Privy Council Appeal No. 42 of 1978

Donald William Manning – – – – – – *Appellant*

v.

Robert James Thompson and others – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL DIVISION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE 1979

Present at the Hearing:

LORD WILBERFORCE
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal (by special leave of Her Majesty in Council) is from a decision of the Court of Appeal of New South Wales (Glass J.A. and Reynolds J.A., Mahoney J.A. dissenting) which reversed a decision of Yeldham J. The present appellant had in October 1973 applied for a Spirit Merchant's licence (a liquor off-licence). The Full Bench of Licensing Magistrates had refused to entertain his application on the ground, now admittedly erroneous, that the relevant statute forbade it. In proceedings brought by the present appellant against objectors to the grant of the licence and the relevant magistrates Yeldham J. made an order in the nature of mandamus on the licensing magistrates to hear and determine the appellant's application according to law and declared that they had jurisdiction to hear and determine the application upon its merits. That order was set aside by the Court of Appeal.

The respondents to this appeal have taken no part in it, but their Lordships have had the advantage of a full judgment by Glass J.A., and of course counsel for the appellant has been of great assistance in the absence of an opponent.

In New South Wales if a person wishes to sell liquor from premises for consumption off those premises he needs a Spirit Merchant's licence under the Liquor Act, 1912, (as amended). Objections can be made to the grant of such a licence when an application for one is made, the main question on the merits of such an application being whether the proposed licence is one which in the interests of the public is reasonably required in the neighbourhood of the proposed premises.

S.34 of the statute contains provisions designed to restrict in some degree repeat applications for the same or nearby premises when there has been previous refusal. In particular s.34(2)(*d*) was in the following terms:—

> "Where an application or conditional application for the grant or removal of a spirit merchant's license under paragraph (*a*) or (*b*) has been refused after the expiration of twelve months from the date of a previous refusal on the ground of objection referred to in paragraph (*e*) of section 29, no application or conditional application for the grant or removal of a spirit merchant's license by the same or any other person in respect of the same premises or premises or proposed premises situate within a radius of 1·61 kilometres thereof shall, notwithstanding anything in subsection (1), be made within three years from the last refusal".

On 22nd October 1973 the present appellant applied for a licence in respect of premises C. On 22nd March 1971 a licence had been refused for premises A. On 10th October 1972 a licence had been refused for premises B. Premises C are within the stated distance from premises B but outside that distance from premises A. In spite of objections on the merits the single magistrate in the Licensing Court granted the conditional licence. The objectors appealed to the Full Bench—the appeal is a rehearing. The Full Bench on 4th October 1974 decided against the grant of a licence, not on the merits, but upon the ground that the application was forbidden by s.34(2)(*d*) because it was within three years of the refusal for premises B and was in respect of premises within the relevant distance from *premises B*.

At that time it appears to have been generally thought that for the purposes of s.34(2)(*d*) the equivalent of premises B was the correct point from which the relevant distance was to be measured. Accordingly the present appellant did not within the time laid down seek in the Courts to take a point of law on a case stated. Instead he waited until the expiration of three years from the premises B refusal and renewed his application for premises C on 13th October 1975. But though the single magistrate again was on the merits prepared to grant the licence an intervening refusal for premises D spiked the appellant's guns, admittedly correctly.

The Court of Appeal in March 1976 decided that for the purposes of s.34(2)(*d*) the premises from which the distance was to be measured were those of the first refusal—the equivalent of in this case premises A: see the case of *Mitakos v. Allan* [1976] 1 N.S.W.L.R. 62. Accordingly the Full Bench in October 1974 were in error in declining to entertain the application of October 1973 on the ground that that application was forbidden by s.34(2)(*d*).

The present appellant then took the only step presently available to him. He sought a mandamus (or its equivalent) on the ground that in October 1974 the Full Bench had wrongly neglected their duty to entertain and decide on its merits the application of October 1973 for premises C. (It will be recalled that twice a single magistrate had concluded that on its merits the application should be granted.)

Their Lordships first regard the problem apart from authority. Under the statute everyone has a right to make in due form application for a licence. The Licensing Court is obliged to entertain the application and decide it on its merits—here the needs of the neighbourhood for an "off-licence". In the instant case the magistrates in October 1974 failed to fulfil their duty to consider the application of October 1973 for premises C on its merits because they asked themselves the wrong

question; viz: whether for the purposes of s.34(2)(*d*) premises C were within the relevant distance from premises B. The right question (see the *Mitakos* case) was whether they were within the relevant distance from premises A. Since they were not, s.34(2)(*d*) did not operate to deprive the present appellant of his right to apply for a licence. It is of course true to say that not every error by a tribunal is susceptible of an order by way of mandamus on the ground that it has failed to fulfil the duty put upon it. A tribunal may in the course of fulfilling its task err. Perhaps if a tribunal such as this had correctly enquired for the purposes of s.34(2)(*d*) whether premises C were within the stated distance of *premises A*, but by an error of measurement decided erroneously that they were, mandamus would not have been appropriate: the correct question would have been incorrectly answered in the exercise of the tribunal's functions. But in the instant case the proximity of premises C to premises B was of no more relevance to functions of the tribunal (in determining whether the application for a licence was forbidden by s.34(2)(*d*)), than would have been their proximity to the dwelling house next door. Their Lordships are unable to accept the view that the particular error of the Full Bench can fairly be described as one within the field committed by the statute to its decision for better or worse. It was a matter collateral, preliminary to the enquiry and the decision that was entrusted to the tribunal.

In this connection their Lordships cite with approval from the judgment of Yeldham J:

> " In these circumstances it is apparent that a person who desires to obtain the relevant license has a statutory right to apply, and the court has a corresponding statutory duty to hear and determine such application. The issues are whether the conditions prescribed (*e.g.* in relation to premises, plans etc., and the giving of notice) are complied with; whether or not any objections are sustained; and whether, if they are, there should in any event be the grant of a license. Section 34, which is contained in Division 4, in my opinion deals with a collateral matter or a condition precedent to the right of an application to be made and hence to the obligation of the court to hear and determine it. It is not, as I have already indicated, something to be raised by way of objection under s.29 but rather is to be dealt with as a preliminary objection because, if it succeeds then the court cannot enter at all upon the merits of the application. I do not agree that in deciding, upon an erroneous view of the section, that there was a moratorium period which precluded the application being heard and determined, the Full Bench was merely adjudicating upon facts committed to it for its decision in the course of the enquiry which it had jurisdiction to make. Rather do I think the position is akin to the cases referred to by Coleridge J. in *Reg v. Richards* (20 L.J.Q.B. 351) (referred to by Griffith C.J. in *President and Members of the Court of Arbitration* (*W.A.*) *v. Nicholson* (1906) 4 C.L.R. 362 at page 369) where the inferior court abstained from entering upon the merits in consequence of arriving at a wrong decision upon a preliminary point, in which case the superior court will set them right. As Isaacs J. observed in *Amalgamated Society of Carpenters and Joiners v. The Haberfield Proprietary Ltd.* (1907) 5 C.L.R. 33 at page 53 'everything depends upon ascertaining in any particular case whether the matter in contention is collateral or preliminary, or is part of the subject matter, which, if true is within the court's jurisdiction' ".

Their Lordships also approve the approach of Mahoney J. in his dissenting judgment where he stresses that s.34(2)(*d*) in terms deals with a matter or condition precedent or collateral to the right to make an application rather than of the Court to grant the application.

Glass J.A. (with whose judgment Reynolds J.A. concurred) stated the question as being whether the Full Bench

> " decided a question upon which its jurisdiction depended (which can be reviewed upon an application for a mandamus) or a question in the exercise of its jurisdiction (which cannot)."

Accepting that formulation of the question it appears to their Lordships that in fact the Full Bench did decide a question upon which its jurisdiction depended in that for a wholly irrelevant reason they decided that the application was forbidden by the statute. Their Lordships are of opinion that on the construction of the statute it was not within the jurisdiction of the magistrates in effect (albeit in good faith) to invent a ground not provided for by the statute for depriving the applicant of his prima facie right to apply for a licence.

There are of course a great many authorities on this kind of point, though most of them concern situations in which a tribunal has (allegedly wrongly) exercised jurisdiction rather than (as here) declined jurisdiction. A passage from the judgment of Jordan C.J. in *Ex parte Redgrave* (1946) 46 S.R. (N.S.W.) 122 at p.125 may be usefully cited:

> " It is not possible to devise a test which will supply a ready and easy solution for any and every case in which the question may be raised. The answer depends, in every case, upon the intention of the statute by which the jurisdiction is conferred, and this must be gathered by a consideration of its language, the scope of the jurisdiction which it confers, the nature of the fact, and its relation to the matter to be determined. For instance, if the statute confers jurisdiction in cases of a general class and then goes on to except especially a type of case that would otherwise fall within the class, this affords some indication that it is intended not only that the jurisdiction of the tribunal shall not extend to the excepted class but that it shall not have the power to determine, unexaminably, whether a particular case is within or without it."

Some reliance was placed below on the case of *Parisienne Basket Shoes Pty. Ltd. v. Whyte* (1937–8) 59 C.L.R. 369: that concerned an information laid out of the time prescribed by the statute creating the offence, and it was held to be within the jurisdiction of the magistrate to decide (albeit erroneously) that it was properly laid: and see particularly Dixon J. at pages 388–389 and 391. But that case is very different from the instant case, in which the Bench were dealing with a question preliminary and collateral to the existence of a power to hear and determine the application and disclaimed power to do so on an erroneous view on the construction of s.34(2)(*d*) that the application itself had no standing before them. Their Lordships do not consider that the comments of Dixon J. are inconsistent with the passage already cited from Jordan C.J. in the *Redgrave* case. The case of *Ex parte Weiss* (1939) 61 C.L.R. 240 may be mentioned, if only to say that it has nothing to contradict the opinion of Yeldham J. It was there held that it was within the powers of the Commissioner of Patents, in the course of proceedings for the grant of a patent, to rule (albeit erroneously) on the *locus standi* of an objector to the grant. But such objection was a matter which arose after proceedings for a grant had been initiated, and it was natural to suppose that the Commissioner, being validly seized of the proceedings, was intended to have power to rule on matters arising in the course of them. In the instant case however the question under s.34(2)(*d*) stands before the threshold of the proceedings.

In considering the intention of the statute on this question of the field in which jurisdiction or power of decision is committed to the licensing magistrates it is to be observed that a substantial failure to comply with

the preliminaries to an application under s.24 deprives the magistrates of jurisdiction: see the decision in *Minahan v. Baldock* (1951) 84 C.L.R.1 on a comparable statute in the Northern Territory, from which Mahoney J. extracted the following citation:

> "The Licensing Court is a tribunal with special jurisdiction exercisable only subject to the conditions which the ordinance lays down. The remedy of prohibition is appropriate to restrain it from acting when there is no fulfilment of conditions precedent laid down by s.27. The language used by Jordan C.J. in *Ex parte Toohey's Ltd.; Re Butler* (1934) 34 S.R. (N.S.W.) 277 at p.283, is applicable: 'The present case is not one in which a subordinate tribunal from which there is no appeal has given a decision as to certain facts, and there is a question whether these are collateral or part of the issue. It is, I think, one in which the right of the tribunal of limited jurisdiction . . . depends upon a certain proceeding which has been made an essential preliminary to the inquiry'. In that case the preliminary was the application for a determination within a specified time. In the present case it is the deposit of the plans . . ."

By way of contrast with s.24 and s.34(2)(*d*) is to be found s.34(2)(*c*) under which it is clearly left to the magistrates to arrive at a conclusion whether the licence (if granted) will be used substantially for wholesale sales. Similarly s.34(2)(*e*) leaves it within the field of the magistrates' powers to decide whether an application for the removal of a licence is one for removal " within the neighbourhood of the existing premises ".

Accordingly their Lordships are of opinion that on the true view of the statute it was not within the ambit of matters committed to the decision of the magistrates to refuse to entertain the application on the ground, irrelevant in law, that the application was forbidden by s.34(2)(*d*). Accordingly the case was one appropriate for the order by way of mandamus and declaration made by Yeldham J. Remedy of that character is discretionary: Yeldham J. carefully considered that matter and made the order: Mahoney J.A. would have supported the exercise of discretion: neither of the other judges criticised that aspect of Yeldham J.'s judgment, and their Lordships see no reason to disagree with it.

Accordingly their Lordships are of opinion that the order of the Court of Appeal should be set aside (save as to costs) and that of Yeldham J. restored, and will humbly advise Her Majesty accordingly.

As to costs: the order of Yeldham J. in favour of the present appellant stands. He does not seek an order for costs of this appeal nor to reverse the order for costs in the Court of Appeal and undertakes not to rely upon the Certificate granted to him by the Court of Appeal under the Suitors' Fund Act.

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In the Privy Council

DONALD WILLIAM MANNING

v.

ROBERT JAMES THOMPSON
AND OTHERS

DELIVERED BY
LORD RUSSELL OF KILLOWEN

Printed by HER MAJESTY'S STATIONERY OFFICE
1979