WESTERN AUSTRALIAN REPORTS

[SUPREME COURT OF WESTERN AUSTRALIA (FULL COURT)]

CHARLIE CARTER PTY LIMITED v STREETER AND MALE PTY LIMITED and Another (4) (1991)

Malcolm CJ, Pidgeon and Walsh JJ

11 March, 21 June 1991

Liquor and Licensing — Liquor store licence — Application — Whether licence necessary to provide for reasonable requirements of the public — Liquor Licensing Act 1988, s 38.

The appellant operated a supermarket on premises at a shopping centre in the town of Broome. The appellant applied to the Liquor Licensing Court for a liquor store licence in respect of the supermarket. Section 38 of the *Liquor Licensing Act* 1988 provided that the Court may grant a licence if, having regard to a number of factors, it is satisfied that "the licence is necessary in order to provide for the reasonable requirements of the public for liquor ...". The Court dismissed the application and the appellant appealed on the grounds, inter alia, that the Court erred in law by incorrectly interpreting the phrase "reasonable requirements of the public" and that the decision of the Court on the evidence before it was so unreasonable that the Court could not properly have reached the decision which it did according to law.

Held, allowing the appeal (per Malcolm CJ, with whom Pidgeon and Walsh JJ agreed): (1) In the context of s 38 of the *Liquor Licensing Act* the test of what is "necessary" is in terms of "reasonable requirements". Thus the factual inquiry of the Court is directed at the issue of "reasonable requirements" of the public. The question then is whether the proposed licence is necessary in order to provide for those requirements.

(2) "Necessary" probably means no more than that the licence is "reasonably required" in order to provide for the "reasonable requirements" of the public.

(3) "Reasonable" imports a degree of objectivity and means sensible, not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate.

(4) The requirements of the public in an affected area may be proved by inference from the evidence of a representative sample of a relevant section of the population of the area. It is then necessary to determine whether this subjective evidence of requirements is objectively reasonable. If it is, it is then necessary to determine whether the proposed licence will meet those requirements in whole or in part.

(5) A consideration of inconvenience may be relevant to an evaluation of reasonable requirements but there is no requirement that an application for a licence must show that inconvenience to the public exists or will ensue if the application is refused.

(6) To the extent that the Licensing Court held that in the absence of positive evidence of inconvenience the subjective evidence was incapable of establishing

that there was a reasonable requirement by a significant section of the public to purchase liquor at the applicant's supermarket, the Licensing Court was in error.

(7) On the facts the Court was bound to find that the grant of the licence was necessary to provide for the reasonable requirements of the public.

CASES CITED

The following cases are cited in the judgment:

Buttery v Muirhead [1970] SASR 334.
Carjay Pty Ltd v Target Cellars Pty Ltd (1972) 3 SASR 484.
Coles Myer Ltd v Liquorland Noranda (unreported, Supreme Court, WA, Library No 8267, 28 May 1990).
Costopolous v Petona Pty Ltd (unreported, Supreme Court, WA, Library No 7724, 23 June 1989).
David Jones (Aust) Pty Ltd v Fahey (1989) 50 SASR 323.
Edgecock v Myer Western Stores Ltd (unreported, Supreme Court, NSW, Yeldham J, 2 April 1984).
Lovell v New World Supermarket Pty Ltd (1990) 53 SASR 53.
Shreeve v Martin (1969) 72 SR (NSW) 279.
Silkman v Kendall [1982] 1 NSWLR 133.
Taylor v Toohey [1982] 1 NSWLR 493.
Vine v Smith [1980] 1 NSWLR 261.

The following further cases were cited in argument:

Ruhamah Property Co Ltd v Commissioner of Taxation (Cth) (1928) 41 CLR 148.
Shreeve v Martin (1968) 88 WN (NSW) 580.

APPEAL

P D Evans, for the appellant.

J P Rogers, for the respondent.

Cur adv vult

21 June 1991

MALCOLM CJ. This is an appeal under s 28(2) of the *Liquor Licensing Act* 1988 from a decision of the Licensing Court on 2 August 1990 dismissing an application by the appellant for a liquor store licence in respect of the appellant's supermarket in the Seaview Shopping Centre in Broome.

The Seaview Shopping Centre was described as the only "suburban-style shopping centre" in Broome. It is of the air-conditioned mall design, incorporating the appellant's supermarket and a range of speciality and convenience shops. Broome is a town with a population of between 6,000 and 7,000. The population increased substantially in the 1980s. The town is both a commercial centre and a resort town. The tourist trade has increased significantly in the last 10 years or so. The trade is seasonal and mostly in the winter months. The town enjoys a warm to hot dry winter and a very hot and wet summer.

At the time the appellant's application was heard there were 16 liquor licences in the Broome area. Four of the licences permitted the sale of packaged liquor to the general public. One such licence was held by the first respondent, who is the proprietor of a small independent supermarket at the northern end of the town. A second is held by the second respondent in respect of the Continental Hotel which is also to the north of the appellant's

premises. A third is held by the appellant's parent company in respect of Kennedy's Store, which is located in the northern part of the town known as Chinatown. The fourth is held in respect of the Roebuck Bay Hotel, which is located in the same area as Kennedy's Store. The licences in respect of the two hotels are unrestricted hotel licences which permit the sale of packaged liquor. The licences in respect of the first respondent's supermarket and Kennedy's Store are liquor store licences. There are other hotels in the area which are all the subject of restricted hotel licences which do not permit the sale of packaged liquor, other than to lodgers on the licensed premises. Their market is substantially restricted to bar and restaurant sales for consumption on the premises.

The respondents both objected to the grant of the licence to the appellant. The objections were taken under s 74(1)(a) and (d) of the Act. The first ground was that the grant of the application would be contrary to the public interest. This ground was not upheld by the learned judge. The second ground was that the grant of the licence was not necessary in order to provide for the requirements of the public. This ground was upheld by the learned judge. The notice of appeal is not directed specifically to this aspect of the decision. The relevant findings made by the learned judge are in par 64 of his reasons, which he expressed primarily in terms of s 38(2) of the Act, rather than in terms of the objection in terms of s 74(1)(d). His Honour said:

> "Upon all the evidence, therefore, I find that having regard to each and all of the matters referred to in s 38 the grant of this licence is not necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area. Upon the same evidence I also find that the second ground of objection has been made out. Accordingly, I do not find it necessary to consider the remaining grounds of objection but in case it should be material I would observe that in my opinion the evidence in these proceedings is not sufficient to establish any of those remaining grounds."

The difference between the two provisions is that the word "reasonable" qualifies the word "requirements" in the former, but not in the latter.

The grounds of appeal are as follows:

> "1. The Court erred in law in holding that it was necessary, in order to establish a reasonable requirement of the public for liquor and related services or accommodation in the affected area, that the evidence establish that the members of the public find it inconvenient to purchase their requirements at the licensed premises already existing in the affected area.
>
> 2. The Court erred in law in failing to hold that the convenience that would be afforded to the population of the affected area as patrons of the Seaview Shopping Centre by reason of the grant of the application was necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.
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> 3. The Court erred in law in failing to hold that the convenience that would be afforded to the population of the affected area as patrons of the Seaview Shopping Centre by reason of the grant of the application was a reasonable requirement of the public for the purposes of Section 38(1) of the *Liquor Licensing Act* 1988.
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> 4. The Court erred in law in failing to hold that the evidence of an

'imbalance in the distribution of the licensed premises' within the affected area was evidence that the reasonable requirements of the public referred to in ground (3) above were not presently being met.

5. The decision of the Court on the evidence before it was so unreasonable that the Court could not properly have reached the decision which it did according to law.
6. Upon the facts found by the Court and the other evidence before it the Court could not properly have found that the grant of the application was not necessary to provide for the reasonable requirements of the public in the affected area."

The thrust of the appellants' case is that, on the facts as found by the learned judge, he was bound to find that the grant of the licence was necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area.

The learned judge noted the distribution of the licensed premises in the Broome area which I have described. The four other premises were found to be the following distances by road from the Seaview Shopping Centre:

Roebuck Bay Hotel	1.75 km
Continental Hotel	500 m
Kennedy's of Broome	1.5 km
Streeter and Male Liquor Store	2.0 km

In par 13 of his reasons the learned judge said:

"Pursuant to s 38(2) in considering what the requirements of the public may be, the Court is required to have regard to the population of, and the interest of the community in, the affected area; the number and kinds of persons residing in, resorting to or passing through the affected area; or likely in the foreseeable future to do so and their respective expectations; and the extent to which any requirement or expectation (i) varies during different times or periods; or (ii) is lawfully met by other premises licensed or unlicensed."

In pars 16-20 his Honour said:

"16. The Court heard considerable evidence about the number and kinds of persons residing in the affected area and their respective expectations as the population of the affected area and relatively little evidence of the number and kinds of persons resorting to or passing through the affected area and their respective expectations. Notwithstanding my invitation, the applicant did not seek an order pursuant to s 18 of the Act requiring the operators of those coach lines which service Broome to appear before the Court to give evidence of the number and kinds of persons resorting to or passing through the affected area and their respective expectations. Other than by implication from the evidence of Mr Thompson there was likewise little evidence from which any inference might be drawn about the number and kinds of persons likely in the foreseeable future to reside in, resort to or pass through the affected area.

17. It is, however, plain on all the evidence that tourism in Broome always has been, is and likely will remain a seasonal trade.

18. I accept the submission made for the applicant at the close of the evidence that each of the 14 witnesses called by the applicant stated their requirement of a liquor store within the Seaview Shopping

Centre so as to be able to purchase all their grocery and liquor requirements at one place which would be more convenient to them than the location of the existing licensed premises in Broome. I accept also that of the total of 19 witnesses who gave evidence of their subjective requirements in the affected area to the Court, 13 shopped at the Streeter and Male Liquor Store, seven shopped at Kennedy's Liquor Store, four shopped at the Roebuck Bay Hotel and five shopped at the Continental Hotel. A large number of those witnesses gave evidence at the hearing that if this application were granted, they would cease to patronise the existing premises which presently enjoy their patronage. Other than in respect of the Continental Hotel there was very little evidence from these witnesses to suggest that they expected more attractive prices from the applicant than those presently existing.

19. Their subjective evidence, clearly representative of the population of the affected area, is to the effect that as existing patrons of the Seaview Shopping Centre they would like the convenience of a liquor store at the centre and would patronise such premises. I have no doubt, as the evidence of Professor Nesdale in Exhibits 32 and 33 suggests, that this evidence is representative of a large number of the public in Western Australia in their shopping habits and preferences. I have no doubt that many such people hold the subjective opinion that they should be permitted to purchase liquor, particularly for consumption off the premises, anywhere and at any time they wish. It is not for me to comment upon the policy of the *Liquor Licensing Act* and whether that policy meets the expectations of such persons or not.

20. I am required to determine whether on the evidence the applicant can satisfy the Court that the grant of this licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area having regard to the matters set out in s 38."

The learned judge then noted that the appellant's case was conveniently summarised in par 5 of the written submissions made by counsel. The summary was as follows:

"5.1 The population of the affected area, and the development of residential housing and tourist developments have increased substantially during the 1980s. Between the 1981 and 1986 census, the total population of Broome increased by 2,112 or 57.6 per cent. The visitor component of the population increased by 680 persons or 59.1 per cent and the permanent resident population increased by 1,432 or 56.9 per cent (Thompson, Exhibit 56 at pp 9-17 Appeal Book Volume IV pages 803-812).

5.2 There is evidence of significant population growth in Broome since 1986, including a 55 per cent increase in the number of private dwellings between 30.6.86 and 31.12.89 with the majority of that growth taking place in western parts of Broome close to the Seaview Shopping Centre (Thompson, Exhibit 56 at pp 9 and 13 Appeal book Volume IV pages 804 and 808).

5.3 The Seaview Shopping Centre was developed during the 1980s to provide suburban style shopping facilities for the rapidly increas-

ing permanent resident population of Broome (Thompson, Exhibit 56 at p 17 Appeal Book Volume IV page 812).

5.4 The Seaview Shopping Centre is the only 'one stop' shopping centre in Broome, and it is clear from the evidence that the majority of residents and visitors to Broome, carry out most of their shopping at the Seaview Shopping Centre.

5.5 The existing licensed premises in the affected area are not well distributed throughout the affected area so as to service the population of Broome. More particularly, they are not conveniently associated with the shopping facilities at the Seaview Shopping Centre to permit the integration of the purchase of good and alcohol requirements so as to maximise convenience to the public.

5.6 There is a demand and expectation amongst residents and visitors of the affected area to be able to purchase liquor concurrently with other ordinary daily or weekly shopping requirements.

5.7 There is a requirement and expectation amongst residents and visitors of the affected area to be able to have and use a modern air-conditioned liquor store in a modern air-conditioned shopping centre and to be able to make use of adequate browse facilities. The extremities of heat in summer in Broome reinforce the reasonableness of this requirement.

5.8 The requirements and expectations of the public in the affected area are founded on a desire to purchase liquor in the most convenient manner possible.

5.9 The requirements and expectations have as their most significant element the purchase of liquor and groceries under one roof, in the course of visits to the Seaview Shopping Centre involving one trip, without detours, and involving one movement from a parked vehicle into the carpark surrounding that shopping centre, to the main shopping centre, and back to that vehicle.

5.10 The requirements and expectations are objectively reasonable but presently unsatisfied in the affected area.

5.11 The Applicant's proposal can meet those requirements and expectations.

5.12 By reason of the matters summarised in paragraphs 5.1 to 5.11 the Applicant has satisfied the requirements of section 38 and has also demonstrated that it is in the public interest under section 33 to grant the application."

The learned judge dealt with these submissions as follows:

"22. Against the evidence to which I have referred, I accept the submissions made at pars 5.1 to 5.2 of those submissions. As far as par 5.3 is concerned, I accept that the Seaview Shopping Centre provides suburban style shopping facilities for the permanent resident population of Broome. I accept that the evidence suggests that the population of Broome continues to increase but I do not accept that it is rapidly increasing. In relation to par 5.4, I accept that the Seaview Shopping Centre is the only 'one stop' shopping centre in Broome with the qualification, under one roof. I do not accept that it is clear from the evidence that the majority of residents and visitors to Broome, carry out most of their shopping at the Seaview Shopping Centre. It is plain that there are a number

of retail facilities, other than the premises of Streeter & Male, which serve the public in Chinatown and thereby attract patronage from the resident population, as well as tourists in some cases.

23. It will be observed that the propositions contained in pars 5.5 to 5.9 of the written submissions on behalf of the applicant are each founded upon the subjective evidence to which I have referred. It is then submitted in pars 5.10 that 'the requirements and expectations are objectively reasonable but presently unsatisfied in the affected area'. The submission is that since the subjective evidence establishes that one stop shopping is a requirement of a section of the public in the affected area, that evidence itself compels the conclusion that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area.

24. If the proposition is that s 38 of the Act compels the Court to draw such an inference from the subjective evidence alone, I do not accept it. If the proposition is that s 38 require the Court to decide what weight should be attributed to such subjective evidence in its determination of the application upon the evidence as a whole in accordance with the criteria expressly and by implication contained in the Act, and to explain why the Court attributes that weight to the evidence, then I accept it. In my opinion, such an approach is consistent with the approach adopted by the Full Court in its determination of a recent appeal from this Court in an application by *Re Coles Myer Ltd v Liquorland Noranda* (unreported, Supreme Court, WA, Library No 8267, 28 May 1990). I may say also that in my opinion such an approach is consistent with the approach adopted by this Court in the determination of that application, although it appears that on the facts of that case their Honours may have been disposed to the opinion that this Court should have attributed greater weight to the subjective evidence in that case than for the reasons which it gave, it was disposed to do in the circumstances, on the evidence as a whole. Since that case remains to be determined by this Court in accordance with the directions of the Full Court, it is not appropriate to say anything further of the facts in that case."

The learned judge did not accept that it was clear from the evidence that the majority of residents of Broome and the majority of visitors to Broome, carried out most of their shopping at the Seaview Shopping Centre. At the same time, the learned judge appears to have accepted the evidence that the number of customers served per week by the applicant at the supermarket ranged from a low of about 10,000 in December 1989 to between 14,000 to 15,000 in May and June 1990. The learned judge noted that this evidence was relied upon to support a contention that since these numbers were significant in proportion to the population of Broome, including those passing through and resorting to the affected area, the grant of the licence was necessary.

The learned judge had found the subjective evidence to which reference has been made was "clearly representative of the population of the affected area". The evidence of the relevant witnesses was that they would like the convenience of a liquor store at the Seaview Shopping Centre. Importantly, however, the learned judge found:

"Very few of those witnesses made any complaint whatever about the

number and condition of the licensed premises already existing in the affected area or the extent and quality of the services provided on those premises. In my opinion the evidence as a whole does not establish that at present the members of the public find it inconvenient to purchase their requirements at the licensed premises already existing in the affected area.

The only inference which in my opinion it is open to draw from the whole of the evidence is that there was some implicit criticism of the manner in which and the extent to which the licensed premises already existing in the affected area for the sale of liquor for consumption off the premises are distributed."

His Honour found an imbalance in the distribution of licensed premises already existing in the affected area which may sell liquor and related services for consumption off the premises. He did not consider, however, that the grant of an additional licence would redress the imbalance. His reasons for this conclusion were as follows:

"I reach that conclusion on all the evidence in this case because I am of the opinion that where that evidence demonstrates that the reasonable requirements of the public for liquor and related services for consumption off the premises are otherwise adequately provided for by the licensed premises already existing in the affected area, it is not a proper application of s 38 in the scheme of this Act as a whole to conclude that the grant of a new licence is necessary to address that imbalance and that imbalance, such as it may be, alone. This is because the Court finds that the grant of a new licence is otherwise not necessary and in my opinion it is no answer to such a conclusion to say that such further grant should be made unless it is shown that the grant is not in the public interest.

It may be that in proper case, that imbalance is a matter which an applicant might seek to address by way of application for removal of an existing licence within the affected area, in which case it would in principle be implicit in the application that the grant was not necessary to provide for the reasonable requirements of the public for liquor and related services for consumption off the premises in the affected area in terms of the number of the licences already existing in the affected area but rather for such other reasons in the public interest, as may be appropriate in the circumstances. I shall return to this question in due course."

The basic approach taken by the learned judge was that the applicant's subjective evidence, taken with all of the other evidence tendered, did not demonstrate that there was an objective need for the grant of the licence to satisfy the reasonable requirements of the public. This is apparent from the following passage in the reasons leading up to his Honour's final conclusion:

"... the evidence on behalf of this applicant in support of an application for the grant of another licence in the affected area has no foundation other than the desire of this applicant to sell liquor to existing and potential customers of the Seaview Shopping Centre who on the evidence have an equally subjective desire to purchase liquor at the proposed premises, which desire is not shown on the evidence to have any extrinsic foundation beyond the fact that such persons have such a desire."

Section 38 of the Act relevantly provides that:

"(1) An applicant for the grant or removal of a Category A licence must satisfy the licensing authority that, having regard to —

(a) the number and condition of the licensed premises already existing in the affected area;

(b) the manner in which, and the extent to which, those premises are distributed throughout the area;

(c) the extent and quality of the services provided on those premises; and

(d) any other relevant factor, being a matter as to which the licensing authority seeks to be satisfied,

the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.

(2) Taking into account the matters referred to in subsection (1), the licensing authority in considering what the requirements of the public may be shall have regard to —

(a) the population of, and the interest of the community in, the affected area;

(b) the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and

(c) the extent to which any requirement or expectation —

(i) varies during different times or periods; or

(ii) is lawfully met by other premises, licensed or unlicensed."

The Court is required under this provision to determine whether the licence is "necessary in order to provide for the reasonable requirements of the public for liquor and related services ... in that area", having regard to the considerations set out in subsection (1). Counsel for the appellant submitted that the key words were "necessary", "reasonable" and "requirements". The crux of the appellant's argument was that the learned judge adopted an approach in the application of those words which resulted in the application of too strict a test. The thrust of the argument was that the approach adopted by the learned judge was that proof that the additional licence was necessary required more than subjective evidence of desire or demand, in that it required proof by extrinsic facts of the objective necessity of the licence. In other words, subjective evidence of a body of persons representative of the population that it would be more convenient to them if they were able to purchase their liquor while shopping at the applicant's supermarket did not demonstrate objective necessity in the absence, for example, of positive evidence of inconvenience in relation to the making of purchases from the existing licensed premises.

"Necessary" is a word which has the same connotation as words such as "needs" and "need". Thus in *Buttery v Muirhead* [1970] SASR 334 at 337 Bray CJ said:

> "'Needs of the public' must mean 'need' in the sense of 'demand', meaning by that a reasonable demand by contemporary standards. It cannot mean 'need' in the sense of necessity judged by some ethical or sociological test."

In the context of s 38(1) the test of what is "necessary" is in terms of "reasonable requirements". Thus the factual inquiry is directed at the issue of "reasonable requirements" of the public. The question then is whether the proposed licence is necessary in order to provide for those requirements. In

this context "necessary" probably means no more than that the licence is "reasonably required" in order to provide for the "reasonable requirements" of the public. The word "reasonable" imports a degree of objectivity in that the word reasonable means "... sensible; ... not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate": see *Shorter Oxford Dictionary*, at p 1667.

The requirements of the public in the affected area for liquor facilities may be proved by inference from the evidence of a representative sample of a relevant section of the population of the affected area: see *Coles Myer Ltd v Liquorland Noranda* (unreported, Supreme Court, WA, Library No 8267, 28 May 1990), per Rowland J, at 8; per Nicholson J, at 5. This is the "subjective evidence". It is then necessary to determine whether the subjective evidence of requirements is objectively reasonable. If it is, it is then necessary to determine whether the proposed licence will meet those requirements in whole or in part.

The learned judge concluded that the evidence of persons representative of the population of the affected area was that they would like the convenience of a liquor store at the Seaview Shopping Centre. At the same time his Honour concluded that the evidence did not establish that the public found it inconvenient to purchase their liquor requirements at existing licensed premises. This appears to have led him to conclude that the grant of the licence was not objectively necessary, notwithstanding the "imbalance" in the distribution of licensed premises in the affected area, because the evidence "demonstrates that the reasonable requirements of the public for liquor and related services for consumption off the premises are otherwise adequately provided for by the licensed premises already existing in the affected area". It is implicit from his Honour's reasoning that this conclusion was thought to follow from the perceived failure of the applicant to prove inconvenience to the public.

It was submitted on behalf of the appellant that an applicant for a liquor store licence was not required to show that inconvenience to the public exists or will ensue if the application is refused, in order to satisfy what is required by s 38(1) of the Act. No doubt a consideration of inconvenience may be relevant to an evaluation of reasonable requirements. In *Shreeve v Martin* (1969) 72 SR (NSW) 279 at 284-285, per Wallace ACJ it was made clear that, while the inability to purchase a bottle of wine in a department store may not be a substantial inconvenience, it may be a very reasonable requirement. In *Vine v Smith* [1980] 1 NSWLR 261 at 266 Hope J said that:

> "It is an unwarranted restriction upon the generality of the concepts contained in the statutory provisions of assent that if the applicant has failed to establish that existing outlets can meet the relevant requirements only at substantial inconvenience to the public."

See also *Silkman v Kendall* [1982] 1 NSWLR 133; *Taylor v Toohey* [1982] 1 NSWLR 493; and *Lovell v New World Supermarket Pty Ltd* (1990) 53 SASR 53 at 54-55.

It is plain that evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public may in itself be sufficient to establish a reasonable requirement: see *Shreeve v Martin* (supra), at 284-285, per Wallace ACJ and at 292, per Walsh JA; *Vine v Smith* (supra), at 266, 269; *Coles Myer Ltd v Liquorland Noranda* (supra), per Rowland J, at 11. In my view, to the extent that the learned judge held that in the absence of positive evidence of inconvenience the subjective

evidence was incapable of establishing that there was a reasonable requirement by a significant section of the public to purchase liquor at the applicant's supermarket the learned judge was in error. Ground 1 of the grounds of appeal is made out.

The learned judge found that:

(a) persons being representative of a significant section of the population in the affected area would like the convenience of the proposed licensed premises;

(b) such persons would make use of such premises to the exclusion of other licensed premises in the affected area; and

(c) such premises would be more convenient to them than existing premises.

The learned judge also accepted that the Seaview Shopping Centre was the only suburban style shopping centre under the one roof in Broome and that the extremes of climate made the centre particularly attractive to shoppers. His Honour concluded that there was very little subjective evidence against the evidence in favour of "one stop shopping", including shopping for liquor. In these circumstances it was submitted in support of grounds 2 and 3 of the appeal, on the basis of the authorities to which I have already referred and *David Jones (Aust) Pty Ltd v Fahey* (1989) 50 SASR 323 at 351, that the learned judge:

> "... should have concluded as a matter of law that the applicant's evidence as to convenience or additional convenience ... was evidence of a requirement which was reasonable and which of itself made necessary the grant of the application, irrespective of whether the public found it inconvenient to purchase their liquor at existing outlets ..."

In support of this submission counsel for the appellant referred to a number of authorities in which it has been recognised that it is a reasonable requirement, based on convenience, for members of the public to purchase their liquor at the same time and the same place that they do their other shopping. This reasonable requirement is not met by the existence of other licensed premises in the vicinity: see *Vine v Smith*, at 266; *Taylor v Toohey*, at 497-498; *Carjay Pty Ltd v Target Cellars Pty Ltd* (1972) 3 SASR 484 at 491; *David Jones (Aust) Pty Ltd v Fahey* (supra), at 351; and *Edgecock v Myer Western Stores Ltd* (unreported, Supreme Court, NSW, Yeldham J, 2 April 1984) at 14.

The effect of the appellant's submission is that on the facts found the learned judge was bound to find that the evidence relied on by the applicant and accepted by the learned judge established a reasonable requirement that made the grant of the application necessary, even though it was not shown that it was positively inconvenient for members of the public to purchase their liquor from existing outlets. This submission cannot be distinguished from that in support of ground 1, which in my view has already been made out. In my opinion, grounds 2 and 3 have also been made out.

In support of ground 4 of the appeal it was submitted that the learned judge was in error in formulating the test under s 38 to be as set out in par 24 of the reasons, which I have cited above. In doing so, the learned judge relied upon *Costopolous v Petona Pty Ltd* (unreported, Supreme Court, WA, Library No 7724, 23 June 1989). That case was concerned with the interpretation of s 71(1)(b) of the *Liquor Act* 1970 which required the Court to be satisfied that "there were insufficient store licences or other licences in the area to meet the requirements of the public". It was argued

that the test under s 28(1) is different. It is whether the licence is "necessary in order to provide for the reasonable requirements" of the public: see *Coles Myer Ltd v Liquorland Noranda*, per Nicholson J, at 2. The difference reflects the difference in the philosophy of the new Act as expressed in s 5(c) namely to:

> "... facilitate the use and development of licensed facilities, reflecting the diversity of consumer demand ..."

In *Costopolous* (supra), Wallace J, after reviewing the authorities, said (at 6):

> "In other words, the objection is not to be answered solely by reference to the subjective desires or wishes of persons in, resorting to or passing through the affected area: *Vine v Smith*, at 267."

Wallace J also said (at 15):

> "I am unable to agree with counsel's argument. What Mr Meadows seems to be saying is that, one first of all looks to ascertain whether there is a sufficient population within the definition of the three categories. Then, pursuant to s 71(1)(b) one asks the question as to whether there are insufficient store licences or other licences in the area to meet the requirements of the public. The requirements of the public, as demonstrated by the evidence, was the desire to be able to obtain liquor purchases at the same location where they did their general shopping. It follows therefore, that there is such a requirement and that could not be met by any of the existing store licences in the affected area. With great respect to counsel, that cannot be the construction which one would place upon s 71 and s 57 of the Act, nor does it accord with authority."

The learned judge held that these views were "equally applicable to the determination of an application under the *Liquor Licensing Act* 1988". The question under s 71(1)(b) of the former Act was whether there were insufficient store licences or other licences in the area to meet the requirements of the public. With respect that is a very different question from that posed by s 38(1): cf *Lovell v New World Supermarket Pty Ltd* [1990] 53 SASR 53 at 54-55, per King CJ. The question is not now whether there are insufficient store licences or other licences to meet the requirements of the public. The question is whether there is a reasonable requirement by the public for the purchase of liquor in the manner and under the circumstances contemplated by the proposed licence. There is no question of protecting the monopoly or market share of an existing licensee. In my view, for the reasons already stated, the relevant findings of fact made by the learned judge were such that no other view was open on the evidence than that there was a reasonable requirement of the public to purchase liquor while shopping at the Seaview Shopping Centre.

In my opinion ground 4 is made out.

Ground 5 of the grounds of appeal does not appear to add anything to grounds 1, 2 and 3.

As to ground 6 I accept that the finding that there was an imbalance in the distribution of existing licensed premises in the affected area, being a concentration of licensed premises away from that part of the affected area where the appellant's premises would be located, the learned judge should have held that the grant of the proposed licence would substantially rectify that imbalance.

In the circumstances it is unnecessary to say anything about grounds 7 and 8.

For these reasons I consider that the appeal should be allowed. This gives rise to the question whether this Court should take the further step sought by the appellant and order that the application by the appellant for the conditional grant of the liquor store licence be granted. In my opinion, the Court should not take that step in this case. There is a residual public interest discretion to refuse the grant of a licence under s 33. In view of the conclusion which the learned judge reached, he did not consider matters relevant to the exercise of the residual discretion. No matter relevant to the exercise of that discretion has been argued in this Court. In the circumstances, I consider that the order of the Licensing Court should simply be set aside and the matter remitted to the Licensing Court for further consideration in the light of the reasons for judgment of this Court.

PIDGEON J. I have read the reasons to be published by the Chief Justice Justice and agree with them.

I agree the appeal should be allowed and with the orders proposed.

WALSH J. I have had the advantage of reading, in draft form, the reasons for judgment of Malcolm CJ. I agree with those reasons, and the orders proposed, and have nothing further to add.

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Solicitors for the respondent: *Phillips Fox.*

MJS