IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 17, 18 August 1992

Delivered: 28 August 1992

THE FULL COURT

CORAM: IPP, WALLWORK & WHITE JJ

Appeal No 169 of 1991

B E T W E E N :

BAROQUE HOLDINGS PTY LTD

Appellant
(Applicant)

and

ALJOHN (1982) PTY LTD, CHRISTOFF & SONS PTY LTD, TREVOR ATFIELD, PATRICK GERARD O'TOOLE and LINDA VILLIERS

Respondents
(Objectors)

Catchwords

Liquor and licensing - liquor store licence - application - whether the requirements of the public include a section of the public - the determination of a "significant" section of the public - determination of the reasonable requirements of the public - *Liquor Licensing Act* 1988, s 38

Evidence - admissibility - relevancy - market survey evidence

Mr D W McLeod (instructed by McLeod & Co) appeared for the appellant.

Mr D Mossenson (instructed by Messrs Phillips Fox) appeared for the respondents.

Cases referred to in judgment:

Arnotts Ltd v Trade Practices Commission (1990) 97 ALR 555
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd & Anor (1991) WAR 1
Christoff & Sons Pty Ltd v Coles Myer Ltd CRT delivered 1 February 1991
Coles Myer Limited v Liquorland Noranda unreported; FCt SCt of WA; Library No 8267; 28 May 1990

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Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd [1973] SASR 503

Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd (1990) 96 ALR 277

Ritz Hotel Ltd v Charles of the Ritz Ltd(1988) 15 NSWLR 158

IPP J

The Issues on Appeal

This is an appeal under s 28(2) of the *Liquor Licensing Act* 1928 (the Act) from a decision of the Licensing Court dismissing an application by the appellant for a liquor store licence in respect of its liquor store in the Mirrabooka Village Shopping Centre. The appellant is the owner of that shopping centre and seeks to establish the liquor store to provide "one-stop shopping" in the shopping centre.

Five objectors (four being owners of other licensed premises) opposed the grant of the licence at the hearing. The principal ground of objection was:

> "That the grant of the application is not necessary in order to provide for the requirements of the public."

This objection was upheld. This issue was central to the appeal.

The statutory requirements for the grant of a licence of the kind sought by the appellant are set out in ss 38(1) and (2) of the Act. These provide:

> "38(1) An applicant for the grant or removal of a Category A licence must satisfy the licensing authority that, having regard to -
>
> (a) the number and condition of the licensed premises already existing in the affected area;
>
> (b) the manner in which, and the extent to which, those premises are distributed throughout the area;
>
> (c) the extent and quality of the services provided on those premises; and

(d) any other relevant factor, being a matter as to which the licensing authority seeks to be satisfied,

the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.

(2) Taking into account the matters referred to in subsection (1), the licensing authority in considering what the requirements of the public may be shall have regard to -

(a) the population of, and the interest of the community in, the affected area;

(b) the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and

(c) the extent to which any requirement or expectation -

(i) varies during the different times or periods; or

(ii) is lawfully met by other premises, licensed or unlicensed."

The "affected area" referred to in s 38(1) was determined by the Director of Liquor Licensing in terms of s 71(1) of the Act as being an area within a radius of 4 kilometres from the proposed premises.

The population of the affected area has increased rapidly since 1981 and at the time of the hearing was estimated as being between 70,000 and 76,000 persons. Several suburbs or parts of suburbs fall within the affected area. These include Dianella, Nollamara, Balga, Girrawheen, Alinjarra, Marangaroo, Ballajura, Malaga, Noranda, Morley,

Koondoola, and Mirrabooka. At the hearing, however, the appellant sought only to establish that the proposed licence was necessary to provide for the reasonable requirements of the public for liquor and related services in the suburbs of Mirrabooka and Koondoola.

In so attempting to establish its case the appellant sought to tender a market survey conducted within Mirrabooka and Koondoola by Dr D M Fenton and certain evidence by Mrs J Gilchrist, commenting on that survey. The learned Judge refused, for several reasons, to admit the market survey. The appellant contended that that refusal amounted to an error in law.

It was also submitted that the learned Judge erroneously refused to admit the evidence of one J J Aloi which tended to show that a supermarket within the Mirrabooka Village Shopping Centre drew its trade mainly from Mirrabooka and Koondoola.

The first ground of appeal, accordingly, was that the market survey evidence and the evidence of Aloi were wrongly rejected.

The learned Judge found that the residents of Mirrabooka and Koondoola did not constitute a significant section of the public and, as the appellant's evidence concerned principally their needs alone, the appellant had failed to establish the requirements of the public in the affected area for liquor and related services. This finding gave rise to what, in substance, was the second ground of

appeal. There were in fact several separate grounds relating to this issue, but these were, in effect, particulars of the same basic complaint, namely, that the learned Judge had erred in his construction of the expression "the reasonable requirements of the public" in s 38(1).

The learned Judge found that, in any event,

> "the requirements of the section of the public, which the applicant identified, for liquor for consumption off the premises are reasonably and sufficiently provided for by the licensed premises already existing in the affected area and by some outside the affected area."

It was submitted on the appellant's behalf that the learned Judge had misconstrued s 38(1) of the Act and applied the wrong principles in coming to this conclusion. This gave rise to the third ground of appeal.

The learned Judge considered that the applicant was seeking the grant of the licence "to advance the fortunes of the new shopping centre as much to provide a packaged liquor service to the public". This was a further reason given by his Honour for refusing the application. The appellants submitted that the learned Judge was wrong in this regard and this issue was the subject of the fourth ground of appeal.

Other grounds of appeal were set out in the notice of appeal but were not argued or were not pressed during argument.

The Relevance of the Requirements of a Section of the Public

The learned Judge's view that the residents of Mirrabooka and Koondoola did not constitute a significant

section of the public influenced him in deciding most of the issues which are the subject of the various grounds of appeal. It is therefore convenient to deal with this question first.

The learned Judge expressed his view unequivocally when dealing with the market survey evidence. He said:

> "... the determination of this application may only be made upon a consideration of the requirements of the public in the affected area as a whole and ... survey evidence of this nature, emphasising certain attitudes of residents of part of the affected area should not be received."

This statement appears to indicate a view that under s 38 of the Act a licence could only be granted if a licensing authority is satisfied that the licence is necessary to provide for the reasonable requirements of the public in an affected area as a whole. Indeed, it expresses the opinion that evidence of the requirements of a section of the public in an affected area is irrelevant and inadmissible.

Later, in his reasons, the learned Judge does however appear to accept that an applicant may be granted a licence if it is established that the licence is necessary to provide for the reasonable requirements of a *significant* section of the public in the affected area. It was for this reason that he made the express finding that:

> "the section of the public referred to in this case is not significant."

In my view, ss 38(1)(a), (b) and (c) make it plain that the reasonable requirements of a section of the public within

an affected area could satisfy the licensing authority that a licence should be granted. These subsections require to be taken into account the number and condition of the licensed premises already existing in the affected area, the manner in which, and the extent to which, those premises are distributed throughout the area, and the extent and quality of the services provided on those premises. The further a person is from existing licensed premises, the more likely it is that the extent and quality of liquor store services that that person will receive from those premises will diminish. The extent and quality of services are not likely to be distributed in a uniform way throughout the affected area. Areas within the affected area will inevitably receive differing qualities of services. It follows therefore, in my view, that the Act enjoins the licensing authority, where necessary, to have regard to discrete sections of the public within an affected area when considering an application under s 38.

In any event, the question has been authoritatively resolved by this Court in *Coles Myer Limited v Liquorland Noranda*, unreported; FCt SCt of WA; Library No 8267; 28 May 1990 and *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd & Anor* (1991) WAR 1. In *Coles Myer Limited v Liquorland Noranda*, Rowland J (with whom Wallace J agreed) explained (at 9-10) that the appellant's main complaint was that:

> "His Honour seems to be saying that if an applicant can only point to the requirements and convenience of a particular section of the public in the area,

no matter how large or how reasonable their requirements may be then an applicant will not satisfy the requirements of s 38(1) to the effect that the reasonable requirements of the public in the area for liquor are not being met."

Rowland J proceeded to say (at 10) that:

"Counsel argues correctly in my view that one cannot say that it is not a reasonable requirement of the public simply because the whole of the public does not have that requirement."

At 11 Rowland J remarked:

"The short point of this appeal is that his Honour has effectively found that those people who attend 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.

If that is in fact what his Honour was suggesting then in my view it is wrong and takes far too narrow a view of the section. Certainly his Honour is obliged to take into account as far as he can the matters set out in s 38(2) but it is difficult to see how he can ignore or fail to accept the obvious inference open from the evidence that even apart from the increased population there will be a very large section of the public from the 37,000 weekly visitors to the centre who would be convenienced if they could obtain their liquor purchases at such an outlet as the one proposed. It is not particularly relevant that other residents and others who pass through the area are sufficiently catered for by the other licensed outlets in the area, if there is a significantly large section of the public who would find it more convenient."

Nicholson J was of the same opinion, holding (at 5) that it was wrong to say that:

The court must look to the requirements of the public only in terms of all persons in the area whether or not they patronise the shopping centre."

He pointed out that the court below:

"did not consider the possibility that the evidence of those patronising the shopping centre may itself constitute evidence of the requirements of the public."

Coles Myer Limited v Liquorland Noranda was followed by Malcolm CJ (with whom Pidgeon and Walsh JJ agreed) in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd & Anor.* The learned Chief Justice said at 10:

> "The requirements of the public in the affected area for liquor facilities may be proved by inference from the evidence of a representative sample of a relevant section of the population of the affected area: *Coles Myer Limited v Liquorland Noranda*. ..."

In my opinion, therefore, the learned Judge erred in saying that:

> "the determination of this application may only be made upon a consideration of the requirements of the public in the affected area as a whole."

How is a "Significant" Section of the Public to be Determined?

It is apparent from the remarks of Rowland J in *Coles Myer Limited v Liquorland Noranda* that it is a "significantly large section of the public" which has to be considered.

The learned Judge in holding that "the section of the public referred to in this case is not significant" said:

> "the evidence is of a relatively small section of the public in the affected area, now and in the foreseeable future, which would prefer to have a liquor store close to where those people live. It is a section of the public with limited liquor requirements ...
>
> My experience in this jurisdiction leads me the conclusion that the section of the public referred to in this case is not significant."

The expression "relatively small section of the public in the affected area" suggests that his Honour was establishing the significance of the section concerned by

relating the size of the section concerned to the size of the public in the affected area.

The principal purpose of defining an affected area is to establish the qualification for standing for those who wish to object to the application (see s 73(2)). The very term "affected area" suggests that it is intended to embrace those persons who would be affected by the grant of the application. It is those persons who have the right to object to the grant of a licence.

Section 38(2)(a) requires the licensing authority to have regard to the population of, and the interest of the community in, the affected area. This confirms that the size of the affected area is principally determined by an assessment of those persons who would be adversely affected by the grant of a licence. Factors that might be relevant in making such an assessment include the extent of other licensed premises in the area, the density of the population, ease of transport within the area, the nature and quantity of amenities that might be affected and their distance from the proposed store, and the general makeup of the population concerned. This list is not intended in any way to be exhaustive.

While, however, the size of the affected area may be determined by the number of persons who might be prejudiced in some way by the grant of an application, that number would not necessarily have any relationship with the number of people within the affected area who would reasonably require

the establishment of additional licensed premises within the area. In my view, the number of persons in the affected area is not intended by the Act to have any bearing on the number of persons required to constitute a significant section of the public. The assessment of the size of the affected area is dependent on unrelated factors and is determined for an unrelated purpose.

Therefore, the significance of a particular section of the public concerned is not to be determined on a mere arithmetic basis by measuring the numbers of the section concerned and comparing them to the numbers in the affected area. Each case has to be considered on its own merits and it is not possible to lay down all possible criteria. It would plainly be relevant to consider whether the demand from the section would be sufficient to enable the proposed store to make a reasonable profit, having regard also to services offered by other premises. Another factor, for example, may be that the section caters significantly for tourists (it being an object of the Act "to cater for the requirements of the tourist industry (s 5(b)). It may be relevant that a group of consumers within the area have needs that are out of the ordinary and which should be recognised, having regard to s 5(c) of the Act which provides that one of its objects is "to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand." It may also be the case that the sheer weight of numbers alone is determinative.

Do Mirrabooka and Koondoola Constitute a Significant Section?

At the time of the application the population of Mirrabooka was approximately 6,500 and increasing; further, some 610 residential lots were being built upon which would lead to an ultimate population in the near future of approximately 8,300. The population of Koondoola was between 4,000 and 5,000 persons. According to Dr Fenton's survey report there were 1,295 houses and units in Koondoola at the time and 1,925 houses and units in Mirrabooka. These facts strongly support a conclusion that the inhabitants of Mirrabooka and Koondoola, by their numbers alone, constitute a significant section of the public.

The learned Judge said that he:

> "gained the impression from the evidence for the applicant that in the case of a noticeable number of residents of Mirrabooka, many individuals patronised the Mirrabooka Village Shopping Centre through lack of private transport."

In my opinion this is a further important factor in determining the significance of the number of persons in the Mirrabooka and Koondoola area. Residents who have difficulties in purchasing liquor through lack of private transport constitute a group of consumers having special needs and demands. In my view s 5(c) of the Act requires recognition and weight to be given to their particular requirements.

It is also not without relevance that Mirrabooka and Koondoola are bounded by busy roads. This tends to separate

the residents (and their shopping needs) from the rest of the affected area.

In my opinion, as I have indicated, the learned Judge, with respect, misdirected himself when he determined the significance of the particular section of the public by reference to the population of the affected area. This Court is therefore at liberty to determine that issue itself. In my view, for the reasons I have expressed, I consider that the suburbs of Mirrabooka and Koondoola constitute a significant section of the affected area.

The Admissibility of the Market Survey Evidence

Section 16 of the Act provides:

> "(1) In any proceedings under this Act, the licensing authority, however constituted -
>
> (a) shall act without undue formality;
>
> (b) ... is not bound by legal rules relating to evidence or procedure but may -
>
> (i) obtain information as to any question that arises for decision in such manner as it thinks fit; ..."

The licensing authority therefore has a discretion as to whether hearsay evidence and evidence of the kind contained in the market survey should be admitted.

As I have indicated, one of the grounds on which the learned Judge refused to admit the market survey evidence was that it was not evidence "that the grant of the proposed licence would provide a convenient service to a significant section of the public". To that extent his Honour

misdirected himself. There were other grounds, however, on which the learned Judge refused to admit the evidence and these need to be addressed.

His Honour said that neither Mrs Gilchrist nor Dr Fenton had expertise in the liquor industry and in liquor retailing, and for that reason:

> "Since neither witness has that expertise, I reached the conclusion that the survey data was advanced as primary evidence of witnesses not before the court which Mrs Gilchrist and Dr Fenton purport to condense and repeat in their evidence."

Although neither Mrs Gilchrist nor Dr Fenton has expertise in the liquor industry and liquor retailing they do have expertise in compiling market surveys and in drawing therefrom conclusions as to consumer demand . Their evidence is plainly of an expert nature.

The learned Judge equated the market survey with the kind of evidence referred to by Bray CJ in *Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd* [1973] SASR 503 at 509 as being hearsay that "shrieks for cross examination".

The market survey seeks largely to prove the future intentions of inhabitants of Koondoola and Mirrabooka with regard to purchasing liquor on the assumption that the appellant is granted the licence it seeks. That evidence concerns the state of mind of the witnesses and to that extent it is admissible: *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158 at 178; *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1990) 96 ALR 277 at 293, confirmed on appeal at (1991) 30 FCR 326.

Some of the evidence in the market survey, however, can not be easily categorised and it is often a difficult question to establish whether evidence of the kind sought to be tendered is admissible on the grounds that it falls within the recognised exception to the hearsay rule, or whether it is objectionable. The matter was resolved in the Federal Court by *Arnotts Ltd v Trade Practices Commission* (1990) 97 ALR 555. This case concerned O 33 r 3 of the Rules of the Federal Court which permits the court, in certain circumstances, to dispense with the rules of evidence. The rule is not dissimilar to s 16(1) of the Act (although s 16(1) provides a wider discretion). In a joint judgment Lockhart, Wilcox and Gummow JJ at 602-605 said:

> "However, it is not very profitable - at least in this Court - to spend time in determining whether a particular survey is hearsay evidence. Even if it is, ordinarily the court will have a discretion under O 33 r 3 to permit the evidence to be adduced. To call the persons who responded to the survey will almost always result in appreciable expense and delay. Given the existence of a discretion, it seems more sensible to concentrate attention upon the necessity for, and reliability of, the survey evidence, rather than to worry about its compliance with rules regarding hearsay evidence which were developed before this type of problem arose. This is not a situation, like that encountered in *Pearce v Button* (1986) 8 FCR 408 where the evidence sought to be adduced is the subject of 'a real dispute about matters which go to the heart of the case'; see per Lockhart J at 422; see also *Multi Modal Ltd v Polakow* (1987) 78 ALR 553 at 558."

The learned Judge referred to these remarks but said:

> "In my opinion it is quite plain that the survey evidence adduced in the present case is the subject of a real dispute about matters which go to the heart of the case, namely the requirements of the

> public for liquor and related services in the affected area."

The remarks of Lockhart J in *Pearce v Button* at 422, to which reference was made in *Arnotts Ltd v Trade Practices Commission*, are the following:

> "The power conferred upon the court by the rule is limited to dispensing with compliance with the rules of evidence to prove any matter not bona fide in dispute (r 3(a)) or where such compliance might occasion or involve unnecessary or unreasonable expense or delay (r 3(b)). In my opinion although it is for the judge to determine in each case whether the rule may be applied, its essential object is to facilitate the proof of matters which are not central to the principal issues in the case. The rule is not confined to dispensing with the rules of evidence to facilitate the proof of merely formal matters, but a judge should be slow to invoke it where there is a real dispute about matters which go to the heart of the case."

In dealing with the particular evidence in the present case his Honour said:

> "Having regard to the purpose for which this evidence was adduced, to admit the present survey evidence without affording the objectors the opportunity to cross examine the primary witnesses is unfair and objectionable."

The market survey evidence concerned principally the question whether those who were interviewed proposed to purchase liquor at the appellant's store. In addition, those interviewed were asked to give their reasons for their attitude. They were questioned as to whether they would purchase liquor at the appellant's store instead of their current suppliers. Various other questions of varying degrees of relevance were asked of the interviewers. Dr Fenton expressed views as to the significance of the answers. Mrs Gilchrist's evidence was of a similar kind.

The appellant initially proposed to call those who had carried out the interviews, but in view of the ruling that the survey was inadmissible, this was not done.

As Malcolm CJ explained in *Charlie Carter Pty Ltd v Streeter & Male*, the enquiry under s 38 of the Act involves 2 limbs. Firstly, the subjective requirements of the public in the affected area have to be established. Secondly, it is necessary to determine whether the subjective evidence is objectively reasonable. The evidence of Dr Fenton and Mrs Gilchrist concerns the subjective requirements of the public in Koondoola and Mirrabooka. To the extent that those interviewed are said to intend to acquire liquor at the applicant's proposed store in preference to the existing outlets, that evidence is of facts on which inferences may be drawn as to the subjective requirements of the public, to which in turn (when established) an objective standard has to be applied. I doubt, with respect, that the survey evidence can be categorised as going "to the heart of the case." It is merely evidence tending to establish one of the limbs of the inquiry. Moreover, I would have thought that the room for credibility disputes on these issues is limited. It would be rather difficult to refute the testimony of an individual in Mirrabooka who says that he or she would prefer to purchase liquor from a store that is significantly nearer and more accessible to his or her home.

In *Arnotts v Trade Practices Commission* at 605 Lockhart, Wilcox and Gummow JJ said that:

> "In a civil case in which a market survey may cast light on relevant issues, it is desirable in principle to admit into evidence a report of a professionally conducted survey, upon proof that it has been satisfactorily conducted using relevant and unambiguous questions, and without requiring evidence from each of the participants."

Their Honours gave 2 reasons for this view. Firstly:

> "market survey techniques have now been refined to the point where, if undertaken by experienced, professional people they are capable of providing answers which are highly likely to be accurate, subject only to a small sampling error."

Secondly, the other course, which is to call evidence from a number of selected witnesses, is fraught with its own inherent problems. For such evidence to be persuasive, many witnesses would have to testify; thereby causing extra expense and delay. Such witnesses would be carefully selected (in comparison to those in a properly conducted market survey, where the persons questioned are randomly chosen); this may tend to suggest that their evidence may not be representative.

Their Honours concluded at 607:

> "Where the state of public knowledge of, or attitudes to, some subject is a relevant factor in the court's adjudication of an issue, it is better to admit than to preclude evidence on those matters."

In my opinion, in the light of the above remarks, and the issues to which the survey evidence would be relevant, I consider, with respect, that the learned Judge misdirected himself in concluding that, in refusing to admit the survey evidence, he was adopting an approach:

> "consistent with that expressed in the joint judgment of Lockhart, Wilcox and Gummow JJ in *Arnotts Ltd v Trade Practices Commission.*"

In *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1990) 96 ALR 277 at 293 Hill J said:

> "There is much to be said, however, for the view that in the twentieth century where important commercial and political considerations are made by reference to market or other surveys conducted in rigidly controlled circumstances, evidence obtained from surveys similarly conducted and for the express purpose of obtaining evidence for the proceedings should be admissible if relevant to an issue in issue. This is particularly so where statistical analysis can confirm that to a specified degree of probability and subject to a specified error rate, the result can be projected to the whole or a defined section of the population. The community might rightly regard evidence from such surveys as more inherently likely to be reliable than evidence which is subject to cross examination. They may well regard the rejection of that evidence as, to use the words of Deane J in *Walton v R* (1989) 63 ALJR 226 at 236, confounding justice or common sense and producing 'the consequence that law was unattuned to the circumstances of the society which it exists to serve'."

On appeal at (1991) 30 FCR 326 Lockhart J at 713 expressed agreement "in general" with the views of Hill J. I too, with respect, would adopt that approach. In my view, the survey evidence should have been admitted.

I wish to stress that nothing that I have said should be taken to be any reflection on the weight to be attributed to the survey evidence. The learned Judge did not consider it necessary to examine the detail of that evidence nor to determine whether the market survey was conducted effectively and scientifically. It is similarly not necessary for me to comment on those matters.

The Evidence of Aloi

The evidence of Aloi is relevant to the determination whether persons in Mirrabooka and Koondoola would shop at the appellant's store if a licence were to be granted. Accordingly it should have been admitted. In coming to this conclusion I make no comment as to the weight to be attributed to that evidence.

The Test to be Applied when Determining the Reasonable Requirements of the Public

The learned Judge found that the population both in the affected area and in the suburbs of Mirrabooka and Koondoola was "plainly increasing". He also appeared to accept that the evidence of those who testified on the appellant's behalf that they would prefer to have a liquor store close to where they live. Nevertheless his Honour held that:

> "the evidence demonstrated that the requirements of the section of the public, which the applicant identified, for liquor for consumption off the premises are reasonably and sufficiently provided for by the licensed premises already existing in the affected area and by some outside the affected area."

In coming to this conclusion the learned Judge said that:

> "the convenience of the public in any one case remains a relevant criterion in the determination of the reasonable requirements of the public for liquor and related services or accommodation in an affected area and in many cases the consideration of that convenience in the exercise of the discretion invested in the court involves, inter alia, a consideration of the licensed premises already existing in the affected area, including their number and distribution."

Section 71(1)(b) of the previous *Liquor Act* 1970 required the court to be satisfied that:

> "there are insufficient store licences or other licences in the area to meet the requirements of the public."

In *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* Malcolm CJ pointed out that the approach under s 38(1) is very different to that which previously had to be taken under s 71(1)(b) of the former Act. The learned Chief Justice said at 12:

> "The question is not now whether there are insufficient store licences or other licences to meet the requirements of the public. The question is whether there is a reasonable requirement by the public for the purchase of liquor in the manner and under the circumstances contemplated by the proposed licence. There is no question of protecting the monopoly or market share of an existing licensee."

Further, the learned Chief Justice accepted that it was a reasonable requirement, based on convenience, for members of the public to purchase their liquor at the same time and at the same place that they do their other shopping. This requirement may not be met by the existence of other licensed premises in the vicinity.

Under s 38(2)(c)(ii), the licensing authority, in considering what the requirements of the public may be, shall have regard to the extent to which any requirement is met by other premises. In the present case, however, none of the licensed premises in the affected area or outside the affected area enable those persons who do their shopping in the Mirrabooka Village Shopping Centre to purchase their

liquor at the same time and at the same place that they do their other shopping. Furthermore, many of the inhabitants in Mirrabooka and Koondoola are not able to afford their own private transport and there are presently no licensed premises in Mirrabooka, which conveniently caters for their particular needs.

As is explained in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* and *Coles Myer Limited v Liquorland Noranda* the test under s 38(1) is whether the licence is necessary in order to provide for the reasonable requirements of the public. The interests of the public are of paramount importance; they override the interests of any existing individual licensed premises in the affected area, or outside the affected area. In the circumstances, to deal with the desire of a significant section of the public to purchase their liquor at the same time and at the same place that they do their other shopping, and with the needs of a significant number of persons who do not have their own transport to travel to the existing licensed premises, by holding that the persons concerned should purchase their liquor at existing licensed premises in different suburbs or at a significant distance away from where they live, in my opinion, is to apply the test under s 71(1)(b) of the *Liquor Act* 1970 rather than s 38(1) of the Act. Under the Act the reasonable requirements of the public take precedence over the protection of any income received by existing licensed premises.

It may well be the case that in a particular instance the grant of a new licence may so adversely affect a store with an existing licence that the latter might not be able to continue to provide the same level of services to a section of the public. Such circumstances should of course be taken into account when determining whether a new licence should be granted. The learned Judge did not, however, base his decision on grounds of this kind.

In supporting his conclusion the learned Judge referred to a grant of a liquor store licence for premises now trading as Budget Liquor in the Mirrabooka Square Shopping Centre. The latter is a different shopping centre to that in which the appellant seeks to trade and is approximately 2.5 kilometres away therefrom.

His Honour accepted the submission that:

> "Budget Liquor was given a licence by this Court to operate in and service not just the surrounding area, but also a regional catchment. The surrounding area or most immediate part of that regional catchment is the very area which this applicant wishes to cater to."

It appears, however, from the reasons which the learned Judge gave in granting the licence to Budget Liquor (*Christoff & Sons Pty Ltd v Coles Myer Ltd* CRT delivered 1 February 1991) that the licence was:

> "necessary to provide for the reasonable requirements of the public residing in, resorting to or passing through the affected area and in particular those persons patronising the Mirrabooka Square Shopping Centre during the day."

Budget Liquor was, therefore, primarily intended to service the persons shopping in the centre in which it is situated. It is not the case that the primary purpose of the grant of the licence to Budget Liquor was to service persons who now shop at the Mirrabooka Village Shopping Centre.

It is, in any event, not necessarily to the point that when Budget Liquor was granted a licence it was thought that it might be able to provide services to persons who live in the vicinity of the Mirrabooka Village Shopping Centre. The true question is whether, at the time the appellant applied for a licence, the licence was necessary in order to provide for the reasonable requirements of the public. The fact that the grant of a licence to the appellant might lead to a reduction in the income earned by Budget Liquor is not necessarily relevant. In my view, the learned Judge did not apply the appropriate test under s 38(1) as explained by Malcolm CJ in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd.* and, in my opinion, this ground of appeal is made out.

The Private Interest of the Appellant

At the hearing, the principal witness for the appellant was Mr J N Russell, who had a financial interest in the appellant. The learned Judge said that the evidence of Mr Russell:

> "makes it quite clear that this applicant seeks the grant of this licence to advance the fortunes of the new shopping centre as much to provide a packaged liquor service to the public. This court has previously held that such evidence does not go to establish the reasonable requirements of the public within the scheme of the Act. If anything,

> it emphasises the private interest of the applicant in making the application over the public interest otherwise demonstrated by the evidence. For this reason also, I am of the opinion that this application should be refused."

The appellant submitted that the learned Judge erred in refusing the application on the ground that the appellant wished to make a success of its shopping centre. Plainly, the appellant's desire to make a profit from its shopping centre is an irrelevant factor. It does not detract in any way from the case made out by the appellant. To the extent that the learned Judge considered that the private interest of the appellant, in making the application, had a bearing on the public interest, he erred.

Conclusion

In the circumstances I consider that the order of the Licensing Court should be set aside and the matter should be remitted to it for further consideration in the light of the reasons for judgment of this Court.

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 17, 18 August 1992

Delivered: 28 August 1992

THE FULL COURT

CORAM: IPP, WALLWORK & WHITE JJ

Appeal No 169 of 1991

B E T W E E N :

BAROQUE HOLDINGS PTY LTD

Appellant
(Applicant)

and

ALJOHN (1982) PTY LTD, CHRISTOFF & SONS PTY LTD, TREVOR ATFIELD, PATRICK GERARD O'TOOLE and LINDA VILLIERS

Respondents
(Objectors)

Mr D W McLeod (instructed by McLeod & Co) appeared for the appellant.

Mr D Mossenson (instructed by Phillips Fox) appeared for the respondent.

WALLWORK J

I agree with the reasons for judgment of Mr Justice Ipp and to the orders proposed by him.

IN THE SUPREME COURT)
)
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Mr D Mossenson (instructed by Phillips Fox) appeared for the respondents.

WHITE J

I have had the benefit of reading the reasons to be published by Ipp J. I agree with those reasons and have nothing further to add.