

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CITATION : DOWNES FAMILY TRUST & ORS -v-
WOOLWORTHS (WA) PTY LTD
[2001] WASCA 382

CORAM : MALCOLM CJ
OWEN J
PARKER J

HEARD : 16 NOVEMBER 2000

DELIVERED : 3 DECEMBER 2001

FILE NO/S : FUL 42 of 2000

BETWEEN : DOWNES FAMILY TRUST
RIVERTON GARDENS HOTEL/MOTEL 1997 PTY
LTD
LA & MJ PIKE AND CA GREATWOOD
J & J TRUESDALE
LIQUORLAND (AUSTRALIA) PTY LTD
Appellants

AND

WOOLWORTHS (WA) PTY LTD
Respondent

Catchwords:

Liquor law - Licensing - Conditional grant of a liquor store licence - Appeal from decision of Licensing Court granting the respondent a conditional grant of the licence - Whether Licensing Court applied the proper test established by s 38(2b)(a) of the *Liquor Licensing Act 1988* - Substantial difficulty and inconvenience - Contemporary standards

Legislation:

Liquor Licensing Act, s 38

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellants : Mr P D Evans
Respondent : Mr W S Martin QC & Mr G D Crocket

Solicitors:

Appellants : Freehills
Respondent : GD Crocket & Co

Case(s) referred to in judgment(s):

Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1
Laveson Pty Ltd v Prosser Automotive Engineers Pty Ltd [1999] WASCA 285
Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405
Liquorland (Australia) Pty Ltd v Hawkins (1997) 16 WAR 325
Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205
New World Supermarkets Pty Ltd v Liquor Licensing Commissioner,
unreported; FCt SCt of SA; 2612 of 1988; 5 July 1989
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
South Eastern Hotel Pty Ltd v Woolies Liquor Stores Pty Ltd (1998) 71 SASR
402

Case(s) also cited:

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Baroque Holdings Pty Ltd v Aljohn, unreported; SCt of WA; Library No 920441; 28 August 1992
Hay Properties Pty Ltd v Roshel Pty Ltd, unreported; FCt SCt of WA; Library No 980496; 20 July 1998
Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458
Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd [2000] WASCA 105
Liquorland (Australia) Pty Ltd v Porton Pty Ltd, unreported; FCt SCt of WA; Library No 950287; 8 June 1995
R v District Court of Sydney, Ex parte White (1996) 116 CLR 644
Waterford v Commonwealth (1987) 163 CLR 54
Williams v R (1986) 161 CLR 278
Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd, unreported; FCt SCt of WA; Library No 940553; 7 October 1994

MALCOLM CJ
OWEN J

- 1 **MALCOLM CJ:** I have had the advantage of reading in draft the reasons to be published by Owen J. I agree with those reasons and with his Honour's conclusion that the appeal should be dismissed. There is nothing I would wish to add.
- 2 **OWEN J:** The respondent applied to the Director of Liquor Licensing for the conditional grant of a liquor store licence for premises in the Riverton Forum Shopping Centre ("the Centre"). The appellants objected to the grant. The Director rejected the application for the conditional grant. The respondent applied to the Liquor Licensing Court Judge for a review of the decision. The learned Judge quashed the Director's decision and made a conditional grant of the licence. The appellants now appeal against his Honour's decision.

Background

3 The appellants own or operate liquor outlets in the area surrounding the Centre. The respondent proposes to establish a liquor store in the supermarket that it currently operates in the Centre. I will refer to the respondent's supermarket as both "the Supermarket" and "the Site" as the context requires. At the hearing of the appeal the appellants J and J Truesdale sought and obtained leave to discontinue the appeal so far as they were concerned.

4 The Centre is a reasonably large sub-regional district shopping facility in the southern suburbs of Perth. It attracts approximately 2,900,000 visitors each year. The Supermarket operated by the respondent attracts around 1,600,000 people per year. When the respondent made its application the Director fixed, as the affected area, a radius of three kilometres from the Site. The population of the affected area is 42,420. Within the affected area there are nine licences capable of selling packaged liquor to the general public: two hotels, one tavern and six liquor stores. Their type and proximity to the Site are described in detail at p 34 of the Appeal book. I do not need to repeat that information other than to note that the Riverton Gardens Hotel-Motel ("the Hotel") (one of the objectors to the grant) is situated 500 metres from the Site. There is direct access from the Centre carpark to the Hotel's drive-through bottle shop, although evidence led by the respondent suggested the access was in a poor state of repair and unlikely to be upgraded. The evidence also indicated that the access path required the traveller to "dog-leg" around existing buildings and that there was no line of sight between the Centre and the Hotel bottle shop.

5 Evidence was presented of a survey of shoppers and residents. It revealed that 94 per cent of shoppers and 88 per cent of residents regarded the Centre and the Supermarket as a convenient place to shop. A significant number (31 per cent of shoppers and 23 per cent of residents) nominated the Hotel as the place at which they purchase most of their packaged liquor. Of the shoppers who live in the affected area, 58 per cent indicated that if a liquor store were established in the Supermarket they would find it more convenient to purchase liquor there rather than from the Hotel, while 17 per cent expressed the opposite preference. The survey of residents revealed a very similar result.

The Director's Decision

6 The Director summarised the respondent's survey as showing strong support for a liquor store in the Supermarket. Although many currently purchased packaged liquor from the Hotel it was not their preferred option. He concluded that the "strong support" for the new liquor store was "closely associated with the perception that it would be convenient to be able to buy liquor when purchasing other groceries". The Director summarised the cases of the respondent (as applicant for the licence) and the appellants (as objectors) as follows:

"It is the applicant's overall submission that the [Centre] is the only significant sub-regional district shopping centre without a liquor store and that the large volume of customers who visit the centre generally and those who visit the [Supermarket] specifically to do their weekly grocery shopping, have been shown by the surveys carried out that they have a subjective requirement for packaged liquor at the proposed site. The localised sites of the existing liquor outlets scattered throughout the affected area, and the manner in which packaged liquor is presented and sold at the [Hotel], means that the public who regularly do their weekly grocery shopping at the [Centre], who have an objectively reasonable requirement to purchase packaged liquor, cannot do so without incurring considerable inconvenience.

.....

It is the objector's [sic] overall submission that this application is based upon big numbers and convenience, focused entirely upon the [Supermarket] and ignoring the fact that packaged liquor is available within close proximity of the proposed site,

especially the packaged liquor outlet closest to the proposed site which is easily accessible to members of the public who visit the shopping centre. In addition, the objectors maintain that the strategic location of the other outlets throughout the affected area, their range of liquor products, as well as the competitive prices offered by them, means that persons who live in the affected area or who are passing through the affected area, do not experience any degree of inconvenience or difficulty in purchasing packaged liquor in the area. They suggest that the evidence produced for the applicant, for example, the data analysis report and the statements of the needs witnesses, all highlight one single reason for this application, and that is the convenience factor. They suggest that there is no evidence that the public in the area experience any practical or actual difficulty in obtaining packaged liquor products from premises already established in the area."

- 7 The Director noted that the test under the *Liquor Licensing Act 1988* required the respondent to establish that the licence was necessary for the reasonable requirements of the public for liquor at the proposed premises and that the reasonable requirements for liquor in the affected area could not be provided for by licensed premises already existing in the area. The Director said that "reasonable requirements" means more than mere preference and convenience. It means either that packaged liquor cannot be provided for at all, or cannot be provided for by the licensed premises already existing in the affected area without occasioning substantial difficulty or inconvenience to the relevant section of the public. He expressed his conclusion against the grant in this way:

"This application is about allowing a major retailer (Woolworths) to sell liquor as an additional product line at one of its supermarkets, located in a large district shopping centre. The evidence from the surveys suggested that the majority of those who purchase packaged liquor and shop at [the Supermarket] would like to be able to make their liquor purchases there, at the same time as they do their other shopping.

Whilst contemporary standards of retailing generally appear to focus upon convenience, one-stop shopping, easy access by motor vehicles, product choice and preference, these criteria on their own are no longer those which determine whether or not

there should be the grant of a liquor store licence at a particular location.

Evidence that a particular shopping centre within an affected area attracts large numbers of the public to do their weekly and specialist shopping is not sufficient in itself to satisfy the requirements of the Act relating to need for a liquor store licence, unless it can be proved that the public in the area is currently being put to considerable inconvenience or difficulty when making packaged liquor purchases. The distance required to be travelled to access a liquor outlet may indicate that the public is put to considerable inconvenience or difficulty if that distance is lengthy or the time taken to travel is significant. The evidence of the surveys suggests that the public generally, is quite prepared to travel anywhere between three and five kilometres to carry out their weekly shopping for food and other products, therefore it is reasonable to expect they would be prepared to travel similar distances in order to purchase liquor.

The evidence presented in support of this application focused upon convenience and preference as being the predominant criteria. It was proposed that a very large district shopping centre such as this, should have a liquor store within its range of specialist retail outlets when contemporary standards of retailing are taken into account. The public now expects that it should be able to purchase packaged liquor at such a major retail centre. Such a proposition would, in all probability, have found favour prior to the 1998 amendments to s 38 of the Act.

In any event, the existence of the [Hotel bottle shop] adjacent to this shopping centre, does offer the public who shop at this centre, a reasonably convenient packaged liquor outlet, where the range of product is reasonable, where the prices are competitive and where accessibility and presentation is of a reasonable standard. The other packaged liquor outlets are well distributed throughout the affected area and, for the most part, they are strategically located in shopping centres within the suburbs which make up this affected area.

The applicant has failed to discharge its onus under the requirements of s 38(2)(b)."

The Judge's Decision

8 The Licensing Court Judge commenced with a discussion about the true nature and extent of the review process under the Act. His Honour decided to review the first instance decision on the evidence that had been before the Director. He indicated that, while he would give due weight to the conclusion reached by the Director, it was not necessary for the respondent to demonstrate error in the way the conclusion had been reached. I do not understand that approach to be under challenge in this appeal.

9 Having canvassed the evidence, his Honour reached the view that a conditional grant should be made. He expressed his conclusion in this way:

"It can be seen from these reasons that the Director concluded that the existing [Hotel] packaged liquor facilities can provide for the requirements of the section of the public relied upon because, in his opinion, those premises are reasonably convenient, the range of products is reasonable, the prices competitive, and accessibility and presentation is of a reasonable standard. The [Director] reached this conclusion on the survey evidence, which in his opinion suggests that "the public generally" is quite prepared to travel anywhere between 3 and 5 kilometres to carry out their weekly shopping for food and other products and that therefore it is reasonable to expect they would be prepared to travel similar distances in order to purchase liquor.

It will be observed that the [Director] has made no finding on the evidence whether, according to contemporary standards, the licensed premises already existing in the affected area, and in particular the [Hotel], cannot provide for the requirements of the section of the public relied upon for packaged liquor, without substantial difficulty or inconvenience. His only conclusion is that the evidence ... suggests that the public generally is prepared to travel between 3 and 5 kilometres to purchase packaged liquor. In my opinion, that is not the finding of fact which the [Director] was required to make.

In my opinion the evidence ... establishes on the balance of probabilities that a significant section of the public residing in and outside the affected area has a subjective requirement to purchase packaged liquor at the proposed premises. Further, I

am of the opinion that such subjective requirement is in this case objectively reasonable, given the sheer weight of numbers of the section of the public relied upon.

Applying the narrower test to the evidence under s 38(2b)(a) of the Act, I find that access from the [Centre] to the [Hotel] is such that those premises cannot provide for the reasonable requirements of the section of the public relied upon for packaged liquor itself without substantial difficulty and inconvenience. In my opinion, the distance between many parts of the shopping centre and the hotel makes pedestrian access substantially difficult and inconvenient, particularly carrying heavy products such as liquor. I find that motor vehicle access is, to say the least, "constrained". In my opinion contemporary standards are such that on the evidence in this case the court should conclude, on the balance of probabilities, that motor vehicle access from the [Centre] to the [Hotel] does occasion substantial difficulty and inconvenience to the public relied upon. It is no answer that agreement between the proprietors of the hotel and the shopping centre might resolve this difficulty and inconvenience. It is clear that no such resolution is likely. Otherwise, I find that the extent and quality of the goods and services provided by the [Hotel] to be adequate.

I reach a similar conclusion on the evidence about the remaining licensed premises in the affected area. I agree with the [Director] that the distribution of the existing licensed premises in the affected area is satisfactory. In my opinion, however, the evidence in this case establishes that the location of these premises and the distances from the proposed liquor store ... , which require a return journey of between 2 and 8.6 kilometres are such that, according to contemporary standards, I should conclude on the balance of probabilities, that these premises cannot provide for the reasonable requirements of the section of the public relied upon for packaged liquor itself without substantial difficulty and inconvenience.

Accordingly, I am of the opinion that the applicant has discharged the burden upon it"

The Statutory Framework and Legal Test

10 In this appeal nothing turns on the fact that this is an application for a conditional grant. Nor is any issue taken with the standing of the appellants to object or to any questions of onus relating to the objections. In the grounds of appeal, issue is taken with some findings of fact and I will come to them later. But the real question is whether the Licensing Court Judge misconstrued s 38 (2b)(a) of the Act. Section 38 is, relevantly, in these terms:

"38. (1) An applicant for the grant ... 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 different times or periods; or

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

(2a) In considering what the reasonable requirements of the public may be for the purposes of an application under subsection (1) the licensing authority may have regard to

(a) the subjective requirements of the public, or a section of the public, in the affected area for liquor and related services, whether those requirements are objectively reasonable or not; and

(b) whether the grant or removal of the licence will convenience the public or a section of the public in the affected area,

but the licensing authority may disregard either or both such considerations as it sees fit.

(2b) Notwithstanding anything else in this section -

(a) a liquor store licence shall not ... be granted in respect of ... premises unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area;"

11 It is common ground that a store licence is a Category A licence. As Anderson J pointed out in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405 at 408, liquor store licences are singled out for special attention within Category A licences. There is a special onus on applicants for store licences. The requirements are more onerous than those specified in s38(1). This is behind the reference made by the Director to the "narrowest sense" (Appeal Book p 37) and by the Licensing Court Judge to the "narrower test". In *Liquorland*, Anderson J, at 413 - 415 described the proper construction of the subsections in this way:

"[Subsection 38(2a)] embraces the concepts of subjective requirements and mere convenience as relevant considerations in deciding on the grant of Category A licences generally. This subsection aims, I think, to resolve the question as to whether and to what extent the subjective requirements of shoppers and

matters of mere shopping convenience can be taken into account in determining whether the licence is "necessary" under s38(1). Subsection (2a) expressly permits the licensing authority to take those things into account in an application under s38(1), or disregard them as it sees fit in the particular case.

Subsection (2b) is exclusively concerned with liquor store licences. The subsection plainly signifies a legislative intention that there be ... a 'particular restraint' on the grant of liquor store licences.

.....

Looking at the section as a whole, and having regard for the legislative history and the obvious legislative policy of special restriction in regard to liquor stores, I am of the opinion that subs(2b) is not concerned - in the way that subs(1) is - with the requirements of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like, but is concerned with the requirements of the public for liquor itself.

I think that, on the proper construction of s38, an applicant for a liquor store licence is required by subs(2b) to satisfy the licensing authority that the reasonable requirements of the public for liquor itself (or liquor of a particular type, such as bottled table wines) and related services cannot be provided for in the affected area by licensed premises already existing in the area; that is, cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public.

There are still questions of degree about which value judgments must be made. It remains a question for judgment in every case whether the licensing authority ought to be satisfied that the 'requirements ... for liquor and related services', in this narrower sense, 'cannot' be provided for by licensed premises already existing in the affected area."

Substantial Difficulty and Inconvenience; Contemporary Standards – The Relevant Test

12 Grounds 2 and 3 of the grounds of appeal raise an issue of substance. It is convenient to take them together because they involve the same basis question although looked at from a different angle. Given the interpretation placed on the section by Anderson J in *Liquorland* (an interpretation with which I am in entire agreement) the applicable test is not in doubt. The question is whether the Licensing Court Judge correctly applied it.

13 The first thing to note is that his Honour expressly referred to the "narrower test", which seems to me to be an acknowledgment of what was said in *Liquorland*. He referred to "substantial difficulty or inconvenience" to the relevant public which, again, is the language employed in *Liquorland*. The question is whether, when he came to his conclusion, he applied that test or one that equates more with "mere shopper convenience". If the latter, it was an error.

14 Grounds 2(a) and (b) of the grounds of appeal add little, if anything, to the first ground and I will deal with them later. I do not think there is merit in ground 2(c)(ii). It is true that his Honour concentrated on the requirements of persons patronising the Centre. That is hardly surprising as the respondent's case was built around the provision of a facility within the Supermarket which, in turn, is situated within the Centre. Section 38(2a) refers to "the public or a section of the public". Persons patronising the Centre would be "a section of the public". They are persons "residing in, resorting to or passing through the affected area". The Licensing Court Judge felt that the case had been made out on that basis. So far as I can see there was no evidence that the requirements of the public (other than patrons of the Centre) were so different or that the needs of patrons of the Centre were so at odds with those of the broad sweep of the relevant public as to negate the case which his Honour felt had been made out by reference to persons frequenting the Centre.

15 I should add that it is not necessary to establish that the grant of the licence would be to the advantage of everybody who comes within the definition of the "public" in relation to the affected area. It is sufficient to demonstrate that it would be to the advantage of a significant section of the relevant public: *Liquorland (Australia) Pty Ltd v Hawkins* (1997) 16 WAR 325 per Ipp J at 327, Murray J at 337.

16 His Honour pointed out that the evidence in the case, particularly as to the subjective requirements of the public, was strong because of the

sheer weight of number of the section of the public relied on. I take this to be a reference to the fact that about 2,900,000 persons visited the Centre each year. It probably does not need authority to support the proposition that the larger the number of persons forming the "public" or "section of the public" concerned, the greater the likelihood of this aspect of the test being satisfied. If authority is needed it is to be found, for example, in observations of Malcolm CJ in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1991) 4 WAR 1 at 10.

17 That brings me squarely to what I regard as the gravamen of the appeal. It is to be found in grounds 2(c)(i) and 3, namely whether the concentration on "contemporary standards" reflected a misunderstanding of, or a misapplication of, the statutory criteria. There is, of course, nothing particularly novel about the reference to "contemporary standards". It was referred to, for example by Anderson J in *Liquorland*, at 417. There, his Honour noted that part of the authority and responsibility of the Liquor Licensing Court, as a specialist tribunal, was to assess matters peculiar to the field of liquor licensing including availability of liquor supply, assessment of contemporary standards and accessibility of licensed premises to the public. However, it must do so after a proper examination of the evidence and in accordance with findings of fact that appear from the evidence.

18 It is for this reason that I set out at some length what the Director and the Licensing Court Judge, in turn, had to say about this question. The Director referred to "contemporary standards of retailing", which he said generally focused on convenience, one-stop shopping, easy access by motor vehicles, product choice and preference. The Director pointed out that these matters, alone, could not determine whether a licence should issue. The Licensing Court Judge made two references to "contemporary standards". He pointed out that the Director had made no finding on the evidence whether, according to contemporary standards, the existing licensed premises could provide for the requirements of the section of the public relied upon. He had come to the view that because of the problems of ingress and egress patrons of the Centre could not gain access to the service provided by the Hotel without substantial difficulty or inconvenience. He then noted that patrons would have to embark on a return journey of between 2 and 8.6 kilometres to purchase packaged liquor from the other outlets in the area. He concluded that, "according to contemporary standards", this meant the other premises cannot provide for the reasonable requirements of the section of the public relied upon for packaged liquor without substantial difficulty and inconvenience.

19 It is not the case, as the appellants contend in ground 3(a), that the Licensing Court Judge failed to identify the elements of the contemporary standards on which he was relying. The decision was not made strictly according to what has become known as the "one stop shopping" concept, although it may be that the Director thought this was the thrust of the respondent's case. The Licensing Court Judge concentrated more on difficulties of access.

20 It is tempting to describe the problem which arises under this head as whether the Licensing Court Judge took into account an irrelevant consideration, namely difficulties of access between the Site and the other licensed premises in the affected area. That is not strictly accurate but it has some of the hallmarks of the approach that was taken. I do not think there is much doubt that his Honour regarded it as the most significant factor.

21 There are some South Australian cases that suggest difficulties of access are relevant considerations. The cases themselves have to be approached with caution because the right of appeal under the South Australian legislation is broader than that under the Act. The appellate tribunal has wider powers to reach its own view on contentious matters of fact and the value judgments arising from them. In *New World Supermarkets Pty Ltd v Liquor Licensing Commissioner*, unreported; FCt SCt of SA; 2612 of 1988; 5 July 1989 the Court dealt with a situation where there were "three good bottle shops" within distances ranging from 1.7 to 3.3 kilometres of the proposed new site. However, accessibility to the existing premises was restricted by main roads and conditions of traffic. King CJ said, at 5:

"... the learned Licensing Court judge was doing no more than to convey that, in his view, it was not reasonable to expect persons constituting a significant body of potential customers of the proposed new premises, to travel to any of the three bottle shops in order to purchase their liquor.

It is always a matter of judgment and often a matter of difficulty to decide at what point inconvenience and difficulty in gaining access to the required liquor effectively precludes in a real and realistic sense the public from obtaining the liquor so that it can be said that the public demand for liquor in the locality cannot be met by the existing facilities. The section is satisfied if the public demand for liquor in the locality cannot be met without unreasonable difficulty and inconvenience. Distance and

conditions of traffic play an important part in such a decision as is shown by *Nepeor Pty Ltd v Liquor Licensing Commission*. Entrenched shopping habits and aversions arising out of these and other considerations, if reasonable, are not to be disregarded."

- 22 In *Nepeor Pty Ltd v Liquor Licensing Commission* (1987) 46 SASR 205 King CJ had said, at 207:

"The local hotel does not provide adequately for the demand for packaged liquor. The distances which many people have to travel in busy traffic conditions and across arterial roads to satisfy their packaged liquor needs are quite unreasonable."

- 23 In *South Eastern Hotel Pty Ltd v Woolies Liquor Stores Pty Ltd* (1998) 71 SASR 402 the Court returned to this theme. It is, I think, sufficient to refer to the headnote:

"A [licence] will only be granted if the Licensing Court is satisfied that the difficulty and inconvenience involved in obtaining liquor at existing ... outlets, taking into account shopping patterns and the habits of people affected, are sufficiently great to say that those outlets do not adequately cater for the public demand for liquor and that the degree of difficulty in obtaining liquor from those outlets was more than was acceptable having regard to contemporary standards.

The degree of difficulty facing members of the public in accessing existing ... outlets must be assessed by reference to contemporary standards. This involves an assessment of the likelihood of their purchasing liquor in the course of other shopping trips and the degree of difficulty in obtaining car-parking space at or near existing facilities."

- 24 *South Eastern Hotel* was referred to with apparent approval in *Liquorland* at 417. In my view, the authorities establish that traffic and related conditions are relevant factors to be taken into account in deciding whether the requirements of the public cannot be satisfied by existing outlets without occasioning substantial difficulty or inconvenience to the relevant public. This does not mean that any particular distance or any combination of traffic problems will inevitably result in a conclusion of difficulty or inconvenience to the requisite degree. Each case will depend on its own circumstances. It may be, for example, that there are no access difficulties or, if there are, they are no more than a minor irritation.

This, it seems to me, will be a value judgment to be made in accordance with the evidence that is led in a particular case. The reference to "contemporary standards" has to be seen in this light and it falls to be assessed in the same way.

25 I accept that broad concepts such as "contemporary standards" are apt to cause confusion. For this reason I agree with the contention of counsel for the appellants that it is important that in each case the Liquor Licensing Court should reveal with clarity the elements of "contemporary standards" on which the decision and the reasoning process applied to it are based. Not to do so will deprive the unsuccessful party of the right to know exactly why the decision went the way that it did. As I have said, I do not think the parties should be in doubt as to the elements that the Judge considered critical in this application. As will appear shortly, views will often differ on the most appropriate resolution of the appeal to such broad concepts. But that is a different matter.

26 In my view none of grounds 2(c), 3(a) or 3(b) of the grounds of appeal have been made out.

Substantial Difficulty and Substantial Inconvenience – The Evidence

27 The first ground of appeal challenges the finding that, due to the distance between the Site and other facilities (including the Hotel) and the problems with motor vehicle access between the two, patrons suffered substantial difficulty or inconvenience in using the existing facilities. This is said to be an error of law.

28 In my view ground 1 is, in reality, a complaint that the finding was against the weight of the evidence. An argument as to the weight of the evidence does not give rise to an appeal "upon a question of law" as required by s 28(2) of the Act: *Laveson Pty Ltd v Prosser Automotive Engineers Pty Ltd* [1999] WASCA 285 per Ipp J at [10].

29 In ground 4 the appellants contend that an inference of substantial inconvenience was not open on the primary facts as found. On the primary facts it seems to me that the inferences which were drawn were open. I think they fall directly within the description of "questions of degree about which value judgments must be made". In that respect, due regard has to be paid to the views of the specialist tribunal: *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241 at 250. This is, of course, subject to the proviso that the fact finding exercise on which the tribunal embarked was conducted in accordance with the

conventional rules that must be applied by a body having a duty to act judicially.

30 While the distance between the Supermarket and the Hotel is short, there was evidence from persons who use the facilities (and others) concerning difficulties in moving between the two. I note, by way of example, Cross at Appeal Book p 88-89, Elks at 108-109, McCourt at 121 and Goff at 58 and 246 (in which reference is made to "risk").

31 The evidence indicated that to travel from the Centre carpark to the Hotel a driver would have to go onto two busy roads, namely Willeri Drive and High Street (both of which have median strips) and proceed through an intersection controlled by traffic lights. The exit from High Street is by means of a right turn across on-coming traffic and into an area of heavy traffic density due to the presence of fast food outlets. Elks, for example, described it as "a nightmare". Cross said it meant "fighting the traffic twice" and referred to the danger presented by children in the vicinity of the food outlets.

32 The access way directly from the Centre car park to the Hotel car park is unofficial. It was created, apparently, by people knocking over parts of the kerbing. It was the subject of detailed evidence by Goff. It requires a dog-leg movement around existing buildings. There is no line of sight and it is attended by danger. It is pejoratively referred to as a "goat track" and a "rat run". It is in a poor state of repair. The owners have no present intention of repairing it. Cross said he had suffered a puncture while traversing it and does not now do so. Elks said she would not take her car through there because it was too messy. McCourt said she did not use it. On two occasions she had been involved in "near misses" with cars coming out of the undercroft car park. McCourt also said that it was difficult and unpleasant to use it as a pedestrian thoroughfare.

33 In relation to the distance between the Site and other liquor outlets, there was evidence about the pattern of movements in the area. It is convenient to mention the references collected in par 11 of the respondent's written outline of submissions. In particular there is a lot of evidence in the report of Goff about the locality and the trunk routes between the various outlets. The mere arithmetic calculation of distances is not necessarily critical. The ease of access can also be a measure of difficulty. The survey evidence indicated that there was a demand among a significant number of those who were contacted to purchase packaged liquor. There was evidence that a significant number of those surveyed

would find it more convenient to purchase liquor at the Site rather than at any of the existing outlets. This, of course, is not the test. But there was some evidence of the difficulty encountered by some members of the public in utilising the existing facilities.

34 His Honour was not bound to accept this evidence but it was open to him to do so. In my view it cannot be said there was "no evidence" to support the finding. Nor, in my view, can it be said that the conclusion was so unreasonable that no reasonable decision maker could have come to it. That is a well known legal concept and I do not need to discuss it. Views will no doubt differ on the most appropriate inferences to draw from bodies of evidence. This is illustrated by the fact that the Director and the Licensing Court Judge reached opposite conclusions on the same body of evidence. But that does not demonstrate an error of law.

35 There was evidence that elements of danger are associated with travel across the "goat track". There was evidence that some patrons found it difficult to traverse Willeri Drive and High Street to get from the centre carpark to the Hotel. There was evidence that some patrons found it difficult to make the journey to other outlets in the affected area. Whether the traffic conditions about which the witnesses spoke were unreasonable and whether they crossed the line from "mere inconvenience" or "preference" to "substantial difficulty or substantial inconvenience" is, in my view, a matter of judgment. To paraphrase the dicta of King CJ in *New World* the value judgment is whether inconvenience and difficulty in gaining access to the required liquor effectively precludes in a real and realistic sense the public from obtaining the liquor. If so, it could be said that the public demand for liquor in the locality cannot be met by the existing facilities. I am not convinced that in making the judgment in the way that he did the Licensing Court Judge erred.

OWEN J
PARKER J

36 In my opinion none of grounds 1, 2(a), 2(b) or 4 of the grounds of appeal have been made out.

Conclusion

37 I would dismiss the appeal.

38 **PARKER J:** I agree, for the reasons published by Owen J, that this appeal should be dismissed.