

Re: Dunsborough Districts Country Club Inc [1982] WAR 321
Free Lanka Insurance Co Ltd v Ranasinghe [1964] AC 541
JR Exports v Australian Trade Commission 71 ALR 717
Mathieson v Burton (1970) 124 CLR 1
Maxwell v Murphy (1957) 96 CLR 261
Winter v The Ministry of Transport (1972) NZLR 539
Yrttiaho v Public Curator (1971) 125 CLR 228

WALLACE J

This is an appeal from a decision of the Liquor Licensing Court dismissing the appellant's application for a transfer of a liquor store licence from the respondent. The store in question is situated at 367 Canning Highway, Palmyra. The licence, originally a gallon licence, has existed since 2 March 1949. By a deed of lease dated 3 August 1983, the premises upon which the licence was conducted were leased to Gordon Matheson Pty Ltd for a term of three years commencing on 1 April 1983. The lease contained an option of renewal which was exercised, the term thus expiring on 31 March 1989. Special covenants contained in that lease provided that, *inter alia*, the lessee held the liquor store licence as lessee and not as owner, not without the consent in writing of the lessor to transfer the licence of the demised premises to any other premises and finally within one month of the expiration of the lease, at the request of the lessor, to procure the signature of the holder of the licence upon three blank forms of notice of application for transfer of such licence and deliver them to the lessor.

On 29 March 1988, Gordon Matheson Pty Ltd assigned its interest in the renewed term of the lease of the licensed

premises from 26 September 1987 to the respondent. The deed of assignment, evidencing this transaction, contained covenants providing for the delivery of five blank forms of transfer under the Liquor Act 1962 and amendments duly executed under seal by the authorised signatories of the assignee in its capacity as licence holder of the store licence issued in respect of the leased premises and "such forms shall thereupon be held by the lessor in escrow pending the expiration or earlier determination of the term of the said lease." The assignee of the lease further covenanted to hold the liquor store licence in respect of the demised premises as lessee and not as owner and "otherwise in all respects as a trustee upon trust for the lessors herein and at the expiration or sooner determination of the said lease to transfer the licence to the lessor free of charge."

On 24 November 1987, Gordon Matheson Pty Ltd transferred to the respondent, the store licence in respect of the assigned premises. The forms of application for transfer of licence under the Liquor Act 1970, s 85, in blank duly executed by the respondent and bearing the words "I consent to this transfer" were conveyed to the appellant when on 31 March 1988 the then registered proprietors of the premises transferred their interest in the land to J K Corporation Pty Ltd, a related company to the appellant, the directors and shareholders of each company being identical.

On 5 December 1988 the blank transfers were dated and lodged with the Director of Liquor Licensing on 13 December 1988 accompanied by a letter from the solicitors for J K Corporation Pty Ltd and the appellant wherein attention was drawn to the special covenants contained within the relevant lease and deed of assignment to which I have already referred and permission was sought for the transfer to be granted from a future date "conditional upon our client's company being in possession of the premises on the expiry of the lease, namely on or around 31 March 1988." The date was an obvious error and should have read 31 March 1989. The application for transfer of licence was advertised in a local newspaper on 15 December 1988. A copy of that advertisement was forwarded to the Director of Liquor Licensing.

On 23 December 1988 the respondent's solicitors advised J K Corporation Pty Ltd and the Director of Liquor Licensing that the transfer documents lodged with the lessor were held in escrow pending the expiration or earlier determination of the relevant lease, that the respondent's right to occupy the leased premises had not expired, as was the case, until at least 31 March 1989 and that the respondent had exercised a statutory option under the Commercial Tenancy (Retail Agreements) Act to extend the term until 25 September 1992. Litigation then commenced between J K Corporation Pty Ltd and the respondent which was not determined until 6 October 1989. On 9 October 1989 the Supreme Court granted J K Corporation

Pty Ltd possession of the premises from Wednesday, 11 October 1989 at 8:30 pm.

On 12 October 1989 the Director, by his delegate, Mr A J Secker, heard the application for transfer by the appellant and on 16 October 1989 refused that application. The next step was for the learned Judge of the Liquor Licensing Court to review the decision of the Director of Liquor Licensing. On 15 December 1989 his Honour delivered extended reasons for reaching the opinion that the application for transfer should be refused. This appeal is brought under s 28 of the Liquor Licensing Act 1988 because, it is said, it involves a question of law.

The grounds evidencing that question of law contend that the Liquor Licensing Court erred in law in holding:

- "1 (a) that exhibits 36 and 37, being the lease and assignment of lease contracts respectively, do not require Dileum Pty Ltd to assign its right to carry on business under the licence to Jericho Nominees Pty Ltd; and
- (b) that exhibit 23, the application for transfer, was not an application which was made pursuant to a contract for the assignment of the right of Dileum Pty Ltd to carry on business under the licence,

and should have held that the application was made pursuant to a contract for assignment of the right to carry on business under the licence;

- 2 The Court erred in law in failing to find that Jericho Nominees Pty Ltd was a person who under Section 86 of the Liquor Licensing Act 1988 ("the Act") had a right to carry on business under a licence.

- (2a) The Court erred in law in finding that the application was not made by a person who may be granted a protection order under Section 87(1)(b).

3 The Court erred in law -

- (a) in holding that nothing advanced on behalf of the Applicant demonstrated facts or considerations which call for the exercise of the discretion to grant the application in the public interest in that the Court failed to take into account the uncontradicted evidence of Messrs Griffiths and McInness and the public interest McInness described in that evidence;
- (b) in holding that there was nothing in the circumstances of the case which demonstrated any 'collision' between the private right and public interest calling for the exercise by the Court of its discretion in the public interest in that:-
- (i) the new Act does not require there to be such a 'collision' in order for the discretion to be exercised, and
 - (ii) the uncontradicted evidence of Messrs Griffiths and McInness was before the Court which was sufficient to justify the exercise of the discretion to grant approval of the application in the public interest.
- (c) in failing to exercise its discretion to grant leave under Section 84(i)(c) of the new Act;

4 The Court erred in law in determining the application in accordance with the provisions of the new Act and not in accordance with the provisions of the Liquor Act 1970 and its amendments in that the Court ignored or improperly applied the transitional provisions of the new Act and improperly applied the provisions of the Act by giving the new Act retrospective effect."

The problem which the appellant has with ground 1 is that on 1 February 1989, that is two months prior to the expiration of the respondent's assigned lease term, the Liquor Licensing Act 1988 commenced to operate. Section 177 of the new Act and Schedule 1 provide the relevant transitional provisions in cl 3(2):

"If, on the appointed day, an application (not being an application for a licence or permit) had been made under a provision of the repealed Act but had not been determined and the decision had not been reserved, the proceedings based on the application may be continued and completed as if the application were an application under this Act in so far as a corresponding provision is contained in this Act."

and cl 16 relating to Store Licences which provides:

"(1) A store licence that was in force under the repealed Act immediately before the appointed day shall, on that day, become a liquor store licence under this Act."

Section 82 of the Act provides the jurisdiction for transfer of a licence. Thereby, an application to the Director for approval to the transfer of a licence shall be made by the person wishing to hold the licence after the transfer. Section 84 of the Act relating to applications for approval to a transfer is completely new and is said to contain the policy of the Act. Thereby:

"(1) The Director shall not grant an application for approval of the transfer of the licence in relation to any premises unless the application is made -

- (a) pursuant to a contract for the sale or assignment of the right of the licensee to carry on business under the licence, the licensee consenting to the application;

(b) by a person who -

(i) has under section 86 a right to carry on the business of the licensee; or

(ii) may, under section 87, be granted a protection order;

or

(c) with leave of the Director,

but where the Director is satisfied that a licensee can not be found or has unreasonably or capriciously refused to consent the requirement for that consent may be waived.

(2) A licensee shall not purport to sell or assign the right to carry on business under the licence or to sell or assign the licence itself unless -

(a) the contract of sale or assignment is subject to a condition precedent under which the prior approval by the Director of the proposed transfer of the licence is a prerequisite to the contract taking effect; or

(b) the Director has approved the proposed transfer." (my emphasis)

It is as a result of the learned Judge's understanding of the legislation that the applicant failed to prove the existence of the conditions set out in the above section. It is, of course, a piece of social engineering, as the answer to a question posed to the relevant Minister on 26 October 1988 reveals:

"All licences are granted to the person who occupies the licensed premises and owns and runs the business. The licensee has a lease and that lease expires, the licensee and the landlord can agree to a transfer of the licence to the landlord or to someone else. If they do not agree, neither the tenant nor the landlord obtains the licence. That is the situation which prevents what the Leader of the Opposition outlined from happening."

The situation to which the Minister referred was that which existed where a lessee had built up a very good business and the owner of the premises refused to renew the lease.

It seems to me, therefore, that upon the repeal of the old legislation, s 176, the transitional provisions to which I have referred preclude the operation of the old Act as the appellant argues because of the contrary intention therein expressed - so as to exclude the common law presumption enshrined in s 37 of the Interpretation Act. I turn therefore to s 84 of the Act.

Here senior counsel for the appellant has argued that the Liquor Licensing Court Judge should have found that the application for transfer was made "pursuant to a contract for the sale or assignment of the right of the licensee to carry on business under the licence, the licensee consenting to the application." The special covenants contained in the lease and assignment together with the printed consent evidenced by the seal of the respondent upon the blank transfer forms are said to satisfy this condition. The special covenant in the lease relating to the transfer of the licence to the lessor at the termination of the lease provided the transfer or assignment of the right to the goodwill of the business, namely the benefit of customers resorting thereto. In other words, "the business" had been assigned.

I am quite unable to agree with this argument. Section 84(1)(a) provides that the contract must be for the sale or the assignment of the right of the licensee to carry

on business under the licence. The business was never that of the appellant but that of the respondent who owned the plant, fittings and stock and to whom the goodwill adhered. By s 116 of the Act a licence shall vest personally in the licensee to whom it was granted, and is not capable of being -

- "(a) made subject to, or used as security for, any lien charge or other adverse interest; or
- (b) vested in any other person, except in accordance with this Act."

By s 184(b) the appellant had no right to carry on the business arising under s 86 of the Act because of the death of the licensee, bankruptcy or other disability or event referred to in that section. Nor was leave of the Director of the Licensing Authority sought or granted, s 84((1)(c). This is not a case where the statute has interfered with the contractual rights of lessor and lessee.

The argument that the special conditions contained in the lease and deed of assignment should govern the position because of the contention that the liquor store licence was held in trust, is defeated by the provisions of ss 119(4), 123(4) and 124(1) of the old Act and certainly by ss 116 and 104 of the Act. The contract referred to in s 84(1)(a) must be for the sale or assignment of the right of the licensee to carry on business under the licence. No such contract exists. The special covenants contained within the lease and assignment do not contain express provision relating to the sale or assignment to the appellant of the respondent's right

to carry on business under the licence. In other words, an agreement to transfer a licence does not imply an agreement to transfer the right to carry on the business the subject of that licence. They are clearly two different concepts.

Insofar as ground 2 is concerned, the events contemplated by s 86 of the Act, ie death of an individual licensee, bankruptcy, the licensee becoming permanently disabled or a receiver, manager or liquidator appointed, have not occurred. Accordingly, therefore, no protection order for the premises to which the liquor store licence was applicable could have been granted, s 87(1)(a) and (b), which covers ground 2A.

Ground 3 relates to the private rights of the directors and shareholders of the appellant arising out of the circumstances of their purchase of the real estate involved. The affidavit therein would suggest that the appellant had paid a very substantial amount of money to the vendors of the real estate in consideration of the acquisition of the respondent's business. That so called private right was acquired prior to the operation of the Act. Thus, it is argued, that the appellant was entitled to a transfer of the store licence to which the respondent had consented because the Director should have granted leave for that purpose pursuant to s 84(1)(c). No application for leave had been sought by the appellant and in my opinion, the operation of the section would only have permitted leave to be granted within the policy of the Act, ie ss 82 and 33 which confers

an absolute discretion upon the Licensing Authority for any reason that that Authority considers in the public interest. Once the policy of the statute is understood, there can be no collision between the private and public interest.

Finally, as to ground 4, the old Act can never have been applicable. The first date upon which vacant possession of the premises occurred was 1 April 1989, two months after the new Act was proclaimed. The appellant never had a right which was capable of being exercised prior to 1 February 1989.

For these reasons I would dismiss this appeal.

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

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V.

REASONS FOR JUDGMENT

Judgment delivered on

the opposite effect and an appeal by the respondent against that decision was rejected in October 1989 and the Supreme Court granted the appellant an order for possession of the premises effective from Wednesday 11th October 1989.

In the meantime the Liquor Licensing Act 1988 came into force on the 1st February 1989 and that repealed the Liquor Act 1970 and Amendments.

Pursuant to the provisions of s.89 of the Liquor Licensing Act (the new Act) the appellants sought and obtained from the Director a protection order.

By s.3 of the new Act, unless the contrary intention appears, protection order "means an order made under s.87". Unless s.89 is to be meaningless the only protection order available is one that is made under s.87.

Section 89 is in the following terms:

" Where in relation to any premises a dispute arises as between the owner or lessor and a licensee or former licensee as to the terms of any lease under which the licensee carries on or the former licensee carried on business, or as to compensation relating to any such lease or former lease, the Director may-

- (a) suspend the operation of the licence, pending determination of the dispute in a manner approved by the Director; or
- (b) grant a protection order in respect of the premises to any party to the dispute.

I do not know what the dispute was except the respondent was evidently claiming that it had some residual rights in the licence granted to it, in respect of the premises, it had been evicted from. Following on from this, the appellant made application under s.82 of the new Act to have the licence transferred to it or at least it appears that his application was dealt with on that basis. It may be however that this was

the continuation of an application which the appellant had made under the old Act. In any event the Director, rather sensibly it seems to me, heard various submissions before deciding that the matter should be dealt with under the new Act.

It is necessary to consider the affect of the new Act on this licence and to mention some other sections of the Act that have an impact on this appeal.

By s.177 of the new Act schedule 1, which contains transitional provisions, has effect. By s.16 of schedule 1 "A store licence that was in force under the repealed Act immediately before the appointed day shall on that day become a liquor store licence under this Act".

By s.3 of the new Act;

"'licence' means a licence granted under, or continued in force by this Act;

'licensed premises' means the premises specified or defined by the licensing authority in relation to a licence, protection order or permit as the building or place to which that licence, order or permit relates;

'licensee' means a person who holds a licence...under this Act, includes a person who is authorised under section 86 or 87 to carry on business under a licence or as if that person were a licensee...

'liquor store licence' means a licence granted under section 47;"

Rather surprisingly s.47 does not purport to grant a liquor store licence it simply defines the powers of the licensee.

By s.47:

"Subject to this Act, the licensee of a liquor store licence is-
 (...during certain prescribed hours...)
 to keep open the licensed premises, and to sell on or from there packaged liquor to any person."

By s.82 jurisdiction is given to the Director to transfer a licence and by s.84 (1):

" The Director shall not grant an application for approval of the transfer of the licence in relation to any premises unless the application is made-

(a) pursuant to a contract for the sale or assignment of the right of the licensee to carry on business under the licence, the licensee consenting to the application;

(b) by a person who-

(i) has under section 86 a right to carry on the business of the licensee; or

(ii) may, under section 87, be granted a protection order;

or

(c) with leave of the Director,

but where the Director is satisfied that a licensee can not be found or has unreasonably or capriciously refused to consent the requirement for that consent may be waived."

I return to the facts. A preliminary hearing relating to the transfer application was commenced before the Director on 14th October 1989. It was not then in fact an application under s.82 of the new Act but rather a hearing to determine issues on an application for transfer which had been made by the appellant under the old Act whilst it was still in force for the purpose of finalizing a transfer of licence when the lease expired. However, the events I have described being not only the repeal of the old legislation, and various Supreme Court hearings had overtaken that initial application.

After hearing wide ranging argument the Director dealt with the matter as an application under s.82 of the new Act and found that he was precluded from granting any application because the applicant could not bring itself within the

provisions of paras (a) and (b) of s.84(1) and it was his view that to give leave under para. (c) would be contrary to the policy of the new Act. That policy he was able to extract from reading a report of the debate when the Bill for the new Act was before the Legislative Council and for that purpose he relied upon s.19 of the Interpretation Act.

I will deal with each of the matters that are the subject of dispute in the Director's reasons and in the reasons given by the Liquor Licensing Court Judge who dismissed an appeal from the Director's decision.

I should say as a preliminary observation however that irrespective of the objectives of some of the members of Parliament who were debating what the Bill as drafted meant, I cannot accept that it was intended that the result produced by this case was the object of the legislation, nor in my view, is it the result which a proper construction of the Act would support. By its long title the Act is said to be:

"AN ACT to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold, and the services and facilities provided in conjunction with or ancillary to the sale of liquor,..."

Assuming that the application was properly brought under s.82 of the new Act and assuming that the provisions of paras. (a) and (b) of s.84(1) do not apply, the result of not giving leave to an applicant who is apparently otherwise a proper person to hold the licence and is entitled as a matter of contract to it is that a licence which existed because there was a need for it in the area, has now been taken out of operation.

The licensing authority under the Act has extremely wide powers to grant or refuse an application notwithstanding that any objections are upheld or that the applicant meets all the requirements of the Act. These powers extend to matters of procedure (s.33 and also see s.5[e]).

It is not the policy of the Act to permit licensees to retain a continuing interest in a licence in circumstances where their tenancy has expired s.37(5). That in my respectful submission should not lead to the rather chaotic situation which presently exists and which in effect means that in these circumstances there is no regulation of the industry, that contractual rights entered into in good faith before the change in policy was announced are flouted and the public is in effect deprived of an amenity which the Act was designed to provide.

Irrespective of the view which the Director took of the operation of para. (a) of s.84(1) the Director was wrong in saying as he did when refusing to grant leave under s.84(1)(c) "I consider that the intent of the Act is that neither the tenant (due to s.37[5]) nor the lessor or its nominee should get the licence."

The Director evidently gleaned the second part of this so called intent from the following exchange between the Minister and a Member of the Opposition during the course of a debate on what became s.87: (See p.10 Appeal Book.)

✓ "Question: The licensee may have spent some time building up an excellent business, but the lease is not renewed. Under the present conditions I am not sure who is issued with the licence, but under the new arrangements in this legislation, if that situation arose, and the person has built up the successful business, he may decide to move down the road and commence operations in new premises with

the same name, and I suppose the same clientele. What is the situation as far as the owner of the premises is concerned?

Answer: This clause is one which the Licensed Stores Association supports as it encourages stability by removing the incentive not to renew a licence in this situation. If that happens, it will stop a landlord from benefiting from a windfall type situation. Licences are granted to the person who occupies licensed premises.

Question: That is at the present time?

Answer: That is at the present time, and under the Bill. All licences are granted to the person who occupies the licensed premises and owns and runs the business. If the licensee has a lease and that lease expires, the licensee and the landlord can agree to a transfer of the licence to the landlord or to someone else. If they do not agree, neither the tenant nor the landlord obtains the licence. That is the situation which prevents what the Leader of the Opposition outlined from happening.

Question: Assuming there is no agreement and the licence is lost to the present licence holder, I would assume that that person who had run a successful business, who knew the industry, knew the game, would have more chance of having the licence allocated to him or her than the owner of the property who may have had no experience at all.

Answer: It is up to the court, but certainly those things would be taken into consideration. Certainly in that situation the lessee would be in a far stronger position than the inexperienced landlord."

There are several comments I should make on that. First if it can be gleaned from the debate that the Minister is suggesting the intent of the Act is to sweep aside contractual arrangements (which I doubt) then such answer is contrary to the stated purpose of the Act. Secondly s.19 of the Interpretation Act exists to enable the use of some material to determine the meaning of the provisions of the Act. In my view there is nothing doubtful about the provisions in this Act. The intent is reasonably clear from a consideration of its provisions. Relevantly it is that the advantages enjoyed

by a landlord of premises the subject of a liquor store licence under s.88 of the repealed Act will now, no longer flow automatically in the circumstances where there is no approved contractual arrangement between the licensee and the landlord and it will according to the Act mainly be in that context that the Director will be called upon to exercise a discretion as to whether or not he grants leave under sub-s. (c). The danger of reading material from a debate to obtain an inkling of how a discretion may be exercised will always be highly suspect and in this case highly misleading.

There are no words in the Act or any of the sections of the Act which taken singularly or together could lead to the conclusion that a statute passed for the purpose of regulating an industry would sanction the exercise of a discretion which would have the effect of effectively abandoning a public facility because of a private dispute unless it was apparent that the applicant was unsuitable or for some other reason to be gleaned from the other provisions in the Act. The Act does not purport to exclude an application for transfer in circumstances where a lease is about to expire or has expired. On the contrary s.84(3) seems to give express recognition to the fact that an application will be made by the landlord or someone who is entitled to possession from the landlord. This simply carries on the permitted practice under the repealed Act of giving effect to a contract between the landlord and the licensee.

It is only the former right of the landlord to obtain the licence at the expiration of the lease by re-entry under the repealed Act which is negated by the new Act. And that is not this case.

This is a case where apparently both parties in good faith and on the basis of the law as it existed at the time entered into contractual arrangements the effect of which could not be in doubt and in my view that is a matter which must be taken into account in the proper exercise of a discretion if it became necessary to consider the grant of leave under s.84(1(c)).

In considering, as he did, whether leave should be granted the Director has exercised his discretion on a totally wrong basis.

I turn to the reasons of the learned Liquor Licensing Court Judge for refusing to exercise his discretion, this is also, in my view based on a false premise. He said:

"For example, to grant this application would not in my opinion ensure continuity of trading at the established outlet. If nothing else, such an assertion flies in the face of the very liquor store licence itself which was granted to Dileum with respect to certain premises. Continuity of the licence itself by the grant of this application would not ensure continuity of trading which can only be predicated upon the business of Dileum which can no longer be carried on in the premises by Dileum."

With respect to the author that is irrelevant for the purposes of this exercise. It apparently comes from the same source that was relied upon by the Director. It is apparent that the suitability of the applicant was left to be resolved after the Director had decided the preliminary matters that went to his power to deal with the application either under the repealed Act or under s.82 of the new Act and the effect of s.84 on that application.

I reject the suggestion by both the Director and the Liquor Licensing Court Judge that it is the policy of the Act to let the licence lapse rather than transfer it to a landlord in circumstances where there was a valid contract to that effect.

If one can speak in terms of policy it is that when the interest of a licensee is terminated after he ceases to occupy the licensed premises (s.37[5][b]) a landlord will in the absence of an approved contract be obliged to seek the leave of the Director to make application for transfer and the grant or refusal of that leave will be made in the context that there is no longer an automatic right to the grant but otherwise in conformity with the clear objects of the Act which is to regulate the industry and provide the other objects set out in s.5.

In my view the appeal should be allowed on that basis.

The question arising under s.84(1)(a) has been fully argued and I also indicate my views on that. It was apparently conceded by the appellant before the Director that the application was not in the terms of s.84(1)(a) pursuant to a contract for the sale or assignment of the right of the licensee to carry on business under the licence "the licensee consenting to the application". This concession was apparently withdrawn on appeal before the learned Liquor Licensing Court Judge without objection. His Honour however found against the appellant.

I have already briefly outlined the facts but I should mention the covenants of the lease and deed of assignment enforceable by the appellant. By cl.17(g) of the schedule to the lease;

"That the Lessee will not do or suffer any act or thing which may cause the forfeiture or suspension of the said licence or place the same in jeopardy and will use the best endeavours of the Lessee to comply with any notices or requisitions pertaining to the said licence from the Licensing Authority or any other authorised body or person and at the expiration or sooner determination of this demise or any extension will transfer the said licence to the Lessor or their nominee free of charge."

By cls. 9 and 10 of the assignment dated 29th March 1988 the respondent undertook;

" Contemporaneously with the execution hereof by the Assignee, the Assignee shall deliver to the Lessor five (5) blank forms of transfer under the Liquor Act 1962 as amended duly executed under seal by the authorised signatories of the Assignee in its capacity as the licence holder of the store licence issued in respect of the leased premises and such forms shall thereupon be held by the Lessor in escrow pending the expiration or earlier determination of the term of the said Lease PROVIDED HOWEVER should the Assignee throughout the unexpired residue of the said term seek the consent of the Lessor to a further assignment of the said Lease it shall be a condition precedent to the granting of consent to assignment, inter alia, that such further Assignee shall execute such further forms as aforesaid as the Lessor shall reasonably require.

The Assignee and the Guarantor acknowledge that the Assignee shall from the date of assignment hold the Liquor Store Licence No.19829 or any substitute or further licence or permit issued in respect of the demised premises by the Licensing Commission of Western Australia under the Liquor Act 1962 as amended or any similar or amending legislation as Lessee and not as owner and otherwise in all respect as a trustee upon trust for the Lessors herein and at the expiration or sooner determination of the said Lease the Assignee will transfer the said licence and permits (if any) to the Lessor or their nominee free of charge. Any transfer fees occasioned by the transfer shall be the liability of the Lessor."

It is conceded by the appellant that the draftsman of cl.10 is mistaken with respect to any suggested trust but notwithstanding that concession, the contractual obligation is quite clear. Pursuant to cl.9 transfers in escrow were lodged and subsequently completed and produced. At some stage the

respondent purported to withdraw the consent to transfer implicit in the signing of the transfer itself and this was apparently accepted by the Director.

It is the appellant's argument that accepting that the new Act applies then the matters I have recited indicate compliance with the provisions of s.84(1)(a). The respondent disputes this, it claims that one cannot turn a contract to transfer a licence into a "contract for the assignment of the licence to carry on business under the licence" in terms of sub-s.(a).

With respect I do not agree. The licence itself is no more than the right of the licensee to carry on business under the licence. In fact it is not only a right it is an obligation placed on the licensee. This was the philosophy of the repealed Act and it is in my view carried forward in the new Act.

I note that in s.84(2) there appears to be an attempt to distinguish "the right to carry on business under the licence" and the 'licence itself' but I cannot understand how one can sell or assign a licence which is bereft of not only a right but the obligation to carry on business. I have already referred to the interpretation provisions of the new Act in s.3 and made reference to s.47. Also in that regard see the decision of Burt C.J. in Hwang v. Celeghin [1987] W.A.R. 67 at p. 69 where he said of a licence under the repealed Act "a licence...is a single licence granted to a person with respect to premises. It authorises the licensee...to sell and supply wine and brandy on the licensed premises. It is not divisible so that it should be regarded as a licence to a person and

separately as a licence for premises". See also the reasons of Brinsden J. in Steve's Nedlands Park Nominees Pty. Ltd. v. Secker and Others unreported 23 August 1988, library no. 7252 at pp. 19-23. The clause in the lease and assignment to which I have already referred were drawn against a background of the provisions of the old Act which provided relevantly under s.88 that when the licensee ceased to occupy premises the licence enures for the benefit of the landlord who may "carry on the business of the licence".

Leaving aside any considerations that arise in the operation of s.84 and the policy of the new Act it seems to me that the nature of the licence has not changed. It is no more than a right which has within it the right to carry on the business of the licence at the premises the subject of it. This is I believe spelled out also in the new Act under s.86 which is similar in effect to the provisions of s.88 and the third schedule of the old Act, except it can be seen that the new policy no longer gives to the landlord of a liquor store licence under the new Act the automatic right to carry on the business of the liquor store licence when the premises are vacated by the licensee. The vacation of the premises by the licensee will not trigger the operation of s.86 and give rise to any rights in the landlord of those premises. That however has nothing to say about nor does it detract from the characteristics of a licence under the new Act nor does it exclude the landlord from obtaining the licence by contract. It can be seen under the new Act that the landlord of premises the subject of a liquor store licence is excluded under the provisions of s.87(1) and to an extent under s.87(2) from

obtaining a protection order based only on the licensee ceasing to occupy or where the licence ceases for any reason to be in force. These provisions do not alter the characteristics of the licence itself. They simply highlight the change in policy that the landlord is not to be given the automatic statutory protection or right which it once enjoyed.

In this case the store licence became by virtue of the transitional provisions to which I have already referred a liquor store licence. Whatever it was and whatever it became by virtue of the operation of the new Act it was that licence which the respondent contracted to assign to the appellant and it was the transfer which the licensee signed which evidenced his consent to the application for the transfer of that licence and that licence both under the old Act and the new Act was the right of the licensee to carry on business under the licence which the respondent contracted to transfer to the appellant free of charge pursuant to the terms of the lease.

Again assuming that the proper application is pursuant to s.82 of the new Act the appellant can bring itself within the provisions of s.84 para.(1)(a). I would allow the appeal on that basis.

I turn to what the applicant says is its primary argument. It is, that, the application it made in December 1987 was an application to transfer conditional on the contract to which I have already referred. The application was made before the contract time for transfer had arrived. It is apparently accepted that this had been a common practice and one can well understand why, if the transition was to occur with the minimum of fuss. In fact s.85 of the repealed

Act required a notice to be given not later than 30 days before the earliest day on which the application can be heard.

The application which incidentally under s.1(1) schedule 1, "includes notice of an application" was lodged at the court and accepted by it on 13th day of December 1988. The hearing of that application was adjourned because the respondent in breach of its contractual obligations refused to leave the premises.

I return to the transitional provisions. Under s.1(2) schedule 1 the provisions of s.36 and 37, Interpretation Act, are preserved if there is no relevant provision in the schedule. The respondent says that s.3(2) of the schedule is such a provision.

By s.3(2):

" If, on the appointed day, an application (not being an application for licence or permit) had been made under a provision of the repealed Act but had not been determined and the decision had not been reserved, the proceedings based on the application may be continued and completed as if the application were an application under this Act in so far as a corresponding provision is contained in this Act."

The appellant argues, based on the premise that under the new Act the licence and the business are separate, that there is no corresponding provision in the new Act for the transfer of what was once a store licence but which is now a liquor store licence by consent of the licensee and accordingly s.37 of the Interpretation Act applies. It is true that by s.82 there is a provision for the transfer of a liquor store licence but the appellant argues that there is now no absolute right to be granted the licence in the sense that the liquor authority can at least at face value ignore prior contractual rights acquired it is said for purposes of the repealed Act.

To the extent that the argument is based on the appellant's right to enter under s.88 of the repealed Act the same argument is made. It had acquired conditional rights under the repealed Act.

Section 3 of schedule 1 is apparently a procedural provision, but that alone may not give the answer to this problem. The retrospective operation of statutes was recently considered by the High Court in Rodway v. The Queen 24th May 1990 Library No. 1895. In that case the court had to consider the operation of a provision in the Tasmanian Criminal Code which altered the law relating to a warning to be given to the jury in a criminal trial of a sexual offence, that it is unsafe to convict on the uncorroborated evidence of persons against whom the crime is alleged to have been committed. That provision repealed and replaced a provision which in relation to the particular offence was to the opposite effect. The alleged offences were committed between June 1982 and October 1986 the new provision came into force on the 26th November 1987 and the applicant's trial commenced in February 1989. He argued that s.16(1) of the Acts Interpretation Act which is in many respects similar to s.37 of our Interpretation Act preserved his rights to the procedures under the repealed provision of the Criminal Code. This argument was rejected. In a joint judgment the court said at p.2:

" The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we

think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure."

The court was alert however to the difficulty at times in deciding between matters of procedure and substance. They continued at p.6:

"Whether or not the previous requirement of the law that certain evidence required corroboration before it could safely be relied upon could be described as basic or fundamental, both in **Attorney-General's Reference No.1 of 1988** and in this case the statutory amendments were clearly intended to alter the existing law with respect to corroboration. Both amendments were procedural in character. They did not operate to affect existing rights or obligations. Rather, they operated to affect the way in which rights fell to be determined at trial and, for that reason, they did not fall within the presumption against retrospective operation. It follows that, in our view, **Attorney-General's Reference No.1 of 1988** was wrongly decided and that the Tasmanian Court of Criminal Appeal was correct in declining to follow the decision.

Nor, in our view, does s.16(1) of the **Acts Interpretation Act** support the applicant's case. Paragraph (c) of that sub-section applies only to preserve acquired or accrued rights and, as we have endeavoured to explain, the applicant had acquired no right to a particular mode of procedure at his trial, at all events before his trial had commenced. A right to a particular procedure is acquired only when the occasion for the application of that procedure arises."

In that case the court pointed out that the provisions of s.16 of the Acts Interpretation Act applied only to preserve acquired or accrued rights and they said:

"The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure."

That is not necessarily this case. In this case there are two arguments. First the appellant had acquired a right by contract not shared by any other member of the public in accordance with the provisions of the repealed Act which gave ~~to him on the happening of a certain and ascertainable event~~ the right to a transfer of the licence which included the right to carry on the business of that licence from his premises. Secondly, under the provisions of s.88 of the repealed Act the applicant had the right to the licence on re-entry after the licensee had quit the premises. In my view both of these are rights of substance which if it can be said that they fall within s.37 Interpretation Act they can be enforced unless in the repeal the contrary intention appears.

I need not pause to consider whether the rights claimed have accrued because it seems to me with respect that there is a contrary intention to be found in the new Act. I accept that in its terms it is arguable that s.3(2) schedule 1 may not be applicable but I cannot imagine that the answer to this problem depends solely on whether a landlord in the present circumstances was fortunate enough to be able to have the benefit of s.37 simply because his contractual rights fell due at a time when he was able to make an application prior to the coming into operation of the new Act. One can imagine that there are other landlords with similar contractual rights but who have not yet made an application for transfer under s.82 because the licensee's lease has not yet expired.

In so far as the first argument is concerned as I have already indicated the contractual right to apply for a transfer is preserved by s.84(1)(a) of the new Act and in so

far as the second argument is concerned there is a clear intention to be gleaned from a consideration of the new Act including Schedule 1 that the new Act extinguishes any prior entitlements which existed under s.88 of the repealed Act but which had not then accrued. That ground of appeal fails.

It is clear to me however, that the provisions of the new Act are sufficiently flexible to enable the licensing authority to take these matters into account if it is in the circumstances necessary for a landlord to seek leave to apply under s.84(1)(c).

I would allow the appeal on the two grounds previously mentioned which means that the decision of both the Liquor Licensing Court Judge and the Director should be set aside and the application returned to the Director to be dealt with under s.82 of the new Act in accordance with these reasons.

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered on

8322e

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

Heard:

18 May 1990

Delivered:

18 June 1990

THE FULL COURT

CORAM: WALLACE, ROWLAND & WALLWORK JJ.

Appeal No. 6 of 1990

B E T W E E N :

JERICHO NOMINEES PTY LTD

Appellant
(Applicant)

and

DILEUM PTY LTD

Respondent
(Objector)

Mr C J L Pullin QC and Mr D Mossenson (instructed by Messrs. Phillips Fox) appeared for the appellant.

Mr D R Williams QC and Mr G D Crocket (instructed by Messrs. Corrs) appeared for the respondent.

WALLWORK J

I agree with the decision of Rowland J and with his reasons. I add some comments of my own.

In the definition section of the Act "licensee means a person who holds a licence.....under the Act, includes a person who is authorised under s.86 or 87 to carry on business under a licence... ."

A licensee is licensed to carry on business under the licence. That is the notion behind the Act.

Section 37(5)(b) of the Act provides that "...if the licensee ceases to occupy the licensed premises, whether or

not to the exclusion of others, the interest of the licensee in the licence terminates."

Section 47 of the Act refers to the licensee of a liquor store licence being authorised and required subject to the Act, "to keep open the licensed premises."

In *Hwang v Celegin* [1987] WAR 67 at 69 Burt CJ said:

"A licence granted under the Liquor Act 1970 (the Act) is a single licence granted to a person with respect to premises. It authorises the licensee, he being the holder of a wine house licence, which is the relevant licence to sell and supply wine and brandy on the licensed premises. It is not 'divisible so that it should be regarded as a licence to a person and separately as a licence for premises.' *The Licensing Court (SA) v White* (1918) 24 C.L.R. 318 per Griffiths C.J. at 321."

In the same decision Wallace J said at p 78:

"It is well established that the nature of a liquor licence is twofold - whilst it is personal to the holder it also applies to the relevant premises: see *Jack v Smail* (1905) 2 CLR 684 at 705 and 714 and *Licensing Court (SA) v White* (1918) 24 CLR 318 at 321."

It is apparent from the provisions of the 1988 Act that the dicta of Burt CJ and Wallace J in *Hwang's* decision are still applicable to that Act. It is in that light that the words in s.84(1)(a) should be interpreted. That subsection refers to "the right of the licensee to carry on business under the licence." It is that "right" which is to be the subject of "a contract for the sale or assignment."

The learned Judge of the Licensing Court decided that exhibits 36 and 37 (the lease and assignment) "do not require Dileum to assign its right to carry on business under the licence." (A.B. 25).

The parties to this appeal derived their legal relationship from the lease of the relevant premises and the assignment of that lease. The point is not taken that the appellant is not the same company as J. K. Corporation.

In clause 2(q) of the lease it is agreed that "The lessee shall keep open the demised premises during normal business hours and conduct therein the business thereof in a proper and business like manner and shall not do or neglect to do anything whereby the goodwill of such business may be impaired."

In the schedule to the lease, the nature of the business is described as "General store and off licence for the sale of liquor."

There are special covenants on behalf of the lessee as follows:

- "(d) Included with the demised premises is a liquor store licence number 19829 which is held on behalf of the Lessee by the Guarantor. The Lessee and the Guarantor acknowledge that they hold this licence as Lessees and not as owners and covenant and agree to comply with the provisions of the Licensing Act and Regulations and advise the Lessor forthwith of any notices or requisitions received in respect thereof and renew the said licence annually as required and keep the same on foot.
- (e) Not without the consent in writing of the Lessor on each occasion first had and obtained (which consent may be arbitrarily refused) to remove or attempt to remove or suffer or apply for the removal of the said licence in respect of the demised premises to any other premises nor its transfer to any other person likewise.
- (f) In the event of any breach of any of the Lessee's covenants and conditions contained in the lease or within one month before the

expiration of this lease or any renewal thereof at the request of the Lessor to procure the signature by the holder for the time being of the said licence of three blank forms of notice of application for transfer of such licence and deliver the same to the Lessor.

- (g) That the Lessee will not do or suffer any act or thing which may cause the forfeiture or suspension of the said licence or place the same in jeopardy and will use the best endeavours of the Lessee to comply with any notices or requisitions pertaining to the said licence from the Licensing Authority or any other authorised body or person and at the expiration or sooner determination of this demise or any extension will transfer the said licence to the Lessor or their nominee free of charge. "

It is apparent from these covenants that the parties contracted that "included with the demised premises" was a liquor store licence and the lessee acknowledged that it held the licence as a lessee and not as owner. The lessee covenanted to keep the licence on foot; also without the consent of the lessor (which consent might be arbitrarily refused) the lessee would not "remove or attempt to remove or suffer or apply for the removal of the said licence in respect of the demised premises to any other premises nor its transfer to any other person."

The lessee covenanted to effect the transfer of the licence back to the lessor at the conclusion of the lease.

In the assignment of lease in clauses 9 & 10 the assignee, being the respondent in this appeal, contracted as the "licence holder" that it held the licence "as lessee and not as owner and otherwise in all respects as a trustee upon trust for the lessors herein and at the expiration or sooner determination of the said lease, the assignee will transfer

the said licence and permits (if any) to the lessor or their nominee free of charge."

The respondent completed a blank form of application for the transfer of the licence in accord with clauses 9 and 10 of the Assignment Contract.

It is against this background that the learned Judge decided that although the lease and the assignment of the lease required the assignment and transfer of the licence itself to the registered proprietor at the expiry or sooner determination of the lease, those contracts did not require the respondent to assign its right to carry on business under the licence. Therefore the application for transfer of the licence which was lodged on 13 December 1988 was not an application which was made pursuant to a contract for the assignment of the right of the respondent to carry on business under the licence within the meaning of s.84(1)(a) of the Liquor Licensing Act 1988.

In my view there was no "right of the licensee to carry on business under the licence" which could be separated from the licence itself. A contract by the licensee to transfer the licence included a contract to transfer the right of the licensee to carry on business under the licence. The learned Judge erred in law in his finding in this aspect.

I agree that the appeal should succeed.

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered on 18 June 1990