DIRECTOR
cc: MANAGERS
cc: A/ASST. LCD



IN THE SUPREME COURT ) Heard: 10 November 1993
)
OF WESTERN AUSTRALIA ) Delivered: 20 July 1994

THE FULL COURT

CORAM: KENNEDY, FRANKLYN & WALLWORK JJ

Appeal No 35 of 1993

B E T W E E N :

BAROQUE HOLDINGS PTY LTD

Appellant
(Applicant)

and

ALJOHN (1982) PTY LTD, CHRISTOFF & SONS PTY LTD, TREVOR ATFIELD, PATRICK GERARD O'TOOLE and LINDA VILLIERS

Respondents
(Objectors)

Catchwords

Liquor law licensing - liquor store licence - application - appeal against rejection - previous remittal to Liquor Licensing Court for further consideration - failure to give adequate reasons - question of fact.

Mr D W McLeod (instructed by McLeod & Co) appeared for the appellant.

Mr C J L Pullin QC and Mr A V McCarthy (instructed by Phillips Fox) appeared for the respondents.

Cases referred to in judgments:

Apps v Pilet (1987) 11 NSWLR 350
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd, unreported; FCt SCt of WA; Library No 920441; 28 August 1992
Carlson v King (1947) 64 WN (NSW) 65
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1
Clark v Flanagan (1934) 52 CLR 416
Commonwealth of Australia v Pharmacy Guild of Australia (1989) 91 ALR 65
Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd, unreported; FCt SCt of WA; Library No 930701; 13 December 1993
Housing Commission of New South Wales v Tatmar Pastoral Co [1983] 3 NSWLR 378
Palace Securities Pty Ltd v Donnelly (1992) 7 WAR 241
Palmer v Clarke (1989) 19 NSWLR 158
Pannizutti v Trask (1987) 10 NSWLR 531
Pettitt v Dunkley [1971] 1 NSWLR 376
Pillai v Messiter (No 2) (1989) 16 NSWLR 197
Public Service Board of NSW v Osmond (1986) 159 CLR 656
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247
Sterling Pharmaceuticals Pty Ltd v Johnson & Johnson Australia Pty Ltd (1990) 96 ALR 277

Cases also cited:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
re Coles Myer Limited, unreported; FCt SCt of WA; Library No 920085; 24 February 1992
Coles Myer Limited v Liquorland Noranda, unreported; FCt SCt of WA; Library No 8267; 28 May 1990
David Jones (Aust) Pty Ltd v Fahey (1989) 50 SASR 323
ex parte Watts; re Parmenter (1969) 72 SR (NSW) 293
Falc v SPC (1992) 74 LGRA 68
Gronow v Gronow (1979) 144 CLR 513

Lloyd v Faraone [1989] WAR 154
Lovell v Lovell (1950) 81 CLR 513
Sharp v Wakefield [1891] AC 173
Shreeve v Martin (1969) 72 SR (NSW) 279
Vine v Smith [1980] 1 NSWLR 261
Water Conservation & Irrigation Commission (NSW) v Browning (1947) 74 CLR 492

KENNEDY J

This is the second occasion upon which an appeal has been brought to this Court in relation to a rejection of the appellant's application for a liquor store licence for premises within the Mirrabooka Village shopping centre, of which it is the owner. The proposed store has been described as an average suburban liquor store, which the appellant intended to establish and operate in order to provide one-stop shopping to local residents at the appellant's shopping centre. That shopping centre is what is known as a neighbourhood shopping centre, with a fairly large supermarket and 14 specialty shops.

On the previous occasion, the appeal primarily concerned the Liquor Licensing Court Judge's refusal to admit into evidence a market survey conducted within Mirrabooka and Koondoola by Dr D M Fenton, the evidence of Dr Fenton and Mrs J Gilchrist commenting on that survey, and the evidence of Mr J J Aloi, which tended to show that a supermarket within the shopping centre drew its trade mainly from Mirrabooka and Koondoola. This Court, which was differently constituted, then concluded that all of that evidence should have been admitted. The Court further held that the Judge had not applied the appropriate test under s 38(1) of the *Liquor Licensing Act 1988*, as explained by Malcolm CJ in ***Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*** (1991) 4 WAR 1, and that the Judge had also erred to the extent that he considered that the private interest of the appellant in making its application had a bearing on the public interest. See ***Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd***, unreported; FCt SCt of WA; Library No 920441; 28 August 1992.

On the further hearing of the application, pursuant to this Court's remittal of the matter to him for further consideration in the light of its reasons for judgment, the Judge received the evidence of Dr Fenton and Mrs Gilchrist,

and he admitted the survey into evidence. Nothing was said in his judgment, or in the course of the present appeal, as to the previously rejected evidence of Mr Aloi.

In his brief judgment, the Judge noted that the effect of this Court's order was to require his reconsideration, upon the evidence previously before him and upon the market survey evidence, of the question whether the appellant had established that the grant of the application was necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area "in accordance with the approach to the application of s 38 of the Act to the evidence by the Full Court" (sic). He observed that he was also required to consider the first and sixth grounds of objection and to reconsider the second ground of objection to determine whether the objectors had established any such ground.

In relation to s 38 of the Act, Ipp J had pointed out, at 8:

> "The further a person is from existing licensed premises, the more likely it is that the extent and quality of liquor store services that that person will receive from those premises will diminish. The extent and quality of services are not likely to be distributed in a uniform way throughout the affected area. Areas within the affected area will inevitably receive differing qualities of services. It follows therefore, in my view, that the Act enjoins the licensing authority, where necessary, to have regard to discrete sections of the public within an affected area when considering an application under s 38."

He went on to express his view that the suburbs of Mirrabooka and Koondoola constituted a significant section of the affected area.

The first ground of objection to the appellant's application was that the grant of the application would be contrary to the public interest. The second ground of objection was that the grant of the application was not necessary in order to provide for the requirements of the public. The sixth ground of

objection was that, if the application were granted, undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or the amenity, quiet or good order of the locality in which the premises or proposed premises are or are likely to be, situated would in some other manner be lessened. Notwithstanding his Honour's initial assessment of that which he was required to do, he ultimately concluded, apparently for the reason that he found that the application failed on the second ground, that it was not then necessary for him to consider and determine the first and sixth grounds of objection, although he did go on to express a view as to the public interest. With respect, having regard to the past history of the application, it would have been preferable for him to have dealt fully with each of the objections so that, if the appeal in relation to his Honour's finding under s 38(1) had been successful, this Court could finally have disposed of the matter rather than having to send the application back for a third hearing in the Liquor Licensing Court.

His Honour went on in his judgment to indicate that he was in no doubt that the proper determination of the issues would depend upon the weight which he should give to the evidence in accordance with the reasons of the Full Court. In this respect, he noted the observations of Ipp J in his reasons for judgment in the Full Court concerning the survey evidence, when his Honour said, at 18:

> "It is merely evidence tending to establish one of the limbs of the enquiry. Moreover, I would have thought that the room for credibility disputes on these issues is limited. It would be rather difficult to refute the testimony of an individual in Mirrabooka who says that he or she would prefer to purchase liquor from a store that is significantly nearer and more accessible to his or her home."

Very properly, Ipp J, in concluding his consideration of this matter in the Full Court, added that he wished to stress that nothing which he had said should be taken to be any reflection on the weight to be attributed to the survey evidence, which was a matter for the Liquor Licensing Court; but it should be observed that this statement followed immediately upon his Honour's acceptance of the approach of Hill J in ***Sterling Pharmaceuticals Pty Ltd v Johnson & Johnson Australia Pty Ltd*** (1990) 96 ALR 277, at 293, where the latter said:

> "There is much to be said, however, for the view that in the twentieth century where important commercial and political considerations are made by reference to market or other surveys conducted in rigidly controlled circumstances, evidence obtained from surveys similarly conducted and for the express purpose of obtaining evidence for the proceedings should be admissible if relevant to a matter in issue. This is particularly so where statistical analysis can confirm that to a specified degree of probability and subject to a specified error rate, the result can be projected to the whole or a defined section of the population. The community might rightly regard evidence from such surveys as more inherently likely to be reliable than evidence which is subject to cross-examination. They may well regard the rejection of that evidence as, to use the words of Deane J in *Walton v R* (1989) 63 ALJR 226 at 236, confounding justice or common sense and producing "the consequence that law was unattuned to the circumstances of society which it exists to serve"."

The Liquor Licensing Judge concluded that the appellant had failed to establish its case under s 38 of the Act that the requirements of the public identified by the Full Court were objectively reasonable. He added that he also found that the objectors had established their ground of objection under s 74(1)(d) that the grant of the application was not necessary to provide for the requirements of the public. There was no attempt on his part to consider in his reasons the weight of the additional evidence which had been admitted

following the earlier successful appeal. He gave no reasons as to why he preferred the evidence of the objectors, apart from saying he had heard and seen the witnesses, or as to why that evidence had led him to conclude that the requirements of the public identified by the Full Court were not objectively reasonable.

The appellant now appeals to this Court on the following grounds -

"1. The Court erred in law in that it applied unstated and unexplained policies and considerations in the determination of the application.

2. The Court erred in law in failing to hold that the convenience afforded:

(a) those members of the public patronising the Mirrabooka Village Shopping Centre; and

(b) the noticeable number of residents of Mirrabooka without their own transport,

together with the fact that Mirrabooka and Koondoola are bounded by busy roads was sufficient to establish that the grant of the application was necessary in order to provide for the reasonable requirements of the public for liquor and related services.

3. Notwithstanding the learned Judge's comments in paragraph 16 of his reasons that:

> "In reaching this conclusion I have had no regard to the question whether there are insufficient store licences in the area to meet the requirements of the public. As always, I have considered only whether the grant is necessary to provide for the reasonable requirements of the public."

the test the Court effectively applied to the evidence was:

(i) whether there were insufficient licences to meet the requirements of the public; and/or

(ii) the public did not find it inconvenient to purchase their requirements at existing licensed premises,

and in doing so it erred in law.

4. (i) Following the findings of the Liquor Licensing Court in its decision in this case on 18 November 1991 and the findings of the Full Court on appeal in their decision of 28 August 1992, no other view was open to the Liquor Licensing Court than that the subjective requirement as identified was reasonable. In failing to find this the Court erred in law.

(ii) Following the findings of the Liquor Licensing Court in its decision in this case on 18 November 1991 and the findings of the Full Court on appeal in their decision of 28 August 1992 there was not sufficient evidence upon which the Court could reasonably have come to the conclusions it came to and the Court should have found that the identified subjective requirement was reasonable.

(iii) Upon the facts found by the Court and the other evidence before it the Court could not properly have found the grant of the application was not necessary to provide for the reasonable requirements of the public in the affected area.

5. The decision by the Court that the application should be refused in the public interest pursuant to section 33(1) of the Act without providing any written or oral reasons for such refusal was wrong in law.

6. The Court erred in law in determining that the application should be refused in the public interest pursuant to section 33(1) of the Liquor Licensing Act 1988 ("the Act") without

first having determined the first and sixth grounds of objection.

7. Upon the findings of the Liquor Licensing Court in its decision in this case on 18 November 1991 and the findings of the Full Court on appeal in their decision of 28 August 1992 and the other evidence before the Liquor Licensing Court, the Court could not properly have found that the application should be refused in the public interest pursuant to section 33(1) of the Act.

8. The decision of the Court on the evidence before it was so unreasonable that the court could not properly have reached the decision which it did according to law."

Ground 6 was abandoned by the appellant at the commencement of the hearing of the appeal.

The respondents gave notice pursuant to O 63 r 9(2) of the *Rules of the Supreme Court* that they intended to contend that the decision should be affirmed, not only on the grounds set out in the decision, but also on the following additional or alternative grounds:

"1. That the Liquor Licensing Court should have held that the ground of objection contained in paragraph 3.1.1 and particularised in paragraph 4.1 of the re-amended notice of objection dated 12 June 1991 (the objection) was established by the evidence and that by reason of those matters and for the purposes of section 74(1)(a) of the Liquor Licensing Act the grant of the application would be contrary to the public interest.

2. The court should have held that the ground of objection contained in paragraph 3.1.6 and particularised in paragraph 4.6 of the objection, was established by the evidence and that by reason of those matters and for the purposes of section 74(1)(g) of the Liquor Licensing Act if the application were granted, undue annoyance disturbance or inconvenience would be likely to occur or the amenity, quiet or good order of the locality would be lessened."

It is to be noted that, by s 28(2) of the Act, no appeal lies from a decision of the Liquor Licensing Court unless the appeal involves a question of law.

On the face of his reasons, his Honour indicated that he accepted the survey evidence, together with other evidence for the appellant, as being evidence of a representative sample of a relevant section of the public from which the requirements of the public in the affected area may be proved by inference - see ***Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*** (supra), per Malcolm CJ, at 10. He went on to acknowledge the observation of Ipp J, at p 22 of his reasons in the last appeal in this matter, that none of the licensed premises in the affected area or outside the affected area enabled those persons who do their shopping in the Mirrabooka Village shopping centre to purchase their liquor at the same time and at the same place that they do their other shopping. Furthermore, as Ipp J also observed, many of the inhabitants in Mirrabooka and Koondoola are not able to afford their own private transport and there are presently no licensed premises in Mirrabooka which conveniently cater for their particular needs. Whilst acknowledging that these were matters to be taken into account in determining whether the requirements of the public "identified by the Full Court" are objectively reasonable on all the evidence, his Honour proceeded, without any further consideration of the significance of that evidence, to put it on one side in favour of the evidence of the objectors' witnesses residing in Mirrabooka - there were none of those referred to by his Honour who resided in Koondoola - about their utilisation of existing licensed premises. He said he found that evidence both reliable and persuasive and preferred it to the evidence for the appellant. He then specified the evidence of certain witnesses by reference to their written statements, without any

reference to their evidence under cross-examination, in the course of which a number of them retreated to some degree from their written statements.

As I have indicated, apart from what was effectively a merely passing reference, no consideration was given in his Honour's reasons to the independent survey which was conducted of 11% of the households in Mirrabooka and Koondoola. That survey might well have been regarded as being of greater weight than the evidence of those witnesses selected by the four licensee objectors as present users of their licensed premises. At the very least, the survey provided some objective evidence as distinct from the evidence of chosen supporters of the various contending parties. From the survey, of those who were accustomed to purchase liquor, 69.3% (or 121 persons out of 153) said they would purchase liquor at the proposed store. That is a significant proportion. A further 12.8% said that they did not know whether they would purchase liquor at the premises. The great majority (77%) of those who indicated that they would purchase their liquor from the premises said they would do so on the ground that it was closer for them. Only 9.2% gave as their principal reason the fact that they used other outlets at Mirrabooka Village Shopping Centre. It is unnecessary for the purposes of this appeal to consider the survey in any greater detail. It is sufficient to say that, in the circumstances, it might reasonably have been thought to have called for very careful consideration by the Liquor Licensing Judge in the course of his determining whether a new licence was "necessary" in terms of s 38(1) of the Act. Only after detailed consideration could its weight fairly be assessed.

His Honour went on simply to state his conclusion that, in approaching the determination of "the application under s 38 and [the] objections under s 74(1)(d) in accordance with the reasons of the Full Court", the subjective requirements of the public identified by the Full Court were not objectively

reasonable having regard to the matters which the court was required to take into account "under s 38(1) and (2) and under s 74(1)(d) of the Act".

As this Court has previously indicated in ***Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd***, unreported; FCt SCt of WA; Library No 930701; 13 December 1993, it is wrong to approach the Act in this manner. Section 74(1)(d) does not pose a separate test. It only specifies the grounds upon which an objection may be made. Section 38(1) imposes on an applicant the obligation of satisfying the licensing authority that the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in the affected area. In arriving at his conclusion on this aspect of the matter, it is for the Judge to take into account the evidence adduced by an objector who has lodged an objection on the ground specified in s 74(1)(d) of the Act, namely, that the grant of the application is not necessary in order to provide for the requirements of the public. Nevertheless, the approach adopted in this case does not give rise to any appealable error, and it has not been contended that it does so.

His Honour went on to acknowledge, on the face of his reasons, that he had reached his conclusion notwithstanding that the evidence for the appellant revealed that a significant section of the public desired a liquor store at the shopping centre and that Mirrabooka and Koondoola were suburbs where no liquor store currently existed. He added:

> "In my opinion, the evidence is not such that it is in itself sufficient to establish a reasonable requirement. In reaching this conclusion, I have had no regard to the question whether there are insufficient liquor store licences in the area to meet the requirements of the public. As always, I have considered only whether the grant is necessary to provide for the reasonable requirements of the public."

His Honour continued:

> "Having heard the evidence and seen the witnesses and having considered the issues in accordance with the reasons of the Full Court, I prefer the evidence for the objectors to the evidence for the applicant and I conclude that the applicant has failed to establish its case under s 38 that the requirements of the public identified by the Full Court are objectively reasonable. I find that the objectors have established their grounds of objection under s 74(1)(d) that the grant of the application is not necessary to provide for the requirements of the public."

In a case such as the present, particularly where a matter has been referred back to a court at first instance with a direction that certain evidence should be admitted, that evidence, if accepted, supporting a conclusion contrary to that previously reached, it is to be expected that, once admitted, the evidence will be carefully examined by the court in its reasons for decision. It does not appear to me that it was in this case. Nevertheless, it does not follow from this that the appeal should be allowed.

The requirement for the provision of reasons by a court was expressed by Jordan CJ in ***Carlson v King*** (1947) 64 WN (NSW) 65, at 66, as follows:

> "It has long been established that it is the duty of a court at first instance, from which an appeal lies to a higher court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision."

It is, however, clear that the general rule does not require a judicial officer to provide reasons in every case. The requirement to give reasons is a normal, although not a universal, incident of the judicial process - see ***Public Service Board of NSW v Osmond*** (1986) 159 CLR 656, per Gibbs CJ, at 666-667. As McHugh JA (as he then was) pointed out in ***Soulemezis v Dudley***

***(Holdings) Pty Ltd*** (1987) 10 NSWLR 247, at 280, where the resolution of a case depends *entirely* on credibility, it is probably enough that the trial Judge has said that he believed one witness in preference to another; but the position will usually be different if other evidence and probabilities are involved. That is the present case. But that is not the end of the matter. At 281, McHugh JA added:

> "If no right of appeal is given against findings of fact, a failure to state the basis of even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done."

No attempt was made to demonstrate that a breach of the principle occurred in this case. As to the duty of a court at first instance to provide reasons for its decision, see generally also ***Pettitt v Dunkley*** [1971] 1 NSWLR 376, ***Housing Commission of New South Wales v Tatmar Pastoral Co*** [1983] 3 NSWLR 378, ***Apps v Pilet*** (1987) 11 NSWLR 350 and ***Palmer v Clarke*** (1989) 19 NSWLR 158.

Even if there is no legal requirement for Judges to provide adequate reasons, there may be strong policy reasons as to why they should do so. In ***Commonwealth of Australia v Pharmacy Guild of Australia*** (1989) 91 ALR 65, at 88, Sheppard J said, in relation to an administrative tribunal which was under a statutory duty to provide reasons in writing for each set of findings and determinations which it made:

> "... I think it is a fair criticism of the tribunal to say that the report consists of a reference to the relevant provisions of the Act, a comprehensive statement of the submissions of the Guild and the Commonwealth and the tribunal's conclusions. The tribunal's reasoning process is not disclosed. I would add my voice to his Honour's in saying that I think that this is unfortunate. The provision of reasons is an important aspect of the tribunal's overall

> task. Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function which it has."

In my opinion, these observations have general application to the present case, particularly having regard to the fact that his Honour was being called upon to reconsider a decision which he had previously reached. However, on the central issue in this case, the determination under s 38(1) of the Act as to whether the granting of the licence was necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in the affected area, and his Honour not relevantly having misdirected himself as to the law, although it would have been highly desirable for him to have provided substantial reasons for his conclusions, I am unable to conclude that his failure to do so constituted an error of law if there was some evidence to support those conclusions. In my view, there was. It

cannot be maintained that the evidence required a particular determination. This clearly was recognised by Ipp J in the earlier appeal.

Counsel for the appellant sought to rely upon comments made by his Honour in the course of the hearing in support of his argument that his Honour had erred in law. Whilst not necessarily excluding the possibility in a particular case of making use of such comments, I do not regard it as permissible to do so in the present case. The reasons for judgment must speak for themselves. Observations in the course of argument are not to be taken as concluded views or as expressing reasons for a subsequent decision. It may, however, be appropriate in this general context to observe that the decision of a case by the application of some unexplained policy would be fundamentally wrong, as indeed would the application of a revealed policy on the basis that it was determinative.

Having, at its commencement, acknowledged that he was required to consider the first and sixth grounds of objection, it is surprising that, at the end of his relatively short judgment, his Honour concluded that it was not necessary for him to consider and determine those grounds of objection. However, he went on:

> "In my opinion, the evidence does not establish any reason on the merits of this case why this application should be granted pursuant to s 33(1) in the public interest notwithstanding that a valid ground of objection has been made out. The contrary is the case. Even if the evidence for the applicant were to be preferred, I am of the opinion that this application should be refused in the public interest because I consider that to grant this licence would not contribute to the proper development of the liquor industry in this State and would not facilitate the use and development of licensed premises reflecting the diversity of consumer demand for reasons which it is not presently necessary for me to explain."

His Honour, in the passage just quoted, has provided no reasons for the formation of his view in relation to the public interest. He has stated it only in terms of the expressed objects of the Act. The discretion conferred upon the licensing authority by s 33(1) of the Act is in terms an absolute discretion; but that concession is conferred "subject to this Act". It is not an arbitrary and unlimited discretion, but one which is to be exercised having regard to the scope and subject of the Act - see ***Palace Securities Pty Limited v Director of Liquor Licensing*** (1992) 7 WAR 241, per Malcolm CJ, at 249-252 - and in terms of the sub-section, the discretion is to be exercised "on any ground or for any reason that the licensing authority considers in the public interest". In my view, in exercising that discretion, it is necessary that the Judge should identify that ground or reason. If he does not do so, the right of appeal under s 28 could be rendered nugatory.

Having regard to the conclusion which I have reached under the later grounds of appeal on his Honour's decision adverse to the appellant under s 38 of the Act, ground 1 of the appellant's ground of appeal, which appears to have related to "the public interest discretion", becomes irrelevant. If a ground of objection has been made out, as his Honour found in this case, under s 74(1)(a) of the Act, that the grant of the application was not necessary in order to provide for the requirements of the public, his discretion was to grant the application under s 33(2)(b). The onus of establishing some basis for the favourable exercise of that discretion must rest upon the appellant. In this case, the appellant's argument appears to have assumed that it had met all the requirements of the Act, and that the relevant discretion was that under s 33(2)(a), that is, a discretion to refuse the application. I am unable to find anything in the appellant's submissions, or, indeed, in the evidence, which would justify the exercise of the Liquor Licensing Court's discretion in its

Dixon J, at 428. This, as counsel for the respondent argued, is the consequence of the fact that this is not an appeal by way of rehearing on questions both of law and of fact.

In relation to ground 3, it is by no means clear to me that, having stated that he had no regard to the question whether there were insufficient store licences in the area to meet the requirements of the public, his Honour then effectively applied the test of whether there were insufficient licences to meet the requirements of the public as this ground would have it. But, in any event, this is, in terms of s 38(1)(a), a relevant factor, notwithstanding that the ultimate question is not whether there are insufficient licences to meet the requirements of the public. The appellant has not, in my opinion, established that the wrong test was applied. The second part of the ground raises only a question of fact.

Ground 4 of the grounds of appeal endeavours to elevate to an error of law an error of fact. For the reasons outlined under ground 2, this is not permissible.

In my opinion, although ground 5 of the grounds of appeal would otherwise have been made out, the appellant's case falls at the earlier hurdle of s 38(1), and, as I have indicated, there is nothing to support the view that the Judge was required to exercise his discretion under s 33(2)(b) in favour of the appellant.

Ground 7 must fail for the same reason that ground 5 fails. This ground of appeal proceeds upon the basis that the appellant had satisfied the requirements of s 38(1) and that his Honour had exercised his discretion against the granting of the application pursuant to s 33(2)(a). Nevertheless, it is desirable once again to indicate that, had the exercise of the discretion under s 33 been material, if the appellant's right of appeal were not to be rendered

illusory, it would have been necessary for the Judge to indicate the factors which he was taking into account in exercising his discretion in the manner in which he was. It is quite inadequate to state a conclusion, without explanation, expressed merely in terms of the objects of the Act set out in s 5, with no indication as to why it is believed that the grant of a licence would not contribute to the proper development of the liquor industry in the State and would not facilitate the use and development of licensed facilities reflecting the diversity of consumer demand.

Ground 8, for the reasons already expressed, endeavours to elevate to an error of law what is, at most, an error of fact.

In my opinion, this appeal should be dismissed.

illusory, it would have been necessary for the Judge to indicate the factors which he was taking into account in exercising his discretion in the manner in which he was. It is quite inadequate to state a conclusion, without explanation, expressed merely in terms of the objects of the Act set out in s 5, with no indication as to why it is believed that the grant of a licence would not contribute to the proper development of the liquor industry in the State and would not facilitate the use and development of licensed facilities reflecting the diversity of consumer demand.

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In my opinion, this appeal should be dismissed.

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Mr C J L Pullin QC and Mr A V McCarthy (instructed by Phillips Fox) appeared for the respondents.

FRANKLYN J

I agree entirely with the reasons for judgment of Kennedy J to which I can not usefully add anything. I would dismiss the appeal.

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WALLWORK J

I agree with the reasons for judgment of Mr Justice Kennedy. There is nothing I wish to add to those reasons.