

Erythos Holdings Pty Ltd [2015] SALC 34

LICENSING COURT OF SOUTH AUSTRALIA

ERYTHOS HOLDINGS PTY LTD

JURISDICTION: Application for Retail Liquor Merchants Licence

FILE NO: 3703 of 2015

HEARING DATE: 7, 8, 9 and 23 July 2015

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 9 September 2015

*Application for a retail liquor merchant's licence - Whether the licensed premises that already exist within the locality 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 satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - **Held** that the public interest does not require the refusal of the application in the exercise of the Court's discretion - Given that the application was based on a very specific footing conditions on the licence should be imposed to ensure that the nature of the business to be conducted under the licence conforms with representations made to the Court - Ss 43, 53, 57 and 58 Liquor Licensing Act 1997*

Pharmacy Restructuring Authority v Chatfield [1993] FCA 348

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

Cufone v Harvey (1986) 40 SASR 261

BWS – Mount Gambier [2013] SALC 82

BWS – Seaford [2015] SALC 19

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

Liquorland (Islington North Shopping Centre) [2013] SALC 64

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC with Mr I Rice

Respondent: Mr J Firth with Mr C McEwen

Solicitors:

Applicant: Griffins Lawyers

Respondent: Wallmans Lawyers

- 1 This is an application for the grant of a retail liquor merchant's licence.
- 2 The applicant, Erythos Holdings Pty Ltd, seeks the licence in respect of premises in Port Pirie. The proposed premises are on the corner of Kingston Road and Golding Street, Risdon Park.
- 3 For now the site upon which the proposed premises are to be developed comprise of a small butcher, a mini mart and a vacant tenancy. In their present form, apart from the butcher shop, they are quite run down and not particularly attractive.
- 4 The applicant owns the site. It proposes a redevelopment that will see the butcher remain; a modern well stocked retail liquor store trading under the Cellarbrations badge in the area which presently comprises of the mini mart; an IGA supermarket; and a takeaway food facility store operating within part of the site that is presently vacant.
- 5 To succeed in this application the applicant needs to satisfy the Court that the pre-requisites of ss 57 and 58 of the *Liquor Licensing Act 1997* have been met and that in the exercise of the Court's discretion¹ that the licence should be granted.
- 6 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.
- 7 None of these matters are at issue in this case.
- 8 What is in dispute is whether pre-requisites provided by s 58(2) have been met and whether in the Court's discretion the licence should be granted.
- 9 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.”

¹ Section 53 of the Act provides that 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 and that an application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.

- 10 This case was argued from the premise that the relevant locality is the whole of the township of Port Pirie. I agree and I approach my assessment of this application accordingly.
- 11 The application has drawn objections from the licensees of three of the hotels in Port Pirie, the Central Hotel,² the Sportsman Tavern³ and the Risdon Hotel.⁴
- 12 The hearing was conducted over several days in Port Pirie and Adelaide. Whilst in Port Pirie, the Court, in consultation with the parties, drove and walked around Port Pirie and inspected various premises and sites. The Court's notes of this were distributed to the parties' advisors and their comments were noted.
- 13 The observations made herein about Port Pirie and various places within it are either uncontroversial or reflect the observations of the Court as advised to the parties.

Port Pirie

- 14 Port Pirie is a moderately large rural city in South Australia, about 220 kilometres north of Adelaide. It comprises of the southern point of the Spencer Gulf triangle, with Port Augusta to the north and Whyalla to the east. It is about five kilometres west of National Highway 1, such that it is a destination town. It is linked to that highway by Warnertown Road which, as it moves west becomes Main Road, which in turn abuts the Pirie River, a tidal saltwater inlet from Spencer Gulf. That road marks the eastern/northern boundary of the city.
- 15 The Port Pirie Town Centre is the city's core administrative and retail area. It is wrapped around Main Road/Ellen Street. To the west is Port Pirie West. To the south-east is the suburb of Solomontown. At the mid-point between Port Pirie Town Centre and Solomontown is a major road, Three Chain Road. It runs from north to south. As it travels south it goes through the suburbs of Port Pirie South and Port Pirie East and then becomes Spencer Highway and ultimately links up with the townships of Port Broughton and Wallaroo.
- 16 South of Port Pirie West are the suburbs of Risdon Park and Risdon Park South. They contain a number of relatively new allotments, some containing completed houses, some under construction, and a number still to be developed. Most of the residential development in Port Pirie is occurring in and around the general vicinity of these suburbs.

² The licence is owned by Chelsea Bay Pty Ltd, MJ Lunnis Pty Ltd and Magwes Holdings Pty Ltd.

³ The licence is owned by Karen Bay Pty Ltd and Magwes Holdings Pty Ltd.

⁴ The licence is owned by Risdon Pty Ltd.

- 17 The whole of Port Pirie is relatively easy to negotiate by car. There is very little congestion on its roads and it only has two sets of traffic lights.

Licensed premises in and about Port Pirie and notable landmarks

- 18 The Town Centre contains a number of retail outlets, cafes and the like. It has a large Woolworth's supermarket and adjacent to that is a BWS liquor store. It has a large off street car park. It is about four kilometres from the proposed premises.
- 19 Like many country towns Port Pirie has an abundant supply of hotels. As Main Road travels north it becomes Ellen Street. Located on Ellen Street are three hotels, the Portside Tavern, the International Hotel/Motel and the Family Hotel. None offer takeaway liquor.
- 20 About half a kilometre west of and parallel to Ellen Street is The Terrace. Located on The Terrace is the Federal Hotel. It does not offer takeaway liquor.
- 21 Halfway between the Terrace and Ellen Street is Florence Street. Located at the junction of Florence Street and Alexander Street is the Central Hotel. It has a takeaway facility trading under the Sip N Save badge. The facility comprises of a typical drive-through and an adjacent walk-in bottle shop. The drive through has two lanes in the same direction. This facility also sells takeaway chicken. It is a little over four kilometres from the proposed premises.
- 22 About a kilometre south west of Ellen Street is the Risdon Hotel. It has a takeaway facility trading under the Thirsty Camel badge. The facility comprises of a typical drive-through and an adjacent walk-in bottle shop. The facility has a large cool room. It is surrounded by a large car park. In the car park are two containers that are used for storage and a large shed also used for storage. It is a bit over two and a half kilometres from the proposed premises.
- 23 On Warnertown Road, Solomontown is the Sportsman Tavern. It has a takeaway facility trading under the Sporty Liquor badge. The facility comprises of a typical drive through and an adjacent walk-in bottle shop. It is surrounded by a large car park. It also has another block of land currently used as an additional hotel car park on the corner of Burt Street directly opposite the hotel property, and adjacent to a house property also owned by the hotel. It is a little over four kilometres from the proposed premises.
- 24 A second commercial zone is situated in Centro Port Pirie, a shopping centre situated about one kilometre south of Main Road and about one kilometre west of Three Chain Road within Port Pirie South. It is a modern shopping complex anchored by a Coles supermarket and a

K-Mart Discount Department Store. It contains a variety of other smaller shops, including a BWS liquor store. It has a large off street car park containing a Coles Express Shell Service Station. It is about three kilometres from the proposed premises.

The evidence

25 I now turn to discuss the evidence in support of this application. I commence with the applicant's evidence.

Allan McMillan

26 Mr McMillan is one of the directors of the applicant. His wife Gaye is the other director. He is aged 62 years. He resides in Adelaide. He and his wife previously lived in Tasmania. They originally came from New Zealand.

27 He is a builder by profession undertaking commercial and domestic developments.

28 For a time in the mid-80s he and his wife owned and operated an IGA supermarket in New Zealand. In two years they doubled its turnover and then sold it for a profit.

29 He said that the applicant purchased the subject site in 2006. He saw a long term potential to buy the shops and to develop them. Since their acquisition he had noted a lot of housing development to the south and to some degree to the south-west and south-east of the site.

30 Since buying the site he had spent about twelve months in Port Pirie.

31 Within the next two months he and his wife intend to shift to Port Pirie more or less permanently. He said that the current lease on the mini mart expires on 24 August 2015. There will be no renewal of the lease.

32 He said that the vacant shop will be developed into a takeaway food outlet. His daughter is a qualified chef. She has recently taken a redundancy package and it is proposed that she will manage the takeaway.

33 He has obtained development planning consent from the local council to develop the site. He plans to commence the redevelopment by the end of the year.

34 He thought that the re-build would take about four months to complete.

35 In terms of the IGA, the proposed building area is 489.5 square metres with a retail floor area of about 450 square metres. He intends to find someone to manage that store.

- 36 In terms of the proposed premises he and his wife intend to manage it and operate it along with staff. They intend availing themselves to the assistance that the Cellarbrations group have on offer.
- 37 He said that he and his wife were involved in the preparation of the proposed stock list for the proposed premises. They wanted to increase the offerings of local Clare Valley and Southern Flinders Ranges wines. They contacted a lot of the wineries themselves and secured much interest.
- 38 He understood that within the Cellarbrations framework he was able to order in special requests made by customers and he intended to do that.
- 39 He sees this project as very important in terms of he and his wife's long term retirement plans.
- 40 He explained how the idea of the store materialised. Having owned and operated an IGA in New Zealand they contacted IGA here. They in turn went to Port Pirie and did their own demographics, surveys and the like. They suggested that it was a good development and at the same time suggested that there was an opportunity there for a liquor outlet, which confirmed what he and his wife had already been thinking. They did so because there was not a lot on offer in that particular area.
- 41 In terms of what they plan to offer they want to have a point of difference with the other local facilities.
- 42 He said that their vision was to create a community hub where there would be a butcher, a takeaway, a liquor outlet and an IGA grocery store. He said that there was a pharmacy nearby.
- 43 He said that the IGA would be much smaller than the larger supermarkets. He intended the IGA store to have a wide range of groceries. He spoke of the current IGA policy of matching the price of the larger supermarkets and of its success.
- 44 He said that the development of the site and the creation of an IGA store was not contingent on the success of this application and would proceed anyway.

Paul Tisato

- 45 Mr Tisato is the General Manager of Australian Liquor Marketers Pty Ltd (ALM). ALM is a liquor wholesaler that supplies liquor across the whole range of licensed premises. It is a division of Metcash Ltd.

- 46 One of ALM's subsidiaries, Independent Brands Australia (IBA) manages the marketing and promotion of ALM's retail brands, one of which is the Cellarbrations brand.
- 47 Mr Tisato said that he was involved in the promotion of a Cellarbrations store at the proposed premises. He said that he drove around Port Pirie and noted a real distinction between the southern areas and the rest of the town. He described newer substantial homes and well-kept gardens. This led him to conclude that people living in and around the proposed premises would be demanding a range of liquor items that was not currently available in Port Pirie.
- 48 He thought that a Cellarbrations store along the lines of some Cellarbration stores in Adelaide would do well at the proposed premises.
- 49 He said that the core Cellarbrations range is only about 400 products and that the balance of the range is tailored to the particular market in which the store operates. In some instances this can involve a focus on local wines. He said that a similar approach was taken in respect of the proposed premises and that the proposed stock list is focused on wines from the Clare Valley and the Southern Flinders.
- 50 He said that in respect of premium wines the Cellarbrations range was significantly better than the offer at a BWS store. He described the BWS store at Port Pirie Centro as a C grade store and the BWS store in the town Centre as a B grade store. His evidence about that was not challenged.
- 51 He said that the proposed stock list for the proposed store would result in an improvement of availability of a broader range of liquor than that which is currently available at the BWS stores in Port Pirie and at the other takeaway facilities in the town.
- 52 He is familiar with the IGA style of supermarket. IGA stores form part of the Metcash Food and Grocery division of Metcash Ltd and he gained knowledge of their means of operation through that connection.
- 53 He envisaged the proposed IGA store would offer fresh fruit and vegetables, meat, bread, and all the general grocery lines. He expected that it would attempt to be different to what is currently on offer in Port Pirie.
- 54 He spoke of the viability of the proposed premises. He thought it has an excellent chance of being a thriving bottle shop. He said that the breakeven would be around \$25,000 retail a week. His expectation was that within six months the shop would be averaging about \$30,000 a week.

- 55 It seems that ALM had identified that a Cellarbrations store would work in Port Pirie and as a result, he had previously investigated the possibility of the takeaway facility at the Sportsman's Tavern as being a site for a Cellarbration store in Port Pirie.
- 56 He was asked to comment on the takeaway facilities at the various hotels in Port Pirie. In his opinion whilst they were in competition with each other, he regarded the BWS stores as focussed towards a different market. He described the hotels as "blokey". He said stand-alone bottle shops adjacent to supermarkets have a massively higher proliferation of female shoppers than a drive-through bottle shop. He said that he envisaged a Cellarbrations store in Port Pirie as being in competition with the BWS stores, not the hotels.

Angela Meaney

- 57 Ms Meaney is a winemaker. She lives in Clare. She makes wine for Bundaleer Wines, a boutique winery located in the Southern Flinders wine region.
- 58 She said that Bundaleer makes a variety of wines including a premium shiraz cabernet blend.
- 59 Very recently they have started to sell some of their wine through the Sportsman Tavern through a contact with someone at the Eureka Group. She said that the Central Hotel also stocks some Bundaleer wine.
- 60 She said that they would not even attempt to try to get into any of the BWS stores anywhere in Australia or any of the Coles or Woolworths branded stores. In her view they did not look particularly fondly on small brands.
- 61 She understood that the proposed premises would stock the full range of Bundaleer wines. She said that a lot of Cellarbrations stores in Adelaide stock their wines.
- 62 I now set out the evidence of the so called needs witnesses.

Raymond Phillip Allen

- 63 Mr Allen is a production supervisor. He lives in Risdon Park with his wife and two of his three children, the third having moved to Adelaide. He has lived there for nine years.
- 64 Although he lives in Port Pirie, he works in Whyalla. He works a five and four day shift roster, such that when he is at home he is there for four to five days.

- 65 He spoke of the changes to Risdon Park. He said that since he moved there about fifty to sixty new dwellings had been erected and that there was further development in the area to east of his house. He described it as a “good little neighbourhood”.
- 66 In terms of shopping he uses the mini mart and butcher that are situated on the site of the proposed premises and the Centro Port Pirie, which is about five minutes away by car. He said that for now the only shopping he does at the mini mart is for small things like bread and milk. He does his main shopping at the Coles at Centro Port Pirie. He goes there about two or three times a week.
- 67 He said that it would take him about eight minutes by car to travel to the Town Centre.
- 68 For now he buys takeaway liquor from the drive through at the Risdon Hotel. He mainly buys pale ale. He said that the Risdon hotel sold it at very competitive prices. He said that it is a great little pub. He likes the Thirsty Camel loyalty program. His only criticism of the Risdon Hotel was that the takeaway facility was a drive-through, it was difficult to browse and in terms of range on things like spirits and wine, it was limited. If the opportunity were there he would like to contemplate trying and purchasing different beers such as craft beers.
- 69 He said he likes IGA stores. He said that he would use the proposed IGA. He expected that his wife would use it a few times a week. He said that he would use the Cellarbrations store if this application succeeds.
- 70 He said that a lot of his wife’s friends are wine drinkers. They would use the proposed facility to purchase wine.
- 71 He spoke of the range of retail facilities that are currently conveniently available in Port Pirie. He thought that BWS has a fair monopoly, they predominately stock their items, and in that sense their range was limited.
- 72 He said that if the proposed facility stocked a range of Southern Flinders Ranges and Clare Valley wines that would be something that he and his family and friends would be attracted to.

Donna Coad

- 73 Ms Coad is a carer, working for an aged-care group. She effectively lives next door to the proposed premises. She has lived in Port Pirie for some 63 years.
- 74 She and her late husband owned the Risdon Hotel. He also owned the Portside Tavern and the Port Broughton Hotel. She has much experience

in the hospitality industry. She worked at the Risdon Hotel for many years. She witnessed the closure of a number of the retail takeaway liquor facilities in Port Pirie.

- 75 She spoke of the optimism of the town and its belief that through, Nyrstar, an international company that has taken over and is in the process of redeveloping the Port Pirie smelter plant, it had a future.
- 76 She said that there is significant development occurring resulting in a number of younger people building new homes. She described them as: “Legoland”. She said: “It’s just booming out there.”
- 77 She was asked about the existing retail liquor facilities available in Port Pirie. She said that whilst the BWS stores were fine it was her view that people who lived in her area and to the south should be able to have something closer to them. She said; “we should have that availability to be able to go to the corner supermarket with its liquor store, with its post office, with its butcher shop and shop there.”
- 78 She also mentioned that there were a lot of older people who lived near her who would prefer to avoid driving and parking in the other shopping venues.
- 79 She complained about the adequacy of the bus service in Port Pirie. She said that to take a taxi from her place to the city costs \$18 each way. She said that her daughter lives further away and it costs her \$30 each way by taxi.
- 80 She said that she intended to use the proposed IGA store all the time. She expected others who lived in her area would do the same.
- 81 She described her particular liquor needs. She likes to have beer and red and white wine available for her guests and family. Her partner is German and she seeks out a German sparkling wine known as “Henckell”. She said that the BWS stores offer a set range. She would like to be able to go to a local liquor store and ask them to get Henckell in for her. She also likes making cocktails with Vok liqueurs. She said that BWS stores stock their own brands of liqueurs and do not have Vok liqueurs available.
- 82 She expected to be able to purchase the Vok brand through a Cellarbrations store.
- 83 She inspected and was favourably impressed by the proposed stock list for the proposed premises.

Rohan Voumard

- 84 Mr Voumard is a TAFE lecturer in carpentry. He lives a short distance north of the proposed premises. He has lived there for the past nineteen years. He has lived in Risdon Park all his life.
- 85 In his work he travels to Balaclava on Mondays and Clare on Tuesdays. Otherwise he works in Port Pirie.
- 86 He spoke of the changes to Risdon Park over the period that he has lived there. He said that there had been a lot of housing development. He thought it was a very good neighbourhood with a good mix of elderly couples who had lived there for some time together with younger people, moving into the area and buying houses.
- 87 He said that what the neighbour lacked was shops. He said that the proposed IGA supermarket would change his shopping habits. Instead of visiting Centro Port Pirie, he would shop locally.
- 88 He said that the addition of a bottle shop would suit him down to the ground. He said “Instead of jumping the car and looking around for what specials are around; something that close would be ideal, especially if they’ve got what I like in their selection.”
- 89 For now he purchases takeaway liquor from the BWS store at Centro Port Pirie as part of his trip to the Coles store there.
- 90 He reflected on the takeaway liquor facilities at Port Pirie in the past. He said that the bottle shops were always good; they had a good range and were family-owned. He said that they all had different brands and a variety of wines, spirits and beers at reasonable prices.
- 91 He said that these days there is not as much choice.
- 92 He inspected and was favourably impressed by the proposed stock list for the proposed premises. He said; “I would be very delighted to walk-in that store and grab a bottle of wine any day. I would have no worries picking one out and not walking out empty-handed.” He thought it offered a much better selection than the BWS at Centro Port Pirie.
- 93 He was asked about his use of the local hotels. He said that he would shop at the Risdon Hotel to buy beer at the right price, because he worked just around the corner. He had looked inside the bottle shop there but thought it had very few selections. He thought the Sportsman Tavern was much the same.
- 94 He agreed that if this application fails he will continue to buy most of his liquor from the BWS at Centro Port Pirie.

Matthew Richard Ganley

- 95 Mr Ganley is a real estate agent. He lives in Port Pirie. He has lived there for fifteen years. Prior to that he lived in Whyalla.
- 96 In his capacity as a property manager he manages the applicant's property.
- 97 He spoke of his time in Port Pirie over the last fifteen years. He said that there were more bottle shops, one of which was within thirty to forty metres of where he lived.
- 98 Drawing on his knowledge as a real estate agent he spoke of his observations about the development of Port Pirie. He said that the area south of the proposed premises was the one area of Port Pirie that had developed.
- 99 He said that most of the western side of town is a coastal reserve subject to flooding and is therefore unsuited to development. He said that the area to the north had issues arising out of the smelter, such that the lay of the land meant that development was essentially confined to the south and the east.
- 100 He said that a lot of new houses have recently been erected in those areas. He said that in light of the growth in the southern area of Port Pirie, as an estate agent, he would have expected that there would be more facilities to service to that population than is presently the case. He said that for now "there's pretty much nothing".
- 101 As such, he expected that the proposed IGA store and the proposed premises would do very well. He said that there is a higher concentration of owner occupiers in that area compared to the many rental properties in Port Pirie West and Solomontown.
- 102 He was enthusiastic about the prospect of a bottle shop promoting local wines. He said that Port Pirie is sometimes stigmatised because of its blue-collar nature and that it would be good to give examples of other nearby wineries and the like.
- 103 He inspected and was favourably impressed by the proposed stock list for the proposed premises.
- 104 I now turn to the evidence of the planners.

Jeffery Smith

- 105 Mr Smith is a planning consultant.

- 106 He noted that there is a bus service that operates in Port Pirie passing through the suburbs in a clockwise direction, returning in a counter clockwise direction over a thirty minute journey limited to 6.50am to 5.40pm Monday to Friday and 9.00am to 11.40am on Saturdays.
- 107 He noted that population growth in Port Pirie has in recent years been low. He said that the number of dwellings without cars was relatively high, being 13.11% compared to a State average of 8.73%. He said that the southern suburbs of Port Pirie have a significant component of State housing. He said that in Risdon Park South there is a high percentage of rented accommodation. He said that Port Pirie South is a significant area of private housing.
- 108 He analysed incomes and concluded that for the residents of Risdon Park South their median weekly household income was much higher and the portion of income spent on mortgage repayments was relatively much smaller than for the residents of Risdon Park and Port Pirie South.
- 109 He said that the age cohorts for the 30 through 64 age bracket in Risdon Park South was in percentage terms higher than corresponding cohorts for Port Pirie as a whole.
- 110 He thought that the upgraded development would have the characteristics of a large local centre or a small neighbourhood centre.

Graham Ashley Burns

- 111 Mr Burns is a planning consultant.
- 112 He said that for planning purposes there was a hierarchy of the zones, comprising of a regional centre, a neighbourhood centre and a local centre. In Port Pirie the regional centre is the centre of the town near the river and the smelters. The neighbourhood centre comprises of Centro Port Pirie.
- 113 As to the local centres, in his view, the site on which the proposed premises are to be built fell within that category.
- 114 In his view, in considering what the local catchment area or the primary catchment area of that centre might be, consideration needs to be given to the proposed convenience store as well as the road pattern.
- 115 This led him to conclude, based on the 2011 census that the catchment area comprised of no more than 4770 persons. He described that as pretty small.
- 116 He was asked as a planner to express his opinion of the difference between a convenience store and a supermarket.

- 117 He said that supermarkets are not convenience stores. They might provide a convenience by way of facility, but that is all. In contrast, a convenience store is all about convenience and is usually a much smaller store.
- 118 He said that he expected that people living in outlying towns would use Port Pirie as their major shopping destination.
- 119 He expected that they would do their shopping in the Town Centre or at Centro Port Pirie and that they would travel to Port Pirie through the main roads and by inference have access to the takeaway liquor facilities on or near those roads.
- 120 He accepted that based on the 2011 census the suburb of Risdon Park South housed about 2,000 people and that this was about 15% of the population of Port Pirie.
- 121 Finally, I turn to the evidence of the objectors.

Michael Lunnis

- 122 Mr Lunnis is the Group Manager for the Eureka Hotel Group. He has worked in the hospitality industry for about 30 years.
- 123 He said that the Eureka Hotel Group currently owns and operates sixteen hotels in South Australia as well as others interstate. A number of its hotels have been the subject of extensive rebuilding and refurbishment.
- 124 It has operated the Central Hotel in Port Pirie for about five years. Upon acquisition it undertook a total demolition and revamp of the hotel. It now comprises of a modern bar and gaming room, an outdoor dining area and a drive-through and a walk-in bottle shop
- 125 The Group purchased the freehold and leasehold of the Sportsman Tavern in September 2014. To date it has done very little to that hotel and for now it has a fairly basic stock list in its bottle shop.
- 126 He said that the Group saw the Sportsman Tavern as a redevelopment opportunity. When it negotiated to buy the Sportsman Tavern it made enquiries about some adjacent properties. It placed a condition on its offer that it would only proceed, if it were able to purchase a site adjoining the hotel car park on Burt Street. That subsequently occurred.
- 127 Since taking over the hotel the Group has initiated plans to redevelop the hotel, including provision for a large bottle shop. This has been the subject of ongoing issue with the Port Pirie Council. He said that the Group is now intending to bypass Council by seeking planning approval from the Development Assessment Commission.

- 128 He said that the Group planned to substantially increase the range of takeaway liquor on offer at the redeveloped bottle shop. He said that it will include a wine club that will meet regularly and have regular offers in wine tastings.
- 129 He said that it was exploring the establishment of a new online facility for the region and that it made sense for it to have this facility as the hub for that concept. He said that online purchasing was the future and that this was an area that that the Group needed to be in.
- 130 He maintained that at the time of buying the hotel and deciding upon the plans that it put in with council in November 2014, the Group was unaware that the applicant intended to apply for a retail liquor merchant's licence for the proposed premises.
- 131 He spoke of some plans in connection with the Central Hotel.
- 132 In February 2015 the Group obtained approval from the Port Pirie Council to expand the bar, dining, and gaming facilities at the Central Hotel at the expense of the bottle shop. That approval has a twelve month time limit on it. The plans were lodged at the same time the Sportsman's plans were lodged. He said that the decision to proceed with the proposed changes to the Central Hotel was contingent on the Sportsman application being approved. He said that as that approval had been delayed nothing had happened at the Central Hotel and that its bottle shop remains and will do so until further notice.
- 133 He said that the Group's Port Pirie hotels carry the Vok range of liqueurs and that they carry Bundaleer Wines.
- 134 He was asked about a previous occasion when he gave evidence in this Court on behalf of the Group. The case concerned an application by the Group for a retail liquor merchant's licence in respect of premises at the Northgate Shopping Centre to be known as Northgate Cellars. On two earlier occasions Woolworths had unsuccessfully applied for such a licence at that shopping centre. Mr Lunnis gave evidence, which was accepted by this Court, to the effect that the proposed outlet would have a larger range, particularly at the premium end than typical convenience outlets. That evidence was pivotal in the Court's acceptance of the need for the licence.
- 135 Judgment was delivered on 30 June 2005. Within a few months of securing the licence the Group sold the licence to Woolworths.
- 136 He acknowledged that the Group was proposing a very significant and substantial range of premium wines at the Sportsman Tavern to meet an unmet demand for those products in Port Pirie.

Antony Harnett

- 137 Mr Harnett is one of the four directors of the company Risdon Pty Ltd, the licensee of the Risdon Hotel.
- 138 He and his father have an interest in the Kingsford Hotel in Gawler. He said that they had carried out significant renovations at that hotel since acquiring it in 1999.
- 139 He spoke of plans for substantial redevelopment at the Risdon Hotel. These include the relocation, enlargement and modernisation of the drive-through and walk-in bottle shop.
- 140 He said that his company purchased the Risdon Hotel in 2005 and set about making some internal renovations, focussing on the bistro, gaming, and bar areas.
- 141 He said that these initiatives had improved sales and reduced costs.
- 142 In more recent years the company had concentrated in reducing debt but it was now poised to continue with its redevelopment. This was partly motivated by the Eureka Group's acquisition of the Sportsman Tavern and the expectation that the Group would redevelop that facility. He said that it presents quite a significant commercial threat. He said:
- “The Risdon and the Sportsmans Tavern are the two big competitors in town from a drive-through point of view and, you know, we're basically competing against them. We see them as our biggest competitor.”⁵
- 143 He said that it was this and not the within application that had prompted the decision to redevelop. He said that even if the applicant withdrew this application this project would still proceed. He said: “The threat to our business is coming from the Sportsmans Tavern and that's the one we're concerned about.”⁶
- 144 He spoke of increasing the stock levels to compete with the Sportsman Tavern and the BWS outlets increasing the available red wines to 300 stock lines and white wines to at least 200.
- 145 He spoke of an attempt in November 2011 to promote the sale of quality wines at the Risdon Hotel. He said that the result was disappointing. He said they only sold about a dozen bottles of wine.
- 146 He said that he did not see the need for an additional bottle shop in Port Pirie. He thought that the two BWS outlets were well located and carry

⁵ Tr 179

⁶ Tr 187

very good ranges of products and are meeting the needs of the shopping community. He thought that they and the drive-throughs at the Sportsman Tavern and the Risdon Hotel are meeting the community's needs, albeit he recognised that the takeaway facilities at both hotels needed upgrading.

The parties' submissions

- 147 I was taken to judgments of this Court that reveal that in the early 1980s there were five independent bottle shops in Port Pirie selling takeaway liquor and that each was sensibly sited in parts of the city where they could most effectively serve the local resident public. Since then two of the bottle shops have become the BWS stores that I have identified earlier and the others have ceased to exist.
- 148 The applicant contended that I should find that the growth of population of Port Pirie has been relatively static and if anything there has been a small increase since the census in 2011. It said that this population is disadvantaged in terms of takeaway liquor purchasing because of a lack of competition.
- 149 It submitted that the situation was compounded by the fact that there had been a population growth in the southern area with no stand-alone facility available to that section of the public, short of the BWS stores in the northern areas of Port Pirie, the most southern being in Centro Port Pirie.
- 150 It said that in 2011 in excess of 2000 people lived in Risdon Park South and that that population is clearly growing.
- 151 It submitted that what was being proposed here was a significantly better facility than what it described as the B and C grade BWS stores in Port Pirie.
- 152 It submitted that in considering this application I ought to have regard to the fact that a new supermarket adjacent to the proposed premises will be constructed. Reference was made to a decision of the Federal Court in *Pharmacy Restructuring Authority v Chatfield*⁷ where in connection with determining the need for a new pharmacy the court endorsed the approach of the Administrative Appeals Tribunal in considering that the fact that a shopping centre had been approved and was going to be constructed was a relevant consideration. French J (as he then was) said:

“A need is public if it is a need of a public character. A present need of a public character may be demonstrated by showing the

⁷ [1993] FCA 348.

proposed pharmacy will meet projected expectations and demands within a reasonable time frame.”⁸

- 153 It submitted that although those living in and about Risdon Park South are clearly having their liquor needs met, I ought not find that they are contented with the existing facilities.
- 154 It submitted that if the Risdon Hotel redevelopment goes ahead that change is likely to be directed towards the size and accessibility of the drive through and bottle shop as opposed to the range.
- 155 As to the planned redevelopment at the Sportsman Tavern, it submitted that it reveals that there is an unmet market for a better range of premium products. I was asked to reflect on the evidence of Mr Lunnis in respect of the Northgate Cellars case. There was no suggestion of any impropriety but it was said that this evidence illustrates how quickly, in business, things can change with a view to asking the Court to be cautious in taking into consideration the Group’s plans in connection with the Sportsman Tavern. It was suggested that the change of plans in respect of the Central Hotel illustrated the same point.
- 156 It acknowledged that this application could not be based on the premise that it would lead to one-stop shopping because a full range of goods and services would not be available at the new centre. It was, however, submitted that what was proposed was a substantial retail facility.
- 157 It submitted that the people of Risdon Park South will be able to do most of their grocery shopping there; get takeaway food; have access to a butcher next door; a pharmacy just up the road; and they ought to be able to and would expect to be able to buy their liquor there.
- 158 It submitted that the Full Court of the Supreme Court had, in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors*⁹, significantly relaxed the test of “adequately catered for” as it appears in s 58(2) and now requires the Court to give weight to contemporary community expectations.
- 159 It submitted that it would be a significant advantage to the local community to have a liquor store next to a corner supermarket and a butcher and takeaway. It was said that the common theme from the needs witnesses was: “it’s about time we have some infrastructure here.”
- 160 The objectors contended that since the 1980s, at a time when Port Pirie had five stand-alone bottle shops, its population had declined. They took me through some of the history of litigation concerning Port Pirie’s bottle shops that suggests that it may have had a population of the order

⁸ Ibid at para 26.

⁹ [2015] SASFC 72,

of 17,000, whereas at the present time the population is down to about 14,000.

161 They submitted that this population is being serviced by two modern, well laid out and stocked, conveniently located liquor stores in shopping centres, supplemented by three hotel drive-through bottle shops.

162 Next they said that the application is premature. They referred me to *Cufone v Harvey*¹⁰ where King CJ spoke of the question being whether a present, as opposed to a future need, had been established.

163 Mr Firth, counsel for the objectors, said of the proposed supermarket:

“You build it, and then see who uses it, for what and how often; how far people are travelling, and at that stage, look and see what the existing liquor facilities then are. By then, the Sportsman’s and Risdon developments may well have approval and be up and running.”

164 He said that then the Court could make the assessment as to whether the proposed premises were necessary to meet an unmet need.

165 The objectors accepted that it would be very convenient for those who live near or within a short driving distance of the proposed premises to have a bottle shop on Kingston Road; but submitted that I cannot approach this case on the basis of one stop shopping. They contrasted the proposal here to the successful application in *BWS – Mount Gambier*¹¹ in which Woolworths Ltd secured a retail liquor merchant’s licence for a bottle shop in the recently constructed Mount Gambier Market Place.

166 They asked me to note that in contrast to the situation here the shopping centre in that case had been built. It was already servicing the northern Mount Gambier residents. It was very large shopping centre comprising of a modern very large supermarket, a very large Big W, a very large Master’s Hardware store, a service station and some 33 specialty shops.

167 They asked me to note that Mount Gambier is much bigger than Port Pirie and had substantial increases in population, including tourist population.

168 They said that the situation here akin to the situation *BWS - Seaford*¹², where Woolworths Ltd failed to obtain a retail liquor merchant’s licence in respect of premises in the Seaford Meadows Shopping Centre.

¹⁰ (1986) 40 SASR 261

¹¹ [2013] SALC 82

¹² [2015] SALC 19

- 169 They submitted that like here, it was not a one stop shop case; that the roads involved were not busy; and that car travel was easy. They said that like here, the times and distances to travel to existing facilities were not great by contemporary standards; and that an extra three minutes or more to travel to a larger shopping centre that had a bottle shop did not amount to an inadequate catering for a demand.
- 170 They submitted that in any event in the exercise of the Court's discretion the application should be refused.
- 171 They submitted that there already is in existence a genuine and serious bottle shop redevelopment proposal from the Sportsman Tavern, conceived well before and quite independently of the applicant's application. They said that this proposal would serve an unmet need for a better range and that this constituted a sufficient ground to refuse the application.

Consideration

- 172 I commence with some general observations about the witnesses.
- 173 I found Mr McMillan to be an impressive witness. I accept his evidence.
- 174 Ms Meaney's evidence was uncontroversial and unchallenged and I accept it.
- 175 I thought that Mr Allen, Ms Coad, Mr Voumard and Mr Ganley were doing their best to help me. I did not get the sense that in respect of their evidence that there were any credit issues of any moment.
- 176 I thought that Mr Tisato was generally impressive, although perhaps at times he seemed a bit self-serving and partisan. I thought the same was true of the evidence of Mr Lunnis and Mr Harnett.
- 177 I did not get the sense of any major differences between the two planners.
- 178 I now make a general observation about the law. The citation of past authorities from this Court is important because the Court should strive for consistency. That said, each case will turn on its own facts. Moreover, an application for a retail liquor licence requires the Court to make "a normative judgment about contemporary expectations of accessibility",¹³ and an "assessment of contemporary community

¹³ *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* [2015] SASFC 72 at para 47.

standards.”¹⁴ Thus, what might have been decisive in an earlier case at an earlier time might not necessarily hold true at a later time.¹⁵

179 I find that the applicant intends to develop the site upon which the proposed premises are to be located in the manner described by Mr McMillan. I find that regardless of the fate of this application that redevelopment will occur. I find that Mr and Mrs McMillan will proceed with the establishment of an IGA supermarket and a takeaway food facility. I find that if this application is granted the applicant will operate the proposed premises and endeavour to stock it as Mr McMillan described.

180 I find that within Port Pirie there is at present an unmet need for a better range of premium liquor than is currently on offer. That accords with the studies undertaken by Metcash. It accords with the evidence of Mr Lunnis. It is consistent with much of the evidence of the needs witnesses.

181 Although I did not get the sense that any of the needs witnesses were particularly unhappy about the way they presently access takeaway liquor it is plain that once the IGA store is trading they,¹⁶ and many like them, will do much of their daily and weekly shopping at the new site and that they would find it very convenient to be able to combine their takeaway liquor shopping with that shopping.

182 I reject the submission that I ought to disregard this because there is a future component about it. The observation of King CJ in *Cufone* must be looked at in context. It was made in connection with anticipated population growth. There is nothing in *Cufone* that prohibits this Court from taking into consideration community expectations of what will be on offer at commercial developments that will, with reasonable certainty, occur.

183 There are some similarities between this case and *BWS - Seaford*. There are, however, some significant differences. In that case there was an adequate freestanding bottle shop just over a kilometre away from the proposed premises and an identical bottle shop to that which was proposed only two kilometres away.

184 The fact that about 2,000 people live in Risdon Park South is significant. Although it was said in the context of a different statutory regime, the

¹⁴ *Woolworths Ltd v Drake Coosit Pty Ltd* [2010] SASC 13; (2010) 106 SASR 146.

¹⁵ As Kourakis J (as he then was) observed in *Woolworths Ltd v Drake Coosit Pty Ltd* “The concept is not a static one.Recent Australian social history shows that facilities which one day are thought to be no more than matters of convenience quickly become, or at least are soon thought to be, necessities.” [2010] SASC 13; (2010) 106 SASR 146 at paras 54 and 55.

¹⁶ Perhaps with the exception of Mr Ganley.

observations made by French J in *Pharmacy Restructuring Authority v Chatfield* about the word “public” are instructive. He said:

“What must be addressed next is the constraint imposed by the word ‘public’ in the phrase ‘definite unmet public need’. The word ‘public’ is here used as an adjective; it describes the kind of need which must be demonstrated. That is to say, the need to be considered is of a public rather than a private nature. So construed, it is not necessary to attach the need to an extended group. It is sufficient that the community which is under consideration is large enough that its need is not able to be characterised as merely private. The threshold size and geographic spread of a group of people necessary to qualify their need for pharmaceutical benefits as a public need is a matter of evaluation.”

- 185 And so it is here. In the expression “the public demand” as it appears in s 58(2), the word “public” is used as an adjective. As with the provision under consideration in *Pharmacy Restructuring Authority v Chatfield*, it is not necessary to attach the inadequately catered for demand to an extended group. It is sufficient that the community which is under consideration is large enough that its need is not able to be characterised as merely private, and that in turn is a matter of evaluation.
- 186 I regard those living in Risdon Park South and beyond as a community large enough so as to be considered, in the relevant sense, the public.
- 187 Although Port Pirie is an easy town to get around the times and distances involved for those living in Risdon Park South to travel to the Town Centre and to Centro Port Pirie are not insignificant. They can involve round trips of at least ten minutes by car (by the time parking is taken into account) and six kilometres or more.
- 188 If this were the only issue it probably would not be enough. But when I weigh it with: the evidence suggesting an older population in Risdon Park South; evidence of a lower than usual car ownership there; a pretty basic bus service that does not operate on Saturday afternoons or on Sundays; a relatively expensive taxi trip to the Town Centre and Centro Port Pirie; an unmet need for a better range of premium liquor; a lack of choice in terms of stand-alone bottle shops; takeaway facilities attached to hotels that are in the form of traditional drive-throughs with small walk-in bottle shops; together with the convenience to this section of the public in being able combine their takeaway liquor shopping with shopping at the IGA store that will be built shortly, I conclude that the pre-requisites prescribed by s 58(2) have been met.
- 189 I now turn to the issue of discretion.

- 190 It is notable that s 53(1) of the Act expressly provides that the Court must not, in exercising its discretion, take into account the economic effect on other licensees in the locality affected by the application.
- 191 Thus, the fact that the grant of this application may have an adverse financial impact upon the objectors is not particularly relevant. That is not to say that it is irrelevant. For the reasons that I explained in *First Choice Liquor*¹⁷ and *BWS-Seaford*¹⁸ if the grant of this application created a significant risk that within this locality the competitive market for the supply of liquor might be compromised because the public ultimately would have less choice than more, that would be a good reason to exercise the Court's discretion to refuse the application.
- 192 But on the basis of the evidence that is not a concern that I have in this case. The evidence in this case and in other cases demonstrates that there is a clear differentiation between the patronage of a stand-alone bottle shop, especially one adjacent to a supermarket, and a drive-through with a walk-in bottle shop attached to a hotel. I think Mr Tisato is right when he says that the proposed store's major competitors will be the two BWS stores.
- 193 Thus in terms of the existing facilities, whilst the grant of this application will have some impact upon the objectors, I suspect that the facilities that will be most affected will be the two BWS stores. There is no hint that the grant of this application will result in the closure of either of those stores. It is notable that Woolworths did not object to the grant of this application.
- 194 Should I refuse the application because the proposed redevelopment of the Sportsman Tavern will result in a takeaway liquor facility that will in large measure deal with the need for a better range of liquor than is presently available in Port Pirie?
- 195 This is a relevant factor and I have considered it. I have, however, concluded it does not warrant the refusal of the application.
- 196 First, this application is not just based on the need for a better offering in Port Pirie. It is also based on offering extra convenience to those residing in the vicinity of the proposed premises. The Sportsman Tavern is a little over four kilometres from the proposed premises. A redeveloped takeaway liquor facility at the Sportsman Tavern will not achieve the convenience that those residing in the vicinity of the proposed premises are entitled to expect.

¹⁷ [2015] SALC 1 at para 217.

¹⁸ [2015] SALC 19.

- 197 Secondly, the plans for the Sportsman Tavern redevelopment are not finalised. In its final form the takeaway facility might end up being a typical a drive-through with an adjacent walk-in bottle shop, albeit with a very good range. This Court has accepted that a proportion of the public do not like purchasing takeaway liquor from a hotel and would prefer to make their purchases from a dedicated retail facility.¹⁹ Thus, even if the proposal goes ahead, the Court cannot assume that it will necessarily result in a facility that many of those who wish to use the proposed premises would, if this application is refused, contentedly use.
- 198 Finally, whilst I am reasonably confident that the redevelopment will at some future time occur, the timing of that redevelopment is a matter of speculation. The change of plans at the Central Hotel shows how fickle the timing of things like this can be.
- 199 I have therefore concluded that the public interest does not require the refusal of the application.
- 200 This case was submitted on a very specific footing, namely a smallish, good quality bottle shop offering a better range of liquor than is presently available in Port Pirie that will also offer extra convenience to those residing in the vicinity of the proposed premises. I would not have granted the application if the proposed premises were not adjacent to a supermarket that I have found will be built shortly. I may well have refused to grant it if what was proposed was a large format store. Given the size of Port Pirie and the slow population growth that it is experiencing, I would have been concerned about risk that over time the grant of the licence in respect of such a facility might result in the closure of some of the takeaway facilities attached to some of the hotels in the locality resulting in the public having a reduction of choice.
- 201 Accordingly I think it appropriate, in accordance with s 43 of the Act,²⁰ to impose a condition on the licence that any application to remove the licence or any application to change the dimensions of the licensed premises must be referred to the Court for determination.
- 202 Counsel is to forward draft minutes of order.

¹⁹*Liquorland (Islington North Shopping Centre)* [2013] SALC 64 at para 14.

²⁰Amongst other thing s 43 of the Act empowers the Court to impose conditions on a licence conditions to ensure that the nature of the business to be conducted under the licence conforms with representations made to it in proceedings for the grant of the licence.