13/81

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)

TRANSCRIPT RECORD OF PROCEEDINGS

ARTHUR PRITCHARD & CO.
140 Phillip Street
SYDNEY NSW

By their Agents:

WEDLAKE BELL
16 Bedford Street
Covent Garden
LONDON WC2E 9HF

Solicitors for the Appellants

ABBOTT TOUT CREER & WILKINSON
19-29 Martin Place
SYDNEY NSW

By their Agents:

BLYTH DUTTON HOLLOWAY
9 Lincoln's Inn Fields
London WC2A 3DW

Solicitors for the First Respondent

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 :-

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FREDERICK PHILLIPS
THOMAS ANTHONY RATCLIFFE — Respondents (Defendants)

TRANSCRIPT RECORD OF PROCEEDINGS

INDEX OF REFERENCE

Documents included in the record

PART I

IN THE SUPREME COURT OF NEW SOUTH WALES No.11845 of 1978

COMMON LAW DIVISION

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 — Plaintiffs

- and -

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

In the Supreme Court of New South Wales

No. 1 Summons

No. 1

Summons

The Plaintiffs claim:

1. A Declaration that the sixth Defendant has no jurisdiction further to hear and determine the conditional application made by the first Defendant to the Licensing Court for the Penrith Licensing District under S.27 of the Liquor Act for the grant of a Spirit Merchant License in respect of premises 38 Phillip Street, St. Marys.

2. An order that the sixth Defendant be prohibited from proceeding further to hear and determine the said application.

3. An order that the first Defendant pay the Plaintiff's costs of this Summons.

GROUNDS:

1. The application of the Plaintiff is proscribed by the provisions of S.34 of the Liquor Act.

TO THE DEFENDANTS:

HARRY JAMES of 60 Larra Crescent, North Rocks, Manager
C/- Abbott Tout Creer & Wilkinson, Solicitors of
60 Martin Place, Sydney.

In the Supreme Court of New South Wales

No. 1 Summons

HERBERT WILLIAM HARDING of Harrod Street, Prospect, Spirit Merchant

JOHN LESLIE DURKIN of 3 Coolangatta Avenue, Cronulla, Company Director

KEVIN FRANCIS WALZ of 168 Beaconsfield Street, Milperra, Company Secretary
C/- Freehill Hollingdale & Page, Solicitors of 60 Martin Place, Sydney.

FREDERICK PHILLIPS C/- Office of the Superintendent of Licenses, 174 Phillip Street, Sydney
C/- State Crown Solicitor

THOMAS ANTHONY RATCLIFFE Chairman of the Licensing Magistrates, 174 Phillip Street, Sydney
C/- State Crown Solicitor

If there is no appearance before the Court by you or by your Counsel or Solicitors at the time and place specified below the proceedings may be heard and you will be liable to suffer Judgment or an order against you in your absence. Before any attendance at that time you must enter an appearance in the Registry.

Judge:

Time: 10 am 26th May 1978.

Place: Supreme Court, Phillip Street, Sydney

Plaintiffs: JOHN ALBERT CARBERY of 31 Bellevue Street, Blacktown, Manager
ROSS FRANCIS CARBERY of 221 Queen Street, St. Marys, Spirit Merchant
PETER BRIAN HORAM of 47-51 Chapel Street, St. Marys, Australian Wine License Holder
BRIAN GEORGE WILEMAN of 3 Orana Avenue, Pymble, Company Director
N.M.L. INVESTMENTS PTY LIMITED a body corporate whose registered office is at Suite 303, 144 Pacific Highway, North Sydney.

Solicitor: Robert Lloyd Pritchard of Arthur Pritchard & Co., 4 Bligh Street, Sydney.

Plaintiffs' Address for Service: C/- the offices of Messrs Arthur Pritchard & Co., Solicitors of 4 Bligh Street, Sydney.

Address of Registry: Supreme Courthouse, Queens Square, Sydney.

In the Supreme Court of New South Wales

Plaintiffs' Solicitor

No. 1 Summons

FILED:

No. 2

No. 2 Affidavit

AFFIDAVIT

IN THE SUPREME COURT OF NEW SOUTH WALES No. 11845 of 1978

COMMON LAW DIVISION

BETWEEN :-

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

- and -

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

On 27th April 1978 I, ROBERT LLOYD PRITCHARD of 4 Bligh Street, Sydney in the State of New South Wales, Solicitor, say on oath:

1. I am the Solicitor for the Plaintiffs.

2. The first Defendant by a conditional application under S.27 of the Liquor Act, 1912 on 25 November 1977 applied to the Licensing Court for the Penrith Licensing District for the grant of a Spirit Merchant's License in respect of premises at 38 Phillip Street, St. Marys, in the said licensing district.

3. The Plaintiffs, being persons associated with the exercise of Licenses under the Liquor Act in the said Licensing district objected to the application.

4. The second, third and fourth Defendants, also being persons associated with the exercise of Licenses under the Liquor Act in the said district objected to the application.

5. The fifth defendant being the District Licensing Inspector also objected to the application.

6. The sixth Defendant being the Chairman of Licensing Magistrates constituted the Licensing Court for the Penrith Licensing District in the exercise of jurisdiction delegated to him under S.5(10) of the Liquor Act when the application came on for hearing on 18 April 1978.

7. At the hearing it was submitted on behalf of the Plaintiffs and other objectors that the application could not proceed because of the provisions of S.34(2)(d) of the Liquor Act. There was argument and submissions on behalf of all parties and in an interim decision it was held such question should first be determined before the application otherwise proceeded.

8. It was submitted on behalf of the Plaintiffs and the other objectors that the application should be refused on the ground that it did not comply with S.34(2)(d) of the Liquor Act. It was submitted on behalf of the first Defendant that the application was not barred by S.34 and that it may proceed. The agreed facts were:

A. Prior refusals on the ground prescribed in S.29(e) of the Liquor Act;

(1) 23 February 1970 at Parklawn Place, St. Marys

(2) 21 November 1974 at 66 Queen Street, St. Marys

(3) 26 August 1975 at first instance, at Monfarville Street, St. Marys and again on 9 April 1976 on appeal. This application was made on 4 July 1974.

B. Premises (1) and (2) are within 1.61 kilometres of each other and of the present applicant's site. Premises in (3) are within 1.61 kilometres of the premises in (2) and of the present applicant's site. Premises in (3) are not within 1.61 kilometres of the premises in (1).

9. In a further Interim Decision it was held that the application of the first Defendant was not proscribed by any of the provisions of S.34 of the Liquor Act and that it can proceed.

10. Hereto annexed and marked with the letter 'A' is a copy of the Interim Decision. Hereto annexed and marked with the letter 'B' is a copy of the further Interim Decision.

11. I respectfully request that the orders sought in the summons be made.

SWORN at Sydney)
Before me:)

S. WANG
Solicitor, Sydney

No. 3

District Licensing Court Penrith

No. 3
District Licensing Court Penrith

CONDITIONAL APPLICATION BY HARRY JAMES FOR A SPIRIT MERCHANT'S LICENSE IN RESPECT OF PREMISES AT COLES NEW WORLD, 38 PHILLIP STREET, ST. MARYS.

INTERIM DECISION

Having again referred to the Court of Appeal's decision in Manning v. Thompson & Ors, I am satisfied that Section 34 has a twofold effect namely :-

(1) It has expressed the intention of the legislature to limit, to the degree set out in the section, "the opportunities of applicants for spirit merchants licenses to launch investigations into the reasonable requirements of particular neighbourhoods."

and

(2) It "touches his (an applicant) right to proceed and not the jurisdiction or capacity of the tribunal to adjudicate."

It follows from these findings that where the provisions of Section 34 are alleged to be breached, with reasons or evidence to substantiate such allegations, then the applicant should, in my view, be called upon to justify his right to proceed. Mr. Palmer appearing for

for the applicant in this matter has submitted that the whole of his evidence should be given including his submissions on Section 34 before a decision on that Section is given. I do not agree. His right to proceed is at stake and that question should be determined before he does proceed with his evidence relating to the "investigation into the reasonable requirements of the particular neighbourhood" in this application.

Licensing Court for the PENRITH Licensing District HOLDEN at PENRITH on this 18th day of April, 1978. T.A. RATCLIFFE Chairman

cmb

No. 'B'

CONDITIONAL APPLICATION BY HARRY JAMES FOR A SPIRIT MERCHANT'S LICENSE IN RESPECT OF PREMISES AT COLES NEW WORLD, 38 PHILLIP STREET, ST. MARYS.

FURTHER INTERIM DECISION

James has made an application for a spirit merchant's license for premises at 38 Phillip Street, St. Marys, and made such application on 25th November, 1977. There have been prior refusals of similar applications with area and grounds qualifications as follows :-

(1) 23rd February, 1970 at Parklawn Place, St. Marys

(2) 21st November, 1974 at 66 Queen Street, St. Marys

(3) 26th August, 1975 at first instance, at Monfarville Street, St. Marys and again on 9th April 1976 on appeal. This application was made on 4th July, 1974.

Premises in (1) and (2) are within 1.61 kilometres of each other and of the present applicant's site. Premises in (3) are within 1.61 kilometres of the premises in (2) and of the present applicant's site.

After hearing submissions from Mr. Rummery of Counsel and from Mr. Palmer appearing for James, and again referring to Hore v. Fitzmaurice NSW LR 1976 (1) P. 75 and Mitakos v. Allan & Ors NSW LR 1976 (1) 62 I have come to the following conclusions :-

(1) Refusal 1 creates a moratorium for 1 year in the required radius. Refusal 2 falls within that radius, was entitled to be heard as it was made after the 1 year moratorium, was refused on the ground of (29(e)) and so created a 3 year moratorium. James made his application on 25th November, 1977 - more than 3 years after refusal 2; so James' application is not prescribed by those refusals.

(2) Refusal 2 creates a 1 year moratorium in its own right, as well as the 3 year moratorium in the radius of refusal 1. The premises of refusal 3 are within that radius and if satisfying the conditions of Section 34(2)(d) will bring in the 3 year moratorium. This application (refusal 3) was made on 4th July, 1974 - a date occurring before the refusal of refusal 2. It is an application therefore, not prohibited by Section 34(2)(b), and as a consequence, the pre-conditions imposed by Section 34(2)(d) to bring in the 3 year moratorium have not been fulfilled, unless refusal 3 is also within the proscribed radius of refusal 1.

The map showing the respective radii of the refusals listed above indicates that it is not within that radius and accordingly, James' application is not proscribed by Section 34(2)(d) by reason of refusal 3 nor, as it (the James application) was made more than 1 year after the date of refusal 3 it is not proscribed by Section 34(2)(b).

Accordingly I find that this present application of James can proceed, i.e., it is not proscribed by any of the provisions of Section 34.

Licensing Court for the PENRITH Licensing District HOLDEN at PENRITH on this 18th day of April, 1978.

T.A. RATCLIFFE
Chairman

cmb

In the Supreme Court of New South Wales

No. 3
District Licensing Court Penrith

DISTRICT LICENSING COURT PENRITH

BEFORE T.A. RATCLIFFE, ESQUIRE
CHAIRMAN
LICENSING MAGISTRATE

TUESDAY, 18TH APRIL, 1978.

APPLICATION FOR THE CONDITIONAL GRANT OF A SPIRIT MERCHANT'S LICENSE BY H. JAMES FOR PREMISES SITUATE AT 38 PHILLIP STREET, ST. MARYS.

Appearances: Mr. Palmer appeared for the applicant.

Mr. Rummery, instructed by Barry J.R. Wilson for certain private objectors and instructed by Freehill, Hollingdale & Page for other private objectors.

Sergeant Gardner appeared on behalf of the District Licensing Inspector and to assist the court.

MR RUMMERY: Perhaps I can formally indicate for whom I appear. I appear for objectors in the interests of N.M.L. Investments Pty. Limited and objections have been lodged by Brian George Wileman, Ross Francis Carbery, Peter Brian Horam and John Albert Carbery. In respect of those persons I am instructed by Barry J.R. Wilson. I also seek leave to appear for Herbert William Harding, John Leslie Durkin and Kevin Francis Walz; they are in the interests of a business conducted under the name of Parklawn Cellars at Parklawn Place, North St. Marys, on behalf of a company called Consleigh Pty. Limited, Mr. Durkin being a director and Mr. Walz being the secretary. No objections have been lodged for reasons which I will explain if necessary. Perhaps I should explain as I am making an application.

In summary, your Worship, the matters are as set out in a letter which my instructing solicitor sent to my friend's firm on yesterday's date. I seek, your Worship, to object only on one ground; that is that this court has no jurisdiction to grant the application. So, in announcing my appearance for them I indicate that would be the ground that I would seek to press for them. That is the only ground on which I would seek to rely.

I would, because of the lateness of time and the absence of documents, be seeking the exercise of the court's discretion under S.178.

SGT. GARDNER: I would seek to join Mr. Rummery in his objection to jurisdiction, particularly when your Worship looks at the minute of the Superintendent of Licensing dated 22nd December. He refers specifically to par.12 of Sgt. Ross' report of 10th December; par.12 points to various matters in respect of refusals.

HIS WORSHIP: Mr. Palmer, have you any submissions in relation to Mr. Rummery's application?

MR. PALMER: I have no objection to Mr. Rummery appearing for further objectors. I note they are not residents of the licensing district.

HIS WORSHIP: Do you admit they are qualified persons to object?

MR. PALMER: Yes, I do.

HIS WORSHIP: Do you agree with Mr. Rummery on the objections he has taken in accordance with what the Metropolitan Licensing Inspector has said?

SGT. GARDNER: Yes.

HIS WORSHIP: Can you make any further admissions?

MR. RUMMERY: I can make all admissions save S.34. I would make all formal admissions save for the question of S.34 of the Liquor Act and I in that respect would desire to address argument to the court, when convenient, that the application does not comply with S.34.

(His Worship heard argument on whether S.34 of the Liquor Act should be argued as a preliminary point. Mr. Palmer submitted that his Worship should hear the entirety of available evidence and then give a decision on the question of jurisdiction.

Mr. Rummery submitted that his Worship could not proceed to hear the case until the question of jurisdiction had been decided.

Sgt. Gardner supported Mr Rummery in his arguments.)

(Short Adjournment)

(For his Worship's decision, see separate papers)

(Short Adjournment)

In the Supreme Court of New South Wales

No. 3
District Licensing Court Penrith

MR. PALMER: With the assistance of my friend, Mr. Rummery, I think we have reached an agreed Statement of Facts which I can tender in evidence and the only fact added to those which Mr. Rummery has produced is the return date of an application by Nicodemo Bruzzeze in respect of Lot 6, Monfarville Street, St. Marys and that return date is established from the court record as 4th July, 1974.

SGT. GARDNER: I adopt those facts also.

MR. PALMER: I propose to tender further evidence in a frank form which, I think, will assist your Worship's understanding of the matter. I tender a report of Messrs. W.F. Boyling and Associates and accompanying map.

(Above documents admitted without objection and marked Exhibit 1)

MR. PALMER: That's my evidence on this aspect of the case, the S.34 application.

HIS WORSHIP: Mr. Rummery, have you any evidence?

(His Worship heard further submissions on S.34 and the jurisdiction of the Court to grant the application.)

(Short Adjournment)

(For his Worship's decision, see separate papers)

LUNCHEON ADJOURNMENT :

(At 2.00 p.m. Mr. Rummery stated that he had an application for adjournment to make in the light of his Worship's decision. He had received instructions to inform the court that it was desired to test his Worship's decision. Proceedings would be initiated with expedition.

Mr. Palmer opposed the application for adjournment, stating that he had witnesses ready and available to give evidence.

Sgt. Gardner stated he did not wish to be heard on the application.

His Worship stated that he felt bound to accede to Mr. Rummery's request and grant the adjournment. His Worship added that he would be prepared to expedite the hearing if the required action Mr. Rummery had instructions to launch were not taken within twenty-one days.

Mr. Palmer stated that there was another application by Carbery pending.

Mr. Rummery stated that he was authorised to say that no steps would be taken to list the Carbery application whilst these proceedings were due to be launched or pending.)

(Application adjourned generally, to be restored to the list on seven days notice with leave to the applicant to restore to the list at an earlier date should circumstances arise that warrant that action. Exhibits returned)

No. 4

JUDGMENT

IN THE SUPREME COURT OF NEW SOUTH WALES — No.11845 of 1978

COMMON LAW DIVISION — CORAM: ASH, J.

SYDNEY TUESDAY: 13th June, 1978.

CARBERY & ORS. V. JAMES & ORS.

HIS HONOUR: The present summons is yet another one brought before this Court because of the lack of clarity in portions of s.34(2) of the Liquor Act, 1912, as amended. The central question for determination is once again based upon the interpretation of the word "under" appearing in the third line of par.(d) of sub-s.(2) of that section. It commences as follows :

> "Where an application or conditional application for the grant or removal of a spirit merchant's license under paragraph (a) or (b) ..."

Though the overall purpose and intention of this subsection of s.34 is apparent much delay and litigation could have been saved if that above portion had been more clearly correlated with the remainder of the paragraph, and with the subsection. The particular question in the present case was raised during argument in an earlier summons before this Court, Clark v. Cassidy, (1976) 1 N.S.W.L.R. 524, but it did not then require determination. Now it does, and I shall therefore set out a summary of the facts. There was no dispute between the parties as to any of them.

On 25th November, 1977, the first defendant in the present summons, James, made a conditional application to

In the Supreme Court of New South Wales

No. 4
Judgment

to the Licensing Court for the Penrith Licensing District for the grant of a spirit merchant's licence in respect of premises at St. Marys in that licensing district. Objections were taken to the grant of the application by the plaintiffs and also by three of the other defendants in this summons. Submitting appearances were filed by those three defendants, and others by the two remaining defendants, namely, the presiding magistrate (the Chairman of the Licensing Court), and the District Licensing Inspector.

The hearing before the Chairman was on 18th April, 1978, and at the outset the objectors claimed that the Chairman was unable to proceed with the hearing because of s.34(2)(d) of the Liquor Act. After ruling that that objection should be dealt with before any evidence was called the learned Chairman then ruled that the application could proceed and that it was not proscribed by the provisions of s.34(2)(d). He set out his reasons in the following :

"Interim Decision":

> "James has made an application for a spirit merchant's license for premises at 38 Phillip Street, St. Marys, and made such application on 25th November, 1977. There have been prior refusals of similar applications with area and grounds qualifications as follows :-
>
> (1) 23rd February, 1970 at Parklawn Place, St. Marys
> (2) 21st November, 1974 at 66 Queen Street, St. Marys
> (3) 26th August, 1975 at first instance at Monfarville Street, St. Marys and again on 9th April, 1976 on appeal. This application was made on 4th July, 1974.
>
> Premises in (1) and (2) are within 1.61 kilometres of each other and of the present applicant's site. Premises in (3) are within 1.61 kilometres of the premises in (2) and of the present applicant's site.
>
> After hearing submissions from Mr. Rummery of Counsel and from Mr. Palmer appearing for James, and again referring to Hore v. Fitzmaurice NSW LR 1976 (1) p.75 and Mitakos v. Allan & Ors NSW LR 1976 (1) 62 I have come to the following conclusions :-
>
> (1) Refusal 1 creates a moratorium for 1 year in the required radius. Refusal 2 falls within that radius, was entitled to be heard as it was made after the 1 year moratorium,

was refused on the ground of (29(e)) and so created a 3 year moratorium. James made his application on 25th November, 1977 - more than 3 years after refusal 2; so James' application is not proscribed by those refusals.

(2) Refusal 2 creates a 1 year moratorium in its own right, as well as the 3 year moratorium in the radius of refusal 1. The premises of refusal 3 are within that radius and if satisfying the conditions of Section 34(2)(d) will bring in the 3 year moratorium. This application (refusal 3) was made on 4th July, 1974 - a date occurring before the refusal of refusal 2. It is an application therefore, not prohibited by Section 34(2)(b), and as a consequence, the pre-conditions imposed by Section 34(2)(d) to bring in the 3 year moratorium have not been fulfilled, unless refusal 3 is also within the proscribed radius of refusal 1.

The map showing the respective radii of the refusals listed above indicates that it is not within that radius and accordingly, James' application is not proscribed by Section 34(2)(d) by reason of refusal 3 nor, as it (the James application) was made more than 1 year after the date of refusal 3 it is proscribed by Section 34(2)(b).

Accordingly I find that this present application of James can proceed, i.e., it is not proscribed by any of the provisions of Section 34."

The relevant provisions of sub-s. (2)(d) of s.34 are the following two paragraphs:

"(2) (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)(i), 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 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 the subsection (1), be made within three years from the last refusal."

Paragraph (a) of that subsection had been repealed by the Liquor (Further Amendment) Act 1976, No. 93, and so the reference to par.(a) as indicated above in par.(d) may be overlooked in examining the effect of this relevant portion of s.34(a) in the present case.

The orders sought by the plaintiffs in this summons were first, a declaration that the Chairman of the Licensing Bench had no jurisdiction further to hear and determine the subject application; secondly, an order that the Chairman be prohibited from proceedings to hear and determine it; thirdly, an order concerning costs.

As a preliminary to the identification of the precise issue between the parties in this summons, I note a number of points:

(i) In this judgment I shall use the word "premises" to cover both "premises" and "proposed premises"; and the word "application" will cover both "application" and "conditional application".

(ii) The Learned Chairman at the outset of this Interim Decision, as can be seen above, listed and numbered three "refusals". The date of each refusal is stated, and of course in each case the refusal by the Licensing Court of the application in respect of a Spirit Merchant's Licence was on the ground of objection stated in s.29(1)(e) of the Act, namely, "that the reasonable requirements of the neighbourhood do not justify the granting of such application".

(iii) In a case - such as that listed by the Chairman as number (3), in respect of premises at Monfarville Street, St. Marys - where an application has been

refused on that ground at first instance by a magistrate sitting alone, and then an unsuccessful appeal is made to the Full Bench of the Licensing Court, that is, the Full Bench again refuses it on that ground, the relevant date for the purposes of s.34(2) is the date of the refusal by the Full Bench and not of the refusal at first instance. That was determined by the Court of Appeal in Hindmarsh & Ors. v. Alloqia & Ors., (1977) 2 N.S.W.L.R. 599.

(iv) It is the last sentence in that reference to the refusal listed as number (3), to which I have just referred, namely, "This application was made on 4th July 1974" which is the central fact in the issue now before this Court, and I shall refer to it later.

(v) Though the word "radius" in itself is clear enough, as indicating the size of a circle centred upon the subject premises of an application as being an area round it was a radius of 1.61 kilometres, it would appear from an exhibit tendered by consent at the hearing of this summons that it has, understandably, become a practice to record the drawing around the premises of a circle of 1.61 kilometres radius upon metropolitan maps in the files of the Licensing Court after there has been a refusal of an application in respect of a spirit merchant's licence upon an objection on the ground set out above. Such a circle, with no doubt the date of the subject refusal noted at its centre, provides a quick reference point when the next application to the Court in respect of a spirit merchant's licence in the same general area is sought to be made. If the premises for that next application are within the area of that circle, the application cannot be made for twelve months after that refusal; and if it is made after those twelve months, and is itself refused, another circle of the same radius is then drawn on the same map with its centre upon the premises of the second application. Necessarily, the two circles will intersect. One of the problems arising under par.(d) of s.34(2) when a third application is then sought in the area was dealt with by the Court of Appeal in Mitakos v. Allan & Ors. (1976) 1 N.S.W.L.R. 62. The Court held that the word "thereof" in the phrase "within a radius of 1.61 kilometres thereof" in s.34(2)(d), upon its true interpretation, refers to the first of the two circles which I have identified above, and not to the second. That decision was of course applied by the Chairman in this case; indeed, as his Interim Decision reveals, it was applied in order to examine three possible

proscriptions against the subject application. The circle round the premises of Refusal (1) could be the origin of each of two barriers for the present applicant (the first defendant) under s.34(2)(d): first, if that circle included the premises of Refusal (2) and of the applicant; secondly, if that circle included the premises of Refusal (3) and those of the applicant. However, as is apparent, in neither case was a barrier in fact created. As to the first of those two possible barriers, though the circle did include the two premises the subject application was made more than three years after Refusal (2), so that the "three year moratorium" did not in fact apply. As to the second of those two possible barriers, the circle did not in fact include the premises of Refusal (3). Refusal (1) can therefore be removed from further consideration in this case as being irrelevant. As the Chairman indicated, it is the circle around the premises of Refusal (2) which is the origin of the dispute in the present case; That circle of course had two aspects - one arising from its being a second refusal in the circle around the premises of Refusal (1) - the relevance of which I have just disposed of in the previous sentence - and the other arising from "its own right" (as the Chairman described it), that is, as being a first refusal in relation to a following one.

None of the facts as above stated was in dispute in this summons.

(vi) I shall re-quote here the particular paragraph (or portion thereof) of the Chairman's Interim Decision which is relevant in this summons:

" ... I have come to the following conclusions :-

... ...

(2) ... the premises of refusal 3 are within that radius and if satisfying the conditions of Section 34(2)(d) will bring in the 3 year moratorium. This application (refusal 3) was made on 4th July 1974 - a date occurring before the refusal of refusal 2. It is an application therefore, not prohibited by Section 34(2)(b), and as a consequence, the pre-conditions imposed by Section 34(2)(d) to bring in the 3 year moratorium have not been fulfilled, unless refusal 3 is also within the proscribed radius of refusal 1."

("Refusal 3", as stated earlier in this judgment is not within the proscribed radius of "Refusal 1").

For clarification, I refer to the commencing phrase of the first sentence in the above extract, "The premises of refusal 3 are within that radius ... ". Counsel agreed that the words "that radius" refer to the radius of the circle centred upon Refusal 2 namely that of 21st November, 1974.

(vii) Because, as I have just stated, "Refusal (1)", as mentioned by the Chairman is no longer relevant in this summons, I shall, for more clarification, hereinafter refer to the Chairman's "Refusal (2)", that is, the one of 21st November, 1974, as "Refusal A"; and to the Chairman's "Refusal (3)", that is the one of 9th April, 1976, as "Refusal B". The premises involved in each of those refusals are each within 1.61 kilometres of the premises of James and of each other.

I shall now summarise the issues between the parties:

(a) The plaintiffs (objectors before the Licensing Court) claim that the first defendant (the applicant before the Licensing Court) is precluded from proceeding with his application by reason of the terms of s.34(2)(d);

(b) there is no dispute on the question of "radius";

(c) the plaintiffs' claim is as follows :

Refusal A occurred on 21st November, 1974 and established the relevant radius; Refusal B occurred on 9th April, 1976, and its premises were within that radius; the first defendant's application was made for premises in the same radius on 25th November, 1977, less than three years after Refusal B; and therefore because of s.34(2)(d) it should not be allowed to proceed;

(d) the first defendant's reply, (held by the Chairman to be correct) is that although Refusal B was made, as stated, on 9th April, 1976, the application in respect of which it was made was itself made on 4th July, 1974, that is, that it preceded the date of that first refusal (Refusal A); and that therefore it was an application (to quote from the Chairman's Interim Decision) "not prohibited by s.34(2)(d), and as a consequence, the preconditions imposed by s.34(2)(d) to bring in the three year moratorium have not been fulfilled."

The short question is therefore whether that application made on 4th July, 1974, and ultimately refused on 9th April, 1976, was, or was not, "an application ... under paragraph ... (b)" within the meaning of that phrase as appearing in s.34(2)(d). If it was then the learned Chairman was in error; if it was not, the submissions on behalf of the plaintiffs must fail.

For myself I have no difficulty in resolving this question. The claim of the plaintiffs is correct and, with respect to the learned Chairman who made a contrary decision in this difficult area of problems arising out of this section, his conclusion was in my opinion in error. In the case of Hore & Anr. v. Fitzmaurice & Ors. reported in (1975) 2 N.S.W.L.R. p.379, I had occasion to examine in some depth s.34(2) of the Act, and situations of this nature. In addition to several other possible ones, became apparent during that consideration. The conclusions to which I came, particularly in respect of pars. (a), (b) and (d) of s.34(2) and in particular of the introductory words of par.(d):

> "Where an application ... for the grant or removal of a spirit merchant's licence under par. (a) or (b) ... "

are unchanged, and provide the basis for the conclusion I have reached in this summons. Some references were made to that paragraph in the judgments of the Court of Appeal in Mitakos v. Allan & Ors., (supra), the appeal in that case being concerned with the important matter of "radius". The Court of Appeal had in fact earlier held in Ex parte Rasco: re Bowerman, (1973) 1 N.S.W.L.R. p.543 (n) that to suggest that the latter part of par.(b) was the part of it referred to in par.(d) was an "untenable" argument. In the judgment delivered in Mitakos appeal (which was heard together with the appeal in Hore v. Fitzmaurice, (supra)) their Honours stressed the importance of the evident policy and intention of this part of the Act as a basic guide in resolving expressions which were very hard to interpret and correlate in their own precise words.

The main part of my judgment in Hore v. Fitzmaurice, (supra) appears at pp.386-7 of that report and explains the reasons why in my opinion the words (in par.(d)), "under paragraph ... (b)" apply to the earlier part of par.(b). I shall examine the matter more specifically in relation to the present question. It is most important to note that the phrase under consideration, namely, "where an application ... under paragraph ... (b)" contains the word "under" and not the words "made under". It is difficult to envisage how it could be

thought that an application could be "made under" par.(b). What that paragraph does is "to erect a post" in respect of the refusal of an application, which both marks the centre of a circle and has attached to it a date which imposes a "moratorium", namely that for a certain period no application shall be made (whether, according to its nature, it were to be made under s.24, s.27, s.39 or s.39A) in respect of premises within the relevant radius. Having regard to the overall policy of the subsection, as fully and clearly expressed in the judgments of the Court of Appeal in Mitakos v. Allan & Ors. (supra) that is an understandable first step. The paragraph might have gone further and quashed, or postponed the hearing of an application already made prior to that refusal, but it did not do so; it simply prohibited one from being made within that period after it, and nothing else. Therefore, in respect of the operative part of par.(b), that is to say, the latter part of it, there could not be any applications "under" it because that part deals only with preventing them being made at all during the period identified. Paragraph (d) merely extends that period. If that "post" (i.e. refusal were to reveal itself as being within any other radius as a second "post"), then the "moratorium" imposed would become one for three years instead of for one year. In my opinion, my earlier expressed view that the alteration of the word "under" to the phrase "referred to" would not only resolve this matter for the reasons there already set out, but would also accord with, and indeed implement, the intention and policy of the section.

To re-paraphrase then, a paragraph of my own judgment in Hore's case (referred to above) because par.(a) no longer exists, I would put the matter this way (that is, in relation to the "moratorium" aspect):

> "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."

I refer back to this stage to portions of only one of the judgments made by the members of the Court of Appeal in those two appeals abovementioned concerning the policy of the Liquor Act. Moffitt, P., included the following passages in his judgment in the Mitakos case (supra), at pp.66-67:

"It is necessary to look beyond that paragraph" (referring to par.(d) of s.34(2)) "particularly to the rest of s.34 and the policy of the Act as indicated by its terms.

The policy of the Act upon this matter of public interest is to avoid a multiplicity of applications to re-examine the same question.

In my view the policy of the Act, as demonstrated by its terms and consistently with the provisions of s.34, dictates that, once an area has been the subject of a first investigation which prima facie being the first is an unrestricted one, it is that area which is progressively the subject of bans on future investigations".

To apply then that last pronouncement to the facts of the present case, the first "investigation" of the subject "radius" took place on 21st November, 1974, and the next one on 9th April, 1976, (the intervening first-instance one of 26th August, 1975, being irrelevant). Each of those "investigations" resulted in a refusal. The fact that the application which led to the second refusal in the present case was made some months before the date of the first refusal was made is quite irrelevant. It is the refusals (and the investigations by the Licensing Court at the hearings which immediately precede those refusals) that are the fundamental stages in the implementation of this policy indicated in s.34(2).

Counsel for the first defendant in this summons stated that at the time of the application on 4th July, 1974, (that is the application which ended with the second refusal on 9th April, 1976), there was no "first refusal" in existence and therefore no "radius" (which can be generated only when the first refusal occurs); and, therefore, that the application of 4th July was made on to "virgin territory", (that is, counsel meant, on to "territory" not within any existing "refusal" circle). In my opinion, that submission is irrelevant and could envisage a mis-application of the significance of the two essentials in this subsection, namely, that in respect of the "radius" and that in respect of the refusal dates. That application of 4th July, 1974, could well have been granted before or after 21st November, 1974, but it had no significance in relation to the question in this summons until it should become a refusal, which in fact it ultimately did.

While, of course, as Mahoney, J.A. pointed out in Hindmarsh's case, (supra), it is important to read and follow clearly the words of this and any other section, when the words are not clear one has to take a broader

approach, and I have dealt with this earlier in my judgment. If one were to accept the submissions on behalf of the first defendant as to the application of 4th July, 1974, (ultimately the second refusal) not falling within the requirement of par.(d) as to an application "under par. (b)" some new situations could arise which would not accord with the policy of the Act referred to above, and s.34(2) would lose some of its intended effect.

As I have stated earlier in this judgment, the learned Chairman in my opinion, was in error in allowing the application of the first defendant to proceed. At the hearing of this summons, although a reference was made to the majority decision of the Court of Appeal in Manning v. Thompson, (1977) 2 N.S.W.L.R. 249, it was stated on behalf of the first defendant that there was no challenge to the Court's power to make an appropriate order in this case, as the matter for consideration differed in content and sturcture from the one in that case.

The particular order sought by counsel for the plaintiff was the second of those set out in the summons, and I shall make it. I order that the sixth defendant be prohibited from proceeding further to hear and determine the conditional application made by the first defendant to the Licensing Court for the Penrith Licensing District under s.27 of the Liquor Act for the grant of a spirit merchant's licence in respect of premises 38 Phillip Street, St. Marys.

I further order that the first defendant pay the costs of the plaintiffs in this summons, and is to have, if otherwise qualified, a certificate under the Suitors Fund Act.

In the Supreme Court of New South Wales

No. 5
Order

No. 5

ORDER

IN THE SUPREME COURT OF NEW SOUTH WALES C.L.11845 of 1978

COMMON LAW DIVISION

JOHN ALBERT CARBERY
ROSS FRANCIS CARBERY
PETER BRIAN HORAM
BRIAN GEORGE WILEMAN
N.M.L. INVESTMENTS PTY. LTD.
Plaintiffs

- and -

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

Court orders that:

1. The sixth Defendant be prohibited from proceeding further to hear and determine the conditional application made by the first Defendant to the Licensing Court for the Penrith Licensing District under S.27 of the Liquor Act for the grant of a Spirit Merchant's License in respect of premises at 38 Phillip Street, St. Marys.

2. The first Defendant pay the costs of the Plaintiffs and to have, if otherwise qualified, a certificate under the Suitors Fund Act.

ORDERD 13th July, 1978, and

ENTERED 6th day of March, 1979.

Deputy Registrar

ABBOTT TOUT CREER & WILKINSON, Solicitors, 60 Martin Place, SYDNEY. 2000 D.X. 129, SYDNEY
Telephone: 231-8509
KP:PO'S

No. 6

NOTICE OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES C.A. 260 of 1978
C.L. 11845 of 1978

COURT OF APPEAL

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

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

HARRY JAMES Appellant

JOHN ALBERT CARBERY
ROSS FRANCIS CARBERY
PETER BRIAN HORAM
BRIAN GEORGE WILEMAN
N.M.L. INVESTMENTS PTY. LIMITED
HERBERT WILLIAM HARDING
JOHN LESLIE DURKIN
KEVIN FRANCIS WALZ
FREDERICK PHILLIPS
THOMAS ANTHONY RATCLIFFE
Respondents

The proceedings appealed from were heard on 1st June, 1978 and decided on 13th June, 1978. The appellants appeal from the decision of Mr. Justice Ash.

GROUNDS:

1. His Honour erred in prohibiting Thomas Anthony Ratcliffe, Chairman of Licensing Magistrates, the sixth defendant from proceeding further to hear and determine the application made by Harry James the first defendant for a spirit merchant's license and in finding that there could not be any applications made under paragraph (b) of Section 34(2) of the Liquor Act, 1912.

2. No error of law was disclosed by the findings of the Penrith Licensing Court.

In the Supreme Court of New South Wales

No. 6
Notice of Appeal

3. The appeal involved only matters of fact and degree and did not attract the Appellate jurisdiction of the Supreme Court.

4. His Honour should not have reviewed the findings of fact of the Penrith Licensing Court.

5. The case disclosed no application of a wrong test or lack of evidence to support the Penrith Licensing Court's determination and His Honour should have so found.

6. The facts upon which the Appellant relied were agreed between the parties.

7. There was evidence upon which the Licensing Court could make the finding which is made as to the relevant refusals.

8. The Penrith Licensing Court adequately stated its reasons for its determination of the right to proceed.

9. Section 34(2)(d) of the Liquor Act, 1912 predicates a second application made after the expiration of twelve months from the date of a previous refusal in accordance with the provisions of Section 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.

ORDERS SOUGHT:

1. That in lieu of His Honour's order the appeal from the Penrith Licensing Court be dismissed. Appeal papers will be settled on 24th August 1978 at 11.00 in the Registry of the Court of Appeal.

To the Respondents: John Albert Carbery
31 Bellevue Street,
Blacktown, Manager

Ross Francis Carbery
221 Queen Street,
St. Marys Spirit Merchant

Peter Brian Horam
47-51 Chapel Street,
St. Marys Australian Wine License Holder.

Brian George Wileman,
3 Orana Avenue,
Pymble Company Director

To the Respondents: N.M.L. Investments Pty. Limited
a body corporate whose registered office is at Suite 303, 144 Pacific Highway, North Sydney

Herbert William Harding,
Harrod Street,
Prospect Spirit Merchant

John Leslie Durkin
3 Coolangatta Avenue,
Cronulla Company Director

Kevin Francis Walz,
168 Beaconsfield Street,
Milperra Company Secretary

Frederick Phillips,
C/- Office of the Superintendent of Licenses,
174 Phillip Street,
Sydney

Thomas Anthony Ratcliffe,
Chairman of Licensing Magistrates,
174 Phillip Street,
Sydney

Before you take any step in these proceedings you must enter an appearance in the Registry.

Appellant: Harry James,
60 Larra Crescent,
North Rocks.

Solicitor: Kenneth John Palmer
of Messrs. Abbott Tout Creer & Wilkinson,
Solicitors,
60 Martin Place,
SYDNEY 2000
Telephone 231-8509

Appellants' Address for Service: C/- Messrs. Abbott Tout Creer & Wilkinson
Solicitors,
60 Martin Place,
Sydney 2000

Address of Registry: Supreme Court,
Court of Appeal Office
Queen's Square,
Sydney

K.J. PALMER
Appellant's Solicitor

Filed: 23 June, 1978.

In the Supreme Court of New South Wales

No. 7
Reasons for Judgment of the Supreme Court of New South Wales Court of Appeal

No. 7

REASONS FOR JUDGMENT OF THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES C.A. 260 of 1978
C.L. 11845 of 1978

COURT OF APPEAL

CORAM: MOFFITT, P.
REYNOLDS, J.A.
SAMUELS, J.A.

WEDNESDAY, 17TH OCTOBER, 1979

CARBERY & ORS. v. JAMES & ORS.

Liquor Act, 1912 - successive applications for spirit merchants licence - s.34 of Liquor Act - s.34(2)(d) - meaning of words "under paragraph (a) or (b)" - Mitakos v. Allan (1976) 1 N.S.W.L.R. 63 considered - held connection necessary between paragraph (b) and the application concerned - appeal allowed.

JUDGMENT

REYNOLDS, J.A.: The appellant, Harry James, on 25th November, 1977, made a conditional application for the grant of a spirit merchant's licence in respect of premises at 38 Phillip Street, St. Marys. There were eight private objectors, and in addition the District Licensing Inspector, and these nine objectors, as well as the Chairman of the Licensing Magistrates, are the respondents to this appeal. All but five, who are represented here by counsel, have submitted to such orders as the Court may make.

The Chairman of the Licensing Magistrates was invited to determine a preliminary question as to his jurisdiction to entertain the application having regard to the provisions of s.34(2)(d) of the Liquor Act, 1912. He held that he was not deprived of jurisdiction by the operation of that paragraph, whereupon five objectors, being the five first-named respondents to this appeal, applied by summons to the Supreme Court for an order in the nature of a prohibition directed to the learned chairman. This appeal is in respect of an order made by Ash, J., prohibiting the chairman from proceeding further to hear and determine the appellants' application.

The facts were agreed before the magistrate, and the matter turned upon the application of s.34(2)(d) as properly construed to those facts. The agreed facts were as follows :-

"1. Application for conditional spirit merchant's licence Lot 22, Parklawn Place, St. Marys North, refused on section 29(e) ground on the 23rd February, 1970. No appeal lodged.

2. Application by Doris Matthews for conditional spirit merchant's licence 66 Queen Street, St. Marys, refused on the 21st November, 1974 on Section 29(e), ground. No appeal lodged.

3. Application by Nicodemo Bruzzese for conditional spirit merchant's licence Lot 62 Monfarville Street, St. Marys refused on Section 29(e) ground at first instance on the 26th August, 1975 and on appeal on 9th April, 1976. Return date of this application 4th July, 1974.

4. Premises the subject of the application referred to in 1. above are within 1.61 kilometres of the premises in 2. above.

5. The premises referred to in 1. and 2. above are both within 1.61 kilometres of the applicant's site.

6. The premises referred to in 2. above are within 1.61 kilometres of the premises referred to in 3. above."

Section 34(2) of the Liquor Act, so far as is relevant, provides:

"(2) (b) Where an application or conditional application for the grant or removal of a spirit merchant's licence 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 licence 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 merchant's licence 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 licence 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 the subsection (1), be made within three years from the last refusal."

A consideration of these facts shows that the application referred to in fact numbered 3 was made at a time, namely 4th July, 1974, when it was not rendered incompetent by reason of either of the refusals in facts 1 and 2. More than twelve months had expired since the first refusal, and the refusal referred to in fact 2 had not yet occurred.

Turning now to the words of s.34(2)(d), it is clear that there had been a refusal after the expiration of twelve months from the date of a 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 spirit merchant's licence under par.(b)", for that is what the section requires.

The phrase "application under par.(a) or (b)" has received the attention of this Court in Mitakos v. Allan (1976) 1 N.S.W.L.R. 63. It was only formally submitted here that the phrase "application under par.(a) or (b)" is meaningless, doubtless in deference to that decision where all members of the Court attributed meaning to it. The argument before us was directed rather to the question of what meaning it bore. In the case cited the problem which is posed in this appeal was not the subject of direct consideration, but in construing the same paragraph for different purposes, it was necessary to consider the phrase in question. Moffitt P. wrote at p.66:

> "The words 'under par.(a) or (b)' in s.34(2)(d) are inapt in their context without the addition of other words. Using the context of these two subparagraphs, s.34(2)(d) must be taken to mean that, where an application brought within twelve months of an earlier application, would have fallen within s.34(2)(a) or (d), in that it is in respect of 'the same premises or proposed premises situated within a radius of 1.61 kilometres thereof' and, in consequence, is delayed and brought after the expiration of the twelve months and then refused under s.29(e) 'no application ... in respect of the same premises or proposed premises situate within

a radius of 1.61 kilometres thereof shall ... be made within three years of the last refusal'."

The other members of the Court said nothing inconsistent with this opinion, and indeed I would understand Glass J.A. to have expressed the same view. It may be that these observations are to be regarded as obiter but as I read them and understand them I respectfully agree with them.

Much has been said in the judgment under review and in argument by the respondent as to the policy which the section seeks to implement. However, I am unable to obtain any real assistance from a consideration of the obvious policy of preventing frequent, expensive and wasteful investigations as to the requirements of the same general neighbourhood.

The conclusion at which I have arrived is in no way in conflict with this basic policy. It cannot be disputed, nor do I think it was in this appeal that all applications made in respect of a territory not affected by any prior refusal must be heard and remain unaffected in law by refusals made after application but before hearing. The disposal of all such concurrent matters is left to the administration of the Licensing Magistrates. Decisions may be deferred, matters heard successively, applications expedited or adjourned in order to ascertain whether any, and if so, which application should be granted.

It would not be possible to say that any of these applications was "under par.(b)". If it be accepted that the words are not mere surplussage or meaningless, as I think it must be, then they obviously require that there is to be some connection or relationship between the application in question and par.(b).

When the application was made on its return date of 4th July, 1974, s.34(2)(b) had no operation in respect of it and whatever connection might be required to satisfy par.(d) there was none in this case.

I have already indicated my general agreement with what the President said in Mitakos v. Allan. Expressed in my own language it seems to me that the phrase "application under par.(b)" in the present context means 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.

The application in fact 3 was not such an application. The refusal in fact 1 had become irrelevant in point of area.

The respondents' submission, apart from the formal submission to which I have made reference, is summed-up and indeed to some extent fortified, by a statement of Mahoney, J.A. in Hore & Anor. v. Fitzmaurice & Ors. (1976) 1 N.S.W.L.R. 75 at 79. There His Honour said:

> "The difficulties of construing s.34 are obvious, and any construction of the provision based upon the precise terms of the language used cannot carry compelling conviction. But, having said this, I am satisfied that the words 'an application ... under paragraph (a) or (b)' do not have the effect for which the plaintiffs contend. I have, in Mitakos v. Allan, expressed the opinion that these words 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) ...'."

The respondents' submission is that His Honour was referring to an application whenever made. I am not at all sure that his Honour meant this, and in any event, he was dealing with a different problem.

For the reasons already given, I cannot accept this submission for it denies the necessity for the relationship I have predicated. In my opinion, the appeal should be allowed with costs against the first five respondents, the order below should be set aside and the summons dismissed with costs. The respondents are to have a certificate under the Suitors' Fund Act.

MOFFITT, P.: I agree. I would only add that the arguments advanced in this appeal have not persuaded me to alter the construction which I attributed in Mitakos v. Allan /(1976) 1 N.S.W.L.R. 63 at 66-67/ to the words in s.34(2)(d) of the Liquor Act "under par.(a) or (b)", although, of course, the question under consideration in that appeal is different to that involved in this appeal.

I should add that the word "delayed" was used in the sense that in order to avoid the prohibition of sub-s.(b) the making of the application must be delayed by the applicant and brought after the expiration of the twelve months referred to.

SAMUELS, J.A.: I agree with the judgments which have been delivered and there is nothing I wish to add.

MOFFITT, P.: The order of the Court is as has been indicated by Reynolds, J.A.

I CERTIFY that this and the five preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Reynolds, and of the Court.

J. Mitchell - Associate

Date 17/10/1979

No. 8

ORDER OF THE COURT OF APPEAL

In the Supreme Court of New South Wales

No. 8
Order of the Court of Appeal

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

C.A. 260 of 1978
C.L. 11845 of 1978

HARRY JAMES
HERBERT WILLIAM HARDING
JOHN LESLIE DURKIN
KEVIN FRANCIS WALZ
FREDERICK PHILLIPS
THOMAS ANTHONY RATCLIFFE
Appellants

JOHN ALBERT CARBERY
ROSS FRANCIS CARBERY
PETER BRIAN HORAM
BRIAN GEORGE WILEMAN
N.M.L. INVESTMENTS PTY. LIMITED
Respondents

THE COURT ORDERS that -

1. The appeal be allowed with costs against the first five respondents.

2. The Orders in Court below be set aside and in lieu thereof the Summons be dismissed with costs.

3. The respondents have a Certificate under the Suitors' Fund Act.

Ordered 17 October 1979 and

Entered 30 June 1980

A.W. ASHE
ACTING REGISTRAR

In the Privy Council

No. 9
Order granting Special Leave to appeal to Her Majesty in Council

No. 9

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT WINDSOR CASTLE

The 21st day of April 1980

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of April 1980 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) John Albert Carbery (2) Ross Francis Carbery (3) Peter Brian Horam (4) Brian George Wileman and (5) N.M.L. Investments Pty. Limited Petitioners in the matter of an Appeal from the Supreme Court of New South Wales Court of Appeal between the Petitioners and (1) Harry James (2) Herbert William Harding (3) John Leslie Durkin (4) Kevin Francis Walz (5) Frederick Phillips and (6) Thomas Anthony Ratcliffe Respondents setting forth that the Petitioners pray for special leave to appeal from a Judgment of the said Court of Appeal dated 17th October 1979 allowing an Appeal by the first Respondent from a Judgment of the Common Law Division of the Supreme Court of New South Wales dated 13th June 1978 in proceedings arising out of the conditional application by the first Respondent in the Licensing Court for the Penrith Licensing Distrct for the grant of a Spirit Merchant's License: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal against the Judgment of the said Court of Appeal dated 17th October 1979 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto on behalf of the 1st respondent no one appearing at the Bar on behalf of the 2nd 3rd 4th 5th and 6th Respondents Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of New South Wales Court of Appeal dated the 17th October 1979 on condition of lodging in the Registry of the Privy Council the sum of £3,000 as security for costs:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of New South Wales in the Commonwealth of Australia and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

I CERTIFY that this document is a true and correct copy.

E. R. MILLS

Registrar of the Privy Council

16th June 1980

In the Privy Council

No. 10
Certificate of the Registrar of the Court of Appeal of the Supreme Court of New South Wales verifying the Transcript Record of Proceedings

No. 10

CERTIFICATE OF THE REGISTRAR OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, ALYSON WENDY ASHE, Acting Registrar of the Court of Appeal of the Supreme Court of New South Wales DO HEREBY CERTIFY as follows :-

1. That this Transcript Record of Proceedings contains a true copy of all such orders, judgments and documents as have relation to the matter of this Appeal and a copy of the reasons for the respective judgments pronounced in the course of the proceedings out of which the Appeal arose.

2. That the Respondents herein have received notice of the Order of Her Majesty in Council giving the Appellants Special Leave to appeal to Her Majesty in Council AND have also received notice of the dispatch of this Transcript Record of Proceedings to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this day of One thousand nine hundred and eighty (1980)

.....

A.W. Ashe
Acting Registrar of the Court of Appeal
of the Supreme Court of New South Wales

SW18680kd9345

Exhibit 1

COPY REPORT OF W.F. BOYLING & ASSOCIATES DATED 25 MAY 1976, ACCOMPANYING MAP AND STATEMENT OF AGREED FACTS BEFORE DISTRICT LICENSING COURT, PENRITH

Exhibit 1
Copy report of W.F. Boyling & Associates dated 25 May 1976, accompanying map and Statement of agreed facts before District Licensing Court, Penrith

W.F. BOYLING & ASSOCIATES - CONSULTANTS

21 FORREST AVENUE, WAHROONGA
N.S.W. AUSTRALIA 2076
TELEPHONE: 48 5785

25th May, 1976

REPORT ON ST. MARYS' REFUSALS/EARLIEST APPLICATION DATE

FACTORS

23/ 2/70	Lot 22 Parklawn Place, St. Marys
15/ 1/74	Lot 84 Hewitt Street, St. Marys
21/11/74	66 Queen Street, St. Marys
26/ 8/75	Lot 62 Monfarville Street, St. Marys
9/ 4/76	Lot 62 Monfarville Street, St. Marys - appeal dismissed.

* These Refusals are shown on a map as Annex A to this Report.

DISCUSSION

1. Parklawn Refusal starts Parklawn 1.61 km circle ending 23/2/71.

2. Hewitt Street Refusal has no effect at this stage.

3. Queen Refusal puts Parklawn Circle into 3 year mode ending 21/11/77 and starting Queen Circle which ended 21/11/75.

4. Monfarville Refusal is outside Parklawn Circle and therefore has no effect on it.

5. Monfarville Refsual is INSIDE Queen Circle but refused less than 12 months from Queen Refusal leaving Queen Circle in 1 year mode.

6. Monfarville Appeal is more than 12 months from Queen Refusal.
However my contention is that Monfarville was NOT effected by 34(2)(b) at the time of Queen's Refusal and therefore 34(2)(d) cannot operate.

7. Therefore, I believe, Coles will be able to apply (unless there are other refusals effecting the issue) on the first Court Day after 21/11/77.

AGREED FACTS

APPLICATION BY HARRY JAMES FOR CONDITIONAL SPIRIT MERCHANT'S LICENSE COLES NEW WORLD 38 PHILLIP STREET, ST. MARYS RETURN DATE 25.11.77

1. Application for conditional spirit merchant's license Lot 22, Parklawn Place, St. Marys North, refused on Section 29(e) ground on the 23rd February, 1970. No appeal lodged.

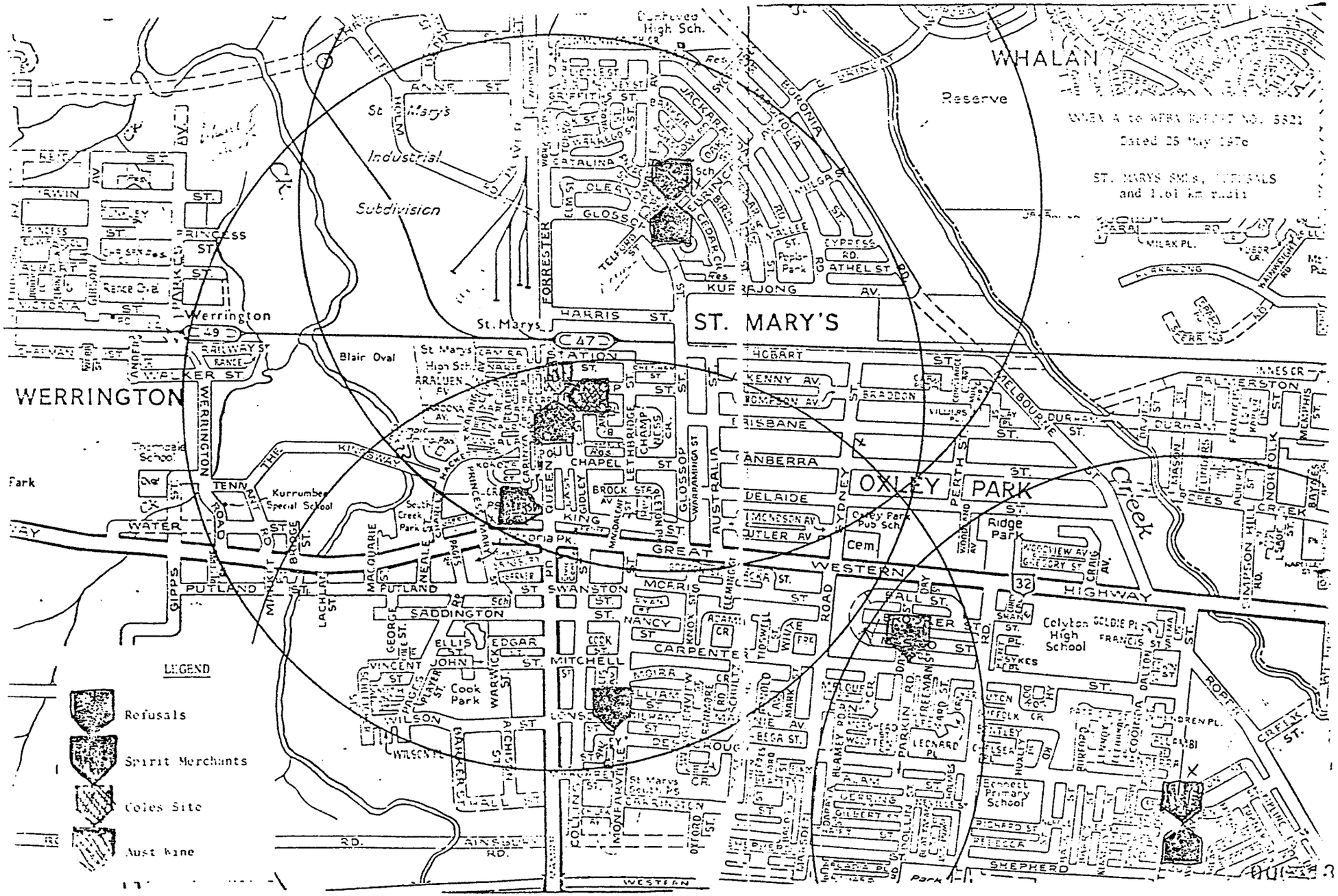
2. Application by Doris Matthews for conditional spirit merchant's license 66 Queens Street, St. Marys, refused on the 21st November, 1974 on Section 29(e) ground. No appeal lodged.

3. Application by Nicodemo Bruzzese for conditional spirit merchant's license Lot 62, Monfarville Street, St. Marys refused on Section 29(e) ground at first instance on the 26th August, 1975 and on appeal on 9th April, 1976.

4. Premises the subject of the application referred to in 1. above are within 1.61 kilometres of the premises in 2. above.

5. The premises referred to in 1. and 2. above are both within 1.61 kilometres of the applicant's site.

6. The premises referred to in 2. above are within 1.61 kilometres of the premises referred to in 3. above.


WHALAN
Reserve
St Marys
Industrial
Subdivision
Werrington
WERRINGTON
ST. MARY'S
OXLEY PARK
Blair Oval
Kurrumbee Special School
Cook Park
Ridge Park
Colyton High School
Creek
LEGEND
Refusals
Spirit Merchants
Coles Site
Aust Wine

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)

TRANSCRIPT RECORD OF PROCEEDINGS

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