IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 58 of 2015

BETWEEN:

JACEK GNYCH
First Appellant

and

SYLWIA GNYCH
Second Appellant

and

POLISH CLUB LIMITED
(ACN 000 469 385)
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. Whether the lease at general law from the Respondent to the Appellants in breach of s.92(1)(d) *Liquor Act 2007 (NSW)* (the **Liq Act**) the duration of which is determined after the grant by the operation of the *Retail Leases Act 1994 (NSW)* (RLA) should be rendered unenforceable and void.

3. In particular:
   a. How does the doctrine of illegality apply in respect of an unlawful grant of a property right;
   b. Is there a conflict between the Liq Act and the RLA and if so how is it resolved;
   c. Whether the legislative purpose of s.92(1)(d) of the Liq Act will be fulfilled without regarding the lease as void and unenforceable.

Part III: 78B Notice

4. The Respondent does not consider that any notice should be given in compliance with section 78B of the *Judiciary Act 1903*.

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Part IV: Material facts

5. The facts set out in the Appellants submissions largely contain the facts which were not disputed on the appeal to the CA.

6. To the extent that any additional matters should be identified in the facts they are set out below.

7. The primary judge found that there was a breach of s.92(1)(d) Liq Act. The primary judge held that there was no breach of s.92(1)(c) Liq Act.[1]

8. The finding that there was a breach of s.92(1)(d) Liq Act was held to be correct on appeal.[2]

9. The importance of the finding that there was a breach of s.92(1)(d) of the Liq Act at first instance is that the result that flowed from that finding raised the central issue of contention on appeal.

10. The primary judge held that whilst there was a breach pursuant to s.92(1)(d) Liq Act, that breach did not disentitle the Appellants to the relief they sought at first instance.

11. The CA held that the finding at first instance, of a breach pursuant to s.92(1)(d) Liq Act was correct. However, the CA found that the holding of the primary judge that the Appellants were nevertheless entitled to the relief they sought was not correct.

Part V: Applicable Provisions

12. The bundle of Joint Legislative Provisions largely contains the legislative material that will concern the Court. However, there are at least two additional provisions that ought to be considered in addition to that contained in the bundle for contextual completeness.

13. Those provisions are:

    s.6A of the RLA

    s.127 of the Conveyancing Act 1919 (NSW)

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[1] *Gynch v Polish Club Limited* [2013] NSWSC at [44]-[45] – AB p 786.
[2] *Polish Club Limited v Gynch* [2014] NSWCA 321 at [57] – AB p 832.

Part VI: Argument

14. The manner in which ground 1 is expressed (the foundation of the other grounds of appeal) discloses a fundamental misunderstanding of the legal relationship of the parties and of the operation of the RLA upon that relationship in so far as it is asserted that it *creates* a lease. That is wrong.

15. The analysis which leads to the consideration of the question of the interaction of two New South Wales laws can only occur after a proper examination of the relationship between the parties and an understanding of the RLA.

16. The appellant asserts in ground 1 that the decision of the CA was to render void a five year lease *created* by operation of the RLA.

17. The RLA does not *create* the Lease the subject of these proceedings. Rather the RLA provides a regime that governs leases of a particular kind, being "retail shop leases" so as to make "provision respect to the leasing of certain retail shops and the rights and obligations of lessors and lessees of those shops, and for other purposes".[3]

18. As the Minister, Mr Chappell's second reading speech of the Retail Lease Bill in the Legislative Assembly on 20 April 1994 emphasized, this legislation is not aimed at creating leases but addressing issues that arise as between lessor and lesses:

> *The bill I have introduced today is intended to foster good leasing practices in the retail industry, nothing more and nothing less. The Government does not wish to interfere in commercial agreements between two parties. It seeks to ensure that retail leasing agreements are explicit as to the requirements of both parties and that they are entered into from a position of reasonably equal negotiating strength. Where an agreement does end in dispute, the bill provides for cost effective and timely dispute resolution*[4].

19. Section 7 of the RLA gives effect to the words of the Minister by entrenching the operation of the Act despite the provisions of a lease and providing that a provision of a lease (not the lease as a whole) is void to the extent that the provision is inconsistent with a provision of the Act.[5]

20. Section 7 of the RLA is illustrative of the fact that the Act does not *create* the lease between the parties but rather governs the provisions or terms of the lease to which the Act applies by providing that where those provisions or terms are inconsistent with the Act, the Act is paramount.

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[3] *Retail Leases Act 1994* (NSW), Long Title.
[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 April 1994, p 1547-1548 (Mr Raymond Chappell) – annexed to submissions.
[5] *Retail Leases Act 1994* (NSW), s.7 – Tab 2, Joint Legislative Provisions.

21. The Respondent does not dispute with the finding both at first instance and on appeal in the CA that the RLA applies to the Lease the subject of the proceedings. However, to characterize the operation of the RLA in particular sections 8 and 16 as creating the Lease between the parties is to misunderstand the role played by the RLA when the Act was invoked by the Appellants.

22. Section 8(1) of the RLA describes when "a retail shop lease is considered to have been entered into.."[6]. That is to say not whether a lease exists between parties or its terms, but rather indentifies the time at which a qualifying *retail shop lease* commences. Section 16 of the RLA provides the minimum term for a retail shop lease that is caught by the operation of the RLA is to be no less than 5 years.[7]

A Lease – Some Observations

23. A lease is a contract as well as the grant of an estate in the land. The right of exclusive possession gives the tenant control of the premises at all times[8], but it means more than having a right of sole occupation[9]. Exclusive possession is secured by the right of the lessee to maintain ejectment and trespass[10]. The term "exclusive possession" refers to the right to legal possession[11]. A reservation to the landlord, either by contract or statute, of a limited right of entry, for example, to view or repair, is consistent with the grant of exclusive possession[12], although there was no such reservation claimed or asserted by the appellants in this case.

24. The reservation is needed because without it there is no such right. Subject to such reservations, a tenant can exclude his or her landlord as well as strangers from the leased premises[13]. Submissions are made in response to the appellants' submissions at [85] to [92].

Analysis of the relationship between the parties

25. The proper analysis of the relationship between the Appellants and the Respondent follows.

26. The Appellants entered into possession of the restaurant area on 31 March 2012.[14]

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[6] *Retail Leases Act 1994* (NSW), s.8 – Tab 2, Joint Legislative Provisions.
[7] *Retail Leases Act 1994* (NSW), s.16 – Tab 3, Joint Legislative Provisions.
[8] *Radiach v Smith* (1959) 101 CLR 209; McTiernan J at 214, Windeyer J at 222.
[9] Ibid at 223.
[10] Ibid.
[11] *Western Australia v Ward* (2002) 213 CLR 1 at [502].
[12] *Radiach* at 222
[13] Ibid.
[14] *Polish Club Limited v Gynch* [2014] NSWCA 321 – AB p 812 - 813.

27. That possession of the restaurant area was exclusive possession.[15]

28. No concluded agreement existed between the parties as to the terms or duration of the possession of the restaurant area.[16]

29. The entry into exclusive possession of the restaurant area created a lease at general law.[17]

30. The duration of the Lease was terminable at the will of either party by one months notice in writing expiring at any time (by virtue of s.127 *Conveyancing Act 1919*).

31. As there were no agreed terms or conditions with respect to the duration of the tenancy, no application was made to the Office of Liqour Gaming and Racing (the **Authority**) for consent for the Lease.

32. The RLA did not apply to the Lease at this point in time as the term of the Lease was less than 6 months (see s.6A RLA).

33. On 31 March 2013, the Appellants had been in possession of the restaurant area without interruption for 1 year, the effect of possession for at least this period of time meant that the RLA had the potential to apply (see s.6A(2) of the RLA). The RLA applied, effectively retrospectively from the date of entering into possession.

34. Section 16 provides that a minimum 5 year term will apply to a retail shop lease unless the lessor provides a certificate to the lessee indicating that s.16 of RLA does not apply,[18] but s.6A(4) of the RLA provides that s.16 does not apply to a lease which is caught by the Act by virtue of 12 months possession unless the lessee decides to elect to have the benefit of 16, that is until such time as the lessee gives notices of that decision.

35. On 7 July 2013 the Appellants gave notice and thus elected to have the benefit of s.16 of the RLA.

36. The Lease remained in breach of the Liq Act, the terms remained not agreed and the duration is "fixed" by operation of s.16 of the RLA for a total period of 5 years.

37. That is the proper analysis to determine the true question to this Court to determine the intersection of the RLA and the Liq Act and the doctrine of illegality.

38. The operation of the RLA on this Lease makes a difference as to the power of a party to terminate on 30 days notice or remain in breach of the Liq Act

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[15] *Polish Club Limited v Gynch* [2014] NSWCA 321 – AB p 816 and 839.
[16] *Polish Club Limited v Gynch* [2014] NSWCA 321 – AB p 812; *Gynch v Polish Club Limited* [2013] NSWSC 1249 – AB p 773.
[17] *Polish Club Limited v Gynch* [2014] NSWCA 321 – AB p 839.
[18] *Retail Leases Act 1994* (NSW), s.16 – Tab 3 Joint Legislative Provisions.

for the balance of the 5 year term imposed by s.16 of the RLA after notice from the Appellants.

39. The judgment of the CA is consistent with authority propounded by this Court that a court may in certain circumstances render an agreement unenforceable for statutory illegality.

Conflict of Laws

40. The grounds of appeal raised by the Appellant and its submissions imply a potential conflict in the operation of sections 8 and 16 of the RLA and section 92(1)(d) of the Liq Act. At [32] the Appellant submits that "*the decision of the CA has had the effect of frustrating the implementation of the legislative purpose inherent in the RLA*". The Appellant appears to be arguing that a lease created by statute (the RLA) cannot be thwarted by a prohibition on leasing under another statute (the Liq Act).

41. The Appellant's submission proceeds two bases: first, that the RLA "creates" a lease; and, secondly, that the findings of the CA do not lead to a harmonious construction of the provisions of the two Acts.

42. As to the issue of the RLA creating a lease, such a view ought to be rejected for the reasons expounded elsewhere in these submissions.

43. The Appellant submits at [94] of its submissions that the CA at [77] relies on the decision in *Radaich v Smith (1959) 101 CLR 209 at 222* as support for the proposition that a common law lease required an agreement for a period of a term that is certain (or capable of being certain). With respect, the CA does not so express and merely identifies *Radaich* as an example to be observed. The decision in *Radaich* is authority for the proposition that the only essential element for the formation of a lease is the grant of exclusive possession over a particular area. Such circumstances existed in this case.

44. The mere fact that a statutory provision has the effect of implying a term into the lease does not have the effect of creating a new lease pursuant to the statute, nor does it convert the lease at common law into a creature of statute. This is because the lease must already exist before the RLA has any work to do.

45. As a result, no conflict arises between laws arise. Rather the conflict in this case is between the existence of a lease at law (albeit with terms determined by statute) and a statutory provision restricting its lawful grant.

46. Even assuming the Appellant was correct and that a conflict of laws arose, the decision of the CA has had the effect of resolving that conflict (even if inadvertently) in accordance with relevant authority.

47. There is no doubt that if conflicts between laws can be resolved by employing a harmonious construction of the relevant provisions then that is to be the preferred course: see the discussion in *Commissioner of Police*

(NSW) v Eaton (2013) 252 CLR 1 at [99]ff. However, where such a construction is not available, as a matter of general principle, the Court must consider whether the relevant provisions are general or specific and which is the more recent in time. Three possible outcomes arising from these considerations were identified in *Associated Minerals Consolidated Limited v Wyong Shire Council* (1974) 2 NSWLR 681 at 686:

> *In its wider presentation the argument raises the issue, which frequently arises, of the interrelation in law of two statutes whose field of application is different, where the later statute does not expressly repeal or override the earlier. The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject-matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of thepre-existing legislation, so that each may operate within its respective field?*
>
> *... even where the earlier statute deals with a particular and limited subject-matter which is included within the general subject-matter with which the later statute is concerned, it is still a matter of legislative intention, which the courts endeavour to extract from all available indications, whether the former is left intact, or is superseded, and the cases in which the latter has been held are almost as numerous as the former.*

48. The Liq Act is both the more specific provision and the more recent in time.

49. The absence of a statutory provision that the consequence of a breach of the Liq Act is to void a lease does not resolve the matter. As observed in *Eaton* at [99]ff (citations omitted):

> *Application of the principle of harmonious construction to the construction of provisions within different statutes can be difficult where a legislature does not "state an intention either that the two statutory regimes should both apply ... or that [one] regime should apply to the exclusion of the [other]".*
>
> *Application of the principle of harmonious construction to the construction of provisions within different statutes is much more straightforward where it is the stated intention of the legislature that the two statutory regimes should both apply. The two statutory regimes might be "so plainly repugnant" that "effect cannot be given to both at the same time" (120). The result produced by giving effect to the statement of intention might be so improbable or inconvenient in light of a policy inhering in one or other of the statutory regimes as to require the statement of intention to be read as implicitly*

> *qualified in a way that conforms to that policy (121). But if that is not so, the stated intention of the legislature is the beginning and end of the matter (122). Both statutory regimes apply.*

50. The legislative intention is paramount to resolving any conflict. In the instant case, the CA undertook an analysis of the competing legislative intentions of the RLA and the Liq Act and determined at [81]:

> *when one considers the legislative purpose of the relevant provisions of the Liquor Act as well as the policy behind the subject prohibitions, then it follows that the prohibition stated expressly in the statutory text of s 92 requires the conclusion that any lease caught by that provision is not to be enforced by the courts.*

51. In summary, there is no relevant conflict of laws, but even assuming there was, such conflict was effectively and correctly resolved by the CA.

Doctrine of illegality

52. It is common ground between the parties that the Lease was in breach of s.92(1)(d) of the Liq Act. That breach of the prohibition of the grant of the Lease gives rise to the question of illegality.

53. The principles that govern the approach to the issue of illegality have been stated by this Court on a number of occasions.

54. It has long been established that a contract whose making or performance is illegal will not be enforced.[19]

55. The courts must not condone or assist a breach of statute, nor must they help to frustrate the operation of a statute.[20]

56. In circumstances where the statute does not declare or indicate that rights arising out of a illegal transaction are unenforceable such a sanction is justified where it is proportionate to the seriousness of the illegality involved, to be determined with reference to the statute its terms and the policy said to be contravened.[21]

57. The statute must always be the reference point for determining the seriousness of the illegality.[22]

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[19] *Miller v Miller* (2011) 242 CLR 446, 457.
[20] *Nelson v Nelson* (1995) 184 CLR 538, 611.
[21] Ibid, 611 - 610.
[22] Ibid, 613.

58. Moreover imposition of the civil sanction must further the purposes of the statute and must not impose a further sanction the unlawful conduct if Parliament has indicated that the sanction imposed by the statute are sufficient to deal with the conduct that breaches of aids the operation of the statute and its policies.[23]

59. Essential to taking account of the manner in which illegality may arise requires a court to discern from the scope and purpose of the statute of whether the legislative purpose will be fulfilled without regarding the contract or trust as void and unenforceable.[24]

60. The task of a court seeking to discern from the statute whether or not the contract or trust may remain enforceable brings with it the converse consideration that the court may ultimately conclude that the obligation created cannot be enforced by the court because of the frustration of the legislative purpose to which the statute is directed.[25]

61. The Appellants submit at [33] that "a contract made in breach of the statutory provision ought not be rendered void or unenforceable unless it is the intention of the legislature to create such an outcome". McHugh J in *Nelson* v *Nelson*(1995) 184 CLR 538, is cited in support of that proposition. However, the particular reference relates to McHugh J in discussing the rigidity of the *Bowmakers* rule prior to discussing why a less rigid rule for approaching illegality ought to be adopted.[26]

62. The Appellants submit at [36]-[39] that certain precepts of statutory construction are to be applied when a court is seeking to discern from the scope and purpose of the statute whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable.

63. With respect to the Appellants submissions at [36]-[39] they conflate the issue of statutory construction with an attempt to discern the scope and purpose of the legislative provision that renders illegal the contract. The Appellants submission fails to have regard to the statements of this Court in *Miller v Miller* (2011) 242 CLR 446 at 459 and more recently in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 513 as to the task of a court dealing with an agreement that is impugned for statutory illegality.

What Flows from illegality

64. The question that flows from whether an agreement is unlawful is not that which has been respectfully in our submission misstated by the Appellants at [43] of their submissions.

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[23] *Nelson v Nelson* (1995) 184 CLR 538
[24] *Miller v Miller* (2011) 242 CLR 446, 459.
[25] Ibid.
[26] *Nelson* v *Nelson*(1995) 184 CLR 538, 611.

65. The task of a Court confronted by an agreement that is illegal as a result of the prohibition of a statutory provision is first to seek to discern from the scope and purpose of the statute of whether the legislative purpose will be fulfilled without regarding the contract or trust as void and unenforceable.[27]

66. That task as stated by this Court in *Miller*[28] has been addressed further by the majority of this Court in *Equuscorp.*[29]

67. French CJ, Crennan and Kiefel JJ in *Equuscorp*[30] cite *Miller*[31] and go on to distill the principles that emerge from the authorities of this Court that show that;

> *an agreement may be unenforceable for statutory illegality where:*
>
> *(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;*
>
> *(ii) the making of the agreement is impliedly prohibited by statue. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;*
>
> *(iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a "contract associated with or in the furtherance of illegal purposes".*
>
> *In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute "whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable." As in the case when a plaintiff sues another for damages sustained in the course of or as a result of illegal conduct of the plaintiff, "the central policy consideration at stake is the coherence of the law."*[32]

68. The principles stated by the majority in *Equuscorp*[33] as to the three categories of case that give rise to the circumstances whereby an agreement may be unenforceable because of statutory illegality applies in our submission with no difference if the agreement relates to a trust, contract or property such as a lease as in this case.

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[27] *Miller v Miller* (2011) 242 CLR 446, 459.
[28] Ibid.
[29] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.
[30] Ibid.
[31] *Miller v Miller* (2011) 242 CLR 446.
[32] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513.
[33] Ibid.

69. It is noteworthy that *Nelson* was indeed a case that dealt with the consideration of these principles in the context of a property transaction.

Review of the Liquor Act

70. Analysis of the Liq Act is to be undertaken having regard to the task as stated by the majority in *Equuscorp,*[34] as the most recent statement of principle of this Court with respect to agreements infected by statutory illegality.

71. The provision of the Liq Act that relevantly bears upon the Lease the subject of the proceedings is s.92(1)(d). That provision provides:

> ***92 Control of business conducted on licensed premises***
>
> *(1) A licensee or a related corporation of the licensee must not:*
> .....
> *(d) lease or sublease any other part of the licensed premises except with the approval of the Authority.*
>
> *Maximum penalty: 50 penalty units*

72. Having regard to the principles enunciated in *Equuscorp,*[35] the provision prohibits a lease or sub-lease except where that approval of the Authority has been given.

73. That provision satisfies the first category of case where agreement may be unenforceable for statutory illegality as stated in *Equuscorp,*[36] as *(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;* in this case the Lease. For the same reasons it may be argued that the Lease falls within the second category of case stated in *Equuscorp,*[37] which may gives rise to its unenforceability.

74. The CA directed their inquiry to the third category of case identified in *Equuscorp.*[38]

75. The CA held that a Lease existed and correctly that the existence of the Lease relevantly engaged s.92(1) of the Liq Act.

76. The CA then correctly (as the authorities identified make plain) sought to discern the scope and purpose of the statute and whether that legislative

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[34] Ibid.
[35] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498
[36] Ibid.
[37] Ibid.
[38] Ibid.

purpose would be frustrated by the existence of this Lease remaining enforceable.[39]

> The CA made the following statement about the policy behind the statutory provisions of the Liq Act: *The policy of the Act generally, and ss 91 and 92 in particular, is to ensure that the licensee or in the case of a licensee which is a Corporation, the manager of licensed premises, at all times is responsible for the personal supervision and management of the (lawful) conduct of the business of the licensed premises. That objective cannot be realised if any part of the licensed premises is subject to a lease to a third party who might not be a fit and proper person to be a licensee or, for that matter, a manager, but who, by virtue of the lease is exclusive possession of part of the licensed premises thus having the right to exclude there from a licensee or in the case of a corporate licensee, the manager*[40]

77. Appellants submit at [57] that on its terms the Liq Act does not provide that any agreement made contrary to the prohibition in the Act is void and that consequences would only occur where there are expressed words in the statute to that effect.

78. That submission fails to have regard to what this Court has said in *Equuscorp*[41] with respect to the third category of case that would lead to an agreement being rendered unenforceable where it is in breach of a statute.[42]

79. As their Honours made plain in *Equuscorp*[43] the third category of case engages the concept of upholding the policy of the law. A court in seeking to uphold the policy of the law will not render unenforceable the agreement that is prohibited by the statute in every case.

80. Their Honours contemplated that there will be circumstances where the agreement remains on foot despite the breach of the statute.[44] For that reason their Honours have, in developing how a court is to approach the third category of case, made clear in *Equuscorp*[45] that a court at first instance would examine the statute and discern from it the scope and purpose to which it is directed and whether that scope and purpose can be fulfilled notwithstanding the agreement that is infected with illegality.[46]

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[39] *Polish Club v Gynch* [2014] NSWCA 321 at [72], [79] and [81] - AB p 838 - 840.
[40] *Polish Club v Gynch* [2014] NSWCA 321 at [72] - AB p 838.
[41] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.
[42] Ibid, 513.
[43] Ibid.
[44] Ibid, 513.
[45] Ibid.
[46] Ibid.

81. The exercise that a court is to undertake when considering the third category of case as described in *Equuscorp*[47] was precisely the exercise that the CA undertook in the appeal below.

Legislative Purpose – *Liquor Act* and its provisions

82. The first proposition at AS [63] that "*CA misconstrued the legislative purpose inherent in statutory prohibition: it does not require the licensee (respondent) to personally supervise and manage the conduct of the business of a lessee in a portion of the premises in which liquor is not sold or supplied*" is fundamentally flawed.

83. The first object of the *Liq Act* is to *regulate and control the sale, supply and* ***consumption*** *of liquor*[48].

84. Section 3(2) of the *Liq Act* requires that in order to secure the objects of the Act each person who exercises functions including a licensee must have due regard to matters concerning sale supply service and consumption of liquor.

85. It is plainly not simply the sale and supply of liquor to which the *Liq Act* directs its attention.

86. The restaurant at all times formed part of the licensed premises. The Club licence authorises the licensee to sell liquor on the licensed premises for consumption on the licensed premises[49].

87. The responsibility of the licensee undoubtedly extends to the whole of the licensed premises including, importantly, where liquor is consumed. Examples of the responsibilities include:

- not permitting intoxication or quarrelsome conduct[50];
- licensee must not permit licensed premises to be used for the sale of goods suspected of being stolen or prohibited drugs[51];
- controlling the behaviour of patrons after they leave the licensed premises, inter alia, because of the manner in which the business of the licensed premises is conducted[52];
- not allow liquor to be sold or supplied to a minor[53].

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[47] Ibid.
[48] Section 3(1)(a) *Liq Act*
[49] Section 18(1) *Liq Act*
[50] Section 73(1) *Liq Act*
[51] Section 74(1) *Liq Act*
[52] Section 79 *Liq Act*
[53] Section 117(8) *Liq Act*

88. At AS [66] the appellants assert that the CA did not explain how the "*overarching responsibility of the licensee to personally supervise and manage the conduct of the business of the licensed premises*" could have been complied with had the consent been given. The point is that consent would not have been given. The Appellants have not led any evidence in support of the proposition that the authority could have or would give consent to the lease. It is the necessary consequence of the way in which the appellants have put there case from the outset asserting a right to exclusive possession without any reservation to the landlord or other condition, that the authority would not approve such an arrangement. The Authority would not approve an arrangement whereby the licensee does not have the necessary control of the licensed premises, in particular an area where liquor is to be consumed.

89. A restaurant in a club where liquor is consumed hardly equates to space occupied by a florist or a physiotherapist in club premises, even accepting for a moment that premises of that type would form part of the licensed premises of a club. If the authority is invited to give its consent to the lease of part of licensed premises for the purposes of a florist then one could imagine the grant of a consent subject to a condition that liquor not be sold supplied or consumed in that space. That could hardly be applied to the restaurant within the club and the appellants have never so asserted.

90. The focus of the appellants therefore at AS [67] and AS [68] on the sale and supply is misplaced. Consumption is equally important and the whole of the licensed premises must be supervised. The reference to the affidavit of Mr Romanowski did not lead to a conclusion other than a finding about how liquor was served to patrons who then consumed it in the restaurant area. There is no conclusion of fact that by such observation, without access to the restaurant area, the licensee's manager Mr Romanowski was able to personally supervise and manage the whole of the licensed premises including the restaurant.

91. At AS [69]-[73] the appellants assert a failure to consider "*range of other potential consequences that could be invoked*" as a consequence of breach of s 92(1)(d) *Liq Act*. It is not clear that each of the matters relied upon now were put to the CA but nevertheless they do not advance the appellants' case.

92. The analysis of the CA at [79][54] is compelling. The CA recognised that there were potential criminal sanctions but not withstanding the purpose or policy of the *Liq Act* will be frustrated unless the prohibited lease was rendered unenforceable and void.

93. The CA understood the significance of the sanction imposed by way of declaring unenforceable the agreement but in doing so made it plain that any sanction short of that would not address the central consideration that it needed to in such cases, being whether allowing the lease to continue

[54] AB 839-840

would frustrate the implementation of the legislative purpose of the statutory prohibition.

94. The CA carefully approached the question of the ultimate sanction to impose they did so having regard to the consideration that they are required to applying the authority and reached a conclusion which they were entitled to do that the only appropriate answer was that the Lease be declared unenforceable because of its frustration of the policy behind the statutory provision.

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95. In relation to the specific matters put at AS [69]:

[69.1] Redefinition of licensed premises.

This does not go to the point of discerning the consequences of a breach of s 92(1)(c) *Liq Act.* In the present case there was no evidence that such a redefinition of boundaries was even possible and on its face would lead to absurd of practical arrangements.

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[69.2] Cancellation of liquor licence

It seems unlikely that the legislature intended that the very reason for being of a registered club ceases to exist because of the breach of section 92(1)(c) *Liq Act*. In addition the necessary consequence of a cancellation would be, ironically, ceased for practical purposes the operation of the restaurant as licensed premises. Upon cancellation of the licence the club also ceases to be a registered club[55].

30 *[69.3] Liquor licence suspended*

The same observations as in the preceding paragraph apply, although obviously only for the period of the suspension.

[69.4] The authority could have imposed a condition

Again the appellants err by focusing upon sale of liquor and in any event is not relevant to the question at hand.

40 *[69.5] Disqualify the licensee*

That has the same effect as a cancellation and the observations above apply.

[69.6] Reprimand the licensee.

That does not achieve the objects of the Act to prevent an arrangement whereby the licensee cannot supervise the premises.

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[55] *Registered Clubs Act (NSW)* 1976 section 4.

[69.7] Criminal proceedings

Dealt with by the CA and again the conclusion is demanded that criminal proceedings do not of themselves allow the achievement of the object of the provision - an end to the arrangement so that the licensee can properly supervise the conduct of the licensed premises.

96. The disciplinary provisions relating to registered clubs in fact are in Part 6A of the *Registered Clubs Act* 1976 rather than in the *Liq Act* to which the appellants have referred. Nevertheless, the potential disciplinary sanctions are not materially different.

97. The availability of a prosecution or disciplinary measures do not of themselves as a matter of general principle mean that the objects of the Act in dealing with an illegality have been met. It obviously depends upon the particular provision, and the particular objects or purposes of the Act.

98. An unlawful lease of the present type creates an immediate issue – the inability of the licensee to properly supervise the premises. A mere prosecution does not address that issue either immediately or at all. Nor does disciplinary proceedings. Each of prosecution and disciplinary proceedings address the breach by the licensee and each remains available, obviously, even if the lease is unenforceable.

99. The only remedy in the present circumstances in order to enable the licensee to properly supervise the licensed premises is that the lease be unenforceable. It is true though that but for the appellants' service of a notice and reliance upon s 16 of the RL Act the respondent could have remedied the illegality by service of one months notice terminating the lease which it in substance though not form, sought to do.

100. It is not possible to conclude (AS [71]) that the Authority may well have given and may still give approval. If comments above at [???] are apposite. It is also worth repeating that there having been at no point any concluded agreement between the parties no application could have been made.

101. The appellants' argument[56] that the conclusion that the lease was unenforceable was entirely disproportionate to the seriousness of the illegality involved is without foundation. Whilst there was evidence that the appellants carried out certain works, there was no evidence of a "significant loss" to be incurred by the appellants if the lease were held to be void. Further, it should not be forgotten that the rent for the lease was merely $500 per week to conduct a restaurant within club premises where the premises were only available to members and their guests, not the public at

[56] AS [73]

large. It was not a business created and run independently of the operation of the club.

102. The appellants made the forensic decision to limit their claim to substantively the enforcement of the lease they claimed. There was no alternate claim for damages in equity or common law for breach of contract, misrepresentation, proprietary estoppel or the like. That decision by the appellants cannot affect the proper approach to statutory construction which the Court must undertake.

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103. The asserted errors at AS [73.4] and following should be dealt with in terms

> [73.4] There is no presumption relevant here as referred to above. This Court in *Nelson* applied the principles of the doctrine of illegality to a proprietary interest without approaching the question on the basis there is the presumption asserted by the appellants.

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> [73.5] The *Bowmakers* principle is not good law. Again the appellant is wrong in submitting that "*title was conferred by operation of the RLA*". The RLA simply identified the term of the lease after its provisions were activated by the appellants by the giving of notice. Title had been conferred by the grant of exclusive possession.
>
> [73.6] Any undertaking or prohibition in relation to the service of liquor is no answer for the reasons set out above. The evidence did not demonstrate that the respondent was well able to personally
30 supervise and manage the licensed premises because it was the fact that the appellants were entitled to eject the respondent's representatives from the restaurant.
>
> [73.7] It is not clear precisely what the appellants are saying here. The Court is concerned with the present lease not "a lease" or "any lease". The present lease provided for exclusive possession without any reservation of rights to the Club. The argument in fact exposes one of the major difficulties in the appellants' case. The appellants did not ever assert an agreement for lease nor seek a declaration as
40 to the terms of a lease or any implied terms or the like. Rather they simply relied upon the fact of exclusive possession and a misplaced reliance upon the *Bowmakers* principle to not plead reliance upon the unlawful lease. Yet here, the appellants assert a reservation or an implied term contrary to its case from the outset. Section 85(1)(c) of the *Conveyancing Act* does not assist the appellants either. Reliance on this particular point was never raised and should not be permitted now.
>
> (It should be noted that the appellants have not hitherto asserted).
50 The licensees requirements to supervise the conduct of the licensed

premises are a constant requirement inconsistent with the granting of exclusive possession with a right of access.

That is, the right of access implied by s 85(1)(c) of the *Conveyancing Act* is construed in the context of a grant of exclusive possession to a tenant. It cannot imply the constant supervision required by a licensee.

[73.8] This submission does not add to what has previously been said by the appellants.

[73.9] The appellants repeat the error by describing a lease as arising by the operation of the RLA and the respondent's submissions in relation to the impliedly asserted conflict between the *Liq Act* and the RLA are at paragraphs [??], [??] of these submission

"The appellants were innocent parties"

104. The appellants are again departing from the case put to date. Be that as it may, it hardly takes the case any further.

105. It defies common sense to suggest otherwise that the appellants were aware at the time of entry into possession that there was no application to the authority for consent. The terms of the arrangement were not agreed, not even the duration of the lease. It was only after the appellants served a notice claiming the right under s 16 of the RLA that the duration of the lease had the potential to become certain.
It is also common sense that some information about the proposed lessee would be required by the authority in the making of the application and the appellants well knew that they had not themselves provided any such information nor signed any forms in relation to such an application. Any such application for consent the details of the proposed arrangement and the identity of the proposed lessee and their capacity to manage that part of the licensed premises appropriately are at the forefront. It cannot truly be said that the claimant was ignorant or mistaken as to the factual circumstances whereby there was no consent from the authority. It must have known.

106. Further, the allegation was not put at first instance and therefore not able to be tested. The appellants should not be able to make that submission now.

107. The appellants also assert for the first time[57] that there is an implied term in the lease. The appellants should not be permitted so to do in circumstances where it expressly disavowed a concluded agreement.

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[57] AS [77]

Exclusive possession under the lease not inconsistent with LA – AS [85]-[92]

108. The respondent has dealt with this submission at [23] above.

109. The assertion by the appellants[58] that the consequence of unenforceability "*would have the effect of enriching the respondent as a result of its own wrong*" cannot pass without comment. There was no such evidence of any enriching of the respondent. For example, there was no evidence that the rent at $500 per week was below market rent or that some other person would pay a sum in excess of $500 per week if the lease with the appellants was terminated. Further, there was no claim of "unjust enrichment" which one might have expected had the point been good.

110. There is no basis for the submission. The difficulty with the submission by the appellants at [87.6] that "*any lease which was declared would be subject to the rights of the respondent to enter the premises for the purpose of ensuring compliance with the LA*" it is entirely contrary to the manner in which the case was conducted and the relief sought. The appellants did not either in their primary position nor as an alternative assert an entitlement to a declaration of a lease upon any terms whatsoever. The appellants are bound by the manner in which they conducted their case at first instance and indeed maintained on appeal in relation to exclusive possession[59].

Part VII:

1. This part is not applicable.

Part VIII:

2. The Respondent estimates that 2.5 hours will be required for the presentation of its oral argument.

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[58] AS [83]

[59] *Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 at 71

Dated 22 April 2015.

.....(signed).....

P. R. Clay
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