IN THE HIGH COURT OF AUSTRALIA No. S58 of 2015

SYDNEY REGISTRY

BETWEEN: **JACEK GNYCH**

First Appellant

and

SYLWIA GNYCH

Second Appellant

and

10 **POLISH CLUB LIMITED**
(ACN 000 469 385)

Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Whether, upon the true construction of s.92(1)(d) of the *Liquor Act 2007* (NSW) (**the LA**), the failure of the respondent club to obtain the approval of the Independent Liquor
20 and Gaming Authority constituted under the *Gaming and Liquor Administration Act 2007* (NSW) (**the Authority**) to the five year lease created in favour of the appellants by operation of sections 8 and 16 of the *Retail Leases Act (NSW) 1984* (**the RLA**) (**the Lease**) had the effect of requiring the Lease to be rendered void and unenforceable.

3. Whether any sanctions short of the Lease being rendered unenforceable and void would frustrate the implementation of the legislative purpose inherent in the statutory prohibition in s.92(1)(d) of the LA, in circumstances where:

   (i) the LA does not make provision for the rendering of such a lease to be unenforceable and void, but it does provide a substantial range of other potential consequences that could be invoked in the event of the Respondent breaching its
30 obligations under the LA by failing to obtain the requisite consent of the Authority, including potential criminal consequences against the Respondent, and potential consequences in relation to the Respondent's Liquor license (including changing the boundaries of the licensed premises, cancelling or suspending the license, or imposing further conditions on the license);

   (ii) the effect of rendering the Lease to be unenforceable and void was to extinguish the Appellants' vested proprietary interests pursuant to the Lease and the RLA, in circumstances where the Appellants' vested proprietary interests did not arise as a result of, and were not dependent upon, any contravention of the LA on the part of the Appellants;

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(iii) the effect of rendering the Lease unenforceable and void was to give the Respondent club the benefit, by virtue of its own wrong, of the Appellants' title;

(iv) there was no evidence that the Authority would not provide its consent to the Lease in the event that the consent was sought by the Respondent;

(v) the evidence demonstrated that as a matter of fact the Respondent was able to ensure that the Appellants' restaurant was not in any way breaching the LA or the Respondent's liquor licence, and that patrons dining in the restaurant were told that the restaurant could not sell or serve liquor because it was not licensed, and there was no evidence that the Appellants in any way contravened section 7 of the LA which prohibits them from selling liquor themselves in the restaurant;

(vi) it was open to the court to mold any relief to the Appellants in such a way as to avoid any significant consequence of the failure of the Respondent to seek the consent of the Authority.

Part III: ***Judiciary Act 1903* s78B**

4. The Appellants do not consider any notice should be given under section 78B of the *Judiciary Act 1903*.

Part IV: Citation of Decisions below

5. *Gnych v Polish Club Limited* [2013] NSWSC 1249.

6. *Gnych v Polish Club Limited (No 2)* [2013] NSWSC 1492.

7. *Polish Club Limited v Gnych* [2014] NSWCA 321.

8. *Polish Club Limited v Gnych (No 2)* [2014] NSWCA 351.

Part V: Relevant Facts

9. The Respondent is a registered club (**the Club**) under the provisions of the *Registered Clubs Act* 1976 (NSW) (**the RCA**) and the holder of a Club Licence under the provisions of Div 3 of Part 3 of the LA. Its premises are situated in Norton Street, Ashfield and comprise a building of two floors together with a rooftop cocktail hall (**the Premises**).[1]

10. The first floor of the Premises relevantly comprise a restaurant with a capacity of approximately fifty seats with an adjoining kitchen and office (**the Restaurant Area**). Adjoining the restaurant is an area referred to as the mirror hall (**the Mirror Hall**) with a capacity of approximately eighty seats. It is accessed directly from the restaurant by way of a moveable wall.[2]

11. The first level of the Premises also contains a bar where members can purchase liquor as well as male and female toilets. It also contains other areas for use by members of the Club.[3]

12. The ground floor of the Premises comprises the entry to the Premises together with, relevantly, a storage area and staff toilets.[4]

13. The First Appellant commenced negotiation for a lease of the Restaurant Area with the Club's President and Vice-President in August 2011. It was agreed *in principle* that the Appellants would be granted a Lease of the Restaurant Area on the first floor and a storeroom and toilet on the ground floor of the Premises. In addition, it was agreed in

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1 *Polish Club Limited v Gnych* [2014] NSWCA 321 (**Reasons**) at [3].
2 Reasons at [3].
3 Reasons at [3].
4 Reasons at [3].

principle that the Respondents would have non-exclusive access to the Mirror Hall for overflow customers of the restaurant and to cater for larger functions.[5]

14. It was also agreed that the Respondent would renovate the restaurant, which it did between December 2011 and March 2012.[6]

15. The Club permitted the Appellants to occupy the Restaurant Area and commence operating the restaurant on 31 March 2012, despite the fact that no Lease had been signed.[7]

16. Negotiations took place between the Appellants and the Respondent concerning the terms of the lease and licence agreement over the Mirror Room. However those negotiations were unsuccessful in reaching final agreement.[8]

17. The Appellants operated the restaurant successfully during the period between 31 March 2012 and July 2013.[9] Rent in the amount of $500.00 per week was paid by the Appellants to the Respondent.

18. During the period that the Appellants were in possession of the Restaurant Area, the Respondent's manager was in a position to ensure there was no contravention by them of the provisions of the LA.[10] The Appellants did not in any way contravene any of the provisions of the LA in relation to the sale or supply or consumption of liquor.[11]

19. However, relations between the Appellants and some members of the Management Committee of the Respondent deteriorated, and on 7 July 2013 the Respondent's solicitors gave notice to the Appellants that it had determined to terminate the relationship with them, and invited them to inform the Respondent of the arrangements they have made to vacate the Club's premises.[12]

20. On 2 August 2013 the Appellants' solicitors gave notice to the Respondent's solicitors that the Appellants had occupied the Premises, for value with the agreement of the Respondent, and used the Premises as a restaurant since on or about 31 March 2012 and that the restaurant is a retail shop as defined in the RLA, and that a minimum lease term of five years applies to the restaurant, given that it satisfies section 16 of the RLA.[13]

21. On 5 August 2013 the Respondent excluded the Appellants from the Premises.[14]

22. On 8 August 2013 the Appellants filed a Summons in Equity Division Supreme Court of NSW in which they sought a declaration that they were entitled to lease of the Restaurant Premises, certain related areas and the Mirror Hall (also referred to as the Mirror Room). By Further Amended Summons filed on 30 August 2013 the Appellants also sought injunctive relief. The Respondent did not seek any relief.

23. On 5 September 2013 the trial judge held that the Appellants were entitled to a declaration substantially in the terms sought, except for the Mirror Hall in respect of which his Honour held that the Appellants were entitled only to a licence.[15] On 30

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5 Reasons at [10].
6 Reasons at [11].
7 Reasons at [12].
8 Reasons at [12].
9 Reasons at [13]
10 Reasons at [41] (paragraph 17.B of the affidavit of Mr Romanowski) [53]-[55].
11 Reasons at [16], [53]-[55].
12 Reasons at [13].
13 Reasons at [14].
14 Reasons at [15].
15 Reasons at [6]; *Gnych v Polish Club Limited* [2013] NSWSC 1249.

September 2013 the trial judge made declarations and orders in favour of the Appellants.[16] Shortly thereafter the Appellants resumed possession.

24. On 16 September 2014 the CA reversed the decision of the trial judge in relation to the Restaurant Area[17] but not in relation to the Mirror Hall,[18] and made certain costs orders against the Appellants.[19] On 17 October 2014 the CA reversed the decision of the trial judge in relation to the Mirror Hall on the grounds that that licence was interdependent with the lease of the Restaurant Area[20] that that license lacked utility in the absence of the Lease.[21] Accordingly, the CA allowed the Respondent's appeal and set aside the declarations made by the trial judge.[22] The Respondent has been in possession of the Restaurant Area and the Mirror Hall since about that time.

Part VI: Argument

The Decision of the Court of Appeal (CA)

25. The CA[23] held that the trial judge was correct to hold that there was a breach of s 92(1)(d) of the LA as the restaurant was part of the Premises, and was leased to the Appellants without the approval of the Authority.[24] However, unlike the trial judge, the CA held that the consequence of the Respondent's breach of s 92(1)(d) of the LA was that it was necessary to render the Lease unenforceable and void as any other sanction would frustrate the implementation of the legislative purpose inherent in the statutory prohibition in s 92(1)(d) of the LA. The nub of the reasoning of the CA is at [79]:

> "*Notwithstanding that a breach of section 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 in my view for the reasons indicated*[25]*,* ***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.*** ..." [Emphasis added.]

26. The CA held[26] that the prohibition in section 92 only applies to a lease or sub-lease under the general law[27] which entitles the lessee or sub-lessee to exclusive possession and, therefore, the right to exclude the licensee (or its manager) from the leased or sub-leased premises.[28] It held that such a lease 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.

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16 Reasons at [7]; *Gnych v Polish Club Limited (No 2)* [2013] NSWSC 1492.
17 *Polish Club Limited v Gnych* [2014] NSWCA 321; Reasons at [90].
18 Reasons at [90].
19 Reasons at [93(6) & (7)].
20 17 October 2014 Reasons at [9].
21 17 October 2014 Reasons at [10].
22 17 October 2014 Reasons at [12].
23 *Polish Club Limited v Gnych* [2014] NSWCA 321 per Tobias AJA with whom Meagher JA and Leeming JA agreed.
24 At [57].
25 It is assumed that the reference to "*the reasons indicated*" is a reference to the submission of the Respondent recorded in [72].
26 At [79].
27 See [75] and [78]. See also Reasons at [79] ("...*the prohibition* ***only applies to a lease*** *or sub-lease* ***which, by definition as it were, entitles the lessee or sub-lessee to exclusive possession and, therefore, the right to exclude the licensee (or its manager) from the leased or sub-leased premises.***") [Emphasis added.]
28 Reasons at [79].

27. Although the CA noted that a breach of section 92(1) carries with it a penalty,[29] it is nonetheless concluded[30] that:

> "... ***when one considers the legislative purpose of the relevant provisions of the Liquor Act as well as the policy behind the subject prohibitions,*** *then it follows that the prohibition stated expressly in the statutory text of s 92 requires the conclusion that any lease caught by that provision* ***is not to be enforced by the Courts.*** *It follows that the Club is entitled to a declaration*[31] *that the Lease of the Restaurant Area to the Respondent is void and unenforceable.*" [Emphasis added.]

10 28. Accordingly, the CA set aside the declarations made by the trial judge in relation to the restaurant.

29. The CA did not, however, uphold the Respondent's appeal in relation to the declaration made by the trial judge in relation to the Mirror Hall. It held that the agreement between the parties with respect to the Mirror Hall only involved the grant of a non-exclusive right of occupation, within the meaning of the definition of Lease, in section 3 of the RL Act.[32] However, because the Court of Appeal had not, on the hearing of the appeal, received argument on the question as to whether there was any utility in the trial judge's declarations in relation to the Mirror Hall, the Court of Appeal gave the parties the opportunity to file written submissions in relation to those declarations.

20 30. The CA handed down a second judgment on 17 October 2014.[33] It held that the licence to use the Mirror Hall was interdependent with the lease of the Restaurant Area. Accordingly, the CA held that the declarations made by the trial judge in relation to the Mirror Hall should also be set aside upon the basis that, absent any lease of the Restaurant Area, no good purpose would be served by retaining the declaration and order in relation to the Mirror Hall. [34]

31. It is submitted that, in the light of the circumstances referred to in paragraph 3(i) to (vi) above, and for the reasons to which we will refer below, the CA erred in holding that any sanctions short of the Lease being rendered unenforceable and void would frustrate the implementation of the legislative purpose inherent in the statutory prohibition. The
30 CA misconstrued the legislative purpose inherent in the statutory prohibition: it does ***not*** require the licensee to personally supervise and manage the conduct of the business of a lessee in a portion of the Premises in which liquor is not sold or supplied; in any event, as will be demonstrated below, the Lease did not in fact prevent the Respondent from exercising the requisite supervision to ensure that the LA was not being breached in any way by the Appellants; moreover, the LA does not make provision for the rendering of a lease to be unenforceable and void if the licensee failed to obtain the requisite consent from the Authority, but it does provide a substantial range of other potential consequences that could be invoked in the event of the Respondent breaching its obligations under the LA by failing to obtain the requisite consent of the Authority,
40 including potential criminal consequences against the Respondent, and potential consequences in relation to the Respondent's Liquor license; furthermore, it was wrong to render the Lease unenforceable and void where the effect of such a decision was to extinguish the Appellants' vested proprietary interests pursuant to the Lease and the RLA, in circumstances where the Appellants' vested proprietary interests did not arise

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29 At [79] and [80].

30 At [81].

31 No Declaration had been sought by the Respondent.

32 At [87]

33 *Polish Club Ltd v Gnych (No 2)* [2014] NSWCA 351.

34 At [214] NSWCA 351 at [10]

as a result of, and were not dependent upon, any contravention of the LA on the part of the Appellants, and in circumstances were there was no suggestion that the Appellant had engaged in any conduct in contravention of the LA, and in circumstances where such a decision would give the Respondent club the benefit, by virtue of its own wrong, of the Appellants' title.[35]

32. *A fortiori*, the CA erred in holding that it was necessary to render the Lease unenforceable and void in circumstances where the Lease arose by operation of sections 8 and 16 of the RLA. Indeed, it is submitted that the decision of the CA has had the effect of frustrating the implementation of the legislative purpose inherent in the RLA.

Relevant principles in relation to illegality

33. A contract made in contravention of a statutory provision ought not to be rendered void and unenforceable unless it is the intention of the legislature to create such an outcome.[36]

34. The extent of statutory illegality and its consequences turn upon a construction of the statute.[37] In construing the statute the Court will have regard not only to its language but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and effect of the prohibition which the statute contains. [38]

35. It is necessary to discern from the scope and purpose of the statute whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable.[39] The central policy consideration at stake is the coherence of the law.[40] The question to be determined is whether the policy of the Act would be defeated if effect is given to a lease made in contravention of the Act. [41]

36. In construing the statute, regard will be had to the principle of statutory construction that legislation is not to be construed as cutting down or destroying property rights without clear words.[42]

37. Where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.[43]

38. Courts will seek to construe legislation so as to avoid injustice and the extinguishment of proprietary rights,[44] and the enrichment of one party at the expense of the other,[45]

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35 *Singh v Ali* [1960] AC 167 at 176.

36 *Nelson v Nelson* (1995) 184 CLR 538 at 610 per McHugh J; *Yango Pastoral Group Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429 per Mason J.

37 *Nelson* at 551 per Deane and Gummow JJ.

38 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] 139 CLR 410 at 423 (per Mason J); *Fitzgerald* at 227 per McHugh and Gummow JJ.

39 Cf. *Miller v Miller* (2011) 242 CLR 446 at 459[27] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Equuscorp v Haxton* [2010] HCA 7; (2012) 246 CLR 498 at 513[23] per French CJ, Crennan and Kiefel JJ; 538[96] per Gummow and Bell JJ.

40 *Miller* at 454[15]; *Equuscorp* at 513[23].

41 *Nelson* at 564.

42 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623[38] per Gaudron J (Hayne J concurring) cited by Heydon J (in dissent in the result) in *Equuscorp* at 546[120]. See also *Singh v Ali* [1960] AC 167 at 176; *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 265.

43 *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12; (2009) CLR 603 at [43] per French CJ; see also cases cited in Pearce & Geddes Statutory Interpretation in Australia, 8th ed, at 230[5.21]- 233[5.23].

and the imposition of prejudicial consequences upon an innocent party that did not contravene any obligations pursuant to the statute.[46]

39. In other words, Courts will, if possible, eschew a construction that has the effect of unjustly enriching a guilty party (that is, a party in breach of its obligations under the Act) at the expense of an innocent party (a party that is not in breach of the Act).[47]

40. Unless the statute expressly so provides, the Court should not impose an additional sanction of voidness and unenforceability where such a sanction would cause prejudice to an innocent party without furthering the objects of the legislation. [48]

41. Where a statute imposes a penalty in respect of a contravention, the legal consequences of the commission of the offence may thereby be diminished because the purpose of the statute is sufficiently served by the penalty. [49]

42. When an enactment does not contain a provision rendering unenforceable an agreement that defeats or evades the operation of a relevant rule, the *prima facie* conclusion to be drawn is that Parliament regarded the sanctions and remedies contained in the enactment as sufficient to deter illegal conduct, and saw no need to take the drastic step of making unenforceable an agreement that defeats the purpose of the enactment. [50]

43. A Court that finds that an agreement is unlawful or has an unlawful purpose has merely set the stage for a further enquiry: Are the circumstances surrounding the agreement such that the Court should deny a relevant remedy to the party seeking the assistance of the Court? [51]

44. Leaving aside cases where a statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met:

    44.1. First, the sanction imposed should be proportionate to the seriousness of the illegality involved. It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose term and policy is contravened. [52]

    44.2. Second, the imposition of the civil sanction must further the purpose of the statute and must not impose a further sanction for the unlawful conduct if

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44 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623[38] per Gaudron J (Hayne J concurring); *Singh v Ali* [1960] AC 167 at 176; *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 265.

45 *Nelson* at 597 per Toohey J citing Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [957] 1 QB 267 at [288] p 289.

46 *Fitzgerald* at 221 per Dawson and Toohey JJ.

47 *Fitzgerald* at 221 per Dawson and Toohey JJ; 227 (per McHugh and Gummow JJ); *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 265.

48 *Fitzgerald* at 227 (per McHugh and Gummow JJ); *Equuscorp v Haxton* [2010] HCA 7; (2012) 246 CLR 498 at 518[34]; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216 at 270.

49 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227; *Yango Pastoral Group Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429, 433-434 (per Mason J); *Nelson* at 570 (per Deane and Gummow JJ), 590-591 (per Toohey J), 614, 616 (per McHugh J).

50 *Nelson v Nelson* (1995) 184 CLR 538 at 610 per McHugh J; *Yango Pastoral Group Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429 – 430 per Mason J.

51 *Nelson* at 604 per McHugh J.

52 *Nelson* at 612 – 613 per McHugh J.

Parliament has indicated that the sanctions imposed by the statute are sufficient to deal with conduct that breaches or evades the operation of the statute and its policies. [53]

45. Courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:

(a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or

(b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;

(ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and

(iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of an breach of the statute or the frustration of its policies. [54]

46. Unless the statute expressly so provides, Courts will not refuse relief to a claimant where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. [55]

47. 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.[56]

48. Thus, in the absence of an express provision to the contrary in the legislation, the test for denying equitable relief for reasons of illegality is whether public policy identified from the legislation requires that relief be denied.[57]

49. Where equitable remedies are sought, equity is equipped to attain a result which eschews harsh extremes.[58] Equity may impose terms upon a party seeking administration of equitable remedies. [59]

50. Equity eschews any broad generalisations in favour of concentrating upon the specific situation which has arisen, in the light of the relevant statutory provisions. [60] Courts of equity are usually not required to disregard a circumstance that affects the real justice of the case and calls for the assistance of equitable remedies. [61]

51. The Rule that "*no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*" [62] is too extreme and inflexible to represent sound legal

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53 *Nelson* at 613 per McHugh J.

54 *Nelson* at 613 per McHugh J; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 230 per McHugh and Gummow JJ.

55 *Nelson* at 604 per McHugh .J

56 *Fitzgerald* at 221 per Dawson and Toohey JJ, citing *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 288.

57 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Farrow Mortgage Services Pty Ltd (In Liq) v Edgar* (1993) 114 ALR 1.

58 *Nelson* at 559 per Deane and Gummow JJ.

59 *Nelson* at 558 per Deane and Gummow JJ.

60 *Nelson* at 561 per Deane and Gummow JJ.

61 *Nelson* at [60] per McHugh J.

62 *Holman v Johnson* [1775] 1 Coup 341 at 343 [98] ER 1120 at 1121.

policy in the modern age, even when account is taken of the recognised exceptions to this dictum. [63]

52. A plaintiff will not be denied relief under the principle *ex turpi causa non oritur actio* unless that plaintiff has to rely upon an unlawful or immoral transaction to establish his or her cause of action.[64]

53. Notwithstanding the illegality, relief may still be available to the Plaintiff if the Plaintiff is not in equal fault with the Defendant, that is to say not in pari delicto.[65]

54. The above considerations apply in relation to both contract and equity. [66]

Review of the Liquor Act in the light of the above principles

10 55. An analysis of the LA in the light of the above principles demonstrates that:

55.1. it was *not* the intention of the legislature (as reflected in the LA read as a whole) that a lease made or created in circumstances where the licensee (in this case, the Respondent) failed to obtain the consent of the Authority in contravention of *its* obligations under section 92(1)(d) of the Act is automatically to be rendered void and unenforceable with the consequential extinguishment of the Appellants' proprietary interests. This applies, *a fortiori*, to a lease that simply arose as a result of conduct of the parties and the operation of ss 8 and 16 of the RL Act.

55.2. The CA erred in law and in fact in holding that any sanction short of the Lease
20 being rendered enforceable and void would frustrate the implementation of the legislative purpose inherent in the statutory prohibition.[67]

56. The LA Act does not expressly say or suggest that any lease made in contravention of section 92(1)(d) will be void. Nor does it disclose, either expressly or by implication, an intention that such a lease should be unenforceable in all circumstances.

57. Instead, the LA expressly provides a smorgasbord of other potential consequences that could be invoked in the event of a contravention of section 92(1)(d), as well as a large number of general powers to ensure that the legislative purpose of the Act[68] will not be frustrated.[69] Voidness of the sublease does not form part of that smorgasbord.

58. This is a case, therefore, where (as held by McHugh J in *Nelson*[70]) the *prima facie*
30 conclusion to be drawn is that Parliament regarded the sanctions and remedies contained in the enactment as sufficient to deter illegal conduct, and saw no need to take the drastic step of making unenforceable an agreement that defeats the purpose of the enactment.[71] In any event, as will be demonstrated, the Lease does not in any way

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63 *Nelson* at 611 per McHugh J.

64 *Fitzgerald* at 220 per Dawson and Toohey JJ, citing *Gollan v Nugent* (1988) 166 CLR 18 at 46.

65 *Fitzgerald* at 229 per McHugh and Gummow JJ.

66 *Nelson* at [556-7] per Deane and Gummow JJ; 608, 611 and 613 per McHugh J.

67 At [79].

68 See s 3 for the objects of the Act. Relevantly, s 3(1)(a) provides that an object of the Act is "*to regulate and control the **sale, supply and consumption of liquor** in a way that is consistent with the expectations, needs and aspirations of the community.*" The Lease in issue is in no way inconsistent with the object of the LA.

69 Note that there is a presumption that if legislation includes a remedy for breach, no other remedy is available: see cases cited in Pearce & Geddes Statutory Interpretation in Australia, 8th ed, at 249[5.42].

70 184 CLR 538 at 610

71 *Nelson v Nelson* (1995) 184 CLR 538 at 610 per McHugh J; *Yango Pastoral Group Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429 – 430 per Mason J.

whatsoever defeat the purpose of the Act and that fact was clear from the evidence which was before the Court.[72]

59. It is respectfully submitted that one of the reasons for the fact that the CA fell into error in that it failed to analyse the LA as a whole; it simply had regard to ss 91 and 92 in isolation.

60. As a result of its failure to analyse the LA as a whole, the CA misconstrued the legislative purpose inherent in the statutory prohibition; and it failed to have regard to the multiplicity of consequences provided for by the legislature in the Act itself which could be invoked in the event of a contravention of section 92(1)(d) (and indeed in any event) in order to ensure that "*the implementation of the legislative purpose inherent in the statutory prohibition*" would not in any way be *frustrated.*

61. Accordingly, as a matter of both statutory construction and as a matter of fact the CA erred in holding[73] that "***when one considers the legislative purpose of the relevant provisions of the Liquor Act as well as the policy behind the subject prohibitions, then it follows that the prohibition*** *stated expressly in the statutory text of s 92 requires the conclusion that any lease caught by that provision* ***is not to be enforced by the courts.***" and in in holding[74] that "***any sanctions*** *short of the prohibited lease being rendered unenforceable and void* ***would frustrate the implementation of the legislative purpose*** *inherent in the statutory prohibition.*" [Emphasis added.]

62. It is submitted that the words highlighted in paragraphs 61 above demonstrate that the CA recognised that this was not a case in which the LA itself discloses an intention that a lease created without the prior consent of the Authority is void and unenforceable in all circumstances; if such an intention was disclosed in the LA then the reason for not enforcing such a lease would be otiose: the legislative purpose and policy would not be relevant.

Legislative purpose

63. As noted above, it is submitted that CA misconstrued the legislative purpose inherent in statutory prohibition: it does not require the licensee (Respondent) to personally ***supervise and manage the conduct of the business of a lessee*** in a portion of the Premises in which liquor is not sold or supplied.[75] But even if it did, the Lease would not have prevented it from so doing.

64. The CA appears to have based its conclusion as to the legislative purpose inherent in statutory prohibition only upon its review of ss 91 and 92 of the LA in isolation. It failed to analyse the Act as a whole.

65. Thus, its conclusion appears to have been reached in the absence of any analysis of the objects of the Act, as expressly set forth in s 3. That section provides, inter alia, but relevantly, that the object of the LA is to regulate and control of "*the* ***sale, supply and consumption of liquor*** *in a way that is consistent with the expectations, needs and aspirations of the community.*"

66. The CA erred in holding that that objective cannot be realised if any part of the Licensed Premises – in which liquor is not sold or supplied - is subject to a Lease to a

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72 See, for example, Reasons at [16], [41] (para 17.B of the Ramanowski affidavit), [53]-[55].

73 Reasons at [81].

74 Reasons at [79].

75 For example, if the licensee were to lease to lease a room in a licensed club to a florist or to a physiotherapist it is unlikely that Parliament intended to provide that the licensee was required to be "responsible at all times for the personal supervision and management of the conduct of the business of the" florist or physiotherapist. Those lessees would not be conducting the "business of the licensed premises under the license" within the meaning of s 91 of the LA.

third party. (If the CA was correct in that regard, it is difficult to see why the objective of the Act would not similarly be defeated if the Authority in fact gave its consent to the Lease. The CA did not explain how, had the consent been given, the alleged "*overarching responsibility of the licensee to personally supervise and manage the conduct of the business of the licensed premises*' could then have been complied with. There is nothing in the LA that suggests that the licensee has to in fact "***manage the business***" of a lessee in circumstances where the Authority has given consent to the lease and where the lessee (such as, for example, a florist or physiotherapist) will not be involved in the sale or supply of liquor.)

67. As will be demonstrated below, the CA also erred in fact. The evidence before the Court, accepted on appeal, was that the manager of the Club, Mr Romanowski, was well able to supervise the business of the Appellants and to ensure that the LA was not in any way being breached.[76] Moreover, the trial judge found as a fact (not challenged on appeal) that patrons dining in the restaurant were told that the restaurant could not sell or serve liquor because it was not licensed, but that they could obtain liquor from the bar area.[77]

68. Moreover, the CA failed to have regard to the fact that s 7 of the Liquor Act prohibited the Appellants from selling liquor, and that, in any event, an undertaking was given to the CA that no liquor would be sold. Furthermore, the CA thus failed to have regard to the fact that relief could, if necessary, have been moulded to the circumstances of the case (by, for example, making the relief granted by the trial judge subject to the condition that the Respondent has the right to ensure that the LA was not being breached in the restaurant in relation to the sale, supply and consumption of liquor); where the Plaintiff seeks equitable relief, whether in aid of a legal or equitable right, equity may impose terms. [78] (It is submitted that in the circumstances of this case no such terms were necessary; however, the Appellants would not have objected to any such terms.)

Failure to consider range of other potential consequences that could be invoked in the event of the Respondent breaching its obligations under the LA

69. More significantly, the CA failed to have any regard to the legislative provisions in the LA (or to even review those provisions) from which it can be inferred – as a matter of construction – that Parliament did not intend that a lease made in contravention of s 92(1)(d) would have to be declared to be void on the ground of a contravention by the Respondent of its obligations under s 92 of the LA. Those legislative provisions are more than adequate to ensure that the legislative purpose of the LA will be fulfilled without regarding the contract as void and unenforceable.[79] An analysis of those provisions would have demonstrated that the policy of the Act would not be defeated if effect was given to the Lease.[80] Those legislative provisions include the following:

69.1. The specified **boundaries** of the licensed premises could have been changed by the Authority on its own initiative; thus the Authority could have decided to

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76 See [41]: he deposed to the fact that in his ""*direct observation, and under [his] supervision, patrons of the Restaurant would exit the Restaurant and go into the bar area where they would purchase alcohol from the Club and take it back and consume it within the Restaurant.*" His evidence was accepted: [52]-[53]; it was not challenged on appeal.

77 At [16].

78 *Fitzgerald* at 231 per McHugh and Gummow JJ.

79 Cf. *Miller v Miller* (2011) 242 CLR 446 at 459[27] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Equuscorp v Haxton* [2010] HCA 7; (2012) 246 CLR 498 at 513[23] per French CJ, Crennan and Kiefel JJ; 538[96] per Gummow and Bell JJ.

80 *Nelson* at 564.

exclude the leased premises from the licensed premises: see section 94(2).[81] If the restaurant were to be excluded from the *specified boundaries of any licensed premises*, it would not form part of the licensed premises, and there would be no ongoing contravention of s 92(1)(d) which specifically relates to "the licensed premises."

69.2. The liquor licence could have been **cancelled**: see section 141(2)(a) read with section 139(3)(b) and (d). It is emphasised that it was the *Respondent* that contravened s 92(1)(d). Thus, as a matter of statutory construction, it is probable that the intention of the legislature is that the liquor licence of the Respondent should, if the Authority considered it to be appropriate, be cancelled – rather than the lease (and the extinguishment of the lessee's proprietary interest without compensation).[82] To cancel the lease is grant a benefit to the party in breach at the expense of the innocent party. It is unlikely that that was the intention of the legislation.[83]

69.3. The liquor licence could have been **suspended**: see section 141(2)(b). For example, the licence could have been suspended pending the approval of the Authority, or during the period of the Lease.

69.4. The Authority could have **imposed a condition** to which the licence is to be subject – (for example, that the Respondent was to ensure that no liquor is sold in the leased premises. Indeed, an undertaking to that effect was proffered by the Appellants before the trial judge): see section 141(2)(e). See also ss 53(1)(b), 54 and 75.

69.5. The Authority could have **disqualified** the Licensee from holding a licence for such period as the Authority thinks fit: see section 141(2)(f).

69.6. The Authority could have **reprimanded** the Licensee: see section 141(2)(m).

69.7. The Authority could have pursued **criminal proceedings against the Licensee**: see section 92(1)(d).[84]

70. In addition to the above, there were a large number of further remedies and consequences that could be invoked in the event of a contravention of s 92.[85]

71. Moreover, it is most significant that the Authority may well have given (and may still give) the requisite approval for the lease, had the approval been sought by the respondent.[86]

72. Thus, the CA was factually wrong to hold that "*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*". Recognition of the Lease as

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81 Section 94(2) is not dependent upon any contravention of the Act being committed. S 94(2) provides that "*The specified boundaries of any licensed premises may be changed by the Authority on the Authority's own initiative or on the application of the owner of the premises or the licensee.*" Licensed Premises is defined in s 4 to be "*the premises to which a licence relates.*"

82 Cf. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623[38] per Gaudron J (Hayne J concurring) cited by Heydon J (in dissent) in *Equuscorp* at 546[120].

83 *Singh v Ali* [1960] AC 167 at 176; *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 265.

84 Section **145** "*proceedings for an offence under this Act ... are to be dealt with summarily before the Local Court*". Apart from the imposition of a criminal penalty, none of the above remedies require a criminal conviction: cf section 139(3)(a).

85 See ss 148, 150 (imposition of penalties on the Respondent); 53 (imposition of conditions on the licence); 54 (conditions); 75 (directions).

86 See s 92(1)(d).

valid would not in any way have impeded the Respondent's or the Authorities ability to regulate and control the sale, supply, and consumption of Liquor in a way that is consistent with the expectations, needs and aspirations of the community.

73. It is submitted that the CA erred in failing to have any regard whatsoever to the above considerations, and that it therefore erred in that it:

73.1. Paid no regard to the fact that this is a case where (as held by McHugh J in *Nelson*[87]) the *prima facie* conclusion to be drawn is that Parliament regarded the sanctions and remedies contained in the enactment as sufficient to deter illegal conduct, and saw no need to take the drastic step of making unenforceable an agreement that defeats the purpose of the enactment.[88] In fact, the lease in the present case did ***not*** in any way "***defeat the purpose***" of the LA. The sanctions imposed by the legislation sufficiently protect the purpose of the legislation.[89]

73.2. Paid no regard to the statement of McHugh J in *Nelson*[90] that, leaving aside cases where the statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met –

73.2.1. *First*, the sanction imposed should be proportionate to the seriousness of the illegality involved.

73.2.2. *Second*, the imposition of the civil sanction must further the purpose of the statute and must not impose a further sanction for the unlawful conduct if Parliament has indicated that the sanctions imposed by the statute are sufficient to deal with conduct that breaches or evades the operation of the statute and its policies.

73.3. Ignored the fact that its conclusion that the Lease should be rendered unenforceable and void was an **entirely disproportionate** to the seriousness of the illegality involved. It ignored the fact that the Respondent allowed the Appellants into possession, allowed them to expend moneys on undertaking works over a three month period, and thence to establish and run a business for the period of almost a **year and a half**, and that they – the innocent parties - would thus suffer significant loss if the lease were held to be void, at the expense of the party in breach of its obligations under the Act, and that the Lease came into existence by reason of the RLA.

73.4. Had no regard to the fact that its decision results in the **extinguishment of a proprietary interest** of a lessee (without any compensation) – contrary to the presumption that legislation is not to interfere with vested proprietary interests.[91]

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87 184 CLR 538 at 610

88 *Nelson v Nelson* (1995) 184 CLR 538 at 610 per McHugh J; *Yango Pastoral Group Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429 – 430 per Mason J.

89 *Nelson* at 609.

90 At 612-613

91 Legislation is not to be construed as cutting down or destroying property rights without clear words: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623[38] per Gaudron J (Hayne J concurring): cited by Heydon J (in dissent) in *Equuscorp* at 546[120]. See also *Singh v Ali* [1960] AC 167 at 176; *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 265.

73.5. Had no regard to the *Bowmakers*[92] principle that, in the absence of a clear legislative expression to the contrary, where a person acquires a title, albeit by way of a transaction prohibited by statute, the Court will not deprive that person of his or her title unless that person needs to rely on his or her own illegal conduct to prove that title. (In this case the Appellants did not engage in any illegal conduct whatsoever. Title was conferred by operation of the RLA. Notwithstanding that fact, the CA failed to have regard to the fact that where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.[93])

10 73.6. Had no regard to the fact that the imposition of the sanction of unenforceability and voidness was ***not necessary*** having regard to the terms of the statute, to protect its objects or policies; ample remedies (not including a declaration of voidness) were provided under the Act. Moreover, the CA ignored the undertaking given by the applicants that no liquor would be supplied in the leased areas,[94] and that in any event they were not permitted to do so,[95] and it ignored the evidence that, notwithstanding the lease, the evidence demonstrated that the Respondent was in fact well able to personally supervise and manage the conduct of the business of the licensed premises – i.e. the selling and supplying and consumption of liquor.

20 73.7. Wrongly concluded that the existence of a Lease necessarily meant that the Respondent could not enter and perform such functions as were necessary for the purpose of complying with the provisions of the LA, and failed to take into account that (as was accepted by the applicants) any lease would preserve the right of the licensee to take such steps as were necessary to ensure compliance with the LA.[96]

73.8. Paid no regard to the fact that this is a case where (as held by McHugh J in *Nelson* and by McHugh and Gummow JJ in *Fitzgerald*) because the LA fails to disclose an intention that rights obtained in breach of the LA should be unenforceable in all circumstances, courts should ***not*** refuse to enforce legal or
30 equitable rights simply because they arose out of or were associated with an unlawful purpose *unless* (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of an breach of the statute or the frustration of its policies.[97]

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92 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65 at 70-71; see also *Alexander v Rayson* [1936] 1 KB 169 at 184 and 185; *Wilson International Pty Ltd v International House Pty Ltd (No 2)* [1983] 1 WAR 257 at 285; *Australian Wheat Board v Ison* [1967] 2 NSWR 643 at 651; *Gollan v Nugent* (1988) 166 CLR 18 at 28-29; *Abinger Investments Pty Ltd v Royal George Hotel Holdings Pty Ltd* [1993] 46 FCR 483 at 491; *Leason v Attorney-General* [2014] 2 NZLR 224 at 251-253.

93 *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12; (2009) CLR 603 at [43] per French CJ; see also cases cited in Pearce & Geddes Statutory Interpretation in Australia, 8th ed, at 230[5.21]- 233[5.23].

94 The fact of this undertaking has not been in dispute.

95 S 7 of the Liquor Act.

96 Cf. s 85(1)(c) of the *Conveyancing Act* 1919 (NSW) which implies in every lease the power in the lessor, inter alia, to "at all reasonable times during the term, ... ***enter upon the demised premises or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting the said premises***..."

97 *Nelson* at 613 per McHugh J; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 230 per McHugh and Gummow JJ.

73.9. Paid no regard to the fact that the Lease arose by operation of sections 8 and 16 of the RLA and that its decision therefore had the effect of frustrating the implementation of the legislative purpose inherent in the RLA.

The Appellants were innocent parties; the respondent was in breach of its obligations

74. In the present case, the contravention, if any, of the LA was caused by the failure of the *Respondent* to comply (or even attempt to comply) with the obligations imposed *upon it* pursuant to that Act.[98] Like in the case of *Fitzgerald v Leonhardt Pty Ltd,*[99] there was no failure by the Appellants to observe the requirements placed upon them by that Act.

75. This is a case, therefore, where the Respondent is seeking to benefit from its own wrong, just as it previously sought to benefit from its own alleged failure to comply with the RC Act.[100]

76. The action by the Appellants for a declaration in relation to the Lease was not an action by parties to a contract who had chosen to perform it illegally. The penalty imposed by section 92 was directed at a party in the position of the Respondent rather than the Appellants. Further, Like in the case of the driller *Fitzgerald v Leonhardt Pty Ltd,*[101] it has not been suggested that the Appellants acted otherwise than in good faith or that the Appellants had aided and abetted the Respondent in any offence committed by it,[102] within the meaning of the principles considered in *Giorgianni v The Queen* [103] and *Yorke v Lucas* .[104]

77. It has not been suggested that the Appellants were aware of the fact that, in breach of its obligations under the LA and under the Lease,[105] the Respondent had failed even to request the consent of the Authority to the Lease. Thus, the CA ought to have had regard to the fact that, unless the statute expressly so provides (and the LA did not so provide), Courts will not refuse relief to a claimant where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. [106]

78. Having regard to the range of consequences provided for in the LA in the event of a contravention by the Respondent of that Act, the imposition of an additional sanction, namely a decision to render the Lease is unenforceable and void, would be an inappropriate adjunct to the scheme for which the Act provides; it would cause prejudice to an innocent party without furthering the objects of the legislation. [107]

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98 Section 92(1)(d). It is also submitted that pursuant to the lease there was an implied undertaking by the Respondent to procure the requisite consent of the authority so as to enable the Appellants to have the benefit of performance of the contract: cf. *Fitzgerald* at [226] per McHugh and Gummow JJ.

99 (1997) 189 CLR 215 at 226.

100 [2014] NSWCA 321 at [23] – [29].

101 (1997) 189 CLR 215 at 226.

102 If the Respondent wished to make such an allegation it would bear the onus of so proving: *Venus Adult Shops Pty ltd v Fraserside Holdings Limited* [2006] FCAFC 188 at [103]-[105] per French and Kiefel JJ. However, no such allegation was made.

103 (1985) 156 CLR 473 at [478] – [488], [490] – [491], [506] – [507]

104 (1985) 158 CLR 661 at [667] – [668], [676].

105 It is a general rule applicable to every contract that every party agrees, by implication, to do all such things that are necessary on his part to enable the other party to have the benefit of the contract: *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71 per Griffith CJ, cited in *Fitzgerald v Leonhardt Pty Ltd* (1997) 189 CLR 215 at 219 per Dawson and Toohey JJ.

106 *Nelson* at 604 per McHugh J

107 Cf. *Fitzgerald* at [227].

79. In this case the Appellants complied with the law in relation to the sale of liquor. There is no challenge to the finding of the trial judge[108] that patrons dining in the restaurant were told that the Restaurant could not sell or serve liquor because it was not licensed, but that they could obtain it from the bar area and, presumably, return with it to their tables in the restaurant for consumption. In this case, like in *Fitzgerald*, [109] the Appellants complied with the law insofar as the conduct of their business was concerned.

80. Nor is there is any suggestion that the Appellants in any way contravened section 7 of the LA (being the central provision of the LA) which prohibits them from selling liquor themselves in the restaurant.

81. Furthermore, and in any event, the evidence before the Court[110] was that the manager of the Club, Mr Romanowski, was well able to supervise the business of the Appellants and to ensure that the LA was not in any way being breached. He deposed to the fact that in his:

> "*direct observation, and under [his] supervision, patrons of the Restaurant would exit the Restaurant and go into the bar area where they would purchase alcohol from the Club and take it back and consume it within the Restaurant.*"

82. Thus, as a matter of fact, it is submitted that even if the Court of Appeal correctly summarised the policy and objective of the LA in [72] of its reasons, it still nonetheless erred in holding that that objective cannot be realised if any part of the Licensed Premises is subject to a Lease to a third party.

83. Like in the *Fitzgerald* case, the imposition of a sanction of unenforceability and voidness would be disproportionate to the seriousness of the breaches of section 92 of the LA, and would be unnecessary to protect the objects or policies of the LA; moreover such a consequence would have the effect of enriching the Respondent as a result of its own wrong to the prejudice of the Appellants.

84. Having regard to the range of other potential consequences provided for in the LA in the event of a contravention of section 92, it is submitted that there would be no incongruity or incoherence in the law if the Court were to hold that the Declaration made by the trial judge was correct.

Exclusive possession under the Lease is not inconsistent with the objectives of the LA

85. The decision of the CA was premised upon the proposition that the Lease entitled the Appellants to "exclusive possession" and that that fact was fatal to the Appellants' case:[111]

> "*...the prohibition* ***only applies to a lease*** *or sub-lease* ***which,*** *by definition as it were,* ***entitles the lessee or sub-lessee to exclusive possession and, therefore, the right to exclude the licensee (or its manager) from the leased or sub-leased premises.***"

86. The CA held[112] that the Respondent could not perform the functions that it was required to perform or observe if the Appellants had exclusive possession.

87. The Court of Appeal was wrong in so concluding because:

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108 *Gnych v Polish Club Ltd* [2013] NSWSC 149 at [16]; see also *Polish Club Ltd v Gnych* [2014] NSWCA 321 at [16].

109 See *Fitzgerald* at [228].

110 At [41].

111 At [79].

112 At [79].

87.1. There was insufficient regard to the objects of the Act set forth in s 3, and the central prohibition of the legislation namely the prohibition against selling liquor unless authorised by a licence to do so set forth in section 7.

87.2. At the hearing before the trial judge the Appellants by their Counsel undertook not to sell or supply alcohol in the Premises.

87.3. It is customary for leases which, of necessity, confer exclusive possession upon tenants to provide rights on the part of the landlord to enter the Premises for various purposes. In *Radich v Smith*[113] Wynder J observed that a limited right of entry of a landlord, either by contract or statute, for example to view or repair, is of course not inconsistent with the grant of exclusive possession.

87.4. The *Conveyancing Act 1919* (NSW) specifically provides a right of entry to the Lessor in certain circumstances. Thus, for example, s 85(1)(c) of the *Conveyancing Act* implies in every lease the power in the lessor, inter alia, to

> "... at all reasonable times during the term, ... ***enter upon the demised premises or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting the said premises***...".

87.5. It is common for commercial leases of premises which are the subject of particular licences to provide that the landlord might enter from time to time to ensure compliance with applicable licensing requirements.

87.6. In this case the Appellants by their Counsel specifically conceded in the CA that any lease which was declared would be subject to the rights of the Respondent to enter the premises for the purpose of ensuring compliance with the LA.

87.7. The evidence before the Court, accepted on appeal, was that the manager of the Club, Mr Romanowski, was well able to supervise the business of the Appellants and to ensure that the LA was not in any way being breached.[114] he deposed to the fact[115] that in his:

> "*direct observation, and under [his] supervision, patrons of the Restaurant would exit the Restaurant and go into the bar area where they would purchase alcohol from the Club and take it back and consume it within the Restaurant.*"

87.8. It is apparent that in this case the alcohol that was consumed in the restaurant was indeed supplied by the Respondent.

87.9. The trial judge found[116] that patrons on the Restaurant were told that the Restaurant could not sell or serve liquor because it was not licensed but they could obtain it from the bar area (that is the area controlled by the Respondent) and presumably return with it to their tables in the Restaurant for consumption. That finding has never been challenged and was indeed adopted by the CA.[117]

88. In these circumstances it is submitted that the CA erred in concluding that because the Lease granted exclusive possession to the Appellants to the Restaurant Area it followed that the Respondent could not perform the functions that it was required to perform or

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113 (1959) 1 CLR 209 at 222.
114 See [41, [52]-[53].
115 At [41].
116 At [16].
117 At [16].

observe under the LA. In this regard, reference is also made to the photos which show the physical ability of the Club Manager and his staff to control the alcohol that was purchased and consumed in the Restaurant.

89. The CA erred in concluding that exclusive occupation under a lease is necessarily inconsistent with what it referred to as "the overarching responsibility of the licensee to personally supervise and manage the conduct of the business of the licensed premises."[118] It is clear from the LA itself that the Authority may give its consent to a lease which the CA held, "by definition" to denote exclusive occupation.[119] As noted above, there is nothing in the LA that suggests that the licensee has to in fact "***manage the business***" of a lessee in circumstances where the Authority has given consent to the lease and where the lessee (such as, for example, a florist or physiotherapist) will not be involved in the sale or supply of liquor.

90. Accordingly it is submitted that there is no inconsistency between the ordinary concept of exclusive possession on the one part and the steps that might be needed to be taken by the Respondent as a Licensee on the other.

91. Although terms embodying the above mentioned undertaking and concession might, in accordance with principle, be implied, it was not necessary for the Court to proceed on the basis of an implied term but instead it was open to it to order that any lease that it declared be conditional upon such terms being incorporated, if it considered such terms to be necessary.

92. The appropriateness of the Court granting relief which satisfies any discerned policy but no more is demonstrated by the decision of this Court in *Nelson* to the effect that the policy of the Act may be satisfied in a manner which does not require the transaction to be void.[120]

Section 92(1)(d) of the LA should not be read so as to invalidate a lease created by reason of the operation of the RLA

93. The Court of Appeal [77] concluded that the Appellants obtained a lease at law (meaning at common law). This was not so.

94. Reliance was placed by the CA on the decision of *Radaich v Smith*[121] in support of the proposition that a common law lease required an agreement for a period of a term that is certain (or capable of being certain).

95. To enable effect to be given to his conclusion the CA then said:

> "*Once Respondents (the present Appellants) entered into possession the term of their right to occupy was rendered certain by section 16(1) of the RL Act.*

96. The CA accepted that such a lease comes into existence when the "tenant" enters into possession and when there is an "agreement" between them that the lease should be for a period or a term that has been agreed or can be determined; such a circumstance cannot exist where the term is not the product of any agreement but only the consequence of the statute.

97. However, the requirements of section 8 and section 16 have been satisfied so that a finding of there being a lease at common law does not detract from there being a statutory lease created by the RLA.

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118 At [79].

119 See definition of lease in s 3 of the RLA.

120 *Nelson* at 564 per Deane and Gummow JJ and at 612 per McHugh J.

121 (1959) 1 CLR 209 at 222.

98. It could not be the case that what would otherwise be a statutory lease would cease to be so because it may at the same time be a lease at common law. Such a proposition would be wholly inconsistent with the RLA.

99. Accordingly the consequence of there being a statutory lease created by the RLA remains.

100. The effect of s 92 of the LA has to be understood in the context of the RLA and the creation of a statutory lease in accordance with its terms.

101. In circumstances where the effect of the RLA is to create a valid lease, it would not be appropriate to infer that an illegality constituted by a contravention by a third party of a different statute (the LA) should, in the absence of clear provision to the contrary, be understood as making that lease void.

102. At the time the RLA was enacted in 1994, the predecessor to the LA contained a provision to the same effect as s 92(1)(d) (see section 101 *Liquor Act* (NSW) 1992). As the two statutes, in the absence of the construction placed on the current version by the CA, can exist harmoniously they ought to be so interpreted.

103. Moreover when the LA was passed, the RLA creating statutory leases was already in existence. Notwithstanding that fact the legislature did not see fit to declare that a lease created by ss 8 and 16 of the RLA would be void if the licensee failed to obtain the requisite consent from the Authority. Similarly when the legislature enacted the RLA it did not see fit to exclude from its terms leases created in breach of section 101 *Liquor Act* (NSW) 1992.

104. As pointed out by Mr Robert Angyal SC in his note on the decision of the CA[122]:

> "*It seems inherently contradictory to say that an arrangement which is converted into a lease by operation of one New South Wales statute is illegal because it breaches another New South Wales statute. To put it another way how can a relationship that comes into existence only by force of one New South Wales statute be regarded as illegal by reference to another New South Wales statute.*"

105. In *Commissioner of Police v Eaton*[123] Crennan, Kiefel and Bell JJ, after referring to the Judgments of Gummow and Haine JJ in *Ferdinands v Commissioner for Public Employment* said [48]:

> "*The law presumes that statutes do not contradict one another. The question is not whether one law prevails but whether that presumption is displaced.*"

106. In the same case, Gageler J, although in dissent in the result, drew attention to the application of the principle of harmonious construction to the construction of provisions within different statutes.[124]

107. Because the LA does not contain a statutory declaration that a lease created in breach of the s 92(1)(d) is void, there is no basis to conclude that the presumption against inconsistency has been rebutted. The LA and the RLA are able to sit harmoniously together. The CA erred in failing to have regard to the presumption against inconsistency.

108. Accordingly, it is submitted that the CA erred, *a fortiori*, in holding that it was necessary to render the Lease unenforceable and void in circumstances where the Lease arose by operation of sections 8 and 16 of the RLA. Indeed, it is submitted that the decision of the CA has had the effect of frustrating the implementation of the legislative

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122 89 ALJR 13 at 15; 252 CLR 1.

123 [2013] HCA 2; (2013) 252 CLR 1.

124 At [99]-[100].

purpose inherent in the RLA. The Lease came into existence by virtue of the operation of the RLA, and its operation is not effected by the LA. Accordingly, the principles of illegality are not engaged.

Part VII: Relevant Provisions

109. A tabulated bundle of the applicable statutory provisions as they existed at the relevant time is annexed. Those provisions are still in force, in that form, as at the date of these submissions.

Part VIII: Orders sought

110. Appeal allowed with costs.

10 111. Set Aside the orders of the Court of Appeal of New South Wales on 17 October 2014, and the orders for costs made by that court on 16 September 2014, and, in place thereof, order that:

(a) the appeal to the Court of Appeal be dismissed;

(b) the respondent club pay the appellants' costs in that court.

112. Order that the proceedings be remitted to the Supreme Court of New South Wales for the assessment of the appellants' damages.

Part IX: Estimate

113. The Appellants' estimate is that 2.5 hours will be required for the presentation of its oral argument.

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Dated: 9 April 2015

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