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O'SULLIVAN v FARRER †

Court of Appeal: Hope, Mahoney and McHugh JJA

30 March, 23 June 1988

Liquor — Licensing — Powers of Licensing Court — Objections and grounds for grant or refusal of licence — Ground that grant of licence is against public interest — Whether can be refused on this ground when none of statutory objections taken have been made out — Liquor Act 1982, ss 18, 45, 46, 47.

Liquor — Licensing — Transfer of licence — Transfer within a neighbourhood — Whether interests or needs of public in the neighbourhood relevant — Liquor Act 1982, s 57.

Law Reform — Need for legislative reform to extend powers of Licensing Court — Liquor Act 1982.

Held: (1) (Mahoney JA contra) The provisions of the *Liquor Act* 1982, s 47, are exhaustive of the circumstances which enable the Licensing Court to exercise its discretion for or against the granting of an application or to remove a licence, so that having found that none of the statutory objections that were taken to the grant of an off-liquor licence had been made out, including objection on the ground that it was contrary to public interest, the Licensing Court had no discretion to refuse such an application on that ground. (570D, 571G, 574B, 575G)

Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1 at 7, applied.

Ex parte Bodel; Re Maxwell (1954) 55 SR (NSW) 188 at 191; (1954) 72 WN (NSW) 173 at 175; *Bradley v Fitzmaurice* [1974] 2 NSWLR 286; *Marriott v Coleman* (1963) 109 CLR 129 at 140 and *Lorence v Abraham* [1982] 2 NSWLR 551, distinguished. E

(2) (Mahoney JA contra) When a licence is to be removed from one site within a neighbourhood to another site within the neighbourhood, the interests of the public of the neighbourhood of the premises from which it is proposed to remove the licence and the needs of the public in the neighbourhood of the premises to which the licence is to be removed, are irrelevant. (576E)

(Per McHugh JA) "It is difficult to believe that the legislature contemplated that the Licensing Court should have no discretion to refuse a licence on the ground that to grant it would be contrary to the public interest simply because no objector had raised the ground. Yet that is the consequence of the language of s 47. The provisions of s 47 seem to call for urgent legislative attention." (575G) F

Note:
A Digest — LIQUOR [24], [33.5], [65], [48]

CASES CITED

The following cases are cited in the judgments:

Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1. G

†[EDITORIAL NOTE: An application for special leave to appeal to the High Court has been lodged.]

Benning v Sydney City Council (1958) 100 CLR 177.
Bodel, Ex parte; Re Maxwell (1954) 55 SR (NSW) 188; 72 WN (NSW) 173.
Bradley v Fitzmaurice [1974] 2 NSWLR 286.
Fleming v Associated Newspapers Ltd [1973] AC 628.
Lorence v Abraham [1982] 2 NSWLR 551.
Marriott v Coleman (1963) 109 CLR 129.
Rathborne v Abel (1964) 38 ALJR 293.
Sandown Park Hotel Pty Ltd v The Queen (1963) 109 CLR 521.
Ward v Williams (1955) 92 CLR 496.
Water Conservation and Irrigation Commission (New South Wales) v Browning (1947) 74 CLR 492.

The following additional cases were cited in argument and submissions:

Australian Coal and Shale Employees' Federation v Commonwealth (1953) 94 CLR 621.
man v Settree [1976] 2 NSWLR 8.
Licensing Court for the District of Northam v Worner (1915) 19 CLR 521.
Taylor v Hankey (Court of Appeal, 24 June 1987, unreported).

APPEAL

In proceedings for the grant of an application for the removal of an off-liquor licence from one site to another in the same "neighbourhood" made under the *Liquor Act* 1982, none of the objections, including an objection that to grant the application would not be in the public interest, was sustained, yet the Court refused the application on the ground that it was in the public interest to leave the licence where it was, a point taken by any objector. The applicant appealed to the Supreme Court which found the Licensing Court, in such circumstances, lacked the discretion to refuse the application. An appeal was brought against that finding.

A G Whealy QC and *J T Kearney*, for the appellant.

D A Staff QC and *G R Rummery*, for the respondent.

Cur adv vult

23 June 1988

HOPE JA. I agree with McHugh JA.

MAHONEY JA. Application was made for the transfer of an off-licence (retail) from premises at 15 Progress Road, Mount Hutton to premises in Wilsons Road, Mount Hutton. The Full Bench of the Licensing Court refused the application because, or inter alia because, the interest of the public would be better served by the retention of the licence where it was rather than by transferring it to the proposed premises. The proposed premises at Wilsons Road are within the neighborhood of the premises at Progress Road.

No objection was taken to the removal of the licence from Progress Road to Wilsons Road on that ground.

The question to be determined is whether it was open to the Full Bench to refuse the application on that ground.

The Full Bench were of the opinion that there is reserved to it under the *Liquor Act* 1982 a discretion to refuse an application for removal of such a

licence on such a ground notwithstanding that objection to the grant of the application was not taken by way of objection in accordance with the Act. It is the correctness of this view which is the matter, and the sole matter, which is in dispute on this appeal.

In order to determine this question there are, formally, three matters to be determined: what is the source of the Licensing Court's power to grant an application for removal of such a licence; whether the power is discretionary; and (if it is) whether the ground relied upon by the Full Bench in this case is within that discretion.

In order to deal with these matters it is necessary to refer generally to the scheme and the provisions of the Act. Provision is made, as far as is here relevant, for three things: the grant of licences, the removal of them from one premises to another, and the transfer of them from one person to another. The grant of licences, including an off-licence to sell liquor by retail, is provided for by s 18(1) and s 18(3)(a). Provision is made for the transfer of a licence from one person to another. Section 61(1) grants such power in terms and other sections of the Act provide for and regulate the exercise of that power: see, eg, s 41 and s 42. As Yeldham J said, there appears to be no provision which, in terms, grants to the Licensing Court power to remove a licence from one premises to another. However, it is contemplated by the Act that application for such a removal may be made (see s 45(2)) and the power of the Court to grant such an application is regulated by, for example, s 57.

It is arguable that, in principle, the removal of a licence constitutes the grant of a fresh licence. Thus, the Act contemplates that licences granted under it will be, not licences to sell liquor generally, but licences authorising a particular licensee to sell liquor on specified premises and, as an order for removal of a licence will involve that "the premises specified in the licence" (s 18(1)) will be different, the licence in respect of the new premises will be, in a sense, a new licence. However, as at present advised, I incline to the view that an order for removal of a licence from one premises to another does not constitute the grant of a licence and that therefore the power to order the removal does not fall within s 18(1). On this basis, the power is granted by implication from the terms of the Act and as part of the general grant of jurisdiction contained in s 7(2).

Proceedings before the Licensing Court are, as far as is here in question, instituted by application (s 12(1)). Provision is made by Pt III in respect of the making of applications (Div 4); the making of objection to applications (Div 5); and circumstances which may affect the grant of applications (Div 6). In my opinion, these Divisions apply, subject to the terms of them, to all forms of applications and in particular to applications for the removal of licences from one premises to another.

The making of applications is, in general, governed by s 37. Section 40(1)(b) recognises that an application may be made for removal of a licence and s 41 and s 42 refer to the transfer of a licence from one person to another.

Division 5, in so far as it provides for objections which may be made to applications and the way in which they are to be made, applies to applications generally. Thus, s 44 provides, as there set forth, for the persons who may object to the grant of any form of application. Section 45(1), in so far as it provides for the grounds on which objection to an application may be made,

applies to applications generally. And s 45(2) makes special provision for objection to be taken "to the grant of an application for, or for the removal of, a hotelier's licence or an off-licence to sell liquor by retail" on a ground not specified in terms in s 45(1).

Section 46 regulates the way in which an objection may be taken. It refers to "an objection under section 45" and therefore deals, inter alia, with an objection to the removal of a licence. Accordingly, it regulates the way in which an objection to an application for removal may be taken.

Section 47 also applies, subject to its terms, to an application for removal of a licence. That section is in the following terms:

"(1) Notwithstanding a finding by the court that a ground of objection to the grant of an application specified in s 45(2) or (3) has been made out, the court has a discretion to grant the application.

(2) Notwithstanding that an objection to the grant of an application for a licence on the ground specified in section 45(1)(a) or (b) has not been taken or made out, the court may refuse the application if it finds, after subsection (3) has been complied with:

(a) that the applicant is not a fit and proper person to be the holder of a licence; or

(b) that a person directly or indirectly interested in the application, or in the business, or the profits of the business, to be carried on pursuant to the licence if the application were granted is not a fit and proper person to be so interested.

(3) A finding under subsection (2) may not be made unless:

(a) the applicant has been made aware of reasons for the possibility of such a finding;

(b) the applicant has been given an opportunity to make submissions, and adduce evidence related to those reasons; and

(c) those reasons are, or include, the reasons for the finding."

Section 47(1), in so far as it gives a discretion to grant an application despite the making out of an objection, applies to an application for removal of a licence. But, in my opinion, s 47(2) does not apply to an application for removal. The power given by that subsection to refuse "the" application is given notwithstanding that "the grant of an application for a licence . . ." has not been successfully objected to; "the" application which may be refused is, I think, "an application for a licence". On that basis, the power granted to the court to refuse an application in the circumstances specified in s 47(2) does not apply in respect of an application for removal.

Provision for the refusal of an application for removal is made by s 57. That section is in the following terms:

"(1) The court shall not grant an application for removal of a hotelier's licence or an off-licence to sell liquor by retail to a place outside the neighbourhood of the premises from which it is proposed to remove the licence unless it is satisfied that the removal of the licence to the proposed new site will not affect detrimentally the interests of the public in the neighborhood of the premises from which it is proposed to remove the licence.

(2) The court may refuse an application for removal of a hotelier's licence if it considers that the removal would adversely affect the interests of the owner or a lessee or mortgagee of the premises from

which it is proposed to remove the licence, or a sublessee from a lessee or sublessee of those premises. A

(3) The grant of an application for removal of a licence to premises other than those specified in the licence takes effect when the registrar endorses the licence to the effect that those other premises are the premises to which the licence relates.

(4) Section 45(2) does not apply to a removal of a licence to premises within the same neighbourhood as the premises from which it is proposed to remove the licence." B

Section 57, in its terms, operates to restrict such power or discretion as the court would otherwise have to grant an application for removal. And, I think, that restriction is placed upon the court's power notwithstanding that objection may not have been taken on that ground under, for example, s 45(1)(c).

Section 57(1) does not apply in the present case because, as is agreed, the removal is not "to a place outside the neighbourhood of the premises from which it is proposed to remove the licence". C

Division 6, notwithstanding its title "Grant of applications", appears in general to operate to place restrictions upon the grant of applications rather than to grant the power or jurisdiction to grant them. Section 61 does, in terms, confer power or jurisdiction to grant applications but it relates only to applications under s 41 or s 42 "for the transfer of a licence" from one person to another. D

I come now to consider the nature of the Licensing Court's jurisdiction in respect of applications for removal of licences and the considerations which may be taken into account in the exercise of that jurisdiction.

As I have said, the power of the Licensing Court to grant an application for removal is not granted in terms but by implication. The general power of the Licensing Court in respect of the grant of a licence is expressed in the terms conventionally used to grant judicial powers: s 18(1) provides that "the court may grant a licence . . .". The power of the court in respect of removal applications is, I think, to be taken to be in such a form. E

A power granted to a court in such terms is, in form, discretionary. The nature of such a power has been considered in the cases: see, eg, *Ward v Williams* (1955) 92 CLR 496. Ordinarily, where the considerations relevant to the exercise of a discretion are not exhaustively specified, they are to be inferred from the scope and purpose and the subject matter of the legislation in the manner indicated by Dixon J in *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492 at 504-505. In the present Act, there has been no such specification. What initially is in question in this case is whether, in exercising its jurisdiction to refuse the application for removal, the Licensing Court could take into account the matter on which it relied, which it expressed in the words: ". . . that the public interest would be better served by the retention of" the licence where it is. F

Subject to the taking of that matter as a ground of objection, to which I shall refer subsequently, that matter is, in my opinion, within the ambit of the court's jurisdiction. It would, I believe, be strange if, on an application for removal of a licence from one place to another, the Licensing Court could not take into account the interests of those who were using it where it was or, at the least, take into account such public interest as there was in leaving it G

where it was. But, in addition, the terms of s 45(1)(c) allow such a matter to be taken and therefore pressed as an objection to the removal application. The court's judgment was that it was in the public interest to leave the licence where it was: "it would not be in the public interest" to grant the application to remove it.

Therefore, if the Licensing Court was wrong in taking that matter into account in this case, it was because it had not been made the basis of a ground of objection and because no such matter may be relied on by the court in refusing a removal application unless it is taken as an objection.

The present appeal has proceeded on the basis that the matter relied on by the Licensing Court was not taken as an objection to the application. In the judgment of Mr Brahe, who initially heard the application, reference was made to a "public interest ground of objection" being taken and presumably there was an objection based on s 45(1)(c). However, the court does not have before it the terms of the actual objection taken and the Full Bench of the Licensing Court found that the objectors had not sustained the objections taken. It is therefore proper to deal with the appeal upon the basis to which I have referred.

The question is therefore whether, if it be in the public interest to refuse an application for removal, the Licensing Court is prevented from giving effect to the public interest because no objection was taken to the application on that ground.

It might have been thought that it is the function of the Licensing Court to give effect to the public interest and, in particular, the public interest in the distribution of licences. There is an obvious public interest in the licensing law and in the proper distribution of licences of various kinds which from time to time may be granted. In *Marriott v Coleman* (1963) 109 CLR 129 and *Sandown Park Hotel Pty Ltd v The Queen* (1963) 109 CLR 521 at 522, 525, the High Court saw the jurisdiction of the Licensing Court in Victoria as being of this character and, I think, for reasons which did not depend upon the particular provisions of the Victorian Act. In *Lorence v Abraham* [1982] 2 NSWLR 551, this Court saw those considerations as relevant to the jurisdiction of the Licensing Court under the *Licensing Act* 1912.

And it might be thought that the Licensing Court's power to give effect to the public interest should not depend upon whether that power has been invoked by a private or even a public person. In the context of the Victorian Act, Taylor J saw the Licensing Court's power to refuse an application as not dependent upon the fact that no ground of objection had been taken or made out: see *Marriott v Coleman* (at 140).

The argument for the contrary view of the court's jurisdiction is, I think, based essentially on two things: the scheme of the Act in relation to objections; and the terms of s 47 and s 57.

The argument suggests that, subject to sections such as s 47 and s 57, the only objections which can be taken are those referred to in s 45 and that the court can give effect only to such of those objections as have been taken under s 46. The terms of s 45 and s 46 provide significant support for this view: s 46 appears to assume that the only objections which are to be dealt with by that section and so may be taken are those which may be taken under s 45; and s 46, and in particular s 46(2) and s 46(3), supports the view that only those objections can be taken and relied on at the hearing.

But there are, in my opinion, difficulties in this argument. I find difficulty in accepting that s 45 states exhaustively the objections — or the considerations, whether objections or otherwise — to which the court may have regard. Section 45 appears to make no provision for, as I shall describe them, objections in the private interest. I mean by this that no objection can be taken, in terms of s 45, on the ground: "If the application is granted I shall be financially ruined", or grounds of that kind. I am conscious that a public interest may be stated in terms of a private interest: it may be said that there is a public interest in avoiding the ruin of private individuals. But there is, in s 45, no provision for an objection in the private interest, or an objection that the interests of a private individual, financial or otherwise, will be affected if the application is granted. It appears unlikely that the Act intended to exclude the effect of the orders of the Licensing Court upon private individuals or generally upon matters which would sustain objections in the private interest.

In s 44(1) it is provided that an objection may be taken by, for example, the owner of the premises to which the application relates (s 44(1)(a)); by a person who satisfies the court that his interests, financial or other, are likely to be adversely affected by the grant of the application (s 44(1)(f)); or by any person with the leave of the court (s 44(1)(i)). If, for example, a person whose interests are likely to be adversely affected by the removal of a licence can take an objection, it is to be expected that he would be able to take objection on the ground that his interests are likely to be affected in that way. Yet, as I have said, no provision is made in s 45 for an objection of that kind.

In my opinion, it follows that either the objections which may be taken are not limited to those set forth in s 45 or, alternatively, the Licensing Court may take into account in what it does matters which cannot be or have not been taken by way of objection. If this be so, then, under s 46(3) or otherwise, the court may, as there provided or upon proper notice otherwise, hear and determine any objection or take into account any consideration which, within the ambit of the jurisdiction of the Licensing Court, is relevant to the matter.

But, the submission is, s 47 and s 57 establish that the intention of the legislature was to the contrary. The argument in respect of s 47 suggests that, because that section specifies the circumstances in which an application may be granted notwithstanding that an objection under s 45(2) and s 45(3) has been made out (s 47(1)); or in which an application for a licence may be refused notwithstanding that an objection under s 45(1)(a) and s 45(1)(b) has not been made out (s 47(2)); it follows that an application may not be refused on a ground not taken as an objection or made out in any other circumstances. The argument is based essentially on the expressio unius principle. The force of it derives, I think, from the fact that, if an application can be refused generally for reasons other than a reason grounded in an objection which has been taken and established, there would be no point served by the enactment of s 47(2).

The limitations on the expressio unius principle are well known. In *Benning v Sydney City Council* (1958) 100 CLR 177 at 196, Fullagar J said there are many judicial statements to the effect that the maxim must be applied with great caution. In *Rathborne v Abel* (1964) 38 ALJR 293 at 301, Kitto J said that perhaps few so-called rules of interpretation have been more

frequently misapplied and stretched beyond their due limits than that principle.

One may, I think, conjecture a reason why the draftsman made specific provision as he did in s 47(2). It is, as Lord Reid said, the ordinary practice of a draftsman to "include things which are not entirely obvious": *Fleming v Associated Newspapers Ltd* [1973] AC 628 at 640. The draftsman may have seen it as of importance to place beyond doubt the power of the Licensing Court to refuse the grant of a licence to a person who was not fit and proper to hold one, notwithstanding that those who might have objected to the application had failed to object or, perhaps, had been persuaded not to do so. Section 47(2) so provided. But it does not follow that, in respect of an application for removal of a licence or any other form of application, there may be no refusal in the absence of an objection.

In relation to s 47(1) the argument is to an extent different. It is that s 47(1) assumes that if it had not been enacted, the Licensing Court would have no power to grant an application if an objection under s 45(2) and s 45(3) had been made out; and that, in any event, it has no power to grant an application if an objection under s 45(1) has been made out.

This view of s 47(1) is, in substance, that s 45 and s 46 exhaustively state the matters by reference to which objections can be taken and applications granted or refused: at least it is in accordance with that view. But if, as I have said, an application may be refused on the ground of hardship to a particular individual then that inference from s 45 is not to be drawn.

I do not think that s 57(1) is determinative of the present case. The argument based on that provision is to the effect that, because the court may not grant an application for removal to a place outside the neighbourhood of the premises unless it is satisfied that the removal will not affect prejudicially the interests of the public and the neighbourhood from which the licence is to be removed, it may not grant an application for removal to a place inside the neighbourhood if it will detrimentally affect the interests of the public where the license then is. Section 57(1) was, I think, intended to make a specific provision, by way of prohibition, in favour of the interests of the public in the neighbourhood where the licence is. It was not intended to indicate the legislative view that in no other case could the detrimental effect of a removal be taken into account.

This leads me to the conclusion that the matters to which the Licensing Court may have regard in determining an application for removal of a licence extend beyond the matters on which objection may be taken under s 45; and that, even in respect of matters within s 45, there is a discretion to refuse notwithstanding that an objection has not been taken. I am conscious that, in this conclusion, I differ from the conclusions of Yeldham J and of Hope and McHugh JJA. Mr Whealy QC, for the appellant, submitted that the statutory provisions from which the arguments accepted by Yeldham J and my brethren are derived are explicable by reason of the amendments made in 1984 and 1985. His submission was that the scheme of the 1982 Act, before those amendments, provided an explanation of the matters on which those arguments relied. I shall not add to this judgment by pursuing those matters. In the end, I am influenced by my conclusion that, in determining whether to grant or refuse an application, the court may take into account matters not specified in s 45 and that it may therefore take into account the kinds of

private interests to which s 44(1) refers. If an objection may be taken to a removal application on the ground that grant of it would affect a person where the licence is or, for example, interfere with a rest home for the aged next to the place to which it is to go, it follows that the application may be refused for grounds not within s 45. The present ground is, of course, within s 45; but if s 45 and s 46 do not exhaustively state the grounds on which the Licensing Court may act, that ground is not to be distinguished from grounds of the private kind to which I have referred. If the Licensing Court ensures that the parties are aware of the matter to which it proposes to have regard, it follows that the Licensing Court made a decision upon a matter which has not been a formal ground of objection.

I should add that it has not been suggested in argument that, in the material to which the court is to have reference in matters of statutory interpretation under the *Interpretation Act* 1987, there is anything which provides significant assistance in determining the effect of s 45 and s 46 or the other questions which arise in this case.

In my opinion therefore the appeal should be upheld and the judgment of the Full Bench of the Licensing Court affirmed. The appellant should have the costs of the proceedings before this Court and before Yeldham J.

McHUGH JA. The question in this appeal is whether, after finding that none of the statutory objections to the grant of an off-liquor licence has been made out, the Licensing Court has a discretion to refuse the application on the ground that the grant of the licence would be against the public interest.

Section 18(1) of the *Liquor Act* 1982 provides:

> "Subject to this Act, the court may grant a licence in a form approved by the Board authorising the licensee to sell liquor on the premises specified in the licence."

The grounds of objection to an application for a licence are specified in s 45 of the Act. Subsection (1) provides:

> "Objection to the grant of an application may be taken on one or more of the following grounds:
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> (a) that the applicant is not a fit and proper person to be the holder of a licence;
>
> (a1) that the applicant is closely associated with a specified person and, by reason of that association, is not a fit and proper person to be the holder of a licence;
>
> (b) that a person directly or indirectly interested in the application or in the business, or the profits of the business, to be carried on pursuant to the licence if the application is granted is not a fit and proper person to be so interested;
>
> (c) that, for reasons other than the grounds specified in paragraphs (a), (a1) and (b) and subsections (2) and (3) it would not be in the public interest to grant the application."

Subsection (2) of s 45 provides that objection to the grant of an application may be made on the ground that the needs of the public in the neighbourhood of the premises to which the application relates can be met by facilities for the supply of liquor existing in and outside the neighbourhood. Because the application the subject of this appeal concerns the removal of a licence within a neighbourhood this ground was not available as an objection (see

A s 57(4)). Subsection (3) of s 45 states five other grounds of objection. It is unnecessary to set them out. Subsection (4) provides that, where an objection to an application is taken on a ground referred to in s 45(1)(a) or s 45(1)(b) or s 45(2), the onus is on the applicant to satisfy the court concerning the matters specified in those provisions. The onus is on the objector, however, to establish the public interest ground (s 45(1)(c)) and the five grounds mentioned in s 45(3).

B Section 46 provides that an objection under s 45 may be taken only by written notice of objection. The objection must be signed by the objector and specify his address. Where the ground for objection is a ground specified in s 45(1) the objection must specify the reasons why the objector considers that the case falls within any of the three paragraphs in that subsection. By subsection (2) an objection may not be heard and determined unless a copy of the notice of objection has been given to the applicant and the Registrar at least three clear days before the hearing of the application. However, s 46(3)
C enables the court in a proper case to hear and determine an objection not served three days before the hearing subject to compliance with any conditions imposed by the court and the grant of an adjournment for a period of not less than three days if the applicant requires it.

Section 47 is of crucial importance in the present case. It provides:

> "(1) Notwithstanding a finding by the court that a ground of objection to the grant of an application specified in section 45(2) or (3) has been made out, the court has a discretion to grant the application.
>
> D (2) Notwithstanding that an objection to the grant of an application for a licence on the ground specified in section 45(1)(a), (a1) or (b) has not been taken or made out, the court may refuse the application if it finds, after subsection (3) has been complied with—
>
> (a) that the applicant is not a fit and proper person to be the holder of a licence; or
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> E (a1) that the applicant, because of his or her close association with another person, is not a fit and proper person to be the holder of a licence;
>
> (b) that a person directly or indirectly interested in the application, or in the business, or the profits of the business, to be carried on pursuant to the licence if the application were granted is not a fit and proper person to be so interested.
>
> (3) A finding under subsection (2) may not be made unless—
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> F (a) the applicant has been made aware of reasons for the possibility of such a finding;
>
> (b) the applicant has been given an opportunity to make submissions, and adduce evidence related to those reasons; and
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> (c) those reasons are, or include, the reasons for the finding."

Yeldham J held that the Full Bench of the Licensing Court had fallen into error in holding that independently of s 47 it had a discretion to refuse the
G present application on the ground that it was contrary to the public interest. His Honour held that s 47 is exhaustive of the circumstances which enable the court to exercise its discretion for or against the granting of an application.

The appeal is concerned with an application by Ronald James Farrer for the conditional removal of an off-licence (retail) from Progress Road, Mount

Hutton to Wilson Road, Mount Hutton. Both sites have the same "neighbourhood" for the purposes of the Act. The application was heard by Mr Brahe, the chairman of the Licensing Magistrates. In the proceedings before Mr Brahe the objectors pressed only the ground of objection based on s 45(1)(c) of the Act — the public interest ground. The particulars of that objection were:

> "... that the title of the proposed new site is subject to a restrictive covenant for the benefit of the owner of the Bushwhacker Tavern at Mount Hutton preventing the sale of intoxicating liquor."

Mr Brahe held (at 47) that:

> "... the applicant in the light of the Planning and Environmental Plan and the authorities has an arguable case that he is not bound by the covenant I take the view that it is not a matter for me to determine in these applications. If it were clear on the evidence that he had no rights whatsoever the situation may very well be different but where it can be established on the evidence that a party has an arguable case, then in my view it is not for this Court to refuse an application on the ground raised here."

His Worship went on to find that it was in the public interest to have a licence at the site of the proposed removal. He held that the objection on the public interest ground was not sustained. Accordingly, he granted the application.

On appeal to the Full Bench, Mr Hammond and Mr Swanson held that the matters arising in relation to the restrictive covenant were "not matters of public interest, but rather matters of private interest, which if in dispute, would have to be resolved in some other jurisdiction". They said that:

> "... no grounds of objection have been sustained against the application by Farrer to remove the licence from Progress Road, Mount Hutton to the proposed new site adjacent to Shoey's Food Barn in Wilson Road. Notwithstanding these findings, the court still has a discretion to refuse the application, and in the present context such a consideration is a weighty one. The fact is, that the court found a need, or at least a requirement, for a liquor store in the neighbourhood shopping centre in Mount Hutton in Progress Road only a few years ago. The applicant now desires that the licence be removed from the neighbourhood shopping centre and placed almost adjacent to an hotel in circumstances where a shared parking area permits immediate access from one to the other and where we have already found, by reason of the existence of the Bushwhacker Tavern, there is no need for an additional licence at Woolworths site."

Their Worships said that:

> "... notwithstanding the fact that we do not find the objectors to have sustained the objections taken, we are nonetheless of the view that the public interest would be better served by the retention of the off-licence (retail) in Progress Road, Mount Hutton rather than permitting its removal to a site cheek by jowl with an existing hotel providing adequate package liquor facilities."

Accordingly, they allowed the appeal and refused the application.

The other member of the Full Bench, Mr P G Harvey, agreed with the

reasons of Mr Hammond and Mr Swanson but gave additional reasons. His Worship said (at 73):

> "The Court had also to be satisfied in the case of a removal that such removal to the proposed new site would be in the interests of the public in the neighbourhood of that site and would not effect [sic] detrimentally the interests of the public in the neighbourhood of the premises from which it was proposed to remove the licence."

Mr Harvey thought that the decisions in *Bradley v Fitzmaurice* [1974] 2 NSWLR 286 and *Lorence v Abraham* [1982] 2 NSWLR 551 confirmed that a discretion was vested in the Licensing Court. He said that, if the land the subject of the application was subject to a covenant or other legal restraint which prohibits the operation of an off-licence retail on that site, it did not itself preclude the Licensing Court from approving a conditional application for the grant a licence. However, his Worship thought that, in the circumstances of this case, the existence of the covenant was a matter of public interest. He said that the onus was on the applicant to remove any doubt as to its continued operation and its possible effect on the grant of an application for a licence at Wilson Road. In his Worship's view any doubt should be resolved by the applicant before the Court proceeded to a determination of its application. He concluded that:

> "... these matters relating to the restrictive covenant, when taken together with the fact that the removal of the licence would place the only two public liquor facilities within the neighbourhood cheek by jowl, requires that the application by Farrer should be refused."

The critical question in the appeal is whether, as Yeldham J found, s 47 exhausts the situations where the court has a discretion to grant or refuse a licence. That is to say, is it exhaustive of the discretion conferred by s 18 to refuse or grant a licence?

The first thing to be noted in relation to s 47(1) is that the section gives the court a discretion to grant a licence notwithstanding that the court has upheld an objection under s 45(2) or s 45(3). There is nothing in s 47(1) which enables the court to grant an application after a defence under s 45(1) has been made out. If the objector proves that the applicant is not a fit and proper person to be the holder of a licence or that a person who is interested in the business is not a fit and proper person to be so interested or that it would not be in the public interest to grant the application, the court has no discretion to grant the application. Mr Whealey QC, for the appellant-objector, conceded that s 47(1) is exhaustive of the circumstances in which the Licensing Court has a discretion to grant a licence after an objection has been made out. That s 47(1) is exhaustive of the circumstances where the court has a discretion to *grant* an application provides a persuasive, if not compelling reason, for concluding that s 47(2) which deals with the discretion to *refuse* an application is also exhaustive of the circumstances in which the court has a discretion to refuse an application.

The first answer which Mr Whealey made to the suggestion that s 47(2) is exhaustive of the discretion to refuse an application is that it only applies to an application for a new licence and has no relevance to an application for removal. He pointed out that, while s 47(1) refers to "an application", s 47(2) refers to "an application for a licence". He contended that s 47(1) applied to all applications but s 47(2) only applied to an original application. However, I

do not think that the verbal differences between s 47(1) and s 47(2) make any difference to the meaning of s 47(2). It is difficult to accept that in enacting s 47(2) the legislature intended to draw a distinction between an application for a licence and an application for the removal of a licence. Although many provisions of the Act recognise the right to apply to remove a licence (see, eg, s 45 and s 57), no provision of the Act makes express provision for it. Subject to certain express provisions in the Act, applications for removal of a licence are dealt with in the same way as an original application. Moreover, it is not apparent why the legislature should wish to deal specifically with the exercise of discretion in respect of all grants of licences (s 47(1)) but only with the exercise of discretion in respect of the refusal of an application for an original licence. Accordingly, I reject the submission that s 47(2) does not cover the case of an application to remove a licence. It is, however, still necessary to consider whether s 47(2) is exhaustive of the exercise of the discretion to refuse an application.

The terms of s 47(2) are admittedly very curious. For it deals with both the case of an objection under s 45(1)(a) and s 45(1)(b) not being taken and the case of them not being made out. It is understandable that, if an objection under s 45(1)(a) or s 45(1)(b) has not been taken, the court should have a discretion to refuse the application if it finds that the applicant is not a fit and proper person or that a person interested in the business is not a fit and proper person to be so interested. But it is not so obvious why s 47(2) also deals with the case where an objection "has not been ... made out". The hypothesis upon which this part of the subsection proceeds is that an objection has been made. Because of the onus under s 45(4), the applicant must have already satisfied the court that he is a fit and proper person to be the holder of the licence or that some person who is interested in the business is a fit and proper person to be so interested. It is difficult to understand how upon that hypothesis the court may refuse the application on the ground that the applicant or person interested is not a fit and proper person. For by hypothesis it has already found that he is a fit and proper person. However, it is probable that the provision was intended to deal only with the case where the objection has been formulated on one ground and has failed but some other ground, not the subject of the objection, exists for finding that the applicant is not a fit and proper person or that some person interested in the business is not a fit and proper person to be so interested.

But what is even more difficult to understand is why, under s 47(2), the court is given a discretion to refuse an application after the failure of an objection specified in par (a) or par (b) of s 45(1) and not after the failure to prove an objection founded on par (c) of that subsection. In the present case for example, the court has held that the public interest ground, as formulated by the objector, has failed. Yet the court itself has found that there was another aspect of the public interest, which was not particularised in the objection, but which required the refusal of the licence. If the judgment of Yeldham J is correct, the Licensing Court cannot act on its own finding concerning the public interest simply because of the technical point that the matter was not raised by way of an objection under s 46.

Why the legislature should exclude s 45(1)(c) from consideration under s 47(2) is not readily discernible. However, it is difficult to think that it was done by inadvertence. Between them s 47(1) and s 47(2) deal with all the

grounds of objection in s 45 except the public interest ground in s 45(1)(c). Moreover, since its enactment the subsection has been amended by including the ground in s 45(1)(a1). In addition, before the passing of the 1982 legislation it was established that there was a discretion in the court to grant or refuse a licence on public interest grounds: see *Ex parte Bodel; Re Maxwell* (1954) 55 SR (NSW) 188 at 191; 72 WN (NSW) 173 at 175; *Bradley v Fitzmaurice; Marriott v Coleman* (1963) 109 CLR 129 at 140 and *Lorence v Abraham* [1982] 2 NSWLR 551.

Nevertheless, the cases which recognised or held that a Licensing Court had a general discretion to grant or refuse an application notwithstanding the failure or upholding of an objection were concerned with legislation which contained no specific provision regulating the exercise of the court's discretion. When the legislature enacts new legislation which specifically addresses the question of discretion, the circumstances of the exercise of the discretion are governed by the terms of legislation. Conclusions that can be drawn when the legislature has left the matter at large are unlikely to be available when the matter is subject to detailed enactment. In *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7, Gavan Duffy CJ and Dixon J said:

> "... When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

If s 47 had not been enacted, the general power to grant or refuse a licence conferred by s 18 would have been sufficient to justify the course which the Full Bench took. But s 47 deals with the case of a refusal and the case of a grant of a licence and it specifies the conditions which must exist before any discretion can be exercised. Accordingly, in my opinion it is quite impossible to hold that the court has a general discretion to grant or refuse licences or at all events that the court has a general discretion to deal with cases not mentioned in s 47. The language of s 47 is too comprehensive to admit of a conclusion that it does not exhaust the circumstances where the court can exercise its discretion. Moreover, in s 47(3) the legislature has been at pains to ensure that the discretion to refuse a licence is not exercised without the applicant being given an opportunity to meet the case. If the Licensing Court has a general discretion to refuse a licence other than as specified in s 47(2), the applicant could have his application refused without being given any opportunity to deal with the matter in accordance with the policy expressed in s 47(3). Indeed it is said that is what occurred in this very case. The terms of s 47, therefore, must be taken both to regulate and to be exhaustive of the discretion to grant a licence conferred by s 18.

Accordingly, I conclude that Yeldham J was correct when he held that the Full Bench of the Licensing Court made an error of law in holding that it had a discretion. I have come to this conclusion with regret. Although the language of the legislation is clear, I think that the legislature could not have foreseen the consequences of enacting s 47 in its present form. It is difficult to believe that the legislature contemplated that the Licensing Court should have no discretion to refuse a licence on the ground that to grant it would be contrary to the public interest simply because no objector had raised the

ground. Yet that is the consequence of the language of s 47. The provisions of s 47 seem to call for urgent legislative attention.

In practice, however, it may be possible for the defect in s 47 to be overcome. If the court is of the view that there is a ground of public interest which has not been taken by an objection, it would seem quite proper for the Licensing Court to invite an objector to amend or to make an objection encompassing the court's concern. No doubt in such a case the requirements of s 46(3) would have to be fulfilled. Even if no objection to the grants of the licence or removal has been filed, there is no reason why the Licensing Court cannot invite the Licensing Inspector to raise the matter by way of objection.

If it were not for the provisions of s 57 of the Act, I think that serious consideration would have to be given to remitting the present case back to the Full Bench to determine whether even at this late stage the objector should be given an opportunity to amend her objection to encompass the ground raised by Mr Hammond and Mr Swanson in their judgment. However, s 57(1) and s 57(4) provide:

> "(1) The court shall not grant an application for removal of a hotelier's licence or an off-licence to sell liquor by retail to a place outside the neighbourhood of the premises from which it is proposed to remove the licence unless it is satisfied that the removal of the licence to the proposed new site will not affect detrimentally the interest of the public in the neighbourhood of the premises from which it is proposed to remove the licence.
>
> . . .
>
> (4) Section 45(2) does not apply to a removal of a licence to premises within the same neighbourhood as the premises from which it is proposed to remove the licence."

The result of these provisions is that, when a licence is to be removed from one site within a neighbourhood to another site within the neighbourhood, it is irrelevant that the interests of the public of the neighbourhood of the premises from which it is proposed to remove the licence may be detrimentally affected or that the needs of the public in the neighbourhood of the premises to which the licence is to be removed can be met by facilities for the supply of liquor existing in and outside the neighbourhood. Either expressly (s 57(4)) or by implication (s 57(1)), the legislature has declared that these matters are not to be taken into account in determining whether an application for the removal of a licence should be granted. Consequently, they cannot be taken into account by purporting to raise them under a public interest objection.

In the present case Mr Hammond and Mr Swanson said that the removal of the licence "must of necessity result in inconvenience to shoppers at Progress Road". Later they said that "the public interest would be better served by the retention of the off-licence (retail) in Progress Road . . . rather than permitting its removal to a site cheek by jowl with an existing hotel providing adequate packaged liquor facilities". Finally, they concluded that "the interests of the public in having a browse liquor store in Progress Road and a drive-in-hotel bottle shop in Wilson Road outweigh the private interests of Shoey's which would apparently be advantaged by the grant of the application".

The matters to which their Worships have referred are contrary to the

scope and purpose of the *Liquor Act* 1982 as evidenced by the provisions of s 57(1) and s 57(4). To enable an application for the removal of a licence to be refused on these grounds would be to subvert the legislative scheme. The grounds upon which the Full Bench relied to dismiss the application were not proper matters to take into account under the public interest ground or at all.

In the circumstances the proper order is that the appeal should be dismissed with costs.

(By majority)
Appeal dismissed with costs.

Solicitors for the appellant: *Cragg, Braye & Thornton* (Singleton), by their city agents, *Turner, Whelan & Wells.*

Solicitors for the respondent: *Kalyk Hansen Deegan* (Newcastle).

R J DESIATNIK,
Barrister.