Liquorland McLaren Vale [2022] SALC 44

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND MCLAREN VALE

JURISDICTION: Application for Review from a decision of the Commissioner

FILE NO: 138 of 2022

HEARING DATE: 20 May 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 23 May 2022

CATCHWORDS:

Review of the Commissioner's decision to refuse an application for a packaged sales liquor licence – On review the objector at the initial hearing, the AHA, seeks an order that the applicant disclose various business records to demonstrate one way or the other whether there is a correlation of increased liquor sales and bottle shops aligned with supermarkets in comparison with those bottle shops that are aligned – Whether this Court can order disclosure in respect of a review and if so whether that order should be made – ***Held*** *that in an appropriate case the Court may order disclosure – The order must be reasonable and proportionate – The commercial sensitivity of the documents is a relevant consideration – In this case the documents are not likely to be of significant probative value and their confidential nature holds sway – The application for disclosure is refused – On review the AHA seeks to adduce evidence about the tourist features of the relevant locality – It made submissions to like effect before the Commissioner – In the circumstances the evidence should be received de bene esse with the applicant being given permission to adduce evidence on the same issue and on the same footing – The applicant seeks to re-badge its application for a Liquorland badge to a Vintage Cellars badge – Noted that the community guidelines require liaison and engagement with key stakeholders and community groups about a range of matters including the nature of the business to be conducted – Held that to permit the variation at this late stage would be to deny that liaison and engagement on the revised business model and should therefore be refused – Liquor Licensing Act 1997.*

Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd [2002] SASC 17; (2002) 81 SASR 337

Cellarbrations Mannum [2021] SALC 42
*Compagnie Financière et Commerciale du Pacifique v Peruvian Guano (*1882) 11 QBD 55
Nolan: Reform of Discovery in the 21st Century [2017] Precedent AULA 56
Science Research Council v Nasse [1980] AC 1028
Trade Practices Commission v Arnotts Ltd [1989] FCA 248; (1989) 88 ALR 90
Botany Bay Instrumentation & Control Pty Ltd v Stewart [1984] 3 NSWLR 98
Cosco Holdings Pty Ltd v Commissioner for Taxation [1997] FCA 1504
WA Pines Pty Ltd v Bannerman [1980] FCA 79; (1980) 41 ALR 175
Mandic v Phillis [2005] FCA 1279
Liquorland [2013] SALC 51
Woolworths Liquor – BWS Arndale [2014] SALC 14
Woolies Liquor Stores Pty Ltd [2018] SALC 40
Hove Sip N Save [2017] SALC 7
Mamo v Surace [2014] NSWCA 58; (2014) 86 NSWLR 275

REPRESENTATION:

Counsel:
Applicant: Mr S Henry QC with Mr G Coppola
Respondent: Mr M Roder QC with Mr R Harley
Solicitors:
Applicant: Australian Hotels Association
Respondent: Jones Harley Toole

1 There are three interlocutory applications before the Court in connection with an application seeking the review of a decision of the Commissioner for Liquor and Gambling that refused an application for a packaged liquor sales licence.

2 The first is an application by the Australian Hotels Association (AHA) that seeks an order that the applicant, Liquorland (Australia) Pty Ltd (Liquorland), make disclosure of various documents.

3 The second is an application by the AHA to introduce new evidence before the Court.

4 The third is an application by Liquorland, that it be given permission to amend its application from a 'Liquorland' branded retail store to one trading as a 'Vintage Cellars' branded retail store.

5 All applications are opposed, although the second less seriously than the others.

Background

6 Liquorland is part of the Coles group of companies and is an experienced operator of licensed premises that includes bottle shops around Australia, some of which are attached to hotels, whilst others are either stand alone or aligned to adjacent supermarkets.

7 The AHA is an industry organisation that represents and advocates for the hotel industry across Australia.

8 The grant of liquor licenses in this State is regulated by the *Liquor Licensing Act 1997*.

9 In its original form, the Act provided for various classes of licenses that included a retail liquor merchants licence. The test in connection with such a licence was prescribed by s 58(2) of the Act as it then was, which required an applicant to satisfy the Court that:

> ... the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.

10 Unless such an application was either unopposed or in the case of an objection, was resolved by conciliation, the application had to be dealt with by the Court. Typically such applications would be conducted like a conventional civil dispute, with the applicant and objectors presenting their respective cases through written and oral evidence, followed by submissions before the Court as to the appropriate outcome. That said, there was always

in play an additional factor because s 53 of the Act required the Court to be guided by what was in the public interest. That meant that the Court could be concerned about matters beyond the immediate interests of the parties before it. This on occasions led to a refusal to grant an application that had otherwise satisfied the needs test.[1]

11 In the Act's current form, the range of licence classes has changed. The former retail liquor merchant's licence is now known as a packaged liquor sales licence which to be granted, must meet a different test. An application for this type of licence is defined in the Act as a 'designated application'. Pursuant to s 53A of the Act, a 'licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.' In deciding that question, the authority must have regard to-

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> (i) the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
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> (ii) the cultural, recreational, employment or tourism impacts; and
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> (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
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> (iv) any other prescribed matter; and
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> (b) must apply the community impact assessment guidelines.

12 The community impact assessment guidelines (the guidelines) stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has liaised with the relevant key stakeholders and interest groups in the community. The guidelines provide that 'applicants are required to show, as part of their application, that they have engaged with members of the community and any relevant stakeholders.' They provide that '[e]vidence of this may include petitions, survey results and/or letters of support.'

13 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that if relevant is expected to address various matters, including the key features of its products and services and potential customers, a general description of facilities and services, a statement as to whether the community supports the proposed

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[1] See, for example: *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd* [2002] SASC 17; (2002) 81 SASR 337.

business, including providing evidence of such support, and a statement as to why the granting of the application is in the community interest.

14 In accordance with s 53 of the Act, the licensing authority must, as before, also be satisfied that it is in the public interest to grant the application.

15 The way these applications are dealt with has also changed. The Commissioner has the power to determine such applications, even when vigorously contested. In respect of proceedings before the Commissioner, the Commissioner has an absolute discretion as to how the proceedings are to be conducted. Pursuant to s 81(a) of the Act, the Commissioner may determine to deal with the application by way of written submissions only, without holding a hearing.

16 In this case, Liquorland made an application for a packaged sales licence in connection with proposed premises in the McLaren Vale Central Shopping Centre, adjacent to a Coles Supermarket.

17 The Commissioner resolved to deal with the application by way of written submissions. The AHA was amongst those who filed submissions opposing the application.

18 In refusing Liquorland's application, the Commissioner stated that the grant of the application 'would not be consistent with the responsible development of the licensed liquor industry'. He said that to grant the application 'would be a further step towards proliferation and would provide … [an undesirable] precedent that would support the wholesale alignment of packaged liquor and shopping centres. He concluded by making reference to 'the existing take-away offerings in McLaren Vale, the nature of the wine and tourism industries in McLaren Vale, the higher than average liquor licensing density in the locality, and the proximity to a stand-alone packaged liquor store operated by a major retailer' in concluding that it would not be in the public interest to grant the application.

19 A party aggrieved by a decision of the Commissioner may, pursuant to s 22 of the Act, seek review by the Court. That section provides that the hearing before this Court is by way of a rehearing. Through s 22(8), on review, the Court may exercise any one or more of the following powers:

> (8) On a review, the Court may exercise any one or more of the following powers:
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> (a) affirm, vary or quash the decision subject to the review;
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> (b) make any decision that should, in the opinion of the Court, have been made in the first instance;
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> (c) refer a matter back to the Commissioner for rehearing or reconsideration

(d) make any incidental or ancillary order.

20 Liquorland has exercised its right to seek a review of the Commissioner's decision. By its application for review, it makes several complaints about the Commissioner's decision. Some are of a general nature, such as a complaint about the adequacy of reasons. Others are more specific, such as a complaint that he erred in 'proceeding on the basis that the convenience of a liquor store adjacent to a supermarket in such a centre was contrary to the public interest because the convenience may induce liquor purchases to be made' and 'concluding that tourists may be damaged by the grant of the licence because tourists to the McLaren wine region may use the store in preference to visiting wineries and cellar door facilities'.

21 Liquorland contends that this Court, in exercising its powers on review, ought to set aside the Commissioner's decision and substitute it with a decision granting the application.

22 Following the filing of the application for review, the AHA filed a notice to the effect that it wished to participate in the proceedings before this Court.

The application for disclosure and production

23 The AHA seeks for Liquorland's disclosure and production of the records of transactions involving the sale or purchase of liquor for each Liquorland store in South Australia for the periods ending 30 June 2021 and 31 March 2022; its business plans and forecasts in relation to the proposed store, an analysis of Flybuy points earned at Liquorland outlets and redeemed at Liquorland outlets, its records and business plans or strategies in relation to the co-location of Liquorland packaged liquor sales businesses adjacent to supermarkets and sales records in respect of Liquorland stores that it is required to collect under the Act.

24 The AHA contends that a significant factor that influenced the decision of the Commissioner was his concern about the alignment of packaged liquor stores with supermarkets. I understand that although it did not make this submission to the Commissioner, it wishes to support that view and will submit in the review by this Court that Liquorland's application, if granted, would expose vulnerable people to the temptation of purchasing liquor that they would not otherwise buy and consume, and that this would be to the detriment of vulnerable sub-groups in the community. It plans to submit that the grant of the application should be refused on the grounds found by the Commissioner, that is, that it is not in the community interest, and it is not in the public interest.

25 The AHA submits that an effective way of determining whether the concern about co-location and alignment is real, is to make a comparison between the trading figures of Liquorland's stand-alone bottle shops and those aligned with supermarkets. It submits that Liquorland should have no difficulty in

providing these records because it can be presumed to be complying with its obligations under the Act. It referred me to s 109A of the Act, which requires a licensee, under the pain of a fine, to 'keep records of all transactions involving the sale or purchase of liquor'.

26 The AHA contends that there is ample power in the Court that enables it to make these orders, given that it is a court of record that possesses wide powers enabling it to summons and order the production of records.

27 It submits that this Court should make its decision of the best evidence that is available. It submits that this is important evidence, it is evidence that is within the power and control of Liquorland, and that it should be directed to provide it.

28 Liquorland vigorously opposes the application.

29 It submits that the notion of being required for the first time to make disclosure of documents on appeal is extraordinary and should not be entertained. Indeed I understood it to contend that it might be beyond the Court's power to make an order for disclosure.

30 It submits that that the application is properly characterised as 'fishing'. It submits that it would be an abuse of the Court's power to order production to enable a party that made no such argument in the initial hearing, and on appeal has provided no evidence to support an allegation of the relevance of the documents sought, when the purpose is simply in hope that it might throw up some material to support its case. It submits that it is highly significant that the AHA had earlier foreshadowed that it would obtain expert evidence to support the contention that co-location is harmful and that it has not done so. It points out that co-location of bottle shops to supermarkets is not unique to Coles or other supermarket chains and that there are hotel bottle shops that are co-located with supermarkets. It submits that it was therefore within the power of the AHA to obtain some evidence to support its contention that co-location was harmful and that, absent that evidence, it should not be permitted to 'fish' around in the hope of finding it elsewhere.

31 Liquorland further submits that to entertain this type of application would be inconsistent with the lack of formality and expedition that is expected of proceedings before this Court. It submits that if the orders were granted it would be inevitable that there would be satellite litigation over issues such as the breadth of the disclosure and the like.

32 Finally, Liquorland submits that the range of disclosure is oppressive, and the material is highly confidential, especially considering that the recipient would be the AHA, a frequent objector to its applications for packaged sales licences.

The application for fresh evidence

33 The AHA seeks to tender in the application for review a report issued by the Corporate Ascent, being a commercial entity that reviewed published information in respect of tourism in the McLaren Vale region. The purpose of the report is to identify the tourist visitation numbers in the region, breaking down the visitations between day trips and overnight stays, information as to visitors' expectations, and an analysis of available accommodation.

34 Although not strenuously opposing this application, Liquorland points out that there is no evidence indicating that this evidence could not have been adduced before the Commissioner and no explanation has been provided as to why it was not adduced before him. Next it says, that the AHA has not clearly explained how this evidence, if accepted, would support the Commissioner's reasoning that the grant of the application would impact upon the region's tourist activities.

The application to amend

35 Liquorland contends that its application to amend is modest. It says that it does not involve any significant change to the proposed premises, but rather is limited to a change in the style and range of liquor and the name, which, had the licence been granted, would have been routine changes that are likely to have been allowed administratively by the Commissioner.

36 The AHA submits that the change is of substance. It submits that only a licensing authority can permit the variation and that, unless and until this Court grants the application for review and resolves to decide the case for itself, it is not a licensing authority, such that for now the application is beyond the power of the Court to grant.

37 Next, it says, that in any event, it would be inappropriate for the Court to entertain the application to vary because the focus of the community consultation was directed towards a Liquorland branded store, not a Vintage Cellars branded store.

Consideration

Disclosure

38 I accept that in conventional civil litigation it would be seen as very exceptional for a court that is hearing an appeal, to order that a party make disclosure of documents that did not form part of the record of the trial below.

39 This is so because in conventional litigation, the litigation is likely to have been conducted through pleadings, and the rules governing that litigation would invariably impose upon the parties an obligation to make disclosure of

documents in their possession, custody or power, that are directly relevant to the issues in dispute, as defined by those pleadings in connection with the initial hearing.

40 Proceedings before the Commissioner, so far as I am aware, are never conducted through pleadings. They certainly were not conducted through pleadings in this case. I am not aware of any practice directions issued by the Commissioner that impose a general obligation upon the parties to make disclosure of documents in their possession, custody or power that are directly relevant to the issues that the Commissioner must resolve or on any other general basis.

41 Because of the variable nature of the proceedings before the Commissioner, the conduct of the review may take many forms. In some instances, because of the informality of the proceedings before the Commissioner, the review hearing before this Court, may be in the nature of a full hearing, during which, for the first time, oral evidence is received.[2] In conducting that hearing, the Court may make such directions as it thinks necessary to ensure that the proceedings are conducted fairly. As a matter of principle, I see no reason why that could not include an order for disclosure of documents, even though no such order was made in the proceedings below.

42 I therefore reject Liquorland's submission that the order for disclosure sought, is beyond power.

43 I now turn to consider whether it should be made in this case.

44 Historically the test of general application for determining issues of disclosure was the Peruvian Guano test, or the so called 'train of inquiry test', as propounded by Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano* as follows:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.[3]

45 This is an extremely wide test. It was formulated at a time when business records were scant. In connection with contemporary business practices the

[2] See, for example: *Cellarbrations Mannum* [2021] SALC 42.
[3] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.

test led to voluminous lists of documents and much time and effort wasted on pre-trial disclosure skirmishes. It has been the subject of much criticism.[4] I think it is doubtful as to whether this test was ever applicable to proceedings before this Court, but I think there can be no doubt that, at least since 1985, when this Court was directed to conducting its litigation without undue formality, the test did not apply.

46 That is not to say that disclosure was not or is not required in proceedings before the Court. Basic principles of fairness apply to all proceedings under the Act. If a party intends to rely upon a document in a hearing it must be disclosed. If there are clearly relevant documents, the disclosure of which will facilitate proof of material facts or save the trouble and expense of determining facts that ought not be in dispute, as a general proposition they should be disclosed, and the licensing authority should act upon them. It follows that something akin to the directly relevant test, which now applies to most contemporary civil litigation, may have application.

47 Without intending to lay down any hard and fast rule, I think a useful guiding principle is to ask whether ordering disclosure of a class of documents is reasonable and proportionate to do so and the disclosure will, in all likelihood, contribute to the fair and expeditious hearing of the matter.

48 To this I would add an additional rider. Cognisance must be given to the fact that parties to proceedings before the Commissioner and in this Court will often be commercial competitors. As such, I think there should be appropriate recognition of the commercial sensitivity of documents that they may have in their possession. Albeit said in a different context, I think the observation of Lord Wilberforce in *Science Research Council v Nasse* are apposite. He said: -

> ... English law as to discovery is extremely far reaching: parties can be compelled to produce their private diaries; confidences, except between lawyer and client, may have to be broken however intimate they may be. But there are many examples of cases where the courts have recognised that confidences, particularly those of third parties, ought, if possible, in the interests of justice, to be respected'.[5]

49 In my opinion guidance can be had by considering the position that applies to subpoenas in respect of a complaint that because of the confidential nature of the material sought, the issue of a subpoena to obtain such material may be an abuse of the process of the Court.

50 In dealing with this issue, in *Trade Practices Commission v Arnotts Ltd*[6], Beaumont J, referred to the judgment of Powell J in *Botany Bay Instrumentation & Control Pty Ltd v Stewart*, where Powel J identified

[4] See, for example: *Nolan: Reform of Discovery in the 21st Century* [2017] Precedent AULA 56.
[5] [1980] AC 1028 at 1067.
[6] [1989] FCA 248; (1989) 88 ALR 90.

various matters that might provide grounds for setting aside such a subpoena, which included: 'where to require a party to comply with a subpoena to produce documents would be oppressive' and 'where the subpoena has been issued for a purpose which is impermissible, as, for example, "fishing"'.[7]

51 Beaumont J suggested that the following questions needed to be asked: 'Does the material sought have an apparent relevance to the issues in the principal proceedings, that is, is adjectival, as distinct from substantive, relevance established? Does the subpoena have a legitimate forensic purpose to this extent? This involves a consideration of the matter from the standpoint of [the issuing party]. Is the subpoena seriously and unfairly burdensome or prejudicial? This is to look at the matter from the point of view of [the party subpoenaed].'

52 Dealing with the same issue, in *Cosco Holdings Pty Ltd v Commissioner for Taxation*, Spender J referred to Beaumont J's test of 'adjectival relevance' and explained it as follows:

> Notwithstanding the use of the word "possibly" in this paragraph, in my opinion, that word is not used in any speculative sense. I take his Honour's conclusion expressed in that paragraph as an acquiescence to the correctness of the submission that the material sought could reasonably be expected to throw light on some of the issues in the principal proceedings. It is not a question of looking at the documents to see if the documents might permit a case to be made.[8]

53 Again dealing with the same issue, and having made references to these judgments, in *Mandic v Phillis*, Conti J spoke of the need to balance the conflicting right of the party seeking disclosure to enable the party to prepare its case in meeting an issue arising in the proceedings with the potential invasion of privacy. Later, and by reference to the judgment of Brennan J in *WA Pines Pty Ltd v Bannerman*,[9] he then went on to say:

> The present circumstances are an apt demonstration of the need for courts to be vigilant to prevent parties to litigation impermissibly using the court's processes to coerce the production of documents, particularly from strangers to litigation, in circumstances where the 'proceeding is essentially speculative in nature'.[10]

54 Conti J then adopted the following passage from the judgment of Brennan J in *WA Pines Pty Ltd v Bannerman*:

> This is a case where a bare allegation is made by par 6 of the statement of claim and, the paragraph being denied, the applicant seeks to

[7] [1984] 3 NSWLR 98 at 101.
[8] [1997] FCA 1504.
[9] [1980] FCA 79; (1980) 41 ALR 175 at 182.
[10] [2005] FCA 1279 [49] at 1282.

> interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing.[11]

55 In like manner, in my opinion in dealing with an application for disclosure, this Court should be loath to permit a party to seek disclosure of confidential documents based upon no more than the hope that it might provide some assistance to a submission that the party may wish to make.

56 If the AHA put some evidentiary material before this Court that established that there was a reasonable possibility that Liquorland was in possession of documents that would support its contention that, all other things being equal, bottle shops aligned with supermarkets generate greater sales than stand-alone bottle shops, there may have been some force to its request for disclosure.

57 As it is, its submissions effectively concede that it does not possess such evidence. It claimed that the production of the documents would either support the Commissioner's concern or show that it was misplaced. In other words, it apparently concedes that it does not know what the documents will show.

58 There are additional matters that point against ordering disclosure.

59 This Court, as a specialist Court is not only permitted, it is obliged to act upon its accumulated knowledge.

60 As was pointed out to the parties during argument, this Court has received mixed evidence as to the performance of bottle shops aligned to supermarkets, relative to unaligned bottle shops.

61 I take the following from *Liquorland*[12] which concerned an application to remove an underperforming Liquorland bottle shop in the Athelstone Shopping Centre to a location in Newton:

> As to the closure of the Liquorland at Athelstone and the non-renewal of the lease for that store, … prior to its closure … [t]he trading was flat and was slightly declining. The opening of the Cellarbrations store some 18 months ago had led to a downturn in its sales … The store closed on 16 September 2012. The other concerns that led to the closure of the store was the anticipated Dan Murphy's store at the Highbury Hotel which he said would have a similar effect on the Liquorland store's trading as did the opening of Cellarbrations. This would be likely to further reduce the turnover at the Liquorland store… No business case could be made, he said, to renew the lease. It was a "loss-making store".[13]

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[11] Ibid at 181-2.
[12] [2013] SALC 51.
[13] Ibid at [25].

62 Then there was this evidence given in *Woolworths Liquor - BWS Arndale*[14] where Mr Fassina, having spoken of purchasing a retail liquor licence trading inside the shopping centre, said:

> We couldn't make things work in the shopping centre, … No matter what we did we couldn't build it up enough to warrant basically the rental …
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> … if they had a car, of course - they would call into a pub and just get a slab in the boot which is a lot easier for them, than actually having to negotiate a trolley…
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> So at the end of the day we were just losing money on the site and we just had to decide to leave and relocate.[15]

63 Later Mr Fassina spoke of the contrasting fortunes of a well-located non-aligned bottle shop. He said that:

> ... there are two components to liquor business as we see it. One is supplying the alcohol for the local area which is important of course, but the second factor, and it is quite a major factor, is passing traffic and passing traffic has a lot to do with how the business evolves, hence our Camden project. There is - when we rebuilt Camden and the business exploded …[16]

64 This is to be contrasted with evidence given in connection with an application by Woolworths to remove an underperforming unaligned stand-alone BWS bottle shop on Main North Road into the Sefton Park Shopping Centre, where it was said on its behalf:

> … 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.[17]

65 In other words, the bare statistics of the sales of aligned and opposed to unaligned bottle shops will not necessarily reveal anything of substance.

66 An unaligned shop might be a good performer because of passing trade, and/or lack of viable competition. It might be a poor performer because another competitor in the general locality might attract more trade or because of changes to the traffic conditions or even parking laws. A previously well performing store might lose trade because the abutting road becomes subject to a clearway, such that parking on the street outside of the store is prohibited, in what were otherwise the peak trading periods of between 4.00pm and

[14] [2014] SALC 14 at [100]-[104].
[15] Ibid at [100].
[16] Ibid at [104].
[17] [2018] SALC 40 at [32].

7.00pm. A previously underperforming store might gain trade because a nearby hotel, that had previously operated a successful drive through, upon a change of ownership converted its bottle shop into a dining or gaming area.

67 An aligned shop might be a good performer because of the popularity of adjacent stores and facilities. It might then become a poor performer because of the creation of a large format discount destination bottle shop within a few kilometres, or the establishment of a well-stocked bottle shop/ drive through at a nearby hotel.

68 Thus, in my opinion, the production of these documents is unlikely to be of much probative value in connection with the issues that this Court must decide. When I balance this with the obvious disadvantage that Liquorland would suffer by having to make disclosure of these documents to a fierce commercial rival, I conclude that the preservation of confidentiality wins the day.

69 The application for disclosure is refused.

Fresh evidence

70 It must be accepted that generally a court will ordinarily only allow the receipt of fresh evidence on an appeal by way of a re-hearing if it is satisfied that it either was not available at the time of the original hearing or that, notwithstanding the exercise of reasonable diligence, its existence could not have been discovered in time to be used in the original trial. Even then it must also be clear that the proposed new evidence might have impacted upon the outcome of the hearing.

71 In *Hove Sip N Save*[18] this Court held that although described as a 'review', what is involved is an 'appeal', and that with some qualifications, the general principles applicable to appeals by way of a rehearing apply. It recognised that qualifications might be necessary because, as before, the hearing before the Court is not a conventional inter parties dispute that is solely concerned with the interests of the parties. It also recognised that qualifications might be necessary because the hearing before the Commissioner might be a relatively informal process, conducted on the papers, and in a way that might seem more administrative than curial. This was followed by a caution that this should not be understood by an applicant or an objector that they could treat the proceedings before the Commissioner as no more than a rehearsal or dummy run.[19]

72 In this case, the further evidence sought to be adduced is not really 'fresh evidence', in the sense that it paints a different picture to that which was put in the hearing before the Commissioner. It is evidence that is sought to fortify

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[18] [2017] SALC 7 at [78].
[19] Ibid at [80].

the Commissioner's concern about the unique characteristics of the relevant locality and the potential adverse impact to tourism if the application were granted.

73 This evidence potentially addresses the issues of community interest and the public interest. These are matters that the Court is obliged to consider. In the circumstances I have resolved to receive this evidence *de bene esse* and see where it takes us as the case unfolds. As a matter of procedural fairness, Liquorland ought to be permitted to place before the Court, on the same footing, evidence that it may wish to adduce addressing these issues.

An application to vary

74 There are some 'nice' issues as to whether at this stage of the proceedings, the Court is a licensing authority for the purposes of the Act, and whether it can permit an applicant to rebadge its application before determining that the application to grant the licence should succeed.

75 But I have a more fundamental difficulty with the application. Mr Roder QC would have it, that it was little more than a cosmetic change. But he added during submissions that a motive underlying the change was to allay concerns about the tourist impact of the store.

76 I can accept that in proceedings before this Court, on review, the normal principles that generally forbid a party from running a new case of appeal,[20] may not apply.

77 But where, as here, a precursor to an application is the applicant's liaison and engagement with the relevant key stakeholders and interest groups in the community, based upon matters that include the key features of the applicant's products and services, to permit the applicant to change tack at this late stage, would be to deny the relevant key stakeholders and interest groups the opportunity to have input into the new proposal.

78 This was a Liquorland application. I am permitted to know that a Vintage Cellars store is different to a Liquorland store. Liquorland must accept that this is so, otherwise it would not be pursuing its application to vary. The key stakeholders and interest groups responded on the basis that it was a Liquorland application. If they were aware that this was to be a Vintage Cellars application, there may have been different issues that they may wish to have responded to. They should not be denied that opportunity because of an eleventh-hour application to vary, almost literally on the eve of the hearing.

[20] See, for example: *Mamo v Surace* [2014] NSWCA 58; (2014) 86 NSWLR 275 at [76]-[77] per McColl JA.

79 Assuming, without deciding that I have jurisdiction to permit the variation, I would decline to grant it.

Summary and conclusions

80 The application for an order for disclosure is refused. The application to adduce further evidence on review is permitted and the evidence will be received *de bene esse*. The applicant has permission to adduce evidence that addresses the same issues and on the same footing. The application to vary the application is refused.