

LICENSING COURT OF SOUTH AUSTRALIA

WOOLIES LIQUOR STORES PTY LTD

JURISDICTION: Application for Removal of a Retail Liquor Merchant's Licence

FILE NO: 534 of 2018

HEARING DATE: 7, 8, 28 and 29 May 2018

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 20 June 2018

*Application for the removal of a retail liquor merchant's licence - Existing licence is conducted under the trade name BWS on Main North Road, Blair Athol - Proposed premises to trade under the same trade name within a shopping centre 1.5 kilometres south and on the opposite side of Main North Road - Two issues - One is locality, the second is whether the Court should exercise its discretion to refuse the application - **Held** that the existing and proposed premises are within the same locality - As to the issue of discretion, the public interest does not require the refusal of the application - Liquor Licensing Act 1997.*

S & J White Pty Ltd v Liquorland (Australia) Pty Ltd [2011] SASCFC 103

Liquorland (Australia) Pty Ltd v Hurley's Arkaba Hotel Pty Ltd [2001] SASC 232

Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205

Lee v Evans (1964) 112 CLR 276

Nuriootpa Vine Inn v Licensing Court [1999] SASC 152

Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd [2014] SASCFC 87

Woolworths Limited v Smithfield Hotel Pty Ltd [2012] SALC 57

Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd [2002] SASC 17

REPRESENTATION:

Counsel:

Applicant: Mr B Doyle with Mr R D'Aloia

Respondent: Mr M Roder SC with Mr B Allen

Solicitors:

Applicant: Clelands Lawyers

Respondent: Wallmans Lawyers

- 1 This is an application for the removal of a retail liquor merchant's licence pursuant to the *Liquor Licensing Act 1997* (the Act).
- 2 The applicant is Woolies Liquor Stores Pty Ltd. It is part of the Woolworths Group of companies, which amongst other things is a major participant in the liquor industry and the proprietor of numerous supermarkets in South Australia.
- 3 The application involves the proposed transfer of a licence in respect of premises conducted under the trade name "BWS" at 398 Main North Road, Blair Athol, to premises about 1.5 km to the south, at Shops 24 and 35 in the Sefton Plaza Shopping Centre at 225-239 Main North Road, Sefton Park. It is proposed that the licence, if transferred, will also trade under the trade name "BWS".
- 4 The application has drawn objections from Duke Northpark Pty Ltd and Duke West Coffee Palace Pty Ltd.
- 5 At issue is first, whether the existing premises and the proposed premises are in the same locality for the purposes of s 61(2) of the Act. If they are not, the application fails.
- 6 If the two sites are found to be in the same locality, the second issue is whether the Court's general discretion under s 53 of the Act should be exercised to refuse the removal application.
- 7 The issue of locality arises because of the terms of s 61(2) of the Act, and the manner in which it has been interpreted.
- 8 Section 61(2) provides that:
 - (2) An applicant for the removal of a retail liquor merchant's licence must satisfy the licensing authority that the licensed premises already existing in the locality to which the licence is to be removed do not adequately cater for the public demand for liquor for consumption off licensed premises and the removal of the licence is necessary to satisfy that demand.
- 9 In *S & J White Pty Ltd v Liquorland (Australia) Pty Ltd*¹ the Full Court confirmed the approach it had taken in the earlier case of *Liquorland (Australia) Pty Ltd v Hurley's Arkaba Hotel Pty Ltd*,² that the requirement to satisfy the licensing authority that existing licensed premises do not adequately cater for public demand, does not apply in the case of a removal, where the proposed premises are within the same the locality as the existing premises.

¹ [2011] SASFC 103.

² [2001] SASC 232.

- 10 A consideration of the general discretion arises because s 53 confers upon the Court a general discretion which enables it to grant or refuse an application and which requires it to refuse an application if it is “satisfied that to grant the application would be contrary to the public interest”.

The general locality

- 11 Before moving to discuss the evidence, I make some uncontroversial observations about the general locality and the licensed premises within it.
- 12 Main North Road is a major road linking the city of Adelaide to the major roads carrying traffic to north of the State. It commences at the northern end of O'Connell Street, North Adelaide. It then passes northwards through the suburbs of Thorngate, Medinde, Medindie Gardens, Prospect, Nailsworth, Sefton Park, Enfield and Blair Athol before reaching the major intersection known as Gepps Cross. That intersection comprises of Grand Junction Road, which runs from east to west, Port Wakefield Road which runs from south to north and Main North Road, which north of the intersection runs in a north easterly direction.
- 13 Between the start of Main North Road and Gepps Cross, Main North Road has two, and sometimes three lanes in each direction, and at various points it has median strips, turning lanes and pedestrian crossings. It is a busy road.
- 14 About halfway between the start of Main North Road, and Gepps Cross, is Regency Road. It bisects Main North Road. It has two lanes in each direction. It is a main east-west road that spans from Arndale Shopping Centre at Kilkenny in the west to Broadview in the east. Over that journey it passes from Hampstead Road to the east and through Prospect Road to the west. It is a busy road, although not quite as busy as Main North Road.
- 15 The suburbs of Blair Athol West, Kilburn and Kilburn North are north of Regency Road and west of Blair Athol.
- 16 The suburbs of Clearview, Northfield, Northgate and Broadview are north of Regency Road and east of Enfield.
- 17 To the east of Main North Road, just south of Regency Road is the suburb of Sefton Park.
- 18 Sefton Park, Nailsworth and Broadview share the same postcode, 5083.

- 19 As it heads north, Port Wakefield Road passes through the suburbs of Gepps Cross, Dry Creek and Cavan on its way to connecting Adelaide to the Yorke Peninsular and the northern and western parts of the State.
- 20 As it heads north east, past Gepps Cross, Main North Road passes through the suburbs and towns of Mawson Lakes, Pooraka, Salisbury, Elizabeth and Smithfield on its way to connecting Adelaide to Gawler and the towns beyond.
- 21 On the south western corner of Gepps Cross is a licensed facility known as the Coopers Ale House. It trades under a hotel licence. It is owned by the Woolworths Group. It operates two retail liquor facilities under its hotel licence. One trades under the BWS badge. It is located on Main North Road. It is in the nature of a drive through. Although not inspected, it was agreed that it contains the range that might be expected of a BWS store, albeit slightly smaller. The other trades under the Dan Murphy's badge. It is a typical Dan Murphy's store of almost warehouse proportions. It contains an excellent range of liquor. It is located in the north western corner of the site, adjacent to Grand Junction Road.
- 22 The existing premises are about a kilometre north of the intersection of Regency Road and Main North Road, on the eastern side of Main North Road. It is about the same distance from the Gepps Cross intersection. It is a typical BWS store. It is a convenience store fitted out with a dedicated cool room with the main floor area containing shelves and cabinets for the storage, display and sale of beers, wine and spirits. It is an attractive and moderately stocked retail liquor facility.
- 23 On the southern side of the intersection of Regency Road and Main North Road are three shopping centres. On the western side there is the Northpark shopping centre. It contains a Coles and a Woolworths' supermarket as well as numerous other retail outlets. It has a large carpark. The Woolworths is located in the north west of the centre. Adjacent to that supermarket is a BWS store, which can only be accessed from inside the centre. It is a typical BWS store.
- 24 On the eastern side of the intersection, immediately south of it, is Regency Plaza. It formerly contained a Woolworth's supermarket that has since closed. For now it has a Lincraft store, a mix of specialty stores, and a hotel known as the Northern Tavern. The hotel has a bottle shop that is attached to it and which trades under the Sip N Save badge. It is a fair average quality hotel bottle shop.
- 25 A little further south of that shopping centre is the Sefton Plaza. It is in the suburb of Sefton Park. In the south of the centre there is a large Target store. Just north of the Target store is a large Foodland supermarket. Across from the Foodland, and further north of it, are a

number of smaller retail outlets. The proposed premises comprise of two shops immediately across from the Foodland. Sefton Plaza is serviced by a car park in the area between the eastern side of Main North Road and the centre as well as the carpark in Regency Plaza.

The evidence

- 26 In support of the application the applicant called Mr Matthew Holland, a senior regional property manager for Woolworths, Mr Graham Burns, a planning consultant, and Mr Gregory Malempre, an economist and consumer researcher. It also relied upon a statement of evidence from Mr Nick Dimauro, the owner of Magnia Investments Pty Ltd, which in turn is the owner of the Sefton Plaza.
- 27 The objectors called Mr Sean Stephens, an economist, and Mr Marcus Rolfe, a planning consultant.

Mr Holland

- 28 Mr Holland said that the licence at the existing premises was granted in about 2003 in respect of premises within a shopping centre then known as the Harvey Norman Centre, which was on the eastern side of Main North Road, just south of Gepps Cross. He said that Woolworths purchased the licence from another entity. He said that it was a pretty average store and that Woolworths decided to move it to the existing site to improve its performance by taking advantage of outward bound traffic and its co-location with a take away chicken store. He said that its trade improved, but it was always a modest trader. He said that by 2013 its level of trade was such that it was becoming unprofitable and that by 2017 it was running at a substantial loss. He put part of this down to the grant of a retail liquor licence to a Liquorland Store in Islington, a couple of kilometres to the west.
- 29 Mr Holland spoke of Woolworths “Everyday Rewards Card” (ERC). I am permitted to know that customers are encouraged to apply for these cards with a lure of discounts and that those who have the cards are encouraged to have them scanned when they purchase goods from Woolworths’ stores, including BWS stores.
- 30 Retail entities such as Woolworths collect data from the use of these cards as a means of obtaining important marketing information. Mr Holland gave evidence about the data collected for the existing premises for the 2017 calendar year. He said that in that year the existing premises recorded 10,887 transactions that were scanned with an ERC. Over that same period the store conducted 40,600 transactions. It follows that around 26% of all transactions at the existing premises involved an ERC. Woolworths monitors the postcode associated with each scanned transaction. If the raw number of scanned transactions that pertain to a

particular post code are multiplied by a factor of around four, the resultant number gives a reasonable estimate of the total number of transactions relative to the area covered by the particular post code.

- 31 This information forms the basis of the expert evidence of Mr Malempre and Mr Stephens that I will discuss shortly.
- 32 Mr Holland spoke of the proposed premises. He said that retail liquor bottle shops, supermarkets and shopping centres compliment one other and that whilst ideally Woolworths would prefer to align its own supermarket with its own bottle shop, it was content to align a bottle shop with a competitor supermarket. Hence the proposal to remove the licence of the existing premises to the proposed premises. He said that subject to succeeding in this application, Woolworths had a binding agreement to secure premises adjacent to the Target store and immediately opposite to the Foodland in Sefton Plaza.
- 33 He said that if the application fails Woolworths would close the existing premises. He said that Dan Murphys had just opened. He accepted that in light of its opening the existing store's future looked bleak. He conceded that its turnover would drop by several hundreds of thousands of dollars.
- 34 He was asked about the Woolworths supermarket in Northpark and that centre generally. He said that Northpark was about the same size as Sefton Plaza but it had more tenancies. He thought the two centres had their own market share although there was some crossover.

Mr Dimauro

- 35 Mr Dimauro said that he has a number of commercial investments throughout Australia and New Zealand. He has property investments in several suburban shopping centres in the Adelaide metropolitan area. His company purchased Sefton Plaza in 1996. He said that the centre had performed very well throughout the years and that there were no issues regarding the timely payment of rent or expressions of tenant dissatisfaction. He said that the proposed premises will occupy two shops opposite the Foodland Supermarket and that the existing tenants of those shops will be relocated to other tenancies. If that occurs, overall the centre will have two vacancies.
- 36 Mr Dimauro said that his company had recently decided to refurbish a number of areas within Sefton Plaza. This includes a redevelopment of the Foodland Supermarket to expand it by an area of 800 square metres, such that the supermarket will occupy 3,241 square metres upon completion.

Mr Burns

- 37 Mr Burns prepared a report.³ He measured the time taken to travel by road between the existing premises and the proposed premises at just under four minutes. He noted that Sefton Plaza offered ample parking adjacent to the proposed premises.
- 38 In his opinion the locality of the existing premises extends generally to a kilometre north, perhaps as far as Grand Junction Road, east to include Enfield and parts of Clearview and Broadview, west to include Blair Athol, and south to include both Northpark and Sefton Plaza.
- 39 In his oral evidence he pointed to a number of facilities on Main North road, north of Regency Road, such as Spirit Auto Parts, Pitmans Motorcycles, Yamaha Pitmans Marine and Taste Furniture. He noted that there were several take away food outlets in that area as well as a medical clinic, community facilities, an Aged Care Centre, a Child Care centre and some schools. He said that people living in the areas south of Regency Road and in particular the residents of Sefton Park could be expected to travel north along Main North Road to access these outlets and facilities and that some might be expected to combine that journey with a purchase of liquor from the existing premises.
- 40 He said that whilst Main North Road and Regency Roads are busy roads, neither were barriers of a type that might define locality.

Mr Malempre

- 41 Mr Malempre analysed the ERC data. After projecting the number of transactions (by multiplying the raw data by a factor of about four) he compared that number with the number of adults living in the areas with the same postcode and arrived at a figure that he described as the penetration rate. He then rated the top ten relative penetration rates as follows:

5094 Cavan, Dry Creek and Gepps Crossing: 605 projected transactions out of an adult population of 724 yielding a penetration rate of 836.

5084 Blair Athol, Blair Athol West, Kilburn and Kilburn North: 6,199 projected transactions out of an adult population of 7,943 yielding a penetration rate of 780.

5085 Clearview, Enfield, Enfield Plaza, Northfield and Northgate: 9,567 projected transactions out of an adult population of 15,662 yielding a penetration rate of 611.

³ Ex A8.

5106 Parafield, Parafield Airport and Salisbury South: 90 projected transactions out of an adult population of 200 yielding a penetration rate of 488.

5082 Fitzroy, Ovingham, Prospect, Prospect East, Prospect West and Thorngate: 2,715 projected transactions out of an adult population of 11,991 yielding a penetration rate of 226.

5371 Roseworthy, Shea-ok Log and Templers: 134 projected transactions out of an adult population of 931 yielding a penetration rate of 144.

5083 Broadview, Nailsworth and Sefton Park: 803 projected transactions out of an adult population of 5,976 yielding a penetration rate of 134.

5118 Bibaringa, Buchfelde, Concordia, Gawler, Gawler Belt, Gawler East, Gawler River, Gawler South, Gawler West, Hewett, Kalbeeba, Kangaroo Flat, Kingford, Reid, Ward Belt and Willaston: 1,777 projected transactions out of an adult population of 14,345 yielding a penetration rate of 124.

5471 Gulnare: 7 projected transactions out of an adult population of 72 yielding a penetration rate of 104.

5455 Hilltown: 4 projected transactions out of an adult population of 37 yielding a penetration rate of 101.

- 42 He then conducted a similar analysis by reference to the penetration rates in respect of postcodes with an adult population of more than 1000, which excluded 5094, 5106, 5371, 5471 and 5455. On that analysis the suburbs of Blair Athol, Blair Athol West, Kilburn and Kilburn North had the highest penetration rates, followed by Clearview, Enfield, Enfield Plaza, Northfield and Northgate. The ranking of 5083, being Broadview, Nailsworth and Sefton Park, went from seventh to fourth.
- 43 Based on this data, Mr Malempre thought that there was strong evidence indicating that people living south of Regency Road were using the existing premises. This, and the fact of the short drive time and distance between the existing premises and the proposed premises, led him to suggest that both were in the same locality and catchment area.
- 44 In his report⁴ he noted that typically trade areas comprise of one or more primary catchment sectors, one or more secondary sectors and sometimes one or more tertiary sectors.

⁴ Ex A9.

- 45 He assessed the primary catchment area for the existing premises to extend west beyond Prospect Road, east to Hampstead road, north to Grand Junction Road and south to Regency Road.
- 46 He thought that the secondary catchment area extended to Mawson Lakes and Pooraka in the north and to Prospect and Collinswood in the south.
- 47 In cross examination Mr Malempre acknowledged that Woolworths was one of his major clients.
- 48 It was put to him that in light of the existing store's poor performance the number of transactions overall was relatively low and that the number of transactions coming from a particular area might be so low as to be insignificant. When challenged in cross examination he maintained that the number of transaction coming from the residents living south of Regency Road and Main North Road and those coming from the residents of Sefton Park were of a sufficient quantity to warrant inclusion in a secondary catchment area.

Mr Stephens

- 49 Mr Stephens also analysed the ERC data. In contrast to Mr Malempre, he thought that the numbers of transactions conducted by the residents of Sefton Park at the existing premises was for trade purposes insignificant. He considered that a number of people who came from that area and who made purchases at the existing premises should be regarded as opportunistic passing trade and that when these were taken into account, what was left was such a small number as to be of no real interest to a retail analyst defining the relevant trade area. In his view the low numbers coming from south of Regency Road indicated that that road was a significant physical barrier that was having a profound effect on shopping and trading patterns.
- 50 In cross examination Mr Stephens accepted that in a typical shopping pattern in an urban area most residents would be familiar with all retail facilities within a three to four kilometre radius of where they live.
- 51 He accepted that in determining whether the level of trade at the existing premises that was coming from post code 5083 was high enough to constitute part of the secondary catchment area of the existing premises was a matter of professional judgment over which there might be legitimate disagreement. That said, he left me with the impression that he strongly disagreed with Mr Malempre's judgment.

Mr Rolfe

- 52 Mr Rolfe noted that Main North Road is a primary arterial road that carries some 43,200 vehicles per day. He regarded that fact and the restrictions in terms of right turn movements onto it meant that it is a significant barrier to east/west traffic movement. As such he limited his locality for those living east of Main North Road to 300 metres south of the existing premises, based on walking distance. He thought that residents who lived further south on the eastern side of Main North Road would find it inconvenient to turn right into Main North Road and were therefore much more likely to service their take away liquor needs by using the BWS store in Northpark rather than the existing premises.
- 53 Mr Rolfe studied the results of the 2016 census. He noted that in the Kilburn/Blair Athol district 14.4% of household did not own a vehicle. This compared to 10.6% for Enfield/Clearview, 8.2% for Prospect, and 7.8% for Greater Adelaide. This led him to conclude that “the statistical area is less mobile than Greater Adelaide”.
- 54 Mr Rolfe thought that the locality extended approximately one kilometre to the north of the existing premises and that it extended westwards to about Prospect Road. He noted that Regency Road is a secondary arterial road and that in and around that area, it carries between 26,000 to 29,000 vehicles per day. He said that he timed his drive time between the existing and the proposed premises as being between four and six minutes in a southerly direction and between four and seven minutes in a northerly direction. He noted that you cannot turn right onto Main North Road from Sefton Plaza and that the intersection of Regency Road and Main North Road can be quite busy and congested such that a right hand turn from Regency Road into Main North Road can take some time. In his view the travel time and inconvenience of movement were such that the two sites could not be regarded as being within the same locality.

The parties’ submissions

- 55 Mr Doyle, counsel for the applicant, submitted that the concept of locality for licensing purposes involves an evaluative judgment and that matters such as distance and time to travel within the contended area are significant matters. He said that the small distance between the existing premises and the proposed premises, being 1.5 kilometres, and the convenient driving time of under seven minutes, decisively demonstrated that the two are within the same locality for the purposes of the Act.
- 56 Whilst he accepted that the concept of locality does not simply mean the local community, he said that it necessarily has a geographical connotation that denotes in a general way the fact of being local or neighbouring, as opposed to distant or remote. By reference to various

authorities he submitted that because the purpose of identifying a locality was not to draw lines on a map, but rather to focus on the local, as distinct for a purely general demand, the process was necessarily imprecise.

57 He said that the significance of the actual trade is that it can extend the notion of what is local, in the sense that if there is significant trade coming from an area that might at first blush seem remote, that might provide a basis for including that area within the locality. He said, however, that the actual trade was not necessarily decisive, and that trade figures had to be looked at in the context of the store's actual trade. He said that if it were otherwise, applications to remove poorly performing stores would face serious obstacles. He said that such an approach should not be adopted. He said that it was in the public interest to enable an owner of a retail liquor merchant's licence to remove a poorly performing store to an area that would be of greater service to the public. He submitted that in this case, although the trading figures for the existing premises for the area in the vicinity of Sefton Plaza were not high, when viewed by reference to a poorly performing store, they are sufficiently significant to establish that it is part of the relevant trade area.

58 He took me to the following passage from the evidence of Mr Malempre when he was asked why the postcode 5083 had a higher penetration rate than some of the other postcodes. Mr Malempre said:

I think there's a couple of factors, one being the proximity of that post code to the BWS Blair Athol about 1.5 kilometres along Main North Road. The second would be the offer that's there at the moment, which is really a convenience offer; that if a person living in 5083 at the moment did not want to shop at their closest liquor stores, which would be the Sip'N Save on the same side of the road or BWS at Northpark but just want a convenience offer, they could easily drive to that store. And then, finally, people in this area would be driving up and down Main North Road for a range of difficult uses, be it recreation, education, their place of employment, other retail activities, that makes it more than just a passing-by trade.⁵...

59 Mr Doyle said that these reasons demonstrated a character of trade that was patently local as distinct from general. He also made the point that the small number of projected transactions coming from that postcode was consistent with the existing premises performing poorly.

60 Mr Doyle submitted that there is no basis to consider using the Court's discretionary power to refuse an application such as this unless the

⁵ Tr 88.

removal would impair the satisfaction of public demand in the locality or unless the application was disingenuous and was motivated by a purpose inconsistent with or detrimental to the policy of the Act. He submitted that neither was present here. He said that there was every reason to think that the removal would provide the public with a more convenient offering and would allow those who wanted to combine their liquor purchasing with their use of Sefton Plaza, the ability to do so. He said that in seeking the removal Woolworths was motivated solely by a genuine commercial need to deal with an under-performing store.

- 61 Mr Roder SC, counsel for the objectors, noted that the applicant did not call the person responsible for making the decision to apply for the removal. He noted that no evidence was given of any attempts to or thought given to improve the performance of the existing premises or to reduce its overheads.
- 62 He pointed out that the effect of the application was to move a licence that was originally granted in respect of a local area proximate to Grand Junction Road to a shopping centre 300 metres south of Regency Road, directly across the road from an identical facility.
- 63 He submitted that locality is not concerned with what people might think is their locality and that it is not determined by distances and time taken to travel, although he concedes that distance and time can be relevant factors. He said that the most powerful factor to consider is the actual trade, and where it is coming from.
- 64 Mr Roder made reference to the judgment of von Doussa J in *Nepeor Pty Ltd v Liquor Licensing*⁶ where His Honour cited the following passage from the judgment of Barwick CJ in *Lee v Evans*, where Barwick CJ said: “public demand” is descriptive of a demand emanating from a sufficient area of the community to constitute the public, that is from people in the “locality.”⁷ He said that in conformity with this, the relevant demand must be significant. He said that whilst this includes secondary catchment areas and therefore can involve smaller numbers, it still must be associated with significant and consistent sales.
- 65 He submitted that many of those from post code 5083 who accessed the existing premises would have done so as passing trade and that when this was taken into account, the number of transactions coming from the residents of that post code were so few as to be insignificant. He said that this was especially so if those within the post code, residing north of Regency Road were excluded. He submitted that the trading records established that the catchment area for the existing premises does not extend south of Regency Road.

⁶ (1987) 46 SASR 205.

⁷ (1964) 112 CLR 276 at 285-286.

- 66 Mr Roder submitted that Mr Malempre's significant commercial relationship with Woolworths made it difficult for him to be completely objective. He said that his trade area involved absurd propositions and that I should prefer Mr Stephen's evidence
- 67 He submitted that it was of significance that the applicant did not call a single witness who resided south of Regency Road and who uses the existing premises.
- 68 As to discretion, he submitted that the demise of the existing premises was of Woolworths' own making. He said that those living in Blair Athol will plainly be disadvantaged by the removal in circumstances where the end result will be two identical stores in close proximity to each other. He said that this does not advance the objects of the Act that include "to encourage a competitive market for the supply of liquor"⁸.

Consideration

- 69 I commence by repeating the observation made by Perry J in *Nuriootpa Vine Inn v Licensing Court*:

I have said before while sitting as a member of the Full Court, and I repeat, that there is a tendency in the Liquor Licensing jurisdiction to place too much emphasis on so-called need witnesses and lay evidence of demand. That type of evidence is relevant, but it tends to be very subjective and coloured by the natural leaning of many people to support any new facility however marginal the real case as to need might be. More important than evidence of that kind are the objective features of the locality and its demographics, coupled with the Licensing Court's own expertise as to what the reasonable requirements of contemporary demand may be, considered in the light of a very stringent test for the grant of a retail liquor licence which is still a feature of the legislation.⁹

- 70 With this advice in mind, in determining what the relevant locality is, I give little weight to the fact that the applicant has not called any evidence from the residents living near Sefton Plaza. I propose placing much more weight on the objective features of the general area and its demographics.
- 71 I also make the point that whilst the opinions of the planners, Mr Burns and Mr Rolfe are important, and must be given consideration, it is for the Court to determine the locality, not the experts. And in like manner, on issues such as whether the number of transactions in a particular area is significant enough to be taken into account in determining the locality that too is ultimately a matter for the Court.

⁸ Section 3(1)(e).

⁹ [1999] SASC 512 at [15].

The locality

- 72 The concept of locality in connection with liquor licensing has been canvassed by the Supreme Court on many occasions. A recurring theme is that it is an elusive concept that defies precise definition.
- 73 In *Nepeor Pty Ltd v Liquor Licensing*¹⁰ von Doussa J (with whom King CJ and Bollen J agreed) said that the word “locality” should be treated in a much less exacting manner than had previously been the case. He held that the concept “was far too indefinite and flexible to permit it to be marked out precisely on a map as a matter of course.” He said:

I consider the word is used in the Act to denote, in a general way, the fact of being local, or neighboring, as opposed to distant or remote. Often the “locality” is, as a matter of fact, not a matter for dispute as the relevant area is geographically discrete, as, for example, in the case of a country town [case references omitted]. In other cases, particular physical features of the area, such as a river, or some other significant obstruction to the free movement of people, might provide the basis for including or excluding particular areas from consideration in a precise way. However, in a case like the present one, where the proposed premises are within a built up region which, on any view, extends well beyond areas which could conceivably be relevant to the inquiry, precise delineation or definition, will rarely be possible. Nevertheless, if the concept and purpose of the section is recognised, it is capable of rational application in a practical way.

Section 38(1) assumes that the applicant will endeavour to establish a “public demand” which the licensing of the proposed premises will meet. The meaning of the word “public” is also elusive. It is related to the concept of “locality”. In a different setting, Barwick CJ, in *Lee v Evans*, related the notion of “public” to an “area of the community”, the magnitude of the area depending upon the context in which the word “public” appeared in the particular enactment. In my opinion, in s 38(1) “public demand” is descriptive of a demand emanating from a sufficient area of the community to constitute the public, that is from people in the “locality”. The evidence of the applicant should indicate the “catchment area”, an expression used by counsel, from which the alleged public demand arises; or more accurately, the places from which the people come whose demands aggregate to constitute the “public demand”. The evidence will, in a particular case, identify “the public” and in turn the “locality”. (footnotes omitted)

- 74 In that same case King CJ held that the word “locality” is not intended to identify an area delineated by definitive boundaries. He said that the task

¹⁰ (1987) 46 SASR 205, 215-216.

is to identify the area from which demand for liquor “might be expected to be met at least in part by the proposed licensed premises”.

75 In *Liquorland (Aust) Pty Ltd v Woolies Liquor Store Pty Ltd*,¹¹ Parker J elaborated upon the concept when identifying an error in the trial judge’s approach in that case. He said that s 61(2) of Act is not concerned with identifying the local community but its focus is identifying the area from which demand for liquor might, at least in part, be met by the licensed premises. He made reference to the judgment of von Doussa J in *Nepeor* and noted that he adopted the term “catchment area” to describe the same concept.

76 Parker J then said as follows:

The locality should not be limited to the primary catchment area of the relevant licensed premises. The *Nepeor* test of determining locality by reference to the area from which residents use the premises to supply at least part of their liquor needs necessarily includes the secondary catchment area.

In light of the admonition by King CJ and von Doussa J in *Nepeor* against the fixing of overly precise boundaries for a locality, and in light of the evidence available, I will not attempt to fix a precise limit to the locality...¹²

77 In light of these and other authorities, I think that Mr Doyle is correct in submitting that the concept of locality requires an evaluative judgment that involves a range of factors including time, distance and areas of trade. I think he is also correct in contending that in considering actual trade, the Court must take into account the performance of the premises and to make due allowance if the store is performing poorly.

78 The difficulty with the objectors’ case is that by drilling down into fine detail through the data produced by the ERC and focusing on the numbers of transactions in particular areas within a single calendar year, they are asking this Court to embark on too rigorous an exercise to fix a precise limit to the locality.

79 I am sure that if one obtained more information from the ERC and examined this area, street by street, there would be some streets, even in areas where there was substantial trade, from which there were either none or very few transactions at the existing premises. But the idea of excluding those streets from the locality would be absurd and contrary to the clear directive given by King CJ in *Nepeor* that the Court should not attempt to identify an area delineated by definitive boundaries. I think the same is true in respect of analysing too closely the trade figures that

¹¹ [2014] SASFC 87.

¹² *Ibid* at [69]-[70].

relate to individual suburbs and being too concerned about separating those who reside on one side of Main North Road from the other and those who reside on one side of Regency Road from the other. It would be different if one were to conclude those roads were substantial barriers. But I do not believe that to be the case.

- 80 It is important to reflect on what is meant by substantial barrier in the context of placing a bright line in defining a locality for licensing purposes. As von Doussa J stated in *Nepeor*, in the passage set out above, it involves a particular physical feature that significantly obstructs the free movement of people.
- 81 Whilst one would naturally expect there to be more trade at the existing premises coming from north of Regency Road than south of it, and that there would be more trade coming from west of Main North Road than east of it, does not establish that Main North Road and Regency Road are substantial barriers.
- 82 Main North Road in the vicinity of the existing premises, although a busy road, is scarcely comparable to that road further north when it has speed limits of 80 kph and more. Further north, Main North Road can constitute a formidable barrier.¹³ But not here. Moreover, there are no supermarkets in about Main North Road between Regency Road and Gepps Cross. It follows that many living in the area north of Regency Road, including those living east of Main North Road and south of the existing premises, would travel to Northpark or Sefton Plaza to attend to their supermarket needs. Many would do so by car. That journey will involve traversing Main North Road, Regency Road or both. I think it is reasonable to infer that for many living in the area south and east of the existing premises, travelling by car on and across busy roads is part of their ordinary life and is unexceptional. In saying this, I have not overlooked the fact that the percentage on no car ownership in the Enfield/Clearview district in 2016 was 10.6%, compared with a figure of 7.8% for Greater Adelaide. However, I would not regard that difference as significant. Importantly, 82.8% of households in the Enfield/Clearview district declared in the 2016 Census that they had one or more vehicles. (The figure for Greater Adelaide was 85.8%)
- 83 As for Regency Road, it is a typical busy four lane suburban road. The time taken to drive from the existing premises to the proposed premises, which involves crossing Regency Road, is less than seven minutes and sometimes it can take as little as four minutes. This confirms that Regency Road is not a road that is a significant obstruction to the free movement of people from north to south and vice versa.

¹³ See, for example: *Woolworths Limited v Smithfield Hotel Pty Ltd* [2012] SALC 57 at [100].

- 84 As such, I did not find Mr Rolfe's evidence that limits the south eastern boundary of the existing premises' locality to 300 metres south east of those premises, based on walking distance, persuasive.
- 85 What the data from the ERC shows is that some of the customers using the existing premises reside south of Regency Road in the general vicinity of the proposed premises. It is true that some of these patrons would fairly be regarded as passing trade. But not all. In my view the balance are a sufficient area of the community to constitute the public in the relevant sense.
- 86 I find that the relevant locality extends south of Regency Road on both sides of Main North Road, including and perhaps beyond the southern boundaries of Northpark Shopping Centre and Sefton Plaza. The fact that there is more trade at the existing premises coming from the western side of Main North Road than on the east, is in my view unimportant. There are no bright lines here.
- 87 It is not necessary to make findings as to the northern, eastern and western boundaries, although I am inclined to think that the locality extends to Grand Junction Road to the north, towards Hampstead Road to the east, and at least to Prospect Road in the west.
- 88 It is sufficient for me to conclude, as I do, that in light of the reach of the southern and eastern boundaries of the locality, the existing premises and the proposed premises are in the same locality.
- 89 It will be apparent that this my finding as to the relevant locality is broadly consistent with that expressed by Mr Burns. I wish to stress, however, that in making my assessment, I have not simply adopted Mr Burns' opinion. I have had due regard to the evidence of all of the experts but have ultimately reached my own conclusion based on the objective features of the general area, the time and distance involved in travel, and the areas of trade of the existing premises.

Discretion

- 90 The circumstances here are a long way from those which troubled the Full Court in *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd*.¹⁴ That case concerned the grant of a retail liquor merchant's licence. The applicant was essentially the same entity that owned the licence under which a nearby hotel traded. The hotel had amongst its offerings a bottle shop which made substantial sales of take-away liquor. It did away with that bottle shop to extend its bar, dining and gaming facilities. It then relied upon the closure of the bottle shop in support of its case that there was an unmet demand in the locality for take-away liquor. The Full

¹⁴ [2002] SASC 17.

Court held that this Court should have used its discretion under s 53(1) to refuse the application because to do otherwise might encourage other holders of hotel or retail liquor merchants licences to cease meeting an existing demand with a view to applying and obtaining an additional licence to meet that demand.

91 As Parker J stated in *Liquorland (Aust) Pty Ltd v Woolies Liquor Store Pty Ltd*:

The discretion should not be used to provide protection to existing licensees, to penalise the applicant for making a shrewd commercial decision or to enforce some vague notion that the grant of the licence will result in the undue proliferation of licences.¹⁵

92 I accept Mr Holland's evidence. I find that the decision to remove the existing premises has been motivated by a decline in trade, and an expected further decline in the future. The evidence does not support a finding that the establishment of the Dan Murphys was motivated in any way to manipulate licensing arrangements to create the commercial need to remove the licence.

93 As for the submission as to a lack of evidence of any attempts to improve the performance of the existing premises or to reduce its overheads, I would have thought that a sophisticated trading entity such as Woolworths can be taken to have carefully considered all its options before making a decision to come to this Court to pursue the application for removal, that will deliver a retail liquor store onto the footsteps of a competitor supermarket.

94 It is true that the offering at the proposed premises will be identical to that on offer a few hundred metres over the road. But as things presently stand, there is already a virtually identical offering one and a half kilometres up the road. On a positive note, the placement of this licence in the Sefton Plaza will be a significant advantage to the users of that centre who will now be able to combine their purchase of liquor with their use of that centre without having to traverse the car park to use the Northern Tavern or cross the road to use the BWS in the Northpark Centre.

95 As for the patrons on the existing premises, those who do not want to use the BWS stores in Northpark and Sefton Plaza can use the BWS store a kilometre up the road from the existing premises or the Dan Murphys just around the corner from that store. They will therefore not be unduly inconvenienced by the removal.

¹⁵ [2014] SASFC 87 at [76].

- 96 I find that there is no cause for the Court to exercise its general discretion to refuse the application nor are there grounds to find that the grant of the application would be contrary to the public interest.

Conclusion

- 97 The existing premises and the proposed premises are in the same locality for the purposes of s 61(2) of the Act. There is no occasion to exercise the Court's discretion under s 53 of the Act to refuse the removal application.
- 98 The application for removal is granted. Counsel is to forward draft minutes of order.