[1991–92 Gib LR 385]

CEPSA (GIBRALTAR) LIMITED v. STIPENDIARY MAGISTRATE

COURT OF APPEAL (Fieldsend, P., Davis and Huggins, JJ.A): October 12th, 1992

Trade and Industry—trading licence—refusal of licence—needs of community—Authority obliged under Trade and Licensing Ordinance to grant licence unless one of s.16(1) conditions met—appeal from decision is rehearing de novo, not examination of Authority's decision—if no evidence adduced that community's need met, Authority directed to grant licence

Trade and Industry—trading licence—refusal of licence—needs of community—Authority to consider how existing licences operate, as well as number of such licences, in deciding whether community's needs met—irrelevant that applicant will benefit commercially from granting of licence—reasons for refusal to state area of community for which needs already met

The appellant appealed to the Stipendiary Magistrate against the Trade Licensing Authority's refusal of a licence to trade.

The appellant, whose business was the supply of fuel to ships, transport contractors and retailing dealers, applied for a licence to trade in petroleum and petroleum products from Waterport House in addition to its existing trading licence in respect of Pitman's Alley. Its administrative headquarters were already based at Waterport House and a licence would allow it to accept orders for fuel there, though not to store or deliver any from the premises.

Three other Gibraltar oil companies objected to the grant of a licence, primarily on the ground that, for the purposes of s.16(1)(*f*) of the Trade Licensing Ordinance, the needs of the community either in Gibraltar or in the specific area in which the appellant proposed to trade were adequately provided for. The Trade Licensing Authority refused to grant a licence and the appellant appealed to the Stipendiary Magistrate under s.22(1) of the Ordinance.

The objectors were heard by the Magistrate, and evidence was given by a director of the appellant, the chairman of the Authority and the head of the Consumer Protection Unit. The chairman of the Authority placed in evidence a list of trading licences for petroleum products issued by it and of storage licences issued by the relevant authorities, and stated that the

number of licence-holders in the area of business proved that it was adequately provided for. Evidence of the *modus operandi* of the objectors given before the Authority was not put before the Magistrate. The appellant's director gave evidence that the granting of a licence would not only benefit the appellant commercially by enabling it to increase its business, but would also benefit the community by promoting competition within the industry and thereby lowering prices.

The Magistrate held, *inter alia*, that there were several existing unrestricted licences similar to that sought by the appellant, but only those held by the appellant itself and one of the objectors (Shell) were worked in a substantial manner. He outlined Shell's operations in Gibraltar and those of the appellant, and described the major components of the market in petroleum products. He found that the Trade Licensing Authority had properly arrived at the conclusion that the needs of the community were adequately provided for by the existing licence-holders. He stated that the appellant's primary reason for applying was its own commercial benefit and that this would not reflect to the advantage of the community. Nor was there evidence that that the existing licence hampered the appellant in the carrying on of its business, which, in any event was an improper ground on which to apply. He upheld the Authority's refusal.

The Supreme Court also dismissed the appellant's further appeal on the ground that there was no evidence on which to find that the need of the community had not been adequately provided for. The proceedings in the Supreme Court are reported at 1991–92 Gib LR 26.

On further appeal, the appellant submitted that (a) since both the Magistrate and the Supreme Court were obliged to hear the appeal before them *de novo*, they had both considered the wrong question in deciding that there was no evidence that the community's needs were not provided for rather than that there was evidence on which to conclude that they were; (b) the factual findings of the Magistrate did not support the conclusion that the community's needs were met, since the number of trading licences granted was not conclusive without evidence of how the licences were operated and whether that operation met those needs; (c) the appellant had given no evidence to suggest that there was no need for the Authority to grant a licence, and its director had not been cross-examined; and (d) the Authority had no discretion to refuse a licence if none of the conditions of s.16(1) were shown by the objectors to exist; consequently, the Magistrate had erred in upholding the Authority's refusal and should have exercised its discretion *de novo* to grant a licence or to direct the Authority to issue one.

Held, allowing the appeal:

(1) Under s.4 of the Trade Licensing Ordinance, the Authority was required to grant a licence in response to an application unless it was satisfied that at least one of the circumstances described in s.16(1) existed. If so, it then had a discretion (to be exercised judicially) to refuse

the licence. Since an appeal to the Magistrate or the courts was to be in the nature of a rehearing, each had to consider whether there was evidence on which to find that one of the conditions in s.16(1) was met, not whether the Authority had properly reached its decision. In this case, the matter in issue was whether the needs of the community were adequately provided for, and accordingly that was the question to which the Magistrate and the Supreme Court had to address their attention. Such a conclusion could only be reached on the basis of evidence, and if no evidence existed, the Authority had had no power to refuse a licence (paras. 6–8; para. 16; para. 20; para. 23).

(2) Neither the Authority nor the Magistrate had specified what evidence they relied on to support the finding that the needs of the community were adequately provided for. Specifically, the Magistrate had failed to state whether he referred to the needs of Gibraltar as a whole or the area in which the business operated, and if so which area. Furthermore, his reasons suggested that he was considering whether the Authority had properly reached its conclusion rather than rehearing the issue *de novo*. The Supreme Court fell into the same error when it considered the "strong reasons and uncontroverted evidence" that had been before the Authority. Although there was evidence to support his individual findings of fact regarding existing licences, they did not amount to evidence that s.16(1)(*f*) of the Ordinance had been made out. Nor did the list of issued trading licences produced by the chairman of the Authority prove the case. The Magistrate wrongly stated that the *number* of unrestricted licences already granted was proof enough, whereas in fact it was necessary to examine the manner in which those licences were operated to know whether their operation provided for the community's needs. There was no direct evidence that those needs were met and accordingly the licence should have been granted (para. 7; paras. 9–16; paras. 19–22; paras. 24–27; para. 34).

(3) The Magistrate also wrongly placed reliance when refusing the licence on irrelevant matters such as the fact that the existing licence imposed contractual and commercial restraints on the appellant, and that a new licence would benefit the appellant commercially. The appellant was not required to show that its own convenience was advantageous to the community. Other factors, such as competition, might well have been relevant to the Magistrate's decision, but he had to decide the matter on the evidence before him (paras. 28–32).

(4) It was unclear whether the Magistrate had power actually to grant a licence under s.4, but he should, in any event, have directed that the Authority do so. In the light of the evidence, no purpose would be served by remitting the application to be reheard by the same or another Magistrate. Accordingly, the court would order that the Authority issue a licence (para. 17; para. 33; paras. 35–36).

Cases cited:
(1) *Furniture Centre Ltd.* v. *Stipendiary Mag.*, Supreme Ct. Appeal No. 27 of 1985, applied.
(2) *Seruya (Moses S.) Ltd*. v. *Stipendiary Mag.*, Supreme Ct. Appeal No. 8 of 1985, applied.

Legislation construed:
Trade Licensing Ordinance (1984 Edition), s.4: The relevant terms of this section are set out at para. 5.
s.16(1)(*f*): The relevant terms of this paragraph are set out at para. 5.

J.J. Neish for the appellant;
D.J.V. Dumas for the objectors.

1 **FIELDSEND, P.:** This appeal arises out of the Trade Licensing Authority's refusal of a licence to Cepsa (Gibraltar) Ltd. to trade in petroleum and petroleum products from Unit 1, Waterport House, Waterport. Cepsa appealed unsuccessfully to the Stipendiary Magistrate and from his decision, again unsuccessfully, to the Supreme Court.

2 Cepsa is a company in which Cepsa S.A. of Spain, through Cepsa (UK) Ltd., controls 50% of the shares. It has a licence, acquired in March 1989 on a transfer from A. Mateos & Sons Ltd., to trade in petroleum and petroleum products from Pitman's Alley. At Pitman's Alley it has only office premises and no products are stored, or physically delivered from, there. Indeed, Cepsa has no storage facilities on land in Gibraltar. Orders for products are imported from Spain and delivered by bowser. Cepsa's main business is the supply of fuel to ships (known as bunkering) but it also supplies in bulk to other customers in Gibraltar such as transport contractors and, on occasions, to retail dealers such as Shell and Mobil Oil.

3 Cepsa has its main offices in Gibraltar at Waterport House where it has administrative facilities provided partly, if not wholly, by Gibunco Ltd., a company with which it is associated. But without a licence in respect of these premises it cannot there receive or accept orders or otherwise trade. The purpose of Cepsa's application was to allow it to trade from Waterport House as it traded from Pitman's Alley. It did not propose to, and indeed could not, store its products at Waterport House, nor physically deliver them from there. It proposed to continue doing its bunkering business from Pitman's Alley and for that reason did not merely apply to transfer its licence from there to Waterport House. It also hoped to do other business it hoped to do from Waterport House, as this would be much more convenient for it. There were, too, some unspecified limitations in Cepsa's arrangements with Mateos which, it was hinted, might be of disadvantage to some customers.

4 Objections were lodged by or on behalf of Shell (Gibraltar) Ltd., Mobil Oil (Gibraltar) and BP (Gibraltar), based primarily on s.16(1)(*f*) of the Trade Licensing Ordinance, namely that the needs of the community generally in Gibraltar were adequately provided for.

5 Section 4 of the Ordinance provides that the Licensing Authority "may issue" licences to trade or carry on business. Section 16(1)(*f*) provides:

> "(1) . . . [T]he authority may in its discretion refuse to issue a licence, if it is satisfied—
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> . . .
>
> (*f*) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for . . ."

6 The inter-relationship of these sections has been considered in *Furniture Centre Ltd.* v. *Stipendiary Mag.* (1) and in *Moses S. Seruya Ltd.* v. *Stipendiary Mag.* (2). In my view, these cases correctly state the law in reaching the conclusion that the Trade Licensing Authority must grant a licence applied for unless satisfied that at least one of the circumstances in s.16(1) obtain. If the Authority is so satisfied then, of course, it has a discretion to refuse the licence, and this must be exercised judicially. It is not obliged to refuse the licence.

7 The Authority and the Magistrate refused the licence on the single ground that the needs of the community were adequately provided for. Neither set out why they had exercised their discretion to refuse the licence. This appeal, however, has been confined to the question of whether there was evidence upon which such a finding was justified.

8 It was agreed that the proceedings before the Magistrate were in the nature of a rehearing. Evidence was therefore given before the Magistrate and it is upon that evidence that this appeal must be decided. The appeal to the Supreme Court is limited to an appeal on a point of law, as is this appeal. The point of law is in effect that there was no evidence that the needs of the community were adequately provided for.

9 The evidence, and the only evidence, came from Mr. Bassadone, a director of Cepsa, and Mr. Barabich, who had been the Chairman of the Authority which refused the licence, and head of the Consumer Protection Unit. The relevant findings of fact made by the Magistrate were:

> "(e) There are several unrestricted licences similar to that sought by the appellant in existence. Only two licence-holders work these licences in a substantial manner: the two are Shell and [Cepsa].

(f) Shell is the major importer and wholesaler of petroleum and petroleum products. Shell supplies some 70–75% of bunkers for shipping, is the sole supplier of aviation fuel at the Airport, the sole supplier to the generating station and supplies the bulk of petroleum products to Mobil Oil and BP. Shell is the only company which has storage facilities for fuels on land in Gibraltar. Shell also imports and supplies lubricating oil.

(g) [Cepsa] imports and supplies petroleum and petroleum products (bunkers) for shipping. It supplies Mobil Oil and to a transport contractor and sometimes supplies to Shell.

(h) There are several importers of lubricating oils apart from the before-mentioned entities.

(i) Fuel, automobile fuel, petrol and diesel comprise the important and substantial market in petroleum matters."

10 There was evidence to support each of these findings but it can only be on these findings of what one might call primary facts that the Magistrate had earlier in his judgment found that the evidence he heard "points unerringly to the conclusion" that the needs of the community were adequately provided for.

11 Mr. Barabich in his evidence-in-chief did not say that the needs of the community were adequately provided for by the existing licence. He did, however, produce a list of licences issued under the Ordinance in respect of petroleum products, and lists of licences to store petroleum products issued by the Fire Officer and the Captain of the Port. Licences *to store* these products are, of course, irrelevant to the issue of whether the needs of the community are adequately provided for by *trading* licences, and must be disregarded. The list of trading licences included:

(i) a licence in respect of Shell's administrative centre, a licence in respect of its aviation service, a licence in respect of its bunkering installation, a licence in respect of its storage depot, a licence in respect of a yacht supply station and two licences in respect of filling stations;

(ii) a licence in respect of Mobil Oil's administrative office, a licence in respect of its yacht filling station and four licences in respect of service stations;

(iii) two licences in respect of BP's service stations; and

(iv) nine licences in respect of small retail outlets ancillary to other businesses.

12 It is not clear which of these licences were "unrestricted licences" such as those referred to in para. (e) of the Magistrate's findings. All that Mr. Barabich said at the conclusion of his cross-examination was that

"the number of licence-holders proves that the area of business is adequately taken care of." This is the only direct evidence of adequacy.

13 The relevance of the number of retailers could be to show that there was only a limited number of retail outlets to be supplied by the bulk suppliers, but this does not seem to have been the Magistrate's approach. Rather, he appears to have thought that the existence of several issued unrestricted licences showed that the needs of the community were adequately provided for. This must be a wrong approach. The question of adequacy must be tested not simply by the number of licences, but by the way in which those licences are operated, and whether their operation adequately provides for the needs of the community.

14 These very points were clearly and succinctly made by Davis, C.J., as he then was, in the *Seruya* case (2). In that case there had been submitted a list of 143 licences to trade in goods similar to those in which the applicant proposed to deal, and there were 17 shops selling some or all of such goods in the particular area. There was, however, no direct evidence that the existing businesses adequately provided for the needs of the community. It was held that in the absence of such evidence, the Magistrate was not entitled to exercise his discretion to refuse the licence applied for.

15 On the facts in the instant case, there is no direct evidence that the needs of the community are adequately provided for. There was no cross-examination of Mr. Bassadone designed to show that there was no need for the grant of Cepsa's licence. Mr. Barabich's evidence was based on the false premise that the number of licence holders is decisive. If there was to be evidence, one would have thought it would have come from Shell or one of the other objectors. They are the people most likely to know of the requirements of the market and the way in which they are being met. The objectors apparently gave evidence before the Trade Licensing Authority of their *modus operandi*, but this was not given to the Magistrate. He had to decide the issue on the evidence before him, not on what evidence he might have been told was before the Authority.

16 In my view, there was no evidence before the Magistrate upon which he could, properly directing himself, have been satisfied that the needs of the community were adequately provided for. That is not a matter of discretion, as seems to be implied by a passage in the judgment of the learned Chief Justice. The discretion given by s.16(1) to refuse a licence comes into play only when the Authority or the Magistrate is satisfied that the needs of the community are adequately provided for. That satisfaction must be founded on evidence, or perhaps on facts of which the Authority or Magistrate has knowledge, which have been put to the applicant. There is nothing in the findings of fact recorded by the Magistrate under items (e) to (i) in his reasons from which the inference of adequate provision can be drawn.

17 In my view, the Magistrate had, on the evidence before him, no discretion to refuse the licence applied for, and should have allowed the appeal against the Authority's refusal. It is not entirely clear from the Ordinance whether the Magistrate himself is given the power to grant a licence under s.4. It is not one of the powers expressly given to him by s.15 or reg. 6. But he must at least have the power to order the Authority to grant a licence if he finds that it was wrong to have refused it. The Supreme Court and this court must have the same power.

18 Accordingly, I would allow the appeal and order that the Licensing Authority grant the appellant the licence applied for. No order as to costs was sought.

19 **HUGGINS, J.A.:** The Magistrate dismissed the appeal from the Authority on the ground that he was satisfied that the needs of the community, either generally in Gibraltar or in the area thereof where the trade or business was to be carried on, were adequately provided for. He did not indicate whether his finding related to the needs of the community generally in Gibraltar or the needs of the community in the area where the trade or business was to be carried on, nor, indeed, what constituted the area where the trade or business was to be carried on.

20 He held that the hearing before him was a hearing *de novo*, and no one has sought to question that view. Nevertheless, there are passages in his reasons for decision which suggest that he was at times considering whether the Authority had properly arrived at its conclusion. If he was, that was wrong. Under s.4(1) of the Trade Licensing Ordinance 1978 it is the Licensing Authority which issues licences to trade or carry on business. The general principles affecting the issue of licences are set out in s.16, the material part of which, for our purposes, reads:

> "The licensing authority may in its discretion refuse to issue a licence, if it is satisfied—
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> . . .
>
> (*f*) that the needs of the community generally in Gibraltar or in the area thereof where the trade or business is to be carried on have been adequately provided for . . ."

Whatever the extent of the discretion to refuse to issue a licence may be, there is clearly no discretion to refuse unless the Licensing Authority is satisfied as to one of the conditions which follow the opening words, and, if the hearing before the Magistrate is a hearing *de novo*, it is necessarily he who must be satisfied upon the appeal.

21 An appeal from the Magistrate to the Supreme Court having been dismissed, the applicant appeals to this court, as I have no doubt it is

entitled to do. It appeals principally on the grounds that (i) the Chief Justice was wrong to hold that the Magistrate based his decision upon any or any sufficient evidence which would entitle him to find that the needs of the community were adequately provided for, and that (ii) in finding that they were, the Magistrate had "reversed the burden of proof." Although the second of those grounds was stated in terms of the burden of proof, it is clear that what the applicant contended below, and has contended here, has been that the Magistrate sought evidence on the wrong issue, namely whether there was evidence that the needs of the community had not been adequately provided for rather than evidence to satisfy him that the needs of the community had been adequately provided for.

22 On the first of those grounds the Chief Justice said: "Strong reasons and uncontroverted evidence were all there before the Authority and the Magistrate to underpin the exercise of their discretion against Cepsa." He having agreed that the Magistrate was right to hear the applicant *de novo*, it was not relevant to the Chief Justice's decision that strong reasons and uncontroverted evidence were before the Licensing Authority.

23 Of greater importance is the reference to the discretion of the Magistrate. With respect, the Magistrate could have no discretion to refuse unless he were first satisfied that the needs of the community had been adequately provided for, and it was evidence on that for which the judge should have been looking in the Magistrate's reasons for decision. That he appreciated this appears from the passage in his judgment where he said (1991–92 Gib LR 26, at para. 26):

> "Ideally, the Authority and the Magistrate should record their decision to refuse to issue a licence in phrases which echo the provisions of s.16, *e.g.*:
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> > 'In the exercise of the discretion vested in the Authority (or the court) the issue of a licence is refused because it is satisfied that the needs of the community generally in Gibraltar and in the area thereof where the trade or business is to be carried on are adequately provided for.'"

24 Although the Magistrate had not recorded his decision in phrases which echoed the provisions of s.16, the Chief Justice thought the result was the same. I am unable to agree. It seems to me that the whole approach of the Magistrate was flawed. By saying that there was no evidence that the needs of the community had not been provided for, he convinced himself that there was evidence that the needs of the community had been provided for, though he was apparently unable to set out any such evidence. I have searched the Magistrate's reasons for evidence to support his finding and none is mentioned.

25 The Magistrate asserted: "The members of the Licensing Authority had before them, I am told and I accept, basically the same evidence (although not in as much detail) as was presented to me." On a trial *de novo* it mattered not what evidence was before the Authority. It was the duty of the Magistrate to indicate the evidence upon which he was basing his own decision and then to apply that evidence to the correct question. It mattered not from what source the evidence came. Even assuming that there was before him evidence which could have justified his conclusion, we are not informed what was the evidence which he applied to the wrong question.

26 The Magistrate made a series of findings of fact "in respect of this appeal" and concluded: "The net result is that I dismiss the appeal." For my part I cannot see that those findings could found the further finding that the needs of the community had been provided for. Paragraphs (a) to (d) and—if the Magistrate was right to think that the existing licence of the applicant was still renewable and would be renewed (which conclusions were not challenged on appeal)—para. (j), had no relevance whatever to the needs of the community. The other paragraphs were material but were concerned with the nature of the needs and the manner in which they were being provided for rather than to the extent to which they were being provided for. In particular, para. (f) relates to the identity of the persons at present supplying petroleum products in Gibraltar without indicating whether the needs of the community (both present and in the immediate future) were adequately provided for.

27 It is further apparent that the Magistrate based his decision on evidence which could not prove that the needs of the community had been provided for when he said: "It seems to me that the Licensing Authority properly arrived at the conclusion that the needs of the community are adequately provided for having regard to the licences in existence and which are being worked." Again, the number and nature of the existing licences, including the applicant's own licence, were not irrelevant, but there could be hundreds of existing unrestricted licences without the community's needs being provided for. Even if they were all being worked, it was vital to know the extent to which the licences were being worked in relation to the needs of the community.

28 I think it is inescapable that the Magistrate was addressing himself to irrelevant matters when he said:

> "The primordial reason why the appellant's [*sic*] seek a further licence, I am persuaded, is for its own commercial benefit and convenience. At one stage I understood Mr. Bassadone to suggest that the convenience to the company would reflect to the advantage of the community. I disagree with that view and in any case there is only his say so, which is not backed up by any hard factual evidence."

It would have been surprising if the prime reason for the applicant's seeking a further licence were *not* for its own commercial benefit and convenience. That would normally be the prime reason behind any applicant's application. It would certainly not be a factor unfavourable to the applicant that it was in business for its own advantage. The benefit and convenience of the trader might well reflect to the advantage of the community if they resulted in an increased volume of business which supplied unsatisfied needs of the community. It is true that in this case there was no evidence that the commercial benefit and convenience of the applicant would reflect to the advantage of the community, but there was no obligation upon the applicant to adduce such evidence.

29 Until such a case arises, I reserve the question whether the Authority would be bound to dismiss, under s.16(1)(*f*), an application made solely for the applicant's convenience in continuing exactly the same volume of business that it was already doing, as, for example, where it desired merely to improve the working conditions of its staff.

30 Then the Magistrate said: "I also understand [Mr. Bassadone] to suggest that the present licence hampers the appellant company through restraints contractual and commercial. I do not agree that this is a proper ground (again in the absence of actual evidence)." I think the Magistrate may have misunderstood Mr. Bassadone, but I cannot see that it would be an improper ground for applying for a new licence that an existing licence imposed restraints upon the applicant. I do not read Mr. Bassadone's evidence as being to the effect that the applicant's present licence did hamper the applicant company. The applicant's contention was that a new licence would enable the applicant more conveniently to increase its business. Whether that was true or not was irrelevant to the question whether the needs of the community were already adequately provided for.

31 There was considerable argument as to the factors which were relevant to the issue which the Magistrate had to decide. In particular, the Chief Justice referred to the applicant's wish to increase competition in the industry and the possible results that that might have on prices and the sources of supply of petroleum products. The Magistrate did not mention prices, but in my view it was a material, though, of course, not decisive, factor. Clearly the needs of the community had to be viewed not only in relation to the quantities of products available but also to the availability of the products at reasonable prices. High prices resulting from a monopoly and cut-throat prices resulting from excessive competition were equally undesirable, and this should properly come into the calculation. On the other hand, the sources of the existing supply might or might not be a relevant factor on this issue, though it might always be a factor in relation to s.16(1)(*e*).

32 I would add that, although the Authority and, on appeal, the Magistrate have power to institute their own enquiries, at the end of the day they must decide the application upon the evidence before them. They are not bound to consider factors in respect of which no evidence has been adduced and of which they have no knowledge.

33 I am satisfied that the appeal must be allowed, but the difficult question that then arises is: What order should we make? If there had been evidence before the Magistrate which, if believed and properly applied to the correct issue, would have entitled him to dismiss the application, I think we should remit the case to the Magistrate to reconsider the matter in the light of the opinion of this court. Alternatively we could send the case to another magistrate to hear the application *de novo*. However, I have read the evidence recorded by the Magistrate and find nothing which could have justified him in saying that he was satisfied that the needs of the community had been adequately provided for.

34 The opinion to that effect expressed by the Chairman of the Authority could hardly be enough, or the appeal process would be futile. His evidence that he had not heard of anyone's complaining that there were only two suppliers of bunkers, which was the only direct evidence before the Magistrate on the relevant issue, could not reasonably found a conclusion that all the needs of the community had been adequately provided for.

35 In those circumstances, no useful purpose would be served by remitting the application to a magistrate. It has been argued that we have no power to direct the Authority to issue a licence, but I have no doubt that that would be a proper order and I would order accordingly.

36 **DAVIS, J.A:** I have had the opportunity of reading the judgments of the President and Huggins, J.A. I agree with what they have said in their judgments and have nothing to add. I, too, would allow this appeal and order that the Trade Licensing Authority grant to the appellant the licence applied for.

Appeal allowed.
