

HWANG v CELEGHIN and Another

Burt CJ, Wallace and Kennedy JJ

12 November, 5 December 1986

5 *Landlord and Tenant — Liquor licence — Liquor Act 1970 — Ability of licensee to apply for removal of licence to other premises — Implied term — Jurisdiction of Supreme Court — Declaration.*

10 The appellant and respondents sought declaratory relief by originating summons in relation to a dispute which had arisen between them over a liquor licence for a wine house granted to the first respondents under the *Liquor Act* 1970. The first respondents had been the lessees of premises from the appellant and second respondent and ran their wine house from those premises. The first
15 respondents agreed to purchase from the second respondent his undivided one half share in the freehold of the premises, but a dispute arose between them and an order was made for the sale of the premises. The question arose as to whether the first respondents during the currency of their lease of the premises were prevented by the terms of that lease from making application to the Licensing Court for the wine house liquor licence to be transferred to other premises. The
20 trial judge considered that there was nothing in the lease which prevented the first respondents from making application for removal of the liquor licence, but in any event declined to grant any declaration by reason of a lack of jurisdiction due to s 11(1)(a) of the *Liquor Act* 1970.

25 *Held*, allowing the appeal, by all the Court: (1) Section 11(1)(a) of the *Liquor Act* 1970 did not prevent the Supreme Court from granting a declaration.

Dalgery Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552, distinguished.

(2) There was to be implied into the lease a covenant on the part of the lessee not to remove or make application for the removal of the liquor licence pertaining to the premises otherwise than with the consent of the lessor.

30 Per Burt CJ:

35 "The removal of the licence would make it impossible for the first respondents 'to use the premises only for a wine saloon or wine house and for no other purpose whatsoever' and even more to the point to do so would necessarily involve a breach of the positive covenant to 'use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping open the premises as a wine saloon or wine house and duly licensed for the sale and consumption of such spiritous and fermented liquors as are from time to time authorised by law to be sold by retail in such type of licensed premises'."

4. CASES CITED

The following cases are cited in the judgments:

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.

Dalgery Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552.

45 *Jack v Smail* (1905) 2 CLR 684.

The Licensing Court (SA) v White (1918) 24 CLR 318.

The following additional cases were cited in argument:

Blackburn v Attorney-General [1971] 1 WLR 1037.

50 *Buck v Attorney-General* [1965] Ch 745.

Gardner v Dairy Industry Authority (NSW) (1977) 52 ALJR 180.

Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286.

APPEAL

F C Davis, for the appellant.

R J M Anderson and *J C Manera*, for the first respondents.

M P Workman, for the second respondent.

Cur adv vult

5 December 1986

BURT CJ. This is an appeal from a judgment of this Court whereby the appellant's originating summons claiming:

"1. A declaration that during the term of the lease of the premises known as 'Silver Dollar Winehouse' being portion of the property situate and known as 219-221 William Street, Perth being the land comprised in Certificate of Title Volume 338 Folio 134A GIUSEPPE CELEGHIN and FRANZISKA CELEGHIN are prohibited from removing or making application for the removal of the Liquor Licence pertaining to the premises, save with the consent of the Lessor.

2. A declaration that at the expiration of the Lease of the said premises and upon GIUSEPPE CELEGHIN and FRANZISKA CELEGHIN ceasing to occupy the said premises, the Liquor Licence reverts to the owner or Mortgagee of the property pursuant to the provisions of Section 88 and the Third Schedule of the *Liquor Act 1970-1981*"

was dismissed.

The grounds of appeal are set out in the reasons to be delivered by Wallace J. It is not necessary to repeat them.

Affidavits were read in support of and in opposition to the making of those declarations and in addition the parties agreed upon a statement of facts. I say that the affidavits and the material exhibited to them were in addition to the statement of agreed facts because as argued before us that was the agreed position.

The statement of agreed facts was as follows:

"1. The Plaintiff (the appellant) and the Second Defendant (the second respondent) are the registered proprietors as tenants in common of premises situate and known as 219-221 William Street, Perth being the whole of the land comprised in Certificate of Title Volume 338 Folio 134A ('the property').

2. The Plaintiff and the Second Defendant purchased the property in October 1978. At the time of the purchase part of the property was occupied and leased by the First Defendants (the first respondents) who operated a restaurant business known as the 'Silver Dollar Winehouse' ('the premises').

3. The First Defendants had purchased the business 'Silver Dollar Winehouse' by an Agreement for Sale dated the 22nd March 1976.

4. 'Silver Dollar Winehouse' is and was licensed as a winehouse pursuant to the provisions of the *Liquor Act 1970-1982*.

5. Upon the purchase of the business 'Silver Dollar Winehouse' by the First Defendants the male First Defendant, Giuseppe Celeghin became the registered Licensee of the winehouse licence.

6. In February 1981 the Plaintiff and the Second Defendant as Lessors entered into a new lease with the First Defendants as Lessees

enabling the First Defendants to lease the premises for a period of four years from the 22nd February 1981, with an option to renew the lease for a further period of four years.

5 7. In October 1984 pursuant to the terms of the lease the First Defendants exercised their option to renew and the lease now expires on or about 22nd February 1989.

8. During 1984 the Second Defendant agreed to sell his half share in the property to the First Defendants.

10 9. Following a dispute between all parties as to the transfer of the Second Defendant's interest in the property to the First Defendants and payment of the Mortgage registered over the property, proceedings were commenced by the plaintiff in this Honourable Court in Action No 1903 of 1985 seeking, inter alia an order for sale of the property pursuant to Section 126 of the *Property Law Act*.

15 10. On the 13th March 1986 an order for sale of the property was made by Master Staples in Chambers.

20 11. A further dispute has now arisen between the Plaintiff and the First Defendants regarding the respective rights to the winehouse licence of the First Defendants as Lessees and the purchaser of the property, (whoever that may be) both during the term of the Lease and after the expiry of the Lease upon the First Defendants ceasing to occupy the premises."

25 The purpose of the originating summons was to resolve the dispute referred to in par 11 of the agreed statement. Reference to the affidavits and to the correspondence exhibited to them reveal the dispute to arise out of the contention put forward by the appellant that an application if made by the male first respondent during the term of the lease to remove the licence from the premises would be a breach of an implied negative covenant in the lease and out of the first respondents' answer to that contention it being that

30 "the licence is a personal matter and is issued to the person (the male first respondent) as such and not to the building (and) . . . Celeghin has the absolute right to remove the licence at the expiry of the lease as there is no embargo whatsoever upon him in the lease".

35 A licence granted under the *Liquor Act 1970* (the Act) is a single licence granted to a person with respect to premises. It authorises the licensee, being the holder of a wine house licence, which is the relevant licence to sell and supply wine and brandy on the licensed premises. It is not "divisible so that it should be regarded as a licence to a person and separately as a licence for premises": *The Licensing Court (SA) v White* (1918) 24 CLR 318 per Griffiths CJ at 321. "A "licensee" under the Act means "the holder of a licence": (s 7 of the Act). By s 88(1) of the Act:

40 "Where in relation to a licensee, an event mentioned in the first column of the Third Schedule occurs . . . the licensee's right to the licence terminates and the licence enures for the benefit of his successor, being the person or one of the persons mentioned in the second column of the Third Schedule directly opposite to the event . . ."

45 By cl 5 of the Third Schedule when the licensee ceases to occupy the licensed premises his successor, for the purposes of s 88(1) of the Act is:

50 "The owner or mortgagee of the licensed premises or any other person who may be lawfully entitled to possession of the licensed premises or the nominee or agent of any such person."

By s 90(1) of the Act:

"A licensee may, by application in writing, in the prescribed form apply for the removal of his licence . . . from the licensed premises to some other premises."

And by subs (2) of that section "where the applicant is not the owner of the premises from which he seeks to remove the licence, he shall give notice of his application to the owner of those premises".

The provisions of the Act with the exception of provisions personal to the licensee apply to an application to remove a licence from one premises to another and for the most part, if not entirely, those provisions relate to the suitability of the premises and to their location.

The effect of those provisions, in my opinion, is that a licensee holding licensed premises as a tenant for a term can only make an application to remove the licence while the term is current because on the expiration of the term he ceases to occupy the premises and ceases to be a licensee.

The lease under which the first respondents hold these premises does not contain any express negative covenant by them or by the first male respondent as licensee that they or he would not, during the currency of the lease, make application to remove the licence to other premises. The lease is however a lease of licensed premises and it does contain the following lessee's covenants:

- "(f) Not to carry on or suffer to be carried on on the Premises or any part thereof any dangerous hazardous noxious noisome or offensive art trade business occupation or calling whatsoever and not to use or permit the Premises to be used as the residence or sleeping place of any person or for auction sales but to use the Premises only for a wine saloon or wine house and for no other purpose whatsoever and may not sell other than wine and brandy and other non-alcoholic drinks and also that the Lessee shall annually cause application to be made and use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping upon [sic] the Premises as a wine saloon or winehouse and duly licensed for the sale and consumption of such spirituous and fermented liquors as are from time to time authorized by law to be sold by retail in such type of licensed premises.
- ...
- (t) To yield up the Premises with all fixtures fittings and additions thereto including (but without limiting the generality of the foregoing) water and electric light fittings and keys at the determination of the Term or any extension thereof in good and tenable repair and condition in accordance with the covenants in that behalf herein contained PROVIDED HOWEVER that this covenant shall not apply to tenant's fixtures which said fixtures the Lessee is hereby authorised to remove on or before the expiration of the Term or any extension thereof making good to the satisfaction of the Lessor all damage caused by such removal.
- ...
- (w) The Lessee will comply with all the formalities and requirements of the *Liquor Act* 1970 as amended and in particular will apply to renew the licence each year and will lodge liquor returns as are required under the *Liquor Act* 1970 as amended."

The trial judge held that:

“The removal of the licence during the term would of course deprive the Celeghins of the ability to lawfully comply with par 6(f) of the lease and that may well give rise to other consequences.”

5 But he expressly held that the lease did not contain an implied negative covenant that the first male respondent would not, during the currency of the lease, make an application to remove the licence to other premises. As I read his reasons this finding was not necessary to his conclusion because assuming such an implied negative covenant or indeed an express negative
10 covenant not to make application for the removal of the licence the court should not, in the exercise of its discretion, make a declaration to that effect because:

15 “To do so would be to encroach upon the exclusive jurisdiction of the Licensing Court in an area in which the *Liquor Act 1970* has left the court the widest possible discretion and despite the differences in the legislation, I think such a view is wholly consistent with the decision in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552. Sufficient to say that the Licensing Court may well consider it appropriate to have regard to the contractual relationships between the owner and the
20 licensee and indeed the whole history of the licensee’s involvement with the premises and as was said in *Dalgety’s* case if the court thereby falls into error, that is something which can be corrected on appeal.”

With great respect I would not agree with his Honour on either point.

25 The removal of the licence would make it impossible for the first respondents “to use the premises only for a wine saloon or wine house and for no other purpose whatsoever” and even more to the point to do so would necessarily involve a breach of the positive covenant to

30 “use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping open the premises as a wine saloon or wine house and duly licensed for the sale and consumption of such spirituous and fermented liquors as are from time to time authorised by law to be sold by retail in such type of licensed premises”.

35 In my opinion the reasons of the justices of the High Court in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552 support the conclusion that the lease contains an implied negative covenant by the lessee that he will not make an application to remove the licence and I would so hold: see Gibbs J, as he then was, and with whom Barwick CJ agreed, at 558-560 of the report and per Mason J at 569, with whom Stephen J agreed at 566.

40 I do not think that the decision in this case is in other respects governed by the decision of the High Court in the *Dalgety Wine* case. By s 57(1)(d) of the *Licensing Act 1967* (SA) a ground upon which an application for removal of the licence could be objected to was

45 “that the lease under which the holder of the licence occupies his premises contains a covenant or prohibition against removing the licence to any other premises without the consent of the lessor, and such consent has not been obtained”.

And by s 61(1) of that Act:

50 “... upon the hearing of any application for the ... removal of a licence, whether objection is taken at the hearing or not, the court shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application with or

without conditions upon any ground or for any reason whatsoever which, entirely in the exercise of its discretion, it deems sufficient."

And finally by s 9(1) of the South Australia Act as it was when the *Dalgety Wine* case was decided:

"There shall be an appeal to the Full Court of the Supreme Court from every direction, determination, order, or decision given or made by the Full Bench of the Licensing Court with respect to any matter arising out of this Act."

The decision of the majority of the justices of the High Court in the *Dalgety Wine* case was firmly based upon the effect of those three provisions considered together as appears from the reasons of Stephen J at 566-567 of the report as follows:

"The specific inclusion in the legislation of this ground I regard as of considerable significance. It differs in kind from the other four specific grounds of objection which precede it in s 57(1). They each describe a particular set of circumstances opposed to the interests of the public or of a section of it and each of them involves abstract and relative standards: for instance, the extent of the public's need, or the extent of public inconvenience or annoyance. By way of contrast, ground (d) is neither directly concerned with the public interest nor does it involve abstractions; to make it good requires no more than proof of breach of the covenant or prohibition to which it refers.

It is s 61(1) which gives to s 57(1) its significance. Section 61(1) confers upon the Licensing Court the widest of possible discretions in arriving at its decisions upon, inter alia, licence removal applications. If the two sections be read together it becomes clear that the legislation contemplates that the court may in its discretion accede to an application, despite the making good by an objector of any one or more of the grounds of objection which he relies upon. The terms of s 61(1) are themselves enough to produce this result, but the very nature of the first four grounds in s 57(1) also serves to make this consequence inevitable: the public interest is a many-faceted subject-matter and proof of the circumstances referred to in any one of those grounds of objection could scarcely be thought, of itself, to be decisive of the overall public interest.

What follows from this is that the legislation must be taken to contemplate that the court, although satisfied that an objector has established the factual circumstance referred to in any of the grounds, including ground (d), may nevertheless, in appropriate circumstances, see fit to grant a removal application. Having regard to the obvious concern for the public interest which pervades this legislation, this is scarcely surprising. On the contrary, what would be surprising would be to find that proven breach of, for example, a covenant against removal of a licence should compel the court to refuse the application, regardless of all questions of the public interest.

The legislative intent must be taken to be that even licensees whose applications for removal are in breach of a negative covenant into which they have entered may have their licences removed if the Licensing Court, in all the circumstances of the case, thinks fit. That Court, as the specialist tribunal charged with responsibility in the field of liquor licensing, is to be free to exercise the very wide discretionary powers with which s 61(1) has armed it, paying regard, inter alia, to relevant

breaches of covenant but not being obliged to regard them as factors determining the fate of the application.

5 In the present case I am not called upon to say whether there are any circumstances in which the Supreme Court should, as a matter of discretion and on the ground that the making of the application is in breach of covenant, enjoin an applicant for removal from making application to the Licensing Court. It is enough to conclude that there exists in this case no special circumstances which would justify intervention by injunction. The Supreme Court was correct in refusing to enjoin the respondents.

10 For the Supreme Court to grant an injunction would have the effect of withdrawing from consideration by the Licensing Court a subject-matter, the removal of licences, which the legislature has exclusively conferred upon it. To grant such an injunction because the applicant for removal was in breach of covenant would be to go even further, fixing upon a circumstance as ground for grant of the injunction which was a circumstance specifically adverted to by the legislature and determined by it to be the proper subject of consideration by the Licensing Court."

15 as appears from the reasons of Mason J in that case (at 574-575):

20 "The issue is whether the Supreme Court should have exercised its discretion so as to prevent the respondents in breach of their covenant from invoking the jurisdiction of the Licensing Court in a matter in which jurisdiction was conferred upon it by the Act. I would answer this question in the negative. There are a variety of considerations which persuade me to this conclusion.

25 First, a superior court should hesitate before granting an injunction restraining a party from commencing or maintaining proceedings in a court or tribunal which has been specially constituted by statute with a jurisdiction to entertain and determine proceedings of that kind, the more so when the proceedings relate to rights or privileges which depend for their existence on the statute: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 427 and 438-439. The Act creates the licence and regulates what may be done with it by way of transfer or removal. And, as we have seen, the Act has constituted the Licensing Court with an exclusive jurisdiction in licensing matters.

30 Secondly, the Licensing Court is specifically directed to determine the grounds of objection. Accordingly, the Licensing Court in the exercise of its jurisdiction must decide, once the ground of objection mentioned in s 57(d) is taken, whether there is a covenant of the kind in question and whether the landlord has failed to give its consent, these being the two issues which the Supreme Court was asked to determine in the proceedings for relief by way of injunction. Thirdly, these issues may not be decisive in the proceedings in the Licensing Court because it has an overriding discretion to grant an application for removal despite the existence of a breach of covenant. Fourthly, the grant of an injunction would effectively deprive the Licensing Court of the opportunity of exercising that overriding discretion, notwithstanding that the discretion had been given to the Licensing Court so as to enable it to determine applications in the public interest. Indeed, the effect of granting an injunction would be to set private rights above the public interest, for an injunction would effectively prevent the Licensing Court from deciding whether, despite the existence of a covenant, considerations of public

interest outweigh the desirability of enforcing private rights. Finally, there is an appeal from the Licensing Court to the Supreme Court. The existence of this appeal enables the Supreme Court to correct any mistake which the Licensing Court may make. All these factors indicate that the Supreme Court was correct in exercising its discretion against intervention."

The Act does not contain provisions similar to s 57(1)(d) or s 61(1) of the South Australian Act and the right of appeal conferred by the Act is confined to appeals which involve a question of law: (s 15(2)).

In my opinion once it be held, as I think it should be held, that the lease contains an implied negative covenant that the first respondents would not apply to the Licensing Court for a removal of the licence there is nothing to be found in the Act and nothing to be found outside the Act which would lead this Court to withhold declaratory relief. I think in the exercise of its discretion it should make a declaration in substance as claimed, but I think it would be enough if it were to declare that upon a proper construction of the lease it contains an implied negative covenant by the first respondents that they will not apply for removal of the licence relating to the leased premises without the consent of the lessor. That is a covenant the breach of which could, if necessary, be restrained by injunction: see Gibbs J in the *Dalgety Wine* case at 366 of the report.

I would allow the appeal and subject to any submission which may be made as to its formulation I would make the declaratory order in the terms set out.

WALLACE J. This appeal arises out of the dismissal of two originating summons filed respectively by the appellant and first respondents wherein each sought declaratory relief. The matters were heard together and argued on the basis of the following agreed facts:

"1. Ah Soon Hwang (Hwang) and James Albert Graham (Graham) are the registered proprietors as tenants in common of premises situate and known as 219-221 William Street, Perth being the whole of the land comprised in Certificate of Title Volume 338 Folio 134A ('the property').

2. Hwang and Graham purchased the property in October 1978. At the time of the purchase part of the property was occupied and leased by Giuseppe Celeghin and Franziska Celeghin (the Celeghins) who operated a restaurant business known as the 'Silver Dollar Winehouse' ('the premises').

3. The Celeghins had purchased the business 'Silver Dollar Winehouse' by an Agreement for Sale dated the 22nd March 1976.

4. 'Silver Dollar Winehouse' is and was licensed as a winehouse pursuant to the provisions of the *Liquor Act* 1970-1982.

5. Upon the purchase of the business 'Silver Dollar Winehouse' by the Celeghins, Giuseppe Celeghin became the registered Licensee of the winehouse licence.

6. In February 1981 Hwang and Graham as Lessors entered into a new lease with the Celeghins as Lessees enabling them to lease the premises for a period of four years from the 22nd February 1981, with an option to renew the lease for a further period of four years.

7. In October 1984 pursuant to the terms of the lease the Celeghins

exercised their option to renew and the lease now expires on or about 22nd February 1989.

8. During 1984 Graham agreed to sell his half share in the property to the Celeghins.

9. Following a dispute between all parties as to the transfer of Graham's interest in the property to the Celeghins and payment of the Mortgage registered over the property, proceedings were commenced by Hwang in this Honourable Court in Action No 1903 of 1985 seeking, inter alia an order for sale of the property pursuant to Section 126 of the *Property Law Act*.

10. On the 13th March 1986 an order for sale of the property was made by Master Staples in Chambers.

11. A further dispute has now arisen between Hwang and the Celeghins regarding the respective rights to the winehouse licence of the Celeghins as Lessees and the purchaser of the property, (whoever that may be) both during the term of the Lease and after the expiry of the Lease upon the Celeghins ceasing to occupy the premises."

For the purpose of arranging the sale referred to in par 10 above the applicant sought the following orders:

1. A declaration that during the term of the lease of the premises known as 'The Silver Dollar Winehouse' being portion of the property situate and known as 219-221 William Street, Perth being the land comprised in Certificate of Title Volume 338 Folio 134A Giuseppe Celeghin and Franziska Celeghin are prohibited from removing or making application for the removal of the liquor licence pertaining to the premises save with the consent of the Lessor.
2. A declaration that at the expiration of the lease of the said premises and upon Giuseppe Celeghin and Franziska Celeghin ceasing to occupy the said premises, the liquor licence reverts to the owner or mortgagee of the property pursuant to the provisions of Section 88 and the Third Schedule of the *Liquor Act* 1970-1981."

Whilst the first respondents' relief claimed was:

"A declaration that Hwang and Graham have no proprietary right in the Winehouse Licence issued by the Licensing Court to Giuseppe Celeghin under the provisions of the *Liquor Act* 1970 on the 21st April 1986 and that upon sale of the property referred to in paragraph 1 of the Order of Master Staples made the 13th March 1986 no estate or interest in the said Licence shall be deemed to pass to the purchaser of such property."

After analysing the various provisions of the *Liquor Act* 1970 the learned trial judge expressed the following view:

"In my opinion neither the *Liquor Act* 1970 nor the lease when considered separately nor indeed the two considered together can give rise to an implied obligation on the part of Giuseppe Celeghin to refrain from making application for removal of the licence during the continuance of the term of the lease. Nor is there any reason why the Licensing Court could not, in the proper exercise of its discretion, grant an application for removal while the lease subsists. This being so I decline to make any declaration upon the application in action 1455 of 1986 (the appellant's cause)."

It is necessary to have regard to the contractual rights of the parties expressed in the lease provisions. They are as follows:

"6. The Lessee COVENANTS with the Lessor as follows:

...
 (f) Not to carry on or suffer to be carried on on the Premises or any part thereof any dangerous hazardous noxious noisome or offensive art trade business occupation or calling whatsoever and not to use or permit the Premises to be used as the residence or sleeping place of any person or for auction sales but to use the Premises only for a wine saloon or wine house and for no other purpose whatsoever and may not sell other than wine and brandy and other non-alcoholic drinks and also that the Lessee shall annually cause application to be made and use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping upon the Premises as a wine saloon or winehouse and duly licensed for the sale and consumption of such spirituous and fermented liquors as are from time to time authorized by law to be sold by retail in such type of licensed premises.

...
 (t) To yield up the Premises with all fixtures fittings and additions thereto including (but without limiting the generality of the foregoing) water and electric light fittings and keys at the determination of the Term or any extension thereof in good and tenable repair and condition in accordance with the covenants in that behalf herein contained PROVIDED HOWEVER that this covenant shall not apply to tenant's fixtures which said fixtures the Lessee is hereby authorised to remove on or before the expiration of the Term or any extension thereof making good to the satisfaction of the Lessor all damage caused by such removal.

...
 (w) The Lessee will comply with all the formalities and requirements of the *Liquor Act* 1970 as amended and in particular will apply to renew the licence each year and will lodge liquor returns as are required under the *Liquor Act* 1970 as amended.

...
 Part 8 — General Provisions

8. AND IT IS HEREBY MUTUALLY COVENANTED AND DECLARED between the Lessor and the Lessee as follows:

(a) In the event that:

- (i) any rent or any other moneys payable under this Lease shall remain unpaid for fourteen (14) days next after the date appointed for payment thereof (although no formal or legal demand shall have been made therefor); or
- (ii) the Lessee being a corporation, an order is made or a resolution is effectively passed for the winding up of the Lessee (other than for the purposes of amalgamation or reconstruction) or the Lessee ceases or threatens to cease to carry on business; or
- (iii) the Lessee fails to perform or observe any one or more of the covenants or provisions on the part of the Lessee

expressed or implied in this Lease unless the non-performance or non-observance has been waived or excused by the Lessor in writing.

5 THEN the Lessor may at any time thereafter but without prejudice to any claim which the Lessor may have against the Lessee in respect of any breach of the covenants and provisions in this Lease on the part of the Lessee to be observed or performed either re-enter into and repossess and enjoy the Premises as of its former estate (anything herein contained to the contrary notwithstanding) and
10 thereupon this Lease shall absolutely determine or call for an immediate surrender of the Lessee's estate and interest under this Lease and for the more effectual enforcement of this right of Lessee hereby irrevocably appoints the Lessor its true and lawful attorney to surrender or cause to be surrendered this Lease and to sign all
15 notices deeds and documents for the purpose of such surrender in the name of the Lessee and upon such surrender the Lessor shall be freed and discharged from any action suit claim or demand by or obligation to the Lessee under or by virtue of this Lease."

20 As the learned judge expressed the opinion so far as the above contractual provisions go they place an obligation on the lessees (the first respondents) to use the premises only as a licensed wine house and to ensure that the licence is kept current during the term of the lease and, I might add, to yield up the premises in accordance with cl 6(t) including the bar and its facilities depicted therein in the lease.

25 In the opinion of the learned trial judge the exclusive jurisdiction of the Licensing Court to entertain and grant a liquor licence would have the effect of excluding the jurisdiction of the Supreme Court to construe and determine the parties' contractual rights. This view his Honour held to be consistent with what was decided in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141
30 CLR 552 as to which see especially Mason J at 574-575. That was a case involving the provisions of the *Licensing Act 1967* South Australia wherein the court by a majority of one declined to grant the equitable relief sought by way of injunction. In one material respect, however, the legislation in South Australia is different to that in Western Australia. Section 57(1) of the
35 *Licensing Act 1967* provides as an objection to the removal of a licence that:

"(d) That the lease under which the holder of the licence occupies his premises contains a covenant or prohibition against removing the licence to any other premises without the consent of the lessor, and that such consent has not been obtained."

40 There is no similar statutory provision in the *Liquor Act 1970*.

The grounds of appeal are as follows:

45 "1. His Honour erred in law and in fact in failing to determine and declare that the provisions of the Lease made between the parties on or about the 22nd day of February 1981 (as extended by the exercise of an option to renew in October 1984) and the covenants made by the First Respondents (First Defendants) in the Lease and in particular clause 6(f) thereof obliged the First Respondents (First Defendants) to refrain from making application for removal of the licence during the term of the Lease.

50 2. His Honour further erred in law in failing to find and declare that on the proper construction of the Lease document and of the covenants made by the First Respondents (First Defendants) in the

Lease, there is by virtue of clause 6(f) necessarily implied a covenant that the First Respondents (First Defendants) would not remove the licence from the premises or apply to the Licensing Court for such removal during the term of the Lease and there is imposed upon the First Respondents (First Defendants) by the lease a duty to the Lessor to refrain from taking any action to remove the licence during the term of the Lease.

3. His Honour further erred in law and in fact in not declaring pursuant to Order 58 Rule 11 that by operation of law and the provisions of Section 88 and the Third Schedule of the *Liquor Act* 1970-1981 that at the expiry of the term of the Lease and the First Respondents (First Defendants) ceasing to occupy the premises as Lessees the liquor licence would then revert to the owner or the mortgage of the property."

In my opinion the above grounds have been clearly established particularly if one adds to the clauses in the lease referred to that of cl 6(t) and (w). At no stage was it possible for the wine house licensee to both apply to transfer the licence applicable to the premises and at the same time comply with his leasehold provisions. He was obliged, inter alia, to keep the premises licensed as a wine house and not to do anything (including the removal of the licence) which would prejudice the use of the premises as such. It is well established that the nature of a liquor licence is twofold — whilst it is personal to the holder it also applies to the relevant premises: see *Jack v Smail* (1905) 2 CLR 684 at 705 and 714 and *Licensing Court (SA) v White* (1918) 24 CLR 318 at 321. The provisions of the lease to keep the premises licensed as a wine house, to comply with the provisions of the *Liquor Act* 1970, to renew the licence from year to year and not to do anything which would adversely affect the licensed premises are all intended to preserve and do preserve the licence in the interests of the landlord so that at the end of the term of the lease the premises will still enjoy the advantage of being licensed. At the end of the day when the lease expires the licence enures for the benefit of the land owner by virtue of the provisions of the *Liquor Act* 1970, s 88 and the Third Schedule.

I would allow the appeal and grant the declarations sought in pars 1 and 2 of the appellant's originating summons.

KENNEDY J. On 21 April 1986, the appellant issued an originating summons in which he sought two declarations, namely:

1. . . . that during the term of the lease of the premises known as 'Silver Dollar Winehouse', being portion of the property situate at and known as 219-221 William Street, Perth, being the land comprised in Certificate of Title Volume 338 Folio 134A, the first respondents are prohibited from removing or making application for the removal of the liquor licence pertaining to the premises, save with the consent of the lessor;
2. . . . at the expiration of the lease of the said premises and upon the first respondents ceasing to occupy the said premises, the liquor licence reverts to the owner or mortgagee of the property pursuant to the provisions of s 88 of the Third Schedule of the *Liquor Act* 1970-1981.

On 29 July 1986, the learned trial judge ordered that the originating summons be dismissed. The appellant now appeals against that order.

The facts and the grounds of appeal are to be found in the judgments which have just been delivered, and it is sufficient to turn immediately to the two critical issues which now fall for decision. They are, first, whether there is to be implied in the lease a covenant on the part of the lessee not to remove or to make application for the removal of the liquor licence pertaining to the premises otherwise than with the consent of the lessor and, secondly, if such a covenant is to be implied, whether there is anything to be found in the *Liquor Act* 1970 (the Act), which prevents this Court from making declarations of the nature sought.

The deed of lease is undated; but it was stamped on 5 June 1981. It is a lease of "portion of the building situate at 221 William Street, Perth and known as 'Silver Dollar Winehouse'". By cl 6(f) of the lease, the respondents covenant, inter alia:

"... to use the Premises only for a wine saloon or winehouse and for no other purpose whatsoever and may not sell other than wine and brandy and other non-alcoholic [sic] drinks and also that the Lessee shall annually cause application to be made and use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping open the Premises as a wine saloon or winehouse and duly licensed for the sale and consumption of such spirituous and fermented liquors as are from time to time authorized by law to be sold by retail in such type of licensed premises."

By cl 6(w), the first respondents further covenant "to comply with all the formalities of the requirements of the *Liquor Act* 1970 as amended and in particular will apply to renew the licence each year and will lodge liquor returns as are required under the *Liquor Act* 1970 as amended".

There is no provision in the lease dealing with what is to happen with respect to the licence upon its expiration. By virtue of s 88 of the Act, however, read with the Third Schedule, upon the respondent's ceasing to occupy the licensed premises, the licence still being attached to the premises, it enures for the benefit of "the owner or mortgagee of the licensed premises or any other person who may be lawfully entitled to possession of the licensed premises or the nominee or agent of any such person". A failure on the part of the licensee to apply for the renewal of the licence or a refusal of renewal upon grounds personal to the licensee has the same consequence.

The first-named first respondent is the licensee of the wine house. Were he successful during the term of the lease in an application under s 90(1) of the Act for the removal of the licence to other premises, it would no longer be lawful for the lessees to use the premises as a wine saloon or wine house and first respondents would at once be in breach of their covenant in cl 6(f) of the lease: cf Gibbs J in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 C 552 at 559. What is put on behalf of the first respondents is, however, there is nothing to prevent the first respondents from making application for the removal of the licence so as to take effect contemporaneously with the expiration of the lease. Assuming this to be possible, notwithstanding the terms of s 88 of the Act, the effect would be that the first respondents would be yielding up, not that which was leased to them, namely, premises to which a wine house licence attached, but premises denuded of that licence. For the reasons expressed by the other members of this Court, I find it impossible to accept that this could have been a situation which the parties contemplated when they entered into the lease. In my opinion, it is clear that a covenant should be implied on the part of the first

respondents against their applying for the removal of the licence without the consent of the lessor. I consider that each of the criteria recognised in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 is fully met, namely: (1) it is reasonable and equitable; (2) it is necessary to give business efficacy to the contract; (3) it is so obvious "that it goes without saying"; (4) it is capable of clear expression; and (5) it does not contradict any express term of the contract.

There is nothing to be found in the *Liquor Act* 1970 which runs counter to the implication of such a covenant. Nor is there, in my opinion, any sufficient reason why this Court should not make declarations of the nature sought. In particular, I do not regard the decision in *Dalgety Wine Estates Pty Ltd v Rizzon* as requiring a different conclusion. The South Australian legislation which was being considered in that case differed from the Western Australian Act in at least one critical respect, for it specified as a ground of objection against an application for removal of a licence that the lease under which the holder of the licence occupied his premises contained a covenant or prohibition against removing the licence to any other premises without the consent of the lessor and that such consent had not been obtained: s 57(1)(d) of the *Licensing Act* 1967 (SA). Furthermore, s 61(1) of the Act clearly gave the Licensing Court power to grant an application, notwithstanding the existence of such a covenant in the relevant lease. The granting of an injunction was refused in that case on the ground that to do so would have the effect of withdrawing from consideration by the Licensing Court a subject-matter which the legislature had exclusively conferred upon it. As it was expressed by Stephen J (at 567):

"For the Supreme Court to grant an injunction would have the effect of withdrawing from consideration by the Licensing Court a subject-matter, the removal of licences, which the legislature has exclusively conferred upon it. To grant such an injunction because the applicant for removal was in breach of covenant would be to go even further, fixing upon a circumstance as ground for grant of the injunction which was a circumstance specifically adverted to by the legislature and determined by it to be the proper subject of consideration by the Licensing Court."

Nor do I consider that the granting to the Licensing Court by s 11(1)(a) of the Western Australian Act of exclusive jurisdiction to hear and determine all applications under the Act for the removal of licences prevents this Court from making the declarations sought. Any determination by the Licensing Court of the matters the subject of this appeal would itself, of course, be subject to appeal to this Court under s 15 of the Act.

For these reasons, I would allow the appeal, and, subject only to two amendments, I would make the declarations sought. Those amendments are to substitute the words "would be in breach of an implied covenant in the lease in" for the words "are prohibited from" in the first declaration and to insert the words "relating to the premises" after "liquor licence" in the second declaration.

Solicitors for the appellant: *McPhee & Meyer*.

Solicitors for the first respondent: *Durack & Manera*.

Solicitors for the second respondent: *Paterson & Dowding*.

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5 *Supreme Court Practice —*
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