

RB PATEL GROUP LTD v SUVA CITY COUNCIL, LAUTOKA CITY COUNCIL, NASINU TOWN COUNCIL, NAUSORI TOWN COUNCIL AND SIGATOKA TOWN COUNCIL (ABU0056 of 2010S)

5 COURT OF APPEAL — APPELLATE JURISDICTION

CALANCHINI AP, CHANDRA, MUTUNAYAGAM JJA

5, 28 September 2012

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Trade and commerce — business licensing — levying of business licence fees — designated businesses include “supermarket” and specialised trading and business activities — certain activities also falling within kinds of activities carried on at supermarkets — operators of supermarkets liable to licence fee for “supermarket” licence, but not liable to further licence fees for specialised activities — Business Licensing Act ss 3, 4, 5.

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The appellant was a limited liability company that operated a chain of supermarkets in Fiji. The respondent councils had issued business licences under the Business Licensing Act (Cap 204) (the Act) to the appellant with respect to the appellant’s supermarkets within their authority (except the fourth respondent, whose by-laws did not contain the relevant licence type). The appellant sought a declaration in the High Court that, pursuant to the Act and the respective by-laws, it was liable to pay licence fees for “Shop, Large Supermarket with Liquor Licence” only, and not to pay further licence fees with respect to each and every type of product sold at the supermarkets. The High Court judge dismissed the appellant’s summons. The appellant appealed from the judgment of the High Court judge to the Court of Appeal. At issue was what “activities” of trade or business could be carried out by a licensee under the Act, who has paid a licence fee in respect of a “Shop, Large Supermarket with Liquor Licence” licence, without paying a further licence fee.

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Held –

(1) (per Chandra JA, Calanchini AP and Mutunayagam JA concurring) Although there was no statutory definition of “supermarket”, the term had been judicially understood by reference to the activities that are carried on in them and, having regard to the relevant by-laws and the other licence types therein, it would be difficult to demarcate between the activities that would be carried on in supermarkets.

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(2) Although the relevant by-laws were not unreasonable, they should be interpreted benevolently, such that where a council has charged a licence fee in respect of a licence for a designated business of a supermarket, the council should not charge a separate fee for other activities that fall within the other designated businesses.

Appeal allowed in part.

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Cases referred to

Bugg v Director of Public Prosecution [1993] 2 All ER 815; *Wednesbury Principle (Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), applied.

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Fine Fare Ltd v Aberdare Urban District Council [1965] 1 All ER 679; *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd and Another* [2007] ZWSC 109; *R v Central Divisional Liquor Tribunal Ex parte Hari Ram Maharaj* (SC Judicial Review No 19 of 1984), considered.

Kruse v Johnson [1898] 2 QB 91, followed.

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H. Nagin for the Appellant.

Z. Sahu Khan for the first Respondent.

N. Lajendra for the second, fourth and fifth Respondents.

S. Tivivata for the third Respondent.

[1] **Calanchini AP.** I have read the judgment of Chandra JA and agree with his
5 proposed orders.

[2] **Chandra JA.** This is an appeal by the Appellant (hereinafter referred to as the Plaintiff) from the judgment dated 28th September 2011 of the learned High Court Judge at Suva.

10 [3] The Plaintiff filed originating summons against the Respondents (hereinafter referred to as the Defendants) stating that

(a) The Plaintiff is a limited liability company that operates a chain of supermarkets in Fiji and that some of them are situated within Councils of the Defendants, and that the Defendants issued business licences to the Plaintiff's supermarkets located within
15 their authority.

(b) That the Plaintiff had paid business licence fees levied by each Defendant for designated businesses as follows:

(i) Suva City Council (1st Defendant)

(a) Shop, large supermarket with liquor licence

20 (b) Agent, gas cooking

(c) Refreshment Bar

(d) Butcher.

(ii) Lautoka City Council (2nd Defendant)

(a) Shop, Large Supermarket with liquor licence

25 (b) Agent Gas cooking

(c) Butcher

(iii) Nasinu Town Council-Center Point (3rd Defendant)

(a) Shop, Large Supermarket with Liquor License

(b) Butcher

30 (c) Refreshment Bar

(d) Retail Shop

(iv) Nausori Town Council (4th Defendant)

(a) Shop liquor

(b) Gas Agent

(c) C. Shop Wholesale & Retail

35 (d) Frozen & Pre-Packed Meat

(e) Shop Toys & Curios

(v) Nausori Town Council-South Point (Nakasi)

(a) Shop liquor

(b) Gas Agent

40 (c) Shop Wholesale and Retail

(d) Frozen & Pre-Packed meat

(e) Shop Toys & Curios

(vi) Sigatoka Town Council (5th Defendant)

(a) Shop & Large Supermarket with Liquor Licence

45 (b) Agent Gas Cooking

(c) Butcher.

(c) That the Defendants charge the plaintiff licence fees for various types of business activities, though carried out within the same premises.

(d) That the Business Licensing Act, Cap 204 together with the Defendants' respective Business Licence Fees By-Laws do not restrict the nature of the items sold at large supermarkets such as those operated by the Plaintiff and that supermarkets by
50 their nature carry multiple types of products.

(e) That the Plaintiff accepts that it must pay for licence fees to operate its supermarkets within the Defendants' Municipalities but denies that there is any requirement to pay multiple licence fees in respect of each and every type of products the Plaintiff sells within its supermarkets.

5 [4] The Plaintiff sought the following orders and declarations:

(a) An Order and/or Declaration that the Business Licence Fees payable by the Plaintiff for its supermarket businesses to the Defendants pursuant to the Defendants' respective Business Licence Fees By-Laws shall be for "Shop, Large Supermarket with Liquor Licence" only and no other Business Licence Fees in respect of its supermarkets
10 situated with the Defendants' respective boundaries.

(b) An Order that the Defendants by themselves, their respective servants and/or agents be permanently restrained from demanding payment of other business licence fees from the Plaintiff apart from business licence for shop, large supermarket with liquor licence, and not to interfere in any manner whatsoever in the Plaintiff's day to day
15 running of its supermarkets situated within the Defendants' respective boundaries.

(c) An Order that the Defendants do pay costs on indemnity.

[5] The learned High Court Judge dismissed the Plaintiff's summons with costs to be taxed if not agreed by Judgment dated 28th September 2011.

20 [6] In the notice of Appeal filed by the Plaintiff against the judgment of the High Court the following grounds of appeal have been set out:

1. The learned Trial Judge erred in law and in fact in wrongly interpreting and applying s 5 and other provisions of the Business Licensing Act (Cap 204).

2. The learned Trial Judge erred in law and in fact in not properly considering the interpretation of a "Shop: Large Supermarket with Liquor License" and not properly
25 considering the ambit of the business of a supermarket.

3. The learned Trial Judge erred in law and in fact in not properly considering the items that may reasonably be sold in Supermarkets.

4. The learned Trial Judge erred in fact in holding that the Plaintiff's submission was that it should be able to operate several businesses on the same premises when the
30 business of a Supermarket is one business under which various categories of items are offered for sale.

[7] The learned High Court Judge in the course of his judgment referred to and considered the provisions of the Business Licensing Act (Cap 204) and the By-Laws made pursuant to the provisions of the said Act and the interpretation
35 that could be given to the said provisions.

[8] The learned Judge arrived at his conclusion thus at para 70 of the Judgment:

"That Sections 3,4 and 5 of the Business Licensing Act does not appear to this Court produce any ambiguity in their respective meanings, and that it was plain and obvious according to the Business Licensing Act and Buy-Laws that each designated business has to be issued a separate licence. It is immaterial whether the businesses are carried on in the same premises or not. What is important and required is that each of the designated businesses should have been issued separate licences."
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[9] In considering the submissions made by the Plaintiffs regarding the grounds of appeal, it is necessary to consider the relevant provisions of the Business Licensing Act (Cap 204) and the By-Laws made pursuant to the provisions of the said Act by the relevant Town Councils.

[10] The relevant provisions in the Business Licensing Act are:

50 "S.3 (1) There shall be for the purposes of this Act the following licensing authorities:

a. In respect of a municipality, the council thereof;

b. In respect of all other areas in Fiji, the Chief Accountant.

(2) Notwithstanding the provisions of subsection (1), the Minister may by Order declare any area to be an additional licensing area and designate any person or authority to be the licensing authority for that area.

5 *S.4. The Minister may by notification in the Gazette, designate any business as being one in respect of which a license is required by the provisions of this Act.*

10 *S.5. No person shall engage in any business designated under the provisions of s 4 in Fiji without a license issued by a licensing authority in respect of each place in which such business is carried on or, in case of a hawker or other person carrying on business from or at no fixed address in Fiji, in respect of such businesses.”*

[11] According to S.3 above, the licensing authority in respect of a municipal area would be the Council of such area and therefore the Defendants are clearly licensing authorities of their respective Council areas.

15 [12] In terms of S.4 above different types of businesses have been designated as businesses requiring licences and are set out in the By-Laws relating to the said Act. It is to be noted that in the said list of “Designated Businesses”, “Shop, Large Supermarkets with Liquor Licence” is one of such businesses.

20 13. According to S.5 a person who wishes to engage in a business designated under S.4 has to obtain from the Licensing Authority a license to engage in such business. The Section caters to two types of situations, firstly where the business is carried on in a designated place, when it stated “in respect of each place in which such business is carried on” and secondly to a situation where there is no fixed place of business, such as in the case of a hawker or other person who has no fixed place of business. In both situations to engage in business, a license has
25 to be obtained.

[14] From the above provisions it would appear that if an entrepreneur wishes to engage in the business of a Supermarket, and call it as such, would come under the category of Designated Business of “Shop, Large Supermarket without Liquor License” or “Shop: large Supermarket with Liquor License”. The venture
30 in the present case falls under the second category, namely “Shop: large Supermarket with Liquor License”.

[15] There is no dispute that an entrepreneur who wishes to have the business of a Supermarket has to obtain and pay a licence fee. But the question at issue
35 is as to what “activities” of trade or business could he carry out in such a Supermarket with or without paying a further licence fee. Should he pay a license fee for every activity in the nature of a business that is carried on in such a Supermarket or is he entitled to carry any such activity as he has obtained a license to carry on a Supermarket under the designated category of “Shop:
40 large Supermarket with liquor licence”.

[16] Obviously, having obtained such a license, the plaintiff would have had to obtain the necessary authorization from the relevant authorities apart from the City Council to carry on the business relating to sale of liquor.

45 [17] In the present case, according to the argument of the Plaintiff, it should be able to carry on different activities of trade from the Supermarket once they have obtained a licence under the designated category of Shop: large Supermarket. This is what is being opposed to by the City Council, whose argument is that if the Plaintiff is carrying different activities of trade within such a supermarket and they fall under the categories of designated business, the plaintiff should obtain
50 licenses for such activities too in addition to the license for the Supermarket. Needless to say that if the Plaintiff did not call itself a supermarket, the other

activities that he was carrying on could be carried on by paying the respective licence fees for such activities without paying a separate licence fee for the Supermarket.

5 [18] This situation has thus arisen as there is no definition or interpretation in the Statute regarding the term “Supermarket”. It is a well known phenomenon that in the modern business world, Supermarkets are a matter of commonplace in many jurisdictions. They serve the community in making available many items that consumers would need under one roof which makes the activity of marketing especially for household goods so very convenient.

10 [19] In such a situation that is as present, would it be possible for the Court to give a meaning and interpret the term “Supermarket” to keep with contemporaneous situations? It is to be observed that the subsidiary legislation which designated “Supermarkets” under the Designated Businesses was formulated in 1985, and the phenomenon of Supermarkets has advanced much more up to the present time. However, no attempt has been made to give a Statutory Interpretation to the term by the Legislature and it would be appropriate for such measures to be taken.

20 [20] The question at issue for this Court is to determine the correctness of the judgment of learned High Court Judge in the light of the grounds of appeal raised by the Plaintiff in this appeal.

25 [21] The learned Judge has interpreted the relevant statutory provisions cited above referring to several decisions relating to interpretation of statutes and adopted the literal interpretation on the basis that the words are plain and clear and unambiguous. The intention of the Legislature is clear when it set down the statutory provision to the effect that any person who wishes to carry on a business has to obtain a license for such purpose. As far as that point of view is concerned, the learned Judge’s interpretation that any person who wishes to do a business should obtain a license from the relevant local authority as stated in paras. 61 and 30 62 of the judgment cannot be faulted.

35 *“61. Therefore, it is quite clear, that the words ‘each place in which such business is carried on’ are there to prevent any one to carry on a business in several places under one and the same license. For example, if a license is issued to a person to carry on a restaurant business in Raiwaqa, he cannot run a similar kind of restaurant in Suva on the strength of the same license.*

62. Therefore, having obtained a license to carry out a designated business in a particular place, one cannot carry on the same business in several places by virtue of the same licence.”

40 [21] However, in paras. 63-66 of the judgment the learned Judge has stated thus:

“63. Similarly, once a license is obtained to carry out a designated business in a particular place, one cannot carry on different kinds of designated businesses in the same place unless and until he obtained separate licenses for the respective businesses.

45 *64. If a person is allowed to carry on different types of businesses in the same premises on a licence issued to a particular business the whole purpose of the Act and By-Laws would frustrate.*

65. Hence, there is no doubt that as to what the legislature meant. If the Legislature intended the provision to apply to different places rather than businesses it would have stated so. Therefore, it is clear and unambiguous the words ‘in any business designated under the provisions of s 4’

50 *66. In my view, there is only one meaning that can be seen in s 5 of the Business Licensing Act. That is whoever intended to carry on any of the businesses designated*

under the provisions of s 4 of the Business Licensing Act, a license has to be obtained for each and every business irrespective of the place where the business is carried on.”

[22] In my view, the position taken up by the learned High Court Judge in paras 63 to 66 would be contrary to the position taken up by him in paras 61 and 62.
5 The words in s 5 ‘in any business designated under the provisions of s 4’ have to be read with the remaining portion of the section namely ‘in Fiji without a license issued by a licensing authority in respect of each place in which such business is carried on’ and cannot be dissociated from that portion. As I have stated in para 13 above, the issue of a license applies to the place of business.

10 [23] The contention of the Plaintiff is that as he has obtained a license for the place of business which is designated as “Shop: large supermarket with liquor license” he need not pay for the different trading activities therein though such trading activities taken individually would encompass the different “designated businesses” in the schedule of “Designated Businesses” in the Schedule of the
15 By-Law of the particular Council.

[24] It is observed that as far as the 4th Defendant is concerned, that is the Nausori Town Council, there is no designated business in their By-Law as “Shop: large Supermarket with liquor” and the plaintiff is not claiming to have taken a
20 license of that nature. Therefore the position that the Plaintiff has taken regarding “Shop: large Supermarket with liquor” would not apply to the said 4th Defendant Council. Consequently, the appeal of the Plaintiff would fail as far as the 4th Defendant is concerned.

[25] A consideration of the manner in which the different Councils have levied
25 license fees from the Plaintiff as set out in para 3 above reveals that:

- a) The 1st, 2nd and 3rd and 5th Defendants have charged license fees for “Shop: large Supermarket with Liquor License”.
- b) The 1st, 2nd, 3rd and 5th Defendants have charged license fees for “Butcher” as well as for “Agent, Gas Cooking”.
- 30 c) The 1st and 3rd Defendants have charged license fees for “Refreshment Bar”.
- d) The 3rd Defendant has charged license fees for “Retail Shop”.
- e) The 5th Defendant has charged license fees for “Petroleum” and “Shop, Wholesale & Retails”.

[26] Now, the question revolves round the issue regarding the 1st, 2nd, 3rd and
35 5th Defendants charging the Plaintiff for different “Designated Businesses” such as “Butcher”, “Agent, Gas Cooking”, “Refreshment Bar”, “Retail Shop”, “Petroleum” and “Wholesale & Retails” while charging for another “Designated Business” named “Shop: large Supermarket with Liquor”. It is also to be
40 observed that the fee for “Shop: large Supermarket with Liquor License” is the highest fee when compared to the other named Designated Businesses for which fees have been charged from the Plaintiff.

[27] The perusal of the Schedule of the Designated Businesses in the By-Laws of the several Defendants reveals that under the category of “Shops” that the
45 following are set out:

- S20 Shop, Agriculture, Industrial and Consumer, Chemical Sales
- S21 Shop, Boatbuilding
- S22 Shop, Cabinet Joinery or Furniture
- S23 Shop, Domestic Appliances
- S24 Duty Free Goods
- 50 S25 Shop, Electrical and/or Contractor
- S27 Shop, Engineering, small/light

- S26 Shop, Engineering, heavy
- S28 Shop, Green grocer
- S231 Shop, Jewellery
- S34 Shop, Motor Mechanic
- 5 S36 Shop, Pawn
- S37 Shop, Plumber
- S38 Shop, Retail
- S39 Shop, Retreading and/or Recapping of Tyres
- S41 Shop, Small Retailers
- S33 Shop, Large Supermarket Type without Liquor Licence
- 10 S30 Shop, Household Appliances Retail Sale (Refrigerator, W/Machine, etc).
- S29 Shop, Household Appliances, Wholesale and Retail
- S40 Shop, Sales and Services of Life Rescue Equipment
- S42 Shop, Spray Painting and/or Panel Beating
- S43 Shop, Tailor and/or Drapery
- 15 S44 Shop, Tailor (solely)
- S45 Shop, Toys and/or Curios
- S46 Shop, Upholstery (solely)
- S48 Shop, Wholesale
- S49 Shop, Wholesale and Retail
- S47 Shop, Welding, including Mobile Welding
- 20 S35 Shop, not otherwise defined
- S35 Shop, Service and Bowser.

[28] It is seen that in the above list there a few designated businesses which appear to be very wide and vague, such as “Shop Domestic Appliances”, “Shop Green Grocer”, “Shop Small Retailer”, “Shop Household Appliances”, “Wholesale and Retail”, “Shop Wholesale”, “Shop Wholesale and Retail”.

[29] It would be rather difficult to demarcate the activities that any one of the above would really mean as far as their scope is concerned, and these are similar to activities that would be carried on in Supermarkets. Taking for instance the activities that the Plaintiff is said to carry out as stated in his affidavit (page 29 of the High Court Record) such as “Frozen & Pre-packed Meat”, “Clothes”, “Toys”, “Refreshments”. “Fast Food”, “Gas for Cooking”. In the Plaintiffs submissions to the High Court (page 158 of the High Court Record) it is further stated as “Agent for Fiji, Vodafone and Digicel in the Sale of Telecards”, “Cosmetics in the Cosmetic Department”, “Small Hardware”, “Electrical Appliances”, “Milk Bar”, “Liquor Department”,. Each such activity may be caught up under designated businesses in the classification of designated Business in the Schedules of the By-Laws of the several Town Councils.

[30] The activities of trade as set out above are similar to activities in a Supermarket as stated in the Judgment of Kermode J in *R v Central Divisional Liquor Tribunal Ex parte Hari Ram Maharaj* (S.C. Judicial Review No.19 of 1984). “A reasonable requirement of anyone living in the neighbourhood of a supermarket is that a shopper should be able to purchase groceries and beverages and other household requirements in the one store”.

[31] In *Fine Fare Ltd v Aberdare Urban District Council* [1965] 1 All ER 679 which involved a case of the effect of a closing order of the Local Authority in respect of the businesses carried on in a Supermarket, it was stated that the Supermarket in question had carried on a variety of retail businesses, including those of grocery, tea dealers, greengrocery, fruiterer, provision merchant, florist, driedfishmoner, poulterers, butcher, domestic hardware merchant, stationer, confectioner, baker and seedsman.

[32] In *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd and Another* (2007) ZWSC 109 a decision of the Supreme Court of Zimbabwe, where an issue arose regarding the content of a Supermarket in a building relating to a lease, the Court referred to the following meanings
5 given to the term Supermarket. In the New Collins Concise Dictionary (1982) Supermarket is defined as ‘large self-service store retailing food and household supplies’.

The Court also referred to the definition of Supermarket in Wikipedia Free Encyclopedia where it is stated that:

10 “A supermarket is a departmentalized self-service store offering a wide variety of food and household merchandise. It is large in size and has a wider selection than a traditional grocery store.

The supermarket typically comprises meat produce, dairy and baked goods departments along with shelf space reserved for canned and packaged goods as well as
15 for various non-food items such as household cleaners, pharmacy products and pet supplies. Most supermarkets also sell a variety of other household products that are consumed regularly such as alcohol (where permitted) household cleaning products, medicine, clothes and some sell a much wider range on non-food products.

The traditional supermarket occupies a large floor space on a single lever and is
20 situated near a residential area in order to be convenient to consumers. Its basic appeal is the availability of a broad selection of goods under a single roof at relatively low prices.”

[33] The above meanings or definitions given to the term Supermarket has thus drawn the attention of Courts in relation to the activities that are carried on in
25 them. In the context of the present case too, as claimed by the Plaintiff their Supermarkets also have a wide array of trading activities and therefore some meaning should be attached to the term Supermarket when the Town Councils charge a license fee for such an establishment and more so when they charge a higher fee than for other designated businesses.

30 [34] The By-Laws of a Town Council come within the scope of delegated legislation where such Councils are authorized to formulate laws to be operative within their Council limits. It is in terms of such authorization that the By-Laws relating to Designated Business too have been formulated. It is an accepted principle of law that such by-laws should be certain and be reasonable. The
35 judicial authorities starting with the introduction of the *Wednesbury Principle* (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) have been adopted in many jurisdiction in dealing with such delegated legislation. The Courts have gone to the extent of striking down by-laws on such basis as had occurred in *Bugg v Director of Public Prosecutions* [1993] 2 All ER
40 815.

[35] When applying those principles to the present situation, it cannot be strictly said that the by-laws formulated by the Councils regarding Designated Businesses are unreasonable. However in the operation of them a certain amount
45 of certainly should attach to them. If vague or wide terms are used, it should be possible to circumscribe their limits. It is my view that though the by laws relating to designated businesses have been properly laid down, in their operation they should be certain and be able to lay down their scope.

[36] I am of the view that the 1st, 2nd, 3rd and 5th Defendants Councils who have charged a license fee from the Plaintiff for “Shop: large Supermarket with
50 liquor” should not charge a separate fee for the other activities which have been categorized by the Councils as Designated Businesses among the activities of the

Plaintiff's Supermarket. However, where such business activity requires special authorization from the Council itself or other Regulatory Bodies, in relation to excise matters or hygienic matters or safety measures etc. such authorizations should be obtained and fees for such would have to be paid regarding such

5 authorizations. If as submitted by the 1st Defendant, if such Council has to assist in matters requiring such authorization, they should formulate measures to accommodate such assistance and work that they have to do in such circumstances.

[37] Therefore I would set aside the order of the learned High Court Judge

10 dismissing the summons of the Plaintiff and allow the appeal of the Plaintiff in respect of the order of dismissal in respect of the 1st, 2nd, 3rd and 5th Respondents in that the Business Licence Fee payable by the Plaintiff for its supermarket business shall be for "Shop: Large Supermarket with Liquor Licence" only.

15 [38] The Courts in dealing with By-Laws of Local Authorities have been over the years treating them rather benevolently (Lord Russel of Killowen C.J in *Kruse v Johnson* [1898] 2 QB 91).

Therefore in the present circumstances I would not award any costs against the

20 Defendants.

[39] **Mutunayagam JA.** I also agree with the proposed orders of Suresh Chandra JA.

Chandra, JA.

25 **ORDERS OF THE COURT**

[40] The Orders of Court are:

- a) The judgment is set aside in so far as they relate to the 1st, 2nd, 3rd and 5th Defendants.
- 30 b) The judgment is affirmed in so far as it relates to the 4th Defendant.
- c) The appeal of the Plaintiff is allowed in respect of their claim against the 1st, 2nd, 3rd and 5th Defendants only.
- d) The Plaintiff to pay as Business Licence Fee only the Fee for "Shop: Large Supermarket with Liquor" in respect of the 1st, 2nd, 3rd and 5th
- 35 Defendants.
- e) No costs.

Appeal allowed in part.

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Justin Carter
Barrister

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