

1967/5

1.

IN THE PRIVY COUNCIL

No. 19 of 1966

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
 LEGAL STUDIES
15 MAR 1968
 25 RUSSELL SQUARE
 LONDON, W.C.1.

ON APPEAL

COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

BOOTS THE CHEMISTS (NEW ZEALAND)
 LIMITED and BOOTS PURE DRUG
 COMPANY LIMITED Appellants

- and -

10 THE CHEMISTS' SERVICE GUILD OF
 NEW ZEALAND INCORPORATED Respondent

- and -

WILFRED FOSBERREY STILLWELL
Pro Forma Respondent

A N D BETWEEN

THE CHEMISTS' SERVICE GUILD OF
 NEW ZEALAND INCORPORATED Appellants

20 - and -

BOOTS THE CHEMISTS (NEW ZEALAND)
 LIMITED and BOOTS PURE DRUG
 COMPANY LIMITED Respondents

- and -

WILFRED FOSBERREY STILLWELL
Pro Forma Respondent

C A S E FOR THE RESPONDENT AND THE
APPELLANT ON THE CROSS-APPEAL

Record

30 1. This is an appeal from the judgment of the
 Court of Appeal of New Zealand given on the
 8th February 1966 in proceedings removed into

Record

the Court of Appeal from the Supreme Court. By its judgment the Court of Appeal (North P. dissenting) made the following Declaratory Order on the application of the respondent as plaintiff:

p.81 11.17-28

"THIS COURT HEREBY ORDERS AND DECLARES

that the third Defendant by reason of the admitted facts is a wholesale dealer in drugs within the meaning and application of Section 13 (1) of the Pharmacy Amendment Act 1954 and accordingly the having by the third Defendant of an interest in the business of a pharmacy proposed to be established by the second Defendant at Porirua would by reason of the admitted shareholding of the third Defendant in the second Defendant be in contravention of the provisions of Section 13 of the Pharmacy Amendment Act 1954".

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The respondent had been plaintiff, the first appellant had been the second defendant, and the second appellant had been the third defendant in the original proceedings.

p.81 11.28-31

- 2. The respondent in turn appeals against that portion of the judgment of the Court of Appeal whereby the Court refused the application of the respondent as plaintiff for a further Declaratory Order in the following terms:

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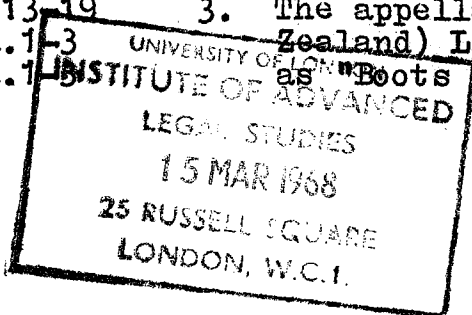
p.83 11.24-32

"that the second defendant by reason of the admitted facts is a wholesale dealer in drugs within the meaning and application of Section 13 (1) of the Pharmacy Amendment Act 1954 and accordingly the establishment or carrying on by the second defendant of business in a pharmacy at Porirua would be in contravention of the provisions of that section".

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p.3 11.13-19
p.21 11.1-3
p.23 11.1-15

- 3. The appellant Boots the Chemists (New Zealand) Limited (hereinafter referred to as "Boots N.Z.") is a company duly



Record

p.25 11.21-26

p.9 11.29-34

p.10 1.

10 incorporated in New Zealand under the Companies Act 1955. It is a wholly owned subsidiary of Boots Pure Drug Company Limited (hereinafter referred to as "Boots U.K.") a company incorporated in England. The respondent is a society incorporated in New Zealand under the Incorporated Societies Act 1908 membership of which is open to one registered chemist from each registered pharmacy in New Zealand. Its principal object is to promote protect and maintain the interests and welfare of its members and of their businesses and profession, and a copy of its Rules is an exhibit in these proceedings.

20 4. The remedies sought by the respondent as plaintiff in these proceedings were based on the provisions of the Pharmacy Amendment Act 1954. Section 1 of this Act provides that it is to be "read together with and deemed part of the Pharmacy Act 1939". The latter Act is described in its long title as "an Act to make better provision for the registration and control of pharmaceutical chemists".

30 5. The Pharmacy Amendment Act 1954 lays down a number of restrictions as to the ownership and control of pharmacies in New Zealand. It establishes a Pharmacy Authority and provides that certain of the restrictions imposed are not to apply if the consent of the Authority is obtained. Except with the consent of the Authority, and in conformity with conditions prescribed by the Authority:

40 (a) No company may establish or carry on business in a pharmacy unless 75% of the share capital is vested in a chemist or chemists in whom is vested effective control of the company and no member of the company owns any other pharmacy or is a member of a company which owns any other pharmacy (section 3).

(b) No person other than a chemist may establish or carry on business in a

Record

pharmacy (Section 3A).

- (c) No person may establish or carry on business in more pharmacies than one (section 4)

There are certain saving provisions in respect of businesses established prior to the commencement of the Act.

6. The functions of the Pharmacy Authority and the way in which they are to be exercised are laid down by section 7 of the Act in the following terms: 10

"(1) The functions of the Pharmacy Authority shall be to consider applications under this Act in respect of any matter where the consent of the Authority is required under this Act.

"(2) In the exercise of its functions the Pharmacy Authority shall have regard to the public interest and the interests of the pharmaceutical profession and for those purposes shall ensure, as far as its authority under this Act extends, and as far as is consistent with the provisions to the public of a full, efficient, and economic service in respect of the supply of drugs and pharmaceutical goods, that pharmacies are carried on by independent chemists owning and conducting their own businesses." 20 30

7. The respondent's claims in these proceedings were based on certain further restrictions contained in section 13 of the Act from which there is no dispensing power vested in the Authority. Section 13 provides as follows:

"13. Certain persons not to have interest in pharmacy -

- (1) The proprietor of a pharmacy or a wholesale dealer in drugs shall not have or acquire, whether in his own 40

10 name or in the name of any nominee or
 by means of any device or arrangement
 whatsoever, any direct or indirect
 estate or interest in a business carried
 on in a pharmacy (other than a pharmacy
 of which he is lawfully the proprietor)
 whether by way of shares in a company,
 or by way of charge, loan, guarantee,
 indemnity, or otherwise, so as to affect
 the ownership, management, or control of
 the business carried on in that
 pharmacy:

Provided that nothing in this section shall
 apply to any estate or interest in
 existence at the commencement of this Act.

20 (2) Without affecting the generality of the
 foregoing provisions of this section, it
 is hereby declared that any covenant,
 condition, or stipulation expressed or
 implied in any contract or agreement
 whereby the proprietor of a pharmacy is
 restricted in the purchase of his
 pharmaceutical requirements or other
 stock in trade shall, for the purposes
 of this section, be deemed to be a device
 or arrangement affecting the management
 and control of the business carried on
 in that pharmacy."

30 Certain of the words in this section are
 defined either in the principal Act or in
 the Amendment as follows:

"'Company' includes any body corporate
 registered under the provisions of any
 Act".

40 "'Drug' means any drug (as described in
 any official pharmaceutical publication)
 used in the treatment, prevention,
 investigation, or alleviation of any
 disease, illness, or injury affecting
 human beings."

"'Pharmacy' means a shop or place of
 business in which the business of a

Record

pharmaceutical chemist is carried on."

"'Proprietor', in relation to any pharmacy, means the person conducting or occupying the pharmacy, and includes the personal representatives of a deceased proprietor."

By section 15 of the Act any person who fails to comply with or does any act in contravention of any of the provisions of the Act commits an offence. 10

p.3 11.26 -
P.4-1
p.21 11.10-11
p.23 1.17-18

8. On the 2nd November 1962 the appellant Boots N.Z. applied to the Pharmacy Authority for consent to the establishment of a new business in a pharmacy in premises to be erected at Porirua. The application was made under sections 3 and 4 of the Pharmacy Amendment Act 1954, consent under these sections being required because Boots N.Z. is a company, and because it also carries on business in a number of other pharmacies in various parts of New Zealand. Pursuant to section 8 (2) of the Act, the Pharmacy Authority duly notified this application to the respondent as being a person who might be materially affected by the decision. 20

9. The respondent commenced the present proceedings in the Supreme Court of New Zealand seeking the issue of a Writ of Prohibition dated the 28th March 1963 directed to the Pharmacy Authority to prohibit him from taking any further steps to hear and determine the application of Boots N.Z., or in the alternative for certain declaratory judgments or orders. The respondent alleged: 30

p.4 11.2-3
p.4 11.19-25

(a) That Boots N.Z. was a wholesale dealer in drugs, and that the establishment by it of a business in a pharmacy at Porirua would therefore contravene section 13 of the Pharmacy Amendment Act 1954. 40

- (b) That Boots U.K. was a wholesale dealer in drugs, and the establishment by its subsidiary Boots N.Z. of a business in a pharmacy at Porirua would give Boots U.K. a direct or indirect interest in such business in contravention of section 13 of the Act. Record
p.4 11.3-5
p.4 11.39-P.5
1-6
10. By consent of all parties an order was made by the Supreme Court on 9th March 1965 removing the proceedings into the Court of Appeal. p.50 11.23-41
11. At the hearing before the Court of Appeal on the 11th and 12th November 1965, it was conceded by the appellants that Boots N.Z. is a wholesale dealer in drugs. The evidence showed that Boots U.K. was the registered holder of 59970 out of the 60,000 shares of £1 each comprising the total capital of Boots N.Z. and Boots U.K. was admitted to be the beneficial owner of the entire capital. The evidence further showed the activities of Boots U.K. to be as follows:- p.25 11.21-26
- (a) It manufactures drugs and pharmaceutical products. p.30 11.24-30
p.35 11.33-43
- (b) It sells its manufactured drugs to the following:-
- i. its United Kingdom subsidiaries, at retail price less a discount fixed annually; p.42 11.24-32
p.33 11.13-31
p.37 11. 1-7
- ii. other wholesalers for resale; p.42 11.33-41
p.39 11.34-40
p.33 11.32-34-
p.34 1-3
p.36 1.2-3 -
p.25 1.31-33
- iii. independent retail chemists, to a limited extent: 1% of (ii) and 0.02% of total drugs manufactured and sold; p.40 1.1-p.44
1.20
p.36 1.2-45
p.30 11.41-
p.31-1-p.44
1-20

<p><u>Record</u> p.43 ll.35-40 p.37 ll. 7-11</p> <p>p.46 ll.40-44 p.47 1-11</p> <p>p.30 ll.41- p.31-1 p.37 ll.33-36 p.46 ll.40-44 p.47 1-26</p> <p>p.41 l.39-42 p.42-1</p> <p>p.42 ll.2-23. p.33 ll.18-24 p.37 ll. 1-11</p> <p>p.42 ll.9-38</p> <p>p.45 ll.17-29</p> <p>p.52, ll.38-45 p.68, ll.29-45</p> <p>p.5 l.35-42 p.6 ll.29-36</p>	<p>iv. bulk users - 2% of total drugs manufactured and sold;</p> <p>v. industrial users in New Zealand;</p> <p>vi. Boots N.Z. and other overseas subsidiaries;</p> <p>(c) It buys drugs from other manufacturers and wholesalers and resells them to:-</p> <p>i. its United Kingdom subsidiaries, at retail price less a discount fixed annually;</p> <p>ii. bulk users, to a limited extent;</p> <p>iii. Boots N.Z. to a more limited extent, such sales averaging £275 per annum over 5 years.</p> <p>12. The Court of Appeal by its judgment dated the 8th February 1966 refused the respondent's application for a Writ of Prohibition holding that no question of jurisdiction arose. It also refused to make the first of the declarations sought by the respondent declaring the jurisdiction of the Pharmacy Authority in relation to the application of Boots N.Z. and the rights of the parties in respect of the hearing thereof. These portions of the judgment of the Court of Appeal are not challenged in the present appeals. By its Statement of Claim and Amended Notice of Motion the respondent had further sought an order:</p>	<p>10</p> <p>20</p> <p>30</p>
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"Declaring that the establishment or carrying on by the second defendant of business in a pharmacy in premises to be erected at Porirua would be in contravention

of the provisions of section 13 of the Pharmacy Amendment Act 1954 and illegal by virtue of section 15 of the said Act."

Record

At the hearing before the Court of Appeal and by consent there was substituted for this part of the respondent's application an application for two Declaratory Orders in the form set out in the judgment of North P. as follows:

10 "(1) An order declaring that the second defendant, by reason of the admitted facts, is a wholesale dealer in drugs within the meaning and application of section 13 (1) of the Pharmacy Amendment Act 1954, and accordingly the establishment or carrying on by the second defendant of business in a pharmacy at Porirua would be in contra-
20 vention of the provisions of that section and illegal by virtue of the provisions of section 15 of that Act.

p.53, 1.1-28

 (2) An order declaring that the third defendant, by reason of the admitted facts, is a wholesale dealer in drugs within the meaning and application of section 13(1) of the Pharmacy Amendment Act 1954, and accordingly the having by the third defendant of an interest in the business of a pharmacy proposed to
30 be established by the second defendant at Porirua would, by reason of the admitted shareholding of the third defendant in the second defendant, be in contra-
 vention of the provisions of section 13 of the Pharmacy Amendment Act 1954 and illegal by virtue of the provisions of section 15 of that Act."

40 13. The Court of Appeal by its judgment of the 8th February 1966 (North P. dissenting) made an order in terms of the second of the applications referred to in the preceding paragraph, but omitting therefrom the concluding words "and illegal by virtue of the

p.81 1.4.-
p.82 1.6

Record

provisions of section 15 of that Act". It is against this order that the appellant now appeals. The respondent's appeal is against the refusal of the first of the applications referred to in the preceding paragraph, save that the respondent no longer seeks to have included therein the concluding words "and illegal by virtue of the provisions of section 15 of that Act".

AS TO THE APPELLANTS' APPEAL

14. The questions which arise in respect of the appellants' appeal are: 10

- (a) Is Boots U.K. a "wholesale dealer in drugs" within the meaning of section 13 (1) of the Pharmacy Amendment Act 1954?
- (b) If so would its admitted ownership of all the shares in Boots N.Z. amount to "a direct or indirect interest" in the business of a pharmacy proposed to be established by Boots N.Z. at Porirua "so as to affect the ownership management or control of the business" within the meaning of section 13 (1)? 20
- (c) If so can the appellants invoke the proviso to section 13 (1) whereby that section does not apply to any estate or interest in existence at the commencement of the Pharmacy Amendment Act 1954?

15. In their judgments the learned Judges of the Court of Appeal of New Zealand dealt with these questions as follows: 30

p.57 11.16-38
 p.58 1.1-20
 p.66 11.13-
 p.67 - 1.
 p.75 11.39-
 p.76-29.

- (a) All three members of the Court rejected the argument that the term "wholesale dealer" applied only to persons who both buy and sell goods in gross or bulk, so as to exclude a manufacturer selling his own product in quantity or bulk. They held that the term "wholesale dealer" as understood and used in New Zealand includes a manufacturer; it is clearly used in this 40

sense in section 33 (1) (e) of the principal Act.

Record

Both North, P., and Turner J. also expressed the view that even if the term "wholesale dealer" were restricted to one who buys and sells, then Boots U.K. would still fall within the definition by reason of their wholesale division and the trading of this kind which the company is engaged in. McCarthy J. did not expressly refer to this point.

p.57 11.39-53
p.67 1. 1-20

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The majority of the Court, comprising Turner and McCarthy, J.J., rejected the applicants' argument that the words "wholesale dealer in drugs" were restricted to such dealers as carried on business in New Zealand. Turner J. said that the section did not attempt to prohibit the doing of some act outside New Zealand, but prohibited the acquisition in New Zealand of certain interests by a wholesale dealer. A person is no less a wholesale dealer because his wholesale dealing takes place outside of New Zealand. McCarthy J. said that the prohibition was not against a wholesaler being a wholesaler in England. It was against a person who answered the description of a wholesale dealer, wherever he might be resident, holding in New Zealand an interest in a pharmacy contrary to the Act. North P., in his dissenting judgment, agreed that on any view of the case no question of extra territorial jurisdiction arose, as the amending Act dealt only with conduct taking place in New Zealand. At the same time he differed from the other members of the Court in holding that the term "wholesale dealer in drugs" should be construed narrowly, as meaning only a wholesale dealer trading as such in New Zealand. The other category dealt with in the section, namely "the proprietor of a pharmacy", was so limited

p.64 1.47
p.66 1.15
p.76 1.76-
p.80 - 19.

p.65 11. 11-24

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p.77 11.39-44

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p.59 11.42-47

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p.58 1.21-
p.61 1.13

Record

by virtue of the statutory definitions. Moreover, a contravention of section 13 would be an offence under section 15, but Boots U.K. having no place of business in New Zealand could not be the subject of a prosecution.

p.61 11.16-28
p.67 11.24-36
p.80 1.19-31

(b) All three members of the Court rejected a submission based on a change in the Articles of Association of Boots N.Z. made after the proceedings were instituted. The Articles had provided that no person could be appointed Managing Director of Boots N.Z. without the approval of Boots U.K. This provision was subsequently revoked. The learned Judges held that ownership of the shares gave control of the company for the purposes of the section. 10

p.61 11.29-42
p.67 11.36-47
p.80 11.31-43

(c) All three members of the Court held that the proviso to section 13 (1) did not assist the appellants. It applies only to pharmacies in existence in 1954 and could not apply to the proposed pharmacy at Porirua. It refers not to shareholdings but to the estate or interest in a pharmacy, the acquisition of which it is the purpose of the section to prohibit. 20

16. The respondent respectfully submits that the Declaration made by the Court of Appeal is right and should be affirmed, and that the Appeal of the appellants should be dismissed with costs, for the following among other 30

REASONS

1. FOR THE REASONS given by the majority in the Court of Appeal, and in the judgment of North P. save on the point on which he differs from the majority;
2. BECAUSE the term "wholesale dealer in drugs" in section 13 of the Pharmacy Amendment Act 1954 is not limited to wholesale dealers trading as such in New Zealand; 40

3. BECAUSE the term "wholesale dealer in drugs" in the said section is not limited to one who buys and sells but includes a manufacturer who sells his own product;
4. BECAUSE (whether or not the term includes a manufacturer) Boots U.K. is a wholesale dealer in drugs within the meaning of the said section;
- 10 5. BECAUSE the ownership by Boots U.K. of the shares in Boots N.Z. would give Boots U.K. a direct or indirect estate or interest in a business established or carried on in a pharmacy at Porirua by Boots N.Z. so as to affect the ownership management or control of such business;
- 20 6. BECAUSE the estate or interest referred to in the last preceding paragraph was not in existence at the commencement of the Pharmacy Amendment Act 1954.

AS TO THE RESPONDENT'S APPEAL

17. It being admitted that Boots N.Z. is a wholesale dealer in drugs for the purposes of section 13, the only question which arises in respect of the respondent's appeal relates to the words which appear in parentheses in the section. The question is whether the words, "(other than a pharmacy of which he is lawfully the proprietor)" apply to a wholesale dealer in drugs as well as to the proprietor of a pharmacy, and exclude from the prohibition the case of direct ownership by a wholesaler of the business carried on in a pharmacy.
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18. All three members of the Court of Appeal answered this question against the respondent. North P. adopted the reasoning of a previous judgment given by McGregor J. in the Supreme Court of New Zealand in In re Boots the Chemists (N.Z.) Ltd. 1956 N.Z.L.R. 31.
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- p.55 l.25-
p.57 l.10

Record

p.62 1.6 -
p.63 1.39

p.70 1.40 -
p.75 1.9

The grammatical construction of the sentence supported the view that the qualifying words applied to both categories of persons with whom the section was dealing. The section was directed against "sleeping interests" or interests not obvious to the general public. Turner J. considered that the plain language of the section lent itself only to the construction favoured by McGregor J. McCarthy J. reached the same conclusion on similar grounds. He also considered the preferable conclusion to be that the legislations's general intention was not a total prohibition of the ownership of retail outlets by wholesalers, but control by the Authority.

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19. The respondent respectfully submits that the cross-appeal should be allowed with costs and that the judgment of the Court of Appeal should be reversed in so far as it refused the application of the respondent for a Declaration in the terms set out in paragraph 2 above, and that such a Declaration should be made, for the following among other 20

REASONS

1. BECAUSE the parenthetical words "(other than a pharmacy of which he islawfully the proprietor)" appearing in section 13 of the Pharmacy Amendment Act 1954 have no application to the case of a wholesale dealer in drugs; 30
2. BECAUSE the purpose of section 13 in so far as it relates to a wholesale dealer in drugs is to ensure that no wholesale drug dealer is in a position to favour his own products, contrary to the whole scheme of the Act which is to ensure the professional impartiality of the chemist advising the public: section 13 should accordingly be construed as prohibiting direct ownership by a wholesale dealer, and not merely "sleeping interests". 40

I. L. McKAY
MERVYN HEALD

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C A S E

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