[SUPREME COURT (In Banco)]

VANDELEUR and Others v DELBRA PTY LTD and LIQUOR LICENSING COMMISSIONER

King CJ, Legoe and Prior JJ

9-10 February, 13 May 1988

Liquor-Licensing — Application for a new licence — Application for s 64 certificate — Public need — Undue annoyance — Test — Condition that building approval be obtained — Whether within power — Liquor Licensing Act 1985, ss 62(2)(b) and 64.

Held: (1) On the facts, a public need had been demonstrated for a particular type of facility.

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458, applied.

(2) The test of undue annoyance under s 62(1) was what local people could reasonably be expected to tolerate in the interests of the public need for a further licence, and regard could be had to previous and alternative uses of the land and all other relevant circumstances. On the facts, the grant was unlikely to result in undue annoyance.

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207, distinguished.

(3) The condition contained in the certificate that *Building Act* 1971 approval be obtained before the licence be granted was valid. Section 62(2) requires the Licensing Court to be satisfied concerning approvals not as a prerequisite of the grant of the certificate, but as a prerequisite of the grant of the licence.

S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd (1987) 138 LSJS 1, distinguished.

APPEAL

Appeal from the Licensing Court.

J R Mansfield QC and *B F Beazley*, for the appellant.

J W Perry QC and *D G W Howard*, for the first respondent.

C M Branson, for the Liquor Licensing Commissioner.

Cur adv vult

13 May 1988

KING CJ. The respondent Delbra Pty Ltd applied to the Licensing Court for a hotel licence with respect to premises to be constructed on the corner of Kangarilla Road and Aldersey Street, McLaren Vale. The appellants are the licensees of four hotels in the McLaren Vale-Willunga locality. They objected to the grant of a licence. The Licensing Court judge granted a certificate pursuant to s 64 of the *Liquor Licensing Act* 1985 that he was satisfied that, if the premises are completed in accordance with the plans submitted by Delbra Pty Ltd, a hotel licence should be granted. The

certificate stated that it was granted on the following condition, namely that "the applicant shall produce evidence to the satisfaction of the court that the approvals, consents or exemptions referred to in section 62(2)(b) of the Act have been obtained". The appellants have appealed, by leave of a single judge of this Court, against the decision of the Licensing Court granting that certificate.

It was necessary for the applicant to prove "that, having regard to the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, the licence is necessary in order to provide for the needs of the public in that locality". The locality is a wine producing area and there are many wineries in the near vicinity of the site of the proposed premises. The area is well served with good class restaurants. There are four hotels in the locality. Clearly liquor is readily and conveniently available in the locality. The need of the public for a further liquor licence, however, is a much wider concept than the need for the supply of liquor.

> "These needs are not necessarily concerned with the mere availability of liquor. They may be concerned with matters of taste, convenience, preference for one type of facility over another, the manner in which liquor is displayed and served, and the type and standard of accompanying services."

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458 at 460.

It is obvious, of course, that the needs of the public which require the establishment of hotels, are not satisfied by the existence of wineries and restaurants. The evidence, and the description of them given by the learned Licensing Court judge, who inspected them, convey the impression that the four hotels in the locality are basic country town or suburban type hotels providing the basic bar and pub meal services expected in such hotels. The learned Licensing Court judge summed up the needs which they satisfy in the following passage in his reasons:

> "Each of the four hotels seems to have established, more by default than by design, its own market niche. The McLaren Hotel is in the commercial centre of the locality and therefore attracts much of its business from those who come to McLaren Vale to work or to avail themselves of the commercial facilities in the town. As far as its bar trade is concerned, it tends to attract the typical front bar customers who do not mind drinking in a fairly noisy, and sometimes crowded, environment. Witnesses voiced some criticism of the ambience of this hotel as well as the standard of service and quality of meals (although there were some complimentary remarks as well). The Alma Hotel seems to have particular appeal to those who are affiliated with the various sporting clubs and organisations in the area. It is also the most aggressive competitor as far as packaged liquor sales are concerned, being the only hotel which is a member of a buying group. The market niche of the Willunga Hotel is harder to determine because of the renovations that are presently being carried out. The clientele is probably in a state of flux at the moment, but this hotel seems to be attractive to younger people in the locality. It also has the potential to attract a significant number of tourists when the new dining room and

beer garden are completed. The Old Bush Inn seems to rely heavily upon a fairly small group of regular customers in an older age group."

His Honour described the proposed premises as follows:

"If this application is granted, then the premises to be constructed will be known as the Southern Vales tavern. They will comprise a public bar designed to accommodate forty to fifty people, a lounge bar for forty to fifty people, a dining room to accommodate forty to fifty diners, a courtyard area for about forty people and a reception room for about eighty people, together with the usual service areas and conveniences. There would be a drive-in bottle department and a walk-in bottle shop with large displays and a comprehensive range of wines — particularly those from the many wineries in the area. Offstreet parking would be available for eighty cars, and there would be four serviced accommodation units separate from the main premises.

The proposed premises have been very cleverly designed so as to nestle into the hillside on the site, with the second of the two storeys at ground level at the rear of the premises and that second storey being accessible also from the front of the premises by a stairway which would rise through a large landscaped mound at the front of the premises and over the drive-in bottle department. The premises would be constructed in Australian colonial style with a large verandah on all four sides. Weather permitting, the verandah at the front (on the second level, accessible from the lounge and dining room) would accommodate additional patrons and would provide a splendid view over the Southern Vales. Apart from the car park area, the premises would present themselves to the casual passerby more as a large colonial house than a hotel. The layout of the main building is designed so as to make effective use of the relatively small area occupied by it, and the positioning of all the facilities and conveniences relative to one another seems to me to be highly efficient.

All in all, I am satisfied that the premises would be of an extremely high standard. They would certainly be more than adequate for the purpose of properly carrying on business as a hotel."

His Honour's conclusions on the question of need are expressed in the following passage:

"The evidence satisfies me that there is a need within the locality for modern bar facilities, tastefully decorated without being garishly modern, and for premises in which a front bar and a lounge bar are clearly separated. There is also a need for an establishment which, in conjunction with bar facilities, provides quality meals at reasonable prices, with an emphasis on food which is different from the food commonly provided in hotel dining rooms (mixed grill, fish and chips, weiner schnitzel etc). The expression 'up market' was used quite often as a description of the facilities that the applicant's 'need' witnesses were looking for.

There is also a need in the locality for an outlet for the purchase of packaged liquor which provides an extensive range of liquor, particularly local wines, in premises more like a modern liquor store than a hotel bottle shop. This is particularly attractive to tourists who like to 'browse around' rather than simply be supplied over the bar or the

bottle shop counter with whatever they may specifically request. None of the hotels in the locality provide a facility of the kind I have described.

It seems to me that the locality prides itself on its 'country' atmosphere and characteristics although, at the same time, expects to have facilities available to it which are comparable to those available to residents of the metropolitan area. The rapidly expanding residential areas of Hackham and Hackham West (approximately 8 kilometres from McLaren Vale) are now virtually part of the metropolitan area of Adelaide and they are only just outside the locality to which I have referred. Residents in, and visitors to, the locality therefore expect to be able to purchase liquor at prices similar to those available in the metropolitan area, particularly now that there is heavy discounting in Mount Compass, which is approximately 14 kilometres south of McLaren Vale. I do not consider that the prices charged by the hotels within the locality are excessive, particularly now that the Alma Hotel has joined the Liquor Mate chain. However, there is certainly a demand for liquor to be available at prices less than those presently charged by the Hotel McLaren.

On the whole of the evidence, I find that, having regard to the availability of liquor within the locality, and to the reasonable demands by contemporary standards of members of the public, the needs of the public are not sufficiently and reasonably met by the licensed premises existing within the locality. I therefore find that the applicant has satisfied the requirements of s 63(1) of the Act and that the objectors have not made out the ground of objection set out in s 85(4)(b)."

Mr Mansfield QC, who appeared for the appellants attacked these conclusions and contended that the evidence was insufficient to establish that the licence was necessary to meet the needs of the public. It seems to me, however, that the evidence did identify needs of the local residents and visitors to the locality which are not met by the existing licensed facilities. The unmet area of need is described by the learned judge in the passage which I have quoted and its existence satisfies the requirements of s 63(1).

The applicant was required to satisfy the Licensing Court "that the grant of the licence is unlikely to result in undue offence, annoyance, disturbance or inconvenience to those who reside, work or worship in the vicinity of the licensed premises". One of the grounds of objection was that such undue offence, annoyance, disturbance or inconvenience would be caused. In dealing with this issue, the learned Licensing Court judge applied the test which was approved in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207. That case was concerned with s 86d of the *Licensing Act* 1967 the corresponding provision in the *Liquor Licensing Act* 1985 being s 114, and the Licensing Court judge pointed out that "any resident who lives nearby an hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises", and also certain other causes of annoyance, disturbance and inconvenience. Those provisions are designed to protect persons who reside, work or worship near the licensed premises from offence, annoyance, disturbance or inconvenience which exceeds the degree reasonably to be expected from the licensed premises. I do not think that that test can

properly be applied to the issue which arises under s 62(1)(b). Section 114 deals with a situation in which licensed premises already exist and have a right to continue in existence. Clearly the remedies contained in s 114 cannot be availed of where the noise or behaviour does not exceed what is to be reasonably expected from the conduct of licensed premises of the particular class. Those remedies can only be available where the noise or behaviour goes beyond what is naturally to be expected and where the consequent offence, annoyance, disturbance or inconvenience exceeds what those who reside, work or worship nearby can reasonably be expected to tolerate. The question under s 62(1)(b), however, arises at a stage at which no licence has been granted. Those who reside, work or worship nearby are not faced with the exigencies arising from the existence of licensed premises having a right to continue to exist. The question is whether the licence should be granted at all. The test of what is undue therefore is not concerned with excess over what will naturally result from the conduct of licensed premises but with what those who reside, work or worship in the vicinity can reasonably be expected to tolerate in the interests of the need of the community for a further licence of the type contemplated. It is not difficult to conceive of circumstances in which hotel premises, no matter how conducted, would result in offence, annoyance, disturbance or inconvenience to nearby residents, workers or worshippers of such a degree as to be properly characterised as undue. It is true, of course, that licensed premises, particularly hotel premises, will usually produce some degree of inconvenience to nearby residents and perhaps to nearby workers and worshippers. It will often be necessary to expect such persons to tolerate a degree of disturbance or inconvenience, even annoyance or offence, in the interests of the community's needs for licensed premises. Whether such offence, annoyance, disturbance or inconvenience can be regarded as undue will be a matter of degree and will depend upon the circumstances. The question cannot be judged, however, in the same way as the question whether existing licensed premises are causing undue offence, annoyance, disturbance or inconvenience.

The proposed site is located in a substantially non-residential part of the town. There is, however, one dwelling situated immediately adjacent to the proposed site. The occupier of that dwelling gave evidence of his concern about the disturbance to his way of life which would result from an hotel on the site. He also gave evidence of fears that the value of his house would diminish, but there was no solid evidence to support those fears. The proprietor of an adjacent service station gave evidence of his concern about obstruction and noise from traffic and nuisance from broken glass. I think, however, that the argument for the appellants on this point rested primarily upon the existence of a church directly across the road from the proposed site. It is a Lutheran Church. Services are conducted each Sunday between 9 am and 10 am. There is Sunday School each Sunday between 10 am and 11 am. There are evening church services on about six occasions a year and there are occasional weddings. There are other activities on the church premises on evenings during the week, such as youth group meetings, table tennis activities and wedding receptions. The protection afforded by s 114 is to those who worship in the vicinity and I think that it is afforded to them in their character as worshippers. The protection certainly extends to those

attending church services and Sunday School classes. I think that it is reasonable to regard it as extending to persons attending meetings and other gatherings on the church premises which are directly associated with or incidental to the work of the church for the activities of its members in their capacity as a worshipping community. I do not think that it can extend to purely social activities carried on on the church premises, even by members of the church community. I do not think that those participating in wedding receptions or table tennis activities and, still less, the occasional discotheque night, can be regarded as attending the church premises in their capacity as worshippers. There seems to be no risk of any impact upon actual worship at the church from the activities of the hotel. An hotel is not authorised to open until 11 am on Sunday: s 26. There is a temporary arrangement by which the local Uniting Church uses the church for a service between 11 am and 12 noon. That is a purely temporary arrangement. I cannot think that there would be sufficient activity in a hotel between 11 am and 12 noon on a Sunday to cause any problem to those worshipping in the church. The other occasions upon which the church is used for worship are too infrequent to cause concern. The objections of the service station proprietor seem to me to be rather nebulous and unconvincing. I feel sympathy for the nearby resident. He will undoubtedly suffer some disturbance and inconvenience and conceivably some annoyance and even offence. But severe restrictions have been placed upon the conduct of the premises as conditions of the planning approval and these will greatly limit the amount of noise and inconvenience emanating from the premises. I do not think that the natural, and perhaps unnecessary, concern of one resident and his family could justify the refusal of a hotel licence which is justified as necessary to meet the needs of the public.

The question of the effect of the grant of a licence upon those residing, working or worshipping nearby must be taken seriously by the Licensing Court. The judge stated his conception of the court's responsibility in this regard in the following passage:

> "I think it is significant that s 62(2)(a) requires the applicant to prove that planning approval has been obtained and s 62(1)(b) refers to undue offence etc resulting from *the grant of the licence.* This Court is not assumed to have any particular expertise in relation to parking, traffic engineering, noise control and the like, but it is assumed to know something of the particular problems, or potential problems, associated with licensed premises. Therefore it seems to me that I may assume that the potential for offence, annoyance, disturbance and inconvenience has, in a general sense, been considered already by the relevant planning authorities, and that I should concern myself only with factors that are peculiar to 'the grant of the licence'. In other words, I approach s 62(1)(b) on the basis that any potential offence, annoyance, disturbance or inconvenience must be attributable to the fact that the premises will be used as a hotel. Without discounting it altogether, I place little reliance on the evidence of persons who would have had the same objection to any other use of the premises that would involve similar numbers of people. Much of the evidence of Mr Nottage, and some of the evidence of Mr Ekert, falls into this category. I note also that some concerns originally expressed by the Southern Districts War Memorial

Hospital about the proposed hotel were satisfied by the conditions attached to the planning approval, which provides some support for the view I have expressed regarding the relationship between planning approval and the factors referred to in s 62(1)(b). Once the hospital's concerns about noise, traffic and parking were satisfied, no further objection was made to the use of the premises as a hotel."

I think that that passage states the responsibility of the court too narrowly. The court is not concerned only with such additional impact as the proposed premises might have over other uses of the land by reason of their being licensed premises. The grant of the licence will cause premises to come into existence which would not otherwise be there and all effects on those nearby resulting from the new use of the land must be considered. In considering what is "undue" the court is entitled to have regard to the previous use of the land and as to likely alternative uses if the licence is refused. As to the latter, relevant considerations may include zoning requirements and the fact that there has been planning approval for the licensed premises. The court is not entitled, however, to abdicate the function of determining the effect of any of the consequences of the grant of a licence simply because those consequences may have been considered by the planning authority.

Notwithstanding the unduly narrow statement of the court's responsibility, I consider that the learned judge reached the correct conclusion. This land was previously used as a transport depot and, by reason of its location, would be likely to be used for some commercial purpose even if the licence were refused. Possibly those attending the church, the service station proprietor and the nearby resident will all feel some impact from the presence of the hotel, but I think the learned Licensing Court judge was right to hold that the grant of the licence is unlikely to result in offence, annoyance, disturbance or inconvenience to them which is undue.

The premises proposed to be constructed require, of course, the approval of the council under the *Building Act* 1971. Subsection (2) of s 62 of the Act is as follows:

"(2) An application for the grant of a licence (not being a limited licence) in respect of premises or proposed premises shall not be granted unless the licensing authority is satisfied—

(a) that any approvals, consents or exemptions that are required under the law relating to planning to permit the use of the premises or proposed premises for the sale of liquor have been obtained;

and

(b) that any approvals, consents or exemptions that are required by law for the carrying out of building work that is to be carried out before the licence takes effect have been obtained."

The *Building Act* approval had not been obtained at the time of the grant of the certificate under s 64. Section 64 is as follows:

"(1) Where—

(a) an application is made for a licence in respect of premises that are, at the date of the application, uncompleted;

and

(b) the licensing authority is satisfied that, if the premises are completed in accordance with the plans submitted by the

applicant, a licence of the class sought in the application should be granted to the applicant in respect of those premises,

the licensing authority may grant the applicant a certificate stating that it is so satisfied.

(2) A certificate under subsection (1)—

(a) may be granted on such conditions as the licensing authority thinks fit;

and

(b) may include a statement of conditions to which, in the opinion of the licensing authority, the license should be subject.

(3) Where—

(a) a certificate has been granted under subsection (1);

and

(b) the holder of the certificate satisfies the licensing authority—

(i) that the conditions (if any) on which the certificate was granted have been complied with;

and

(ii) that the premises have been completed in accordance with plans approved by the licensing authority,

a licence of the class specified in the certificate shall be granted to the holder of the certificate in respect of the premises.

(4) On the grant of a licence under subsection (3), the conditions (if any) stated in the certificate under subsection (2)(b) shall become conditions of the licence.

(5) A certificate under this section shall, for the purposes of the provisions of this Act relating to the transfer of a licence, be deemed to be a licence."

The certificate contains a condition requiring proof that the *Building Act* approval has been obtained before the licence is granted. Mr Mansfield contended that there was no power to grant the certificate subject to such a condition and that the certificate could not be lawfully granted unless the court was satisfied that the *Building Act* approval had been obtained.

Mr Mansfield placed reliance upon the decision of the Full Court in *S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd* (1987) 138 LSJS 1. In that case the Licensing Court judge granted the certificate subject to a condition that before the licence was granted the court should be satisfied by evidence at a hearing at which the objectors should have the right to be represented, that "at the time of the grant that the arrangements made for telecasts are such as to justify what I see now as the need for flexibility of hours — probably 'on any day at any time but excluding Christmas Day and Good Friday'". The condition therefore amounted to requiring further evidence as to need. The court held that the certificate was invalid. Johnston J, who delivered the principal judgment, said:

> "But in my view it is absolutely clear that it cannot be a condition of the granting of the certificate that the applicant come back and establish the matters which are required to be established in respect of the type of licence under consideration."

Jacobs J put the matter somewhat differently. He said:

> "In short, the grant of the certificate presupposes a state of satisfaction. True it is that subs (2)(a) contemplates that a certificate

> may be granted 'on such conditions as the licensing authority thinks fit'. That entitles the authority to say that its state of satisfaction upon which the certificate is granted is conditional upon compliance with conditions (a), (b) and (c) — as the case may be — so that the applicant knows what has to be done in order to sustain the state of satisfaction. There is then no uncertainty about the state of satisfaction. Where, however, the state of satisfaction is itself uncertain, and depends upon further evidence to be adduced in support of the application, which may or may not satisfy the authority that a licence of the class sought should be granted, that cannot in any relevant sense be a 'conditional' state of satisfaction upon which the grant of the certificate depends; but that is precisely the kind of 'condition' which counsel for the respondent sought to write into the present 'unconditional' certificate, which (he conceded) could not stand. It is, quite simply, not a 'condition' in terms of the statute."

It seems to me that the decision in that case must be understood in the light of the condition which was there sought to be imposed. It is clear from s 64(1)(b) that the certificate cannot be granted until the court is satisfied that the licence should be granted, subject only to completion in accordance with the plans and to compliance with conditions properly imposed. I think that *S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd* (supra) establishes that a court must be satisfied about all debatable issues before the certificate is granted. It must therefore be satisfied about the matters specified in ss 61, 62(1) and 63. These sections all require the applicant for a licence to satisfy the licensing authority of the matters specified therein. They are all matters about which there might be debate and about which a court might be satisfied or not satisfied according to the weight of the evidence. To my mind s 62(2) stands quite differently. It deals with approvals, consents or exemptions, the existence of which are capable of ready ascertainment and which could not give rise to debate. They can quite reasonably and sensibly be made the subject of conditions. Moreover, s 62(2) does not require the applicant to satisfy the licensing authority. Its language is quite different. It provides that "an application for the grant of a licence ... shall not be granted unless the licensing authority is satisfied" that the approvals, consents or exemptions have been obtained. Unlike the other provisions referred to, this provision expressly relates the satisfaction of the licensing authority to the granting of "an application for the grant of a licence". The grant of the certificate under s 64(2) is clearly not the grant of "the application for the grant of a licence". When the application for the grant of a licence is granted, the licence is necessarily ipso facto granted. Section 64 expressly distinguishes the grant of the licence from the grant of the certificate. Where a certificate has been granted, the grant of the licence comes at a later stage at which the holder of the certificate is required to satisfy the licensing authority that the conditions have been complied with and that the premises have been completed in accordance with the plans approved by the licensing authority.

Section 62(2) requires the licensing authority to be satisfied concerning the approvals, consents or exemptions, not as a prerequisite of the grant of the certificate, but as a prerequisite of the grant of the licence. I see no justification for requiring the Licensing Court to be so satisfied before

granting the certificate. The statute, as it seems to me, leaves it open to the Licensing Court to require to be so satisfied if it thinks proper. I should think that in many cases, perhaps the general run of cases, will so require. There may be cases, however, in which it is expedient to grant the certificate before the applicant is put to the trouble and expense involved in obtaining a particular approval, consent or exemption. It may be convenient for the Licensing Court in such a case to grant the certificate upon condition that the approval, consent or exemption is obtained. No limit is placed by s 64(2) on the nature of the conditions which may be imposed. Conditions which implied that the authority was not in reality satisfied that the licence should be granted upon the premises being completed in accordance with the plans, would clearly be unauthorised and that is the effect of the decision in *S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd* (supra). There is, however, no such implication in the imposition of a condition that a *Building Act* approval be obtained, and to hold that a certificate containing such a condition is valid does no violence to the decision in the case just cited.

Upon being satisfied of the matters concerning which it is required to be satisfied for the grant of the licence, the Licensing Court is then required to consider how it should exercise the discretion conferred upon it by s 59(1). That subsection is as follows:

> "Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers sufficient."

The existence of this discretion enables the Licensing Court to refuse a licence notwithstanding that the matters required to be proved have all been made out. The court is thus enabled by the exercise of an unqualified discretion, to fashion the licensing system to meet the needs of the community and to minimise the undesirable social consequences which are thought to result from the unregulated supply of liquor. One of the important matters to be considered in the exercise of the discretion is the effect which the grant of a licence will have upon existing licensed premises. If licensed premises are to supply their services in an orderly and dignified way and to the satisfaction of the public, they must be conducted at a profit. If the grant of an additional licence will have the effect of undermining the necessary profitability of other licensed premises, the satisfaction of a particular public need may have disproportionately undesirable consequences. It was argued in the present case that that would be the effect of the grant of the present application.

The discretion granted by s 59(1) is conferred upon the Licensing Court. That Court's exercise of the discretion is to be overturned by this Court on appeal only in accordance with the well-established principles regulating the review by appellate courts of the exercise of discretions. There is particular reason for caution when the discretion is conferred upon a specialist tribunal having a special responsibility in relation to the liquor licensing structure. It has not been suggested that the learned judge misunderstood the law governing the exercise of the discretion, nor has any error of fact been identified. The arguments put before us rather suggested that the learned judge had failed to give sufficient weight to certain factors or had taken

erroneous views of matters which are very much matters of opinion. His Honour gave careful consideration to the economic impact of the grant of the new licence upon the existing hotels. He appreciated that the impact would be serious if there were no increase in the business available to licensed premises in the locality. There was evidence, however, from which he could infer some continuing growth of the population in the area and an increase in tourist activity. There was also evidence from which he could infer that the new facility would produce its own clientele which would not necessarily be a clientele already enjoyed by the existing facilities. He recognised that the balancing exercise involved in the discretion was a difficult one in the present case. He exercised his discretion in favour of the grant of the licence. I am unable to see that he failed to take into account any relevant consideration or took into account any extraneous consideration. There being no error of law or fact, there would therefore be no basis upon which this Court could interfere with the exercise of the discretion.

All the grounds of appeal therefore fail and, in my opinion, the appeal should be dismissed.

LEGOE J. The relevant facts and issues are set out in the reasons of the learned Chief Justice, which I have studied and need not repeat. As counsel for the appellant and the Liquor Licensing Commissioner were putting similar submissions as to the first two grounds of appeal I add some comments of my own in agreement with my brethren that these grounds should be rejected as well as the others.

Counsel submitted the Licensing Court judge was wrong in law in holding that he had the power to issue a certificate under s 64 when no *Building Act* 1971 approval had been obtained for the structure to be erected as a licensed premises.

Counsel for the Liquor Licensing Commissioner submitted:

(i) If the premises are incompleted then no licence can be granted.

(ii) The best that an applicant can obtain if the premises are incompleted is a certificate.

(iii) Division III, Pt IV of the *Liquor Licensing Act* 1985 contemplates the obtaining of a new licence, and intends to provide for just that.

(iv) The certificate is a creature of that Division of the Act and cannot lead to a licence until the building work is finished: cf s 64(3) of the Act.

So on both submissions *Building Act* approval is a pre-condition to the granting of a licence, and on a plain reading of s 62(2)(b) and s 64(1)(b) in the context of Div III, Pt IV of the Act such approval is a pre-condition to the exercise of any discretion to grant a certificate to the applicant under s 64(1).

Counsel for the appellant contended that *S & A D Basheer Nominees Pty Ltd v Hurley's Tea Tree Gully Pty Ltd* (1987) 138 LSJS 1 supported the propositions of law based on the interpretation of s 62(2)(b) and s 64(1) which he advanced. In that case the Full Court (Jacobs, Millhouse and Johnston JJ) allowed the appeal, and set aside the grant of a general facilities licence. In doing so the court said that the certificate granted under s 64 was defective. Counsel for the appellant in that case had argued that the Licensing Court judge had misused s 64. That section, said counsel, only entitled an applicant to prove that any conditions on the certificate had been met, and the premises completed in accordance with the plans.

Johnston J (at 11) agreed with counsel for the appellant and added:

> "In my view s 64 is intended to provide a means whereby intending applicants can avoid the waste, both private and social, of erecting, fitting out, decorating, altering or refurbishing premises without any guarantee that the desired or any licence will be granted in respect of the premises when all this work has been done. The new Act carries on the provision in the old Act for what has come to be called the judicial promise. The authority which gives the judicial certificate (promise) is required to lay down what conditions, if any, apply to the certificate, and what conditions, if any, are to apply to the licence when finally issued. The conditions which might be applied to the promise itself (as opposed to the licence) might be fairly wide-ranging (the most obvious being some alteration to the plan as lodged)."

In setting aside the certificate (with the conditions) Johnston J said (at 20):

> "1. The judge was in error in making the judicial promise even if the concept was one which could justify the issue of the licence claimed since it had not been demonstrated that the applicant was able to achieve the concept."

His Honour goes on to give further particular reasons why the conditions attached to the certificate were impossible for that applicant to achieve and therefore invalid and defective as a certificate.

In my judgment the discretion to grant a certificate (as provided in s 64 of the Act) is subject to the conditions in subs (1) of s 64 namely: (a) the premises at the date of application are *incompleted*, and, (b) (at the time of the hearing of the application) the licensing authority being satisfied that "*if* the premises are completed in accordance with the plans submitted by the applicant, a licence of a class sought in the application should be granted to the applicant in respect of *those premises* . . .".

I am satisfied there was evidence upon which the Licensing Court judge could exercise his discretion under s 64 in this case and upon which he could be satisfied as to the matters provided for in s 64(1)(b). I have reached this conclusion without necessarily agreeing with the Licensing Court judge when he said that s 62(2) is directed not to the time at which the application is initially heard (at which time the requirement of s 62(1) and s 63 must be satisfied) but at the time at which the licence is granted under s 64(3) to the holder of the certificate. I accept and in my opinion I consider that it is relevant to the court hearing the application to be satisfied about the matters provided for in s 64(1)(b) at the time of the hearing of the application. But that being so I still consider that the *Building Act* approval required by s 62(2)(b) of the Act is not a pre-condition or a condition at all for exercising the discretion to grant a certificate under s 64(1).

The *Basheer* decision (supra), deals with conditions to be attached to the certificate (which may be wide as Johnston J said at 12 of the reasons) and conditions to be attached to the licence, which are quite separate as Johnston J was at pains to point out in the passage I have quoted above. *Building Act* approval is conditional before the builder can commence a building (as provided in that Act). A s 64 certificate is a so-called judicial promise, which is satisfied when the premises "are completed in accordance with the plans . . .": s 64(1) of the Act. It is not a promise of approval under the *Building Act*. Likewise *Building Act* approval is not a pre-condition to

the granting of a certificate under s 64 of the *Liquor Licensing Act*. I would reject the submissions put by counsel for setting aside the certificate in this case.

I have nothing to add to the reasons and conclusions of the learned Chief Justice in relation to all other grounds of appeal.

The appeal should be dismissed.

PRIOR J. I agree that the appeal be dismissed for the reasons published by the Chief Justice.

Solicitors for the appellant: *Poveys*.

Solicitors for the first respondent: *Wallmans*.

Solicitor for the Liquor Licensing Commissioner: Crown Solicitor.

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