Privy Council Appeal No. 48 of 1980

John Albert Carbery and Others – – – – *Appellants*

v.

Harry James and Others – – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MARCH 1981

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD SCARMAN

[*Delivered by* LORD SCARMAN]

This appeal from the Supreme Court of New South Wales Court of Appeal requires the Board to determine the true effect of the provisions of the Liquor Act 1912 which restrict the right to make successive applications for a spirit merchant's license in respect of the same premises or other premises within a specified distance of them.

In the second paragraph of their written case the appellants correctly identify the issue. They say that:—

> "The single issue raised in this Appeal is 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")."

More briefly still, the question can be said to be:— what does "under" mean in this context, where it cannot mean "under"? The paragraph has caused some difficulty in the courts which have had to consider it, one judge of the Supreme Court being sufficiently provoked to describe the wording of section 34(2)(d) as "virtually unintelligible"—Brereton J. in *Panaretos v. Laycock* [1973] 1 N.S.W.L.R. 538 at p.542B.

For the purposes of the present appeal it is necessary to consider only a few provisions of the Act. Section 10 confers upon the district licensing court exclusive jurisdiction to hear and determine applications for the various types of liquor license available under the Act and objections to the grant of such licenses. Section 24 permits, *inter alia*, applications to be made for a spirit merchant's license. Section 15A describes such a license as one which authorises the sale of liquor at the specified premises only for consumption off the premises. Section 27 enables a "conditional application" to be made for a license in respect of premises proposed to be erected or for premises already erected but requiring additions or alterations to make them suitable for a license.

Section 29 sets out seven specific grounds upon which objection may be taken to the grant of an application. They include:—

"(e) that the reasonable requirements of the neighbourhood do not justify the granting of such application."

Their Lordships will refer to this ground of objection as "ground (e)".

Section 34 deals with the renewal of applications. In its original form it provided as follows:—

"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."

The section was limited in effect, applying only to successive applications in respect of the same premises.

The Liquor (Amendment) Act 1969 extended the restriction against subsequent applications to premises within a specified radius of premises in respect of which an application had been refused, but confined this extension to application for spirit merchant's licenses. The old section 34 became subsection (1) of a new section 34 and a new subsection (2), limited to spirit merchant's licenses, was added. The amendment became law on 3rd December 1969 and is in these terms, so far as relevant to this appeal:—

"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 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 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."

Paragraph (a), being transitional, was repealed in 1976 but Parliament has not deleted the reference to paragraph (a) in paragraph (d).

Such are the relevant statutory provisions. There is no dispute between the parties as to the legislative purpose of section 34(2). Nor does either party suggest that the other's construction of the subsection is inconsistent with the legislative purpose—though the appellants would submit that their view of the subsection suits it better. The purpose of the subsection is " to limit the number of applications which may be made for an area once there has been an investigation into its requirements ": these are the appellants' words (paragraph 21 of their written case). Or, as an appeal judge has put it, the section is " directed to preventing a multiplicity of applications for a license within a particular area " (Mahoney J.A. *Mitakos v. Allan,* [1976] 1 N.S.W.L.R. 62 at p.73D). The mischief which subsection (2) is intended to suppress is that of further investigations into the requirements of an area, the requirements of which have already been investigated and held not to justify the grant of an application. Their Lordships note that even the appellants describe the legislative purpose as one to limit *applications*, in this respect agreeing with the view expressed by Mahoney J.A.

The first respondent, Mr. Harry James, (to whom it will be convenient to refer as " the respondent ") made on 25th November 1977 a conditional application to the Licensing Court for the Penrith District for the grant of a spirit merchant's license in respect of 38 Phillip Street, St. Mary's. A number of persons, including the appellants, objected to the granting of the application. The appellants, however, took a preliminary point, namely that section 34(2)(d) of the Act debarred the application from being made. Their case was that, when the respondent applied, an application had already been refused in the same area after the expiration of 12 months from the date of a previous refusal on the ground of objection specified in section 29(1)(e): in other words, that when the respondent applied, there were already two refusals on ground (e) in the same area separated by an interval of more than 12 months. The learned Chairman of the Licensing Magistrates (who constituted the Court) rejected this plea to the jurisdiction, whereupon the appellants applied to the Supreme Court for an order of prohibition. Ash J. made the order, but was reversed by the Court of Appeal (Moffitt P., Reynolds and Samuels JJ.A.). The appellants now appeal by special leave to Her Majesty in Council.

Their Lordships set out the agreed facts in the convenient way in which they are stated in the respondent's case:—

" A. *Previous applications refused at St. Mary's, 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 of 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."

Their Lordships would refer to one additional fact (also agreed). Bruzzese's premises (refusal (3)) are within 1·61 kilometres of the respondent's premises and of Matthews' premises (refusal (2)) but more than 1·61 kilometres from Parklawn Place (refusal (1)).

It is accepted by both parties, and clear upon an analysis of the facts, that the first refusal (Parklawn Place) is irrelevant to the problem which has to be solved. The respondent's application, dated 25th November 1977, was more than three years after the Matthews refusal and, though within the area centred on Parklawn Place which includes the respondent's as well as Matthews' premises, is outside the period of prohibition arising from those two refusals. If, therefore, the respondent's application is to be held to be one which cannot be made, the prohibition must arise from the refusal of Bruzzese's application on 9th April 1976, the relevant area being that centred on Matthews' premises. This area does, of course, include the respondent's premises. The question for decision is, therefore, whether the Bruzzese refusal of 9th April 1976 following upon the Matthews refusal of 21st November 1974 operates by reason of section 34(2)(d) to prohibit a further application from being made within three years of 9th April 1976. If it does, the respondent fails in this appeal: if it does not, he succeeds and the appeal must be dismissed.

The rival contentions can be shortly stated. The appellants say that the words " under paragraph (b) " do no more than link the application, which paragraph (d) bars for three years, with previous refusals in the same area on the same ground (*i.e.* " ground (e) "). Accordingly, since Bruzzese's refusal (No. 3) was after Matthews' refusal (No. 2), the respondent's application, made within three years of Bruzzese's refusal, is prohibited by section 34(2)(d). The words " under paragraph (b) " embrace, according to this submission, any application after 3rd December 1969 (paragraph (a) covers earlier applications) which is refused on ground (e) more than a year after a previous refusal on the same ground in the same area. It matters not when the application was made, provided its refusal was subsequent to a prior refusal.

The respondent says that the fallacy of the appellants' contention is that it is inconsistent with what is said in paragraph (b). Whatever the meaning of the words " under paragraph (b) ", they cannot, even in the context of paragraph (d), mean " outside " or " uncovered " by paragraph (b). The words qualify " an application ". But Bruzzese's application was dated 4th July 1974, *i.e.* some months prior to Matthews' refusal. When it was made, it was outside the ambit of the subsection. It was outside the area of Parklawn Place (refusal (1)), and prior in time to Matthews' refusal (refusal (2)). It was made, therefore, as in the course of argument Lord Edmund-Davies commented, " in virgin territory ", *i.e.* in a territory where at the time there was no relevant refusal on ground (e). The respondent accordingly submits that he was entitled to make his application and to have it heard and determined.

In their Lordships' view the respondent's contention must prevail. Paragraph (d) is brought into operation by the refusal of " *an application* . . . . under paragraph (a) or (b) ". It directs attention to the application and indicates by those words the application which there has to be in order that the refusal may bring in train the consequences specified in

the paragraph. Paragraph (a), repealed in 1976, has no relevance. Paragraph (b) is crucial. It prohibits applications within the prescribed radius for 12 months after a prior refusal, but permits a second application after the expiry of that period. Though " under " is inept when applied to a provision which is essentially restrictive in character, its sense in context is clear. " Under paragraph (b) " must mean " subject to the restriction imposed by paragraph (b) "; or, as spelt out in more detail by Reynolds J.A. in the Court of Appeal, " the phrase ' application under paragraph (b) ' in the present context means an application which would be proscribed by section 34(2)(b), but for the expiration of 12 months from the date of the refusal of [a previous] application ". As Bruzzese's application, the refusal of which is said to have brought paragraph (d) into operation so as to bar the respondent's application, was made prior to refusal (2), it could not be subject to the restriction arising from that refusal and imposed by paragraph (b). There was, therefore, no application " under paragraph (b) " barring the respondent from making his application.

Upon, therefore, the point of construction and without reference to authority, their Lordships would reject the appellants' submission and uphold that of the respondent. When one turns to the case law, one finds that, while the point has never arisen for decision, the weight of judicial opinion supports the construction which their Lordships have indicated they favour. Their Lordships have in mind not only the views expressed by the Court of Appeal in the present case but also those to be found in the judgments in *Mitakos v. Allan* [1976] 1 N.S.W.L.R. 62 at pages 66–67 (Moffitt P.) and at pages 72–73 (Mahoney J.A.). In *Mitakos'* case, as in *Hore v. Fitzmaurice,* which immediately follows it (at p.75) in the Law Report and was argued in conjunction with it in the Court of Appeal, the judges believed they were following a decision of the Court of Appeal in *Rasko, ex parte: Re Bowerman.* Counsel for the appellants has, however, submitted that the decision is really in his favour. But counsel for the respondent submits that the judges were right in believing that the decision supports the construction of the subsection for which he contends. The case is reported only in a note: [1973] 1 N.S.W. L.R. 543 (*n*). Their Lordships find the reasoning in the case concealed rather than exposed by the note, while the " refinement " of counsel's argument in support of the applicant which was dismissed as " untenable " cannot be said to emerge with any clarity. Their Lordships think it better to let the case lie quietly in its obscure corner in the law reports, and would observe only that on its facts it was plainly a correct decision.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

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In the Privy Council

JOHN ALBERT CARBERY
and OTHERS

v.

HARRY JAMES and OTHERS

DELIVERED BY
LORD SCARMAN

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