

BWS – to be known as Dan Murphy's [2014] SALC 5

LICENSING COURT OF SOUTH AUSTRALIA

BWS – TO BE KNOWN AS DAN MURPHY'S

JURISDICTION: Application for a removal of Retail Liquor Merchants Licence

FILE NO: 5568 of 2013

HEARING DATE: 17 February 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 17 February 2014 (Reasons published 20 February 2014)

Application for the removal of a retail liquor merchant's licence - Existing licence is conducted under the trade name BWS on Henley Beach Road, Mile End - Proposed premises to trade under the trade name Dan Murphys within a major redevelopment at the Brickworks Market on South Road - Two issues - One is locality, the second is whether the Court is satisfied that to grant the application would not be contrary to the public interest - Held that the application for the removal of the applicant's retail liquor merchant's licence involves the movement of the licence from one facility to another within the same locality - As to the issue of discretion the public interest does not require the refusal of the application - Liquor Licensing Act 1997.

S J White Pty Ltd v Liquorland [2011] SASFC 103

Nepeor v Liquor Licensing Commission (1986) 46 SASR 205

Waiata Pty Ltd v Lane (1985) 39 SASR 290

REPRESENTATION:

Counsel:

Applicant: Mr S Walsh QC with Mr R D'Aloia

Solicitors:

Applicant: Clelands Lawyers

- 1 This is an application for the removal of a retail liquor merchant’s licence pursuant to the *Liquor Licensing Act 1997*.
- 2 The applicant is Woolies Liquor Stores Pty Ltd. It seeks to remove a licence from a store trading under the BWS badge at 139 Henley Beach Road, Mile End, to yet to be constructed premises in a major development at the Brickworks Market Place, on the corner of Ashwin Parade and South Road, Torrensville.
- 3 It is now settled law that if the proposed licensed premises are in the same locality as the existing licensed premises proof of need is not required.¹
- 4 The only contentious issues in the case were whether the two premises are in the same locality and if so whether there were matters indicating that the Court should exercise its discretion to refuse the application.
- 5 On 17 February 2014, at the conclusion of the hearing of this matter, I indicated that I was satisfied that the application for the removal of the applicant’s retail liquor merchant’s licence involved the movement of the licence from one facility to another within the same locality.
- 6 As to the issue of discretion I indicated that the public interest did not require the refusal of the application. I said that, to the contrary, the grant of this application was in the public interest.
- 7 I therefore granted the application and directed that a certificate be issued in accordance with s 62 of the Act.² I directed counsel to forward draft minutes of order.
- 8 These are my reasons for reaching those conclusions.

Locality

- 9 The existing premises are situated on the southern side of Henley Beach Road, a little west from the junction of that road and South Road. It is within an area described in planning terms as the Torrensville District Centre. That centre comprises of a number of mid-range retail outlets of various descriptions on both sides of Henley Beach Road.
- 10 South Road in this vicinity is a major road that relevantly crosses the River Torrens to the north and further north again Port Road. It crosses Sir Donald Bradman Drive to the south.

¹ *S J White Pty Ltd v Liquorland* [2011] SASFC 103

² Section 62 enables the issue of a certificate of approval in connection uncompleted premises.

- 11 Henley Beach Road connects the beach to the city. In this vicinity it crosses Marion Road to the west and further west again, Holbrooks Road. It crosses South Road to the east and further east again, James Congdon Drive.
- 12 The River Torrens is a little over two kilometres from Sir Donald Bradman Drive. About the same distance separates Marion Road from James Congdon Drive.
- 13 The planner, Mr Graham Burns, thought that this area comprised the relevant locality. He regards the River Torrens as a physical barrier of the type spoken of in some of the cases.³
- 14 The proposed premises are intended to be part of a district shopping centre at the now closed Brickworks Markets anchored by a Woolworths Supermarket, a Big W discount department store, 35 to 40 specialty shops and a Dan Murphy’s store, being the facility in respect of which this application is made.
- 15 The site adjoins the River Torrens to the north and South Road to the east. It is just over one kilometre from the existing premises and the two are readily accessible to each other by road.
- 16 Whilst the suggested locality put forward by Mr Burns is a reasonable one, I think arguably the relevant locality extends beyond Holbrooks Road and Marion Road to the west and beyond Sir Donald Bradman Drive to the south. However, nothing turns on that because it seems to me that whatever view one might take of the boundaries of the relevant locality it is clear that the existing and proposed premises are within the same locality.

Discretion

- 17 Section 53 of the Act confers upon the Court an unqualified discretion to refuse an application. The purpose of the discretion is to protect the public. Amongst other things that might require it to exercise that discretion so as to promote the shaping and development of an orderly and harmonious system of liquor facilities.⁴
- 18 If a significant portion of the relevant public was disadvantaged by the removal of the existing licence that would be a matter that would weigh heavily in determining whether the Court in the exercise of its discretion

³ von Doussa J in *Nepeor v Liquor Licensing Commission*, in making some general observations about the meaning of the word “locality”, said: “In other cases, particular physical features of the area, such as a river, or some other significant obstruction to the free movement of people, might provide the basis for including or excluding particular areas from consideration in a precise way.” (1986) 46 SASR 205 at 215.

⁴ *Waiata Pty Ltd v Lane* (1985) 39 SASR 290 at 293-294 per King CJ.

ought to refuse the application. So too would a conclusion that to permit the removal would result in a proliferation of like facilities within a small radius.

- 19 Neither is the case here.
- 20 It must be said that the existing BWS is a very good retail liquor store. By BWS standards it is quite large. It is well served by a large car park. Whilst I expect that a lot of its custom is passing trade I have no doubt it is well patronised by those living in its vicinity.
- 21 Whilst its removal will have some adverse impact upon its customers, they will be left with plenty of alternatives.
- 22 Within easy walking distance of the existing premises, on the northern side of Henley Beach Road, is the Royal Hotel. It is served by a large car park. It has a drive through and browse bottle shop trading under the Sip N Save Cellars badge. It is a fair average quality bottle shop with a reasonable range.
- 23 There is another BWS store on the corner of Marion Road and Sir Donald Bradman Drive, a little over a kilometre to the south west. There is a Cellarbrations store on Holbrooks Road a bit over a kilometre and almost due west of the existing premises.
- 24 All are capable of servicing the needs of those presently using the BWS at Mile End. Besides, the new Dan Murphys, which promises an extensive range, will only be a kilometre or so away.
- 25 The only potentially relevant comparable facility to that which is proposed is a First Choice store⁵ operating along Port Road, about a kilometre to the north of the proposed facility. In my view it was not sufficiently proximate to the proposed premises to be of concern.
- 26 All of this led me to conclude that the public interest did not require the refusal of the application. To the contrary, the grant of this application is in the public interest. Many of the people living in the locality can be expected to use the new Shopping Centre. The addition of a modern extensive retail liquor facility will further add to its attractiveness and will meet a growing desire by many to combine their takeaway liquor purchases with their supermarket shopping.

⁵ This is the Coles equivalent of a Dan Murphys store being a destination facility of almost warehouse proportions.