

### Enforceability of lease executed in breach of statute

Uche Okereke-Fisher reports on *Gnych v Polish Club Limited* [2015] HCA 23.

#### Introduction

The High Court of Australia recently considered the issue of statutory illegality in the matter of *Gnych v Polish Club Limited* [2015] HCA 23. In this case, the court unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales and, in doing so, held that a lease granted in contravention of s 92(1)(d) of the *Liquor Act 2007* (NSW) (Liquor Act) was not void and unenforceable.

#### Facts

The lessor, Polish Club Limited, (Club) was a registered club and the holder of a license under the Liquor Act. The club agreed in principle that Mr and Mrs Gynch (lessee) would be granted a lease of part of the club's licensed premises, namely, the restaurant area together with the kitchen attached to the restaurant, an office next to the kitchen and a store room and toilet. In addition, it was agreed in principle that the lessee would have non-exclusive access to the 'mirror room', for overflow customers of the restaurant and to cater for larger functions.

The lessee drafted a lease agreement proposing the terms of the lease. The club resolved to accept the terms of the lease but the club's resolution was not communicated to the lessee. Subsequently, the lessee's solicitors sent the club a draft lease and negotiations ensued about the terms of the lease. However, no written agreement was ever finalised.

The lessee's restaurant operated successfully. However, relations between the lessee and the club deteriorated. On 7 July 2013, the club's solicitors sent the lessee's solicitors a letter advising the club's decision to terminate the relationship and requesting that the lessee vacate the premises. On 5 August 2013, the lessee was excluded from the premises.

The club contended that the lease, which came into existence upon the lessee's election to take advantage of s 16 of the *Retail Leases Act 1994* (NSW) (Retail Leases Act)<sup>1</sup>, contravened s 92(1)(d) of the Liquor Act and was therefore void and unenforceable. The lessee argued that the contravention of s 92(1)(d)<sup>2</sup> was a result of the club's failure to have the lease approved by the NSW Independent Liquor and Gaming Authority (Authority) before granting the lessee possession of part of the licensed premises (Breach) and to hold the lease to be void and unenforceable would prejudice the lessee without furthering the objects of the Liquor Act.

*The court stated that the question whether a statute which contained a unilateral prohibition on entry into a contract is void was a matter of construction and depended upon the mischief the statute was designed to prevent, its language, scope and purpose and the consequences for the innocent party.*

The main issue between the parties before the primary judge and on appeal concerned the club's contention that the lease was illegal under s 92(1) of the Liquor Act and that consequently the lease was void and unenforceable.

#### Supreme Court

At trial<sup>3</sup>, the primary judge (Ball J) held that, although there had been a breach of s 92(1)(d), the lease was not unenforceable. His Honour's view was that the Breach did not affect the lessee's leasehold interest because their claim did not depend on any illegality. The lease arose from the conduct of the parties and pursuant to s 16(1) of the Retail Leases Act. His Honour went further to state that the lessee was entitled to an injunction restraining the club from interfering with their rights of exclusive possession.

As to the mirror room, the primary judge held that the lessee was entitled to an order for specific performance of an agreement to license that area to them for a period of five years.

#### Court of Appeal

On appeal<sup>4</sup>, the Court of Appeal (Tobias AJA, with whom Meagher and Leeming JJA agreed) held that s 92(1)(d) of the Liquor Act rendered any lease between the lessee and the club unenforceable. The Court of Appeal stated that the legislative purpose of the Liquor Act, as well as the policy behind the prohibitions expressly stated in s 92, required the conclusion that any lease caught by that provision was not to be enforced by the courts.

#### High Court

The High Court<sup>5</sup> allowed the appeal, holding that on a proper construction of the Liquor Act, the breach of s 92(1)(d) did not automatically render the lease void and unenforceable.

**Uche Okreke-Fisher**, ‘Enforceability of lease executed in breach of statute’

*The court noted a general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing<sup>9</sup> except in cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination.*

The court stated that the question whether a statute which contained a unilateral prohibition on entry into a contract is void was a matter of construction and depended upon the mischief the statute was designed to prevent, its language, scope and purpose and the consequences for the innocent party.

The court held that the scope of the prohibition in s 92(1)(d) of the Liquor Act can be understood only by reference to the dual characteristics of a lease being, an executory contract and an executed demise.<sup>6</sup> Accordingly, s 92(1)(d) is not directed at the lease between the club and lessee; rather, it is directed at the conduct of the club in executing the lease. Section 92(1)(d) proscribes the grant by the club rather than that which is granted and does not, proscribe the performance by the parties of their obligations under the granted lease.<sup>7</sup>

The court considered that it would be an ‘unattractive result’ if the club was able to terminate a freely-entered contractual arrangement, by relying on its breach of the statute, to the detriment of the lessee, as argued by the club.<sup>8</sup> The court noted a general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing<sup>9</sup> except in cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination. The club’s breach of s 92(1)(d) was complete when the club granted the

lessee exclusive possession. The subsequent observance by both parties of the terms of the lease was not prohibited.<sup>10</sup>

The High Court was of the view that the provision of a statutory penalty for breach of s 92(1) meant that there was no need to prevent the lease and the Court of Appeal erred in holding that the purpose of the Liquor Act was not compatible with enforcing the lease.<sup>11</sup>

### Endnotes

1. This provides ‘the term for which a retail shop lease is entered into ... must not be less than 5 years’.
2. Section 92(1)(d) provides: ‘A licensee or a related corporation of the licensee must not ... lease or sublease any other part of the licensed premises except with the approval of the Authority’.
3. *Gnych v Polish Club Limited* [2015] HCA 23 at [21]–[24].
4. *Gnych v Polish Club Limited* [2015] HCA 23 at [26]–[28].
5. French CJ, Kiefel, Keane and Nettle JJ in a joint judgment with Gaegler J agreeing with the orders made in separate reasons.
6. *Gnych v Polish Club Limited* [2015] HCA 23 at [41] referring to Deane J in *Progressive Mailing House Pty limited v Tabali Pty Limited* (1985) 157 CLR 17 at 51.
7. *Gnych v Polish Club Limited* [2015] HCA 23 at [43].
8. *Gnych v Polish Club Limited* [2015] HCA 23 at [44].
9. *Gnych v Polish Club Limited* [2015] HCA 23 at [45].
10. *Gnych v Polish Club Limited* [2015] HCA 23 at [46].
11. *Gnych v Polish Club Limited* [2015] HCA 23 at [50].

## Verbatim

### *Macoun v Commissioner of Taxation* [2015] HCATrans 257 (9 October 2015)

**Ellicott QC:** ... That is, I would suggest, one of the most telling statements of principle in relation to the interpretation of statutes. Your Honours, I suggest that the most important question which arises in this case is to identify the privileges and immunities which were appropriate and needed by the specialised agencies and to ask the question why. In searching for the answer to that question, one is most likely to find the meaning of the text in this case. One could address the

court, take your Honours to the provisions, go through them and say, well, they are ordinary words, they should be given the benefit of construction, and sit down, and we would be on the 11 o’clock plane. But, your Honours, one has to recognise that -

**French CJ:** It is a very attractive proposition.

**Mr Ellicott:** I do not think that is going to happen ....