

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

- Applicant:** Liquorland (Australia) Pty Ltd
(*represented by Mr Steven Standing and
Ms Triska Di Cicco of Herbert Smith Freehills*)
- Commission:** Mr Eddie Watling (Presiding Member)
Ms Helen Cogan (Member)
Mr Evan Shackleton (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of 8 October 2012 by the Director of Liquor Licensing (“the Director”) to:
- not grant leave to apply for the approval of the transfer of conditionally granted licence No. 6030137613; and
 - cancel conditionally granted licence No. 6030137613.
- Premises:** 256 Hampton Road, Beaconsfield
- Date of Hearing:** 6 November 2012
- Date of Determination:** 11 December 2012
- Determination:** The Liquor Commission orders:
1. The decision of the Director to cancel conditionally granted licence No. 6030137613 is affirmed;
 2. In view of the order made to affirm the Director’s decision to cancel conditionally granted licence No. 6030137613, it is not necessary for the Commission to make any order in respect of the application for leave to apply for the approval of the transfer of licence No. 6030137613, as the application for leave falls away as a result of the affirmation of the cancellation of the licence.

Authorities referred to in determination:

- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (unreported, Supreme Court WA 18 June 1990)

Background

- 1 On 13 October 2011, the Liquor Commission of Western Australia ("the Commission") approved the conditional grant of a liquor store licence to Woolworths Limited ("Woolworths") in respect of premises to operate as a Dan Murphy's liquor store and located at 256 Hampton Road, Beaconsfield.
- 2 On 30 April 2012, Coles Group Property Developments, an associated company of Liquorland (Australia) Pty Ltd ("Liquorland"), purchased the premises, thus making it impossible for Woolworths to fulfil the obligations of the licence. Pursuant to section 37(5)(b) of the *Liquor Control Act 1988* ("the Act"), Woolworths' interest in the licence was terminated on that date.
- 3 On 18 June 2012, Liquorland applied for leave to apply for a transfer of the licence pursuant to section 82(2) of the Act. The only pre-requisite for the transfer of a licence that has bearing on this application, is that the leave of the Director of Liquor Licensing ("the Director") is required pursuant to section 84(1)(c) of the Act.
- 4 On 12 July 2012, the Director advised Liquorland that leave was not granted. On that same date the Director cancelled the licence pursuant to section 62(10) of the Act (refer Decision No A220710).
- 5 On 10 August 2012, Liquorland lodged with the Commission, an application for review of the Director's decision:
 - to not grant leave to apply for the approval of the transfer of conditionally granted licence 6030137613; and
 - to cancel conditionally granted licence 6030137613.
- 6 On 20 August 2012, Liquorland lodged an application for a new liquor store licence to be approved for premises at 256 Hampton Road, Beaconsfield, pending the outcome of the review application.
- 7 A Commission hearing held on 26 September 2012 in respect of the review application resulted in the following orders being issued:
 - a) *the decision of the Director to refuse leave to Liquorland to apply for the approval of the transfer of the licence is quashed;*
 - b) *the decision of the Director to cancel conditional licence 6030137613 is quashed;*
 - c) *the issue of leave pursuant to section 84(1)(c) of the Act is referred back to the Director to be considered on its merits, that being the materials attached to the application for transfer filed with the Director on 18 June, 2012.*
- 8 On 26 September 2012, Liquorland lodged a submission with the Director for an assessment of the merits of the leave application.
- 9 On 8 October 2012, the Director again refused the leave application.
- 10 On 12 October 2012, Liquorland lodged with the Commission, an application for a review of the decision of the Director to not grant leave.
- 11 On 19 October 2012, the Director cancelled conditional licence 6030137613.

- 12 On 22 October 2012, Liquorland lodged with the Commission an application for a review of the decision of the Director to cancel the licence.
- 13 On 1 November 2012, a submission in support of the application was lodged.
- 14 On 6 November 2012, a hearing before the Commission was held.

Submission by the Applicant:

- 15 The applicant referred to the Director's letter dated 8 October 2012, addressed to Herbert Smith Freehills and submitted that in refusing leave to allow an application for the transfer of the licence, the Director failed properly to apply the principles established in the case of *Jericho Nominees Pty Ltd v Dileum Pty Ltd (unreported, Supreme Court WA 18 June 1990)* ("*Jericho*").
- 16 That case set out that a decision whether or not to grant leave under section 84(1)(c) of the act is to be made "*...in conformity with the clear objects of the Act, which is to regulate the industry and provide the other objects set out in section 5*". It was submitted that that decision further stated that the discretion of the Licensing Authority in relation to a transfer should not be exercised in a way that would "*...have the effect of effectively abandoning a public facility ... unless it was apparent that the applicant (for transfer) was unsuitable or for some other reason to be gleaned from the provisions of the Act...*"
- 17 It was submitted by the applicant that, in the absence of some other circumstances made relevant by the Act, the Director need only be satisfied that the applicant for transfer is a 'fit and proper person to be licensee of the premises to which the application relates'. In the circumstances of Liquorland this criterion is clearly satisfied.
- 18 In response to a question by the Commission as to the relevance of the *Jericho* decision, as it applied to a licence that had been in operation for more than forty years in comparison to a conditionally granted licence yet to become effective, the applicant submitted that this was in fact a strength of the transfer application in that the situation analysis was current and is based on a recent close examination of the circumstances in the locality which lead to the granting of a conditional licence for a large destination style liquor store to be established at 256 Hampton Road, Beaconsfield.
- 19 It was submitted that the liquor store operation proposed by the applicant was in substance the same, albeit in a different form, to that applying to the conditionally granted licence. The applicant's proposed liquor store does, to all intents and purposes, offer the same consumer services and facilities as those proposed for the liquor store for which the conditionally granted licence was granted, therefore the conditionally granted licence has equal function for the applicant and it is not relevant that there are some differences in branding and style.
- 20 In granting the conditional licence the Commission, in its determination, had made it clear that the licence was granted to meet the proven public interest that would be addressed through a large packaged liquor outlet providing a diverse range of products, being established at the premises. The licence had not been granted in respect of a particular brand or style of operation, and nor does the Act contemplate such a grant.

- 21 It was contended that a licence is in the nature of a public facility and where there is a suitable applicant for the transfer of a licence, it would be entirely inconsistent with the objects of the Act and the principle stated in the *Jericho* decision (refer paragraph 16 above) to refuse the transfer and instead, require the applicant to apply for a new licence.
- 22 The fact that the current plans for the design and format of the premises are owned by Woolworths is not relevant, as such interest is a private interest, which should have no bearing on a proper assessment of the public interest in relation to the grant of leave.
- 23 It was submitted that if the transfer application is granted, the applicant will, pursuant to section 62(6) of the Act, seek the variation of some of the conditions including the plans, to which the conditionally granted licence is subject, to reflect the applicant's preferences for the layout of the premises consistent with its particular style of operation.
- 24 It was submitted that the fact that the applicant has separately applied for the grant of a new liquor store licence at the premises is also irrelevant to the grant of leave to apply for a transfer.
- 25 With regard to the Director's decision to cancel the licence pursuant to section 62(10) of the Act, it was pointed out that this action summarily disposed of the applicant's leave (and transfer) application by extinguishing the subject matter, without a consideration of the merits of that application. The Director's decision to cancel the licence, in effect, made those applications otiose.
- 26 It was submitted that consistent with its decision in LC 34/2012 (at 8) if the Commission quashes the leave refusal and grants leave to the applicant, it should also quash the cancellation decision to enable determination by the Director of the applicant's application for a transfer of the licence.

Determination:

- 27 As the 19 October 2012 decision of the Director to cancel conditionally granted licence 6030137613 impacts on the validity of the application for leave for approval for the transfer of that licence, the Commission initially turns its attention to that aspect of the applications.
- 28 In its determination (LC 34/2012) of 26 September 2012 the Commission quashed the decision of the Director to cancel the licence, so that the issue of leave to apply for a transfer of that licence could be further considered on its merits, taking into consideration the material attached to the application filed 18 June 2012.
- 29 On 8 October 2012, the Director advised that having considered the matters relating to the leave application, approval was not granted for Liquorland to make application for approval for the transfer of the licence.
- 30 As the Commission's order (LC 34/2012) in relation to leave pursuant to section 84(1)(c) has been addressed, the issue of the cancellation of the licence can now be determined.
- 31 The Commission has considered the circumstances and the events leading up to the 19 October 2012 cancellation decision and finds that this action is in accordance with the requirements of the Act pursuant to section 62(10) which states:

If the holder of a licence conditionally granted or removed under this section fails to apply for confirmation of the grant, the Director may cancel the licence without notice.

- 32 Accordingly the Commission affirms the Director's decision of 19 October 2012 to cancel conditionally granted licence 6030137613. It is clear from the matters referred to in paragraph 2 above that it was not possible for Woolworths to apply for confirmation of the conditionally grant licence, its interest in the licence having terminated.
- 33 Whilst this affirmation effectively extinguishes the applicant's interest in the licence, the matter of leave to apply for a transfer of the licence is, however, now addressed to provide further clarification of the approach that would have been adopted by the Commission should the cancellation of the licence not have been affirmed.
- 34 The application for leave is based on the fact that the conditionally granted licence applies to premises at 256 Hampton Road Beaconsfield, now owned by Coles Group Property Development of which Liquorland is a subsidiary.
- 35 The change of property ownership took place subsequent to the issue of conditionally granted liquor licence 6030137613 for Woolworths to establish a "Dan Murphy's" destination liquor store at that location.
- 36 The position being put by the applicant is covered in paragraphs 15 to 26 above, however, the Commission does not accept that the refusal to grant leave to apply for the transfer of the licence has the effect of abandoning a public facility.
- 37 In the case of *Jericho* (supra) the liquor licence had in fact been in operation for more than forty years and the inability to transfer that licence would have removed a licensing facility that had a long tradition of providing a public facility.
- 38 The granting of a conditional licence to Woolworths and the subsequent application for leave for transfer by Liquorland involves a different range of circumstances which require the licensing authority to make a re-assessment of the public interest in accordance with the objects of the Act (Section 5).
- 39 To simply claim that a licence issued to one party has equal relevance to another is not a sufficient ground to grant leave to apply for a transfer of that licence and in this instance the following matters are relevant:
- The Licensing Authority granted the conditional licence to Woolworths for the development of a "Dan Murphy's" store in this location having considered a large volume of material submitted in support of that application. This material was specific to the operation of a Dan Murphy's store and was referred to in the determination (LC 44/2011) to grant the licence - paragraphs 81 and 82:

81 *In weighing the evidence the commission is satisfied that the granting of this licence will cater for the requirements of consumers for liquor and related services in the manner and under the circumstances contemplated by the applicant at the proposed location; and*

82 *In reaching the determination, while the Commission has placed some value on the generally demonstrated acceptance by consumers of the Dan Murphy's style of operation, this application has been assessed as it being in the public interest to approve the application to establish a Dan Murphy's*

store in this locality where there are no other large outlets providing a diverse range of product.

- The applicant's claim that the proposed Liquorland (1st Choice) operation is to all intents and purposes the same as a Dan Murphy's store has not been tested in relation to catering for the requirements of consumers in this locality. The Woolworths application, which was supported with a considerable amount of data relevant to both the applicant and the location, was closely scrutinised and it would not be in the public interest to grant leave for the transfer of that licence without the ability to apply a similar analysis to a proposal from a new applicant.
- A new application for a "Dan Murphy's" store to be located some 300 metres from the site proposed in the initial application was lodged on 29 May 2012 (prior to the Liquorland application for leave to apply for a transfer) and because of the nature of the operation of large destination liquor stores, it would not be in the public interest to consider both applications in isolation. To grant leave to apply for a transfer in this situation, without the Licensing Authority giving consideration to the merits of all the applications before it, would not be consistent with the requirement of the objects of the Act (section 5).
- The application from Woolworths to establish a "Dan Murphy's" liquor store at 219 Hampton Road South Fremantle was heard by the Commission on 22 October 2012, and was approved in determination LC 42/2012 published 27 November, 2012.
- The Commission does not question the suitability of the applicant, which has an established record in the operation of liquor stores, however, this alone is not a sufficient basis for the grant of approval of leave to apply for the transfer of a licence. There is no implied right for a liquor licence to be vested in the owner of premises based on the ownership factor alone, as specified in section 30A(2) of the Act:

A licence vests personally in the licensee to whom it is granted, and is not capable of being –

- (a) Made subject to, or used as security for, any lien, charge or other adverse interest; or*
- (b) Vested in any other person, except in accordance with this Act.*

40 In accordance with the observations in paragraph 39, the Commission is not persuaded that it would be in the public interest to grant leave for an application to transfer conditionally granted licence 6030137613 from Woolworths to Liquorland. The Commission is of the view that the objects of the Act (section 5) would not be appropriately addressed through the granting of the leave application.

41 The Commission orders:

41.1 The decision of the Director to cancel conditionally granted licence No 6030137613 is affirmed;

41.2 In view of the order made in paragraph 41.1 above to affirm the Director's decision to cancel conditionally granted licence No. 6030137613, it is not necessary for the Commission to make any order in respect of the application for leave to apply for the approval of the transfer of licence No. 6030137613, as the

application for leave falls away as a result of the affirmation of the cancellation of the licence.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written in a cursive style.

EDDIE WATLING
PRESIDING MEMBER