

BWS – Mt Barker [2016] SALC 33

LICENSING COURT OF SOUTH AUSTRALIA

BWS – MOUNT BARKER

v

CHELSEA BAY PTY LTD & TAKMA PTY LTD, HUTCHINSON HOTEL INVESTMENTS PTY LTD AND A & J CENTAFANTI PTY LTD.

JURISDICTION: Application for a Retail Liquor Merchant's Licence

FILE NO: 1194 of 2016

HEARING DATE: 20, 21, 22 and 23 June 2016

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 15 September 2016

*Application for a retail liquor merchant's licence - Whether the licensed premises that already exist in the vicinity of the proposed facility are adequately catering for the public demand for takeaway liquor - Whether in the exercise of the Court's discretion the application should be refused - **Held:** that the applicant has not satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - **Held:** that had the position been otherwise the Court in the exercise of its discretion would not refuse to grant the licence - Ss 23, 53, 57, 58 and 59 Liquor Licensing Act 1997.*

First Choice Liquor [2015] SALC 1

BWS - Seaford [2015] SALC 19

Liquorland [2011] SALC 27

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

Marion Cellars [2002] SALC 5

Tiffanies [1998] SALC 21

New York Bar and Grill and Anor v West Paddock and Anor [1998] SASCF 7020

Woolworths Ltd v Fassina Investments Pty Ltd & Ors [2015] SASCF 72

Music Talking Pty Ltd as Trustee for the Orlando Farese Family Trust v Villis Group Services & Ors [2011] SASCF 142

Woolworths Ltd v IPG Management (SA) Pty Ltd & Ors [2015] SASCF 97

BWS Seaford v Port Noarlunga Hotel, Cliff Avenue Liquor Store & Cellarbrations [2015] SALC 19

Lovell v New World Supermarket Pty Ltd (1990) 53 SASR 53

Woolworths Ltd v Drase Coosit Pty Ltd [2010] SASC 13; (2010) 106 SASR
146

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

REPRESENTATION:

Counsel:

Applicant: Mr S Walsh QC with him Mr R D’Aloia

Respondent: Mr M Roder SC with him Mr B Allen

Solicitors:

Applicant: Clelands Lawyers

Respondent: Wallmans Lawyers

- 1 This is an application for the grant of a retail liquor merchant's licence.
- 2 The applicant, Woolworths Ltd, is a very large corporate entity that operates supermarkets and liquor facilities across Australia. It seeks the licence in respect of proposed premises that for now comprises of an existing retail shop. The licence, if granted, will trade as a BWS liquor store.
- 3 The proposed premises are within a shopping centre at 5 Walker Street, Mount Barker. The shopping centre is anchored by a Woolworth's supermarket. It is convenient to describe the centre as the Woolworths centre.
- 4 Although the external features of the proposed premises are in place, some modifications will have to be made to accommodate the proposed bottle shop. Accordingly, the applicant seeks a certificate under s 59 of the *Liquor Licensing Act 1997*.¹
- 5 The application has drawn objections from the licensees of nearby hotels, Gray's Inn² and Richies Tavern,³ both of which are related, and the proprietors of a proposed retail liquor licence trading as a Cellarbrations store⁴ that was recently granted and which will be situated some distance away from the proposed store but within the town of Mount Barker. That store is in the process of being constructed.
- 6 To succeed in this application, the applicant needs to satisfy the Court that the pre-requisites of ss 57 and 58 of the Act have been met and that in the exercise of the Court's discretion the licence should be granted.
- 7 Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises have been granted.
- 8 None of these matters are at issue in this case.

¹ Pursuant to s 59(1) of the Act the Court may having regard to the extent to which the proposed premises are uncompleted but may, instead, grant a certificate of approval approving the plans submitted by the applicant in respect of the proposed premises if satisfied that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the proposed premises for the sale of liquor have been obtained.

² Chelsea Bay Pty Ltd & Takma Pty Ltd.

³ Hutchinson Hotel Investments Pty Ltd.

⁴ A & J Centafanti Pty Ltd.

- 9 What is in dispute is whether the pre-requisites provided by s 58(2) have been met and whether in the Court's discretion⁵ the licence should be granted.
- 10 Section 58(2) requires an applicant for this type of licence 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.”
- 11 Before discussing the evidence I make some general observations about Mount Barker and some of the key landmarks relevant to this case.
- 12 By South Australian standards Mount Barker is an old town. It is situated about 30 kilometres or so south east of Adelaide, towards the outer edge of the Adelaide Hills. Historically it was a typical country town with a main street, Gawler Street, which contained most of the town's retail and commercial activity, with the balance occurring in the streets that were adjacent to it. It was surrounded by farming lots. Gawler Street runs from east to west.
- 13 In more recent years the town has changed quite dramatically. It has since developed into a large urban centre, which is continuing to develop. Most of the retail and commercial development has occurred in and about the historic centre of the town, which is just off the South Eastern Freeway and is accessed by an exit road from the Freeway, known as Adelaide Road.
- 14 The Woolworths centre is a bit less than a kilometre south of the Freeway. It is about 200 metres north of Gawler Street. It is at the edge of the town centre of Mount Barker, in the north-west corner. It is easily accessed via Adelaide Road.
- 15 The Woolworths centre is classified as a regional scale centre that is within the District of Mount Barker's regional town centre zone. In addition to the Woolworths supermarket, the centre contains a Cheap as Chips, a real estate agency, a doctor and dental practice, a fish shop, a takeaway food facility known as the Noodle Box, a café, a newsagency, a fruit and vegetable shop and a hair and beauty salon.
- 16 It is serviced by a car park immediately in front of the centre and a multi-story car park nearby.

⁵ Pursuant to s 53 of the Act, the Court has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient.

- 17 About 200 metres east of the Woolworths centre is a large shopping complex known as Mount Barker Central. It is anchored by a large Coles supermarket and K-Mart store. It has over a dozen food outlets, a similar number of clothing and accessory shops, various service outlets and health care outlets. It is a major centre. It is significantly larger than the Woolworths centre. I think it is fair to say that it is the major retail hub of Mount Barker. It is serviced by a large car park.
- 18 Bisecting Gawler Street is Hutchinson Street, which runs from north to south. Those two roads effectively create the quadrant of retail and commercial activity within the historic town centre. Hutchinson Street is about 100 metres east of the Woolworths centre and about 100 metres west of Mount Barker Central.
- 19 On the western side of Hutchinson Street, about 150 metres or so south east of the Woolworths centre, just north of the junction of Gawler Street and Hutchinson Street is the Pulpit Cellars. It trades under the hotel licence owned by Richies tavern. That said the Pulpit Cellars is indistinguishable from a traditional retail liquor store.
- 20 Immediately adjacent to the Pulpit Cellars is an Aldi supermarket. The Aldi supermarket is much smaller in size than the Woolworths and Coles store. Adjacent to the Aldi is a car park. It is a typical supermarket car park of the type that would be encountered in most moderately sized suburban supermarkets in Adelaide.
- 21 Almost immediately opposite and just round the corner, in Gawler Street, just east of the junction of Gawler Street and Hutchinson Street is Gray's Inn. It is a conventional hotel with a conventional drive through bottle shop trading under the Thirsty Camel badge.
- 22 About 400 metres or so further south along Hutchinson Street is a BWS store that in the near future will become a Dan Murphys. There is every reason to think that it will be a typical Dan Murphy's store of almost warehouse proportions that will contain an excellent range of liquor.⁶
- 23 Diagonally across the road from the BWS store is a presently vacant shopping centre, previously anchored by Foodland Supermarket and a car park. Plans for an expansion and refit of the shopping centre and the supermarket are proceeding.
- 24 As Adelaide Road heads south from the town centre, after about a kilometre it forks into three roads, Flaxely Road, to the south-south west, Wellington Road, to the south-south east and Alexandrina Road to the east. About a kilometre along Wellington Road is a shopping centre that contains a largish IGA store. Adjacent to it is the Cellarbrations store

⁶ See, for example: *First Choice Liquor* [2015] SALC 1 at para 41.

under construction that I spoke of earlier. It is a little less than two kilometres from the proposed store. There is every reason to think that it will be a typical Cellarbrations store that will operate as a convenience store offering a range generally comparable to a BWS store, although probably slightly better in an attractive, well laid out facility.⁷

25 Immediately to the north of Mount Barker are the towns of Littlehampton and Blakiston. On the outskirts of Littlehampton there is a Sip'n'Save drive through and walk-in bottle shop that forms part of the Great Eastern Hotel. It is a little less than three kilometres from the proposed store.

26 To the north east of Mount Barker is the town of Nairne. In the main street of Nairne there is a bottle shop at the Millers Arms Hotel. It is about eight kilometres from the proposed store.

The locality

27 The applicant relied upon the expert opinion evidence of Mr Graham Burns, planning consultant. He thought that the locality of the proposed premises was generally defined by an area that included all of Mount Barker and amongst others, the surrounding towns of Littlehampton, Blakiston and Nairne.

28 The objector's expert, Mr Marcus Rolfe, thought that the relevant locality was the area within about a nine kilometre radius of the town centre.

29 Nothing turns on the precise delineation of the relevant locality.

30 On any view all of the take away liquor facilities in Mount Barker, the Sip'n'Save bottle shop and drive-through that forms part of the Great Eastern Hotel and the facility on offer at the Millers Arms Hotel have to be considered.

The evidence of residents

31 I heard evidence from a number of residents who live in and about the locality. I set out a summary of their evidence.

Ms Sandra Lemmer

32 Ms Lemmer has lived in Mount Barker for just over a year. She has lived in the general area for about 15 years or so. By the end of the year she hopes to move to Littlehampton. She works in Adelaide. She travels by car to get to work. Her husband also works in Adelaide but they travel

⁷ See, for example: *BWS - Seaford* [2015] SALC 19 at para 25.

there separately. She shops at the Woolworths store in the Woolworths centre. She said that she will continue to do so when she moves to Littlehampton. She likes the layout of the store. She finds the parking easy. She shops there regularly. The store caters for all of her daily and weekly grocery and food needs. She would like to be able to purchase takeaway liquor as part of that shopping experience. For now she uses the BWS store in Hutchinson Street that is in the throes of being converted to a Dan Murphys. She does not use the Gray's Inn as she does not like drive though bottle shops. She does not use the Pulpit Cellars as she found the parking there difficult. She agreed that not all of her shopping needs could be catered for at the Woolworths centre and that sometimes she needed to go to Mount Barker Central to satisfy them. She agreed that the trip from the Woolworths centre to the BWS store on Hutchinson Street only takes a couple of minutes. She agreed that to walk from the Woolworths centre to the Pulpit Cellars would only take a minute or two. She said that she would not want to carry bottles while walking.

Ms Samantha Wallace

- 33 Ms Wallace has lived in various locations in the Adelaide Hills for the last seven years. She works as a customer service team member at KFC in Mount Barker, working between 14 to 20 hours a week. She is married and has a young family.
- 34 She shops at the Woolworths centre. She drives a large car and finds the parking very convenient. It is close to where she works and is only five minutes from her house.
- 35 For now she purchases takeaway liquor from the BWS store in Hutchinson Street. She finds the service there to be very good. She said that it was also the only place in Mount Barker that sells the Moscato that she drinks. She also likes to take advantage of her Woolworths rewards card.
- 36 She said that she supported this application because it would save her, what she described as “driving over to the other side of Mount Barker”. She said that she could pick up alcohol when doing her shopping on a Wednesday. She spoke of the parking and the convenience.
- 37 She said that she regarded going to the BWS store, in Hutchinson Street, as a special trip.
- 38 As to the prospect of the new Dan Murphys, she described such stores as really big, with too many choices. She said that if she had to go there, she would, but she would prefer to buy her takeaway liquor from a BWS store.

- 39 She said that she did not like the prospect of buying alcohol from the Pulpit Cellars. She said that she might drop a bottle when walking back with it.
- 40 She described those working in the drive through at the Thirsty Camel in Gray's Inn as arrogant. She said that it did not stock Moscato.
- 41 She said that the new Cellarbrations store was all the way over the other side of town. She said that it was even more out of her way than the BWS store that she currently uses.
- 42 She described the prospect of being able to combine her shopping and grocery needs with her purchase of takeaway liquor as "awesome".
- 43 She agreed with the proposition that Mount Barker has two excellent bottle shops, being the Pulpit Cellars and the BWS store that is about to become a Dan Murphys. She agreed that there are ample liquor facilities within the regional centre of Mount Barker.

Mr Andrew MacKinnon

- 44 Mr MacKinnon has resided in Mount Barker for 35 years.
- 45 He works as a sales and technical support officer at Clarence Gardens. He drives to and from Adelaide five days a week. He leaves a little after 7.00am and returns between 5.00 and 5.30pm.
- 46 He spoke of the massive expansion of extra housing estates and population growth in Mount Barker over the last 30 years.
- 47 He said that he and his wife go the town centre of Mount Barker to shop on a Thursday night. He said that they also go there on weekends, if they need extra things.
- 48 He said that they do the majority of their shopping for groceries and fresh food at the Woolworths store in the Woolworths centre. He said that they only make a special trip to Coles if there was a particular need.
- 49 He said that price wise Woolworths was good. He also spoke of the ease of access and the undercover car park.
- 50 He said that he supported this application because it would be convenient to buy liquor from a BWS store at the same time he did his other shopping. He said that at the bottom of the Woolworths docket there is a Shop a Docket which gives a discount at BWS stores, usually on a six-pack of different beers, which he regularly used.
- 51 For now he uses the BWS store in Hutchinson Street. He regarded it as a special trip. He described it as a detour on the way home.

- 52 He does not use the Pulpit Cellars often. He described parking in the area as a nightmare.
- 53 Even though it was conveniently located to where he lives, he thought that it was unlikely that he would use the new Cellarbrations store because he wanted to continue to take advantage of the discounts available at a BWS store because of the Woolworth's docket.
- 54 He said that he buys wine through Cellarmasters, which he collects from the BWS store near his work at Clarence Gardens. He said that that is an online service.
- 55 He agreed that on a Saturday morning he might travel to a number of locations within the Mount Barker regional centre.
- 56 He agreed that within the regional centre there are excellent bottle shops, being the Pulpit Cellars, and the new Dan Murphys that are conveniently available within the regional centre. He accepted that in respect of this application all it meant was greater convenience in having a BWS store right next to the supermarket that he chooses to shop at.

Ms Susan Lories

- 57 Ms Lories has lived in Mount Barker for over 25 years.
- 58 She is a florist and has recently purchased a business on Unley Road at Malvern. She expects to work long hours. The florist trades from Monday to Saturday. She leaves Mount Barker early and arrives home late.
- 59 She spoke of the changes to Mount Barker over her time there. She said that the shopping now available had at least doubled and may have trebled over that time. She said that since the Mount Barker area introduced deregulated shopping hours, it has opened up the shopping window, resulting in a lot more staff being employed and a lot more people in the town. She said that the change had affected the traffic and that sometimes Mount Barker can be busier than a lot of suburbs in Adelaide.
- 60 She shops at the Woolworths store in the Woolworths centre. She finds it very convenient to call in there on her way home from the city. She finds the parking easy. She lives about a kilometre or so from the centre.
- 61 For now she purchases takeaway liquor from the BWS store in Hutchinson Street. She supports this application because it would be very convenient for her to be able to combine her liquor purchasing with her grocery shopping. She said that it would save her quite a bit of time. She said that although going from Woolworths to the existing BWS store

looks close on a map, the trip can take five minutes or more. She said that it would be so much easier for her if the bottle shop was right next door.

- 62 She agreed that there are at least two excellent and convenient bottle shops in the regional town centre, being the BWS/Dan Murphys and Pulpit Cellars.

Mr James Sexton

- 63 Mr Sexton is in his late fifties. He was born in Mount Barker and has lived there for most of his life. For the last 25 years he has conducted a successful real estate business. He said that his company had sold about 65 per cent of the vacant land throughout Mount Barker.

- 64 He said that over his time there Mount Barker had turned into the major regional centre of the Hills.

- 65 He is a part owner of the Woolworths centre. He spoke of a dedicated barbeque facility that formed part of the centre. It is available for sporting clubs and the like to conduct fund raising. He, as did others, spoke of communal bonding that resulted from its use.

- 66 He is also the Chairman of Mount Barker Business which is a group of prominent business people and major landowners who promote Mount Barker and look for ways make it work better. They work in consultation with the local council.

- 67 In that role he is familiar with the general development plans and other plans that are emanating from council and other authorities relating to Mount Barker. He spoke of ongoing and future development. He spoke of tourist initiatives and the successful branding and promotion of the Adelaide Hills wine region.

- 68 He said that he was privy to information that indicated that 45% of the residents of Mount Barker commute to the city during the working week.

Other witnesses

Mr Matthew Holland

- 69 Mr Holland is Woolworths' Senior Regional Property Manager. He is a very experienced operator. He has worked for Woolworths for many years. His main areas of responsibility are South Australia and the Northern Territory. He looks after Woolworths' existing portfolio of supermarkets, liquor businesses and petrol outlets. He also sources new sites for those businesses, whether it be new stores, or relocating the existing stores.

- 70 In his role he needs to be on top of weekly sales figures, business data and market analysis concerning Woolworths' various businesses.
- 71 He described a typical BWS store as a small convenience offer of around 200 square metres. He described the Dan Murphys business as major destination store ranging from between 1300 to 1500 square metres, carrying significantly more lines.
- 72 He said that an average transaction at a BWS store was about \$30; whereas at a Dan Murphys it might be nearly double that.
- 73 He spoke of the Woolworths store in Mount Barker. He said that it had more turnover than any other Woolworths store in this State. He said that it draws customers from all over the Adelaide Hills region and as far away as Strathalbyn.
- 74 He spoke of changes to shopping patterns. He said that not that long ago, after hours shops were only open on Saturdays, and customers would do one shop on the weekend because they were busy during the week. He said that these days, with retail trading hours being significantly longer, customers shop more and buy less per shop.
- 75 He spoke of a consequential use of self-scan check-outs, enabling customers to grab four or five items, check themselves out at the check-outs, and move through quickly.
- 76 In terms of the proposed bottle shop, he said, as has been said elsewhere, that Woolworths' business philosophy is to have a liquor licence adjacent to all of its supermarkets so as to offer its customers a one stop shopping experience.
- 77 He said that the Woolworths store at Mount Barker is busy from about 3.00pm to close at 10.00pm. He said that there was a peak when parents pick up their children from school and a peak when commuters travelling to the city are passing by on their way home from the city.
- 78 He spoke of the existing BWS store in Hutchinson Street becoming a Dan Murphys store. He said that he expected it would be ready before Christmas. He said that the BWS store had performed extremely well. He expected that when converted to a Dan Murphys there would be a 40% increase in the turnover.
- 79 He agreed that in light of the Pulpit Cellars bottle shop and the new Dan Murphys the regional town centre of Mount Barker will have two very substantial retail liquor facilities.
- 80 He accepted that it would have been open for Woolworths to have transferred its existing BWS licence up to the current tenancy, to fulfil its

desire, to have a bottle shop that effectively traded adjoining to or as part of its supermarket.

Mr Luke Jarvis

- 81 Mr Jarvis is in his early thirties. He lives at Kanmantoo, about a 20 minute drive from Mount Barker. He has lived in the general region of Mount Barker for about six years.
- 82 He works for both the Gray's Inn and Pulpit Cellars. He is in charge of the bottle shop at Gray's Inn. He is the Retail Manager at Pulpit Cellars. He spends about equal time at each establishment. He is responsible for staffing matters, stock control and ordering stock and generally dealing with customers and the like in both venues.
- 83 He generally works between 7.00am and 5.00pm, sometimes later.
- 84 He described the Pulpit Cellars as an independent bottle shop that offers a good range of beer, wine and spirits that is focussed on the customer's wants. He said that it has a website from which customers select and they ship goods all around the country. He said that for deliveries in Mount Barker it was the same or next day delivery.
- 85 He said that the Pulpit Cellars has six dedicated car parks, identified by spray painting on the ground, and also additional signage with standalone bollards and signage on the wall. He said that he and his staff ensure that they remain, prioritised 15 minute car parks for their store. He said that they were within 10 metres of the front door.
- 86 He said that in addition to that there are about 98 car parks in the adjacent complex, additional parking across the road and multiple car parks in the Coles and Woolworth's complexes not far away.
- 87 He spoke of the shopping trolleys in the car park. He said that most were Aldi but many were from Coles and Woolworths.
- 88 He said that Fridays and Saturdays are the busiest days, followed by Thursdays.
- 89 He said that the busiest time for the Thursday is early afternoon, and then mid to late afternoon after the school run, between 4.00pm and 6.00pm.
- 90 He and others took photographs of the dedicated car parks outside the Pulpit Cellars that demonstrated that they were available.
- 91 He said that they conformed to his general observation that car parks outside the store were available.

- 92 He took me to the stock list of the Pulpit Cellars. He said that it had over 2300 lines. He said that there was a difference in the range and type of stock on hand at Pulpit Cellars compared to Gray's Inn. He described the former as much more of a destination store with a very extensive range of red wine, white wine, single male whiskeys, gins, boutique craft beers, as compared to the Gray's Inn. He described the latter as more of a mainstream store with a much more limited range.
- 93 He said that the Pulpit Cellars runs a membership and loyalty scheme.
- 94 He described that the bottle shop at the Gray's Inn as a two lane drive through with an adjacent walk-in area where patrons can browse. He said that most customers stay in their cars and only a few use the walk-in. He said it can get busy. He said that its customers were a younger demographic than those who use the Pulpit Cellars.

The planners

Mr Graham Burns

- 95 Mr Burns stated that the township of Mount Barker and the surrounding areas are the subject of significant population growth. He noted that between the 2006 and 2011 censuses the District's population had increases by nearly 3000 people representing an increase of 10.8%, being 2.07% per year, compared to the whole of State average growth rate of 1.1%.
- 96 Based on his assessment of the locality he thought that the 2016 projected number of people living in it was 26,545. He anticipates that by 2034 the population will have increased to 44,655.
- 97 He said that the regional town centre can be expected to experience significant economic growth and that it provides a diverse and increasing range of services and facilities to the town's residents and those living in the Adelaide Hills area generally.
- 98 He highlighted the objective stated in the District Council of Mount Barkers Development Plan that stipulated that the regional town centre would represent the primary focus for business and commercial services. It stated that it was expected to provide a full range of shopping, administrative, cultural, community, entertainment, education, religious and recreational facilities.
- 99 He regarded the Woolworths centre as a primary retail centre that serviced a wide area. His opinion was that the proposed bottle shop was an appropriate addition to the centre and would facilitate the community's preference for one-stop shopping.

Mr Marcus Rolfe

- 100 Because he formed a different view of the relevant locality that Mr Burns, Mr Rolfe used slightly different population figures in making assessments of population growth and the like. The difference between the planners as to the relevant population figures is of no moment.
- 101 Clearly Mount Barker is a growing region. Its population is increasing at a much higher rate than the State average.
- 102 In Mr Rolfe’s opinion the regional town centre of Mount Barker operates in a similar way to a large covered shopping mall in the sense that it was easy to negotiate the range of services and facilities that are available by foot. He accepted, however, that unlike a covered shopping mall, the town centre does not provide constant shelter from the elements.
- 103 He measured the distance between the Woolworths centre and the Pulpit Cellars to be about 150 metres. He measured its distance from the existing BWS store (soon to be Dan Murphys) to be a little over 500 metres and the distance to the Thirsty Camel, that is the takeaway facility on offer at Gray’s Inn to be just under 300 metres.

The parties’ submissions

The applicant

- 104 Mr Walsh QC, counsel for the applicant, contended that the application should succeed on a number of grounds.
- 105 Firstly, he said that contemporary community expectations were such that it would be expected that the primary town centre of Mount Barker would have a retail liquor store. He said that for now, there is none.
- 106 He argued that the town centre of Mount Barker could be regarded as a locality in its own right. He sought to draw parallels with the central business district of Adelaide⁸ and the Marion Shopping Centre.⁹
- 107 Secondly, he said that having regard to contemporary social and work patterns, the limitations on people’s available time, and their strong

⁸ In *Liquorland* [2011] SALC 27 this Court held that in connection with a liquor store in Gouger Street, Adelaide, the relevant locality was the area within the City of Adelaide that has boundaries to the east, south and west fixed by the relevant Terraces and to the north by the River Torrens. That finding was confirmed on appeal by the Full Court in *S & J White Pty Ltd & Ors v Liquorland (Australia) Pty Ltd* [2011] SASFC 103.

⁹ In *Marion Cellars* [2002] SALC 5 this Court held that in connection with an application for a retail liquor merchant’s licence the Marion Shopping Centre should be regarded as a locality in its own right. In doing so it followed an earlier decision in *Tiffanies* [1998] SALC 21 that concerned an application for a hotel licence. A majority in the Full Court deferred to the specialist nature of this Court in declining to disturb that finding: *New York Bar and Grill and Anor v West Paddock and Anor* [1998] SASC 7020.

preference to one-stop shopping, indicated that there should be a retail liquor facility located at a very convenient and popular supermarket, such as the one under consideration here. He said that those using the Woolworths centre would wish to have access to takeaway alcohol at the centre and the fact that, for now they are denied that, meant that in terms of their liquor needs, they were not being adequately catered for.

- 108 In making these submissions Mr Walsh QC was doubtless relying upon the judgment of Parker J in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* where he said:

“I stress that s 58(2) re-focuses the test from a question as to whether the demand in a locality can be ‘met’ without unreasonable inconvenience by existing local retail facilities to require an assessment by the licensing authority of whether the existing facilities ‘adequately cater’ for that demand. The term ‘adequately cater’ has altered the focus of the public demand test to require consideration of the public’s expectations as to the accessibility of retail liquor services.

The extent to which existing facilities cater for the contemporary shopping habits of the public as a whole, or significant sections of it, is an important element of the ‘adequately cater’ test. The degree of difficulty and inconvenience that the public, or a significant section of it, will suffer, if an application is refused, is an important element of that test. However, it is not the sole criterion. Contemporary patterns of family, work, and social life that rely on the convenience of one-stop shopping are also relevant considerations. In that respect, the current provision has effected a significant relaxation of the former test.”¹⁰

- 109 Finally, he contended that given the present number of people living in the locality and the projected growth, the addition of a new retail liquor facility was warranted.
- 110 Mr Walsh QC emphasised the unique characteristics of Mount Barker. He said that its regional town centre is clearly the epicentre of the Adelaide Hills area and as a consequence it has become a vibrant commercial area. He said that it is a growing area and that as it grows more and more, its residents will gravitate to the town centre.
- 111 He said that in considering this application I should not be concerned about the proximity of the Pulpit Cellars and new Dan Murphys store to the proposed store.

¹⁰ [2015] SASFC 72 at paras 50 and 51.

- 112 He said that the Pulpit Cellars is attached to a hotel with a gaming room. He emphasised that it is not trading under a retail liquor merchant's licence.
- 113 As for the new Dan Murphys, he said that it will be a destination venue that will create additional trade which is not currently attracted by the BWS store. He added that it is on the periphery of the town centre boundary.
- 114 He sought to derive comfort from the fact that the Full Court in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* granted a retail liquor merchant's licence notwithstanding the fact that within a relatively short distance of the proposed premises there, there were six retail liquor merchant licences and numerous other takeaway liquor facilities.
- 115 He highlighted the fact that in Mount Barker there are takeaway liquor facilities adjacent to the Aldi and Coles supermarkets (the Pulpit Cellars) the Foodland (the existing BWS store about to be Dan Murphys) and the IGA (Cellarbrations). He submitted that this clearly evidenced by contemporary expectations of the residents of the Mount Barker community. He said that they plainly want to be able to combine their liquor purchasing with their supermarket shopping.
- 116 He pointed to evidence indicating that the Woolworths had upwards of 1,000,000 visitations per annum and to the evidence from Mr Holland and the lay witnesses of the ease of access to the centre having come off the Freeway, who would then use the generous and abundant car parking available at the centre.
- 117 He submitted that there was no basis to adversely exercise the Court's discretion to refuse a licence.
- 118 He said that if a new BWS store is created, the majority of its trade will come from passers-by, namely the commuters, and from existing Woolworths' customers. He said that many of those commuters would for now be purchasing takeaway liquor in the Adelaide metropolitan area, such that the addition of a new licence in the township of Mount Barker should not be an issue.

The Objectors

- 119 Mr Roder SC, counsel for the objectors, met the submission about contemporary community expectations that the primary town centre of Mount Barker would have a retail liquor store with the observation that it would be unprecedented to grant an application for a new retail liquor merchant's licence where within 200 metres of the proposed bottle shop, there is a facility of the quality of Pulpit Cellars and within 500 metres or

so, there will be a facility of the quality of a Dan Murphys, and within a few hundred metres, there is also a drive through bottle shop.

- 120 He said that if people had a desire to combine their takeaway liquor purchasing with their other shopping they had plenty of options available, namely the Aldi/Coles/Pulpit Cellars combination; the New Foodland/Dan Murphys combination and the IGA/Cellarbrations combination. He said the fact that some people are loyal Woolworths customers who want to take advantage of its loyalty programs and its discount vouchers did not provide a sound basis to find in favour of the application.
- 121 He said that if Woolworths were so keen to achieve a Woolworths/BWS combination for the benefit of its customers, all it needed to do was seek to remove its existing BWS licence and place it next to the Woolworths store.
- 122 He challenged the contention that those using the Woolworths centre would be having a one-stop shop experience. He said that the centre has a limited number of shops and that customers who use the centre would need to go elsewhere to places like Mount Barker Central or outlets along the main streets of Mount Barker to service all of their needs.
- 123 He said that if the applicant's contention about contemporary community expectations was correct it meant that we have got to the point where there would be a strong case to allow an application for a bottle shop in every shopping centre next to every supermarket. He said that if it was unreasonable to expect Woolworths' shoppers to cross the road to go to the Pulpit Cellars, it would be equally unreasonable to expect Coles shoppers to do likewise and to access that store as it would be for Foodland shoppers to cross the road to access the Dan Murphys.
- 124 He said that the so called expectations of the needs witnesses were more driven by brand loyalty than location. He took me to the evidence of Mr MacKinnon, where he agreed that if the proposed store was a Cellarbrations store and that that store, being next to the IGA, became a BWS store, he would buy his liquor at the BWS store notwithstanding its distance from the Woolworths store.

Analysis

- 125 I commence with the witnesses.
- 126 I thought that all of the needs witnesses gave credible evidence. I accept their evidence. The common thread is that they are loyal Woolworths' customers who find the Woolworths centre to be very convenient and they would find it even more convenient if they could combine there takeaway liquor purchasing with their visits to that centre.

- 127 Mr Holland is an impressive witness. He willingly made appropriate concessions. I accept his evidence.
- 128 The evidence conclusively establishes that the Woolworths store is very popular, and that it is conveniently accessed by many of the residents of Mount Barker, especially those commuting back to Mount Barker after a day's work in the city.
- 129 I find that the BWS store in Mount Barker is very popular. Doubtless it is a very good retail liquor facility.
- 130 There were no significant differences between the evidence of the planners. I rely upon there evidence in a general way. It establishes that Mount Barker has changed and has grown significantly. It establishes that its population growth will continue.
- 131 Although much of what Mr Sexton had to say was based on second hand information, the Act permits me to rely on it¹¹ and I do. Despite his interest in the outcome of these proceedings, I found his evidence credible. It confirms the popularity of the Woolworths centre. It confirms the growth that Mount Barker has experienced. It confirms the expectation that that growth will continue.
- 132 I find that Mount Barker has grown significantly in recent years and that that growth will continue. I find that the Mount Barker town centre has become an important commercial and retail hub for the town and wider community.
- 133 I thought that Mr Jarvis gave credible evidence and I accept it. I find that the Pulpit Cellars is a very good bottle shop that has a very good range of liquor on offer. I find that it complements the range on offer at the BWS store in Mount Barker. I expect that it will continue to do so when the BWS store becomes a Dan Murphys. I find that the Thirsty Camel at Gray's Inn is a better than fair average quality drive through bottle shop with an adjacent walk-in area.
- 134 I now turn to consider the various grounds relied upon in support of the application by reference to these findings.

The primary town centre of Mount Barker should have a retail liquor store?

- 135 I accept the submission that the town centre of Mount Barker would be expected to provide amongst the facilities on offer a good quality stand-alone takeaway liquor outlet, and probably more than one. I reach this

¹¹ See 23 of the Act and the judgment of Anderson J in *Music Talking Pty Ltd as Trustee for the Orlando Farese Family Trust v Villis Group Services & Ors* [2011] SASFC 142 at para 19.

conclusion, not on the basis that the regional town centre of Mount Barker is a locality in its own right. Whilst the characteristics of Mount Barker are unique, they are vastly different to the exceptional qualities of the central business district of Adelaide and the Marion Shopping Centre. I reach this conclusion by reference to my assessment of contemporary community expectations. I think it is reasonable to infer from the objective stated in the District Council of Mount Barkers Development Plan, as referred to in Mr Burns' evidence, that there is contemporary community expectation that the regional town centre of Mount Barker would provide to the town's residents and those living in the Adelaide Hills area generally a diverse range of services and facilities that that would include good quality stand-alone takeaway liquor outlets.

136 However, contrary to what was submitted, I find that that contemporary community expectation is being met.

137 I reject the suggestion that the existing BWS/Dan Murphys can be ignored because it is supposedly on the periphery of the town centre. It is about two blocks away from the junction of Gawler Street and Hutchinson Street, and is about the same distance from that junction as the proposed store.

138 I find that the existing BWS/Dan Murphys is in the town centre.

139 As for the Pulpit Cellars, the fact that it trades under a hotel licence is not to the point. The test in s 58 of the Act is not whether "premises trading under a retail liquor merchant's licence" already existing in the locality are adequately catering for the public demand for liquor for consumption off licensed premises. The test is whether "licensed premises" are meeting that need. If the Pulpit Cellars morphs into something else the issue might need to be re-visited. But for now, it is a good quality stand-alone bottle shop.

140 In my view, the evidence, including the evidence of the needs witnesses, establishes that within the town centre of Mount Barker there are two very good quality bottle shops and that the town centre has ample takeaway liquor facilities.

The conveniently located and popular Woolworths centre should contain a retail liquor facility?

141 As I noted above, underpinning this submission are the observations made by the Full Court in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* about the importance of the one stop shop notion and contemporary community expectations in connection with shopping centres.

- 142 I think one needs to be cautious in determining what *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* stands for.
- 143 What the Full Court regarded as matters of particular significance in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors*, were the status, size, location and very substantial patronage of the shopping centre under consideration there, being the Arndale Shopping Centre. It took the view that in connection with a very large regional centre with attributes like Arndale, the contemporary community expectation is that it would include a retail liquor store.
- 144 Whilst the decision in that case requires a re-evaluation of the approach taken in cases under the former legislative regime, it does not stand for the proposition that the absence of a takeaway liquor facility in a shopping centre means that other proximate takeaway liquor facilities are not adequately catering for the public's demand for liquor for consumption off licensed premises.
- 145 That is made clear by the Full Court's refusal to grant leave (*Woolworths Ltd v IPG Management (SA) Pty Ltd & Ors*)¹² to appeal this Court's refusal to grant an application for a retail liquor merchant's licence in connection with the Seaford Meadows Shopping Centre (*BWS Seaford v Port Noarlunga Hotel, Cliff Avenue Liquor Store & Cellarbrations*).¹³
- 146 In doing so, the Full Court noted this Court's finding that many people did much of their daily and weekly shopping at the Seaford Meadows Shopping Centre and would find it very convenient to be able combine their takeaway liquor shopping with that shopping. It said, however, that having regard to the small size of the centre and the proximity of other liquor retail outlets, there was not a contemporary community expectation that the centre would include a liquor retail outlet.¹⁴ It therefore refused leave.
- 147 Although the decision in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* establishes that in the case of a very large regional centre it might be proper to pay little regard to the presence of adjacent facilities in determining whether the relevant test has been met, the decision on the leave application in *Woolworths Ltd v IPG Management (SA) Pty Ltd & Ors* makes it clear that that is not the case in connection with smaller shopping centres.
- 148 The leave decision also establishes that notwithstanding the result in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors*, the observations

¹² [2015] SASCF 97.

¹³ [2015] SALC 19.

¹⁴ [2015] SASCF 97.

by King CJ in *Lovell v New World Supermarket Pty Ltd* are not completely otiose. In that case King CJ said:

“The desire for one-stop shopping is widespread in the community. The inability of customers to obtain their liquor supplies where they do the rest of their shopping may be irritating but it does not of itself mean that their demand for liquor cannot be met by existing facilities. It may be that the demand can be met, although perhaps at the price of some inconvenience to the customer. Inconvenience in gaining access to the required liquor is undoubtedly relevant to the determination of the question whether the public demand for liquor in the locality cannot be met by the existing facilities but it is not of itself decisive. If, for example, there existed an accessible first grade bottle shop at a distance of, say, 200 or 300 metres from the shopping centre, it would be absurd to suggest that the demand for liquor by customers of the shopping centre could not be met simply because they would have to drive their cars a short distance from the general shopping centre in order to obtain their liquor. To attempt to provide access to a full range of liquor for everybody who is without the use of a motor car would result in a wholly undesirable proliferation of liquor outlets with consequent deterioration of the standards in the service of liquor which are necessary in the public interest. It is, however, a matter of degree.”¹⁵

- 149 Whilst it goes without saying that each case must be decided on its own facts, there are some parallels between this case and the case concerning the Seaford Meadows Shopping Centre.
- 150 The Woolworths centre is of similar status and size to the Seaford Meadows Shopping Centre.
- 151 I accept that the supermarket at the Woolworths centre is substantially different to the supermarket in the Seaford Meadows Shopping Centre. It is a very large store and it has a substantially greater patronage. But, as with the Seaford Meadows Shopping Centre, the range of facilities on offer at the Woolworths centre is not great. Notwithstanding its attractiveness and convenience, many of the residents of the locality who use the centre would on occasions find it necessary to go to places like the Mount Barker Central or outlets elsewhere in Mount Barker to satisfy some of their retail and other needs. In other words, venturing into other parts of the regional town centre is something that the patrons of the Woolworths centre would routinely have to do.
- 152 Accordingly, like the Seaford Meadows Shopping Centre case, I cannot approach my consideration of this application from the premise that if I

¹⁵ (1990) 53 SASR 53 at 55-56.

granted the application, for most, the Woolworths centre would be a one stop shop.¹⁶

153 Moreover, I cannot ignore the fact that of the very substantial number of residents of Mount Barker who commute daily to Adelaide and who use the Woolworths centre, many will pass or go nearby a number of facilities that sell takeaway liquor and will be contentedly servicing their takeaway liquor needs from those facilities.¹⁷

154 My impression is that travelling within the locality by car is relatively easy. For those shopping at the Woolworths centre, the times and distances involved in accessing the takeaway facilities at the BWS/Dan Murphys, the Pulpit Cellars and the Thirsty Camel at Gray's Inn are, by contemporary standards, not great.

155 Looked at by contemporary standards, there is nothing unusual about the parking difficulties identified in respect of the Pulpit Cellars.

156 Having regard to existing takeaway liquor facilities premises in the locality, and especially the takeaway facilities at the BWS/Dan Murphys, the Pulpit Cellars and the Thirsty Camel at Gray's Inn, and those facilities that commuters may pass on the way to or home from Adelaide, leads me to conclude that any demand for the purchase of liquor at the Woolworths centre is a demand that is being adequately catered for by other licensed premises and that a new retail liquor merchant's licence is not necessary to satisfy that demand.

The present number of people living in the locality and the projected growth, justifies a new retail liquor facility

157 In dealing with this ground it is important to note that in terms of the relevant public's access to takeaway liquor facilities there have been two significant recent developments that have occurred in the locality. One is the conversion of the existing BWS store to a Dan Murphys. It will result in a significant increase in the range of liquor available to the residents of the locality and it is likely to draw custom for the whole area and beyond. It will fulfil, what is probably by now a community expectation, of having access to a large format destination store offering a vast array of liquor products at the competitive prices as part of the range of takeaway facilities servicing their needs for takeaway liquor.¹⁸ The other is the grant of the licence that will result in the Cellarbrations store on Wellington Road.

¹⁶ *BWS Seaford v Port Noarlunga Hotel, Cliff Avenue Liquor Store & Cellarbrations* [2015] SALC 19 at para 79.

¹⁷ See the judgment of Doyle CJ, with whom White J agreed, in *Woolworths Ltd v Drase Coosit Pty Ltd* [2010] SASC 13; (2010) 106 SASR 146 at para 28.

¹⁸ See the discussion about destination retail liquor facilities in *First Choice Liquor* [2015] SALC 1.

- 158 The net result is that the residents in the locality will shortly have access to two good quality convenience type bottle shops, the Pulpit Cellars, which is in the regional town centre, towards the north of the town, and the Cellarbrations store, which is towards the south of the town. They will shortly have access to a large format destination store located in the middle of Mount Barker; a better than fair average quality drive through bottle shop with an adjacent walk -in area in the regional town centre at the Gray's Inn; a comparable facility at the Great Eastern Hotel in Littlehampton; and for those living in Nairne, a bottle shop at the Millers Arms Hotel.
- 159 In light of this, I find that the residents of Mount Barker and those living in adjacent areas have many and varied takeaway liquor facilities to choose from.
- 160 Although the degree of convenience associated with using those facilities will vary depending upon where people live, work and drive, my firm impression is that any inconvenience that the residents in the locality will have in accessing them will not be great.

Conclusions

- 161 The evidence establishes that the Mount Barker town centre has become an important commercial and retail hub for the town and wider community. Contemporary community expectations are such that it would be expected that within the town centre there would be at least one good quality stand-alone takeaway liquor outlet, and arguably more than one. The BWS/Dan Murphys and the Pulpit Cellars are within the town centre and they are fulfilling that expectation.
- 162 The status of shopping centre in which the proposed premises will be located is not significant and it is relatively small. It is not of a sufficient status or size to warrant the conclusion that contemporary community expectations are that it would contain a liquor retail outlet. In any case, having regard to existing takeaway liquor facilities premises in the locality, and especially the nearby takeaway facilities at the BWS/Dan Murphys, the Pulpit Cellars and the Thirsty Camel at Gray's Inn, and facilities that the many commuters who use the Woolworths centre may pass on their way to or home from Adelaide, any demand for the purchase of liquor at the centre is a demand that is being adequately catered for by other licensed premises.
- 163 When the BWS/Dan Murphys and the Pulpit Cellars are considered in combination with the Cellarbrations store near the IGA, the Thirsty Camel facility at Gray's Inn, the Sip'n'Save bottle shop that forms part of the Great Eastern Hotel in Littlehampton and the facility on offer at the Millers Arms Hotel in Nairne, the existing premises in and about the

locality generally are adequately catering for the relevant public demand for liquor.

164 I find that the test postulated by s 58(2) has not been met.

165 If it had been I would not have exercised the Court's very wide discretion under s 53 of the Act to refuse the application.

166 If the applicant had established a requisite need the only criticism that could be made of it would be its decision to convert the existing BWS into a Dan Murphys store. Whilst that fact and the grant of this licence would have given the applicant a very significant presence in the takeaway liquor market in the Mount Barker region, as Parker J noted in *Liquorland (Aust) Pty Ltd v Woolies Liquor Stores and Anor*:

“...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.”¹⁹

167 The application is refused.

¹⁹ [2014] SASFC 87 at para 76.