

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Berbar Nominees Pty Ltd (Licensee of Liquor Barons,
Claremont)
*(represented by Mr Ashley Wilson of Frichot and Frichot
Lawyers)*

Respondent: Destination Holdings Pty Ltd (Licensee of The Wine Box,
Nedlands)
*(represented by Mr John Prior, Counsel and Mr Paul Olivier
Of Talbot Olivier Lawyers)*

Observers: Mr Bernard Hubbard
(on behalf of Berbar Nominees)

Mr Phil Cockman *(on behalf of Destination Holdings Pty Ltd)*

Mr John Kelly *(on behalf of Destination Holdings Pty Ltd)*

Premises: 152 Stirling Highway, Nedlands, and known as The Wine
Box, Nedlands

Date of Hearing: 28 August 2009

**Date of
Determination:** 21 September 2009

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Mr Greg Joyce

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988*, for a review of Decision No A193405 of the Director of Liquor Licensing dated 22 May 2009, relating to a Licence conditionally granted to the Respondent and dismissal of the Applicant's objection.

Legislation: *Liquor Control Act 1988*

Determination: The Decision of the Director of Liquor Licensing is affirmed and the Application is refused.

Authorities referred to by the Applicant at the hearing before the Liquor Commission:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Vermouth Nominees Pty Ltd v The Cabaret Owners Association of WA Inc & Ors* No. 2155 of 1989
- *Woolies Liquor Store v Carleton Investments Pty Ltd* (1998) 73 SASR 6
- *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd* (No. 2 (1981) 28 SASR 458
- *Liquorland (Australia) Pty Ltd v Hawkins & Ors* (1997) 16 WAR 325
- *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* (2001) WASCA 410

Authorities referred to by the Respondent at the hearing before the Liquor Commission:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Liquorland (Australia) Pty Ltd and Ors v Austie Nominees Pty Ltd* (1999) 20 WAR 405
- *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* [2000] WASCA 105
- *Executive Director of Public Health v Lily Creek International Pty Ltd* (2001) WASCA 410

1. Background and Chronology

- 1.1 Destination Holdings Pty Ltd ("the Respondent") made application to the Director of Liquor Licensing ("the Director") on 23 July 2008, pursuant to section 68 of the *Liquor Control Act 1988* ("the Act") for the grant of a liquor Store licence at 152 Stirling Highway to be known as The Wine Box, Nedlands. The respondent also provided the Public Interest Assessment at the same time.
- 1.2 In correspondence dated 25 August 2008, Mrs Joan Dadour of 2B Bulimba Road, Nedlands lodged an objection for the grant of a liquor licence to the subject premises. Mrs Dadour was subsequently given an opportunity to attend the subject Hearing but chose not to attend.
- 1.3 On 3 September 2008, GD Crocket & Co Barristers and Solicitors representing Berbar Nominees Pty Ltd, Licensee of Liquor Barons, Claremont lodged a Notice of Objection pursuant to section 73(4) of the Act in respect of the Application.
- 1.4 On 5 September 2008, the Department of Racing, Gaming and Liquor ("the Department") advised the Respondent of the two objections.
- 1.5 The Respondent advised the Department on 2 October 2008, that Talbot Olivier, Lawyers would be legally representing the respondent.
- 1.6 The Respondent on 17 October 2008, provided a response to the objectors.
- 1.7 GD Crocket & Co provided submissions in respect of the Applicant on 20 November 2008.
- 1.8 The Respondent provided responsive submissions on 16 December 2008.
- 1.9 On 9 January 2009, the Director requested further information from the Respondent.
- 1.10 GD Crocket & Co provided further responses on 12 February 2009 and 17 April 2009 from the Applicant.
- 1.11 Talbot Oliver provided further responses from the Respondent on 27 February 2009 and 16 April 2009
- 1.12 On 22 May 2009, the Director made his decision to grant conditional approval to the Respondent for a liquor store licence for the premises subject to conditions enumerated in the Decision.

- 1.13 GD Crocket & Co lodged an application for review of the Director's decision on 17 June 2009.
- 1.14 On 10 August 2009, the Department was advised that the Applicant had changed its legal representative to Frichot and Frichot and the outline of submissions was provided on 19 August 2009.
- 1.15 On 20 August 2009, Talbot Oliver lodged the Respondent's outline of submissions.
- 1.16 The Respondent provided further outline and responsive submissions on 25 August 2009.
- 1.17 The Director advised the Commission on 29 June 2009 that in accordance with section 69(11) of the Act he proposed to intervene in the subject matter.

On 25 August 2009, the Director withdrew his intervention.

2. Application for Review

The Notice of Objection to the original application, lodged on behalf of Berbar Nominees Pty Ltd (T/A Liquor Barons, Claremont) on September 3, 2008, listed the following grounds:

- (A) In the locality, the Applicant fails to identify in detail the existing packaged outlets and other licensed premises, the level of services and facilities of these licensed premises, the location or distribution of these outlets, and as such fails to assess an important factor in the Public Interest test as required under Section (5)(1)(c) of the Act;
- (B)
 - (i) The Applicant fails to adduce detailed material and evidence in its Public Interest Assessment Statement concerning aspects of the defined locality being a 3km radius from the proposed site.
 - (ii) It fails to adduce factual detail about the Locality's geographical and demographic factors, the road distribution, the makeup of the population and/or identity critical groups of people at risk.
 - (iii) The Applicant fails to present precise details on evidence, about aspects of the defined Locality. The information or material in the Public Interest Assessment Statement (PIA) relates to an entire area and not the Locality.

(C) Clear and detailed statistics on the following aspects (required for a PIA statement), are unavailable:

- i. risk groups;
- ii. analysis of criminal statistics;
- iii. a health statistics analysis;
- iv. tourism;
- v. hospital statistics;
- vi. minority groups (religion, non English speaking immigrants etc.);
- vii. low income groups;
- viii. indigenous population.

These aspects have been inadequately covered in the PIA.

(D) The proposed premises are inadequate because:

- (a) the premises cannot carry a proper range of product;
- (b) the premises are a poor configuration
- (c) there exists inadequate parking;
- (d) access and egress to the premises is poor;
- (e) the premises are situated on a dangerous section of the road;
- (f) the premises are isolated.

(E) The PIA Statement is inadequate, for it does not adequately address the requirements of section 38(2) and (4) of the *Liquor Control Act 1988* or the Director's policy criteria.

(F) The amenity of the area will be deleteriously impacted upon:

- (i) by certain criminal activity:
 - (A) break ins;
 - (B) theft;
 - (C) graffiti.
- (ii) anti social behaviour by groups of youths in vehicles, groups of juveniles hanging around the liquor store and general larrikin behaviour;

(iii) residents being unduly disturbed by excessive noise created in and about the shopping centre.

- (G) The very limited statistical information provided in the PIA statement fails to show if there are any groups of people “at risk”.
- (H) The PIA statement does not provide sufficient information to satisfy the Public Interest test.

A Notice of Objection to the original application was also lodged on September 1, 2008 by local resident Joan Dadour and listed the following grounds:

- **Client noise and fumes:**

A liquor store on the said address will result in increases traffic on the parking lot, resulting in noise disturbances and exhaust fumes into my backyard and into the back part of my property.

- **Evening noise from the store:**

IGA and the Nedlands City Council had agreed to cease activities at the loading bay after 9.00 pm to avoid noise. On a number of occasions, I have complained to the Nedlands City Council about the noise level of pallets, cleaning up, closing dumpsters, etc. after 9.00 pm. To date, IGA has not responded and noise persists in the evenings, even after 9.00 pm. Adding a liquor store to these activities will increase night time activity and hence noise levels.

- **Daytime fumes and noise from trucks:**

The fumes and noise from trucks delivering goods to the store are carried over the fence into my backyard, making my backyard unpleasant place to reside. A liquor store will have different suppliers than the IGA, therefore, the number of trucks (and hence noise and fumes) will increase.

3. The Hearing

3.1 Applicant's Submission:

- 3.1.1 The Applicant, Berbar Nominees Pty Ltd, advised that there were two main grounds for the Application to review the decision of the Director to grant a liquor store licence to the Wine Box Nedlands. Those grounds being:

- That the Director had placed insufficient weight to the likelihood of the effect on the service level in the locality – a potential diminution of services and facilities at licensed premises in the locality;
- That the Director had failed to take into consideration, or failed to give appropriate weight to the potential for increased harm and ill-health to persons in the locality.

3.1.2 In regard to the potential for the diminution of services and facilities, the Applicant referred to section 5(1)(c) of the Act setting out the primary object:

To cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry.

The Applicant considered that the granting of the liquor licence was contrary to this object due to the potential negative effect on the level of services and facilities in the locality from the addition of another packaged liquor outlet.

3.1.3 The Applicant further referred to the Second Reading Speech of the Liquor and Gaming Legislation Amendment Bill 2006, where the Minister stated:

"It should be noted, however, that the government does not consider a proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test. When considering the public interest, the Licensing authority is bound by the objects of the Act as set out in Section 5".

3.1.4 The Applicant's written submission also referred to a letter from the Director dated January 9, 2009, to Cranford Hospitality Consultants (representing Berbar Nominees Pty Ltd), seeking further submissions in respect to the possible impact on existing services in the community that may be caused if the application was granted. That letter stated:

"There are some significant Supreme Court decisions which have had regard to the objects of the Act and which suggest that, notwithstanding anything else, it is appropriate when determining the public interest to consider broader economic impacts of a new licence being granted".

The Applicant contended that despite the acknowledgement of the economic impact issue, the Director, in the approval decision, did not provide adequate reasons why the evidence as to diminution of services adduced by the Applicant, in relation to its own outlet and in relation to other outlets in the locality, was not accepted.

3.1.5 The Director's letter of January 9 2009 also referred to the fact that

" there is a substantial body of evidence which suggests a link between outlet density and increased harms"

a factor that the Applicant did not believe was given sufficient consideration in the approval decision.

3.1.6 Reference was made to the close proximity of the University of Western Australia and the potential for an additional liquor outlet in the proposed location to increase the risk levels of harm or ill-health to students of this institution.

3.2 Respondent's Submission:

3.2.1 The Respondent referred to the fact that there were now only two grounds of objection as against eight in the original Objection Notice – a fact earlier acknowledged by the Applicant.

3.2.2 The Respondent maintained that the reference by the Applicant to the Director's letter of January 9, 2009 should be taken in the appropriate context in that this was not the decision, but a procedural request for more information.

3.2.3 The Respondent claimed that with regard to the potential for a diminution of services as a consequence of the licence being approved, the fact is that there has only been one commercial objector, an indication that other outlets in the locality are not opposed to the licence approval. Most of these outlets are also in closer proximity to the proposed Wine Box Nedlands than are the premises of Liquor Baron Claremont.

3.2.4 In relation to the Applicant's earlier reference to the Second Reading Speech, the Respondent drew attention to the following part of the Minister's statement:

"The 2005 Freemantle Review of the Liquor Licensing Act concluded that our liquor laws need to provide greater flexibility to meet the needs of consumers and tourist while promoting the consumption of liquor in low-risk drinking environments.

For too long the interests of consumers have taken a back seat to vested industry interests and through the reforms I am announcing today, this government plans to put the interests of consumers to the forefront.

The government is determined to promote innovation and diversity in the way liquor services are provided to consumers and provide more opportunity for small businesses”.

and

“The development of the liquor industry in Western Australia has long laboured under an anti-competitive public needs test. In fact, this state is one of the last jurisdictions in the nation to still maintain a needs test.

A key reform is the creation of a public interest test for new licences to replace the current needs test. Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest, and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts on the community.

While the public interest test will involve consideration of the amenity of a locality in the context of the facilities and services provided for consumers, the competitive impacts on other liquor businesses will not be considered”.

- 3.2.5 The Respondent stated that the Wine Box, Nedlands was not a speculative liquor licence application and that the IGA Store exists and will simply be adding a liquor store facility to its grocery range to improve the services and facilities for the consumer.
- 3.2.6 The Respondent referred to the PIA statement and the detailed extent of the information provided therein, which clearly addressed the issues and demonstrated the consumer benefits from the granting of this liquor licence.
- 3.2.7 The Respondent stated that reference by the Applicant to the potential harm to the students of the University of Western Australia was irrelevant in that the University was two kilometers away and there are other liquor outlets in closer proximity. This was to be a combined grocery/liquor store and as such would not offer appeal to attract students to the extent of increasing harm and ill-health issues.
- 3.2.8 The Respondent made the point that it was important to note that there had been no objections from the Police and Health Departments. It was also relevant to consider the locality of the proposed premises in relation to the premises of the Applicant, not only the distance that separates them, but also the railway line barrier.

4. Findings

4.1 Legal Principles

4.1.1 Pursuant to section 33 of the Act the licensing authority, in this case the Commission is empowered with the absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest.

4.1.2 Section 38 of the Act provides for the public interest test and that the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include-

- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
- (b) the impact on the amenity of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated, and
- (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and
- (d) any other prescribed matter.

4.1.3 Section 5 of the Act sets out the objects of the Act:

- (a) to regulate the sale, supply and consumption of liquor; and
- (b) to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the Liquor industry, the tourism industry and other hospitality industries in the State.

4.2 Application-Berbar Nominees Pty Ltd (t/a Liquor Barons, Claremont)

Having considered the material before the Director when making the Decision and in reviewing submissions and hearing the presentations of all parties, the Commission is satisfied that the granting of the liquor licence is in the public interest and conforms with the legislation and the government intention of the

legislation. The decision of the Director to grant a liquor store licence to Destination Holdings Pty Ltd for premises to be known as The Wine Box Nedlands, is affirmed.

4.3 Residential Objection – Ms Joan Dadour

The Commission has considered the merits of this objection, which has its basis in Sections 38(4)(b) and (c) of the Act, and has determined that there is not sufficient cause to reach a determination that it is not in the public interest for this licence to be granted. The decision of the Director to grant a liquor store licence to Destination Holdings Pty Ltd for premises to be known as The Wine Box Nedlands, is affirmed.

5. Reasons

- 4.4 The Applicant's two grounds for objection have not proven to have any basis, both in the context of the legislation and in regard to the government intentions as expressed in the Second Reading Speech of the Liquor and Gaming Legislation Amendment Bill 2006.
- 4.5 The Second Reading Speech acknowledged the potential tension that at times may arise between the objects 5(1)(a), (b) and (c) of the Act, with the Minister stating that the licensing authority will have to weigh and balance the competing arguments about public interest, first against the primary objects and then secondary objects of the Act, with a view to achieving the best possible outcome.
- 4.6 The Applicant's assertion that approving the licence will lead to a potential diminution of services and facilities at licensed premises in the locality is without basis – it is significant that no other liquor outlet in the locality lodged an objection.
- 4.7 The Applicant's premises, being some 1.6 kms from the site of the proposed liquor store licence, are geographically far enough removed that the likelihood of the effect of a potential diminution of services and facilities at the Liquor Baron Claremont directly due to a liquor licence approval for the Wine Box, Nedlands, is questionable.
- 4.8 Be that as it may, there is no requirement for the licensing authority to take into consideration the competitive impacts on other liquor businesses, when considering a new liquor licence application.

Rather, as evidenced by the Second Reading Speech, the Act was amended to specifically remove provisions for objections based on competitive impact grounds.

- 4.9 The Act was also amended to provide a wider choice range for consumers and the addition of a packaged liquor store facility as part of the Nedlands IGA grocery outlet is in accordance with this objective, as prescribed in Section 5(1)(c) of the Act.
- 4.10 When considering the potential for harm and ill-health as a consequence of the liquor licence approval, the Commission does not accept the Applicant's argument that the locality is likely to experience an increased level of harm and ill-health beyond that which already exists in the community.
- 4.11 It is the Commission's view that a liquor store licence, as part of the Nedlands IGA grocery outlet, is very much at the passive end of liquor licence approvals and in particular, is unlikely to have any bearing on the liquor consumption practices of students of the University of Western Australia, as submitted by the Applicant.
- 4.12 The Commission considers that the proposed Wine Box Nedlands liquor store licence complies with the legislation and the intention of the legislation and therefore it is in the public interest that the licensing authority approves the application.
- 4.13 In respect to the residential objection, the Commission is of the view that the addition of a liquor store to the grocery outlet of the Nedlands IGA will not add to vehicular traffic or delivery truck movements to the extent that the granting of a liquor licence is not considered to be in the public interest.
- 4.14 The noise and vehicle fume issues raised by the Objector are matters that have previously been addressed with the Nedlands City Council in relation to the overall shopping complex operation and are therefore not exclusive to the proposed liquor store operation.
- 4.15 Should there be specific issues relating to impacts on the amenity of the locality as a consequence of the approval of the liquor licence, there is scope for those who feel affected to lodge a complaint under Section 117 of the *Liquor Control Act 1988*.



Mr Jim Freemantle
CHAIRPERSON