

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 66 of 1937

ON APPEAL from the Supreme Court
of New South Wales.

BETWEEN:

HOTEL SYDNEY LIMITED

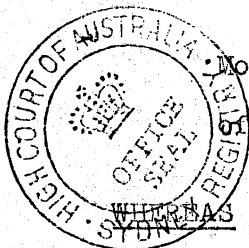
(Plaintiff)
Appellant.

and

MUNICIPAL COUNCIL OF SYDNEY

(Defendant)
Respondent.

Before their Honours The Chief Justice, Mr. Justice
Rich, Mr. Justice Starke, Mr. Justice Dixon and
Mr. Justice McTiernan.

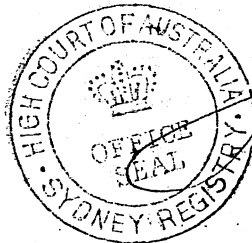


Monday the thirteenth day of December in the year
of Our Lord One thousand nine hundred and thirty seven.

WHEREAS the abovenamed Appellant issued a writ out of the
Supreme Court of New South Wales in an action No. 3387 of 1936
claiming the sum of Two thousand six hundred and twenty
pounds fifteen shillings and two pence (£2620. 15. 2.) for
debt from the abovenamed Respondent AND WHEREAS in pursuance
of the provisions of Sections 55 and 56 of The Common Law
Procedure Act 1899 of the State of New South Wales the
questions of law raised in the said action were stated in
a Special Case for the opinion of the Full Court of the
Supreme Court of New South Wales without any pleadings
AND WHEREAS the Special Case having come on for hearing
before the said Full Court of the Supreme Court of New South
Wales the said Full Court on the twenty-fourth day of August
one thousand nine hundred and thirty seven ordered (inter
alia) that judgment be entered for the Respondent with costs
AND WHEREAS on the thirteenth day of September one thousand

nine hundred and thirty seven the Appellant filed a Notice of Appeal to this Court against the decision of the said Full Court and the Appeal came on to be heard on the tenth and thirteenth days of December one thousand nine hundred and thirty seven WHEREUPON AND UPON READING the certified copy of documents transmitted by the Prothonotary of the said Supreme Court of New South Wales to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Watt of King's Counsel and Mr. Hunter of Counsel for the Appellant and by Mr. E.M. Mitchell of King's Counsel and Mr. Sheldon of Counsel for the Respondent ~~herein~~ THIS COURT DOETH ORDER that the Appeal be and the same is hereby dismissed AND THIS COURT DOETH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Respondent of and incidental to this Appeal and that such costs when so taxed and certified be paid by the Appellant to the Respondent or to Mr. Malcolm William Donald McIntyre its Solicitor.

BY THE COURT



K. Hardman
DISTRICT REGISTRAR

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Hotel Sydney Ltd

v

Municipal Council of Sydney

Reasons for
Judgment

His Honour The
Chief Justice

66/1937

Delivered orally on
13th December 1937

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY)

No. 66 of 1937

BETWEEN HOTEL SYDNEY LIMITED

(Plaintiff) Appellant

and

MUNICIPAL COUNCIL OF SYDNEY

(Defendant) Respondent

Monday 13th. December 1937

Judgment of His Honour the Chief Justice.

This is an appeal from a decision answering in favour of the defendant questions asked in the special case stated in an action in which the plaintiff sued the defendant to enforce a right claimed under section 21 (2) of the Liquor (Amendment) Act 1912.

The plaintiff is now the lessee under a building lease from the defendant of the Hotel Sydney and other premises. A publican's licence exists in respect of the Hotel Sydney. That licence is held on behalf of the plaintiff by William George Bulfin and thus the plaintiff is the lessee of the licensed premises and Bulfin is the licensee. The licence fees were in fact paid by the plaintiff and not by Bulfin.

Section 21 (2) provides that "Any holder of a publican's licencepaid by him" and then provision is made for deduction for rent and a proviso deals with the case where the sum paid to the lessee in respect of the licence fee exceeds one-third of the rent.

The Supreme Court has held that the plaintiff is not the holder of a publican's licence within the meaning of the section and that, therefore, the plaintiff is not entitled to recover from the owner (the defendant) two-fifths of the licence fee paid. The amount involved is £2620.15.3

It is clear that the plaintiff is not in the ordinary sense the holder of a publican's licence, Bulfin is in that sense the holder of the licence. It is urged however that the Liquor Act recognises, as the Courts also recognise, that a person who is not a grantee of a licence may nevertheless have a beneficial interest in a licence. For example, section 41 of the Liquor Act 1912 imposed a penalty upon a person who at any one time holds a beneficial interest, whether in the name of himself or anyone else, in more than one licence. There is a provision also in section 88 which recognises that a manager may hold a licence on behalf of a person but it does not follow

by such provision that each person who has a beneficial interest in a licence can be said to be the holder of a licence. If this view were taken there might be many holders of a single licence all of whom would be subject to the many stringent provisions of the licensing law. There is no distinction which I can discover between the licensee and the phrase "holder of the licence"; in section 57 a licensee is subject to certain provisions as to premium and in section 60 reference is made to proceedings against the holder of a licence under section 57 where the licensee is such as has been mentioned. Accordingly unless there are some special indications in a particular provision

the term the holder of publican's licence. Myself, I think it an indication as meaning the person to whom the licence has been granted.

The terms of 21 (2) appear to be clear. The section confers a right only upon the holder of a publican's licence. The plaintiff is not in fact the holder of such a licence, and because of its incorporation it could not be the holder of such a licence. It may be that it is but that is a matter for the legislature and not for the Court to consider. The fact that the plaintiff is beneficially interested in the licence does not make the plaintiff the holder of the licence itself.

Upon this view of the section, which is the view taken by the Supreme Court, it is unnecessary to enquire into the effect of section 34 of the Liquor (Amendment) Act 1919. This section provides that "A lessee under a building lease.....to the section". The plaintiff here is a lessee under a building lease and the lessor has not made any election under the proviso and there is for the foundation of an argument that even if the plaintiff were the holder of a publican's licence the plaintiff could not be described as the holder of a publican's licence who is not the owner of premises in respect of which the licence fee is paid, which are the introductory words of section 21 (2). It may be that section 34 is directed only to the subject of payment of compensation fees and the receipt of compensation which are matters provided for in legislation which has now been repealed.

It is not necessary to determine for the purpose of answering the question which arises between the parties in this case whether section 34 has any other application. For myself I may say that I am much impressed by Mr. Watt's argument that it has not such an application as that which was contended for.

Secondly, it is not necessary in order to answer the questions in the case to examine the decision in re Plummer (25 S.R. 129) upon which the

appellant relied in support of the contention that the holder of a publican's licence included persons who are beneficially interested in such a licence. Without examining the decision in Plummer's case I think it is sufficient to say that that case was decided upon other provisions of the Act.

Question (b) in the case is as follows "Whether the plaintiff is entitled under section 21 (2) of the Liquor Act 1912 as amended to recover all or any of the amounts mentioned in paragraph 14 hereof".

(I have spoken of the sum of £2620.15.3 but as to two items I think there has been an abandonment of the first two items and the amount is correspondingly reduced.)

In my opinion this question should be answered in the negative.

Question (a) for reasons I have stated need not be answered.

Question (c) raises the question of the Statute of Limitations which was not argued before this Court and no answer is required and question (d) is "Whether the plaintiff is otherwise entitled to recover all or any of the amounts mentioned in paragraph 14 hereof", and in my opinion the answer to that should be "No".

It is I think sufficient that an order should be made that the appeal be dismissed with costs.

71036 of 1937 6.

IN THE HIGH COURT OF AUSTRALIA.

High Court of Australia.
Principal Registry.

Foley

V.

O'Loughlin & Co

REASONS FOR JUDGMENT.

High Court of Australia.
Principal Registry.

Judgment delivered at

Sydney

on

14th December 1937

FOLEY v. O'LOUGHLIN AND OTHERS.

Order.

Appeal dismissed. Costs of all parties to be paid out of the estate, those of the trustees as between solicitor and client.

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