[1991–92 Gib LR 405]

CEPSA (GIBRALTAR) LIMITED v. TRADE LICENSING AUTHORITY

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

Trade and Industry—trading licence—appeal from Trade Licensing Authority—costs—objector to grant of licence not "party" to proceedings and no costs may be awarded to or against him—may be heard before Authority, and before courts at their discretion as amicus curiae

The appellant appealed against an order for costs made by the Supreme Court in proceedings relating to the grant of a trading licence.

The appellant's application for an additional licence to trade in petroleum and petroleum products was refused by the Trade Licensing Authority. On appeal, the Stipendiary Magistrate upheld the Authority's decision, having heard evidence from the appellant, the Authority and three other Gibraltar oil companies who appeared as objectors to the application. The Supreme Court (in proceedings reported at 1991–92 Gib LR 26) in turn dismissed the appellant's further appeal but the Court of Appeal reversed that decision (in proceedings reported *ibid.* at 385). The objectors were heard before each court. The Supreme Court had ordered the appellant to pay the costs of "the respondents" in that court.

The appellant applied for an order that the Supreme Court's award of costs against it be set aside and that the objectors should instead pay its costs of the proceedings in that court and in the Court of Appeal. It submitted that (a) under rr. 69 and 77 of the Court of Appeal Rules, an unsuccessful party to proceedings could be ordered to pay the successful party's costs, and the objectors themselves had interpreted these provisions to mean that the Supreme Court's award of costs to "the

respondents" included their own costs; and (b) since the objectors had had a right to be heard before the Authority, they had been parties to the proceedings from the outset (or at least from their appearance in the Supreme Court) and should pay costs.

The objectors submitted in reply that (a) they were not parties to the proceedings, since although s.12 of the Trade Licensing Ordinance gave them a right to be heard by the Authority, they had no right of appeal against its decision, and regs. 7 and 9 of the Trade Licensing (Appeal) Regulations made it clear that they had no right to appear or be represented at an appeal from the Authority's decision; and (b) this was reinforced by English case law interpreting similar licensing legislation, stating that objectors appeared voluntarily, were heard by the permission of the court and could not be awarded or ordered to pay costs.

The court also considered the correct naming of the parties in the Supreme Court and on further appeal.

Held, making the following order:

(1) The application for costs against the objectors would be dismissed. That the objectors were not to be regarded as parties to the proceedings was clear from the legislation and confirmed by English authority. Although they had a right to be heard by the Authority, that right did not extend to appearances before the courts. The Trade Licensing (Appeal) Regulations, reg. 7 described only the applicant and the Authority as parties to the proceedings. The courts could hear the objectors as *amicus curiae*, but that did not make them parties, even though they had been treated as parties and regarded themselves as such. The Court of Appeal Rules allowed for payment of costs *between the parties*, and only in the "trial court and first appellate court," namely the magistrates' court and the Supreme Court in this case. The parties to the proceedings in both courts were the Authority and the appellant, despite the fact that the later proceedings were wrongly described as being between the appellant and the Stipendiary Magistrate. The Court of Appeal had made no order as to costs and would make none (paras. 4–6; paras. 8–9; paras. 13–14; paras. 15–17).

(2) The Supreme Court's order that the appellant pay the costs of the respondents would be set aside. The objectors could not be awarded their costs and the assumption by the court and the parties that they were respondents was erroneous (para. 2; paras. 6–7; para. 15; para. 17).

Case cited:

(1) *Tynemouth (Mayor &c.)* v. *Att. Gen., ex rel. Newcastle Breweries* (1899), 15 T.L.R. 370, applied.

Legislation construed:

Court of Appeal Rules (1984 Edition), r.69:

> "The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same or direct taxation thereof."

r.77: "The provisions of Part V shall apply to proceedings governed by this Part [Part VI. Second Appeals in Civil Matters] as far as applicable, but subject to the following modifications:–

(*a*) rule 69 shall apply to costs in the trial court and also the first appellate court . . ."

Trade Licensing Ordinance (1984 Edition), s.12(3):

"A person who has given notice of objection shall be entitled to be heard by the licensing authority when it considers the application . . ."

s.22: "(1) Any person who is aggrieved by—

(*a*) the refusal to issue him with a licence . . .

(*b*) the approval to approve an application by him for the transfer of a licence;

(*c*) any term or condition included in a licence issued to him; or

(*d*) the cancellation . . . of a licence issued to him,

may appeal to the Stipendiary Magistrate.

(2) Where any appeal is heard by the Stipendiary Magistrate an appeal shall lie on a point of law from the Stipendiary Magistrate to the Supreme Court."

Trade Licensing (Appeal) Regulations (1984 Edition), reg. 7:

"At the hearing of any appeal the appellant may appear in person and the licensing authority may appear by one of its members and both parties may be represented by counsel."

reg.9: "On the hearing of an appeal both parties may adduce evidence in support of their case."

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

1 **HUGGINS, J.A.:** The appellant's appeal was allowed and the court ordered that the Trade Licensing Authority issue to it the licence it had sought. The appellant now asks, first, that the order of the Supreme Court that it pay to "the respondents" the costs of the appeal in that court should be set aside and, secondly, that we should make an order that the objectors pay the appellant's costs here and in the court below. Notice of this motion was given to the objectors only.

2 In brief, the contention of the appellant is that the objectors were party to the proceedings at every stage and that costs should follow the event. On behalf of the objectors, it is argued that they were never party to the proceedings and that, accordingly, they cannot be ordered to pay costs, although they succeeded in obtaining an order in their favour in the court below. They accept that that order should no longer stand.

3 Mr. Neish, for the appellant submits that no distinction is to be drawn between "a party" and "a person who has a right to be heard." By s.12(3)

of the Trade Licensing Ordinance the objectors had a right to be heard before the Authority and, therefore, from the start they were party to the application, which was adversarial in nature. Before the Magistrate they were allowed to be heard in spite of Mr. Neish's objection, and they were heard before the Supreme Court and before us without further objection.

4 I think the fallacy in the appellant's argument is that, at least in the absence of statutory provision to the contrary, "a party" is not a person who has a right to be heard but a person who claims relief or against whom relief may be granted. Thus, the only parties to the application and to the appeals were the applicant and the Authority. It is significant that by reg. 7 of the Trade Licensing (Appeal) Regulations, the applicant and the Authority were expressly described as parties and given the right to appear on an appeal to the Magistrate, whilst no such right was given by the Regulations to any objectors who had appeared before the Authority, nor were any objectors persons upon whom notice had to be served.

5 In my view, the objectors had no right to be heard otherwise than before the Authority and were not party to the appeals. That is not to say that they could not apply to be heard and that the Magistrate or court had no power to hear their counsel as an *amicus curiae*, but that would not make them parties and they would not be entitled to, or liable to, an order of costs: see *Mayor &c. of Tynemouth* v. *Att. Gen., ex rel. Newcastle Breweries* (1) (15 T.L.R. at 373). Such an application should not normally be necessary, because it is for the Authority to support its refusal of a licence and, to that end, it will have to adduce the evidence and arguments which were presented by the objectors at the original hearing in so far as they were relevant to a material question and not solely to the commercial interests of the objectors.

6 Rule 77 of the Court of Appeal Rules provides that r.69 shall apply to an appeal of the kind now before us, but with the modification that the order may provide for the costs "in the trial court and also the first appellate court." Under the Trade Licensing Ordinance the magistrates' court would be "the trial court" and the Supreme Court "the first appellate court." For the reasons already given, these rules apply only to costs as between parties to the appeal. I do not think that the facts that the objectors have, as I think wrongly, claimed to be a party, and that they and the appellant have understood the Chief Justice's order for the payment by the appellant of "the respondents'" costs to include the costs incurred by the objectors, bring the objectors within the terms of r.69 as modified. They were not entitled to an order for payment of their costs and equally they cannot be made to pay the costs of the appellant.

7 In this court, the objectors' intervention has in fact not materially increased the costs which the appellants have incurred, for counsel for the Authority was content to adopt the arguments advanced by counsel for

the objectors. That was not the position in the Supreme Court, where counsel for the objectors argued at length after the case for the Authority had been presented. However, the status of the objectors in the proceedings was not argued before the Chief Justice and it was assumed that they were respondents. That does not fix them with liability to pay costs and I would make no order against them. However, I would set aside the order for costs made in the Supreme Court.

8 The proceedings before the Magistrate were correctly entitled as being between the appellant and the Trade Licensing Authority. On appeal to the Supreme Court, the proceedings were entitled as being between the appellant and the Stipendiary Magistrate, and we are told that this has been the practice. The Magistrate sat as a judicial officer and the proceedings before him were an appeal, albeit an appeal at which evidence was adduced. I would resile from the description of the proceedings before the Magistrate as "a hearing *de novo*" to the extent that the objectors were not entitled to be heard before the Magistrate. However, it was quite wrong to cite the Magistrate as a party, and it is clear that he was never really regarded as such. His conduct was never in issue, as it would have been in proceedings for judicial review.

9 The dispute has throughout been between the appellant and the Trade Licensing Authority, and this should have been reflected in the title of the proceedings.

10 **FIELDSEND, P.:** In this appeal the appellant was successful in obtaining a trading licence and it now seeks an order for costs against the oil company objectors.

11 In brief, the case started as an application to the Trade Licensing Authority for a licence to trade from Waterport House. The oil companies objected and were represented at the hearing before the Authority, which refused the application. The appellant appealed to the Stipendiary Magistrate under s.22(1) of the Trade Licensing Ordinance. Despite objection by the appellant that the objectors had no *locus standi* before the Magistrate, they were allowed to appear and take part in the proceedings. The appeal was unsuccessful. The appellant appealed on a point of law to the Supreme Court under s.22(2) of the Ordinance, where, again, the objectors took part in the proceedings. The appeal was unsuccessful and the appellant was ordered to pay the costs of the appeal "to the respondents." The matter then came before this court where, again, the objectors took part in the proceedings. Owing to a misunderstanding of counsel's submission, this court made no order as to costs.

12 Mr. Neish, for the appellant, contends that, at least since their appearance in the Supreme Court, the objectors have been parties to the proceedings and are liable for costs. Mr. Dumas, for the objectors, argues

that on the authority of *Mayor &c. of Tynemouth* v. *Att. Gen., ex rel. Newcastle Breweries* (1), the objectors were not parties and that they are neither liable for nor entitled to costs.

13 An examination of the legislation shows that an objector to an application for a licence is entitled to be heard by the Trade Licensing Authority and may take a full part in the proceedings before it (s.12(3)). An objector, however, has no right of appeal from the Authority's decision (s.22) and clearly no right to appear or be represented at such an appeal (regs. 7 and 9 of the Trade Licensing (Appeal) Regulations). It is clear, therefore, that before the Magistrate, the Supreme Court and this court the objectors were not parties, even though they may have regarded themselves as such and been so treated.

14 Though dealing with old English legislation, the *ratio* of Lord Davey in the *Tynemouth* case is entirely apposite here. He said (15 T.L.R. at 373):

> "I think that an objector before the licensing committee has no right to appear and be heard on the appeal to the quarter sessions. The only proper respondents to an appeal are the justices themselves, who are served and may appear in the interests of the public to support their own order. If an objector appears on the appeal he does so voluntarily, and his counsel can only be heard by permission of the Bench, as amicus curiae, and he can neither receive nor be ordered to pay costs. He is not, in short, a 'party to the proceedings'."

This case is really decisive of the issue and makes it unnecessary to consider the effect of r.18(2) of the Supreme Court Rules or r.48(4) of the Court of Appeal Rules, which require, respectively, "all persons" and "all parties" directly affected by the appeal to be served with the notice of appeal.

15 In my view, the order for costs in the Supreme Court must be set aside and this court will make no order on the costs of the appeal before it.

16 I agree with what Huggins, J.A. has said about the proper identification of the parties in an appeal of this nature from the Stipendiary Magistrate.

17 **DAVIS, J.A.** concurred.

Order accordingly.