

13,1981

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

BETWEEN :

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 FIRST RESPONDENT

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BETWEEN :

10 JOHN ALBERT CARBERY
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CASE FOR THE FIRST RESPONDENT

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Introduction

- 20 1. This is an appeal by special leave of the Queen's Most Excellent Majesty in Council granted on 21st April 1980 from a decision given on 17th October 1979 of the New South Wales Court of Appeal (Moffitt P., Reynolds and Samuels JJ.A.) allowing an appeal by the first respondent from a decision of Ash J. given on 13th June, 1978 in the Common Law Division of the Supreme Court of New South Wales. Page 32
- 30 2. The Court of Appeal set aside an order made by Ash J. prohibiting the sixth respondent from hearing and determining a conditional application by the first respondent to the Licensing Court for the Penrith Licensing District under s. 27 of the Liquor Act 1912 for the grant of a spirit merchant's license in respect of premises situate at 38 Phillip Street St. Marys in the said Licensing District. Page 31

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3. The question raised in this appeal concerns the proper construction of s. 34(2)(d) of the Liquor Act, 1912, as amended (hereinafter referred to as "the Act").

Facts

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4. On 25th November 1977 the first respondent made a conditional application to the Licensing Court for the Penrith Licensing District for the grant of a spirit merchant's license in respect of premises situate at 38 Phillip Street, St. Marys. 10

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5. The appellants objected to the granting of the application as did the second, third, fourth and fifth respondents. However, in the proceedings in the Supreme Court of New South Wales these respondents filed submitting appearances.

6. On the 18th April 1978 the sixth respondent being the Chairman of the Licensing Magistrates constituted the Licensing Court for the Penrith Licensing District for the purpose of hearing and determining the said application. The parties before him agreed that the relevant facts were as follows : 20

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	30
(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) These 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 40

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

History of Application

7. The appellants raised a preliminary objection that the Licensing Court was unable to proceed with the hearing because of the provisions of s. 34(2)(d) of the Act. The sixth respondent held that the application was not proscribed by any of the provisions of s. 34 and that he had jurisdiction to entertain the application.

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10 8. The appellants thereupon applied by summons to the Supreme Court of New South Wales for an order in the nature of prohibition directed to the sixth respondent. The summons was heard in the Supreme Court by Ash J. who, on 13th June 1978, made an order prohibiting the sixth respondent from proceeding further to hear and determine the application.

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20 9. The first respondent appealed to the Court of Appeal (Moffitt P., Reynolds and Samuels JJ.A.) from the decision of Ash J. and on 17th October 1979 the appeal was unanimously upheld.

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The Legislation

10. Section 10 of the Act gives the Licensing Court exclusive jurisdiction to hear and determine applications and conditional applications for spirit merchant's licenses and any objections to such applications. A spirit merchant's license authorises the licensee to sell liquor on the premises specified for consumption off the licensed premises - vide s. 15A of the Act.

30 11. Conditional applications for such licenses are made under s. 27 of the Act. Section 29(1)(e) of the Act provides that objection may be taken to the grant of a license upon the ground, inter alia, that the reasonable requirements of the neighbourhood do not justify the granting of such license.

12. At all relevant times s. 34 of the Act provided as follows :

40 "34. (1) 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

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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. Upon the refusal of an application the court shall, at the time of such refusal, state the reasons therefor. 10

(2)(a) * * * * *

(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. 20

(c) Paragraphs (a) and (b) shall not apply where the Licensing Court is satisfied that the license in respect of which the application is being made will be used substantially in connection with the sale of liquor to persons authorised to sell liquor. 30

(d) 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 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. 40

(e) Nothing in the foregoing provisions of this subsection shall preclude the licensing court from hearing and determining, or the holder of a spirit merchant's license making, an application or conditional application for the removal of a spirit merchant's license to other premises within the neighbourhood of the existing premises".

Paragraph 2(a) was repealed in 1976 and prior to its repeal was in the following terms:

10 "34 (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 twenty-nine 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
20 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
 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 five of section one hundred and seventy of
 this Act from an adjudication in respect of the grant
 or refusal before such commencement of any such
30 application. "

Submissions

13. Section 34(2) of the Liquor Act evinces a policy of placing
a time limitation (or moratorium) on successive applications
for spirit merchant's licenses in respect of areas which have
been the subject of decisions of the Licensing Court
determining that the reasonable requirements of the neighbourhood
do not justify the granting of the application.

40 14. Section 34(2) limits the area that will be affected by
 this moratorium, whether it be a twelve month moratorium
 under s. 34(2)(b) or a three year moratorium under s. 34(2)(d).

15. Section 34(2)(d) invokes a three year moratorium only
if there has been a refusal of an application on the ground
specified in s. 29(1)(e) of the Act and then, if after twelve months,
a similar application is refused being an application "under"

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s. 34(2)(b) of the Act.

16. When the application which became refusal (3) was made on 4th July 1974 there was no prior refusal under s. 29(e) within 1.61 kilometres of the site the subject of that application.

17. The application which was the subject of refusal (3) was not an application under s. 34(2)(b) for the purposes of s. 34(2)(d) or in any way tainted by the provisions of the latter subsection. Accordingly, s. 34(2)(d) did not apply to a second refusal of an application made in respect of new territory and unaffected by s. 34(2)(b). 10

18. It is thus submitted that application (3) was not an application under s. 34(2)(b) and that the only moratorium imposed by refusal (3) was a twelve months moratorium from the date of the refusal on appeal, i. e. 9th April 1976.

19. The moratorium imposed by refusal (2) expired one year after 21st November 1974 and the moratorium imposed by refusal (3) expired one year after 9th April 1976. Therefore the first respondent was free from the constraints imposed by s. 34(2) when he made his application on 25th November 1977. 20

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20. It is further submitted that Reynolds J.A. was correct in interpreting the words "application under paragraph (b)" in s.34(2)(d) as "an application which would be proscribed by s. 34(2)(b) but for the expiration of twelve months from the date of the refusal of such application". 30

21. The first respondent relies upon the decision of the Court of Appeal in Mitakos v. Allen (1976) 1 N.S.W. L.R. 62 - see especially per Moffitt P. at p. 66G - 67, Glass J.A. at p. 68F-G and Mahoney J.A. at p. 72F - 73B. The interpretations placed under s. 34(2)(d) in those judgments all lead to the conclusion that there must have been a prior refusal under s. 34(2)(a) or (b) affecting the site before an application for a spirit merchant's license for such site can be said to be an application under s. 34(2)(a) or (b) for the purposes of s. 34(2)(d). 40

22. The first respondent further relies upon the decision of Mahoney J.A. in Hore v. Fitzmaurice (1976) 1 N.S.W. L.R. 75 at p. 79 where he said that

the words "under paragraph (a) or (b) in s. 34(2)(d)" mean, in effect: "when an application which (if it had been made before the expiration of the relevant twelve months period) would have fallen within the operation of s. 34(2)(a) or (b) . . ."

10 23. It is submitted that the Court of Appeal in this case did not approach the interpretation of the words "under paragraph (b)" in a way different from the Court of Appeal in Ex parte Rasko (1973) 1 N.S. W.L.R. 543. In Rasko's Case the Court of Appeal rejected a submission that s. 34(2)(b) should be read as if the first part ended with the words "section 29 of this Act" and the following words were the part of the section referred to in s. 34(2)(d). The Court thus rejected a submission that s. 34(2)(b) should be divided for the purposes of s. 34(2)(d).

What Reynolds J.A. said in the present case:

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20 "Expressed in my own language, it seems to me that the phrase 'application . . . under paragraph . . . (b)' in the present context, means an application which would be proscribed by s. 34(2)(b), for the expiration of twelve months from the date of the refusal of such application"

referred to the whole of s. 34(2)(b) not just the latter part, as submitted and rejected in Rasko's Case.

30 24. Insofar as there is any inconsistency between what the Court of Appeal said in Rasko's Case and in the present case as to the proper construction of s. 34(2)(d) the views of the Court in the present case are to be preferred.

25. The first respondent respectfully submits that the order of the Court of Appeal was correct and ought not to be disturbed for the following (amongst other)

R E A S O N S

- (1) BECAUSE the application by the first respondent was not proscribed by the moratorium imposed by s. 34(2)(d) of the Liquor Act.
- 40 (2) BECAUSE there was not any other proscription in the Liquor Act prohibiting the Licensing Court from proceeding to hear and determine the first

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respondent's application.

T. R. MORLING

W. J. HOLT