

**Boots the Chemists (New Zealand) Limited and Boots Pure  
Drug Company Limited** – – – – – *Appellants*

v.

**The Chemists' Service Guild of New Zealand Incorporated  
and another** – – – – – *Respondents*  
(and Cross-appeal consolidated)

FROM

**THE COURT OF APPEAL OF NEW ZEALAND**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY 1967

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*Present at the Hearing :*

LORD GUEST  
LORD DEVLIN  
LORD UPJOHN  
LORD DONOVAN  
LORD PEARSON

[*Delivered by* LORD DONOVAN]

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This case arises out of the desire by Messrs. Boots (New Zealand) Ltd. to open a chemist's shop in the new town of Porirua and so add to the chain of some eight pharmacies which it already owns and operates in the Dominion.

The opposition comes from the Chemists' Service Guild of New Zealand, a society incorporated to promote the interests and welfare of pharmaceutical chemists, and to raise and maintain the standard of the profession of pharmacy.

The legislation upon which the dispute turns is described by *McCarthy J.* in his judgment as a compromise of the claims of opposing factions. He adds, of one of the Acts in question,

“ It became apparent soon after the 1954 Act was passed that there were many holes and uncertain areas in it, so much so that an extensive amending Act was required three years later. One may question whether even that remedied all the defects.”

The factions to which the learned judge refers are on the one hand those persons in New Zealand who are opposed to numbers of pharmacies being owned and operated by a single concern, and want instead, that as far as possible each pharmacy should be owned and operated by an independent chemist: and on the other hand, concerns like Boots (New Zealand) Ltd. who seek opportunities to add to the number of their branches. With the merits of these opposing aims their Lordships are not, of course, concerned: but having heard argument upon the relevant legislation for some days they share the conclusion above quoted.

The particular enactment giving rise to the present dispute is Section 13 of the Pharmacy Act of 1954. Before citing it, it may be helpful to put the Section in its setting in the code.

This begins with the Pharmacy Act of 1939 which will hereafter be referred to as “ the 1939 Act ”. The long title is “ An Act to make better provision for the registration and control of pharmaceutical chemists ”.

It did this by establishing a Pharmaceutical Society to promote the education and proper conduct of pharmaceutical chemists, and a Pharmacy Board which was empowered to make regulations for the good government of the Pharmaceutical Society. The Board could also appoint a Registrar to keep a register of all persons regarded by the Board as entitled to be registered as pharmaceutical chemists: and it was to be unlawful (with certain exceptions) for any persons not so registered to sell drugs. A disciplinary Committee of the Pharmaceutical Society was to consider cases of impropriety or infamous conduct on the part of any chemist and could order the removal of his name from the register. The Act, of which the foregoing is a brief summary only, came into operation on 6th October, 1939.

The 1939 Act was amended in 1943, 1947, and again in 1950. None of these amendments is germane to the present dispute.

In 1954, however, the Pharmacy Amendment Act 1954 was passed. Its long title was "An Act to amend the Pharmacy Act 1939" and its short title—"This Act may be cited as the Pharmacy Amendment Act 1954 and shall be read together with and deemed part of the Pharmacy Act 1939. . . ." (Section 1.) The 1954 Act will hereafter be so called.

The 1954 Act imposed a number of restrictions.

*First*

No company could, except with the consent of the Pharmacy Authority created by the Act, and in conformity with the conditions which such Authority might prescribe, establish or carry on business in a pharmacy. (Section 3.)

*Second*

No person could, without the consent of the Pharmacy Authority, and in conformity with the conditions which such Authority might prescribe, carry on business in more pharmacies than one. Certain exceptions to this rule were allowed, *e.g.*, to persons who were carrying on business in more pharmacies than one at the commencement of the Act. (Section 4.)

*Third*

The proprietor of a pharmacy, or a wholesale dealer in drugs, was not to have or acquire any interest in a pharmacy (other than a pharmacy of which he was lawfully the proprietor) by way of shares in a company, or by way of charge, loan, etc., so as to affect the ownership, management or control of the business carried on in that pharmacy. (Section 13.)

Since this Section contains the words on which the present dispute turns it will be quoted in full hereafter.

The Pharmacy Authority set up by the 1954 Act was to be a barrister or solicitor of not less than seven years' standing, and his function was to consider applications in respect of any matter where under the Act the consent of the Authority was required. (Section 7(1).) Appeals from his decision would lie to the Supreme Court. (Section 12.)

In the exercise of his functions the Pharmacy Authority was to

"have regard to the public interest, and the interests of the pharmaceutical profession" and for those purposes he was to "ensure, as far as its authority under the Act extends, and as far as is consistent with the provision 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". (Section 7(2).)

Any contravention of the Act was to be an offence punishable by a fine not exceeding £100, plus a further fine of up to £5 a day while the offence continued. (Section 15.)

Amendments were made in the 1954 Act by The Pharmacy Amendment Act 1957. The following require notice.

1. There was a saving provision for already existing pharmacies carried on by companies.

2. The restriction on companies establishing pharmacies was modified so that companies satisfying certain conditions were free from the restriction. One of these conditions was that at least 75 per cent of the share capital of the company should be owned by a chemist or chemists in whom effective control of the company was vested.

3. No person other than a chemist was to establish or carry on business in a pharmacy either alone or in partnership without the consent of the Pharmacy Authority. For this purpose, however, the term "person" was not to include a company or a friendly society.

These last two provisions now appear as Section 3 (1) (A) and Section 3A in the 1954 Act.

Their Lordships now turn to the facts.

Boots the Chemists (New Zealand) Ltd. (hereinafter called "Boots N.Z.") was incorporated in New Zealand in 1923 to carry on the business of owning and conducting pharmacies. At all times relevant to this appeal its share capital was £60,000 divided into 60,000 ordinary shares of £1 each. By 1962 it had eight such pharmacies in various parts of New Zealand.

Boots Pure Drug Company Ltd. (hereinafter called "Boots U.K.") is the well-known company with numerous chemists' shops in the United Kingdom. It also manufactures drugs and sells them to its own subsidiary companies in the United Kingdom, who retail them to the public. As manufacturing chemists Boots U.K. also sells goods of its own manufacture to wholesalers and outside retailers.

Boots N.Z. is a wholly-owned subsidiary company of Boots U.K. Furthermore up to 1963 the Articles of Association of Boots N.Z. gave Boots U.K. the right of control over the appointment and dismissal of the Managing Director of Boots N.Z. This right was terminated by a Special Resolution of Boots N.Z. passed on 28th May, 1963. In fact at all material times Boots U.K. has refrained from interfering in the business of Boots N.Z. and has left that company an unfettered discretion in the running of it.

In November 1962 Boots N.Z. made written application to the Minister of Health pursuant to the Act of 1954 for permission to open a pharmacy at Porirua, as part of a new development in that town. The Minister duly referred the application to the Pharmacy Authority in conformity with Section 8 of the 1954 Act. Notice of the application was given to the Chemists' Service Guild by the Pharmacy Authority pursuant to his duty under the 1954 Act to notify such applications to persons whom he thinks will be materially affected by his decision.

Some 5 months later namely on 26th March 1963 the Guild began proceedings in the Supreme Court of New Zealand for a Writ of Prohibition directed to the Pharmacy Authority against his taking any further step to hear and determine the application in question. The defendants to the proceedings were Boots N.Z., Boots U.K., and Wilfred Fosberry Stillwell, the Pharmacy Authority. The last-named filed no defence, and was eventually given leave to withdraw from the proceedings, having intimated that he did not desire to take part in the argument.

By consent the proceedings were removed into the Court of Appeal in New Zealand: and as argument for the Guild proceeded it became apparent that the proceedings for a writ of prohibition were misconceived. No question of the jurisdiction of the Pharmacy Authority arose since the application of Boots N.Z. to open the new pharmacy was properly before him. The parties then joined in asking the Court of Appeal to treat the Guild's motion as if it were an originating Summons under the Declaratory Judgments Act 1908, for two declaratory orders. With some reluctance the Court agreed to do so.

The first order sought was a declaration that Boots N.Z. was a wholesale dealer in drugs, and accordingly the establishment by that company of the new pharmacy would be in contravention of Section 13 of the 1954 Act, and illegal by virtue of Section 15 thereof.

The second order sought was a declaration that Boots U.K. was also a wholesale dealer in drugs and the having or acquiring by Boots U.K. of an interest in the said new pharmacy, by reason of its shareholding in Boots N.Z. would also be a contravention of the same Section 13, and illegal under Section 15.

The Court of Appeal heard argument on the 11th and 12th November 1965 and gave its judgment on 8th February 1966. The first of the aforesaid declarations was unanimously refused. The second was, by a majority (North J. President dissenting) granted: save that any reference to illegality under Section 15 of the 1954 Act was omitted.

For practical purposes this meant that the Guild was successful, and that Boots N.Z. could not proceed with its application for consent to open the new pharmacy while Boots U.K. was its controlling shareholder.

The two companies now, by leave, appeal to the Board: and the Guild with leave cross-appeals against the refusal of the declaration which it sought against Boots N.Z.

The issue turns upon the language of Section 13 (1) of the 1954 Act which is as follows:

“(1) The proprietor of a pharmacy or a wholesale dealer in drugs shall not have or acquire, whether in his own name or 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.”

Before stating the rival arguments, it will be convenient to mention certain facts which are agreed between the parties.

1. Boots N.Z., is, *inter alia*, a wholesale dealer in drugs.
2. Boots U.K. is resident outside New Zealand and conducts no business in New Zealand. It sells drugs to customers in New Zealand on f.o.b. terms only.
3. Two of the several pharmacies in New Zealand owned and operated by Boots N.Z. were opened after the passing of the 1954 Act and before the proceedings in the present case began. When these two pharmacies were opened Boots U.K. was, as it has always been, the controlling shareholder in Boots N.Z.

The principal argument for the appellants is that Section 13 has no application in the present case since Boots U.K., even if it be a wholesale dealer in drugs, carries on no such wholesale dealing in New Zealand and is not therefore within the scope of the Section. In other words, the term “wholesale dealer in drugs”, where it appears in Section 13 connotes, and connotes only, such persons and concerns as carry on wholesale dealing in drugs in New Zealand.

This view commended itself to the learned President of the Court of Appeal but was rejected by the other members of the Court Turner and McCarthy JJ. Nevertheless, after careful consideration their Lordships have reached the conclusion that on this point the judgment of North (P.) is correct.

It is true, as is pointed out by Turner and McCarthy JJ., that Section 13 prohibits certain conduct in New Zealand, namely the having or acquiring such an estate or interest as the Section describes. It is accordingly within the competence of the New Zealand legislature to prohibit such conduct, both on the part of persons resident and non-resident in New Zealand. The question remains, however, whether upon the true interpretation of Section 13 it was the intention of the legislature to bring within it non-residents doing no business as wholesale dealers in drugs in New Zealand: and in their Lordships' opinion it was not.

In the first place Section 13 associates for the purpose of the prohibition which it imposes,

“The proprietor of a pharmacy” and “a wholesale dealer in drugs. . . .”

It is not contested that here Section 13 applies only to proprietors of New Zealand pharmacies; but the majority of the Court of Appeal thought that this was because of the definitions of “proprietor” and “pharmacy” and “pharmaceutical chemist” in the Act of 1939; and that there was therefore no warrant for reading a similar limitation into the term “wholesale dealer in drugs” since this was left unmodified by any statutory definition.

With this reasoning their Lordships fear they cannot agree, and Counsel for the respondents did not seek to support it. The whole tenor of the 1939 and 1954 Acts, with their provisions for registration and control show that pharmacies situate in New Zealand and proprietors of those pharmacies are alone being dealt with; and this conclusion does not rest solely upon the statutory definitions referred to. Their Lordships do not elaborate the point since Counsel for the respondents announced that he would not argue the contrary. They may, however, refer in addition to the language of Section 13(2) itself which makes the point plain.

The question therefore arises why the term “wholesale dealer in drugs” should by contrast receive a completely unrestricted interpretation, so as to include such a wholesale dealer even though he carried on his business entirely outside New Zealand. The reason suggested by counsel on behalf of the respondents is that this is essential if one of the prime purposes of the 1954 Act is to be fulfilled. That purpose, he says, is the maintenance of the independence of individual proprietors of pharmacies in New Zealand. Thus a wholesale dealer in drugs with an interest in a pharmacy which affected its ownership, management, and control, might exploit that interest so as to give an undue and unfair preference to his own products. Otherwise the proprietor of the pharmacy would be left free to exercise an independent judgment to the benefit of the customer.

This view can be accepted while still leaving the relevant question unanswered. Did the legislature intend to deal simply with wholesale dealers carrying on business in New Zealand, or to extend the prohibition, despite all the wider issues which would thereby be involved, to wholesale dealers all over the world, even though they carried on no business in New Zealand at all? On this point McCarthy J. had no doubt. He says that it would clearly be contrary to the intent and purpose of the Section “if the drug houses of the United States, Great Britain and the Continent, manufacturers and wholesalers alike, provided only that they have no place of business here, could freely obtain undercover control of New Zealand pharmacies”.

If the New Zealand legislature had such an all-embracing intention, three comments may, their Lordships think, fairly be made. *First*, it is hardly likely that the intention would be left to be inferred from four words of a general character in Section 13 and established by abstruse legal argument upon them. Such an intention would have been made perfectly plain, as could easily have been done. *Second*, to prohibit wholesale dealers in drugs who do no such dealing in New Zealand from acquiring the stipulated interests, while allowing proprietors of pharmacies situate outside New Zealand to do so, is a distinction which makes no sense if the intention was the universal one for which the respondents contend. For such a proprietor with a controlling interest in a New Zealand pharmacy could be just as potent a threat to the independence of the New Zealand chemist running the business. *Third*, the legislature would have made effective provision for the enforcement of the law against wholesale dealers outside New Zealand, and this it has not done.

Furthermore, and generally, Section 7(2) of the 1954 Act (above quoted), although in form a direction to the Pharmacy Authority, makes it

reasonably clear that the dominant purpose of the Act was, as would be expected, the service of the public interest, to which the interests of individual chemists were to be subordinate. In the face of the language of the Subsection it is not possible to treat these latter interests as so preponderating that they should control the interpretation of all ambiguous terms.

It appears to their Lordships therefore, as it did to North (P.) that the argument for the appellant based on the association in Section 13 of proprietors of pharmacies and wholesale dealers in drugs is of considerable weight.

Next, Section 33(1)(e) of the 1939 Act refers to "wholesale dealers" in drugs in terms which admittedly refer only to such wholesale dealers as sell drugs in New Zealand: and since Section 1 of the 1954 Act enacts that it is to be read together with, and be deemed part of, the 1939 Act, the appellants contend that the expression "wholesale dealer in drugs" should receive the same meaning in both Acts. The weight which might otherwise attach to this argument is diminished by the consideration that Section 33(1)(e) is excepting wholesale dealers in drugs from a class which is disqualified from selling drugs in New Zealand; and the exception could not therefore apply to any wholesalers except those selling in New Zealand. Nevertheless the point remains as reinforcement for the view urged by the appellants that if the legislature intended that the expression "wholesale dealer" should have a much more extensive meaning in the 1954 Act than it had in the 1939 Act, it would, having directed that the two enactments be read together as one, have made this difference of meaning clear by express language.

Section 15 of the 1954 Act presents more serious difficulties to the respondents. It is necessarily their contention that Boots U.K. would commit an offence against the 1954 Act by having an interest in the proposed new pharmacy; and indeed have already committed such offences by having an interest in the two pharmacies opened by Boots N.Z. in New Zealand after the passing of the 1954 Act.

Section 15(1) of the 1954 Act makes it an offence to do anything in contravention of the Act: so that having or acquiring such an interest as is prohibited by Section 13(1) would, *prima facie*, be an offence on the part of the proprietor of a pharmacy or of a wholesale dealer in drugs. The penalty is a fine not exceeding £100, and a further £5 a day for each day during which the offence continues. In relation to companies, Section 15(2) provides as follows:—

"Where a company commits an offence against this Act, every director or other person acting in the management of the company shall, in addition to any penalty to which the company may be liable, be liable on summary conviction to a fine not exceeding ten pounds for every day during which the offence continues."

Thus in relation to Section 13 the legislature assumes, quite naturally, that a company may be the proprietor of a pharmacy or a wholesale dealer in drugs, and as such may have or acquire a prohibited estate or interest and thus commit an offence. A similar question of construction again arises. Does "company" in this context include a company incorporated outside New Zealand (such as Boots U.K.) which does no wholesale dealing in drugs in New Zealand? The term "company" is defined by Section 2 of the 1954 Act as including "any body corporate registered under the provisions of any Act"; and the term "Act", by Section 4 of the Acts Interpretation Act 1924 "means an Act of the General Assembly". These definitions are to yield to the context in which the terms appear, and the definition of "company" uses the word "includes" and not "means". Their Lordships cannot, however, hold that by virtue of the context the expression any "company" in Section 15(2) means any company incorporated under any enactment in any part of the world. They think it must refer to a company incorporated under any Act of the General Assembly in New Zealand,

with the result that Section 15 (2) has no application to Boots U.K. or to its directors or managers. This does not settle the question of construction arising out of Section 13 (1), (though it may go some considerable distance towards it) for, in theory at least, Boots U.K. although outside Section 15 (2) as a "company" might be caught as a "person" by Section 15 (1), and thus be liable itself to the fines there imposed. But here the legislature has made no provision at all to overcome the difficulties which are obvious in effectively prosecuting a foreign company doing no business in New Zealand. And when it seeks to deal with companies in one of the generally accepted ways, *i.e.*, by prosecuting its officers it does so in terms which are applicable in their Lordships' view to New Zealand companies only.

Counsel for the respondents recognised these difficulties but argued that they were not conclusive of the disputed question of construction arising on Section 13—a view from which their Lordships would not differ. He added that a foreign company doing no wholesale dealing in drugs in New Zealand, might nevertheless be in New Zealand for the purpose of some other business and might in consequence be effectively prosecuted under Section 15 (1). Their Lordships cannot accept that the New Zealand legislature would have depended upon mere possibilities of this sort for the enforcement of its enactments. The position under Section 15 as a whole seems to them strongly to reinforce the appellants' argument that the legislature did not intend to cover non-resident wholesale dealers in drugs doing no business as such in New Zealand.

In this connection the following observation made by Turner J. at the conclusion of his judgment seems to their Lordships to be of much importance. "I would" he said, "omit from the declaration, however, the concluding words of Mr. McKay's draft—'and illegal by virtue of the provisions of Section 15 of the said Act' upon which I do not recall any argument being submitted. I would require more to be said upon the subject before deciding whether, and when, notwithstanding that the 'having' of shares is prohibited by Section 13 an offence is committed under Section 15 when the shares are acquired first, and the pharmacy subsequently, the shareholder being a company resident abroad. The point appears to me full of difficulty and I would limit the declaration made by omitting from it all reference to the provisions of Section 15."

Their Lordships concur in thinking that the point is full of difficulty: and it leads them to say that if criminal liability is to be imposed on non-residents carrying on no business in New Zealand it should be done in clear and precise terms. Other cases which may cause difficulties were instanced during the argument, *e.g.*, an estate or interest in a pharmacy of the kind prohibited by Section 13 devolving upon a wholesale dealer in drugs simply by operation of law. Their Lordships cannot go further into these matters in the present case: but the situation would seem to merit careful consideration if and when the Pharmacy Acts are amended again.

In the light of the foregoing considerations their Lordships agree with North (P.) that on its true construction Section 13 refers to wholesale dealers in drugs wherever resident who carry on such wholesale dealing in New Zealand: and does not extend to non-resident wholesale dealers such as Boots U.K. who carry on no such wholesale dealing in New Zealand.

This is sufficient for the disposal of the appeal. Their Lordships rejected the alternative contentions for the appellants namely (1) that the shareholding of Boots U.K. in Boots N.Z. was not an estate or interest within Section 13 so long as Boots U.K. refrained from active intervention in the affairs of Boots N.Z. and (2) that the proviso to Section 13 (1) was applicable in the present case. Both these submissions failed in the Court of Appeal for reasons in which their Lordships fully concur. It should be added that before them it was no longer contended that Boots U.K. was not rightly considered in New Zealand as a wholesale dealer in drugs for the purpose of the present case.

The cross-appeal of the respondents concerns Boots N.Z. alone. They are admittedly wholesale dealers in drugs carrying on business as such in New Zealand, and are therefore, say the respondents, prohibited from having or acquiring the proposed new pharmacy. Boots N.Z. however rely upon the words of exception in Section 13 “(other than a pharmacy of which he is lawfully the proprietor)” and say that when the new pharmacy is opened, and if the consent of the Pharmacy Authority is obtained, they will be the lawful proprietors. The respondents’ answer to this is that the words of exception refer only to the earlier term in the Section “the proprietor of a pharmacy” and not to the succeeding expression “or a wholesale dealer in drugs”. This contention was unanimously rejected in the Court of Appeal, who upheld an earlier decision of *McGregor J.* in *Re an Application by Boots the Chemists (N.Z.) Limited* (1956) N.Z.L.R. 31 who also rejected it. For reasons upon which their Lordships cannot improve the Court of Appeal held that the respondents’ contention involved a distorted interpretation of Section 13 (1); and their Lordships agree.

They will therefore humbly advise Her Majesty that the appeal should be allowed, and the cross appeal dismissed. The respondents must pay the costs of the appeal and of the cross-appeal.



In the Privy Council

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DELIVERED BY  
LORD DONOVAN