Lib No: 980496A

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CORAM	**:**	MALCOLM CJ MURRAY J WHITE J
HEARD	**:**	20 JULY 1998
DELIVERED	**:**	20 JULY 1998
PUBLISHED	**:**	3 SEPTEMBER 1998
FILE NO/S	**:**	APPEAL FUL 173 of 1997
BETWEEN	**:**	HAY PROPERTIES PTY LTD MARVEENA PTY LTD Appellants (Objectors) AND ROSHEL PTY LTD Respondent (Applicant)

Catchwords:

Liquor licensing - Liquor store licence granted by Licensing Court - Population of affected area 3,600 - Whether evidence of subjective requirements of six witnesses supported by 11 persons who had written letters sufficient to constitute the views of a significant section of the public - Whether open to Licensing Court Judge to determine that requirements were objectively reasonable - Relevance of survey evidence on previous application - *Liquor Licensing Act 1988* s16(1)(b), s28, s38(2a).

Representation:

Counsel:

Appellants	:	Mr D L Jones
Respondent	:	Mr D Mossenson

Solicitors:

Appellants	:	Joanna Matich & Associates
Respondent	:	Phillips Fox

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

Charlie Carter Pty Ltd v Streeter & Male (1991) 4 WAR 1

Case(s) also cited:

Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223

Australian Broadcasting Tribunal v Bond & Ors (1990) 170 CLR 321

Bickel v John Fairfax & Sons [1981] 2 NSWLR 474

Jerford Pty Ltd and Mazz Nominees & Anor v Pearbrook Holdings Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 930639; 25 November 1993

Liquorland (Australia) Pty Ltd v Hawkins & Ors; Liquorland (Australia) Pty Ltd v Porton Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 970167; 22 April 1997

The Australian Gas Light Company v The Valuer-General (1940) 40 SR (NSW) 126

Waterford v The Commonwealth of Australia (1987) 163 CLR 54

Woolworths WA Ltd v Liquorland (Australia) Pty Ltd & Ors, unreported; FCt SCt of WA; Library No 940553; 7 October 1994

Wren v Emmett Contractors Pty Ltd (1969) 43 ALJR 213

Library Number : 980496A, 980496B, 980496C

MALCOLM CJ:

This is an appeal under s28(1) of the *Liquor Licensing Act 1988* against a decision of the Liquor Licensing Court on 10 November 1997 by which the learned Liquor Licensing Court Judge ordered that the respondent's application dated 14 February 1997 for the conditional grant of a liquor store licence be granted subject to the production of a certificate under s40 of the Act.

At the conclusion of the argument on 20 July 1998 the Court was unanimously of the opinion that the appeal should be dismissed and so ordered. The appellants were ordered to pay the respondent's costs of the appeal to be taxed. It was then indicated that the reasons would be published later. These are my reasons.

The application was made in respect of premises known as the Duke of York Cellars, 141 Avon Terrace, York. Objections were lodged by the appellants as the licensees of two hotels in York, namely, the York Palace Hotel and the Castle Hotel. The appellants' objections were rejected by the learned Judge who said at pp2-3 of his reasons:

> "They rely on grounds of objection under s74. The only grounds which remain alive are those under ss74(1)(a) and 74(1)(d). The ground of objection under s74(1)(d) and the issue under s38 of the *Liquor Licensing Act 1988* ('the Act') is one issue. To discharge the onus upon the applicant it must demonstrate that the public in the affected area has a subjective requirement for packaged liquor at the proposed premises, that the requirement and those requirements are objectively reasonable, and that the proposed premises will satisfy those requirements in whole or in part.
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> The evidence in this case is that of a number of residents of York who in my view are representative of that section of the public which makes up those residents. It is a significant section of the public. The question is whether it should be inferred from their subjective evidence that they require this facility that those requirements are objectively reasonable. Primarily, they say that

they wish this facility because the level of service and the price of liquor in York has not for some time been satisfactory.

This applicant made an application for a similar licence in 1995, and at that time I observed that it was plain on the evidence then presented that the range of packaged liquor available in York is limited. The evidence today confirms that view and that the price of packaged liquor in York is, for the section of the public relied upon, unsatisfactorily high. This applicant says that it will offer liquor at Perth prices and it remains to be seen whether that occurs.

What is more important in determining the issues in this case is that the witnesses say that is what they require. If they do not get it, the commercial consequences will no doubt follow. In my view when one looks at their evidence and their requirements so expressed against this proposal, adjacent to shopping facilities for foodstuffs, it is plain that the convenience of this significant section of the public will be advanced by the provision of a packaged liquor facility of the type proposed.

It is from that evidence that I conclude, by way of inference, that the subjective requirements of this significant section of the public are objectively reasonable. In reaching that conclusion, I have taken into account the evidence that the York Palace Hotel is being refurbished and may also provide for the requirements of the public in the affected area. This hotel will be in competition with this applicant and that is not a matter which should have any consequences as far as the issues in this case are concerned. It is quite plain from the authorities of the Full Court that one of the purposes of this Act is not to protect the market share of one licensee against another.

In my view therefore the applicant has discharged the onus of proof under s38 and the objection under s74(1)(d) must fail. There is nothing demonstrated, in my view, which should lead to the conclusion that the grant of this application is not in the public interest in accordance with the scheme of the fact, now well established."

Section 38(1) of the Act provides that:

"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."

Section 38(2)(a) provides that:

"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;"

There were two grounds of appeal. The first was that the learned Judge erred in law when he misdirected himself that cross-examination of the applicant must be confined to issues under the Act. As set out in the particulars it was contended that when Mr Gibbs was giving evidence on behalf of the respondent in support of the application for the licence, the learned Judge refused to allow him to be cross-examined as to his credit in relation to his "purported commitment to maintaining heritage values in York" unless the cross-examination was related to relevant issues under the Act.

In the respondent's application, which had been prepared by Mr Gibbs, there was reference to an intention to:

"... retain the historical character of the building with its high brick walls and Oregon trusses, etcetera."

Mr Gibbs agreed that he was saying that he was committed to retaining heritage values in the buildings that he had control over in York. There was a Chinese restaurant next door to the premises the subject of the application which was owned by his wife. He agreed that he was doing the building work in relation to the restaurant. He was asked whether he would suggest to the Court that the restaurant building as constructed complied with the heritage character and the heritage values of buildings in York. He said he would. The learned Judge queried the relevance of this evidence. Counsel for the appellants said that the evidence was relevant to the credibility of his evidence regarding his commitment to heritage preservation. The learned Judge noted that this was irrelevant and that any question of credibility must be related to relevant issues under the Act.

Counsel for the appellants conceded before this Court that an adverse finding about the credibility of the applicant about the heritage values of the Chinese restaurant could not have affected the outcome of the application either significantly or at all. In my opinion, this concession was rightly made. There was no substance in the first ground of the appeal.

The second ground of appeal was that:

> "The learned Judge erred in law when he concluded that the evidence of six witnesses resident in the affected area were the views of a significant section of the public and consequentially the requirements of this significant section of the public were objectively reasonable when there was no or not sufficient evidence before him on which he could draw that conclusion.
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> Particulars
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> The applicant called six witnesses to give evidence on its behalf. The applicant had relied on evidence that there were 3,200 residents in the affected area residing in approximately 1,000 households. There was no evidence of market surveys conducted to establish the requirements or needs of the community. There was no evidence that these witnesses represented the views of community groups or associations.

> The evidence on which the learned Judge relied as representing the views of a significant section of the public could not be construed as other than evidence of six individual needs and preferences and the findings that their views were the views of a significant section of the public and their requirements were objectively reasonable were not open to him."

In ***Charlie Carter Pty Ltd v Streeter & Male*** (1991) 4 WAR 1 at 9-10 I said:

> "In the context of s38(1) the test of what is 'necessary' is in terms of 'reasonable requirements'. Thus the factual inquiry is directed at the issue of 'reasonable requirements' of the public. The question then is whether the proposed licence is necessary in order to provide for those requirements. In this context 'necessary' probably means no more than that the licence is 'reasonably required' in order to provide for the 'reasonable requirements' of the public. The word 'reasonable' imports a degree of objectivity in that the word reasonable means '... sensible; ... not irrational, absurd or excessive; moderate': see *Shorter Oxford Dictionary*, at p1667.
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> 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: see *Coles Myer Ltd v Liquorland Noranda* (unreported, Supreme Court, WA, Library No 8267, 28 May 1990), per Rowland J, at 8; per Nicholson J, at 5. This is the 'subjective evidence'. It is then necessary to determine whether the subjective evidence of requirements is objectively reasonable. If it is, it is then necessary to determine whether the proposed licence will meet those requirements in whole or in part."

In this case there was no contrary evidence to that called by the respondent. It was contended by counsel for the appellants that the evidence called was insufficient to constitute a representative sample of the relevant section of the population in the affected area. It was further submitted that those persons did not constitute a significant section of the public in the context of my observation in ***Charlie Carter Pty Ltd v Streeter & Male*** at 10 that:

> "It is plain that evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public may in itself be sufficient to establish a reasonable requirement."

The fact is that there is no liquor store in York. Packaged liquor is sold through the two hotels operated by the appellants. There was evidence that the range of stock on offer at those premises was more limited than what would be available in a liquor store. There was also evidence that the liquor store would sell liquor at Perth prices, which would be lower than the prices currently charged by the hotels.

These issues related to what constitutes a representative sample or a significant section of the public and are essentially issues of fact and degree. It needs to be borne in mind that an appeal to the Full Court is only available under s28 of the Act "upon a question of law". Consequently, in order to succeed on the appeal it would be necessary for the appellants to show that the evidence of the six witnesses together with that of the 11 letters from other persons in support was not capable of constituting evidence of "the subjective requirements of the public or a section of the public" for the purposes of s38(2a) of the Act. In my opinion it is plain that the question whether the six witnesses and 11 persons who wrote letters of support, all of whom spoke of the need for a liquor store, constituted a sufficient sample or section of the public to be representative is a question of fact and degree rather than a question of law. The total population in the affected area was 3,200. In the context, particularly having regard to the absence of any contrary evidence from members of the public, I am of the opinion that it was open to the learned Judge to conclude as he did that:

> "The evidence in this case is that of a number of residents of York who, in my mind, are representative of that section of the public which makes up those residents. It is a significant section of the public."

What is a significant section of the public and what number of persons may be said to be representative is necessarily a question of fact and degree depending on the population of the affected area and a range of other circumstances. In my opinion it is not a question of law. Further, it is not possible to say, as a matter of law, that it was not open on the evidence for the learned Licensing Court Judge to conclude as he did that the evidence should be viewed as the subjective evidence of a significant section of the public which was sufficiently representative to constitute the subjective requirements of the public for the purposes of s38(2a)(a).

While survey evidence may be extremely helpful in providing evidence of the subjective requirements of a significant section of the public, it is not possible to say that such evidence is essential. Where a limited number of persons give evidence the question is whether the Court is able by seeing and hearing the witness to conclude that the views expressed are representative of a significant section of the public so as to enable the relevant findings to be made that the subjective requirements are objectively reasonable.

In the present case there had also been a previous application in 1995 which was supported by a survey. The evidence that a liquor store would make available a wider range of wines at lower prices than were currently charged by the hotels was also of significance. The learned Judge was also entitled to take that additional evidence into account under s16(1)(b) of the Act.

MURRAY J:

I have read the reasons published by Malcolm CJ. They express very adequately for me why I joined in the order that the appeal should be dismissed. I have nothing to add.

WHITE J:

I have had the advantage of reading in draft the reasons to be published by his Honour the Chief Justice. I entirely agree with the reasons of his Honour, which sufficiently set out the reasons for which I joined in the decision of the court, and have nothing further to add.