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IN THE PRIVY COUNCIL No.48 of 1980

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS C.A. 260 of 1978

B E T W E E N :

JOHN ALBERT CARBERY
ROSS FRANCIS CARBERY
PETER BRIAN HORAM
BRIAN GEORGE WILEMAN
N.M.L. INVESTMENTS PTY. LIMITED — Appellants (Plaintiffs)

- and -

HARRY JAMES
HERBERT WILLIAM HARDING
JOHN LESLIE DURKIN
KEVIN FRANCIS WALZ
FREDERICK PHILLIPS
THOMAS ANTHONY RATCLIFFE — Respondents (Defendants)

CASE FOR THE APPELLANTS

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RECORD

1. This appeal is brought pursuant to Special Leave to appeal granted on the 21st April, 1980 from the decision of the Supreme Court of New South Wales Court of Appeal (Moffitt P., Reynolds and Samuels JJ.A.) dated 17th October, 1979 allowing an appeal by the first respondent from an order made by Ash J. on 13th June, 1978 in the Supreme Court of New South Wales Common Law Division. Ash J. had ordered that the sixth respondent, the Licensing Magistrate, be prohibited from proceeding further to hear and determine the conditional application made by the first respondent to the Licensing Court for the Penrith Licensing District under section 27 of the Liquor Act, 1912 for the grant of a spirit merchant's license in respect of premises at 38 Phillip Street, St. Marys. 32

2. The single issue raised in this Appeal is

RECORD

the proper construction of the words -

"......under paragraph (a) or (b)..."

appearing in paragraph (d) of sub-section (2) of section 34 of the Liquor Act, 1912 of New South Wales (hereafter referred to as "the Act").

THE RELEVANT STATUTORY PROVISIONS

3. The only provisions of the Act relevant to this Appeal are :-

(i) Section 10, which confers exclusive jurisdiction on the district Licensing Court to hear applications for the various types of liquor licenses and objections thereto;

(ii) Section 27, which lays down the procedure to be followed when an application is made for any "conditional" license - as in this case;

(iii) Section 29(1), which permits various categories of persons to object to the granting of a license application and sets out seven specific grounds of objection, including -

"(e) That the reasonable requirements of the neighbourhood do not justify the granting of such application;"

and

(iv) Section 34, which deals with "Renewed Applications".

4. Both before and after its amendment in 1969, section 34 of the Act was designed to limit renewed applications for liquor licenses after a previous refusal. In its original form section 34 provided :-

"34. The refusal of an application for a license under this Part, or for the renewal, transfer, or removal of any such license shall not prevent a like application being subsequently made in respect of the same premises or subject-matter. But if an application for such license, or for a renewal thereof, is refused after a previous refusal of a like application, and in respect of the same premises, within the period of three years from the date of such

first application, then no such license or renewal in respect of such premises shall be granted until after the expiration of three years from the last refusal.

....."

Although the section applied to all types of licenses its ambit was narrow because, in particular, it only applied the three-year moratorium where successive applications were made in respect of precisely the same premises.

5. By the Liquor (Amendment) Act 1969 which came into force on 3rd December 1969, Parliament made substantial amendments. The old section 34 became sub-section (1) of the new section 34, and a new sub-section (2) was enacted, limited to spirit merchants' licenses (i.e., "off-licenses") consisting of four paragraphs, (a), (b), (c) and (d).

Paragraph (a) was a transitional provision the need for which disappeared in course of time and it was repealed in 1976, before the first respondent made his application in this case. However, it is set out below for completeness and because it plays a part in the proper construction of paragraph (d).

Paragraph (c) provides an exemption for whosesale trading and is irrelevant to this Appeal.

A fifth paragraph, (e), was subsequently added by a further amending Act, but it is also irrelevant to this Appeal.

6. The relevant provisions of sub-section (2) are :-

" (2) (a) Where an application or conditional application for the grant or removal of a spirit merchant's license has, before the commencement of the Liquor (Amendment) Act, 1969, been refused on the ground of objection referred to in paragraph (e) of section 29 of this Act, the licensing court shall not have jurisdiction to hear and determine any application or conditional application by the same or any other person whether made before or after such commencement for the grant or removal of a spirit merchant's license in respect of the same premises or premises or proposed premises situate

RECORD

within a radius of 1.61 kilometres thereof before the expiration of twelve months from the date of such refusal.

Nothing in this subsection shall preclude the licensing court from hearing and determining any appeal under subsection (5) of section 170 from an adjudication in respect of the grant or refusal before such commencement of any such application.

(b) Where an application or conditional application for the grant or removal of a spirit merchant's license has, after the commencement of the Liquor (Amendment) Act, 1969, been refused on the ground of objection referred to in section 29(1)(e), no application or conditional application by the same or any other person shall be made for the grant or removal of a spirit merchant's license in respect of the same premises or premises or proposed premises situate within a radius of 1.61 kilometres thereof before the expiration of twelve months from the date of such refusal.

(d) Where an application or conditional application for the grant or removal of a spirit merchan't 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 section 29(1)(e), 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."

When paragraph (a) was repealed by the Liquor (Further Amendment) Act, 1976 Parliament omitted to make the consequential amendment in paragraph (d) by deleting the words "(a) or". Although courts which have had to construe section 34(2)(d) have repeatedly criticised the obscurity of the words "..... under paragraph (a) or (b)....." Parliament has consistently declined the opportunity of clarifying its intention. Considerable litigation has resulted.

RECORD

7. Before setting out the brief history of this litigation and the agreed facts of the case, certain preliminary comments may be made upon section 34(2)(d). The Supreme Court of New South Wales has said, and it is not in dispute, that :-

(i) The words ".....under paragraph (a) or (b)....." are not mere surplusage and some meaning must be attributed to them.

(ii) They do not bear their most obvious meaning. No application or conditional application is "made" under paragraphs (a) or (b), but under other sections of the Act (sections 24, 27, 39 or 39A according to the type of license applied for or the nature of the application).

(iii) Accordingly, whatever meaning is attributed to the phrase, some violence must inevitably be done to the wording.

(iv) The principal purpose of section 34(2) is to limit, in the public interest, the number of occasions upon which the "reasonable requirements" of a particular area are to be successively investigated. (It will be appreciated that this ground of objection - hereafter referred to as "ground (e)" - habitually gives rise to extensive evidence and prolonged hearings before the Licensing Courts, by contrast with objections based on the other paragraphs of section 29).

THE COURSE OF THE LITIGATION

8. In the proceedings in the Licensing Court the first respondent on 25th November 1977 made a conditional application under section 27 of the Act for the grant of a spirit merchant's license for the specified premises. p.3 L.29

Objections were taken to the grant of the application by the appellants, by the second, third and fourth respondents, and by the fifth respondent who was the District Licensing Inspector. p.3 L.35-37 p.4 L. 1-7

The sixth respondent being Chairman of the Licensing Magistrates on 18th April 1978 constituted the Licensing Court for the Penrith Licensing District for the purpose of hearing and determining the application. At p.4 L.7-11 p.4 L.13-22

RECORD

p.6 L.19 - p.7 L.37

such hearing the appellants claimed as a preliminary question that the Court was unable to proceed with the hearing because of the impact of section 34(2)(d) of the Act on the agreed facts relating to previous refusals. The sixth respondent held that he was not deprived of jurisdiction, whereupon the appellants applied by summons to the Supreme Court of New South Wales for an order in the nature of a prohibition directed to the sixth respondent. The appellants succeeded before Ash J., but the Court of Appeal allowed the first respondent's appeal and endorsed the decision of the Licensing Court.

9. The question raised in this Appeal is whether the application referred to in paragraph (d) as being "under paragraph .... (b)" is the application first referred to in that paragraph, i.e., the one refused on the relevant ground on or after 3rd December 1969 (as Ash J. held and the appellants contend) or is the application secondly referred to, i.e., the one the making of which is forbidden until the expiration of twelve months from the date of a post-commencement refusal, and then having been made is refused on the relevant ground (as the Court of Appeal held and the first respondent contends).

THE AGREED FACTS

p.4 L.24-37

10. The facts were agreed before the Licensing Court as follows :

A. Previous applications refused at St.Marys, all on the ground prescribed in s.29(1)(e):

No.	Applicant	Date Application made	Premises	Date of Refusal	Date of Refusal on Appeal
(1)			Parklawn Place	23rd Feb. 1970	No appeal
(2)	Matthews		66 Queen Street	21st Nov. 1974	No appeal
(3)	Bruzzese	4th July 1974	Lot 62, Monfarville Street	26th Aug. 1975	9th April 1976

(These refusals are hereafter referred to respectively as refusal (1), (2) and (3)).

B. (i) The premises referred to in (1) and (2)

are within 1.61 kilometres of each other and the premises of the first respondent.

(ii) The premises referred to in (3) are within 1.61 kilometres of the premises referred to in (2) and the premises of the first respondent.

THE DECISIONS OF THE COURT BELOW

11. In his interim decision dated 18th April 1978 upon the challenge to his jurisdiction the sixth respondent held that the application which resulted in refusal (3) having been made on 4th July, 1974, before the occurrence of refusal (2), was not prohibited by section 34(2)(b) and accordingly the preconditions imposed by section 34(2)(d) had not been fulfilled, and the application of the first respondent was not proscribed by any of the provisions of section 34. p.6 L.19-p.7 L.37

12. In his judgment Ash J. held that the application which resulted in refusal (3) made on 4th July, 1974, and ultimately refused on 9th April, 1976, was an application .....under paragraph (b) within the meaning of that phrase as occurring in section 34(2)(d). Accordingly, as it resulted in a further refusal following refusal (2), the application of the first respondent made on 25th November, 1977 should not be allowed to proceed. p.18 L.1-10

13. By notice of appeal filed 23rd June, 1978 the first respondent appealed to the Court of Appeal on grounds which included : p.23-25

"9. S.34(2)(d)....predicated a second application made after the expiration of twelve months from the date of the previous refusal in accordance with the provisions of S.34(2)(b), and subsequently refused. Therefore the fact that in this case the second application was made before the first application was refused is relevant." p.24 L.18-24

14. In judgments delivered on the 17th October 1979 the Court of Appeal accepting this argument held that because the application which became refusal (3) was made before refusal (2) occurred it was not an application....under paragraph....(b) of section 34(2). p.28-30

15. The leading judgment in the Court of

RECORD

Appeal was given by Reynolds J.A. who, in summary held :

p.28 L.12-18 (i) the application which became refusal (3) was made at a time, namely 4th July, 1974, when it was not rendered imcompetent by reason of either of the refusals (1) and (2),

p.28 L.19-25 (ii) it is clear that there had been a refusal after the expiration of twelve months from the date of the previous refusal on the relevant ground, but the question remained as to whether the second refusal was in respect of a "conditional application for the grant of a ..... license under paragraph (b)",

p.29 L.33 (iii) the words "under paragraph.....(b)" obviously require that there is to be some connection or relationship between the application in question and section 34(2)(b),

p.29 L.36 (iv) when the application which became refusal (3) was made on its return date of 4th July, 1974, section 34(2)(b) had no operation in respect of it; and whatever connection might be required to satisfy section 34(2)(d), there was none in this case,

p.29 L.43 (v) the phrase "application....under paragraph ....(b)" ... means an application which would be proscribed by section 34(2)(b), but for the expiration of twelve months from the date of the refusal of such /sic/ application. (His Honour presumably meant "a previous application"). The application which became refusal (3) was not such an application. The refusal in fact (1) had become irrelevant in point of area.

p.28 L.38-p.29 L. 8 In support of his so holding, Reynolds J.A. relied on the obiter dicta in Mitakos v. Allan (1976) 1 N.S.W.L.R. 62, at 66 (Moffitt P.) and to a lesser extent at 68-69 (Glass J.A.) and 72-73 (Mahoney J.A.).

p.30 L.31 In his judgment Moffitt P. expressed his agreement with the reasons given by Reynolds J.A., his adherence to the construction which he attributed in Mitakos v. Allan (supra) to the words "under par. (a) or (b)", and added that the word "delayed" therein used was in the sense that in order to avoid the prohibition of sub-section (b) the making of the application

must be delayed by the applicant and brought after the expiration of the twelve months. Samuels J.A. agreed with the judgments of Moffitt P. and Reynolds J.A. RECORD p.30 L.44

The essential reasoning of the Court of Appeal, therefore, was that as the Bruzzese application on 4th July 1974 was not at that date an application the making of which had had to be deferred for at least twelve months by reason of a previous refusal on ground (e), and thus was not an application "under paragraph (b)", the Bruzzese application was not an application falling within the first half of paragraph (d). Accordingly, the fact that it was refused on 9th April, 1976 (the refusal on appeal being the effective date) was irrelevant to the present application which was therefore not prohibited by the second half of paragraph (d).

SUBMISSIONS AGAINST THE COURT OF APPEAL DECISION

16. The appellants make the following submissions on this reasoning :-

(i) It was regarded as untenable by a unanimous Court of Appeal in Ex parte Rasko; Re Bowerman (1973) 1 N.S.W.L.R. 543 (n).

(ii) It involves a strained construction of paragraph (d) which would have to be read as though the following underlined words appeared :-

> "Where an application or conditional application for the grant or removal of a spirit merchant's license being an application the hearing or making of which was prohibited under paragraph (a) or (b) before the expiration of twelve months from the date of a previous refusal has been refused after the expiration of twelve months from the date of a previous refusal on the ground of objection referred to in section 29 (1)(e), ... "

(iii) This necessarily renders the actual words of paragraph (d) "....after the expiration of twelve months from the date of a previous refusal...." otiose (as Ash J. pointed out in the earlier case of Hore v. Fitzmaurice & Ors. (1975)

RECORD

2 N.S.W.L.R. 379 at p.385 D - E).

(iv) It ignores the fact that paragraph (d) is concerned with refusals, not applications.

(v) It is not in accord with the clear legislative policy which lies behind section 34(2).

17. It is not easy to discern any common factor in the obiter dicta of the three Judges of Appeal in Mitakos v. Allan (1976) 1 N.S.W.L.R. 62, a case concerned solely with the "area" provisions of paragraph (d). Their Honours Glass and Mahoney JJ.A. explain the meaning of paragraph (d) in terms which are at least equally consistent with the appellants' contention as with that of the first respondent. They were so understood by Yeldham J. in Clark v. Cassidy & Ors. (1976) 1 N.S.W.L.R. 524.

SUBMISSIONS IN SUPPORT OF THE APPEAL

p.19 L.35-42

18. Ash J. was correct when he said in relation to the moratorium aspect of section 34(2) :

> "If there has been a refusal on the prescribed ground, a further application cannot be made until the expiry of twelve months from the date of that refusal. But if that refusal was not itself a first one, but occurred after the expiry of twelve months from the date of a previous refusal, then a further application cannot be made within three years from it."

His Honour was there rephrasing the paragraph of his own judgment (because paragraph (a) no longer exists) in Hore v. Fitzmaurice & Ors. ((1975) 2 N.S.W.L.R. 379, at pp.385, 386).

This approach follows from the decision of the Court of Appeal in Ex parte Rasko; re Bowerman (1973) 1 N.S.W.L.R. 543 (n).

19. The appellants' contention is that the words "under paragraph (b)", though somewhat inapt, merely serve the necessary purpose of linking the application which paragraph (d) bars for a three-year period with previous refusals (i) in the same area and (ii) on the same ground, i.e., ground (e). The object of paragraph (d) is to create a three-year moratorium on any further application where the reasonable requirements of the same area

have been investigated twice before and twice held not to justify the grant of the application. Without some link sufficiently connecting the second of the previous applications with the first, paragraph (d) would be expressed too widely. To take a simple example, suppose an application is made in respect of premises A and refused on ground (e), paragraph (b) then preventing any further application within 1.61 kilometres of A being made for at least a year from the date of the first refusal. Immediately after the expiration of the one-year period, a second application is made either in respect of premises A or premises within 1.61 kilometres of A. If that application is refused, say, on grounds personal to the applicant (section 29(1)(a), (b) or (c)) or grounds applicable to the particular premises ((d) or (f)) or their immediate neighbourhood ((g)), there is no reason of public interest why a third application in the area should not be made immediately thereafter. If, however, the second application is also refused on ground (e) the reasonable requirements of the 1.61 kilometre area surrounding A will have been investigated twice within a short period, viz., one year plus whatever time passes between the making of the second application and the hearing of objections based on ground (e). In those circumstances paragraph (d) provides that no third application shall be made in the 1.61 kilometre area for three years from the date of the second refusal.

Thus the words "under paragraph (b)" simply provide, in effect, that the only type of second refusal which is relevant for the purpose of barring a third application within three years is a second refusal on ground (e) which follows a first refusal on ground (e), both refusals being in respect of the same area, which is also the area involved in the third application.

On this construction, Ash J. was right. Bruzzese's application was refused on ground (e) on 9th April 1976. This occurred "after the expiration of twelve months from the date of" the refusal of Matthews' application (a refusal in respect of the same area on 21st November 1974, also on ground (e)). The first respondent's application dated 25th November 1977 was thus made within three years of the date of the last refusal (Bruzzese) and was prohibited by paragraph (d). The earliest date on which the first respondent could have applied was 10th April 1979.

RECORD

20. The work to be done by paragraph (d) can be seen by looking at what is the clear operation of paragraphs (a) and (b).

Paragraph (a) is intended to deal with applications awaiting hearing at the commencement of the 1969 amendment as well as those subsequently made, in circumstances where there is an existing refusal, and imposes a moratorium against the hearing of an application for premises in the proscribed area for the proscribed period.

Paragraph (b) is intended to deal with refusal after the commencement date.

As to paragraph (d) it is submitted that this is intended to deal with refusal which are not first refusals but second ones, and occurring after the expiration of twelve months from the date of the previous refusal.

21. The clear legislative policy is to limit the number of applications which may be made for an area once there has been an investigation into its requirements. The construction contended for by the appellants can be seen to be in accordance with such policy. The area surrounding the premises specified in the first respondent's application has already been the subject of three investigations as to its reasonable requirements with the following results :-

(i) refusal (1) on 23rd February 1970 caused a one year moratorium to operate for a distance of 1.61 kilometres from the premises at Parklawn Place;

(ii) refusal (2) on 21st November 1974 caused a one year moratorium to operate for a distance of 1.61 kilometres from premises at 66 Queen Street;

(iii) and, as well, it caused a three year moratorium to operate for a distance of 1.61 kilometres from the premises of refusal (1) at Parklawn Place;

(iv) refusal (3) on 9th April 1976 caused a one year moratorium to operate for a distance of 1.61 kilometres from the premises in Monfarville Street

and on the appellants' contention

(v) also caused a three year moratorium to operate for a distance of 1.61 kilometres from the premises of refusal (2) at 66 Queen Street.

22. The appellants submit that, assuming some additional or explanatory words have to be read into paragraph (d) the proper interpolation is as follows :

> "Where an application or conditional application for the grant or removal of a spirit merchant's license has been refused under paragraph (a) or (b) and has been refused after the expiration of twelve months from the date of a previous refusal on the ground of objection referred to in section 29(1)(e), ..."

Alternatively the paragraph can be interpreted correctly without the addition of any words, but by a simple transposition in the third line :-

> "Where an application or conditional application for the grant or removal of a spirit merchant's license has been refused under paragraph (a) or (b) after the expiration of twelve months...etc."

23. The appellants accordingly submit that the decision of the Supreme Court of New South Wales Court of Appeal is erroneous and ought to be reversed, that the appeal ought to be allowed and that the ords made by Ash J. be restored for the following (amongst other)

R E A S O N S

(1) The application of the first respondent was proscribed by the operation of section 34(2)(d) of the Act upon the agreed facts.

(2) The decision of the Court of Appeal is wrong.

(3) The decision of Ash J. is correct, and conforms with the policy of the Act, and with previous decisions.

ROBERT GATEHOUSE

GEORGE RUMMERY

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