HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, KEANE AND NETTLE JJ

JACEK GNYCH & ANOR APPELLANTS

AND

POLISH CLUB LIMITED RESPONDENT

Gnych v Polish Club Limited
[2015] HCA 23
17 June 2015
S58/2015

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 October 2014 and orders 3, 4, 6 and 7 of the orders of that Court made on 16 September 2014 and, in their place, order that the appeal be dismissed with costs.*

3. *Remit the matter to the Supreme Court of New South Wales for determination of the assessment of damages, if any, pursuant to the undertakings listed in order 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 6 November 2014.*

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with G P Segal and M A Friedgut for the appellants (instructed by Drexler Litigation & Compensation Lawyers)

P R Clay SC with J M McKelvey and A Isaacs for the respondent (instructed by Strathfield Law)

CATCHWORDS

Gnych v Polish Club Limited

Property – Leases – Section 92(1)(d) of *Liquor Act* 2007 (NSW) provides that licensee must not grant lease over certain parts of licensed premises without approval of Independent Liquor and Gaming Authority – Where lease granted in breach of s 92(1)(d) – Whether lease void and unenforceable.

Contracts – Statutory illegality – Where lease granted in contravention of s 92(1)(d) of *Liquor Act* 2007 (NSW) – Where *Liquor Act* imposes statutory penalty for breach – Whether lease void and unenforceable.

Liquor Act 2007 (NSW), s 92(1)(d).
Retail Leases Act 1994 (NSW), ss 6A, 8(1), 16(1), 16(2).

1 FRENCH CJ, KIEFEL, KEANE AND NETTLE JJ. Section 92(1) of the *Liquor Act* 2007 (NSW) ("the Liquor Act") provides:

> "A licensee or a related corporation of the licensee must not:
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> …
>
> (c) lease or sublease any part of the licensed premises on which liquor is ordinarily sold or supplied for consumption on the premises or on which approved gaming machines are ordinarily kept, used or operated, or
>
> (d) lease or sublease any other part of the licensed premises except with the approval of the Authority."

2 The respondent ("the Club") leased part of its licensed premises to the appellants. Section 92(1)(c) of the Liquor Act did not apply in the circumstances because liquor was not sold or supplied on that part of the premises leased to the appellants, nor were gaming machines kept, used or operated on that part of the premises. But because the lease had not been approved by the Authority[1], there was a contravention of s 92(1)(d).

3 The issue in this appeal is whether, as the Club contends, its contravention of s 92(1)(d) of the Liquor Act rendered the lease void and unenforceable. For the reasons that follow, the Club's contention should be rejected.

Factual background

4 The Club is a registered club under the *Registered Clubs Act* 1976 (NSW) and the holder of a club licence under the provisions of Div 3 of Pt 3 of the Liquor Act.

5 The Club's licence pertains to a building of two floors with a rooftop cocktail hall ("the premises"). The ground floor comprises the entry to the premises and, relevantly, a storage area and staff toilets. The first floor contains male and female toilets, and a bar where liquor can be purchased. The first floor also contains a restaurant with a capacity of approximately 50 seats and an adjoining kitchen and office ("the restaurant area"). Adjoining the restaurant is

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1 The Authority is the Independent Liquor and Gaming Authority ("the Authority"), constituted under the *Gaming and Liquor Administration Act* 2007 (NSW): Liquor Act, s 4(1).

an area referred to as the mirror hall ("the mirror hall") with a capacity of approximately 80 seats, which is accessed from the restaurant by way of a moveable wall.

6 By letter to the Club dated 3 August 2011, the appellants offered to run a restaurant in the restaurant area and organise functions on the premises. The Club responded with a counter-proposal in the form of a lengthy document, stipulating that the appellants were to be engaged as the exclusive contractors for catering services to the Club.

7 In response, the appellants, by their solicitors, sent the Club a "term sheet" proposing the terms of a lease agreement with respect to the restaurant area and the downstairs storage area. The lease was proposed to be for two years with two two-year options, at a rent of $500 per week payable monthly, beginning with an initial rent-free period and five months payable at a reduced rate. The appellants proposed not to occupy the bar on the first floor but to operate their own cash register at the bar. Restaurant patrons could order drinks in the bar area and take them back to the tables, and the appellants were to be entitled to 10 per cent of those takings. The appellants also proposed to renovate the restaurant.

8 On the term sheet, under the heading "Licence Agreement", it was stated that the appellants would have "use of [the] small hall area adjacent to the restaurant on Frid/Sat/Sun", referring to the mirror hall. The Club resolved to accept the terms proposed by the appellants, but it appears this resolution was not communicated to the appellants. Nevertheless, renovations commenced in December 2011 and were completed in March 2012.

9 On 29 March 2012, the appellants' solicitors sent the Club a draft lease in registrable form together with a licence agreement for the mirror hall. On 31 March 2012, the appellants held a "grand opening" for the restaurant, and commenced regular trading. In May 2012, the Club engaged solicitors. Negotiations ensued about the terms of the lease, but no written agreement was ever finalised.

The Retail Leases Act

10 Section 3 of the *Retail Leases Act* 1994 (NSW) ("the Retail Leases Act") defines "retail shop lease" or "lease" to mean:

> "any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop:
>
> (a) whether or not the right is a right of exclusive occupation, and

(b) whether the agreement is express or implied, and

(c) whether the agreement is oral or in writing, or partly oral and partly in writing."

11 A restaurant is within the s 3 definition of "retail shop".

12 Section 8(1) of the Retail Leases Act provides that a retail shop lease is taken to have been entered into when a person enters into possession of a retail shop as lessee or begins to pay rent as lessee under the lease, whichever happens first.

13 Section 16(1) of the Retail Leases Act provides that "[t]he term for which a retail shop lease is entered into ... must not be less than 5 years." Section 16(2) provides that the term of a retail lease will be extended by the amount of time necessary for compliance with s 16(1).

14 Section 6A(1) of the Retail Leases Act provides relevantly that the Act does not apply to a lease of a retail shop for a term of less than six months. But s 6A(2) and (4) together provide that s 16(1) and (2) may apply to a lease where the lessee has been in possession of a retail shop without interruption for more than one year, and the lessee notifies the lessor in writing that the lessee elects to have the benefit of s 16. The appellants took advantage of these provisions. They entered into possession of the restaurant area on 31 March 2012.

15 On 2 August 2013, the appellants gave the Club the notice required by s 6A(4). That notice was effective to fix the term of the lease by s 16 of the Retail Leases Act as five years from 31 March 2012.

The dispute between the parties

16 Although the restaurant operated successfully, relations between the appellants and the Club deteriorated. On 7 July 2013, the Club's solicitors sent the appellants' solicitors a letter outlining a number of grievances, stating the Club's decision to terminate the relationship, and requesting that the appellants vacate the premises. By reply letter, the appellants disputed the allegations made by the Club and sought a mediated meeting with the then President of the Club to try and resolve the issues between the parties. There was no response to this letter.

17 On 2 August 2013, the Club's solicitors wrote to the appellants' solicitors, stating that s 92(1) of the Liquor Act overrides any rights the appellants may otherwise have under the Retail Leases Act, with the effect that the appellants had no lease over the restaurant area.

18 On 5 August 2013, the Club excluded the appellants from the restaurant area.

The proceedings in the Supreme Court of New South Wales

19 The appellants commenced proceedings in the Equity Division of the Supreme Court of New South Wales, seeking a declaration that they have a leasehold interest in the restaurant area for a five-year period commencing on 31 March 2012, pursuant to ss 8 and 16 of the Retail Leases Act.

20 The primary judge (Ball J) noted[2] that the restaurant area was a "retail shop" as defined in s 3 of the Retail Leases Act, and held[3] that the appellants:

> "obtained a leasehold interest in the restaurant, kitchen, office, storeroom and toilet. It seems clear that they had exclusive possession of those areas; and that the intention of the parties was that their right of occupation amounted to a lease."

21 The Club contended that the lease for five years, which came into existence upon the appellants' election to take the benefit of s 16 of the Retail Leases Act, was, and remained, in breach of the Liquor Act and was therefore void and unenforceable.

22 The primary judge held[4] that the lease was granted in breach of s 92(1)(d) of the Liquor Act because the restaurant area is "part of the licensed premises", but that the breach did not affect the appellants' leasehold interest. His Honour noted[5] that the appellants' claim did not depend on any illegality: they were simply asserting that a lease arose from the conduct of the parties and by operation of s 16(1) of the Retail Leases Act. His Honour said[6] that:

> "In those circumstances, there is no reason why [the appellants] should not be entitled to a declaration concerning the existence of a lease and an

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2 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,904-32,905 [33].

3 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,907 [48].

4 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,907 [45].

5 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,907-32,908 [48].

6 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,908 [48].

injunction restraining the club from interfering with their rights of exclusive possession".

23 As to the mirror hall, the primary judge held[7] that "there can be no suggestion that the rights [the appellants] had in relation to the [mirror hall] amounted to a lease" under the general law which might contravene s 92(1)(d) of the Liquor Act, and so no question of illegality arose with respect to that part of the premises. The appellants' licence to use that area on certain occasions was said to fall "within the definition of 'lease' under s 16 of the [Retail Leases Act]"[8], so that the appellants had the benefit of the minimum five-year term provided for in that section in respect of the mirror hall as well.

24 The primary judge held[9] that the appellants were not entitled to a declaration of a leasehold interest in the mirror hall, but that they were entitled to an order for specific performance of an agreement to license the area to them for five years commencing on 31 March 2012.

The Court of Appeal

25 The Court of Appeal of New South Wales (Meagher and Leeming JJA and Tobias AJA) allowed the Club's appeal[10].

26 The Court of Appeal (Tobias AJA, with whom Meagher and Leeming JJA agreed) was disposed to accept that a "lease" for the purposes of the Retail Leases Act, which did not confer a right of exclusive possession on the lessee, "would not qualify as a lease under the general law" and so would not engage s 92(1)(d) of the Liquor Act[11]. But because the appellants had conceded[12] that "there was at least an implied agreement between the parties that the [appellants] would have exclusive possession of the restaurant area", it was held that a lease under the general law had been created. The Court of Appeal accepted that "the

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7 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,908 [49].

8 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,908 [49].

9 *Gnych v Polish Club Ltd* (2013) 17 BPR 32,897 at 32,909 [53].

10 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650.

11 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 669-670 [75], [78].

12 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [76].

parties seem to have agreed the rent … [and] [b]y virtue of s 16(1) of the [Retail Leases Act] the term of the [appellants'] exclusive occupation was five years from 31 March 2012."[13] The circumstance that the duration of the lease was dependent upon the operation of the Retail Leases Act did not prevent the conclusion that a lease had been granted so as to attract the operation of s 92(1)(d) of the Liquor Act[14].

27 The Court of Appeal held[15] that the purpose of s 92 of the Liquor Act is to ensure that licensees do not enter into arrangements with others whereby the regulation of the use of licensed premises under the Liquor Act might be compromised. It was said that the grant of exclusive possession to a person other than the licensee "cannot serve the purpose or policy of the statute and, in particular, the overarching responsibility of the licensee to personally supervise and manage the conduct of the business of the licensed premises."[16] This view of the purpose and policy of the Liquor Act required[17] the conclusion that any lease caught by s 92(1)(d) is not to be enforced by the courts.

28 The Court of Appeal set aside[18] the orders of the primary judge with respect to the restaurant area. As to the mirror hall, the Court of Appeal set aside[19] the declaration and order on the basis that, absent an enforceable lease of the restaurant area, there was no utility in maintaining the primary judge's orders in that regard.

The appeal to this Court

29 On 13 March 2015, Hayne and Nettle JJ granted the appellants special leave to appeal to this Court.

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13 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [76].

14 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [77]-[78].

15 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 669 [73], 670 [79].

16 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [79].

17 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670-671 [81].

18 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670-671 [81].

19 *Polish Club Ltd v Gnych (No 2)* (2014) 17 BPR 33,435 at 33,437 [10].

The parties' arguments in this Court

30 One argument advanced by the appellants in their written submissions, but not pressed in oral argument, was that the Court of Appeal erred in concluding that they had a lease under the general law. It was argued that the lease was created by the Retail Leases Act by virtue of the parties' conduct and the operation of ss 8 and 16, and that s 92(1)(d) of the Liquor Act did not apply to a lease created by statute.

31 The Club took issue with this argument, contending that the Retail Leases Act merely regulated the terms of a lease created by agreement between the parties. The Club argued that the mere fact that a statutory provision has the effect of implying terms into an agreement for a lease does not create a new lease pursuant to statute.

32 In oral argument, counsel for the appellants was content to accept that there was a breach of s 92(1)(d) of the Liquor Act and to focus upon the contention that the Court of Appeal misunderstood the effect of that provision.

33 It may therefore be accepted that the Court of Appeal was right to hold[20] that, even though there was no concluded agreement between the parties as to the duration of the appellants' occupation of the restaurant area, a lease under the general law was created by the Club's admitting them into possession of that area on the terms contained in the term sheet. By virtue of s 127 of the *Conveyancing Act* 1919 (NSW)[21], the lease was initially terminable by either party by one month's notice in writing, expiring at any time[22]. On 31 March 2013, when the appellants had been in possession of the restaurant area without interruption for one year, s 6A(2) and (4) of the Retail Leases Act made available to the appellants the right to elect to have the benefit of s 16 of that Act. On 2 August

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20 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [76]-[77].

21 Section 127(1) provides:

> "No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time."

22 *Burnham v Carroll Musgrove Theatres Ltd* (1928) 41 CLR 540 at 565-566; [1928] HCA 31; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249; [1989] HCA 63.

2013, the appellants gave notice of that election, by virtue of which the duration of the lease was fixed at a total period of five years.

34 The principal argument advanced by the appellants in this Court was that the contravention of s 92(1)(d) of the Liquor Act was the failure of the Club to have a lease approved by the Authority before allowing the appellants into possession of part of the licensed premises. It was argued that to hold the lease agreement to be void and unenforceable would prejudice the appellants without furthering the objects of the Liquor Act. The Club advanced no good answer to this argument.

Illegality: general principles

35 In *Equuscorp Pty Ltd v Haxton*[23], French CJ, Crennan and Kiefel JJ explained that an agreement may be unenforceable for statutory illegality in three categories of case, 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;
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> (ii) the making of the agreement is impliedly prohibited by statute. 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;
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> (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'.
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> 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'." (footnotes omitted)

36 There was some vacillation on the part of the appellants as to whether their argument included an invitation to the Court to deal with the present case as

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23 (2012) 246 CLR 498 at 513 [23]; [2012] HCA 7.

a case in the first or third category. In the end, little turns on this point because the consequence of illegality is a matter of statutory construction whatever category of illegality is involved.

37 In this regard, in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*[24], Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ cited with approval the observation by Mason J in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[25] that:

> "the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction".

38 Their Honours went on to state[26] that whether a statute which:

> "contains a unilateral prohibition on entry into a contract … is void … depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction."

39 That statement was, in turn, cited with approval by Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ in *Master Education Services Pty Ltd v Ketchell*[27].

40 Accordingly, the scope of the prohibition in s 92(1)(d) of the Liquor Act and the consequences of a contravention of the prohibition are to be determined by the language of s 92(1)(d) of the Liquor Act construed in the context of the Liquor Act as a whole[28].

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24 (2007) 232 CLR 1 at 29 [45]; [2007] HCA 38.

25 (1978) 139 CLR 410 at 423; [1978] HCA 42.

26 (2007) 232 CLR 1 at 29 [46].

27 (2008) 236 CLR 101 at 107 [11]; [2008] HCA 38.

28 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457, 462; [1989] HCA 15.

The scope of the prohibition in s 92(1)(d) of the Liquor Act

41 The scope of the prohibition in s 92(1)(d) of the Liquor Act can be understood only by reference to the legal characteristics of a lease. In *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[29], Deane J described a lease as possessing a "duality of character … [being] both an executory contract and an executed demise." In this conception, a lease is a "[bundle] of rights and duties which together can be identified as [a] species of property" the origins of which lie in the contract between lessor and lessee[30]. In terms of the dual character of a lease described by Deane J, s 92(1)(d) is not directed at the bundle of rights and duties under the contract between lessor and lessee; rather, it is directed squarely at the conduct of the licensee/lessor in executing a demise of part of licensed premises.

42 In *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation*[31], Windeyer J said:

> "A lease strictly means a species of conveyance, the grant of a right to the exclusive possession of land for a term less than that which the grantor has. But by a usage that is apparently metonymical in origin the word 'lease' can describe not only the grant but that which is granted, namely the term."

43 Section 92(1)(d) is concerned with the act of the licensee: it proscribes the grant by the licensee rather than that which is granted. It does not, in terms, proscribe the performance by the parties of their obligations under the relationship created by the grant.

44 The Club, in pressing for a more expansive view of the scope of the proscription in s 92(1)(d), in which the rights of the parties to the lease are sterilised, did not shrink from the unattractive result that, on this view, contractual arrangements freely entered into by a licensee would be automatically sterilised, at the licensee's instigation, by the licensee's reliance on its own breach of the statute to the detriment of the lessee.

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29 (1985) 157 CLR 17 at 51; [1985] HCA 14.

30 *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* (2013) 251 CLR 592 at 604 [40], 610-611 [61]-[65]; [2013] HCA 51.

31 (1966) 115 CLR 1 at 8; [1966] HCA 15.

45 As a matter of legislative construction, the likelihood of adverse consequences for the "innocent party" to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature[32]. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing[33]. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language[34]. And in the present case, this unattractive aspect of the Club's argument is compounded by the circumstance that, as its counsel acknowledged, the Club was obliged to take steps to seek the approval of the Authority for the grant of the lease and did not do so[35].

46 The breach of s 92(1)(d) on which the Club sought to rely was a breach by the Club which gave rise to an offence that was complete at the moment when the Club allowed the appellants into exclusive possession. The subsequent observance by both parties of the terms of the lease was not prohibited and did not give rise to any continuing offence. This understanding of the limited scope of the prohibition in s 92(1)(d) is confirmed by a consideration of the consequences of a breach of the provision.

Consequences of a breach of s 92(1)(d) of the Liquor Act

47 It is not the case that the only way in which legal effect can be given to s 92(1)(d) is by the sterilisation of leases granted in contravention of the

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32 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 29 [46].

33 *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1 at 8, 9; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180 at 188-189; *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 595; [1991] 1 All ER 267 at 274.

34 *Orr v Ford* (1989) 167 CLR 316 at 323, 326-327, 333-334; [1989] HCA 4.

35 *Mackay v Dick* (1881) 6 App Cas 251 at 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; [1979] HCA 51; *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at 822 [25]; 312 ALR 356 at 365; [2014] HCA 32.

prohibition. Section 92(1) imposes a penalty upon breach. In *Yango*[36], Mason J said:

> "There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished".

48 This observation was cited with approval by Brennan CJ, Dawson and Toohey JJ in *Byrne v Australian Airlines Ltd*[37] in the course of their Honours' expression of support for the proposition that a statute which prohibits the doing of an act under a penalty does not necessarily sterilise a legal relationship associated with that act.

49 In this case, the imposition of a penalty upon the Club by reason of its grant is not the only consequence of the Club's contravention of s 92(1)(d). The crucial step in the reasoning of the Court of Appeal in relation to the consequence of the Club's breach of s 92(1)(d) was explained in the following passage[38]:

> "Notwithstanding that a breach of s 92(1)(d) gives rise to an offence on the part of the licensee (in this case the Club) and notwithstanding that the prohibition contained in that provision can be overcome by the obtaining of approval from the Authority, nevertheless … any sanction short of the prohibited lease being rendered unenforceable and void would frustrate the implementation of the legislative purpose inherent in the statutory prohibition. In this respect it is noteworthy that the prohibition only applies to a lease or sublease which, by definition as it were, entitles the lessee or sublessee to exclusive possession and, therefore, the right to exclude the licensee (or its manager) from the leased or subleased premises. That cannot serve the purpose or policy of the statute and, in particular, the overarching responsibility of the licensee to personally supervise and manage the conduct of the business of the licensed premises."

50 The Court of Appeal erred in its conclusion that the policy or purposes of the Act could not be served by any sanction short of holding the lease void.

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36 (1978) 139 CLR 410 at 429.

37 (1995) 185 CLR 410 at 428; [1995] HCA 24.

38 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 670 [79].

There are two separate but related flaws in the analysis reflected in the passage cited.

51 First, s 92(1)(d) expressly postulates a lease of part of a licensed premises. Given that the right of exclusive possession is the hallmark of a lease[39], s 92(1)(d) necessarily contemplates the vesting of exclusive possession of part of a licensed premises in a person other than the licensee. Accordingly, the vesting of exclusive possession of part of licensed premises in a person other than a licensee cannot be said to be contrary to the purpose and policy of the statute: the statute contemplates that precisely that state of affairs may be brought about by a grant by the licensee. True it is that a grant may lawfully be made only with the approval of the Authority, but the circumstance that s 92(1)(d) acknowledges that a person other than the licensee may enjoy exclusive possession is inconsistent with the Court of Appeal's understanding of the purpose and policy of the Act in this respect.

52 The second flaw in this aspect of the reasoning of the Court of Appeal lies in the failure to recognise the important role assigned by the Liquor Act to the Authority in relation to the supervision and management of licensed premises. That role is inconsistent with the view that the regime established by the Liquor Act for the control of licensed premises requires that a contravention by a licensee of s 92(1)(d) automatically renders the lease which is granted void and unenforceable.

53 Under s 139 of the Liquor Act, a complaint to the Authority may be made against a licensee by, among others, the Secretary of the Department, on the ground that the licensee has failed to comply with a requirement of the Act in relation to the licence or the licensed premises[40]. Under s 141(2), the Authority, if satisfied that the ground is made out, may cancel or suspend the licence. It may also decide to take no action in relation to the licence. A contravention of s 92(1)(d) of the Act thus gives rise to the possibility that the liquor licence might be cancelled, but cancellation is not automatic. Whether or not the licence should be cancelled is a matter for the Authority.

54 The discharge by the Authority of its responsibility might lead to a decision that there should be no change in the status quo in relation to the licence. In that event, the appellants as lessees might continue their occupation of the leased part of the premises. If the Authority were to cancel the Club's

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39 *Radaich v Smith* (1959) 101 CLR 209 at 222; [1959] HCA 45.

40 Liquor Act, s 139(3)(d).

licence, then a question would arise as to whether the lease was terminated by frustration or terminable by the appellants by reason of the Club's inability to make licensed premises available under the lease. On the other hand, the Authority might conclude that the appellants were fit and proper persons to be in charge of the part of the premises dedicated to the restaurant, which might lead it to decide not to cancel the Club's licence notwithstanding its breach of s 92(1)(d), in which case the Club's breach of the Liquor Act would have no consequences for the continuation of the lease. The conclusion that a breach of s 92(1)(d) automatically avoids the lease would pre-empt the effect of the Authority's decision in this regard. That outcome would not be consistent with the supervisory role entrusted to the Authority by the Liquor Act.

55 Finally, it is distinctly possible that, in a case where the Authority has granted its approval to a lease of part of the licensed premises, the lessee may later cause the licensee to fail to observe the requirements of the Liquor Act relating to the licence or the licensed premises. It may be accepted that such a lessee should not have the power to exclude the licensee from the leased part of the licensed premises. The Act does not provide that the lease shall be void and unenforceable in those circumstances. It deals with that possibility by arming the Authority with the regulatory powers already referred to. Accepting that the policy of the section is to guard against the possibility that a lessee may exclude the licensee from the leased part of the licensed premises in such circumstances, there is no more reason to suppose that the Act necessitates avoidance of a lease entered into without approval than that it necessitates avoidance of a lease entered into with approval.

Conclusion

56 The offence created by s 92(1)(d) was committed by the Club when the Club granted the appellants possession of the restaurant area. That offence was committed at that time, once and for all, because the approval of the Authority to the lease had not then been obtained. The continuation of the lease was not a continuing offence. One consequence of the contravention was that the Club was liable to a fine; but that was not the only consequence. The Club's breach of the Act also meant that the Authority was empowered to cancel the Club's licence should it decide to do so. It might do so, but it might not.

57 Whether the licence should be cancelled is a matter for the Authority. The Authority might decide that the licence should be permitted to stand if it does not regard the current arrangements between the parties as unacceptable insofar as the public interest in the due observance of the standards required by the Liquor Act is concerned. If the Authority were to make such a determination, there

would be no reason connected with the licence why the lease should not continue.

Orders

58 The appeal should be allowed. The following orders should be made:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 October 2014 and orders 3, 4, 6 and 7 of the orders of that Court made on 16 September 2014 and, in their place, order that the appeal be dismissed with costs.

3. Remit the matter to the Supreme Court of New South Wales for determination of the assessment of damages, if any, pursuant to the undertakings listed in order 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 6 November 2014.

59 GAGELER J. This appeal was argued on the assumption that an agreement unenforceable for statutory illegality is an agreement the making, or some step in the making, of which was expressly prohibited by statute, was impliedly prohibited by statute, or was otherwise associated with or in furtherance of a purpose made illegal by statute. Mr and Mrs Gnych suggested that their case might be analysed by reference to the first or perhaps the third of those categories; the Club suggested that it might also be analysed by reference to the second.

60 Useful as that tripartite classification might sometimes be[41], it is not a comprehensive description of agreements unenforceable for statutory illegality. To shoehorn a given agreement into one of its categories is to adopt an incomplete mode of analysis.

61 An agreement which is prohibited by statute is not necessarily an agreement which is unenforceable for statutory illegality, and may itself be an agreement which is associated with or in furtherance of a purpose made illegal by statute. There is some utility in laying out in broad terms the analytical framework within which the enforceability or unenforceability of such an agreement is determined.

62 Making an agreement in breach of an express or implied statutory prohibition can have either of two differently sourced consequences for the legal enforcement of the agreement which has come to exist in fact. One is a statutory consequence, the nature and extent of which turns entirely on the construction of the statute imposing the prohibition or of some other statute. The other is a common law (or equitable) consequence, limited to withholding (or imposing conditions on) the grant of a remedy to enforce the agreement at the suit of one or more parties, the application of which turns on considerations of public policy. The distinction between those differently sourced consequences, although fundamental, has not always been recognised in the case law.

63 The nature and extent of any statutory consequence of breach of a statutory prohibition on making, or on some step in making, an agreement is a question of statutory construction which is distinct from the question of statutory construction which determines the scope of that prohibition (if the prohibition is express) or the existence and scope of that prohibition (if the prohibition is implied). A statutory consequence of making an agreement in breach of an express statutory prohibition is sometimes set out in exhaustive terms in the statutory text. Almost inevitably in the case of an implied prohibition, and

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41 Eg *Miller v Miller* (2011) 242 CLR 446 at 458 [26]; [2011] HCA 9; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 513 [23]; [2012] HCA 7.

sometimes in the case of an express prohibition, the statutory consequence is left in whole or in part to statutory implication.

64 Judicial determination of a statutory consequence left to statutory implication has become more sophisticated as statutory regulation has become more sophisticated and more pervasive. What was once a strong presumption of statutory interpretation that a purported agreement made in breach of a statutory prohibition "is not only illegal, but void because illegal, unless the statute indicates a contrary intention"[42] has, since *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[43], given way to an acceptance that "[t]he question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes"[44].

65 An implied statutory consequence determined in accordance with the ordinary principles of statutory construction – if a statutory consequence is implied at all – need not always go so far as to render an agreement made in breach of an express or implied statutory prohibition "void" or "vitiated" or "nullified" or "invalid", in the sense of being "devoid of legal consequences"[45]. There is no reason why an implied statutory consequence cannot stop short of rendering an agreement made in breach of a particular statutory prohibition wholly unenforceable by all parties in all circumstances. An implied statutory consequence might be limited, for example, to rendering an agreement unenforceable by a contravening party in the occurrence or non-occurrence of particular events.

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42 *Bassin v Standen* (1945) 46 SR (NSW) 16 at 18, endorsed in *Bradshaw v Gilbert's (Australasian) Agency (Vic) Pty Ltd* (1952) 86 CLR 209 at 218-219; [1952] HCA 58.

43 (1978) 139 CLR 410; [1978] HCA 42.

44 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; accord at 423, 436; contra at 430. See also *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457; [1989] HCA 15; contra at 461-462.

45 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 458-459; [1969] HCA 4.

66 The contemporary position is therefore that[46]:

> "There is no universal rule that can be applied to the construction of statutes in order to determine whether the effect of a failure to comply with a provision of a particular statute is to render a category of contracts (or an individual contract) to which that provision applied invalid or unenforceable. Each statute has to be considered as a whole and as a separate entity."

67 The considerations which bear on determination of an implied statutory consequence of making an agreement in breach of a statutory prohibition are similar to, and can overlap with, the considerations which bear on determination of the implied statutory consequence of doing an act in breach of a condition which regulates the exercise of a statutory power[47]. Here, as there, cases decided in other statutory contexts can assist in illustrating considerations which have proved to be significant, but reference to the outcomes of those cases can at best provide analogical guidance. Here, as there, the legislative intention to be discerned in a particular statutory context "often reflects a contestable judgment"[48].

68 Reference to the range of considerations which have been identified as significant in other statutory contexts is nevertheless important to ensuring consistency in the approach taken in the application of ordinary principles of statutory construction and, in turn, to maximising the predictability of the judgment that must be made in a novel statutory context. Amongst the most prominent and recurring of the considerations which have been recognised as bearing on the determination of the implied statutory consequences of making an agreement in breach of a statutory prohibition are: the statutory object of the particular prohibition; any positive effect of implying or not implying some further particular statutory consequence on fulfilment of the identified statutory object; any negative effect of implying or not implying that further statutory consequence on the legitimate interests of one or more parties to the agreement

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46 *Tonkin v Cooma-Monaro Shire Council* (2006) 145 LGERA 48 at 59 [65].

47 Eg *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-459.

48 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91]; [1998] HCA 28.

or of third parties; and the extent to which the statute imposing the prohibition expressly addresses the consequences of its breach[49].

69 The last of those considerations is often decisive, and is of particular importance in relation to a prohibition imposed as part of a complex statutory scheme. It is now understood that, within "a framework of legislation that makes elaborate provision not only for the creation of norms of conduct but also for the consequences that are to follow from the contravention of those norms", "[i]t is not readily to be supposed that the consequences of contravention are to be determined by resort to principles hinging upon inferences about legislative intention or the imputed intentions of contracting parties"[50].

70 Where a statute expressly or impliedly denies legal operation to an agreement, it is the statute itself which operates to render that agreement incapable of enforcement at common law. An agreement which is not denied legal operation by statutory force may still be unenforceable at the insistence of one or both parties by operation of the common law by reference to considerations of public policy. The cases in which that might occur, however, must now be closely confined.

71 It is important to identify the considerations of public policy that might be in play in such cases. Although other considerations might arise in some circumstances, two overlapping considerations have generally been recognised in the decided cases to predominate[51]. One of those considerations has long been identified in terms that a person ought not to be permitted by law to base a cause of action on an immoral or illegal act[52]. The other, more focussed, consideration has been identified in terms that a person ought not to be assisted by law to benefit from an immoral or illegal act[53]. That other consideration is reflected in what has been described as "the more specific rule that the court will not enforce

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49 Cf *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 29 [45]-[46]; [2007] HCA 38; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 107 [11]; [2008] HCA 38.

50 *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 527 [30]; [2006] HCA 31. See also *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 117-118 [40].

51 Cf Enonchong, *Illegal Transactions*, (1998) at 14; Farnsworth, *Farnsworth on Contracts*, (1990), vol 2 at 2.

52 *Holman v Johnson* (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121].

53 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 428, quoting *Beresford v Royal Insurance Co* [1938] AC 586 at 598-599.

the contract at the suit of a party who has entered into a contract with the object of committing an illegal act"[54].

72 "Notions of public policy", as Dixon J put it, "are not fixed but vary according to the state and development of society and conditions of life in a community."[55] No consideration of public policy is immutable. Each must accommodate not only societal conditions but also statutory context. In any consideration of public policy at common law (or in equity), "the central policy consideration at stake is the coherence of the law"[56].

73 The consideration of public policy that a person ought not to be permitted by law to found a cause of action on an immoral or illegal act is the product of an earlier age. The broader consideration of public policy is now rarely recognised by the common law to have application in relation to illegality which arises under a modern regulatory statute. That is the import of the observation by Mason J in *Yango* that "[t]here is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished"[57]. It is not the function of the common law to seek to improve on a regulatory scheme by supplementing the statutory sanctions for its breach. If a statute itself does not operate to deny legal operation to an agreement made in breach of one of its prohibitions, or to render that agreement unenforceable by reason of that breach, the coherence of the law is best served by a court respecting and enforcing that legislative choice.

74 But the other consideration of public policy – that a person ought not to be assisted by law to benefit from an immoral or illegal act – can have application where the first does not. That is the import of the further observation by Mason J in *Yango* that "there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty"[58].

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54 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 427.

55 *Stevens v Keogh* (1946) 72 CLR 1 at 28; [1946] HCA 16.

56 *Miller v Miller* (2011) 242 CLR 446 at 454 [15]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 513 [23].

57 (1978) 139 CLR 410 at 429.

58 (1978) 139 CLR 410 at 429.

75 A court examining the application of that consideration of public policy to the enforcement of an agreement made in breach of a statutory prohibition will examine the intention of a person in entering into the agreement and in seeking to enforce the agreement. The court will recognise that, "whilst persons who deliberately set out to break the law cannot expect to be aided by a court, it is a different matter when the law is unwittingly broken"[59]. The court will weigh the consequences of withholding a remedy to enforce the agreement in light of the objects or policies which the statute seeks to advance and the means which the statute has adopted to achieve that end. Ordinarily, it would be open to the court to conclude that withholding a common law remedy from a person whose intention was, and remained, to flout the statute was justified by reference to the narrower consideration of public policy only if the consequence of withholding the remedy could be determined by the court to be both proportionate to the seriousness of the illegality and not incongruous with the statutory scheme[60]. The moulding of an equitable remedy, if sought, might involve other considerations and permit of greater flexibility[61].

76 That consideration of public policy might have arisen here had Mr and Mrs Gnych been knowingly concerned in the breach by the Club of s 92(1)(d) of the Liquor Act. In the absence of Mr and Mrs Gnych having been knowingly concerned in the Club's breach or of any other circumstance suggesting wrongdoing on their part, however, no question arises of the common law (or of equity) operating, by reference to considerations of public policy, to withhold (or to impose conditions on) the declaratory relief which Mr and Mrs Gnych sought and which they were successful in obtaining at first instance.

77 For those reasons, I agree with the joint reasons for judgment that the outcome of the appeal turns wholly on the determination, as a question of construction, of the statutory consequences of breach of s 92(1)(d) of the Liquor Act. I also agree with the conclusion reached in the joint reasons for judgment on that question.

78 The different conclusion reached by the Court of Appeal on that question of construction was reached by reasoning which took as its starting point the identification of the purpose of s 92(1)(d)'s prohibition (on the grant of exclusive possession of part of licensed premises without the consent of the Authority) as being primarily to operate in aid, relevantly, of the requirement of s 91(1) of the

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59 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 221; [1997] HCA 17. See also *Nelson v Nelson* (1995) 184 CLR 538 at 604; [1995] HCA 25.

60 *Nelson v Nelson* (1995) 184 CLR 538 at 612-613; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229-230, 249-250.

61 Eg *Nelson v Nelson* (1995) 184 CLR 538 at 571-572, 617-618.

Liquor Act that the manager of the licensed premises be "responsible at all times for the personal supervision and management of the conduct of the business of the licensed premises under the licence"[62]. I agree with that identification of the relationship between s 92(1)(d) and s 91(1).

79 The Court of Appeal was persuaded that the primary statutory purpose of the prohibition as so identified would not be realised if a grant of exclusive possession of part of licensed premises could be made without the consent of the Authority in breach of that statutory prohibition and yet still be legally enforceable. The Court of Appeal noted that the grant might, for example, be to a lessee who might not be a fit and proper person or who might seek to exclude the manager from that part of the premises or to interfere with the discharge of the statutory responsibility of the manager[63].

80 There is, in my opinion, much to be said for the reasoning adopted by the Court of Appeal and for the conclusion which it reached. The Liquor Act has amongst its objects the regulation of the sale and consumption of liquor, with a view to encouraging responsible attitudes and to minimising harm associated with misuse[64]. The requirement of s 91(1) for the continuous personal supervision of licensed premises is an integral part of the statutory structure put in place to achieve those objects. The prohibition in s 92(1)(d) enhances the efficacy of that requirement.

81 Given the evident public interest protected by the licensing regime of which those sections form part, I find it difficult to place much emphasis on the potential for implied statutory nullification of a lease as a result of a breach of s 92(1)(d) to cause hardship to an innocent lessee. A potential lessee of a part of licensed premises is not within the class of persons sought to be protected by the licensing regime[65]. Any potential lessee could reasonably be expected to be aware at least of the existence of a licensing regime and to have the means of becoming aware of its details before entering into any agreement for lease.

82 There are, however, two indicia of legislative intention which tend against the conclusion reached by the Court of Appeal. The first is the express reference in the statement of objects in the Liquor Act to the regulatory system it facilitates being "flexible and practical" with "minimal formality and technicality"[66]. It has

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62 Section 91(1)(b). See *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 669 [72].

63 *Polish Club Ltd v Gnych* (2014) 86 NSWLR 650 at 669 [72], 670 [79].

64 Section 3(1)(a), (2)(a) and (b).

65 Cf *Nelson v Nelson* (1995) 184 CLR 538 at 604-605.

66 Section 3(1)(b).

not been suggested that s 91(1) could be rendered more efficacious, or that the objects of the Liquor Act could be enhanced, if a lease granted in breach of the prohibition in s 92(1)(d) was merely to be unenforceable by one or other of the parties to it. It would only be possible under a blunt and drastic rule that all leases made in breach of s 92(1)(d) be devoid of all legal operation in all circumstances that the contrary outcome could be explained as having meaningful effect within the statutory scheme. The result is formal, technical and inflexible.

83 The second is the extensive range of discretionary powers expressly conferred on the Authority, through which the Authority remains capable of acting to ensure encouragement of responsible attitudes and minimisation of harm associated with the misuse of liquor, even if a grant of exclusive possession of part of licensed premises were to be made without the consent of the Authority. Those powers include taking administrative action to vary the boundaries of the licensed premises[67], or to cancel or suspend the licence or impose a condition on the licence[68]. They also include commencing proceedings against the licensee which are capable of resulting in similar measures being imposed by a court in addition to the monetary penalty prescribed for breach of the prohibition in s 92(1)(d)[69]. In light of those powers, I do not think implication of a further statutory consequence of nullification of the purported lease to be warranted.

84 In my opinion, within a legislative regime which places emphasis on the minimisation of formality and technicality, the statutory consequences of breach of the prohibition in s 92(1)(d) of the Liquor Act (in addition to the monetary penalty prescribed for its breach) are best seen to lie in exposing a lessee to the exercise of the extensive express discretionary powers of the Authority.

85 I therefore agree with the orders proposed in the joint reasons for judgment.

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67 Section 94(2) and (5).

68 Section 141(2)(a), (b) and (e).

69 Sections 145, 146 and 148.