[SUPREME COURT OF WESTERN AUSTRALIA]

LIQUORLAND (AUSTRALIA) PTY LTD v HAWKINS and Others

Ipp, Murray and Scott JJ

20 February, 22 April 1997

Liquor Licensing — Liquor store licences refused by Liquor Licensing Court — Tests for grant of licence — Necessity to provide for reasonable requirements of the public — Whether must be "more convenient" — "One stop shopping" concept — Liquor Licensing Act 1988 (WA), ss 28, 38, 74.

The Liquor Licensing Court refused two independent applications for liquor store licences. By s 38 of the *Liquor Licensing Act* 1988 (WA) the applicants had to satisfy the court that, having regard to certain criteria, the licence was "necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area". In both applications the learned trial judge found that the section of the public relied upon would find it as convenient to purchase liquor at the proposed stores as elsewhere. However, the learned trial judge held that the ultimate issue for determination was whether it was objectively reasonable for the public to desire to buy liquor at the proposed stores because it was more convenient for them to do so than to buy elsewhere. This was not established on the evidence.

Held (allowing the appeal): It is not a necessary element of proof of "reasonable requirements" within s 38 that the service to be provided by the proposed liquor store be *more* convenient that the service provided elsewhere. Proof that a significant section of the public would find it *as* convenient to purchase liquor at the proposed store as elsewhere may in itself be sufficient to establish a reasonable requirement.

Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1, explained and applied.

(per Ipp J, Scott J agreeing) A requirement for "one-stop shopping" is not a necessary element of an application for a licence for a liquor store within a shopping centre. Purchases of liquor in circumstances that could not be classified as "one-stop shopping" may give rise to convenience establishing a reasonable requirement within s 38.

Observations on the proper approach to an application for a grant of a licence under s 38 of the *Liquor Licensing Act* (per Murray J).

Observations on the concept of "one stop shopping" (per Murray J).

CASES CITED

The following cases are cited in the judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.
Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 920441, 28 August 1992).
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1.
Charlie Carter Pty Ltd v Viabon Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 930683, 23 December 1993).
Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 940563, 12 October 1994).

Liquorland (Australia) Pty Ltd v Porton Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 950287, 8 June 1995).
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241.
Woolworths (WA) Ltd v Liquorland (Aust) Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 940553, 7 October 1994).

The following further cases were cited in argument:

Australian Gas Light Co v Valuer-General (1940) 40 SR (NSW) 126.
Jerford Pty Ltd v Pearbrook Holdings Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 930639, 25 November 1993).
Lovell v Lovell (1950) 81 CLR 513.
Coles Myer Ltd (Liquorland Noranda), Re (unreported, Supreme Court, WA, Library No 8267, 28 May 1990).
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.
Waterford v Commonwealth (1987) 163 CLR 54.

APPEAL

C L Zelestis QC and *M S Hullett*, for the appellant.

D Mossensen, for the respondents.

Cur adv vult

22 April 1997

IPP J. I have had the benefit of reading in draft form the reasons to be published by Murray J. The background to these appeals is described in his Honour's judgment and there is no need for me to repeat them. For the reasons set out below I agree with the orders proposed by his Honour.

Section 38(1) of the *Liquor Licensing Act* 1988 (WA) provides that an applicant for the grant or removal of a category A licence must satisfy the licensing authority that, having regard to certain stipulated criteria (largely relating to the "affected area"), "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".

The circumstances which can give rise to "reasonable requirements of the public for liquor" within the meaning of s 38(1) are infinite. Several decisions of this Court have grappled with the question whether, in the particular circumstances of each case, a licence was necessary to provide for the reasonable requirements of the public in the area concerned. In the course of these decisions general principles have been laid down and, also, remarks have been made bearing only upon the particular circumstances of the case in question. There is nothing unusual in this, but it seems that certain statements applicable only to the idiosyncratic circumstances of a particular case, stemming from the way in which the case was argued, have developed a life of their own and become transmogrified into statements of general principle. This appeal is an example of the unfortunate influence of such a metamorphosis.

A statement of general principle, indeed applicable to all cases and which has frequently been followed, is the observation of Malcolm CJ in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1991) 4 WAR 1 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."

No comparative degree of convenience is required to establish a reasonable requirement; nevertheless, in a given case the fact that it is *more* convenient for

members of the public to buy liquor at a particular shopping centre than elsewhere might well have a greater persuasive quality than an equivalent degree of convenience.

Thus, while it is not a condition of the establishment of "reasonable requirements" under s 38(1) for the purchase of liquor at one shopping centre to be more convenient than at some other place, there have been instances where, for tactical or pragmatic reasons, the case of the applicant for a licence has been put on the basis that the proposed new liquor store will provide a greater degree of convenience to the public than that afforded by nearby existing outlets. The court in dealing with cases so put, has at times resolved the question before it in the terms framed by the parties, namely, in accordance with whether the issue of *greater* convenience, as submitted, has been established. For example, in *Charlie Carter Pty Ltd v Viabon Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 930683, 23 December 1993) Wallwork J (with whom Pidgeon and Ipp JJ agreed) referred to the "true question" as being "whether it is objectively reasonable for the public to desire to buy at the appellant shopping centre because it is more convenient for them to do that than to buy elsewhere". While that was the "true question" that arose for decision in that case by reason of the issues as formulated by the parties, the overall "true question" as regards s 38(1) remains simply whether the licence is necessary in order to provide for the reasonable requirements of the public in the area concerned. In determining that question, the issues as formulated in a particular case may raise the subsidiary question of general principle whether a reasonable requirement of the public has been established by reason that "the grant of the proposed licence would provide a convenient service to a significant section of the public".

As is made clear in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*, proof that a significant section of the public would find it as convenient to purchase their liquor at the proposed liquor store as they do elsewhere may in itself be sufficient to establish a reasonable requirement. It is not a necessary element of proof of "reasonable requirements" within the meaning of this phrase in s 38(1) that the service to be provided by the proposed liquor store would be *more* convenient than the service provided at some other place.

In the present case the learned judge inferred from the evidence before him that a significant proportion of a section of the public "would find it as convenient to purchase their packaged liquor at the proposed liquor store as they do elsewhere". However, he considered that "the ultimate issue for determination" was "whether it is objectively reasonable for the public to desire to buy packaged liquor at the ... shopping centre because it is more convenient for them to do so than to buy elsewhere" and answered that question in the negative. As is laid down in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*, however, a finding that the proposed licence would provide a convenient service to a significant section of the public is capable, alone, of establishing the reasonable requirements of the public. The introduction, in the test postulated by the learned judge, of the need to prove that it would be *more* convenient for the public to buy liquor at the particular shopping centre than elsewhere, is not justified by anything in the *Liquor Licensing Act* or by the statements of general principle that have fallen from this Court in past decisions. In so framing "the ultimate issue for determination", his Honour erred in law. I would uphold the appeal on this ground alone.

I turn now to a related category of the grounds of appeal. This concerns the approach taken by the learned judge that, in the circumstances of this case, the

convenience of a particular section of the public should not be regarded as being of any significance. His Honour pointed out that "only 25.5 per cent of those persons who have purchased liquor in the last 12 months would purchase packaged liquor once a week or more at the proposed store" and referred to evidence "that 66.4 per cent of those who have purchased packaged liquor during the last 12 months would purchase packaged liquor at the proposed store once every two to three weeks or once a month or less". His Honour inferred that the persons making up that proportion of 66.4 per cent "would find it as convenient to purchase their packaged liquor at the proposed liquor store as they do elsewhere", and would continue to purchase packaged liquor elsewhere. Accordingly, his Honour, in effect, as I understand his reasons, disregarded the convenience to those persons of being able to buy packaged liquor at the proposed new store.

This approach was based on the view taken by the learned judge that mere convenience to members of the public, flowing from being able to buy liquor at a new store (instead of at a nearby shopping centre), was not capable of establishing a "reasonable requirement" within the meaning of s 38(1). His Honour was of the opinion that only the convenience to those shoppers, to whom it was *more* convenient to buy liquor in a proposed new store (rather than at another particular shopping centre), would be convenience relevant to the reasonable requirements of the public for liquor in the area in question.

For the reasons I have already expressed, that approach discloses an error of law. His Honour was indeed required to determine the extent of convenience to the persons representing the segment of 66.4 per cent in being able to shop at the proposed new store. Their convenience was relevant to the question for decision even though it might not have been more convenient for them to be able to shop at the new store. In determining whether there was a reasonable requirement for the grant of a licence, the convenience of the 66.4 per cent segment, as well as the convenience of the other members of the public who would purchase liquor at the new store, had to be considered. I would therefore uphold this category of the grounds of appeal.

Finally, I wish to refer to a further category of the grounds of appeal which deal with the learned judge's approach to the convenience of those persons who did not purchase their liquor on a "one-stop" basis (ie in conjunction generally with their weekly shopping) but when going to the shopping centre in question for other purchases of an incidental nature.

The learned judge drew the inference that the section of the public represented by the 66.4 per cent section would purchase packaged liquor at the proposed new store once every two to three weeks, or once a month or less, "not in conjunction generally with their weekly shopping but when resorting to the ... shopping centre for other purchases of an incidental nature". His Honour held that the infrequency of these purchases, coupled with their incidental nature, did "not establish a subjective requirement for one-stop shopping facilities at the ... shopping centre in conjunction with the sale of food and groceries" and concluded in turn that for that reason (as well) the 66.4 per cent section of the public did not have a reasonable requirement for the grant of a licence.

The learned judge appears to have taken the view that, in the context of this case (where a licence was sought for a proposed store albeit that there were other liquor outlets in other shopping centres nearby), purchases of liquor in circumstances that could not be classified as "one-stop shopping", could not

give rise to convenience capable of establishing a reasonable requirement within the meaning of s 38(1).

There have been several decisions of this Court which have turned on the convenience derived from one-stop shopping: see, eg, *Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 940563, 12 October 1994); *Liquorland (Australia) Pty Ltd v Porton Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 950287, 8 June 1995). This has caused judges to define what is understood by the concept of one-stop shopping: see Rowland J in *Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd.* Of course, it does not follow from this that shopping of a different kind, which does not fall within the definition of one-stop shopping, necessarily does not give rise to convenience establishing a reasonable requirement for a licence. Evidence that does not establish a subjective requirement for one-stop shopping facilities is indeed capable of establishing a subjective requirement for a liquor store. The convenience flowing from being able to buy packaged liquor when incidental purchases are made is capable of establishing a reasonable requirement for a licence.

Accordingly, in my opinion, the approach adopted by the learned judge is incorrect in law. Once it is established that a section of the public has a subjective requirement to purchase liquor at a particular place, that requirement is capable of being a "reasonable requirement" within the meaning of s 38(1), irrespective of whether it can be categorised as "one-stop shopping". I would therefore uphold this category of the grounds of appeal.

MURRAY J. These two appeals were heard together. They are brought from decisions of the Liquor Licensing Court pursuant to the *Liquor Licensing Act* 1988 (WA), s 28, which provides for an appeal to this Court but, by subs (2), only if the appeal "involves a question of law". A synopsis of the authorities relevant to the construction of that provision is to be found in my judgment, with which Pidgeon and Rowland JJ agreed, in *Liquorland (Australia) Pty Ltd v Porton Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 950287, 8 June 1995). I need not repeat here what I wrote on that occasion. It is sufficient to note that there is, of course, no difficulty where, on appeal, it is established that the decision of the Liquor Licensing Court is infected by error of law in relation to the tests and the criteria by which it was to determine the question before it in these cases, governing the grant or refusal of the liquor store licences in question. However, a number of the voluminous grounds of appeal in each case seek to attack a conclusion of the Liquor Licensing Court upon the basis that it failed to take into account relevant evidence and considerations. Others are expressed in terms that the decision of the court was so unreasonable having regard to the evidence that it could not have been reached according to law.

It is legitimate in that way to challenge a finding of fact or conclusion as to the facts upon the ground that it was not open on the evidence, because no reasonable person properly instructing himself as to the law could reach the conclusion impugned: see *Woolworths (WA) Ltd v Liquorland (Aust) Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 940553, 7 October 1994), per Malcolm CJ (at 4-5, 7); *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241 at 251-252, per Malcolm CJ; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, per Lord Greene MR.

But in this context it is as well to remember the cautionary remarks of

Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 where his Honour explained the limit of the concept that an inference or conclusion or finding of fact could involve an error of law because no reasonable basis was seen for the conclusion to be reached. As his Honour said:

> "... want of logic is not synonymous of error or law. So long as there is *some* basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

The limitation therefore is that an error of law will only arise in respect of a finding of fact made in the absence of evidence or without any reasonable basis upon the evidence.

That the right of appeal is so limited serves to restrict the role of this Court to matters of law and leave to the Liquor Licensing Court matters of fact, appropriately because that court:

> "... is a specialist court which has an exclusive area of jurisdiction and builds up a fund of knowledge and experience which forms the basis of a body of principles regarding the regulation of the industry over which it has that jurisdiction."; per Malcolm CJ in *Palace Securities Pty Ltd* (at 250-251).

In each case the appellant applied for a Category A licence, being a liquor store licence. In each case, after a lengthy hearing in the Liquor Licensing Court, its application was unsuccessful. The objectors in each case were existing Category A licensees within the relevant affected area specified under the Act in respect of the particular application (s 71).

The objectors raised a number of grounds of objection. I need not here set them out in detail. The Act, s 74(1), sets out the permissible grounds of objection. The grounds relied upon in these cases were as follows:

> "(a) that the grant of the application would be contrary to the public interest;
>
> ...
>
> (d) on an application relating to a Category A licence, that the grant of the application is not necessary in order to provide for the requirements of the public;
>
> (e) that the premises, accommodation or services proposed to be provided if the application is granted will be inadequate to meet the requirements of the public or will be unsuitable or unsatisfactory for any other reason;
>
> (f) that the position, nature, state of repair or standard of the premises or proposed premises renders them unsuitable to be licensed, or to be licensed under a licence of a class to which the application relates;
>
> (g) that if the application were granted —
>
> (i) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
>
> (ii) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened;
>
> ...
>
> (j) that the grant of the application would otherwise be contrary to this Act."

Where reliance is placed on an objection made under s 74(1)(a) in relation to the public interest, subs (3) requires written particularisation of the reasons why the objector considers the objection can be made out, and that requirement was complied with in each of these cases by a lengthy statement essentially relying upon two of the objects of the Act stated in s 5 in the following terms:

> "(a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
>
> ...
>
> (c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;"

The objectors argued that if this application was granted, there would be a concentration of liquor store licences which, under the Act, s 47, are directed to the sale of packaged liquor. This would unnecessarily duplicate such facilities in the affected area when the existing outlets were already capable of satisfying the reasonable requirements of the public. To add another licence would be "no more convenient to members of the public" whose reasonable requirements were met quite adequately by the objectors.

The same sort of matters were raised in relation to the ground of objection which relied upon s 74(1)(d). I should add a reference to the fact that it was under these grounds that in some cases, objectors raised the potential impact upon the viability of their own businesses and that if the applications were granted, that may lead to a truncation in the services provided by particular objectors, thereby reducing the capacity of licensed facilities to meet the diversity of consumer demand. I need say nothing more about the other heads of objection which more particularly challenged the suitability of the proposed licensed premises and their negative impact upon the amenity of their immediate surrounds because it was upon the objections formulated under s 74(1)(a) and (d) that particular reliance was placed.

The provisions of s 74(1)(d) relate directly to the burden imposed upon the applicant for the licence by s 38(1) and (2), which are in the following terms:

> "(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 different times or periods; or
(ii) is lawfully met by other premises, licensed or unlicensed.''

The application the subject of the first appeal before us was for a liquor store licence for premises at The Lakes Shopping Centre in South Lake. The evidence in support of the application was in the usual form. It was given by a series of witnesses advanced as representative of the population of the affected area who were in the habit of using the particular shopping centre and that evidence was supplemented by evidence of survey designed to establish the characteristics of users of the shopping centre and their likely resort to a liquor store licence if one was established in that centre.

The same approach was taken with respect to the evidence in support of the second application made in respect of a liquor store licence sought for premises in the Belridge Shopping Centre in Beldon. An application in relation to the latter shopping centre by the same appellant had been previously dealt with by the Liquor Licensing Court and upon its refusal had been the subject of the appeal to this Court in *Liquorland (Australia) Pty Ltd v Porton Pty Ltd*, to which I have referred above. That appeal did not succeed and so, after the lapse of time required by s 38(5), the application was renewed. It should be said that the grounds of appeal and the matters addressed in the earlier case with respect to the Belridge Shopping Centre are not those raised in the present appeal with respect to that application.

The application for a liquor store licence for premises in The Lakes Shopping Centre was heard on 11-13 September 1995. In his decision given on 6 February 1994, by which he refused the application, the learned judge of the Liquor Licensing Court, after reviewing the evidence and relevant matters of law, concluded that a significant proportion of the users of the shopping centre ''would find it as convenient to purchase their packaged liquor at the proposed liquor store as they do elsewhere''. His Honour did not think it could be put more highly than that. He noted that the case for the appellant was:

> ''. . . that this subjective evidence of requirements is objectively reasonable because this section of the public is significant and it would be more convenient for this section of the public to purchase packed liquor at The Lakes Centre than elsewhere. This submission is formulated in accordance with the true question which the court is required to answer. This is a case of a neighbourhood shopping centre with a retail floor area of some 4,500 m^2. In my opinion, it should not be treated as a district or regional shopping centre.''

His Honour went on to note that, in his view, the evidence did not establish a subjective requirement for one stop shopping facilities at the particular shopping centre, in conjunction with the sale of food and groceries. So far as a subjective need was established, his Honour went on to give consideration to the capacity of other stores in close proximity to meet that need. He accepted that ''convenience is of primary importance'' but he considered that the evidence allowed him to conclude that there were a number of licensed premises authorised to sell packaged liquor already existing in the affected area which are in close proximity to that proposed by the applicant, although he gave that consideration less weight than was to be accorded to the evidence about the use of the proposed liquor store.

His final conclusion was expressed in the following terms:

> ''I am, therefore, of the opinion that the evidence does not establish that it is more convenient for this section of the public to purchase packaged liquor at the proposed liquor store than to buy elsewhere, which might in

other circumstances lead to the conclusion that it is objectively reasonable for the public to desire to buy at The Lakes Shopping Centre. The evidence to which I have referred does not establish there is a reasonable requirement by the public for the purchase of packaged liquor in the manner and under the circumstances contemplated by the proposed licence. It is, therefore, not necessary for me to consider whether the proposed licence will meet those requirements in whole or in part. Accordingly, I find that the applicant has failed to establish its case under s 38 of the Act and I uphold the objection under s 74(1)(d). The application will, therefore, be refused."

The application and objections in respect of the licence proposed for the Belridge Shopping Centre in Beldon took much the same course. The evidence was of the same character. The trial was held on 24 and 25 January 1996 and his Honour's reasons for his conclusion that the application should be dismissed were given very shortly after the other judgment to which I have referred above, on 19 February 1996.

At almost every important point in his Honour's reasoning, his conclusions are expressed in substantially similar terms to the wording of his judgment in The Lakes case. Again, after reviewing the survey data and considering the evidence of individuals about their subjective requirements, his Honour considered that his conclusion would not be put more highly than that:

"... it is a reasonable inference to draw from this data that a significant proportion of the section of the public relied upon would find it as convenient to purchase their packaged liquor at the proposed liquor store as they do elsewhere."

His Honour therefore took the view that the grant of a proposed licence "would provide a convenient service to a significant section of the public at the Belridge Shopping Centre". So far as the objections were concerned, his Honour took the view that if they were to succeed, it would have to be in reliance upon s 74(1)(d), the reverse of the basis for the application to be drawn from s 38.

His Honour went on to review the relevant authorities in respect of these sections, as he had done in the earlier case. Again, he expressed the view that under those sections, the ultimate issue for his determination "is whether it is objectively reasonable for the public to desire to buy packaged liquor at the Belridge Shopping Centre because it is more convenient for them to do so than to buy elsewhere".

Again, his Honour had regard to the proximity of other liquor store licenses and he noted particularly the licence held by a tavern at the nearby Beldon Shopping Centre and concluded that "the neighbourhood of Beldon already has established a neighbourhood shopping centre with a packaged liquor facility which on the evidence provides adequate service to the public". Again, however, the existence of other liquor store facilities in close proximity to the particular shopping centre under consideration does not appear to have been determinative of the issue in his Honour's mind.

His ultimate conclusions were, in this case, expressed very similarly to those in respect of The Lakes Shopping Centre. He said:

"In this case, the inference to be drawn from the evidence of Dr Fenton and the subjective evidence is that the majority of this section of the public would purchase packaged liquor at the proposed premises once every two to three weeks, or once a month or less, not in conjunction generally with their weekly shopping but when resorting to the Belridge Shopping Centre

> for other purchases of an incidental nature. This evidence does not establish a subjective requirement for one stop shopping facilities at the Belridge Shopping Centre in conjunction with the sale of food and groceries."

A little later, having again referred to his conclusion that a significant section of the public in the affected area patronised the Belridge Shopping Centre and to his conclusions about the frequency and the shopping context in which they purchased liquor, or would do so at the Belridge Shopping Centre, his Honour rather oddly expressed the view that:

> "This evidence does not establish that it is convenient for this section of the public to purchase packaged liquor at the proposed liquor store. This is so particularly in the light of my conclusion that the evidence of Dr Fenton and Mr McCormick does not establish a requirement to purchase packaged liquor at the same time and in conjunction with foodstuffs and grocery items."

I am rather of the view that, although those observations are expressed in terms of what the users of the Belridge Shopping Centre would find "convenient", what was meant was that they would not find it "more convenient" to purchase their liquor there than elsewhere, at places where his Honour appears to have considered they would have been doing their main grocery and food shopping. His Honour immediately followed the above observation with the expression of a final conclusion on the case which was, for all practical purposes, expressed identically to the final conclusion in relation to The Lakes Shopping Centre.

I have mentioned that the grounds of appeal in both cases are expressed at very considerable length. I will not set them out here. Some of the grounds are expressed in terms of the unreasonableness of factual decisions, including reference to the surveys by Dr Fenton and the alleged misuse of that evidence by the court. I have examined the arguments presented closely. In my view, whilst there is force in them as factual observations about the conclusions which might have been drawn and in some respects as to the failure to draw conclusions open on the evidence, nonetheless it is the case that, in my opinion, the complaints of the appellant in this area of the appeals are complaints of factual error with which this Court may not be concerned. Having reached that conclusion I do not propose to set out the detailed arguments that were presented in this regard, or to deal with the merits of those arguments further.

It seems to me that it may be more convenient in dealing with the matters of law raised by the appeals to endeavour to express them in summary form as they emerge from the relevant grounds. But the starting point in relation to both appeals is, of course, s 38 of the Act, the relevant terms of which I have set out above. There would appear to be a number of basic propositions about s 38 which have been endorsed by the decided authorities. In the first place, the onus rests upon the applicant for the grant of a licence to establish the grounds upon which it may be required. What must be established is the necessity for the grant of a licence, in the sense that the reasonable requirements of the public for liquor and related services in the affected area are not being met by existing licences. So the reasonable requirements which are relevant are those of the public in the declared affected area and it is relevant to consider the extent to which they are presently being met by existing licensed facilities. The matters referred to in subs (2) reinforce the main approach. It is sometimes said that the first step is to establish the actual subjective requirements of the relevant members of the public, being those resident in, resorting to or passing

through the affected area. Evidence of surveys of a representative sample of such persons will be admissible. Having established the subjective requirements, the court will ask whether they are objectively reasonable.

It should not be overlooked that Category A licences include hotel and tavern licences, as well as liquor store licences and other types of licences. The variety of licensed facilities which may be available is, in my opinion, the means by which the object of the Act referred to in s 5(c), that licensed facilities shall reflect the diversity of consumer demand, is satisfied.

It is clear, I think, that in considering a particular application under s 38, the court is obliged, when considering the reasonableness of the requirements of the public, to consider the extent to which they may already be satisfied by other already existing licensed premises operating in the affected area. In my opinion, when ss 38, 74 and 5(a) are read together, it becomes clear that the reasonableness of the requirements of the public under s 38 may be judged in an appropriate case having regard to the impact which the addition of the proposed licensed premises in the affected area may have upon the viability and the capacity to continue to offer services in respect of the supply of liquor and in related ways, to members of the public in the affected area, by existing licensed premises. At the same time, of course, it is clearly no part of the philosophy of the Act to protect a monopoly or the market share of an existing licensee. The matter is to be judged from the point of view of the reasonable requirements of the public.

So far as that is directly concerned, it is, of course, that section of the public which chooses to consume liquor and avail itself of the related services of which the Act speaks, with which the relevant licensing authority will be concerned. Those persons related to the affected area of this kind will themselves fall into sub-groups, depending upon the degree to which and the circumstances in which they would wish to purchase liquor or, specifically in relation to a liquor store licence, to purchase packaged liquor. It will not be necessary to establish that there is some degree of positive inconvenience associated with the use by the relevant section of the public of existing licensed facilities in the affected area. A reasonable requirement will be established if it appears that members of the public in the affected area would find it convenient, or more convenient than is presently the case, to have the proposed licensed facility available to it.

Cases in this area are very frequently framed upon the basis that the conclusion should be drawn that it would be more convenient to a significant section of the public to have the proposed facility available to it than is presently the case. That was certainly so in relation to the first application in respect of the Belridge Shopping Centre which came before this Court in *Liquorland (Australia) Pty Ltd v Porton Pty Ltd*, and his Honour seems clearly to have considered that that was the thrust of the case presented by the applicant in relation to the applications presently the subject of the two appeals before the court now. To say in such cases that it is established that it would be *convenient* to the relevant section of the public if the proposed licence was granted, or that it would be *more convenient* if that should be done, may be a distinction without practical content.

What will need to be borne firmly in mind is simply that the reasonable requirements of the relevant section of the public will be established by reference to the degree of convenience with which their needs may be met, having regard to the various factors and circumstances relevant in the particular case. That will always be a value judgment and the obligation to make it has

been reposed in the specialist tribunal established by the Act. It goes without saying that the making of the judgment will depend upon the facts of the particular cases as they are found to be on the evidence presented. It has been recognised, for example, 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". This is sometimes referred to as the "sheer weight of numbers" approach. As has been seen, his Honour in these cases did not think they were cases of that type. That was a matter for him.

Further, it has been recognised that 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 and regard must be had to the location of that licence. It is in that context that the "one stop shopping" concept has emerged and has in its turn been visited with some refinement. I shall need to return to that later in these reasons. For the moment it is sufficient to note that where it applies it has its impact upon the capacity of other licensed premises elsewhere in the affected area to meet the reasonable requirements of the relevant section of the public.

All of the above is, in my opinion, supported by the decided authorities in this State, including particularly such cases as *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1991) 4 WAR 1 at 9-12, per Malcolm CJ; *Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 920441, 28 August 1992), per Ipp J (at 8, 12, 15-24); *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd*; *Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 940563, 12 October 1994), per Rowland J (at 5-6); per Franklyn J (at 3-4); and the cases cited therein.

The first matter of specific complaint to which I should turn is that his Honour allegedly misconstrued the requirements of s 38 when he concluded, as I understand his reasons in both cases, that because, in his view, it was not established to be *more convenient* for the relevant section of the public to purchase packaged liquor at the proposed liquor store than to buy elsewhere, the burden cast on the appellants by s 38, which was the subject of the challenge made by the objectors under s 74(1)(d), had not been discharged and the applications should be refused. His Honour had indeed earlier refused the previous application in relation to the Belridge Shopping Centre, expressing himself in similar terms to the words used on this occasion. As I have mentioned, that earlier refusal of the licence was the subject of the appeal to this Court in the unreported case of *Liquorland (Australia) Pty Ltd v Porton Pty Ltd*. But the grounds of appeal on that occasion made no complaint about this aspect of the matter which was therefore not considered by this Court. The grounds now before the court assert that his Honour's reference to the failure of the applications because it had not been demonstrated to be more convenient for the public to purchase liquor at the proposed liquor store at the particular shopping centre than elsewhere, reveals an error of law.

In my opinion it does and it was an error of a kind which might clearly have caused his Honour to have made a decision which he may not otherwise have made, particularly as his Honour did say at times in relation to each case, that he was satisfied that the proposed liquor store would provide a convenient service to a significant section of the public using the particular shopping centre. They would, his Honour concluded, find it as convenient to purchase their packaged liquor at the proposed liquor store as they did elsewhere.

A In my opinion, the point is, as both s 38 and the authorities to which I have referred above make clear, that the relevant question of fact is whether the proposed licence should be granted in order to provide for the reasonable requirements of the public to purchase packaged liquor, and the reasonableness of the requirement subjectively found to exist may (not must) be demonstrated by finding that a significant proportion of the relevant members of the public would find it convenient to purchase their liquor at the proposed liquor store, even though they may not be presently inconvenienced and even though they may have a relatively convenient outlet presently available to them. That is merely a factual basis upon which the necessity of the proposed outlet to provide for the reasonable requirements of the public may be demonstrated. It is an error of law to convert one basis upon which the relevant question of fact may be answered in the affirmative into a statement of the ultimate question of fact itself, because to do that masks and may cause the tribunal to overlook other bases upon which the true question of fact may be answered affirmatively. On that ground alone, I would allow each of these appeals and remit the cases to the Liquor Licensing Court to be further dealt with according to law.

Although, in my opinion, that conclusion is sufficient to dispose of each of these appeals, I should, I think, say something about other matters which have been particularly raised in the grounds of appeal and which may bear upon the ultimate resolution of each of these applications.

D In particular, it is alleged that the learned judge erred in law in his consideration of the relevance of the one stop shopping concept in its application to this case. With respect, I do not think he did so. Indeed I think his Honour appreciated that the relevance of this concept is as one of the factual bases upon which the subjective requirements of a section of the public may be established and by reference to which it may be determined whether those requirements are objectively reasonable.

E His Honour's conclusions of fact in each of these cases were in similar terms. He considered that neither of the shopping centres involved was one where a significant section of the public resorted on a major shopping expedition at which the bulk of their periodic household requirements would be purchased. In each case he considered that the major proportion of the surveyed members of the public were persons who found it convenient to go occasionally, not necessarily as frequently as once a week, to each shopping centre to purchase a range of incidental household requirements — groceries, foodstuffs and the like. His Honour accepted that these persons would find it F convenient to purchase liquor at the same time as other items were purchased, and he considered that it was no doubt the case that those who were in the habit of purchasing liquor in the affected area did so now on shopping trips of a like kind to that described above. He noted that there were, respectively 1.6 km and 1.8 km from these shopping centres, other shopping centres which offered the facility of a Category A licence within the particular group of shops in question.

G In other words, his Honour does not appear to have overlooked the proposition of convenience involved in the capacity of those who use the particular shopping centre in the way he found to be established by the evidence, to make purchases of liquor at the same time as they did so. It was a relevant matter of fact and, provided the learned judge asked himself the correct ultimate question, it was for him to give that consideration, together with others emerging from the evidence in the case, such weight as he thought fit.

In each case, his Honour expressed his conclusion upon this aspect of the matter in terms that the inference he should draw was that the majority of the section of the population of the affected area which patronises the particular shopping centre would purchase packaged liquor at the proposed liquor store once every two to three weeks, or less frequently, not in conjunction generally with their weekly or major periodic shopping, but when resorting to the particular shopping centre to buy minor food items, or for other incidental purposes. It was in that context that his Honour noted that in each case the evidence did not establish what he described as "a subjective requirement for one stop shopping facilities" at the particular shopping centre in conjunction with the sale of food and groceries — in other words, on a major shopping expedition. It may be that that reference to one stop shopping is rather more limited than the concept deserves, but if his Honour had regard to and gave weight as he thought fit to the relevant evidence, it does not seem to me to matter what label he put on the findings of fact he made.

I endeavoured to trace the development of the one stop shopping concept through the authorities following *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*, in my judgment in *Liquorland (Australia) Pty Ltd v Porton Pty Ltd* (at 18-21). I do not wish to repeat what I there wrote, but I wish to say that in this area of fact finding it seems to me that there is a dangerous tendency to elevate relevant factual material to the status of a rule of law. It seems to me that, shorn of any mystique, the idea of one stop shopping is simply a shorthand way of expressing the proposition that a significant section of the public might be established, in a particular case, to have a requirement which may be seen to be objectively reasonable for access to a liquor store in a place where they go to do other domestic or household shopping.

Much will depend upon the evidence in the particular case, of course, but no doubt the persuasive power of this notion to move the Liquor Licensing Court to view the requirement as reasonable, will be enhanced if the particular place where it is proposed to locate the liquor store is one to which people resort on a regular basis for food and grocery shopping, or for shopping which is concerned with the acquisition of other household requisites, in relation to which people will no doubt find it convenient if they are able to get out of their car or leave some other mode of transport and resort to a number of shops to buy all their household needs at the one time.

If that is the way the evidence shows that people wish to use a particular shopping centre, it may be no answer for an objector who has a liquor store licence nearby to say that it is only a short distance to travel to that liquor store from the place where other household needs are being met. And particularly may that be so if the other shopping centre is one where people go regularly on a major shopping expedition, or where they are able to meet a variety of their household needs at the one place. These, to my mind, are simply a variety of factual considerations, having an obvious relevance to the process of establishing what the requirements of the public are and whether they may reasonably be met, as Malcolm CJ put it in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (at 12), by including the capacity for the purchase of liquor "in the manner and under the circumstances contemplated by the proposed licence".

It was in the above sense, I think, that Wallwork J saw the relevance of the question of one stop shopping in *Charlie Carter Pty Ltd v Viabon Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 930683,

23 December 1993) when (at 7 of his reasons with which Pidgeon and Ipp JJ agreed) he said:

> "The question is therefore whether it was a reasonable requirement in the sense to which I have referred, based on convenience, for members of the public to purchase their liquor at the same time that they do their shopping at the appellant's shopping centre. The subjective desire of members of the public to do so is not objectively to be refuted by reason of the fact that those members of the public, at present, shop in other parts of the town where they now buy liquor. The true question is whether it is objectively reasonable for the public to desire to buy at the appellant's shopping centre because it is more convenient for them to do that than to buy elsewhere."

It is, of course, apparent that, when formulating the true question in those terms, his Honour was reacting to the way in which the appellant's case was presented and to the evidence before the Liquor Licensing Court. The question was one of fact, posed with regard to the circumstances of that case.

The concept under consideration was further discussed in *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd* in terms which are consistent with the above. In the case of *Liquorland (Australia) Pty Ltd v Porton Pty Ltd* the finding of the learned trial judge was that the Belridge Shopping Centre at the relevant time was not one to which a significant proportion of the public in the affected area resorted, or would wish to resort, on general shopping expeditions, with whatever frequency, but they only went there occasionally to make domestic purchases of an incidental nature. One such purchase of an incidental nature might be the purchase of liquor, but not necessarily or generally in combination with other domestic items. That was really the negation of any meaningful one stop shopping concept and it was held that his Honour then rightly considered the capacity of other nearby liquor stores to satisfy the requirement for liquor which such shoppers might have, when considering the reasonableness of the requirement, based on convenience, to be able to purchase liquor at the Belridge Shopping Centre. Whether the case when it came before the Liquor Licensing Court on this occasion in relation to the Belridge Shopping Centre remained of the same type is a matter to which I have given no attention, that question involving a mere factual inquiry.

I would summarise my observations about this aspect of the case by saying that if it was the case that the evidence established that a significant section of the public had a requirement for the convenience of being able to use The Lakes Shopping Centre, or the Belridge Shopping Centre, for the purchase of liquor at the same time as other domestic needs for which they were in the habit of resorting to the centre, then the question of the reasonableness of that requirement would have to be addressed as a matter of fact, particularly in the context of what was available and what reasonably ought to be available in the way of retail outlets at the particular shopping centre. That would be a different sort of inquiry from one made in the context of evidence which established merely that people used the shopping centre for occasional and relatively isolated purchases, no matter with what frequency, rather than as part of a general shopping expedition, whether a major periodic event or not.

In each case, under the Act, the existence and the location of other licensed premises within the affected area would, by law under s 38, remain a relevant consideration when judging the reasonableness of the requirement established by the evidence. In a one stop shopping case, depending upon what type of one stop shopping the court was dealing with, I imagine that a nearby facility would

be less able to be regarded as reasonably fulfilling the requirements of the public, unless it was seen that the situation which would be created in the particular shopping centre by the addition of the proposed liquor licence would substantially duplicate a combination of facilities already available in reasonably close proximity. The availability of other licensed premises in close proximity would obviously have a different sort of impact upon the reasonableness of the requirements of the public for the proposed new liquor licence in a case where that licence was seen merely to fulfil a need to be able to obtain liquor, not in the context of the purchase of a variety of other household items.

To say those things, however, in my opinion is to say nothing about the law relevant to the task imposed on the licensing authority and I propose therefore to say nothing specifically in these reasons about the numerous grounds of appeal which challenge the Liquor Licensing Court's approach to this area of the case, which grounds, it seems to me, although they are expressed in terms of errors of law, really do no more than complain about the Liquor Licensing Court's failure to draw the factual conclusions urged upon it by the appellant.

However, having regard to the area of law which I have identified, in my opinion, in each case the appeal should be allowed and the matter returned to the Liquor Licensing Court so that that court may discharge its statutory obligation of resolving the applications upon the facts found by it, according to law.

SCOTT J. I have had the opportunity of reading the reasons in draft to be published by Ipp and Murray JJ.

I agree with each of them and the orders proposed, appreciating that Ipp J identifies two questions of law which Murray J does not touch upon.

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