

First Choice Liquor [2018] SALC 3

LICENSING COURT OF SOUTH AUSTRALIA

FIRST CHOICE LIQUOR

JURISDICTION: Application for a Retail Liquor Merchant's Licence

FILE NO: 1891 of 2017

HEARING DATE: 16 and 17 October 2017

JUDGMENT OF: His Honour Auxiliary Judge Jennings

DELIVERED ON: 12 February 2018

CATCHWORDS

*Application for a Retail Liquor Merchant's Licence - Whether the pre-requisites provided by s 58(2) have been met and whether in the Court's discretion the licence should be granted - **Held** that the pre-requisites for the grant of a Retail Liquor Merchant's Licence not met - **Held** that in any event in the exercise of the Court's discretion the licence should not be granted because to do otherwise would create an undesirable precedent - Ss 32, 37, 43, 53 and 58 Liquor Licensing Act 1997.*

Facac Pty Ltd v Talbot Hotel Group Pty Ltd [2001] SASC 445

Liquorland (Parkholme Shopping Centre) [2017] SALC 2

Cufone v Harvey (1986) 40 SASR 261

MC & TP Westley Cellarbrations [2006] SALC 13

MC & TP Westley Cellarbrations [2008] SALC 16

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

Liquorland (Australia) Pty Ltd v Hurley's Arkaba Hotel Pty Ltd (2001) 80 SASR 59

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

Skye Cellars [2005] SALC 8

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

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC with Mr R Harley

Respondent: Mr B Doyle with Mr D Tillett

Solicitors:

Applicant: Jones Harley Toole

Respondent: Duncan Basheer Hannon

- 1 The applicant Liquorland (Australia) Pty Ltd (“Liquorland”) seeks the grant of a Retail Liquor Merchant’s Licence (“RLML”) in respect of premises situated at 143 Main North East Road, Collinswood. The premises currently trades as a First Choice Liquor store under the hotel licence of the Hampstead Hotel.
- 2 Liquorland (Queensland) Pty Ltd is the licensee of the hotel. Liquorland Queensland operates the majority of the remaining Coles Hotels. The Hotels’ operation is mainly in Queensland.
- 3 Australian Hotels Association (SA) has objected to the application.
- 4 Licensed Hotel premises are subject to various conditions, including a requirement to keep the premises open to the public for the sale of liquor on every day (except Good Friday, Christmas day or Sunday) between 11.00am and 8.00pm and to provide a meal, if required to a member of the public, between noon and 2.00pm, and between 6.00pm and 8.00pm.
- 5 Section 32(2)(a) of the *Liquor Licensing Act 1997* provides that a hotel will be open for the sale of liquor for consumption on the premises and off the premises; it is an obligation of a hotel licensee to have liquor available for sale in both ways: *Facac Pty Ltd v Talbot Hotel Group Pty Ltd*.¹
- 6 The licensing authority may exempt a hotel licensee from the obligation to keep the licensed premises open for the sale of liquor to an extent the authority considers appropriate in the circumstances of a particular case.
- 7 RLML’s are granted pursuant to s 37 of the Act and authorises the licensee to sell liquor for consumption off the premises. It is a condition of a RLML that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.
- 8 Section 58(2) provides:

“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.”
- 9 This section requires an analysis of public demand for consumption of packaged liquor in the locality and the extent to which existing facilities

¹ [2001] SASC 445 at [15].

(of all kinds) are adequately catering for that demand. Contemporary community expectations are part of that assessment.

- 10 The principles were summarised in *Liquorland (Parkholme Shopping Centre)*² and when considering the position of public demand the authority suggests that the focus is on the present and not the future predicted circumstances. See *Cufone v Harvey*,³ *MC & TP Westley Cellarbrations*⁴, *Woolworths Ltd v Smithfield Hotel Pty Ltd*.⁵
- 11 It has been held that, once the s 58(2) test is satisfied, if the licensee seeks a removal to another location which is within the same locality, the test need not be satisfied again: *Liquorland (Australia) Pty Ltd v Hurley's Arkaba Hotel Pty Ltd*⁶, *Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd*.⁷
- 12 I have had the advantage of comprehensive written and oral submissions from counsel and for ease of convenience I have set out in these reasons in some detail aspects of those submissions.

The Evidence

- 13 Mr Sean Stephens is a Senior Economist at Essential Economics Pty Ltd and holds an Economics degree with Honours. His expertise is in urban economics and the assessment of economic impacts on local and regional economies associated with urban development projects. An area of speciality is in retail economic analysis.
- 14 His conclusions were:

“The First Choice Liquor store at Collinswood has locational and trading characteristics which are entirely consistent with successfully meeting consumer expectations for large-format liquor retailing.

In particular, the First Choice Liquor Collinswood is serving consumers seeking access to a wide range of products, hard to find items, and bulk purchases. In many instances, shopping at the First Choice Liquor store at Collinswood complements smaller convenience oriented purchases made at traditional bottle shops.

The Trade Area served by First Choice Liquor Collinswood has experienced ongoing population growth over the past 15 years, and this is expected to continue for the foreseeable future.

² [2017] SALC 2 at [80]-[94].

³ (1986) 40 SASR 261 at 262.

⁴ [2006] SALC 13 and [2008] SALC 16.

⁵ [2012] SALC 57 at [75].

⁶ (2001) 80 SASR 59 at [74].

⁷ [2014] SASFC 87 at [9].

A review of the current network of large format liquor stores serving residents of the Trade Area indicates that a relative gap is apparent to the north-west of the First Choice Liquor Collinswood site. In this respect, the store is of particularly importance to people living in suburbs such as Blair Athol, Enfield, Clearview and Kilburn for whom the store is the only large-format liquor store in relative proximity.”

- 15 Ms Josephine Mangini is the State Manager SA/NT for Coles Liquor and she is responsible for sales, profit, people and resourcing, and strategic outcomes for the Coles Liquor business in South Australia and the Northern Territory.
- 16 Her evidence was that First Choice Collinswood was constructed in 2008. With a total area of 1020sqm and a selling area of 730sqm the store is a typical example of what the First Choice large format offers. It has a large range of wine, spirits and beer with many products exclusive to Coles.
- 17 First Choice Collinswood is a busy store with a turnover of over \$7 million per annum and it is the second ranked store in their SA First Choice fleet. The sales for the store are more than double the sales of the average Coles Liquor store in SA. The store serves over 2,000 customers per week which ranks it as one of the busiest Coles Liquor stores in the State.
- 18 In her opinion this demonstrates the important local role the store plays. She has seen the premises trade area depicted by Mr Stephens and she notes that other facilities that service a local trade are generally right at the periphery of that trade area either just inside or outside the trade area.
- 19 The store is popular with customers generally in areas to the north and west of the store extending into suburbs such as Blair Athol, Prospect, Kilburn and Enfield.
- 20 The First Choice bottle shop is the subject of this application for a RLML and would be the only facility of its kind that would provide reasonable access to consumers who live in those areas.
- 21 Mr Peter Sheean is the General Manager of Spirit Hotels that operates 88 sites across Australia and is one of the divisions of the Coles Liquor Group. He described Hampstead as being “a triple-A location”, and said in answer to a question, if it were suggested to him whether Coles had considered removing the facility, ie the bottle shop, the answer was “categorically no”.

The parties' submissions

The applicant

- 22 Mr Roder SC appeared on behalf of the applicant. I accept and adopt submissions that the evidence establishes that:

“The applicants are part of the Coles Group. Coles Group acquired various hotel premises around Australia, mainly in Queensland, for the purpose of expanding their retail liquor network.

This was predominantly in Queensland because a hotel licence is a pre-requisite for selling packaged liquor.

A small number of hotels were acquired in New South Wales. Coles has largely divested itself of that holding. It owns four hotels in Western Australia and seven in South Australia.

In recent times, Coles has determined to exit the hotel business to the extent possible where it is able to redefine the hotel licence and obtain a retail licence. This has led to successful applications to obtain retail liquor licences in New South Wales and the subsequent sale [of same].”

- 23 It was submitted that the latter is the motivation behind the current application.
- 24 Coles have no current plans for a like application in respect of any other hotels in South Australia. The physical and ownership structures of hotels other than the First Choice at the Hope Inn, would likely make such applications impracticable.
- 25 Aside from the Hope Inn and the Brighton Metro the premises are physically attached to a hotel and, as drive-throughs, would not be permitted to conduct business under a RLML. There is not and never has been any such business conducted under a RLML.
- 26 Mr Roder submitted that there is no basis on the evidence to consider it likely that other applications would be commonly made or could succeed, and there is no basis for accepting the “floodgates” argument.
- 27 In this case, the hotel and First Choice operations trade in a manner in which they are physically and operationally separate and they would appear that way to most customers. The licences which are sought are appropriate to the business being conducted. It would be quite another thing to seek to operate a drive-through attached to the hotel as a RLML. That would not be legally possible and would be inappropriate.
- 28 The First Choice is on standalone premises with its own dedicated car parking. It operates in the manner of a retail liquor merchant. There are

obvious efficiencies for the business to be conducted as far as possible in a single ownership structure like other Cole's retail stores rather than being conducted by the hotel operator. The store is of a different kind than a hotel might ordinarily be expected to provide when operating a typical hotel bottle shop facilities. The need which is met by the store is far greater than a hotel might ordinarily be expected to meet under a hotel licence and even if the drive-through was well operated by the hotel, the need for the First Choice would still exist on the evidence and a new grant would be justified. The premises are of a kind which are at least equally appropriate or possibly, more appropriate to be dealt with under a RLML. It might be considered anomalous that in a store of this nature, the licensee has the ability to trade as a separate First Choice retail liquor store between the hours of 8.00am and midnight on Saturday, whereas the Act makes express provision for lesser hours for RLMLs.

- 29 The evidence in this case clearly establishes the need for this facility so there is no issue that in this case the requirements of the needs test are being avoided, and the evidence establishes the important role that the facility plays, both in serving the general locality, and also a wider catchment area in respect of large format store liquor supplies.
- 30 Mr Roder noted that the Objector accepts that other premises in the locality do not adequately cater for this demand. There is no issue of any proliferation of licences or premises which arises in this case.
- 31 If the application is granted, the only consequence will be that the facility has an appropriate licence with the standard RLML conditions, and that Coles is free to pursue a separate sale of the hotel licence on acceptable terms.
- 32 There is no detriment to the public interest that should trouble the Court in terms of its discretion under s 53. The arrangement of premises and operations will not alter. There will be a freestanding separate First Choice and there will be a separate main hotel building at which intermittent and minor sales of packaged liquor may be expected to occur in the same way that they do under existing operation.
- 33 If there is a genuine concern about this, the matter can be readily dealt with by conditions imposed by the Court which Coles would accede to. It is clear from the evidence that there is absolutely no intention to apply for such a removal and that the site is highly regarded by Coles.
- 34 The concerns expressed regarding this issue are more theoretical than real. In the event that the Court is concerned with any of these matters, as before mentioned, the matter can be dealt with by conditions of the kind

which are commonly imposed by this Court to ensure that the applicant's stated intentions are controlled by the Court.

- 35 Liquorland would accept a condition which required any removal to be approved by the Court. Any concerns can be controlled by the Court's discretion. Having regard to the basis of the grant it would be difficult to conceive, to say the least, that any such application would be favourably viewed. This points out the fallacy involved in the "floodgates" argument. Such arguments are usually fallacious.
- 36 This is a case where none of the hotels would suggest that they are catering for the range of demand across the locality. It is accepted by them that they are not.
- 37 This case does not involve the addition of any existing premises into the locality, and it will not affect the way in which liquor in the locality is supplied. It will simply regularise the existing situation so that the licence conforms with the reality of the situation and it will permit the applicant some commercial flexibility.
- 38 It involves no detriment to the public interest and nothing which would require the adverse exercise of discretion. The needs requirements are not avoided in any way. The grant only arises on the satisfaction of that threshold issue.
- 39 The resolution of the "threshold test" raised by the objectors ie: "Do the existing premises adequately cater for public demand", turns on a question of construction of s 58 rather than any factual issue.
- 40 The issue that must be resolved is whether the licensed premises in the locality of the First Choice premises includes those premises themselves.
- 41 Section 58(2) draws a clear distinction and dichotomy between the premises, and the locality of the premises.
- 42 As a matter of ordinary language the actual premises differ from its locality which is the area surrounding the premises from which it will draw its custom.
- 43 This approach is also consistent with the approach of this Court in *Skye Cellars*⁸ (the case involved an application for a RLML at premises which had previously traded under a special circumstances licence), where the Court approached the matter on the basis that a need for a RLML at the premises was established because:

"But for the existence of the applicant's outlet within its significant retail turnover the existing premises in the locality do not

⁸ [2005] SALC 8.

adequately cater for public demand. In that sense the applicant satisfies the onus under section 58(2) of the Act.”

- 44 The purposes and effect of s 58(1) is not to prevent an applicant of an existing premises from applying for an appropriate form of licence, such as a RLML, if it is demonstrated that other premises do not adequately cater for the demand and that operations at those premises will meet that demand.
- 45 Mr Roder’s submissions on the issue of discretion under s 53 were:
- “That Judge Kelly was correct in the Mount Barker case, there is nothing in the circumstances of the current proposal which requires the Court’s intervention by an adverse exercise of discretion or otherwise.
- There is no detriment to the public interest arising from the proposal. The proposal is wholly innocuous. It involves no change to public services or premises. This is the clear intention as established by Mr Sheean’s evidence and if it considers it appropriate the court can ensure that such representations are kept by the imposition of conditions. This is expressly provided for in the Act.”
- 46 The heavy regulation which is still in force by the statutory threshold test will provide more than adequate restriction against any proliferation of such application.
- 47 The other important aspects of this case, which distinguish it from *Lindsey Cove* is that the applicant has not and does not intend to cease or alter its supply of packaged liquor to the community and that there are no additional retail premises proposed by the application. In fact, there will be no difference at all to the existing retail premises.
- 48 The essential feature of *Lindsey Cove* was an attempt to manipulate the licensing system. The uncontroverted evidence is that Liquorland had made a commercial decision. This is a critical distinction.⁹
- 49 The licence which is sought is wholly appropriate to the way in which the business trades. The business is conducted from a physically separate building.
- 50 The applicant will bring the proposal into line with existing regulation as to hours for RLML.
- 51 The circumstances of this matter would justify the grant of a new licence to meet the demand for a big format liquor store. There is no suggestion

⁹ *Liquorland v Woolies Liquor Store* [2014] SASFC 87.

that ordinary operations under a hotel licence would be expected to meet that need.

- 52 To the extent that there are genuine concerns, they can readily be met by conditions, but in reality there is no need for such conditions. The practice of the Court to impose conditions under s 43 of the Act to ensure that representations are complied with, is well established.

The objector

- 53 Mr Doyle, counsel for the objector, submitted that licensed premises already existing in the locality in which the application is proposed to be, adequately caters for the public demand for liquor for consumption off licensed premises (s 58(2)) and that it is not necessary to grant the application to satisfy that demand since it can be catered for by other licensed premises including under the hotel licence

- 54 As to the first threshold question his submissions in relation thereto were:

“A critical question in the application of section 58(2) in this case is whether for the purposes of that section the existing First Choice Liquor Store is a ‘licensed premises’ is to be taken into account in considering whether ‘licenses 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.”

- 55 According to the plain language of the provision, the existing store forms part of the “licensed premises already existing in the locality”. Further the cases have (albeit in different factual contexts) emphasised that the test speak to the *status quo* at the time of the application, and not to what might be the position in the future.

- 56 The hotel licence will, even if the application is granted, permit the sale of packaged liquor. That is a critical feature of a hotel licence, and the applicants do not seek a relevant exemption. Thus it may be that in practical terms the packaged liquor trade of the hotel might be decimated by the redefinition and grant of a RLML, but to posit that the hotel licence will *no longer* meet public demand, is to assume a hypothetical scenario that the application will be granted, and that is the very issue that needs to be decided. By parity of reasoning, any applicant for a similar application could argue that the effect of their being granted a licence would render other facilities non-viable.

- 57 There is nothing anomalous in the way that the hotel licence caters for demand. Stand-alone bottle shops of a good size operated as an adjunct to a hotel licence, such as the Avoca Cellars and Highway Inn to name but two, are not anomalous in terms of the scheme.
- 58 There is simply no need to grant the licence, and there are risks and disadvantages associated with doing so. But even without those risks and disadvantages, the s 58(2) test is not satisfied.
- 59 On the issue of discretion, Mr Doyle submitted that the Full Court's decision in *Lindsey Cove* is relevant and at para 35 Doyle CJ (with whom Martin and Besanko JJ agreed) said:

“In enacting s 58, Parliament surely did not contemplate that the relevant demand would be one not adequately catered for because of a commercial decision by the applicant to use existing licensed premises in a manner that left the applicant unable to cater adequately for the relevant public demand. This case is not a case in which, speaking practically, McMahon could not adequately cater for the public demand for liquor for consumption off the premises. McMahon decided that it would get a better return from expanding the gaming, bar and meal facilities at the expense of the facilities for the sale of liquor for consumption off the Tavern premises.”

- 60 And at paras 47 and 48:

“[47] A decision to grant the licence may set an undesirable precedent for the grant of further retail liquor merchant's licences to applicants who choose not to meet an existing demand that they are able to meet using a licence that they hold.

[48] I consider that they are solid reasons for the exercise of the discretion adversely to the applicants. I recognise, and have not ignored, that this means that the public demand in the locality will not be adequately catered for. I have taken account of that in coming to my conclusion. I have been influenced by the consideration that the issue which arises here is one which calls for a cautious approach. In an undesirable precedent is set, the Licensing court will be left to cope with the effects of that precedent.”

- 61 Mr Doyle further submitted:

“In *Lindsey Cove*, the effect of exercising the discretion was that public demand would **not be adequately catered for** – plainly an undesirable outcome from the point of view of the objectives of the Act – yet it was necessary for the reasons given by the Court. Here, exercising the discretionary will not have any detrimental impact on

the public. Nor, it seems, will it have any particularly detrimental impact on the applicants. It will be ‘business as usual’.”

- 62 The tendency to proliferation, and to the effective sterilisation of an important feature of hotel licences, is manifest. *Ex hypothesi*, if a hotel is worth purchasing and operating for the retail liquor opportunity it presents, but not otherwise, there will be a risk of an increase in the number of like applications and a devaluation or loss of a number of hotel licences. The statutory scheme continues to recognise the importance of hotels, and it is not consistent with that scheme, or with competition more generally, to encourage a situation which would have the potential to affect the balance of offerings in the market in this way. This is particularly so where removal of a like application, once granted, may prove to be in the best interests of an applicant for a similar application in like circumstances.
- 63 In summary, he submitted that the Court should decline to grant the application under its unqualified discretion; because there is no public benefit in a change to the status quo. The future of the hotel licence is uncertain if the application is granted. To grant the application would create an undeniable precedent and may act as an incentive for hotel licences to be used to advance the interests of retailers of packaged liquor rather than the wider purposes to be served by the operation of hotel licences under the Act and to grant the application would be contrary to the purposes of the Act and reward applicants for seeking not to supply packaged liquor pursuant to a hotel licence.

Consideration

- 64 The submissions advanced by Mr Roder have a simplistic attraction. There are sound commercial reasons underpinning this application. The retail liquor facility that First Choice Liquor is operating is for all intents and purposes trading as a bottle shop. The effect of the within application is to reflect that reality. The end result is that in terms of the public nothing will really change. On the applicant’s case, no issue of discretion arises because this is a one off.
- 65 That said, the submissions advanced by Mr Doyle, for the objector, are sound and persuasive and must be accepted. This application can only succeed if the applicant can establish that the licensed premises already existing in the relevant locality do not adequately cater for the public demand. Those licensed premises are not confined to those trading under a RLML. They include all licensed premises offering take away liquor for sale.
- 66 In conformity with the authorities, the focus of the application must be as things presently are. In its present form the Hampstead Hotel is, through the take away facility that it operates, meeting the relevant public

demand for take away liquor. There is no evidence capable of supporting a contrary finding. It follows that the relevant statutory test has not been met.

- 67 Moreover, despite what Mr Roder submitted in this case, if it succeeded, this application would set an undesirable precedent. An applicant wanting a RLML in circumstances where an application for such a licence would fail could circumvent this. The applicant could do so by acquiring a hotel licence; setting up a take away facility under that licence that gave the appearance of a bottle shop; and then make an application to a licensing authority to split the licence into two, being a hotel licence and a RLML and thereby achieving through the backdoor, what could not be achieved through the front door.
- 68 The application must be refused and I so order.