

LICENSING COURT OF SOUTH AUSTRALIA

JAMES IRVINE WINE CONSULTANCY PTY LTD

JURISDICTION: Application for Direct Sales Licence

FILE NO: 5796 of 2016

HEARING DATE: 18 November 2016

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 25 November 2016

Application for summary relief - The applicant seeks a direct sales licence - The objector opposes the application on the ground that to grant it would contravene a restraint clause in agreement that it has entered into - The applicant contends that the alleged breach of contractual conditions is not a matter that is within the jurisdiction of this Court to determine and that as this is the sole ground of objection the application should be granted - Principles guiding applications for summary relief considered - Arguably a breach of contractual obligations is relevant to the issue of fitness and propriety - As such this is not an appropriate case for summary relief - The primary application will now proceed to hearing - Ss 55 and 71(3) Liquor Licensing Act 1997

Dalgety Wine Estates Pty Ltd v Rizzon [1979] HCA 41; (1979) 141 CLR 552
McHugh Holdings Pty Ltd v Newtown Colonial Hotel Pty Ltd [2008] NSWSC 542

Webster v Lamparde [1993] HCA 57; (1993) 177 CLR 598

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC with Mr G Tye

Respondent: Mr M Livesey QC with Mr S Lumsden

Solicitors:

Applicant: Norman Waterhouse

Respondent: Wallmans Lawyers

- 1 This is an application for the summary disposition of an application for a direct sales licence that has been lodged by James Irvine Wine Consultancy Pty Ltd.
- 2 The application for the licence is opposed by JBW Nominees Pty Ltd and Mr Peter Miles.
- 3 On 29 August 2014 JBW Nominees and Mr Miles entered into an agreement with Irvine Wines Pty Ltd, Mr James Irvine and Ms Marjorie Irvine to purchase the assets used in the conduct of the Irvine Wines business and vineyard business. The assets were defined as Irvine Wines plant and equipment, stock, Irvine Wines intellectual property and goodwill. The sale price was \$2.225 million. The written agreement has within it a “restraint clause” which purports to impose restraints on the capacity of Irvine Wines and Mr and Ms Irvine to carry on business relating to the sale or production of liquor and grape products.
- 4 In objecting to the application for a direct sales licence, JBW Nominees and Mr Miles contend that the application offends the restraint clause and that that provides a sufficient basis for this Court to refuse to grant the application.
- 5 In making this application for the summary disposition, James Irvine Wine Consultancy contends that this Court does not have the jurisdiction to concern itself with the contractual obligations of parties before it. It contends that the jurisdiction of the Court is confined to dealing with the application on its merits and that because on the face of it, all of the necessary pre-requisites for the granting of the licence have been met, the Court should now grant it.
- 6 Much of the debate before this Court centred on the decisions of the High Court in *Dalgety Wine Estates Pty Ltd v Rizzon*¹ and the Supreme Court of New South Wales in *McHugh Holdings Pty Ltd v Newtown Colonial Hotel Pty Ltd*.²
- 7 *Dalgety Wine Estates* concerned an application for the removal of a retail storekeeper’s licence under *the Licensing Act 1967*. Under that Act an applicant seeking the removal of such a licence needed, amongst other things, to satisfy the Court that owners or occupiers of premises in the locality would not be unreasonably affected, that the premises would not be situated in a zone which excludes premises of the relevant kind, that the site was suitable for the premises and that the applicant had complied with all the requirements of the Act. The Act then went on to prescribe the grounds of objection which could be taken to such applications.

¹ [1979] HCA 41; (1979) 141 CLR 552.

² [2008] NSWSC 542.

Amongst others, they included the suitability of the applicant and the premises; as well as a number of grounds which related to other considerations of public and community interest. It then went on to specify additional grounds of objection which included:

“That the lease under which the holder of the licence occupies his premises contains a covenant or prohibition against removing the licence to any other premises without the consent of the lessor, and that such consent has not been obtained.”

8 As it was, in this case there was such a covenant and there was a lack of requisite consent. As such, the landlord sought an injunction in the Supreme Court of South Australia to restrain the Licensing Court from entertaining the application for removal.

9 A majority of the High Court held that the Supreme Court was right to refuse to grant that relief. The ratio of the case is that the breadth of the discretion vested in the Licensing Court to grant or refuse an application, being discretion founded on the public interest, was such that the Court could grant an application, notwithstanding a covenant to prevent removal without consent and a lack of requisite consent.

10 As Mason J observed:

“...the grant of an injunction would effectively deprive the Licensing Court of the opportunity of exercising that overriding discretion, notwithstanding that the discretion had been given to the Licensing Court so as to enable it to determine applications in the public interest. Indeed, the effect of granting an injunction would be to set private rights above the public interest, for an injunction would effectively prevent the Licensing Court from deciding whether, despite the existence of a covenant, considerations of public interest outweigh the desirability of enforcing private rights.”³

11 *McHugh Holdings* also concerned a covenant that seemingly curtailed a party’s capacity to seek a licence. An issue before the Supreme Court of New South Wales was whether in light of *Dalgety Wine Estates* it should entertain an application for injunctive relief.

12 Brereton J distinguished *Dalgety Wine Estates*. He said:

“In *Dalgety*, Mason J said (at 574) that the Supreme Court should not have exercised its discretion to prevent the respondent, in breach of covenant, from invoking the jurisdiction of the Licensing Court in a matter in which jurisdiction was conferred on it by the Act. As well as pointing out that a superior court should hesitate to grant an injunction to restrain a party from commencing or

³ [1979] HCA 41 at para 22; (1979) 141 CLR 552 at 575.

maintaining proceedings in a court or tribunal especially constituted with a specialist jurisdiction, his Honour also adverted to the fact that the Licensing Court was specifically directed to determine the grounds of objection, of which one of those available was the breach of covenant. Referring to the observations of Jordan CJ in *Ex parte Berry; Re Kessell* his Honour said (at 575):

‘In this case, however, the Licensing Court as well as the Supreme Court has jurisdiction to decide whether there has been a breach of covenant. But the Licensing Court alone has jurisdiction to decide whether the licence should be removed. To grant an injunction having the effect of preventing the Licensing Court from exercising its overriding discretion to grant or refuse the application would be to encroach on its jurisdiction, indeed to prevent it from exercising its jurisdiction.’⁴

13 Brereton J then said:

‘...in the present case, the statute does not confer on the Licensing Court jurisdiction to decide whether there has been a breach of covenant.’⁵

14 This led him to conclude as follows:

‘In my view, *Dalgety* (in which there were strong dissents by Barwick CJ and Gibbs J, who would have granted relief) is plainly distinguishable from the present case, because of the difference in the legislation, the New South Wales legislation not conferring on the Licensing Court the ability to consider and determine contractual rights.

....

To my mind, it would be positively wrong to decline to intervene by injunction in the context of the present case.’⁶

15 Mr Roder, SC, counsel for James Irvine Wine Consultancy, submitted that under the *Liquor Licensing Act 1997*, there is no analogous provision to that which was pivotal to the conclusion reached by the majority in *Dalgety Wine Estates*. He submitted that I should conclude that the position is analogous to that which was considered in *McHugh Holdings* and that I should find that it is not within the jurisdiction of this Court to make findings about the contractual rights and obligations arising as a result of the restraint clause.

⁴ (2008) 73 NSWLR 53 at 61.

⁵ (2008) 73 NSWLR 53 at 62.

⁶ (2008) 73 NSWLR 53 at 62-3.

- 16 In considering this application it is important to bear in mind the very limited circumstances where it is appropriate to grant summary relief. The principles that guide such applications are well known. They are as described by Mason CJ and Deane and Dawson JJ, in *Webster v Lamparde* where they said as follows:

“The power to order summary judgment must be exercised with ‘exceptional caution’: *General Steel Industries Inc v. Commission of the Railways* (NSW) and ‘should never be exercised unless it is clear that there is no real question to be tried’: *Fancourt v. Mercantile Credit Ltd*. As Dixon J. commented in *Dey v. Victorian Railways Commissioners*:

‘A case must be very clear indeed to justify the summary intervention of the Court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court with or without a jury. The fact that a transaction is intricate may not disentitle the Court to examine the course of action and needs to go out of it for the purpose of seeing whether the proceedings amount to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether on fact or law and that the rights of parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process.’

Nowhere is that need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that great care ... be exercised to ensure that under the guise of achieving expeditious finality a plaintiff has not been improperly deprived of his opportunity for the trial of his case by the appointed tribunal: *General Steel Industries Inc v. Commissioner of the Railways* (NSW).⁷ (footnotes omitted)

- 17 I accept that unlike the situation in *Dalgety Wine Estates*, there is no express grant of jurisdiction to this Court to delve into the contractual rights and obligations of parties. But, I could only grant such relief if I could be satisfied that such matters could never concern the Court in a case such as this. In my view that cannot be said.
- 18 One of the matters that an applicant for a licence must establish is that the applicant is a fit and proper person to hold the licence. If, as is the case here, the applicant is a corporate entity, the applicant must establish that each person who occupies a position of authority in the entity is a fit and proper person to occupy such a position.⁸ Mr James Irvine and

⁷ [1993] HCA 57; (1993) 177 CLR 598 at p 602, 603.

⁸ Section 71(3) *Liquor Licensing Act 1997*.

Ms Marjorie Irvine have been nominated by James Irvine Wine Consultancy to occupy such positions. Section 55 of the Act prescribes factors to be taken into account in deciding whether a person is fit and proper. It provides that the relevant licensing authority must, in deciding whether a person is a fit and proper, take into consideration the person's reputation, honesty and integrity, including their creditworthiness.

- 19 In conformity with this provision I can envisage that there could be circumstances where a party's failure to adhere to contractual obligations is so morally derelict as to lead to a conclusion that the person is dishonest and lacks integrity and is therefore not a fit and proper person.
- 20 For now, I do not make that finding in respect of Mr James Irvine and Ms Marjorie Irvine. But I cannot exclude the possibility that upon hearing the evidence, I might conclude otherwise.
- 21 It follows that this is not an appropriate case to grant summary relief. Accordingly I dismiss the application.
- 22 I will now list the matter for hearing on the merits.