

of the winding up. This is clearly against the interest of the Commonwealth, and justifies the exercise of the power.

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*Questions 1 and 2 answered in the negative.*

*Question 3 not answered. Plaintiff to pay  
costs of special case.*

Solicitors for the plaintiff, *Villeneuve-Smith & Dawes*.

Solicitor for the defendants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

BARTON-SMITH . . . . . APPELLANT;  
INFORMANT,

AND

RAILTON AND OTHERS . . . . . RESPONDENTS.  
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Local Government—Disqualification of aldermen—Penalty—Interest in agreement with council—Gift to aldermen of free passes by ferry company leasing lands from the council—Local Government Act 1906 (N.S.W.) (No. 56 of 1906), secs. 70, 71.*

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Dec. 17.

Griffith C.J.,  
Barton and  
Rich JJ.

Sec. 70 of the *Local Government Act 1906* (N.S.W.) provides that a person is disqualified for the office of alderman if “(j) he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council, except in a contract or agreement for or in relation to . . . (vi.) any lease granted before his election of land belonging to



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or under the control of the council." Sec. 71 provides that "any person acting in such office while so disqualified shall be liable to a penalty not exceeding one hundred pounds, and if convicted of an offence mentioned" in par. (j) of sec. 70 "the minimum penalty shall be fifty pounds, and he shall be disqualified for such office for seven years thereafter, and shall not be competent to recover from the council any sums due to him by the council under any contract or agreement; and if he has received from the council any sums under any contract or agreement, the same may be recovered from him by the council in any Court of competent jurisdiction" &c.

A council sub-leased land with jetties thereon to a ferry company. Subsequently the respondents were elected as aldermen of the council, and while holding office as aldermen they were presented by the ferry company with passes which entitled them to travel free of charge on steamers belonging to the company, which steamers used the jetties. The appellant filed informations against the respondents for acting as aldermen while disqualified by reason of their acceptance and use of such passes, and the respondents were convicted and fined. Upon appeal by way of special case the Supreme Court of New South Wales (*Sly J.*) decided that the acceptance and use of the passes did not make the respondents interested in the lease, and that the decision of the Magistrate was erroneous and must be reversed, and the conviction set aside.

*Held*, that special leave to appeal from that decision should be refused, it not being the practice of the Court to grant special leave to appeal from an order discharging an accused person merely upon the suggestion that the Court sought to be appealed from has fallen into error in deciding an obscure question of technical guilt or in deciding a mixed question of law and fact upon which opinions may honestly differ.

Special leave to appeal from the Supreme Court of New South Wales (*Sly J.*) refused.

#### APPLICATION for special leave to appeal.

In December 1916 the Council of the Municipality of Manly, constituted under the provisions of the *Local Government Act* 1906, granted a sub-lease of premises held by them to the Port Jackson & Manly Steamship Co. Ltd. for a term of three years from 1st January 1916. The lease contained covenants and conditions, some of which dealt with passenger traffic and goods traffic on the jetties upon the land leased. The respondents were elected as aldermen of the Council in June 1917, and after their election received passes from the Company, entitling them to travel free of charge upon the steamers belonging to the Company, which steamers used the jetties. The respondents, after the receipt of such passes, acted in their office as aldermen. On 3rd October 1918 the appellant



filed informations against the respondents, alleging that they acted in the office of aldermen for the Council of the Municipality of Manly whilst disqualified under the provisions of sec. 70 of the *Local Government Act* 1906, in that they were at the time of so acting directly or indirectly interested in a certain contract or agreement between the Council and the Company, the agreement meant being the said lease. Each of the respondents was convicted and fined before a Stipendiary Magistrate sitting as a Court of summary jurisdiction. A special case was stated by the Magistrate under the provisions of sec. 101 of the *Justices Act* 1902, asking whether the acceptance and use of these passes made the aldermen interested in the said lease. The special case was heard by *Sly J.*, who, on the ground that the respondents were not interested in the lease within the meaning of sec. 70, they not having any pecuniary or proprietary interest in the lease nor being under any obligation flowing from it, and on the further ground that, if they were, the case fell within the exception with reference to a lease granted before the election of an alderman of land belonging to or under the control of the Council, decided that the acceptance and use of the passes in question did not make the respondents interested in the lease, that the decision of the Magistrate was erroneous, that his determination must be reversed and the conviction set aside; and the learned Judge remitted the case to the Magistrate accordingly.

From this decision the informant sought special leave to appeal to the High Court.

*Watt and Ferguson*, for the applicant. The aldermen were interested in the lease within the meaning of sec. 70 of the *Local Government Act* 1906. See *Whiteley v. Barley* (1), and *Ford v. Andrews* (2), where *Griffith C.J.* said: "It is to be noted that the words of the Act are 'is interested in,' not 'has an interest in,' which might, perhaps, be limited to pecuniary or proprietary interest. It would be lamentable if it were to be laid down by the Court that a person bound by the obligation of duty, however arising, is not interested in the matter in respect of which the duty is to be performed."

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(1) 21 Q.B.D., 154.

(2) 21 C.L.R., 317, at p. 321.



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[GRIFFITH C.J. Those words can be stretched to mean many things I did not intend them to mean.]

The exception in sec. 70 does not extend to a lease like the present, containing covenants which are collateral to the lease. There may be an interest in things ancillary to the lease itself.

GRIFFITH C.J. It is not the practice of this Court or of the Judicial Committee of the Privy Council to grant special leave to appeal from an order discharging an accused person merely upon the suggestion that the Court sought to be appealed from has fallen into error in deciding an obscure question of technical guilt, or in deciding a mixed question of law and fact upon which opinions may honestly differ.

For these reasons I think that leave should be refused.

At the same time, I do not desire that it should be supposed that I dissent from the judgment of the learned Judge, or think that his conclusion on the facts was erroneous.

BARTON J. I agree with the reasons of his Honor the Chief Justice. I have read the judgment of his Honor Mr. Justice *Sly*, and see not the slightest reason for disagreeing with him.

RICH J. In agreeing with the order to be proposed by the Chief Justice I must not be taken as approving in any way of the conduct of the aldermen in the acceptance of the free passes in question, or as departing from the wholesome rule that a person in a fiduciary position must not make a profit out of his trust. Such a person who in his office accepts a benefit may in proper proceedings, at the instance of those to whom he is responsible, be made accountable to them. There is another angle of view from which this matter is objectionable—it may possibly lead to a conflict of duty with interest. We, however, are concerned only with the construction of the Statute.

*Special leave to appeal refused.*

Solicitor for the applicant, *A. J. Macaulay*.

C. A. W.