[SUPREME COURT OF WESTERN AUSTRALIA]

PALACE SECURITIES PTY LIMITED and Another v DIRECTOR OF LIQUOR LICENSING

Malcolm CJ, Seaman and Wallwork JJ

11 October 1991; 11 May 1992

Liquor Licensing — Cabaret licence — Refusal by court of cabaret licence for separate part of existing hotel premises — Cabaret necessary for reasonable requirements of public — Whether such cabaret licence in accord with scheme of Act or public interest — Absolute discretion to refuse application — Whether decision unreasonable — Liquor Licensing Act 1988, ss 33(1), 36(1) and 62.

The appellants were the licensees of a hotel which was the subject of a hotel licence created under the *Liquor Licensing Act* 1988 (the Act). They applied (pursuant to s 62 of the Act) to the relevant licensing authority, the respondent, for a cabaret licence for a defined separate part of the hotel premises on the understanding that they would surrender the hotel licence over that part of the premises.

Section 36(1) of the Act provided that two or more licences could not be "granted in respect of the same part of any premises, but licences may be granted in respect of defined separate parts of the same premises".

The respondent referred the matter for determination by a judge of the Liquor Licensing Court of Western Australia. The respondent appeared before the judge giving evidence that if the application were to be granted the general public would be misled so as to believe that the hotel premises had the right to trade for 24 hours per day. Additionally the respondent considered that the scheme of the Act was such that each licence category should have separate trading conditions.

The trial judge found that all the requirements of ss 37 and 38 of the Act had been complied with in that the grant of the application was necessary to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence for the hours proposed.

However, the judge, accepting the respondent's evidence, concluded that neither the public interest nor the applicant's interest would be served by granting the appellants a cabaret licence as it would result in separate parts of licensed premises trading for different hours giving the impression to the public of 24 hour trading from the one hotel premises. His Honour concluded that such a result was neither in accordance with the scheme of the Act nor in the public interest and that this conclusion was justified by the object of the Act as stated in s 5(e), namely, to provide a flexible system for the administration of the Act.

Section 33(1) of the Act provided that "the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground or for any reason, that the licensing authority considers in the public interest". Section 33(2)(a) stated that an application "may be refused, even if the applicant meets all the requirements of this Act".

The appellants appealed to the Supreme Court from the decision of the trial judge seeking to have his Honour's decision reversed on the following grounds:

(1) the appellants were entitled to be granted the cabaret licence over the defined part of the premises,

(2) the decision of the trial judge was unreasonable, particularly as his Honour had found that the appellants met the requirements of the Act,
(3) the respondent was not entitled to intervene at the hearing, and
(4-7) the trial judge acted on considerations which were extraneous to the objects of the Act.

Held (allowing the appeal): (1) (per Malcolm CJ and Wallwork J, Seaman J dissenting) The decision refusing the application would be set aside and the matter remitted to the Licensing Court.

Ground 1

(2) (per Malcolm CJ) Section 36(1) clearly envisages the possibility of different licences for defined parts of one building with the necessary consequence that those parts may well trade at different hours. Thus the respondent's concern that the scheme of the Act was that each licence category should have separate and unique trading conditions was in error to the extent to which it overrode or ignored s 36(1). A grant of the cabaret licence to the appellants would therefore have been within the scheme of the Act.

(per Seaman J, contra) There is no absolute entitlement to the grant of a licence even if the applicant meets all the requirement of the Act.

Ground 2

(3) (per Malcolm CJ) The trial judge's findings of fact which led to the exercise of the discretion pursuant to s 33(1) and (2) to refuse the application, namely that the appellants made the application because it would increase the trading hours of their existing hotel bar and that they could not obtain an extended trading permit for the hotel, were contrary to the weight of the evidence and to his Honour's own findings with respect to s 38.

(4) (per Malcolm CJ) The trial judge misdirected himself as to the scheme of the Act when he concluded that the grant of the cabaret licence in the case was contrary to the scheme of the Act as that conclusion appears to be inconsistent with the public interest considerations which are apparent in ss 5, 36, 38 and 69 of the Act.

(5) (per Malcolm CJ and Wallwork J) The reference in s 33(1) to the public interest imports a discretionary value judgment, confined only insofar as the scope and purpose of the Act enable any reasons given to be pronounced as definitely extraneous to the objects which the legislature had in view.

Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210, applied.

(6) (per Malcolm CJ) The combination of the misdirection concerning the scheme of the Act and the misapprehension or misconception concerning the purpose of the appellants' cabaret licence application produced a result that was not in accordance with the law and which was inconsistent with the true scope and policy of the Act. Thus the refusal of the cabaret licence was unreasonable.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, applied.

(per Wallwork J) The fact that the appellants could have obtained an extended trading permit was no reason to refuse the grant when s 38 had been complied with. No reasonable tribunal should have exercised its discretion other than by making the grant sought by the appellants.

(per Seaman J, contra) The second ground of appeal did not reveal an arguable attack upon the exercise of a discretion which was expressed in absolute terms.

Ground 3

(7) (per Malcolm CJ and Seaman J) The respondent was entitled to intervene at the hearing before the trial judge.

Grounds 4-7

(8) (per Wallwork J) By taking into account that there would be 24 hour trading from the one building identifiable to the public as hotel premises the trial judge relied upon a matter extraneous to the objects of the Act.

Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492, applied.

Also the trial judge did not give sufficient weight to the intention of s 36(1) that licences may be granted in respect of defined separate parts of the same premises.

(per Seaman J, contra) If there were to be a grant of a cabaret licence and to all outward appearances the hotel would remain unaltered and the general public would be misled to believe that it has the right to trade for 24 hours a day then a matter of public interest arose within the terms of s 33(1) of the Act. The necessary authority to trade could have been provided with greater flexibility by extended trading hours in accordance with s 5(e). Thus there was ample material to support his Honour's decision.

No extraneous considerations were taken into account when the trial judge upheld the view of the respondent that the scheme of the Act clearly sets out to establish that each licence category has separate and unique trading conditions.

(9) (per Malcolm CJ, obiter) A refusal to grant an extended trading permit would be invalid as a decision which merely applied ministerial policy without regard to the merits of the application in question and would constitute a failure to exercise a discretion.

R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177, applied.

CASES CITED

The following cases are cited in the judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
Coldham, Re; Ex parte Brideson (1989) 166 CLR 338.
O'Sullivan v Farrer (1989) 168 CLR 210.
Padfield v Minister for Agriculture, Fisheries and Food [1968] AC 997.
R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177.
Sandown Park Hotel Pty Ltd v The Queen (1963) 109 CLR 521.
Ward v James [1966] 1 QB 273.
Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492.

The following further cases were cited in argument:

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1.
Freecorns Pty Ltd v Hooper [1973] WAR 15.
Thompson's Application, Re; Hannaford v Fysh [1964] Tas SR 129.
Wilks v Bradford Kendall Ltd (1962) 79 WN (NSW) 850.

APPEAL

I L K Marshall and *A E Clark*, for the appellants.

J D Allanson, for the respondent.

Cur adv vult

11 May 1992

MALCOLM CJ. This is an appeal under s 28 of the *Liquor Licensing Act* 1988 (the Act) from a decision by the learned judge in the Liquor Licensing Court of Western Australia (the Licensing Court), delivered on 1 May 1991, by which an application by the appellants for the conditional grant of a cabaret licence pursuant to s 62 of the Act was refused.

The facts are sufficiently set out in the reasons for judgment of Seaman and Wallwork JJ. There is no need for me to repeat them, except as

necessary for the purposes of discussion. The appellants are the licensees of the Palace Hotel, Kalgoorlie, which is the subject of a hotel licence. They applied for a cabaret licence for part of the premises on the footing that they would surrender the hotel licence for that part, which would then become the subject of the cabaret licence.

Section 36(1) of the Act relevantly provides that two or more licences "shall not be granted in respect of the same part of any premises, but licences may be granted in respect of defined separate parts of the same premises". It was accepted that the part of the hotel which would be the subject of the proposed cabaret licence was a defined separate part of the hotel premises for the purposes of s 36(1).

The respondent, the Director of Liquor Licensing (the Director), had jurisdiction to hear and determine the appellants' application under s 30(4)(a) of the Act because there were no objections. The Director, however, determined that the application involved questions of substantial importance and referred it for determination to the learned judge. The Director then intervened in the hearing and gave evidence. The evidence was to the effect that a number of applications had been made for the grant of a cabaret licence for a part of licensed premises already covered under a licence of a different type. Although the requirements of s 36(1) had been satisfied by structural alterations, the Director was concerned that

> "... to all outward appearances the buildings will remain unaltered and the general public will be misled to believe that the particular licensed premises have the right to trade for 24 hours per day".

He said he had formed the impression in a number of instances that licensees were seeking cabaret licences in order to overcome some of the trading conditions imposed upon their licences by the Act, namely trading hours and entertainment restrictions. He told the learned judge that, in his view, the scheme of the Act was that each licence category should have separate and unique trading conditions. He acknowledged that there was a need for a variety of liquor outlets, but said that each licence category, "and by definition the licensed premises to which that licence refers has distinct and different trading conditions imposed on it by the Act". The Director told the learned judge that, if the appellants had applied for an extended trading permit in relation to the relevant part of the premises, he would have refused it as a matter of policy. That policy had been imposed by him to meet the wishes of the relevant Minister, who had given certain undertakings to the Cabaret Owners' Association.

The learned judge took the opportunity in his reasons for judgment to point out that refusal of an application for an extended trading permit pursuant to the policy described by the Director would be neither in accordance with the scheme of the Act, nor in accordance with law and would constitute a failure to exercise the relevant discretion. In this respect the learned judge was entirely correct: see *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, per Kitto J (at 188, 189-190). A decision made by the Director on a matter within his discretion by simply applying a policy decided on by the Minister, rather than determining the merits of the application under the Act, would be invalid. The invalidity is the product of a failure to duly exercise the discretion. A decision maker is not entitled to abdicate his function in that way.

During the course of the hearing, counsel for the appellants told the learned judge that the appellants could equally achieve their purposes if an

extended trading permit were granted, but in view of the policy it was thought that course was inappropriate and that a cabaret licence would be appropriate.

The learned judge found that all of the requirements of ss 37 and 38 of the Act had been satisfied. In particular, he found that the evidence before him was sufficient to satisfy him that the grant of the application was necessary to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence during the hours proposed.

In refusing the application, the learned judge said:

> "28. It is not surprising, in my opinion, that the Director of Liquor Licensing has thought it necessary to refer those matters to the Court, because it is quite plain, in my opinion, that neither the public interest nor the private interest of this applicant will be served by the grant of an application for a new licence which is not suited to the circumstances of the case and which will result in separate parts of adjacent licensed premises trading for different hours, the effect of which will be to permit twenty-four hour trading from the one building, identifiable to the public as hotel premises. That is the matter which the Director has raised in paragraph 2(d) of his referral. For the reasons which I have given I have absolutely no doubt that such a result is neither in accordance with the scheme of this Act nor in the public interest. For this reason alone, I am of the opinion that notwithstanding my conclusions in relation to the evidence of the applicant under s 38, this is an application which must nevertheless be refused.
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> 29. It is a conclusion which I come to with no great relish but in my opinion it is the only conclusion open under this Act and according to law. One of the objects of this Act contained in s 5(e) is to provide a flexible system for the administration of this Act. It is quite plain from the material before me that this applicant has been constrained to make the present application in order to obtain the authority to trade, which might otherwise, and with greater flexibility, be granted by way of an extended trading permit, but which it cannot obtain because of the policy which the Director of Liquor Licensing has been instructed to apply."

Section 33 of the Act provides that:

> "(1) Subject to this Act, the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground or for any reason, that the licensing authority considers in the public interest.
>
> (2) An application —
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> (a) may be refused, even if the applicant meets all the requirements of this Act; or
>
> (b) may be granted, even if a valid ground of objection is made out,
>
> but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit."

The reference by the learned judge to s 5(e) of the Act needs to be seen in context. Section 5 provides that:

> "The objects of this Act are —
>
> (a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
>
> (b) to cater for the requirements of the tourism industry;

(c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;
(d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act."

Ground 1 of the grounds of appeal is as follows:

"1. The learned trial Judge erred in law in refusing the Appellants' application as the Appellants were, in all the circumstances, entitled to the grant of a cabaret licence as licences may be granted in respect of defined separate parts of the same premises."

Ground 2 of the grounds of appeal as amended at the hearing was that:

"The decision of the Court to refuse the application for cabaret licence was on the evidence so unreasonable that the Court could not properly have reached the decision it did according to law, particularly as the Court found that the appellants met the requirements of the Act."

In pars 28 and 29 of his reasons the learned judge said that the grant of a cabaret licence would result in separate parts of adjacent licensed premises trading for different hours, the effect of which would be to permit 24 hour trading from the one building. His Honour found that this was neither in accordance with the scheme of the Act, nor in the public interest. As to the scheme of the Act, the provisions of s 36(1) of the Act clearly envisage the possibility of different licences for defined parts of the one building, with the necessary consequence that those parts may well trade during different hours. Section 100(3)(b) of the Act provides for the supervision and management of businesses where two licences are held by the same licensee in respect of separate parts of the same or adjacent premises. Clause 13(2) of Sch 1 of the Act contemplates a cabaret licence for premises which are wholly within licensed premises to which another licence relates. As provided in s 5(c), the objects of the Act include the facilitation of the use and development of licensed facilities reflecting the diversity of consumer demand. Section 38 of the Act contemplates that this will be done by the grant of a cabaret licence where the grant of a licence is necessary to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence during the hours proposed.

Counsel for the respondent submitted that the learned judge correctly viewed the scheme of the Act as being that there were different classes of premises, each with their own distinct trading conditions and trading hours. The learned judge said in par 14 of his reasons:

"Notwithstanding that this applicant proposes to trade between 8 pm and midnight in the cabaret premises, there is no doubt that the purpose of this application is to seek authority to sell liquor on the cabaret premises during hours outside the hours permitted under the hotel licence held by the Palace Hotel. Indeed, the evidence for the applicant does not suggest that between 8 pm and midnight, the services and facilities to be offered in the proposed premises will be markedly different from those presently offered in the existing premises."

After recounting the evidence which approved of the existing licensed premises and the quality of the services provided and other evidence, the learned judge concluded that the appellant sought to provide all the same services and facilities to the public after midnight, as were already provided

before midnight, other than perhaps substantial meals. It was in this context that the learned judge reached a favourable conclusion regarding the necessity to grant the application "to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence during the hours proposed".

The learned judge then referred to the evidence of the Director to which I have already referred. The Director also said that:

> "I take the view that the scheme of the Act sets out to establish that each licence category has separate and unique trading conditions. It is recognised that there is a need for a variety of liquor outlets but each licence category and by definition the licensed premises to which that licence refers, has distinct and different trading conditions imposed on it by the Act."

The learned judge accepted the evidence of the Director. In my opinion the Director's statement of the scheme of the Act is in error to the extent to which it ignores or overrides s 36(1) of the Act.

Plainly, therefore, the grant of a cabaret licence in the present case would be within the scheme of the Act. To that extent ground 1 is made out, but that is not alone enough to succeed in the appeal because of the provisions of s 33(1) which gives the licensing authority an "absolute discretion" to refuse an application "... on any ground, or for any reason, that the licensing authority considers in the public interest".

In essence the learned judge concluded that the grant of a cabaret licence for a defined part of premises already the subject of a hotel licence, in circumstances which would lead to 24 hour trading from the one building identifiable to the public as hotel premises, would be contrary to the public interest. Why this would be so does not appear. We were told that in a number of cases a cabaret licence had been granted for part of premises which were also the subject of a hotel or tavern licence. In all these cases save one, however, the cabaret licence had been granted under the previous legislation. The only exception was in Gosnells, where the Studebaker Night Club was the subject of a cabaret licence on the premises of the Gosnells Hotel. Clause 13(b) of Sch 1 of the Act provides that a cabaret licence granted under the old Act continues under the new Act. Clause 13(2) provides that where the cabaret licence was wholly or partly within licensed premises to which another licence related, the Director may, upon the surrender of the cabaret licence, issue an extended trading permit in respect of the cabaret premises relating to that other licence. There is no compulsion to surrender. Clause 23 of the Schedule also contemplates the grant of a special facility licence to the holder of a hotel licence, tavern licence or limited hotel licence provided certain requirements are met.

It was submitted by counsel for the respondent that these provisions were indicative of an intention to avoid cabaret licences within hotel or tavern premises. I am unable to discern that intention. The scheme of the Act clearly seems to leave the possibility open. It was submitted, however, that hotel licences had a special position within the licensing scheme, because the whole of the hotel premises became the subject of the hotel licence. In the case of other licences, only that part of the premises where liquor was sold or supplied were licensed premises.

Both a hotel licence and a cabaret licence are "Category A" licences under the Act. Section 3(1) of the Act extends this category to include a casino liquor licence, a special facility licence and a liquor store licence. A

"Category B licence" means a restaurant licence, a producer's licence, a wholesaler's licence and an occasional licence.

In his reference to the court the Director asked in par 2(d):

> "Whether it is in the public interest for different types of Class 'A' licences to be granted with respect to different parts of the same provisions where: ... (d) the effect of the combined licence is to permit 24 hour trading from the one building, identifiable to the public as hotel premises."

The learned judge clearly considered that the question should be answered in the negative. No reason was given. The learned judge appears to have regarded it as self evident that it would be contrary to the public interest for there to be 24 hour trading from the one building identifiable to the public as hotel premises. The learned judge expressed his final conclusion as follows:

> "34. I am required to exercise my discretion judicially and in accordance with the scheme of the Act and in accordance with law. In so doing, and for the reasons which I have given, it is plain to me that this application must be refused in the public interest pursuant to s 33(1) and (2), notwithstanding that the applicant otherwise meets the requirements of the Act.
>
> 35. For these reasons, the application should in my opinion be refused in the public interest."

Thus the learned judge based his refusal both on the "absolute discretion" in s 33(1) and on the discretion to refuse in s 33(2) even where the applicant met all the requirements of the Act. It appears that the learned judge considered that it would be contrary to the public interest to grant the application because it was made only to increase the trading hours of the existing bar in the premises the subject of the existing hotel licence. His Honour was also influenced by the fact that the appellants' counsel had expressed the view that it could not achieve that end by means of an extended trading period because of the policy applied by the Director. This may not have been a matter which the learned judge properly took into account, but in my opinion the predominant factor in the exercise of discretion was the point raised by the Director in par 2(d) of the reference that it was not in the public interest to have 24 hour trading from premises which had a hotel licence and a cabaret licence because the public would be misled into believing that the particular licensed premises had the right to trade for 24 hours a day.

The finding that the application for a cabaret licence was made only to extend the trading hours of the existing bar appears to be contrary to the unchallenged evidence of Mr Donnelly. A cabaret licence requires the licensee to provide continuous live entertainment or continuous recorded music. An extended trading permit imposes no such obligation. The evidence in support of the application showed that a substantial investment was to be made in equipment to provide "disco" entertainment in premises with a high standard of decor. There would be disco entertainment each night, varying it on occasions with a pianist/singer. That investment would not be justified with the lesser security of tenure of a mere permit. Mr Donnelly described all this and said:

> "I believe a cabaret licence is necessary for Kalgoorlie in that there is insufficient evening entertainment provided at the present time."

The findings made by the learned judge regarding s 38 of the Act

necessarily accept this evidence. The finding that the application was made only to obtain extended trading hours for the existing bar is quite inconsistent with the s 38 finding.

The finding that the application for the cabaret licence was only made because the appellants could not obtain an extended trading permit also seems to be contrary to the evidence. The interchange between counsel and the learned judge (at pp 44-45 of the Appeal Book) makes it clear that the appellants applied for a cabaret licence in the first instance. It was only after they had applied for that licence that inquiries were made regarding the possibility of obtaining an extended trading permit, and that it was in that context that the policy being improperly applied by the Director was discovered. Counsel for the respondent, who had appeared for the Director at the hearing in the Licensing Court very frankly and properly told us that his discussions with the solicitors for the appellants regarding the possibility of an extended trading permit took place well after the application for a cabaret licence had been lodged.

It follows that some of his Honour's findings of fact which led to the exercise of the discretion under s 33(1) and (2) to refuse the application were against the evidence and the weight of evidence. Does it follow in terms of ground 2 that the decision to refuse was so unreasonable that the court could not properly have reached it according to law?

The discretion referred to in s 33(1) is an "absolute discretion" to grant or refuse an application on any ground or for any reason that the licensing authority considers in the public interest. Reference was made by counsel for the respondent to the judgment of Dixon CJ in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505. In that case the relevant discretionary power of the Commission included no statement of the matters which the Commission was required to take into account in exercising the power. Dixon J said (at 505):

> "... there is no positive indication of the considerations upon which it is intended that the grant or refusal of consent shall depend. The discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have in view."

Dixon J (at 505) also noted that where the discretion was described as "absolute" or the matter was "entirely" within the discretion of the relevant body the discretion was confined to the scope and subject of the Act and was not arbitrary and unlimited. In *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 347, Wilson, Deane and Gaudron JJ said:

> "A legislative direction to decide does not, as a matter of ordinary statutory construction, import a discretion to give effect to that which, having regard to the scope and purposes of the legislation, is in the opinion of the decision-maker desirable. A discretion of that nature will be implied only if the context (including the subject matter to be decided) so necessitates as, eg, where the context provides no positive indication of the considerations by reference to which a decision is to be made: see *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505, per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49, 50; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12-14, 24."

This is not, of course, a case where the context provides no positive indication of the considerations by which the decision is to be made. The reference is to the "public interest". In this respect s 5 of the Act is relevant as are the provisions of s 38 relating to "the reasonable requirements of the public" and the provisions of s 35 which reflect the fact that it is in the public interest that licences should only be granted to fit and proper persons.

In *O'Sullivan v Farrer* (1989) 168 CLR 210 the High Court held, among other things, that s 47 of the *Liquor Act* 1982 (NSW), subject to certain exceptions, conferred a general discretion to grant or refuse an application by reference to public interest considerations which would provide grounds for an objection under s 45(1)(c) of the Act, whether or not the objection had been taken. In doing so the court considered that specific matters referred to in the Act as relevant which were matters falling within the ordinary notions of the public interest were relevant to the exercise of the discretion. Mason CJ, Brennan, Dawson and Gaudron JJ said (at 216-217):

> "Where a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context (including the subject matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made. See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505, per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, at 49-50; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12-14, 24 *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 347.
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> The public interest considerations which may ground an objection under s 45(1)(c) are, in terms, confined to considerations 'other than the grounds specified in pars (a) and (b) and subss (2) and (3)'. But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (NSW) v Browning* (1989) 166 CLR 338 at 347."

In *Sandown Park Hotel Pty Ltd v The Queen* (1963) 109 CLR 521 at 524-525 Dixon CJ, delivering the judgment of the court, affirmed the judgment of the Full Court of Victoria, saying that the High Court had attempted " ... to express in the language of the Full Court, a rule which may be of guidance for the future". That rule was expressed by the Full Court (at 522-523) in terms that:

> "... the only limits upon the matters to which the Licensing Court is entitled to have regard in exercising the discretion here in question are those which can be inferred from a consideration of the scope and purpose of the legislation: *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746."

In this respect it is acknowledged that the Licensing Court is a specialist court which has an exclusive area of jurisdiction and builds up a fund of

knowledge and experience which forms the basis of a body of principles regarding the regulation of the industry over which it has that jurisdiction.

In my opinion, however, the learned judge misdirected himself concerning the scheme of the Act when he concluded that the grant of a cabaret licence in the case was contrary to the scheme of the Act. Furthermore his finding that the only purpose of the application for a cabaret licence was to extend the hotel bar trading hours was against the evidence and inconsistent with his findings with reference to s 38 of the Act. Finally, his Honour misunderstood the true position when he found that the applicants had applied for a cabaret licence because they believed that an application for an extended trading permit would have been appropriate, but would have been refused on the basis of the policy being applied by the Director. The exercise of discretion to refuse the application under s 33(1) appears to be inconsistent with the public interest considerations which are apparent in ss 5, 36, 38 and 69 of the Act. In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030, Lord Reid said:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to protection of the court. So it is necessary first to construe the Act."

Professor H W R Wade, *Administrative Law* (6th ed, 1988) at pp 401-403 regards *Padfield* (supra) as an example of an unreasonable decision in the sense of *"Wednesbury unreasonableness"*. This is a reference to the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 in which his Lordship said:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66 at 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

There is, of course, no suggestion or question whatever in this case of any bad faith. In my opinion, the combination of the misdirection concerning the scheme of the Act and the misapprehension or misconception concerning the

purpose of the application produced a result that was not in accordance with the law and which was inconsistent with the true scope and policy of the Act. Such a result was "unreasonable" in the relevant sense and, for these reasons, I consider ground 2 has been made out.

In the light of the conclusion which I have reached regarding ground 2, that is enough to dispose of the appeal. Ground 4 of the grounds of appeal related to the finding that it was open to the appellants to achieve their objectives by obtaining the grant of an extended trading permit. The point raised by this ground has been substantially covered by my reasons in relation to ground 2. The same comment applies to grounds 5, 6 and 7.

In my opinion there was no substance in ground 3 for the reasons given by Seaman J.

For these reasons I consider that the appeal should be allowed, the decision refusing the application set aside and the matter remitted to the Licensing Court for decision according to the law as stated in the reasons for judgment of this Court.

SEAMAN J. This is an appeal pursuant to s 28(2) of the *Liquor Licensing Act* 1988 against a decision of the Liquor Licensing Court judge to refuse an application by the appellants for a conditional grant of a cabaret licence pursuant to s 62 of the Act.

The appellants as partners conduct a business known as the Palace Hotel, Hannan Street, Kalgoorlie, and their conditional application related to a part of the premises which are the subject of an existing hotel licence. They proposed to surrender the hotel licence in respect of that part of the premises which, after alteration, would be used for the cabaret licence.

Because no objections to the application were lodged, the respondent was entitled to hear and determine the application by virtue of s 30(4)(a) of the Act.

He determined that it involved questions of substantial importance and referred it for determination by the Liquor Court judge pursuant to s 24(1).

The respondent intervened in the hearing before the learned judge and, relevantly, his evidence was as follows:

> "I am aware that a number of applications have been made for the grant of a cabaret licence to a part of licensed premises already covered under a licence of a different type. The licensee in those applications has sought to satisfy the requirements of s 36(1) by structurally altering the premises so that they become defined separate parts of the one building. Notwithstanding the success or otherwise of the structural alterations in achieving that intent, I am concerned that to all outward appearances the buildings will remain unaltered and the general public will be misled to believe that the particular licensed premises have the right to trade for 24 hours per day.
>
> I have formed the impression that, in a number of instances, licensees are seeking cabaret licences in order to overcome some of the trading conditions imposed on their licence by the Act and by imposed conditions, namely trading hours and entertainment restrictions.
>
> I take the view that the scheme of the Act clearly sets out to establish that each licence category has separate and unique trading conditions. It is recognised that there is a need for a variety of liquor outlets but each licence category and by definition the licensed premises to which that

licence refers, has distinct and different trading conditions imposed on it by the Act."

In the course of the respondent's evidence it emerged that if the appellants had applied for an extended trading permit in relation to the part of the premises which were the subject of the conditional application for the cabaret licence, he would have refused it as a matter of policy which had been imposed to meet the wishes of the responsible Minister of the day who had given certain undertakings to the Cabaret Owners' Association.

Counsel for the appellants then told the learned judge that the appellants could equally achieve their purposes if an extended trading permit were granted, indeed more simply achieve it, but in view of the policy it was thought that course was inappropriate and that a cabaret licence would be the appropriate application to make.

Not surprisingly his Honour took the opportunity in his reasons to point out to the respondent that to refuse an application pursuant to such a policy was neither in accordance with the scheme of the Act or in accordance with law. On that subject he said:

"32. My view may be expressed quite shortly. Plainly, the Director of Liquor Licensing has a very wide discretion, as does this Court in other matters, in relation to the grant of extended trading permits. I am of the opinion, however, that it is a discretion which must be exercised according to law. I am of the opinion that such a discretion is not exercised according to law if it is exercised under dictation by another and not in accordance with the circumstances of the particular case. If the Director of Liquor Licensing were to refuse an application by this applicant for an extended trading permit in the circumstances which I have described pursuant to the policy about which he has spoken, he would in my opinion, exercise no discretion in accordance with the particular circumstances of the case. In my opinion, to so refuse would neither be in accordance with the scheme of this Act, nor in accordance with law, nor in accordance with procedural fairness or natural justice. No authority is necessary for that conclusion."

In dealing with the application the learned judge said:

"28. It is not surprising, in my opinion, that the Director of Liquor Licensing has thought it necessary to refer those matters to the Court, because it is quite plain, in my opinion, that neither the public interest nor the private interest of this applicant will be served by the grant of an application for a new licence which is not suited to the circumstances of the case and which will result in separate parts of adjacent licensed premises trading for different hours, the effect of which will be to permit twenty-four hour trading from the one building, identifiable to the public as hotel premises. That is the matter which the Director has raised in paragraph 2(d) of his referral. For the reasons which I have given I have absolutely no doubt that such a result is neither in accordance with the scheme of this Act nor in the public interest. For this reason alone, I am of the opinion that notwithstanding my conclusions in relation to the evidence of the applicant under s 38, this is an application which must nevertheless be refused.

29. It is a conclusion which I come to with no great relish but in my opinion it is the only conclusion open under this Act and according to law. One of the objects of this Act contained in s 5(e) is to provide a flexible system for the administration of this Act. It is quite plain from

the material before me that this applicant has been constrained to make the present application in order to obtain the authority to trade, which might otherwise, and with greater flexibility, be granted by way of an extended trading permit, but which it cannot obtain because of the policy which the Director of Liquor Licensing has been instructed to apply."

With this background I turn to the grounds of the appeal. Grounds 1 and 2 may conveniently be dealt with together and are as follows:

"1. The learned trial Judge erred in law in refusing the Appellants' application as the Appellants were, in all the circumstances, entitled to the grant of a cabaret licence as licences may be granted in respect of defined separate parts of the same premises.

2. The decision of the Court to refuse the application for the cabaret licence was on the evidence so unreasonable that the Court could not properly have reached the decision it did according to law, particularly as the Court found that the Appellants met the requirements of the Act."

Section 33 of the *Liquor Licensing Act* provides:

"33. (1) Subject to this Act, the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers in the public interest.

(2) An application —

(a) may be refused, even if the applicant meets all the requirements of this Act; or

(b) may be granted, even if a valid ground of objection is made out,

but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit."

There is no absolute entitlement to the grant of a licence even if the applicant meets all the requirements of the Act. In my view, the first ground of appeal is not made out. Furthermore in my opinion the second ground does not, in the circumstances, reveal an arguable attack upon the exercise of a discretion expressed in absolute terms and is not made out.

The third ground of appeal was in the following terms:

"3. The learned trial Judge erred in law in permitting the Respondent, Geoffrey Bernard Aves, to give evidence in circumstances where the matter came before the Respondent for him to determine he declined to determine it and referred it to the Court for determination. On a proper construction of Section 24 of the Act the Director's power was limited to referring any question of law to the Court for determination by the Court and on a proper construction of Section 69(11) the Director's power to intervene and to introduce evidence, examine and cross-examine witnesses on any question or matter was not open in circumstances where the Director had the power to determine the application but declined to exercise it and referred the matter to the Court for its determination."

Section 24(1) of the Act is in the following terms:

"24. (1) If an application or matter that is being or is to be determined by the Director is one that, in the opinion of the Director,

involves questions of substantial importance, the Director may refer the application or matter for hearing and determination by the Court.

(2) The Director may refer any question of law to the Court for determination by the Court."

The provision for the respondent's intervention is as follows:

"69(11) In proceedings before the Court or the Registrar, the Director may intervene and may introduce evidence, make representations and examine or cross-examine any witness, on any question or matter."

It seems to me beyond argument that the Director had power to refer these questions to the learned judge and to intervene at the hearing of the application and that this ground of appeal is without merit.

Before turning to those grounds of appeal which, in my view, require closer attention, I turn to the seventh ground of appeal which is in the following terms:

"7. The learned trial Judge erred in law as he failed to identify the grounds or reasons why it was not in the public interest to grant the licence."

In my view the learned judge did expressly identify the matters of public interest which militated against the grant of application in par 28 of his reasons, and this ground is not made out.

At the core of this appeal are the following grounds which emerged by amendment in the course of the hearing of the appeal:

"4. The learned trial Judge erred in law by taking into account extraneous and irrelevant matters and considerations in holding that the application should be refused as it was open to the Appellants to achieve their desired objectives by obtaining the grant of an extended trading permit.

5. The learned trial Judge erred in law by taking into account extraneous and irrelevant matters and considerations in refusing the application and finding that neither the public interest nor the private interest of the Appellants would be served by the grant of the cabaret licence.

6. The learned trial Judge erred in law in refusing the application as it was not open on the evidence to make the finding that to grant the application would not be in the public interest."

The Act contains a statement of its objects in s 5 in the following terms:

"5. The objects of this Act are —

(a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;

(b) to cater for the requirements of the tourism industry;

(c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;

(d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and

(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act."

In my view these three grounds of appeal, no matter how they are expressed, amount to a complaint that in exercising the absolute discretion to grant or refuse an application vested in him by s 33(1) of the Act the learned

judge acted on considerations which were extraneous to the objects of the statute, for it was common ground that the discretion is confined by the subject matter and scope and purpose of the Act: see *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

It seems to me that the appeal stands or falls on a short point. Do the learned judge's reasons or the materials which were before him reveal that in refusing the application he was actuated by reasons extraneous to any objects the *Liquor Licensing Act* could have had in view?

The learned judge found that if he granted the application there would be created a new licence which was not suited to the circumstances of the case and which would result in separate parts of adjacent licensed premises trading for different hours, the effect of which will be to permit 24 hour trading from the one building, identifiable to the public as hotel premises.

He also considered that one of the objects of the Act contained in s 5(e) was to provide a flexible system for its administration, and said that it was quite plain to him from the material before him that the appellants had been constrained to make the conditional application for a cabaret licence in order to obtain an authority to trade, which might otherwise, and with greater flexibility, be granted by way of an extended trading permit, but which it could not obtain because of the policy which the respondent had, wrongly, been instructed to apply.

It seems to me clear that if following the grant of a cabaret licence, to all outward appearances the Palace Hotel would remain unaltered and the general public would be misled to believe that it has the right to trade for 24 hours a day, then a matter of public interest arises within the terms of s 33(1) of the Act, nor would adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal or consumption of liquor be provided in terms of s 5(d) of the Act.

Equally it seems to me that if a separate licence is not suitable to the circumstances of the Palace Hotel, the liquor and hospitality industries are not being properly developed in terms of s 5(a) of the Act.

Furthermore his Honour expressly found, in terms of s 5(e) of the Act, that the necessary authority to trade could be provided with greater flexibility by extended trading hours.

There could be no suggestion that the learned judge did not have clearly in his mind that different licences may be granted in respect of defined separate parts of the same premises.

In my view no extraneous consideration was taken into account when the learned judge upheld the view of the respondent that the scheme of the Act clearly sets out to establish that each licence category has separate and unique trading conditions, for that is another matter of materiality to the provision of control in terms of s 5(d).

By virtue of s 16(1)(b) of the Act the learned judge was not bound by legal rules relating to evidence and might obtain information as to any question which arose for his decision in such manner as he thought fit. He had before him the evidence furnished by the appellants to which he could apply a special knowledge of the structure and workings of the liquor industry and the operation of the Act. He also had before him the respondent's evidence to which I have referred. In my view there was ample material to support his Honour's decision.

In my opinion the appellants have not established grounds 4, 5 or 6.

I would dismiss the appeal.

WALLWORK J. On 1 May 1991 the learned judge in the Liquor Licensing Court of Western Australia refused an application by the appellants for a cabaret licence at the Palace Hotel in Kalgoorlie. No person had lodged an objection to the application. It was therefore an application which the Director was entitled to determine pursuant to the provisions of the *Liquor Licensing Act* 1988. However, the Director referred the application to the court for a determination pursuant to s 24(1) of the Act.

The reason for the Director's referral was that he was of the opinion that the application involved questions of substantial importance. In the Director's opinion, those questions were:

"(1) Whether the area for which the application for the Cabaret licence has been made is a separate part of the premises from that part licensed as a hotel for the purpose of section 36 of the Act, having regard in particular to:
  (a) the proximity of the proposed Cabaret premises to the existing licensed bars and areas;
  (b) the provision made for separate delivery, loading and storage of liquor.

(2) Whether it is in the public interest for different types of Class 'A' licence to be granted with respect to different parts of the same premises where:
  (a) the licensees of each of those parts are the same persons;
  (b) the defined areas of the licensed parts would almost entirely cover the premises;
  (c) there may be confusion in the public [sic] as to the two licensed premises being separate and distinct particularly as the proposed Cabaret premises currently trade as a Bar of the Hotel.
  (d) the effect of the combined licence is to permit 24-hour trading from the one building, identifiable to the public as hotel premises.

(3) Whether it is in the public interest for the application for a Cabaret licence to be granted in this case taking into account those matters in paragraph 1.

(4) Whether it is in the public interest for the application for a Cabaret licence to be granted having regard to the effect of the licence on the proper administration of the Act, and in particular:
  (a) the difficulty in identifying the liquor purchased under each licence and accordingly in determining the proper licence fee for each licence under the Act;
  (b) the possibility of confusion by wholesalers and suppliers as to which licence liquor has been supplied, particularly where the two licences are run as one business;
  (c) the difficulty for the public in differentiating between the two areas for the purpose of complying with different trading conditions."

The Director also intervened pursuant to s 69 of the Act, for the purpose of adducing evidence and making submissions.

In his reasons for judgment, the learned judge said that the application was in respect of part of the premises which were presently the subject of a hotel licence. The applicant intended to surrender the hotel licence in respect of that part of the premises which were the subject of the application

for the cabaret licence. It therefore became an application for the grant of a cabaret licence pursuant to s 62 of the Act, conditioned upon completion of the alterations proposed.

The proposal of the applicants was to set up a cabaret to provide disco entertainment each night, varying it on occasions with a pianist/singer. Food was to be provided in the form of light refreshments, namely steak sandwiches, quiches, pies, other sandwiches and small pizzas. The standard of dress was to be a minimum of shirt with collar, shoes and slacks. Dress requirements were to be strictly enforced by the doormen.

It was proposed that the decor of the premises would be of an extremely high standard with chairs and tables, together with bar stools. The area above the cabaret was to be converted into office accommodation. Because of sound-proofing it was said that no resident of the hotel would be disturbed by the operations of the cabaret.

It was proposed that the cabaret would operate between 8 pm and 2 am on Monday to Thursday. On Fridays and Saturdays the hours would be 8 pm to 3 am; and on Sundays, 9 pm to 12 midnight. It was intended to sell the usual types of liquor such as beer, spirits, wine and cocktails.

Associated with the cabaret would be ladies' and gents' toilets, a coolroom, store, bar, dance floor and a DJ console. The cabaret was to have a separate entrance and exit from the hotel, with access to the cabaret being only available from Maritana Street. Access to the cabaret could not be gained from any other part of the hotel premises.

His Honour found that the conclusion was open on the unchallenged evidence that the grant of the application was necessary to provide for the reasonable requirements of the public because the condition of, and the extent and quality of, services provided in other named premises in Kalgoorlie was inadequate.

His Honour found that in the terms of s 38, he was of the opinion that all the evidence was sufficient to satisfy the court that the grant of the application was necessary to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence during the hours proposed.

The learned judge referred to the evidence of the Director of Liquor Licensing, who had said that a number of other applications had been made for grants of cabaret licences for parts of licensed premises already covered under a licence of a different type. The Director had said that, notwithstanding the success or otherwise of structural alterations, which altered the relevant premises so that they became defined separate parts of the one building, he was concerned that to all outward appearances the buildings would remain unaltered. The general public would be misled to believe that the particular licensed premises had the right to trade for 24 hours per day.

The Director had given evidence that in a number of instances, licensees were seeking cabaret licences in order to overcome some of the trading conditions imposed on their licences by the Act and by imposed conditions, namely trading hours and entertainment restrictions.

The Director took the view that the scheme of the Act clearly sets out to establish that each licence category has separate and unique trading conditions. It is recognised that there is a need for a variety of liquor outlets, but each licence category and, by definition, the licensed premises to which that licence refers, has distinct and different trading conditions imposed on it

by the Act. During the course of his evidence the Director was asked if it would be a fair inference to draw that:

> "If hypothetically the applicants had applied to him for an extended trading permit in relation to the relevant premises, it was very likely that he would have refused that application?"

The Director replied: "That is correct."

The Director said in evidence that he thought an extended trading permit would certainly completely nullify the administrative problems in terms of liquor licence fees and such, because there would only be the one licence. The public perception to which he had referred might still arise to some extent, although it would perhaps be lessened by the fact that the permitted hours under the permit might be substantially less than those permitted under a cabaret licence. He also said he thought a permit was perhaps more controllable in terms that it could be withdrawn if there were any problems associated with the operation of the business during those hours. A permit might be more easily withdrawn than a licence.

His Honour found that, on the evidence for the applicants, the services and facilities which they intended to offer were necessary to provide for the reasonable requirements of the public during the hours applied for. However, he said it was quite plain from the evidence of the Director that in the circumstances, the grant of an extended trading permit, would avoid the very difficulties which the Director had referred to the court for determination unless there was some other impediment about which he had not been informed. Those difficulties appeared not to have their source in the objects which the applicant sought to achieve, or in the scheme of the Act, but rather in an inflexible approach to the application of s 60 of the Act, which section is concerned with the granting of extended trading permits. The relevant approach had apparently been adopted as policy by the Director as a result of instructions from the Minister.

His Honour found that neither the public interest nor the private interest of the applicants would be served by the grant of an application for a new licence which was not suited to the circumstances of the case and which would result in separate parts of adjacent licensed premises trading for different hours. He said that the effect of the grant of a cabaret licence would be to permit 24 hour trading from the one building, identifiable to the public as hotel premises. That was the matter which the Director had raised in par 2(d) of his referral.

His Honour said that for the reasons he had given, he had absolutely no doubt that such a result was neither in accordance with the scheme of the Act, nor in the public interest. For that reason alone he was of the opinion that, notwithstanding his conclusions in relation to the evidence of the applicant under s 38, the application must be refused. His Honour said that it was a conclusion which he had come to with no great relish but, in his opinion, it was the only conclusion open under the Act and according to law. He said that one of the objects of the Act contained in s 5(e) was to provide a flexible system for the administration of the Act. It was quite plain from the material before him that the applicants had been constrained to make the application in order to obtain the authority to trade which might otherwise and with greater flexibility, be granted by way of an extended trading permit. This could not be obtained because of the policy which the Director had been instructed to apply.

His Honour said he was required to exercise his discretion judicially in

accordance with the scheme of the Act and in accordance with law. In so doing, and for the reasons which he had given, it was plain to him that the application "must be refused in the public interest pursuant to s 33(1) and (2), notwithstanding that the applicant otherwise meets the requirements of the Act".

The appellants have appealed from that decision pursuant to s 28 of the *Liquor Licensing Act*. The appeal must therefore involve a question of law. This Court may affirm, vary or quash the decision, or remit the matter to the Licensing Court for further hearing with such directions, if any, as it thinks fit. The court may also make any incidental or ancillary order.

The appellants' first ground of appeal was that the learned trial judge had erred in law in refusing the application as the appellants were in all the circumstances entitled to the grant of a cabaret licence and because licences may be granted in respect of defined separate parts of the same premises.

Ground two of the amended grounds of appeal was allied with ground one. It was that the decision to refuse the application for the cabaret licence was on the evidence so unreasonable that the court could not properly have reached the decision it did according to law, particularly as the court had found that the appellants had met the requirements of the Act.

It was submitted that s 36(1) of the Act provides that different licences may be granted in respect of defined separate parts of the same premises. Section 100(3)(b) also provides for the supervision and management of businesses where two licences are held by the same licensee in respect of separate parts of the same or adjacent premises. Clause 13(2) of Sch 1 to the Act contemplates premises with a cabaret licence which are wholly or partly within licensed premises to which another licence relates, in this case a hotel licence.

Counsel pointed out that there were other hotels under the Act which have cabaret licences in the same premises. Further, that extended trading permits issued pursuant to s 60 are quite different from cabaret licences as they are granted for a particular term. Another difference is that s 97 sets out the permitted hours of trading under a cabaret licence.

It was submitted that his Honour had made a favourable finding as to the requirements for the grant of a cabaret licence in accord with the Act.

His Honour had said in his reasons:

> "In terms of s 38, I am of the opinion that all the evidence to which I have referred is sufficient to satisfy the Court that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services under a cabaret licence during the hours proposed. I turn now to the referral pursuant to s 24 and the notice of intervention by the Director of Liquor Licensing to which I have already referred."

It was submitted that one of the reasons for the learned judge's refusal of the cabaret licence appeared to be that the appellants could get an extended trading permit, but that was not a reason to refuse the grant when s 38 had been complied with. No reasonable tribunal should have exercised its discretion other than making the grant sought.

It was pointed out that his Honour in par 28 of his reasons had referred to the fact that the grant of a cabaret licence would result in separate parts of adjacent licensed premises trading for different hours and that the effect of this would be to permit 24 hour trading from the one building identifiable to

the public as hotel premises. His Honour had said: "That is the matter which the Director has raised in par 2(d) of his referral."

It was submitted that that was the result which he thought was neither in accordance with the scheme of the Act nor in the public interest.

Counsel for the applicants contended that his Honour had also erred by taking into account extraneous and irrelevant considerations in holding that the application should be refused because it was open to the appellants to achieve their desired objectives by obtaining an extended trading permit. It was submitted that the fact that a 12 month extended trading permit might effectively give the appellants for a year what they asked for, was not a reason for not granting the permanent cabaret licence. The discretion of the judge was governed by the scheme and the scope of the Act. There was no guarantee that an extended trading permit would be renewed from year to year, because that was a matter for a decision by the Director. Dependence on an annual decision by the Director was not sufficiently certain to justify the investment in or for carrying on the business of a cabaret.

It was further submitted that his Honour's reference to the private interest of the appellants not being served was another example of an irrelevant consideration being taken into account in the exercise of the discretion. The private interest of the appellants was not a matter specified to be taken into account under the Act.

As set out above the Director's referral notice specified one of the questions of substantial importance raised by the application as being:

> "Whether it is in the public interest for different types of class 'A' licence to be granted with respect to different parts of the same premises where ...
>
> (d) the effect of the combined licence is to permit 24 hour trading from the one building, identifiable to the public as hotel premises."

In par 28 of his reasons his Honour said:

> "For the reasons which I have given I have absolutely no doubt that such a result is neither in accordance with the scheme of this Act, nor in the public interest."

It is apparent that his Honour was applying two distinct criteria there, one being that the result was not in accordance with the scheme of the Act and a second being that it was not in the public interest.

It was further submitted that there were no grounds or reasons given by his Honour as to why such a result would not be in the public interest.

In answer to the appellants' submissions, counsel for the respondent pointed out that in nearly all of the cases where there is a cabaret licence existing in conjunction with either a hotel or a tavern licence, the situation had arisen under the previous legislation. The only exception was the Gosnells Tavern where the Gosnells Hotel and Studebaker Nightclub were co-existing. It was also the situation under the earlier Act, that in certain instances dual licensing had occurred covering areas which were not defined separate parts of the same premises as required by s 31 of the new Act. The Act in its transitional provisions had sought to rectify that situation by including cll 5(4)(b), 13(2) and 23 of Sch 1 of the new Act.

Counsel said that cl 23 enables the grant of a special facility licence to do away with the overlap where a cabaret had previously existed within a hotel. Also cl 15 of the Schedule enabled dining rooms in hotels to operate by way of extended trading instead of requiring a restaurant licence.

It was submitted that there were particular relevant factors operating when

it came to hotels because of their particular position within the licensing scheme. In the case of hotel licences, the whole of the hotel premises became the licensed premises. In other circumstances, only that part of the premises where liquor was sold and supplied was licensed. Traditionally the hotel was a separate building, although some of the newer hotels occupied parts of buildings where there was, for example, office accommodation. A ground of importance had been raised in this case. The application concerned one building identifiable to the public as hotel premises. The grant of the application would effectively excise the existing bar from the front of the Palace Hotel and redefine it as being a separate category "A" licence. In this case an additional "A" class licence would come into existence which, in his Honour's view, was clearly unnecessary in the circumstances of the case.

It was submitted that in par 24 of his reasons, the learned judge had put the application into the category of an application which was seeking a cabaret licence, not necessarily in order to produce a separate category "A" licence, but simply in order to increase the trading options of the existing hotel premises. That was what his Honour was referring to when he referred to the scheme of the Act, and the result not being in accordance with that scheme. He had categorised the application as being an application simply to increase the trading options of the existing hotel premises, because it was the applicants' view that they could not achieve that end by means of an extended trading permit, due to the fact that such permits were not in fact being granted.

Counsel pointed to his Honour's comment in par 29 of his reasons that:

> "It is quite plain from the material before me that this applicant has been constrained to make the present application in order to obtain the authority to trade, which might otherwise, and with greater flexibility, be granted by way of an extended trading permit, but which it cannot obtain because of the policy which the Director of Liquor Licensing has been instructed to apply."

It was submitted that the learned judge was saying that the aim of the applicants was simply to extend trading hours, given that his Honour had already found that there was a need for that sort of facility. But his Honour had thought that the creation of a new and separate class "A" licence under the Act was an inappropriate way of going about this.

It was submitted that the application, had it been granted, would have resulted in there being two class "A" licences within a building which was previously hotel premises. This would have created administrative problems. His Honour had thought this was contrary to the public interest, particularly if the matter could be dealt with by means of an extended trading permit.

It was contended that there was no doubt that his Honour was expressly deciding the matter as an exercise of his discretion. He had said that the application should in his opinion be refused in the public interest pursuant to s 33(1) and (2) of the Act, notwithstanding that the applicant otherwise met the requirements of the Act. Even though the applicant had in all ways met the requirements of the Act, having regard to the discretion conferred on the court, his Honour had thought that the creation of a further class "A" licence was contrary to the public interest.

It was suggested that when his Honour was referring in his reasons to "the scheme of this Act", he was referring to the Director's evidence that the scheme of the Act clearly sets out to establish that each licence category has

separate and unique trading conditions; that it was recognised that there was a need for a variety of liquor outlets; that each licence category and by definition the licensed premises to which that licence refers, "has distinct and different trading conditions imposed on it by the Act". His Honour was in effect saying that new licences should not be given out for the same set of premises where there are different responsibilities involved, if the same result could be achieved broadly by operating the existing licence, and when the reason such a result had not been achieved was because of actions by the Director, which in his Honour's view were wrong, and which had prompted the applicant not to pursue an application for an extended trading permit which the applicants' counsel had conceded would equally and more simply achieve their purpose.

It was submitted that the core question in this case was the proper exercise of the discretion pursuant to s 33 of the Act. That discretion was expressed to be absolute. In circumstances where the Act is silent as to considerations by which a decision is to be made, the discretion should be limited only by the scope and purpose of the statute: see *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 347; *O'Sullivan v Farrer* (1989) 168 CLR 210. Further, that the reference to public interest imports a discretionary value judgment, confined only insofar as the scope and purpose of the Act enable any given reason to be pronounced definitely extraneous to the objects the legislature had in view: see *O'Sullivan v Farrer* (supra) (at 216).

It was said that the court had before it material, including submissions by the appellants, that they could equally meet their purpose by an extended trading permit; that the appellants were not intending to trade for more than a portion of the permitted hours for a cabaret; and that the appellants were seeking primarily to extend trading hours for one bar of the existing premises.

It was further submitted that there had been a recognition by superior courts of the peculiar role of the Licensing Court. Although it is a court, it has its own exclusive area of jurisdiction and builds up its own knowledge and its body of principles regarding the proper regulation of the industry, which it has exclusively as its jurisdiction.

In *O'Sullivan v Farrer* (at 216) Mason CJ, Brennan, Dawson and Gaudron JJ said:

> "But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'insofar as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have in view': *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR at 505, per Dixon J. See the discussion of the expression 'in the public interest' in the context of liquor licensing legislation by Neasey J in *Re Thompson's Application; Hannaford v Fysh* [1964] Tas SR 129 at 143-144. And the subject matter to be decided, involving, as it does, the distribution and location of facilities for the supply of liquor, is one

which has traditionally been seen as permitting the exercise of a broad discretion in the decision-making process. See *Sandown Park Hotel Pty Ltd v The Queen* (1963) 109 CLR 521 at 524-525."

In this case in his reasons for judgment, his Honour said:

"... it is quite plain, in my opinion, that neither the public interest nor the private interest of this applicant will be served by the grant of an application for a new licence which is not suited to the circumstances of the case and which will result in separate parts of adjacent licensed premises trading for different hours, the effect of which will be to permit 24 hour trading from the one building identifiable to the public as hotel premises. That is the matter which the Director has raised in par 2(d) of his referral. For the reasons which I have given I have absolutely no doubt that such a result is neither in accordance with the scheme of the Act nor in the public interest. For this reason alone, I am of the opinion that notwithstanding my conclusions in relation to the evidence of the applicant under s 38, this is an application which must nevertheless be refused. It is a conclusion which I come to with no great relish but in my opinion it is the only conclusion open under this Act and according to law ..."

The Director in par 2(d) of his referral had asked:

"Whether it is in the public interest for different types of Class 'A' licences to be granted with respect to different parts of the same premises where: ... (d) the effect of the combined licence is to permit 24 hour trading from the one building, identifiable to the public as hotel premises."

In my view his Honour has found that such a result is not in accordance with the scheme of the Act, nor in the public interest.

Section 36(1) of the Act specifically provides that: "... licences may be granted in respect of defined separate parts of the same premises."

Dixon J (at 505) in the *Browning* decision (supra) said that:

"The discretion is, therefore, unconfined except insofar as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view ..."

In my opinion, his Honour did take into account a matter "definitely extraneous to any objects the legislation could have had in view". In his reasons for judgment, his Honour relied to a degree on the fact there would be "24 hour trading from the one building, identifiable to the public as hotel premises" for refusing the application. As well as being a matter "extraneous to any objects the legislation could have had in view" this consideration was contrary to the intention in s 36(1) of the Act.

Lord Denning MR in *Ward v James* [1966] 1 QB 273 at 293 said:

"This Court can and will interfere, if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought have weighed with him."

In this case in my view, his Honour did not give sufficient weight to the intention of s 36(1) that licences may be granted in respect of defined separate parts of the same premises.

For the reasons set out above, the appeal should be allowed, the decision refusing the application set aside and the matter remitted to the Licensing Court for decision according to law.

Solicitors for the appellants: *Ackland & Nowland.*

Solicitor for the respondent: State Crown Solicitor.

MRKW