

[2003–04 Gib LR 455]

**ECCLESAL LIMITED v. TRADE LICENSING
AUTHORITY**

SUPREME COURT (Schofield, C.J.): September 9th, 2004

Trade and Industry—retail licensing—general directions from Minister—Minister has no power to give directions to Trade Licensing Authority on individual application, and Authority retains discretion to determine application—Authority to give effect to general policy directions from Minister, given under Trade Licensing Ordinance, s.16(3)

The appellant appealed to the magistrates' court against the decision of the Trade Licensing Authority to refuse an application for a licence to trade in tobacco, cigarettes and cigars.

The appellant applied to the Authority for a licence to trade, to non-residents of Gibraltar via the Internet, in a variety of goods including tobacco, cigarettes and cigars. The Authority, unsure as to whether to grant the licence in respect of tobacco, sought the views of the Minister for Trade as to the Government's policy on such matters. He replied, stating that it was the Government's position that it "would like to see the issue of further tobacco wholesale strictly curtailed" and the granting "of further general retail tobacco licences scrutinized and strictly controlled." He accepted that the Authority had to "consider each application on its merits, in particular to see whether there [were] exceptional circumstances that should be taken into account which would justify a grant of such a licence," but asked that the Authority bear in mind his directions and the Government's policy view. Following this correspondence, the Authority approved the appellant's application, except in respect of trade in tobacco, cigarettes and cigars, on the ground of s.16(1)(e) of the Trade Licensing Ordinance, namely public interest.

The appellant appealed against the decision to the magistrates' court, but the Stipendiary Magistrate upheld the decision of the Authority, holding that the direction given by the Minister absolutely fettered its

discretion and it was therefore obliged to follow it and refuse the application.

On further appeal, the appellant submitted that the Stipendiary Magistrate erred in law in finding that the direction of the Minister absolutely fettered the Authority's discretion and that it was therefore obliged to refuse the application. His interpretation of s.16(3) of the Trade Licensing Ordinance, under which provision the Minister had given the direction, meant that the Authority would have no discretion once it had consulted the Minister, as it was obliged to give effect to that direction.

Held, remitting the case to the Stipendiary Magistrate:

The Stipendiary Magistrate's holding that the Minister's directions absolutely fettered the Authority's discretion, and that it was therefore obliged to refuse the application, was wrong. His interpretation of s.16(3) of the Ordinance, that it was mandatory in nature, *i.e.* the directions given by the Minister under it had to be followed, was incorrect. The Minister was able to give directions to the Authority "generally," but was not empowered to give directions in a specific case. The Authority was obliged to give effect to these general directions, but it still had a discretion to decide what was in the public interest. In fact, the Minister, in giving the direction, had made it clear to the Authority that it still had a discretion in the matter, and it seemed that the Authority also understood this. The Supreme Court could not decide any matter, other than on a point of law, in an appeal of this kind, and, having decided this, the only course of action it could take was therefore to remit the case to the Stipendiary Magistrate to decide the merits of the appellant's application (para. 12; paras. 15–16).

Cases cited:

- (1) *Cepsa (Gibraltar) Ltd. v. Trade Licensing Auth.*, 1991–92 Gib LR 26; on appeal, *sub nom. Cepsa (Gibraltar) Ltd. v. Stipendiary Magistrate*, 1991–92 Gib LR 385; further proceedings, 1991–92 Gib LR 405, followed.
- (2) *Trade Licensing Auth. v. Teziano Ltd.*, 1999–00 Gib LR 540, followed.

Legislation construed:

Trade Licensing (Appeal) Regulations (1984 Edition), reg. 6: The relevant terms of this regulation are set out at para. 15.

Trade Licensing Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at para. 8.

s.4: The relevant terms of this section are set out at para. 8.

s.16(1): The relevant terms of this sub-section are set out at para. 8.

s.16(3): The relevant terms of this sub-section are set out at para. 8.

s.22(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."

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S. Catania for the appellant;
J.E. Triay, Q.C. and *S.P. Triay* for the respondent.

1 **SCHOFIELD, C.J.:** On May 28th, 2002, Ecclesal Ltd. applied to the Trade Licensing Authority for a licence to trade in a variety of goods including tobacco, cigarettes and cigars. The application notice stated that the sales were intended to take place via the Internet to non-residents.

2 The Authority met to consider the appellant's application on July 5th, 2002. The minutes of the meeting show that Mr. Catania represented the appellant, and two directors of the company also attended. They explained that the intention was to trade via the Internet, that duty would be paid on the goods in Gibraltar and then mailed to the appellant's clients. The Postmaster and Customs Department had "cleared" their trade in tobacco here and in the United Kingdom and tobacco would be limited in supply. The minutes of the meeting show the decision of the Authority as follows: "Due to the sensitivity of 'tobacco,' some of the members of the Authority had misgivings about approving this licence and would like the Minister's views before the licence is approved."

3 The Minister for Trade, Industry and Telecommunications responded to the communication of the Authority on August 7th, 2002, in the following terms:

"Direction pursuant to s.16(3) of the Trade Licensing Ordinance and statement of policy in relation to the public interest for consideration in applications for tobacco licences

Pursuant to authority contained in and vested in me under s.16(3) of the Trade Licensing Ordinance and of all other powers vested in me by virtue of s.48 of the Gibraltar Constitution, I hereby direct the Trade Licensing Authority in relation to the following matters that affect the public interest:

- (1) I am concerned (among other issues) at the serious reputational risk that can be suffered by Gibraltar by an unrestricted or immoderate expansion of the wholesale trade in tobacco and the diversification into, or establishment of, further and new lines of retail activities from Gibraltar in a manner which may become internationally sensitive.
- (2) In relation to the letter, I am aware that Customs have had a number of enquiries over the last year or so from parties looking to establish businesses to specifically service an overseas clientele which would contract and order supplies of tobacco via Internet websites.
- (3) I am therefore issuing these directions, not because the situation is worse than in any of the years since 1996, but

because I believe it would assist the Trade Licensing Authority to have this general guidance from me to avoid the risk of there being any doubt as to the parameters of Government policy in this regard.

- (4) The history of tobacco activity—in particular during the early 1990s—illustrates the need to ensure that holders of licences do not, and applicants for new licences shall not, abuse their position or undertake activities which—
 - (i) are impossible or disproportionate in cost to regulate;
 - (ii) are unrestricted or unconditional in practice or subjected to conditions which are difficult to enforce;
 - (iii) whether or not lawful in Gibraltar, result in undesirable activity in Gibraltar or unlawful or undesirable activity elsewhere; or
 - (iv) is bound to expose Gibraltar to negative publicity and consequent reputational damage.

Activity which gives rise to any of these factors would be seriously detrimental to the public interest. The adequate control of these activities has indeed proven to be notoriously difficult in the past.

- (5) With this in mind, I would like to see the issue of further tobacco wholesale licences strictly curtailed and applications for licences to diversify into new lines of wholesale or retail tobacco business strongly discouraged. I would also like to see the grant of further general retail tobacco licences scrutinised and strictly controlled.
- (6) I fully accept that the Trade Licensing Authority must consider each application on its merits, in particular to see whether there are exceptional circumstances that should be taken into account which would justify a grant of such a licence, but I would ask that you bear in mind these directions and the policy view of Government on the question of what is in the public interest when you come to consider applications of this type.”

4 On the following day, August 8th, 2002, the Authority reconvened to consider the appellant’s application and made the following decision:

“After taking into consideration the Minister’s directive, the Authority approved the application, except for tobacco, cigarettes and cigars, which they propose to refuse under s.16(1)(e) of the Trade Licensing Ordinance.”

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5 This decision was communicated to the appellant's solicitors on August 14th, 2002. The solicitors then wrote to the Authority on August 19th, 2002, offering to appear before it to answer any questions it may have regarding the application for a licence to trade in tobacco, cigarettes and cigars. A further hearing was granted at which Mr. Catania attended with the two directors of the appellant. After further representations were made, the Authority decided to confirm its previous decision to refuse a licence for the trade in tobacco, cigarettes and cigars. This was communicated to the appellant's solicitors on September 20th, 2002.

6 On October 8th, 2002, the appellant gave notice of appeal to the Stipendiary Magistrate against the decision of the Authority. The decision of the Stipendiary Magistrate, delivered on July 25th, 2003, upheld the decision of the Authority, and this appeal is against the decision of the Stipendiary Magistrate.

7 There are 10 grounds of appeal but, with respect to the appellant, I think they can be condensed into one issue. The learned Stipendiary Magistrate held that the direction given by the Minister on August 7th, 2002, absolutely fettered the discretion of the Authority and therefore the Authority and he, the appellate body, were obliged to follow it and refuse the application. This, says the appellant, was an error in law.

8 By s.3 of the Trade Licensing Ordinance, "no person shall carry on a [trading] business . . . (a) unless he is the holder of a licence . . ." issued by the Authority. By s.4 of the Ordinance, the Authority "may issue licences to trade or to carry on business." Section 15 of the Ordinance contains provisions as to the power of the Authority when considering applications for licences. The part of s.16(1) relevant to this application reads:

"Subject to the provisions of subsection (2) and of section 17, the licensing authority may in its discretion refuse to issue a licence, if it is satisfied—

. . .

(e) that the issue of such licence would operate against the public interest . . ."

Section 16(3) reads:

"The Governor may give directions to the licensing authority generally with respect to the exercise of its functions under this Ordinance in relation to matters which affect the public interest and the licensing authority shall give effect to any such directions. Whenever a licence is refused on the grounds of public interest the licensing authority shall so state this in its decision."

9 There are decided cases on the interpretation of these provisions. In dealing with the inter-relationship between ss. 4 and 16(1) of the

Ordinance, Fieldsend, P., in *Cepsa (Gibraltar) Ltd. v. Stipendiary Magistrate* (1), had this to say (1991–92 Gib LR 385, at para. 6):

“The inter-relationship of these sections has been considered in *Furniture Centre Ltd. v Stipendiary Mag.* and in *Moses S. Seruya Ltd. v. Stipendiary Mag.* 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.”

10 In *Trade Licensing Auth. v. Teziano Ltd.* (2), Neill, P. said (1999–00 Gib LR 540, at para. 4):

“By s.16(1)(e) it is provided that the Licensing Authority may in its discretion refuse a licence if it is satisfied that ‘the issue of such licence would operate against the public interest.’”

11 The learned Magistrate took into account these passages and held that where a direction had been given by the Government pursuant to s.16(3), the discretion referred to by the Court of Appeal had to be abandoned and the direction followed. He said:

“To my mind, s.16(3) is undoubtedly mandatory in nature: ‘. . . [T]he licensing authority . . . shall give effect to any such directions . . .’ The issue must therefore be: What are the ‘functions’ of the Authority in respect of which directions can be given?

Mr. Catania’s contentions that ‘functions’ relates to the investigative role of the Authority, whilst ingenious, is an argument which I think is strained and offends the natural meaning of that word. As part of his submissions, Mr. Catania relied upon the meaning of the word in the *Oxford English Dictionary*, namely:

- ‘(a) an activity proper to a person or institution.
- (b) a mode of action or activity by which a thing fulfils its purpose.
- (c) an official or professional duty.’

In the context of any of these alternate but related meanings, it seems to me that the only possible interpretation of ‘functions’ of the Authority is the issue or refusal of trade licences. The long title of the Ordinance reads: ‘An Ordinance to make provision for the licensing of traders and persons carrying on certain businesses.’ The ‘function’ of the Authority must be to license traders within the terms of the Ordinance: it cannot be said that its function is merely to investigate.

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On this interpretation of s.16(3), the legislature would appear to constrain the discretion of the Authority and indeed of the Stipendiary. This is, however, arguably at odds with the interpretation of s.16 by the President of the Court of Appeal in *Cepso (Gibraltar) Ltd. v. Stipendiary Magistrate*, where Fieldsend, P., approving *Furniture Centre Ltd. v. Stipendiary Magistrate* and *Moses S. Seruya Ltd. v. Stipendiary Magistrate*, states (1991–92 Gib LR 385, at para. 6):

‘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.’

On my understanding of s.16(3), the Authority does not have such a discretion if it forms the view that the application falls within the remit of a direction properly made pursuant to that sub-section. In this regard, Mr. Triay argues that the Court of Appeal statements are *obiter*, in that those cases dealt with s.16(1)(f), that is the needs of the community, and not with s.16(1)(e), public interest. Moreover, it is also instructive to consider s.16(1)(a), which provides for a refusal where the applicant is under the age of 18. It is difficult to envisage a scenario where the Authority could exercise its discretion and issue a licence where the applicant has not attained the age of 18. This I think lends support to the view that the residual discretion does not necessarily apply in respect of all the circumstances in sub-section (1).

Albeit with great reticence, in that by so doing I do not follow the *obiter dictum* of the Court of Appeal, I am of the view that a direction issued by Government pursuant to s.16(3) absolutely fetters the discretion of the Authority which is obliged to give effect to such a direction.”

12 With respect to the learned Magistrate, this was a courageous but wrong decision, for, in finding that s.16(3) was mandatory in nature, he does not seem to have read the sub-section as a whole. Section 16(3) says that the Government may give directions to the Authority “generally.” Thus, the Government is not empowered to give directions in a specific case. The sub-section, put in broad terms, means that the Government may give directions on policy in connection with the public interest. And who better placed than the Government to deal with, and give directions on, matters of public interest? Once the general direction is given, the Authority is obliged to give effect to it when considering applications for trade licences. This does not mean that, within the general principles of consideration of such applications, combined with its obligations to

follow general directions on what is in the public interest, the Authority does not have a discretion. And the Minister, in giving his direction of August 7th, 2002, was at pains not to be seen to fetter the discretion he undoubtedly understood rested with the Authority, for he said:

“I fully accept that the Trade Licensing Authority must consider each application on its merits, in particular to see whether there are exceptional circumstances that should be taken into account which would justify a grant of such a licence . . .”

It seems that the Authority understood its role because its decision did not declare that it was bound to follow the Minister’s general direction.

13 I must say that there is nothing in my understanding of the statutory scheme which offends natural justice or the right to a hearing before an independent and impartial tribunal, as required by s.8(8) of the Gibraltar Constitution Order. Nor was the Authority wrong in seeking the views of Government on a matter of public interest. This was a novel kind of application. The Authority considered that the public interest ought to be considered and before exercising its discretion sought the Government’s view on what was the public interest. This was a prudent course to take.

14 Even if I am wrong in the above finding, the learned Magistrate erred in that he did not follow the Minister’s direction. The Minister clearly anticipated that a discretion would be exercised within the Government’s indication that it would like to see a curtailment in the issue of further tobacco wholesale licences and new lines of business strongly discouraged. The Minister himself directed that each application be dealt with on its merits and it was this that the Stipendiary Magistrate failed to put into practice.

15 Having found that the learned Magistrate erred in declining to exercise a discretion which is vested in him, what course do I adopt? By s.22(2) of the Ordinance, appeals to the Supreme Court are confined to points of law. I have decided the point of law in this case. I am unable to go into the merits of the appellant’s application. On the other hand, reg. 6 of the Trade Licensing (Appeal) Regulations provides that—

“on hearing an appeal the magistrate shall consider the matter on its merits and shall have all the powers of the duties and obligations of the licensing authority under sections 15, 16, 17 and 18 of the Ordinance.”

16 It seems that the only proper order I can make is to remit the appeal to the Stipendiary Magistrate for him to hear it on its merits. As there is now a new Stipendiary Magistrate in post, no conflict arises.

Case remitted to lower court.

[2003–04 Gib LR 463]

**SECILPAR S.L. v. FIDUCIARY TRUST LIMITED and
FIDUCIARY MANAGEMENT LIMITED**

COURT OF APPEAL (Glidewell, P., Stuart-Smith and Otton, JJ.A.):
September 24th, 2004

Civil Procedure—disclosure—Norwich Pharmacal order—scope—third party ordered to disclose identity of alleged wrongdoer if wrong allegedly carried out by wrongdoer; order necessary to enable proceedings to be brought against him; and third party mixed up in or facilitated alleged wrongdoing and able to provide information

Civil Procedure—disclosure—Norwich Pharmacal order—expediency—expedient to grant “interim relief” under Civil Jurisdiction and Judgments Ordinance 1993, s.17 such as Norwich Pharmacal order in aid of foreign proceedings if foreign court lacks jurisdiction to make order—desirable to grant relief to support foreign proceedings concerning serious civil wrongs as well as international fraud

The respondent companies applied to the Supreme Court for a disclosure order in respect of the identity of the beneficial owner of a foreign company.

The appellant, a Spanish company, brought proceedings in Portugal against the alleged controlling shareholders of a Portuguese company of which it was a minority shareholder. It claimed that as they controlled over 50% of the shares of that company they were obliged, under s.187 of the Portuguese Companies Securities Act 1999, to make a public offer on the remainder. It therefore claimed the enhanced price of its shares, which was 200m above the current market price.

The appellant was, however, unable to establish the beneficial ownership of a British Virgin Islands company which it claimed was also part of the alleged group of controlling shareholders. The appellant needed to know the identity of the beneficial owner of that company so that it could be joined as a defendant to the Portuguese proceedings.

The appellant brought the present proceedings seeking the disclosure of the identity of the beneficial owner and only in this jurisdiction could it be certain of obtaining that information. The respondents, which were Gibraltar companies, acknowledged that they knew the identity of the beneficial owner but refused to disclose it. The Portuguese court itself could not have made the order sought.

On the appellant’s *ex parte* application, the Supreme Court (Schofield,