

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND (AUSTRALIA) PTY LTD

v

NORTH ADELAIDE VILLAGE SHOPPING CENTRE PTY LTD and
VILLAGE CELLARS (SA) PTY LTD

JURISDICTION: Application for the Removal of a Retail Liquor Merchant
Licence pursuant to the Liquor Licensing Act 1997

FILE NO: 4918 of 2011

HEARING DATE: 6, 7 & 8 February 2012 and 27, 28 March 2012

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 19 April 2012

Application for the removal of the retail liquor merchant's licence - Proposed removal of a suspended licence in respect of premises previously conducted at the corner of Wellington Square North Adelaide to much larger premises at 93 O'Connell Street North Adelaide - Whether the proposed premises are suitable because of difficulties in car parking and making deliveries - Held: that the premises are suitable - Whether allowing the removal would cause undue annoyance, disturbance or inconvenience to persons who reside in the vicinity of the proposed premises - Held: that although deliveries will cause some annoyance, disturbance and inconvenience to these residents it will not be undue - Whether in the exercise of the Court's discretion the removal of the licence should be granted - Held that the public interest does not require the refusal of the application - Ss 53, 60 Liquor Licensing Act 1997

Liquorland v Hurley's Arkaba Hotel and Others [2001] SASC 232
Liquorland [2011] SALC 27

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC with Mr R Harley

Respondent Objectors: Mr J Firth with Mr P Hoban

Solicitors:

Applicant: Hunt and Hunt Lawyers

Respondent Objectors: Wallmans

- 1 This is an application for the removal of a retail liquor merchant licence pursuant to the *Liquor Licensing Act 1997*. The applicant is Liquorland Australia Pty Ltd. It is part of the Coles Group, a large retailer.
- 2 By agreement dated 28 June 2011 Liquorland acquired the retail liquor licence in respect of premises known as the Wellington Cellars. This is situated at 2 Wellington Square, North Adelaide. They are relatively small premises situated at the southern end on Wellington Square at the corner of Archer Street and Jeffcott Street. This is within an area of North Adelaide that is predominantly residential. The licence has been suspended pending this application.
- 3 Liquorland seeks to remove the licence to premises at 93 O'Connell Street, North Adelaide and to operate the licensed premises under the Vintage Cellars brand. The distance between the existing premises and the proposed premises is approximately 500 metres by foot.
- 4 The proposed premises formerly operated as a newsagency and before that as a restaurant. It is a few metres north of the junction of O'Connell Street and Chapel Street and about 40 metres south of Tynte Street. It is within a strip of mixed, but primarily commercial development, comprising of restaurants, shops and offices. It comprises of a ground and upper floor with each floor having an area of about 250 square metres.
- 5 It is proposed that the main point of entry will be from O'Connell Street and that the main retail area will be on the ground floor. The upstairs area will be used for tastings and functions.
- 6 The proposed premise has two dedicated car parks at the rear, access to which can be gained from Chapel Street. It is proposed that a roller door will be fitted to the rear of the premises to permit the delivery of goods. At the rear of the car park is a shared driveway that also enables residents residing to the rear of the premises access to their garages to and from Chapel Street.
- 7 Two objectors oppose the application. One is the Makris Group of companies. The other is Village Cellars Pty Ltd.
- 8 Amongst other things Makris owns the North Adelaide Village Shopping Centre. It is a moderately large shopping centre that is bounded by Archer Street to the south, Chapel Street to the north, O'Connell Street to the east and a multi level car park to the west. It occupants include one large and one small supermarket, a fruit and vegetable shop, a butcher, several cafes and restaurants, a delicatessen, a bakery and the objector, Village Cellars. The shopping centre can be accessed from Archer Street,

the car park and from a large opening off O'Connell Street, near the southeast corner.

- 9 The Village Cellars is located in the rear southwest corner of the shopping centre adjacent to the entrance to the car park. It can be accessed from inside the shopping centre and from a small door in Archer Street. It is a moderately sized facility offering an adequate, but moderate range of liquor. It is about 200 metres east of the existing premises and about the same distance to the southwest of the proposed premises.
- 10 Although it is not an objector, there is another licensed facility that features in this case, the Royal Oak Hotel. It is situated about 150 metres north of the proposed premises. It operates a take away liquor facility trading under the BWS brand. It comprises of a drive-in section and a browsing section. The take away facility is presently at the mid rear of the hotel and can be accessed by car via a laneway running east to west that abuts O'Connell Street.
- 11 The Royal Oak has since gained approval to switch its gaming room, which is at the rear, with its retail liquor facility. As a result the take away liquor facility will be larger and a little further away from the proposed premises.

The issues

- 12 This Court, as the relevant licensing authority, must be satisfied that it is appropriate to allow the removal.
- 13 The first issue that must be determined is whether the existing premises and the proposed premises are within the same locality. If they are, proof of need is not required.¹
- 14 The objectors correctly accept that both premises are within the same locality.²
- 15 Next, the Court needs to be satisfied pursuant to s 60(1) of the Act that the proposed premises “will be, of sufficient standard for the purpose of properly carrying on business under the licence” and that they will not “result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises”.

¹ *Liquorland v Hurley's Arkaba Hotel and Others* [2001] SASC 232

² I note that should this matter go on appeal the objectors reserve the right to contend that *Liquorland v Hurley's Arkaba Hotel and Others* was either wrongly decided or has subsequently been misapplied.

- 16 Finally, I must determine in the exercise of the Court's discretion that it is appropriate to grant the application and in particular, that it is not contrary to the public interest to do so: s 53(1) and (1a) of the Act.
- 17 The objectors contend that the premises are unsuitable because there is insufficient car parking and because its location is such that there will be considerable difficulties in arranging for deliveries of stock.
- 18 They contend that the influx of delivery vehicles that will result from allowing the removal will cause undue annoyance, disturbance or inconvenience to people who reside in the vicinity of the proposed premises.
- 19 They also contend that because the removal will result in there being three off licensed facilities within a reasonably small area, there will be an unnecessary proliferation of similar licensed facilities. They contend that it would be contrary to the public interest for this Court to allow that to occur.

The locality

- 20 Although it is not at issue in this case I think it is helpful to say a few things about the relevant locality.
- 21 North Adelaide is within the city council area of Adelaide. The council area is separated from the surrounding suburbs by significant parkland belts. The council area is divided into two distinct areas: North Adelaide to the north, and the square mile of the city area of Adelaide to the south. These areas are separated by the River Torrens, which generally runs from east to west.
- 22 The city area of Adelaide contains the central business district as well as a substantial retail area in the north western corner and substantial residential areas towards the south of the city.
- 23 The area of North Adelaide is itself divided into two main areas, each of which has a hub of commercial activity.
- 24 One, referred to as upper North Adelaide, has as its commercial hub O'Connell Street.
- 25 The other, which is referred to as lower North Adelaide, has as its commercial hub, Melbourne Street, that runs essentially from east to west, a short distance away to the southeast.
- 26 A case could be made that lower and upper North Adelaide are separate localities. The other view is that the whole of North Adelaide is a single

locality. Whatever is the case the existing and the proposed premises are within the same locality.

- 27 Apart from these commercial hubs most of North Adelaide is essentially residential.
- 28 As much of the focus of this case was directed towards issues of accessibility to the proposed premises I need to make some observations about a number of roads.
- 29 O'Connell Street is the continuation of King William Street and King William Road. It is a major arterial road that links the city with the northern suburbs and beyond. It carries a lot of traffic and is littered with a large number of commercial and retail facilities.
- 30 Archer Street is a small road that runs from east to west. It joins Le Fevre Terrace, which is at the eastern edge of North Adelaide, and Wellington Square.
- 31 Chapel Street is a small lane that runs from east to west. It links the service area of the shopping centre with Tynte Street to the north and O'Connell Street to the east. It does so via Tower Street South, which is another small lane that runs from north to south, and which joins Chapel Street to Tynte Street.
- 32 Tynte Street is a relatively wide street that runs from east to west. It also joins Le Fevre Terrace and Wellington Square.

The evidence

- 33 I now turn to the evidence.
- 34 The applicant called Mr Paul Kelly in support of its application. Mr Kelly is the National Operations Manager for Vintage Cellars. Vintage Cellars is a brand of retail liquor outlets owned by the Coles group. Coles also trades under the brands, Liquorland and First Choice.
- 35 Mr Kelly described Liquorland as a convenience based business that stocks a narrow range of products directed towards the convenience customer in premises either attached to a supermarket or providing a drive through service. This is consistent with the evidence given in *Liquorland*³.
- 36 He described First Choice as the Coles equivalent of Dan Murphy's. These outlets operate from very large premises and provide a very large range of local and imported liquor.

³ [2011] SALC 27 at para 41

- 37 He told me that Vintage Cellars had set itself up as a fine wine specialist. He said that they attempt to recruit staff that are genuine wine enthusiasts. He said that staff are expected to be knowledgeable about wines. He told me that the store model operates on the expectation that between 80 to 85% of the ambient floor space would be devoted to wine. He anticipated that the proposed premises would carry somewhere between 2000 and 2200 lines, about 5% of which would comprise of premium wines, valued at over \$100 and up to \$1500 a bottle. He said that the average purchase at a Vintage Cellars store was of the order of \$40, comprising of two or three bottles of wine. He said that he expected the proposed premises would ultimately carry somewhere near the range of stock available at the Vintage Cellars store in the Adelaide Central Market that I visited in *Liquorland*. I accept all of this evidence.
- 38 The applicant also relied upon Mr Jeffrey Smith, a planning consultant. His evidence was primarily devoted towards the issue of locality, which as I have said is non contentious. I note in passing that in his opinion North Adelaide should be treated as a single locality.
- 39 Finally, the applicant relied upon the oral evidence of Ms Melissa Mellen, a chartered professional engineer who specialises in traffic engineering.
- 40 Ms Mellen was asked to assume the following delivery regime in respect of the proposed premises:
- deliveries from the distribution centre will occur using an Isuzu N series truck on approximately three occasions each week;
 - the South Australian Brewery will deliver to the store approximately twice weekly using a Isuzu N series vehicle;
 - deliveries from the Carlton and United Brewery will occur in an Isuzu N series truck or Mercedes Benz splinter van twice weekly;
 - Coopers will deliver once a week using a van;
 - deliveries will be received directly from wineries from time to time using small vans.
- 41 She and her associates conducted some modelling tests based upon the dimensions of Chapel Street and the car park at the rear of the proposed premises. Based upon that modelling it was her opinion that the delivery regimes just described were achievable, and that vehicles such as an Isuzu N series truck, which is 6.025 metres in length, could comfortably enter into and out of the rear of the proposed premises.

- 42 Through her, a video depicting an Isuzu N series truck seen to cautiously enter into and out of the rear of the proposed premises, was tendered.
- 43 She expressed the opinion that the parking needs of the proposed premises would generate a demand less than either a traditional retail outlet or a restaurant facility.
- 44 In opposing the application the objectors relied upon the evidence of Mr Graham Burns, a planning consultant. Mr Burns essentially agreed with Mr Smith as to the appropriate locality, although he would confine the locality to the west of Le Fevre Terrace.
- 45 Mr Burns expressed concerns about the lack of parking in the vicinity of the proposed premises. Having been told that the peak purchasing time was expected to be between 4pm and 7pm, he noted that as a major arterial road, O'Connell Street might be expected to be very busy at that time. He also expressed concerns about vehicles achieving access to the rear of the proposed premises.
- 46 The objectors also relied upon the evidence of Mr Paul Tisato.
- 47 Mr Tisato is the State Manager for Australia Liquor Marketers (ALM) and also Independent Brands Australia (IBA). Both of these companies are part of the Metcash group of companies.
- 48 ALM is large broad liquor wholesaler. Amongst other things IBA runs marketing programs for the "Cellarbrations" retail liquor brand. Mr Tisato told me that there are about 500 such stores operating under that brand nationally and about 24 within South Australia.
- 49 In South Australia one of these stores is a store located at Frewville. It is owned and operated by IBA. It is set up as the model Cellarbrations store.
- 50 Other Cellarbrations stores are operated under an agency and licence agreement. In exchange for a monthly fee, the operator has access to promotional programs and the like.
- 51 When Mr Tisato first gave evidence he told me that an in principle agreement had been reached between the current licensees of Village Cellars and Metcash, with a view that Village Cellars would become a Cellarbrations store. He told me that an operator had been selected and my impression from his evidence was that the execution of an agreement was imminent.
- 52 As a result of this I received considerable evidence about the range of liquor sold at Cellarbrations stores, particularly the one at Frewville. I was also taken to comparisons between the Vintage Cellars proposed

stock list and the Cellarbrations stock list, with a view to demonstrating to me that there were many similarities.

53 When Mr Tisato gave evidence before me on the next occasion he told me that the proposed deal had fallen through. He said that Metcash was in negotiations with the present owners of the licence with a view that they might enter into an agreement to trade under the Cellarbrations brand.

54 Mr Tisato said that if this arrangement were to proceed, the expectation was that the business would be sold to more suitable operators. He explained:

“Our most successful stores are owner-operator stores. In the environment at North Adelaide and I think that has been a big reason why the store has lacked a bit of direction and why the store could be improved but you have three gentlemen who have invested in that business but not had a close handle on that business. They have had a series of managers through that business, and part of our discussions and our agreement with the existing operators to become Cellarbrations store is that we actually find a professional liquor store manager with a lot of experience to operate that store.”⁴

55 Mr Tisato acknowledged that at the present time there are no binding agreements in place with the existing licensees and that none of the organisations that he represents have any actual legal interest in the licensed premises operating as Village Cellars.

56 When asked to comment upon the range of products available at the Vintage Cellars store operating in the Adelaide Central Market Mr Tisato agreed that it has an exceptional range. He also frankly acknowledged that if a Vintage Cellars store operated from O’Connell Street there would be a dramatic improvement in the range of liquor in that street.

57 The objectors relied upon the evidence of Mr John Blunt. He is the CEO of Makris.

58 He told me that the shopping centre contains a car park that accommodates approximately 300 vehicles. It is a private car park intended for people using the various facilities within the shopping centre. There is, however, nothing preventing members of the public generally using the car park.

59 He told me that it is difficult to get a car park in O’Connell Street.

⁴ Tr 228

60 He said that the reason why the Makris group was objecting to the removal was because:

“...we think that the area is already adequately serviced because we have a liquor store in the centre and that is about to be improved. Obviously the Royal Oak is already there and is quite a good shop as well. To put another one right in the middle which won't have adequate parking or loading, just commercially doesn't seem to make sense to me, and I don't see how that is actually going to assist in the public interest.”⁵

61 He later candidly conceded that the Makris group was also objecting to protect its commercial interest that it would naturally have, as the landlord of premises that are presently licensed as a retail liquor outlet.

62 Finally the objectors relied upon the evidence of Mr Philip Weaver, a traffic engineer.

63 Mr Weaver accepted that an Isuzu NLR 200 series truck could access the proposed premises. In his opinion, anything larger than that would be problematic. His evidence was that it would be impracticable to impose a limitation requiring trucks of that size and smaller to only be permitted to make deliveries to the proposed premises “given the potential for the size of service vehicles to change over time given changes to delivery fleets, contractors and the availability of small trucks etc”.⁶ I do not find this explanation convincing.

Findings

64 The existing licensed premises in Wellington Square are not very satisfactory. They are small and are located within a part of North Adelaide that is essentially residential.

65 The proposed premises are considerably larger and located within the commercial hub of this part of North Adelaide. They will operate as a boutique liquor outlet offering an exceptional range of local and imported liquor.

66 From planning and commercial perspectives, it makes much more sense for a retail liquor outlet to be operating out of larger premises in O'Connell Street than out of smaller premises in Wellington Square.

67 The only issues raised as to the suitability of the proposed premises are car parking and accessibility for deliveries.

⁵ Tr 159

⁶ Exhibit O38 at p 6

- 68 I accept that parking in and around O’Connell Street can at times be difficult. However, I think I am permitted to know from my own experience, that it is not that difficult. It might require a trip around the block to find a park. It might require parking in a street adjoining O’Connell Street, such as in this case, Tynte Street to the north, or Archer Street to the south. It might require doing a u-turn and parking on the eastern side of O’Connell Street or in streets on that side of the road adjoining O’Connell Street.
- 69 But it is not, in my view, such an issue as to warrant the conclusion that the premises will not be of an appropriate standard for carrying on the business of a retail liquor outlet.
- 70 I thought that the differences in the evidence of the two traffic engineers were pretty marginal. Whereas Ms Mellen contended that a 6.4 metre length vehicle could access the site without that much difficulty, Mr Weaver thought that it would be difficult. The video demonstrates that provided care is exercised trucks of this length and less can adequately service the proposed premises and I so find. However, the size of the adjoining laneway and the limited area at the rear of the proposed premises are such that vehicles larger than 6.4 metres in length cannot adequately service them.
- 71 Limiting the delivery regime to vehicles of the size stipulated in Ms Mellen’s statement of evidence and smaller will present challenges for the licensee. However, these sorts of challenges regularly present themselves to retail facilities in older urban and semi urban areas. They do not, in my view, lead to the conclusion that the proposed premises are not of an appropriate standard. It seemed to be faintly suggested that these limitations could lead to an inadequate supply of liquor. I am confident that an organisation with the backing of the Coles Group can accommodate these limitations and make arrangements for the supply of liquor sufficient to meet the public’s needs.
- 72 Accordingly, I find that the proposed premises will be of an appropriate standard for carrying on the business of the retail liquor outlet, for the purposes of s 60(1)(a) of the Act.
- 73 As to the complaint of undue disturbance and inconvenience to adjoining residents it is notable that none of the adjoining residents maintained their objection to the transfer of this licence. These residents reside adjacent to a relatively large shopping centre. I am permitted to know that it would receive deliveries from numerous vehicles of varying sizes throughout the working day.
- 74 The relevant word in s 60(1)(b)(i) is “undue”.

- 75 This is a relative concept. These residents already have to put up with commercial vehicles driving in the laneway that adjoins them. If the proposed transfer is allowed, they will have to put up with a few more vehicles and these vehicles will be accessing the rear of the proposed premises. They have no doubt had to put up with that inconvenience in the past when the proposed premises were trading as different entities. If the proposed premises do not become a retail liquor outlet they might be used for some other form of commercial activity that will require deliveries to the rear of the premises. In that event these residents will also have to put up with the ensuing inconvenience.
- 76 I find that there will be times when deliveries to the rear of the proposed premises will result in annoyance, disturbance, and inconvenience to adjacent residents. However, in all the circumstances, I would not regard, on the evidence presented to me, that this annoyance, disturbance and inconvenience will be undue. Accordingly, I find that the removal of the licence is unlikely to result in undue annoyance, disturbance or inconvenience to those who reside in the vicinity of the proposed premises.
- 77 This then leads to the issue of discretion.
- 78 It was faintly suggested that the removal of a retail outlet from Wellington Square would disadvantage residents living west and north of Wellington Square. I think it is highly likely that these people would use the shopping centre and other shops and facilities in O'Connell Street to purchase goods and access services. I fail to see how it could be a serious inconvenience to them to purchase their liquor needs from the Village Cellars in the shopping centre or from one of what would become two retail outlets on O'Connell Street. I do not regard this as an issue.
- 79 I am permitted to know that the residential areas in North Adelaide are relatively affluent. I think it is likely that many of the residents living there would be attracted to the business that the applicant intends to conduct at the proposed premises.
- 80 I am permitted to know that there are many licensed restaurants operating in and around the O'Connell Street precinct. I think it is likely that a number of those restaurants will make purchases of liquor from the proposed premises as will people wishing to take their own liquor to eating facilities within that area that offer BYO and I so find.
- 81 As was the case in the *Liquorland* matter, I think that the creation of a boutique liquor outlet of the type proposed will add to the attractiveness of the area and will fulfil the object of the Act directed towards the sale of liquor being for the benefit of the community as a whole.

- 82 To grant this application, will mean a concentration of three premises within a relatively small area from which take away liquor can be purchased.
- 83 This is clearly a relevant factor that must be taken into account. However, it is of significance that there are differences between the three facilities.
- 84 The facility at the Royal Oak is attached to a hotel and comprises of a browse in section and a drive in bottle section.
- 85 I am permitted to know that some people do not like purchasing take away liquor from a hotel and would prefer to make their purchases from a dedicated retail facility.
- 86 I am permitted to know that a BWS store, which is the retail brand under which the Royal Oak Hotel bottle department operates, has a range more suited to convenience type customer that Mr Kelly described in relation to Liquorland outlets. It would not hold itself out as a boutique liquor outlet.
- 87 As for the Village Cellars, it is notable that the store is located immediately adjacent to the access point to the car park servicing the shopping centre. I think it is likely that many of the customers that would be accessing the Village Cellars would be purchasing alcohol in combination with food purchased from the supermarket and the other food outlets operating within the shopping centre.
- 88 Of course there will be some people who will make that liquor purchase from the proposed premises or from the Royal Oak. But both of those facilities require walking a further 200 metres in one case and over 350 metres in the other. I therefore think it likely that the Village Cellars store is more of a “one stop shop” facility than the others.
- 89 I did not find the evidence of Mr Tisato concerning the Cellarbrations brand particularly helpful. Had the proposed sale gone through, to the extent that is relevant to compare Village Cellars with the proposed business, his evidence would have been on point. But given that that sale has fallen through and the best that can be said is that another possible acquisition is being explored I think that all that I can take from this is that Village Cellars might become a Cellarbrations store at some time in the future. I think I should focus any comparison on what presently exists. What does emerge from Mr Tisato’s evidence is that the proposed Vintage Cellars store will offer a much better range than a store, which to use his words, lacks a bit of direction and could be improved.
- 90 Of course there will be some overlap between the three facilities. I accept the evidence of Mr Tisato that there is a core range of liquor that

accounts for the majority of sales for nearly all retail liquor outlets. I expect that much of the same liquor will be sold at each of the stores.

- 91 However, I do not regard the similarities and overlap as so great as to feel the need to exercise the Court's discretion to refuse the application. I think the differences outweigh the similarities. Importantly, I find that the grant of this application will offer consumers an alternate product that will improve the range of liquor available and that will encourage competition. In all the circumstances, in my view, there is no warrant to exercise the discretion of the Court to refuse the application.

Conclusions

- 92 I am satisfied that the application for the removal of an applicant's retail liquor merchants licence involves the movement of the licence from one facility to another within the same locality for the purposes of the Act. I find that the proposed premises will be of an appropriate standard for carrying on the business of a retail liquor outlet. Whilst I accept that the removal may result in some annoyance, disturbance and inconvenience to adjoining residents, in my view, it is not undue and therefore does not warrant the refusal of the application by reason of s 60(1)(b)(i) of the Act.
- 93 In my view, the public interest does not require me, in the exercise of my discretion, to refuse the application.
- 94 I therefore grant the application, subject to imposing conditions conforming to the representation made to me in court, as contained in the evidence of Ms Mellen, as set out herein.