
or passing through the affected area, or likely in the
foreseeable future to do so, and their respective
expectations; and
- (c) the extent to which any requirement or expectation –
 - (i) varies during different times or periods;

(ii) is lawfully met by other premises, licensed or unlicensed."

5 So far as the premises the subject of the application were concerned, his Honour said:

"These proposed premises, therefore, are intended to provide first and foremost for the requirements for packaged liquor and related services of that section of the public passing through the affected area on Stirling Highway. They comprise very much the larger proportion of the section of the public upon which this applicant relies in support of its application."

6 In my opinion, there was nothing in the evidence to demonstrate the extent, if any, to which the proposed premises would cater for the needs of persons passing through the affected area as a reasonable requirement for obtaining liquor in the affected area. In other words, there was no evidence of the respective expectations of the number and kinds of persons passing through the affected area or likely in the foreseeable future to do so. Similarly, there was no evidence of the extent to which any requirement or expectation of such persons varied during different times or periods, or was lawfully met by other premises, licensed or unlicensed, whether within the affected area or elsewhere. Furthermore, there was no evidence of the subjective requirements of the section of the public represented by persons passing through the affected area for liquor and related services as contemplated by s 38(2a) of the Act.

7 For these reasons, as well as for the reasons stated by Anderson J, I agree that the reasoning of the learned Judge lacks any foundation in the evidence and cannot be sustained. There was simply no evidence that could sustain the conclusion by the learned Judge that the reasonable requirements of the public for liquor and related services in the affected area, either in respect of those persons resident in the affected area or persons passing through the affected area, cannot be provided for by licensed premises already existing in the area. It follows, therefore, that the decision to grant the conditional licence should simply be quashed.

8 **WALLWORK J:** I agree with the reasons of the Chief Justice and Anderson J that there was no sufficient evidence that the people travelling on the relevant part of Stirling Highway in the affected area had a reasonable requirement for liquor and related services in the affected area. I agree that the decision to grant the conditional licence should be set aside.

9 **ANDERSON J:** These are two appeals from a decision of the Liquor Licensing Court of Western Australia delivered on 28 May 1999, by which the Liquor Licensing Court conditionally granted to the respondent in each appeal, Austie Nominees Pty Ltd, a liquor store licence in respect of the premises known as Big Bomber Liquors, at 152 Stirling Highway, Nedlands.

10 The appeals are the second set of appeals arising out of the same application. All of the material facts are set out in the judgment of this Court (differently constituted) in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405. In that judgment, the grant which had been made by the Liquor Licensing Court on 10 August 1998 was quashed and the matter was remitted to the Liquor Licensing Court to be dealt with according to law in the light of that judgment.

11 What this Court decided was that before the Liquor Licensing Court may grant a liquor store licence, it was required by s 38(2b)(a) to satisfy itself that:

"[T]he reasonable requirements of the public for liquor itself (or liquor of a particular type, such as bottled table wines) and related services cannot be provided for in the affected area by the licensed premises already existing in the area; that is, cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public."

Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (supra) at 415.

12 This Court decided that the learned Liquor Licensing Court Judge had not applied that test, but had applied a different and less stringent test, and that the case should go back to be decided in accordance with the correct test.

13 The matter did go back to his Honour and was dealt with as directed, with the same result. That is, in purporting to apply the test which this Court has laid down as the correct test, the learned Liquor Licensing Court Judge considered that the respondent's application ought still to be granted. The appellants are the same appellants as before, they being five of the nine objectors who originally objected to the grant of the licence. In this appeal, they complain that the learned Judge has still failed to apply the correct test.

14 The starting-point is that, on the rehearing of the matter, the learned Judge found that the range of liquor available at existing premises, the standard of those premises and the standard of service at those premises can provide for the reasonable requirements of that component of the public which was resident in the affected area, without occasioning to that component of the public any substantial difficulty or inconvenience. In other words, if the relevant public is considered to be only those people who are resident in the affected area, there is no basis upon which a liquor store licence could be granted to the respondent with respect to these premises. However, his Honour held that the relevant public contained another component, and that the reasonable requirements of that other component cannot be provided for by licensed premises already existing in the affected area. He identified that other component as being "the section of the public passing through the affected area". What he had in mind was the traffic flow on Stirling Highway. His Honour said this:

"These proposed premises, therefore, are intended to provide first and foremost for the requirements for packaged liquor and related services of that section of the public passing through the affected area on Stirling Highway. They comprise very much the larger proportion of the section of the public upon which this applicant relies in support of its application.

...

This is not a case of a country affected area or an outer suburban affected area where contemporary standards may well dictate that the public should be expected to deviate from their journey to obtain access to packaged liquor. I accept, for example, that there may be cases within the metropolitan area in which it is reasonable to expect the public seeking access to packaged liquor to make such a deviation. The recent case of Action Food Barns in *Dog Swamp* is an example (*Fido Bacchus Pty Ltd - Dog Swamp Liquor Store*, unreported LLCT of WA; CRT No 23/98; 16 October 1998). The circumstances of that case are quite different from those on the evidence in this case.

The evidence in this case leads me to conclude on the balance of probabilities that the location of existing licensed premises in this affected area, apart from the Captain Stirling Hotel, is such that they cannot provide for the reasonable requirements of the section of the public passing through the affected area for packaged liquor itself without substantial inconvenience.

I find that this section of the public would not otherwise deviate from Stirling Highway in this affected area. I find on the balance of probabilities that the extent and nature of the deviations to the existing premises, including the return to Stirling Highway, together with the time spent on such deviations, are such that the existing premises cannot provide for the reasonable requirements of this section of the public for packaged liquor itself, without substantial inconvenience to this section of the public."

15 There was evidence from Main Roads Department traffic meters that the annual weekday traffic count on Stirling Highway in the affected area is about 33,000 vehicles. Understandably, there was no evidence as to the make-up of this traffic, or as to the precise destination of the vehicles which were counted. Nor is there, of course, any analysis of the individual vehicles making up the count. Obviously, in any count of commuter traffic over a 24-hour period, many vehicles would be counted twice. However, it was accepted on all sides that the traffic count was at least some measure of the number of people passing through the affected area within the meaning of s 38(2)(b).

16 The reasoning that led his Honour to his conclusion that the location of existing licensed premises in the affected area cannot provide for the reasonable requirements of the public in the affected area is essentially as follows. The relevant public is made up of (a) residents of the affected area and (b) people passing through the affected area along Stirling Highway. Category (a) could be put to one side because their reasonable requirements were or could be provided for by existing outlets. The reasonable requirements of the other component, that is, people passing through the affected area along Stirling Highway, cannot be provided for by existing outlets. This is because they are travellers, or commuters, engaged on a journey along that particular route (Stirling Highway) and the extent of deviation which would be necessary to get them to and from existing outlets in the affected area would present them with substantial difficulty and inconvenience.

17 This line of reasoning contains a particular assumption. The assumption is that those persons using Stirling Highway in the affected area who are not residents of the affected area, but are simply passing through, have a reasonable requirement for liquor in the affected area.

18 That is an assumption that lacks a foundation. It is, with respect, an impermissible extension of the legitimate assumption that a substantial

proportion of the residents of an affected area who are over the age of 18 do have a requirement in the affected area for liquor and related services. That assumption with respect to residents cannot be automatically applied to commuters using a relatively short section of a suburban highway. For all that is known, most of the people in the vehicles in the traffic count are city workers, travelling to and from the city, from and to residential suburbs replete with liquor outlets. Many will be commercial people going about commercial activities. Or they may be shoppers going to supermarkets and shopping centres at which there are liquor outlets. There is evidence that a large volume of highway traffic is generated in this area by people visiting Karrakatta Cemetery to attend funerals; and by students and staff attending the large educational institutions in the Nedlands/Crawley area, including the University of Western Australia. The point is that there is no factual basis upon which it may be simply assumed that people travelling on this section of Stirling Highway have a reasonable requirement for liquor and related services in the affected area.

19 As this is the assumption from which the learned Judge's reasoning proceeds, the conclusion which he reached cannot be sustained.

20 I would allow these appeals. As it is now apparent that there is no evidence that could sustain a finding that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area, I would simply quash the decision to grant the conditional licence.