GNYCH & ANOR v POLISH CLUB LIMITED (S58/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 321 and [2014] NSWCA 351

Dates of judgments: 16 September 2014 and 17 October 2014

Special leave granted: 13 March 2015

The Respondent ("the Club") holds a club liquor licence under the *Liquor Act* 2007 (NSW) ("the Act"). Within the Club's premises is a restaurant with a kitchen and an adjoining office (together, "the restaurant area"). A moveable wall separates the restaurant area from an adjacent hall.

In late 2011 the Club agreed in principle to grant the Appellants both a lease of the restaurant area and a non-exclusive licence to use the hall for customer overflow and for large functions. The Appellants then renovated the restaurant area and in March 2012 they commenced operating a restaurant there. In the ensuing months the Club negotiated with the Appellants over terms of the proposed lease and licence but documents that had been drafted were never finalised and signed.

Relations between the Appellants and the Club's management committee later soured. In July 2013 the Club purported to terminate its arrangement with the Appellants and the following month it excluded them from the premises. The Appellants then sued the Club, seeking a declaration that they had a five-year lease of the restaurant area and the hall. This was on the basis of their asserted exclusive occupation of those areas from March 2012, along with the minimum term prescribed by s 16(1) of the *Retail Leases Act* 1994 (NSW) ("the Leases Act").

On 30 September 2013 Justice Ball declared and ordered that the Appellants had the benefit of a lease of the restaurant area for five years from 31 March 2012. His Honour also ordered the Club to grant the Appellants a non-exclusive licence to use the hall for the same five-year period, with the Appellants having exclusive use of the hall on Fridays and weekends. Justice Ball held that the Appellants were entitled to the lease despite a consequent breach of s 92(1)(d) of the Act, which prohibits any leasing by a liquor licence holder of a part of licensed premises without the approval of the Independent Liquor and Gaming Authority ("the Authority"), which the Club had not obtained.

The Court of Appeal (Meagher & Leeming JJA, Tobias AJA) unanimously allowed an appeal by the Club and set aside the declaration and order in respect of the lease. Their Honours held that in light of s 92(1)(d) of the Act, the lease of the restaurant area must be rendered void and unenforceable. This was because the lease necessarily involved the exclusion of the licensee from part of its licensed premises. Such an effect ran counter to the purpose of the Act, in particular to the overarching responsibility of a licensee to supervise the conduct of its premises. The Court of Appeal then also set aside the order for a licence over the hall, as the utility of such a licence was undermined by the absence of an enforceable lease of the restaurant area.

The grounds of appeal include:

- The Court of Appeal erred in holding that, upon the true construction of s 92(1)(d) of the Act, the failure of the Club to obtain the approval of the Authority constituted under the *Gaming and Liquor Administration Act* 2007 (NSW) had the effect of rendering void the five year lease created in favour of the Appellants by operation of ss 8 and 16 of the Leases Act.