IN THE LIQUOR LICENSING COURT OF WESTERN AUSTRALIA) CRT 269/88

IN THE MATTER of an application by COLES MYER LTD for the conditional grant of a liquor store licence for premises to be known as LIQUORLAND situated at Cnr Benara Road and McGilvray Avenue, Noranda

Mr R Meadows appeared for the applicant (instructed by Messrs Freehill Hollingdale & Page)

Mr L W Roberts-Smith QC appeared as amicus curiae

Reserved decision of His Honour Judge Greaves
18 October 1990

GREAVES J:

1. I accept the submission for the applicant in this case that the only issue is whether the requirements of s.38 have been satisfied on the evidence.

2. I do not accept the submission that the Full Court has held that on the evidence that was before the Court, the Court should have been satisfied as to those requirements.

3. I accept of course that the ratio decedendi of Sinclair v the Mining Warden at Maryborough and Another (1975) 132 CLR 473 is that the nature and extent of the public interest asserted is not to be confused with the identity and interest of the person asserting it. Accordingly, one person may assert a matter of considerable significance in the public interest, while many persons may assert a matter of equally little significance in the public interest.

4. I entirely accept that it would be wrong and far too narrow a view of s.38 to conclude on the evidence that those people who may attend the two supermarkets at the centre for the purpose of obtaining liquor with their one stop shopping cannot be regarded as the public for the purposes of s.38. I accept that 37,000 people is numerically a significantly large section of the public. The question is whether on all the evidence and taking into account the matters referred to in s.38, the Court is satisfied that the grant of this application is necessary to provide for the reasonable requirements of the public in the affected area. I accept that there is an obvious inference open from the evidence that even apart from the increased population there will be a very large section of the public who would be convenienced if they could obtain their liquor purchases at such an outlet as the one proposed.

5. I see no reason on the evidence or in the reasons of the Full Court to vary the findings of fact expressed in paragraphs 22, 23, 24 and 25 of the reasons of this Court of 23 June 1989 reflecting the fact that the witnesses who gave evidence in support of each application (which was relevant to both applications) were almost exclusively customers of each supermarket operated in each case by companies related to each applicant and were not, for instance, customers of any other operator in the shopping centre. With this qualification, I accept the evidence of the witnesses called that each would be convenienced by being able to do one stop shopping at the Noranda Shopping Centre. I accept that evidence as the subjective evidence of the requirements of a section of the public in the affected area representative of the public.

6. Notwithstanding the fact that the section of the public identified is significantly large in its number, in my opinion the interest of that section is not objectively reasonable having regard to the number, condition and distribution of the licensed premises already existing in the affected area and the extent and quality of the services provided on those premises, about which there was no criticism. In paragraphs 19, 20 and 24 of my original reasons, I referred to the fact that each applicant placed particular reliance upon the distribution of the licensed premises already existing in the affected area and my conclusions thereon which I see no reason to vary.

7. Once it is demonstrated that this Court has not made a finding that those people who may attend the two supermarkets at the shopping centre for the purpose of obtaining liquor with their one stop shopping cannot be regarded as the public for the purposes of s.38, there is in my opinion no reason for the Court to reach any conclusion other than that expressed in the earlier decision of this Court.

8. In my opinion, the evidence to which I have referred demonstrates that the requirments of the section of the public identified by the applicant in this affected area for liquor for consumption off the premises are sufficiently catered for by the other licensed outlets in the affected area. In my opinion, it is relevant for the Court to make this assessment on the evidence and consider the extent to which those requirements are met by the licensed premises already existing in the affected area, pursuant to s.38(2)(c)(ii).

9. In reaching this conclusion, I have obviously always been aware that none of the licensees in the affected area have objected to this application. I do not accept that there is anything unusual about this. The right to object is a right which is exercised voluntarily under the Act and there may be many reasons in one case and another why a licensee lodges an objection or does not lodge an objection to an application. There are equally many objectors who appear before this Court who do not allege, or who do not seriously allege that their trade will be affected by the grant of the application in question. Indeed, the Act no longer allows objection on that ground alone.

10. What the Act does require is that in determining whether the requirements of the public in the affected area relied upon by the applicant are reasonable, the Licensing Authority, whether the Court or the Director of Liquor Licensing, objection or no, shall consider whether the applicant has satisfied the statutory criteria contained in s.38 and elsewhere in the Act.

11. In my opinion, for these reasons, the obvious inference which might otherwise be drawn from the number of persons patronizing the shopping centre and from the absence of any objection to this application should not lead the Court to the conclusion that their requirements are objectively reasonable. I reach this conclusion within the scheme of the Act as a whole and notwithstanding, and I repeat, that I accept that there is a large section of the public which would be convenienced by the grant of this application. I accept that such is a relevant consideration in the determination of an application such as this but I am of the opinion that it is not decisive. In my opinion, the approach which I have adopted is consistent with the decision of the Court of Appeal in New South Wales in Vine v Smith, an authority which the applicant accepts. I refer to the judgment of Hope J. A. at page 267 where His Honour said:

> *"It is not merely a matter of what the neighbourhood requires and whether that is according to some unstated standard reasonable; it is also a question whether the demands of those in the neighbourhood ... ought to be acceded to. In the end, it would seem that what is raised by the section is all one question and that read as a whole the language used merely serves to emphasise the objective character of the enquiry and to show that other considerations may enter into its resolution than the mere satisfaction of the demands made by persons in the neighbourhood."*

Later, at page 270, His Honour continued:

> *"The guide used by the learned magistrate led him to place what Yeldham J. described as "an almost total emphasis" on existing outlets, and to omit to take what was an essential step in the resolution of the question which the objection raised, an evaluation of the demand or need for, and of the convenience, advantage or benefit which would be provided by the outlet which the applicant proposed. The fact that there was a significant demand or need by people in the neighbourhood for the outlet, and that it would provide them with a significant convenience, advantage or benefit would not necessarily establish that the reasonable requirements of the neighbourhood justified the grant of the licence, any more than the fact that the people who claimed they*

wanted the new outlet obtained their liquor elsewhere would prevent the applicant from establishing his case."

12. Since the first hearing of this application this Court has delivered judgment in the Charlie Carters Broome Liquor Store case. (Crt 4/90). I adopt the approach enunciated in that case at paragraphs 26 to 29 inclusive as follows:

> *"26. In my opinion, the proper approach to the evidence in the determination of an application such as the present, and the approach which I have sought to express, is put beyond doubt by the decision of the Full Court referred to by counsel for the applicant in paragraph 4.10 of his written submissions, in Costopolous and others v Petona (unreported decision of the Full Court of the Supreme Court in Appeal number 31 of 1989 delivered 23 June 1989). In that case, Wallace J., having considered various authorities including Vine v Smith (1980) 1NSWLR 261, at page 6 of his reasons, observed:*
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> > *"In other words, the objection is not to be answered solely by reference to the subjective desires or wishes of persons in, resorting to or passing through the affected area. Vine v Smith at 267."*
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> *27. It is apparent from the remarks of his Honour a little later at page 15 of his reasons that Mr Meadows, who was counsel for the applicant for the liquor store licence in that case, sought to persuade the Full Court that the proper approach to the determination of the application upon the evidence in that case in accordance with the Liquor Act 1970, is the same approach which he has urged upon the Court in the present case.*
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> *28. At page 15 of his reasons, Wallace J., with whom Pidgeon J. agreed, said:*
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> > *"I am unable to agree with counsel's argument. What Mr Meadows seems to be saying is that, one first of all looks to ascertain whether there is a sufficient population within the definition of the three categories. Then, pursuant to s.71(1)(b) one asks the question as to whether there are insufficient store licences or other licences in the area to meet the requirements of the public. The requirements of the public, as demonstrated by the evidence, was the desire to be able to obtain liquor purchases at the same location where they did their general shopping. It follows therefore, that there is such a requirement and that could not be met by any of the existing store licences in the affected area. With great respect to counsel, that cannot be the construction which one would place upon s.71 and s.57 of the Act, nor does it accord with authority."*
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> *29. I apply what Wallace J. said in this case and interpolate that in my opinion, and the contrary was not suggested, the views expressed by the Full Court in Costopolous' case are equally applicable to the determination of an application under the Liquor Licensing Act 1988 as they were to the determination of an application under the Liquor Act 1970. To put the matter beyond doubt, I should observe that in my opinion there is nothing to be found in the reasons of the Full Court in the Coles Myer decision, to which I have referred, which seeks to place any qualification upon the earlier decision of the Full Court. It is to be observed that although the earlier decision of the Full Court was cited at the hearing of the appeal in the Coles Myer application, it was not referred to in the reasons of their Honours. I infer, therefore, that their Honours said nothing which could be interpreted as a departure from the earlier decision of the Court."*

13. In my opinion it is not for this Court to ignore the clear statement of principle in the earlier decision of the Full Court. If indeed the subjective desires of persons in the affected area are to be held decisive of an application such as this, then it is not for this Court to depart from earlier authority without a clear statement to that effect.

14. The only other matter to which I wish to make reference is the observation by Rowland J. at page 12 of his reasons that the Full Court did not have *"the benefit of any contrary arguments"*. It was for this reason, when the application was returned to this Court, that I required amicus curiae to be appointed. In my opinion, it is patently not practical in this specialist jurisdiction for the discretion of the Court to be exercised without the benefit of hearing opposing argument.

15. For these reasons, in my opinion this application should be refused.

JUDGE

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Liquor Licensing Court

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Your Ref: 31/88

Our Ref: CRT 269/88

DIRECTOR OF LIQUOR LICENSING
LIQUOR LICENSING DIVISION

LIQUORLAND NORANDA

The above matter was referred by you on 16/11/88.

Attached for your personal file is a copy of the Court's decision.

A copy of the decision is forwarded to you under cover of a separate memorandum, for copying and appropriate action by other sections in the Division.

Paul Majewski
FOR
REGISTRAR

18/10/90

att

LIQUOR LICENSING OFFICE
18 OCT 1990
PERTH