THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 356

Record Number: 2018/102

Peart J.
Irvine J.
Whelan J.

BETWEEN:

TRIODE NEWHILL LHP LIMITED, NOMINEE CAMPUS RETAIL MANAGEMENT LIMITED, AND TRIODE NEWHILL LHP LIMITED, NOMINEE MKP STORES LIMITED

APPLICANTS/RESPONDENTS

- AND -

SUPERINTENDENT ALAN MURRAY

NOTICE PARTY/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF NOVEMBER 2018

1. This is an appeal against the order made by the High Court (Barrett J.) dated the 20th February 2018 in answer to a Consultative Case Stated to the High Court by District Judge Seamus Hughes arising from applications made to him for the ad interim transfer of two wine, beer and spirit off-licences attaching to two separate premises in County Westmeath which trade under the well-known Spar brand.

2. By his said order, and for the reasons explained in his written judgment dated 1st February 2018, the trial judge answered *in the negative* the following question raised by the District Judge:

> "Does a franchise agreement between the applicant for an ad interim transfer and its nominee, in the terms presented to me, preclude the grant of the applications before the [District] Court?"

3. The Appellant notice party considers that the High Court has given an incorrect answer to the question raised, and submits that as a matter of law the District Judge must refuse the ad interim applications before him given the nature of the relationship created between Triode Newhill LHP Ltd ("Triode" or "the franchisor") and each of its named nominees, namely Campus Retail Management Ltd, and MKP Stores Ltd ("the franchisees") by the particular franchise agreements presented to the District Judge.

Factual background

4. Triode is part of a group of companies within the BWG Group which holds a leasehold interest in a large number of retail premises throughout the country from which other entities are permitted to trade under the Spar brand in accordance with the terms of a franchise agreement.

5. Each franchise agreement is in identical terms. It specifically provides that the agreement constitutes a licence to trade from the premises and that it does not create a tenancy or any other interest in the premises. The terms and conditions under which the business may be conducted by the franchisee under the Spar brand are set forth, and importantly it contains a clause stating that the franchisee is not the agent of the franchisor. These important facts are not in controversy.

6. Normally there is no difficulty about an assignee or transferee, of even the lowest estate or interest in a licensed premises, such as under a short lease, sub-lease or tenancy agreement, from being granted an ad interim transfer of the licence (provided the statutory requirements are fulfilled, and no objection is raised) because the applicant is in lawful occupation of the licensed premises, and is the entity which will be selling the intoxicating liquor.

7. In such cases, the applicant for the licence and the occupier of the premises will be the same legal entity, be it a natural person or a limited liability company. It is uncontroversial by now that a limited liability company may hold an intoxicating liquor licence in its own name, though it is equally the case that it may hold its licence in the name of its nominee. That nominee will be an employee of the company, such as its manager of the particular premises from which the intoxicating liquor is being sold. There is no statutory provision which provides that a company may hold its licence through a nominee, and there is no statutory definition of a nominee, but it has long been recognised that the nominee must be the servant or agent of the company holding the licence. Section 28 of the Intoxicating Liquor Act, 1960 makes specific provision for an application by the body corporate to transfer the licence held by the company's nominee to such other person as the body corporate may nominate. This provision is availed of where, for example, the nominee may have died, or may have left the employment of the body corporate, and the company wishes to appoint a new nominee to hold *its* licence. The section is silent as to the circumstances in which such an application might be made, but those to which I have referred are certainly the most usual that occur in practice.

8. That relationship of employer/employee or principal/agent is important to keep in mind in the context of nominees. In those situations, the licence will be issued to A.B as nominee of C.D. Limited. No difficulty arises on such applications to the District Court because the applicant for the licence (*i.e.* the body corporate) is not only entitled to exclusive occupation of the premises but is also the entity that will be selling the intoxicating liquor product from the premises, as authorised by the licence. That situation is entirely and, indeed un-controversially, within the relevant statutory provisions.

9. In the present cases the factual position is different, and the question arises as to whether what is sought to be done by way of

application to the District Court for the *ad interim* transfer is within the statutory scheme. It is different because, while Triode has a leasehold interest in the premises, it does not occupy the premises since it has granted that right of occupation to the franchisee. Neither is Triode the entity that sells the intoxicating liquor from the premises. Conversely, the entity selling the intoxicating liquor from the premises (the franchisee) does not, at least on the face of the franchise agreement hold any estate or interest in the premises. It merely has permission to use the premises.

10. It is useful at this point to set out the provisions of s. 1 of the Public House (Ireland) Act, 1855 from which the District Court derives its jurisdiction in relation to an *ad interim* transfer of an intoxicating licence. That section (extended to apply to a transfer of an off-licence by the provisions of s. 20 of the Intoxicating Liquor Act, 1960) provides, as relevant:

> "1. *Upon* the death of any person duly licensed to carry on the business of a licensed victualler, and to sell exciseable liquors by retail, to be consumed on the premises, in Ireland, or upon the removal of any such person from the house or premises at which he is authorised by any such licence to carry on such business as aforesaid in Ireland, or *the sale of or assignment of his interest therein by operation of law or otherwise, it shall be lawful* for the justices of the peace …… *to transfer*, by endorsement thereon, any and *every such licence* as aforesaid then in force *to any person*, not disqualified by law, *to whom it shall be proposed* at the time of such application *to transfer any such licence, to use, exercise, and carry on the business* of a licensed victualler at the same house and on the same premises, and *there to sell such exciseable liquors* as might theretofore have been lawfully sold and retailed therein; *and thereupon it shall be lawful for such person so to use, exercise, and carry on the said business at such house and premises*, until the [Annual Licensing District Court]." [Underlining provided to assist navigation through the section]

11. It would be helpful at this point also to draw attention to a number of features of the franchise agreements entered into between the parties:

> • Clause 1: the franchisee is granted the "right to *use the premises* for the purpose of carrying on the businesses specified in the First Schedule …". [emphasis provided]
>
> • Clause G: the franchisee acknowledges and agrees "that he has no Estate, Rights or Entitlements whatsoever in the Premises, the Permitted Business (or any business carried out therein) or in the Goodwill of the said business which are the sole and exclusive properties of the [franchisor]".
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> • Clause E: "Nothing in this agreement shall constitute or be deemed to constitute a partnership between the parties hereto or constitute or be deemed to constitute the [franchisee] as agent for the [franchisor] …".
>
> • Clause 2.2: "To take all supplies of products used for the purposes of the carrying on of the permitted businesses from a supplier or suppliers nominated and/or approved by the [franchisor] …".
>
> • Clause 2.9.1: "To pay to the [franchisor] a management fee of an agreed percentage of the total sales exclusive of VAT of the [franchisee] during each accounting month …".
>
> • Clause 2.11: "To allow the [franchisor's] authorised personnel to enter the premises at all times during business hours (or otherwise as agreed) to inspect the [franchisee's] stock operations and to facilitate for the purposes of determining whether the [franchisee] has complied with his obligations under this agreement and to a standard required by the [franchisor]"
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> • Clause 2.13: "To discharge forthwith all the debts of the permitted business (save those which are the responsibility of the [franchisor] it being agreed that all such debts are the personal responsibility of the [franchisee] …".
>
> • Clause 2.24: "To operate the permitted business at all times according to the terms and conditions of this agreement and in accordance with the terms, instructions and directions given from time to time by the [franchisor].
>
> • Clause 2.29: "To comply with all instructions given to him by the [franchisor]
>
> • Clause 9.5: "It is HEREBY FURTHER AGREED that the relationship created between the parties hereto is that of licensor and licensee and that nothing herein contained shall be construed as creating the relationship of landlord and tenant between the parties hereto and that this Licence is not intended nor shall it operate or be deemed to operate either at law or in equity as a demise of any property the subject of this Licence nor shall the Licensee have or be entitled to any estate, right or interest in any property the subject of the licence."

12. The difficulties from a licensing point of view presented by this franchise agreement relationship are sought to be addressed by describing the applicant for the two transfers as "Triode Newhill LHP Limited, Nominee MKP Stores Limited", and "Triode Newhill LHP Limited, Nominee Campus Retail Management Limited" respectively. It should be noted that in each case there is a single applicant, namely Triode Newhill LHP Limited. That entity is described on the notice of application as "the Applicant" and it is *Triode's* registered office which is given as the registered office of the applicant in each case. By Triode naming a nominee on each application, it is sought to meet the triple requirements under the licensing code that the licensee should hold the lowest estate and interest in the premises, be in lawful occupation of the premises, and (iii) that the licensee carries on the licensed trade in the premises. But Triode itself, as the applicant for the licence, does not fulfil (ii) and (iii), since its nominee is not its employee or agent (see Clause E set forth in para. 10 above) and is trading in the premises solely on its own account.

13. Whether the relevant statutory provisions can be so expansively interpreted so as to permit these applications for ad interim transfer to be granted in the face of these franchise agreements, is essentially the question posed by the District Judge in his Case Stated. In its quest for an interpretation of the relevant statutory provisions which permits the present applications to be granted, Triode also seeks support from s. 1094 of the Taxes Consolidation Act, 1997, and what is contained in a Manual issued by the Revenue Commissioners entitled Liquor (Excise) Licence Compliance Procedures Manual (last reviewed May 2018). I will come to those submissions in due course.

The trial judge's judgment

14. Having briefly set forth the background to the Case Stated, and the question asked by the District Judge therein, the trial judge then referred to the franchise agreements, and stated in para. 5 " … for the reasons set out below, the franchise agreement confers but a licence to use the relevant premises". At para. 6 he explains why he considers this to be so as follows:

> "It is trite law that howsoever a document purporting to be a lease or a licence is described, whether it creates a lease or establishes a licence is not a mere matter of nomenclature but falls to be established by reference to the substance of what such document achieves. Each of the franchise agreements at issue in the matter before the learned District Judge, the court finds for reasons outlined hereafter, creates a licence. Thus (1) it is clear from each agreement that the applicant in each instance is maintaining its interest in the premises; (2) there is no right of exclusive occupation, with each applicant remaining entitled to enter the relevant premises at any time; and (3) there is no rent reserved. There is nothing additional to the agreements before the court to suggest what the intention of the parties was as regards the relationship they sought to establish between them (such intention being a factor of relevance); however, there is enough in the foregoing for the court to conclude that, from a property law perspective, what has been established between them by way of the franchise agreement is a licence, not a lease"

15. To the above, the trial judge added a footnote in which he set out a number of the clauses from the franchise agreements some of which I have already set forth above. In relation to (2) above, there is a further footnote referring to clause 2.11 (see above) which permits the franchisor's lawful agents to enter the premises for the purpose of inspection. In relation to (3) above, there is a further footnote which refers to clause 2.9.1 which provides for the monthly payment of a "management fee" based on an agreed percentage of total sales.

16. The conclusion that the franchise agreements do not constitute a lease, but rather a mere license to use the premises in accordance with the terms provided, is therefore based on a view that the franchisor has "maintained its interest in the premises" by virtue presumably of Clause G (see above), that the franchisee has no entitlement to exclusive possession because the franchisor may enter for the purpose of inspection, and because the management fee does not constitute a rent. In other words, that none of the indicia of a lease exist.

17. The trial judge then addressed whether it was sufficient for a party seeking a licence to be in lawful occupation of the premises, as opposed to holding the lowest estate or interest in the premises. He rejected the submission made by the notice party that lawful occupation was sufficient, stating that it was necessary that the lowest estate and interest in the premises be held, and that in the present cases that was the franchisor, being the holder of a leasehold interest.

18. The trial judge then proceeded to address the position in the present cases i.e. that the franchisor had named the franchisee in each case as its nominee so that both entities would be on the licence in order to overcome the problems to which I have referred at para. 9 above. In doing so he referred to the historical difficulty that had been perceived to exist in relation to a company holding a licence in its own name, and to the mechanism then adopted to overcome that difficulty, namely the nomination by the company of a person to hold the licence as the company's nominee. In such instances the nominee was always a manager or other employee of the company. The trial judge referred to the more recent view that a company may hold the licence in its own name – see *e.g. Kenny J. in State (Hennessy and Chariot Inns Limited) v. Commons* [1976] IR 238, and went on to state that in such circumstances "it is perhaps somewhat curious that companies continue to engage in the widespread practice of holding licences through nominees, whether individuals or companies". He went on to state that under the current state of the law "there is no strict need for a nominee but there is no prohibition on appointing a nominee; a natural person *or a company may be a nominee* …" [Emphasis provided]. In relation to his view that a nominee did not have to be a natural person but could be a company, he made reference to the provisions of s. 28 of the 1960 Act (to which I referred briefly in para. 7 above) which provides:

> "28. A licence held by a nominee of a body corporate in respect of premises in which the lowest estate or tenancy is held by the body corporate may, on application by the body corporate to the Court at any sitting thereof for the Court area within which the premises are situated, be transferred, by endorsement made by the Court on the licence or, if the licence is not available, on a copy thereof, to such other person as the body corporate may nominate."

19. I will come back to the question of whether the trial judge is correct to state that this section enables the nominee of the company to itself be a corporate entity, as in the present cases.

20. The final section of the judgment of the trial judge is headed: "Licensing Law: Franchising and Management Arrangements". He began his consideration of these matters by referring to the statement by Palles C.B. in *James L. Murphy & Co. Ltd v. Crean* [1915] 1 I.R. 111 that "the licence is an authority to a named person to carry on trade in a described house". He referred also to what was stated by Ridley J. in *Peckover v. Defries* [1907] 95 L.T. 883 namely that in enacting the Licensing Act, 1872 "the Legislature intended that the sales of liquors to take place through the licensed person, not necessarily by himself, but if not by himself then *through somebody who is his agent or servant*" [my emphasis]. The trial judge then referred to "the consequent legal frailty of franchise and management arrangements that this observation has sometimes been considered by practitioners to present as a matter of Irish law". I take this to be a reference to the difficulty presented by these arrangements whereby the nominee (namely the franchisee) being named on the licence is not the franchisor's "servant or agent" since that designation is specifically excluded by the provisions of Clause E of the franchise agreement – see above at para. 10.

21. The trial judge went on to consider a number of what he described as "pre-independence decisions of the Irish courts" which he felt diverged from the judgment in *Peckover*, and which he felt "have a particular cultural resonance and legal persuasiveness". In this regard he referred to *R (Cottingham) v. Justices of County Cork* [1906] 2 I.R. 415, and, in a footnote, to *Edwards v. Edwards* [1905] 39 ILTR 73 – a case to which, he noted, the parties had not drawn his attention but which he considered to be an even more radical departure from *Peckover* than was *R (Cottingham*).

22. The trial judge set forth the following quite lengthy passage from the judgment of Palles C.B. in *R (Cottingham*) and from which he went on to identify what he described as "six precepts … of especial relevance in the franchising/management context" which I will come to:

> "Coming, then, to the construction of the [Beer Houses (Ireland)] Act of 1864 it must be admitted that, prior to its passing, an incorporated Company had an absolute right, on payment of the proper duty, to obtain a licence authorising it to sell beer by wholesale, in the same way as such a Company may, and does every day, obtain it in England. If, then, that Act has had the effect insisted upon by the Solicitor-General, viz., that an incorporated Company cannot now obtain a licence without a certificate, and cannot obtain such a certificate because it is incorporated, the result would be that the Act would prohibit the sale of beer by wholesale by incorporated Companies; at least it would prohibit them selling in their own names. Such a construction ought not likely to be arrived at. To use the words of Lord Selborne, 'it does seem to me to be best to remember the principle that the liberty of the subject ought not to be held to be abridged any further than the words of the statute, considered with the proper regard to its objects, may require'.
>
> Now, does the object of the statute requires this total abrogation of the previously existing right of a public Company? My

opinion is that it does not. Its object is to regulate, not to extinguish, the sale of beer. Before the statute, any person, whatever might be his character, might carry on the trade of selling beer by retail to be consumed off the premises, and the fitness of the house for the purpose, and the carrying on of the trade in an orderly manner, were not conditions precedent to the renewal of the licence. The Legislature seems to have been of opinion that, for the future, licences should be granted only in respect of premises suitable for the purpose, and under circumstances which would render it likely that the trade would be carried on in a peaceable and orderly manner. It, therefore, required as a condition to the grant of a licence, a Justices' certificate that the premises were suitable, and, when the licence was a renewal, that the certificate should extend to the peaceable and orderly conduct of the business during the last year.

The Legislature, however, required something further. It considered, and undoubtedly correctly, that by restricting the grant of licences to persons of good character, a further guarantee would be afforded as to the mode in which the business would be carried on. This was a most effective guarantee, so long as the trade was carried on personally by the licensee.

But the licensee was not bound to carry on the trade by himself personally. He might lawfully carry it on, and as a matter of fact did frequently carry it on, not by himself, but by his manager. In such a case, the guarantee afforded by the certificate of "good character" was necessarily of a different kind. Still it might be very effective. The fact that a licensed person, who had many licensed houses, enjoyed the reputation that (either by himself, or by other efficient persons of good character) he used care in the selection of his managers; that he closely attended to, and constantly superintended, the carrying on of the trade; that he stopped any irregular acts committed in the course of it the moment they came to his knowledge; that he kept a tight rein over his managers and other employees, and visited their improper conduct with dismissal when deserved; would add largely to the probability that his trade would be carried on peaceably and orderly."

23. The six "precepts … of especial relevance …" identified by the trial judge from this lengthy passage were stated to be the following:

"(1) The liberty of persons (natural or legal) ought not to be held to be abridged any further than the words of the statute, considered with the proper regard to its object, may require.

(2) The object of intoxicating liquor legislation is to regulate, not to extinguish the sale of alcohol.

(3) Informing intoxicating liquor legislation is the notion that licences should be granted only in respect of premises suitable for the purpose, and under circumstances which render it likely that the trade will be carried on in a peaceable and orderly manner.

(4) The grant of licences is restricted to persons of good character so as to further guarantee the mode in which licensed business will be carried on.

(5) A licensee "is not bound to carry on the trade by himself personally. He might lawfully carry it on, and as a matter of fact did frequently carry it on, not by himself, <u>but by his manager</u>." [Emphasis provided]

(6) In such a case, the guarantee afforded by the certificate of 'good character' is necessarily of a different kind, but that does not mean it is necessarily less effective."

24. Having identified these six "precepts" the trial judge then stated:

"18. As can be seen, in his judgment in *Cottingham*, Palles C.B. expressly refers to and affirms the legality of management structures in the licensing context. He does not, in his observations, refer to franchising arrangements, but neither in the context or substance of what he states such arrangements excluded from the scope or effect of his comments; quite the contrary, in fact, when one has regard to the sense of what he says. Moreover, the omission of express mention of franchising from the judgment of Palles C.B. is readily explainable by the fact that (i) the wholesale use of franchising which has become so prevalent a feature of the contemporary national (in truth, the international) economy did not come about until after the Second World War, several decades after Cottingham was decided, so it was likely a form of structure that was uncommon in Ireland at the turn of the 20th century and hence which did not spring to the mind of the Chief Baron.

19. The court struggles to see any practical difference between the management arrangement contemplated by Palles C.B. in Cottingham and the franchising arrangement (with payment of fee to the franchisor/licensor under the agreement) that is the focus of the within judgment. From a legal perspective, there is, of course, a difference of legal capacity, with the type of manager contemplated in Cottingham being an agent or servant. However, when one has regard to the various observations made by Palles C.B. and referenced above, this difference of legal capacity does not have any 'real world' consequence under the licensing laws."

25. The trial judge then concluded as follows:

"20. In short, as can be seen from *Cottingham*, there is no reason to believe that an otherwise lawful franchising structure falls necessarily to be treated as incompatible with the licensing laws, and there is nothing in the particular franchising (licence) agreement at issue in the within case that requires the court to reach a contrary conclusion. This is not the 'shoe-horning' of a modern legal structure into an ill-fitting template established by long-enacted licensing laws. It is recognition, by reference to the venerable precedent, that a popular modern commercial structure (franchising) can be accommodated comfortably within the scope of the licensing laws, as enacted in the Victorian Age and amended in the years since. Nor does the court see a legal infirmity to [be] present under s. 1 of the Act of 1855: *the franchisor-licensor* (the licensee for the purposes of the licensing laws) *is carrying on business qua licensor* by way of its contractually binding franchising structure with its franchisee-licensee and *deriving a direct financial benefit from the conduct of that business*." [Emphasis provided]

26. It was for these reasons that the trial judge considered that the question posed by the District Judge in his Case Stated should be answered in the negative, *i.e.* that the franchise agreement does not preclude the granting of an *ad interim* transfer of the wine, beer and spirit off-licences for these two premises to "Triode Newhill LHP Limited, Nominee MKP Stores Limited" and "Triode Newhill LHP Limited, Nominee Campus Retail Management Limited" respectively.

Appellant's submissions
27. The appellant notice party submits that in reaching his conclusions the trial judge has made a number of errors:

> • By holding that a limited company may be the nominee of a corporate licence holder.
>
> • By holding that the franchise agreement does not preclude the granting of the applications in the District Court, even though it provides that the nominee would be trading and would be selling the intoxicating liquor in the premises, on its own account, and not as employee or agent of the corporate licence holder.
>
> • By holding that the relationship created by the franchise agreement structure is a valid structure for the purpose of the licensing legislation.
>
> • By failing to find that the proposed arrangement under the franchise agreement is inconsistent with s. 1 of the Public Houses (Ireland) Act, 1855, and/or holding that it is permissible under the said section.

28. These grounds were addressed in both written and oral submissions to this Court. Much emphasis is placed on the fact that under the franchise agreement the franchisee is in sole occupation of the premises, and is the only entity selling the intoxicating liquor at the premises, and does so not as the employee or agent of the franchisor, but on its own account. It is submitted that given that an intoxicating liquor licence authorises the holder of the licence to sell the intoxicating liquor products from the particular premises, it is clear that it can only be the franchisee who may hold the licence (leaving aside for the moment the question of whether mere occupation of the premises is sufficient, as opposed to holding the lowest estate or interest). In this regard, the Court was referred to the provisions of s. 7(1) of the Intoxicating Liquor (General) Act, 1924 which provides:

> "7(1) From and after the passing of this Act no person shall sell, expose for sale, or keep for sale, by retail, any intoxicating liquor without being duly licensed so to sell the same, or at any place where he is not authorised by his licence to sell the same."

It is submitted that the clear intent of this provision is that only the person who is selling the product requires such a licence, and therefore is the only person entitled to apply for such a licence.

29. It is submitted also that insofar as a body corporate may choose to hold its licence through a nominee, such nominee can only be the servant or agent of the corporate licence holder (and for that very reason, may not be itself a limited company) and may not be some other entity separate and independent from the licence holder, who is carrying on the trade on its own account at the premises, such as the franchisees herein. The Court has been referred to a number of authorities in support of this submission, including R (Cottingham) upon which such reliance was placed by the trial judge, and in which Palles C.B. stated, inter alia, that "the person who is to sell is the person who is to be licensed to sell". That is not to say that where the owner of a licensed premises employs a manager to run the premises for him/her, and serve the customer it is the manager who must be licensed. Such a manager is clearly just the servant of the owner of the business, and it is the owner who will hold the licence as it is he whose business is trading in the premises. The concurring judgment of Johnson J. in *R (Cottingham)* states the position:

> "The only remaining contention for the prosecution which it appears necessary to consider is that if the certificate is to be granted by the Justices, it should be granted to the local agent or manager of the Company. This course might be adopted if such agent or manager was, in the opinion of the Justices, a person suitable for the position, and put by the company in the exclusive occupation and complete control of the premises and the business for the requisite period …, and as between himself and the public, carried on the business in uncontrolled management thereof, although, as between himself and the company, he was paid a salary for services, and bound to render an account to the company, and to account to them for the profits; see *Nix v. Justices of Nottingham* [1899] 2 Q.B. 294".

30. Counsel has referred also to the judgment of Ridley J. in *Peckover v. Defries* [supra] to which the trial judge referred, and submits that, contrary to what was stated by the trial judge, there is in fact no divergence in later pre-independence Irish case law from the judgment in *Peckover.* Ridley J. stated:

> "It appears to me that the legislature intended that the sales of liquors are to take place through the licensed person, not necessarily by himself, but if not by himself then by someone who is his agent or servant. That is, in my opinion, the position of things which is contemplated by the section. In the present instance it seems to me that it was necessary for the magistrate to enquire whether, when Defries or Mrs Defries sold the liquor they were selling it as the agent for Newton, the licensee, or whether they were selling their own beer for their own benefit. If they were selling their own beer for their own benefit, and Newton was but a nominee in respect of the beer and had no interest in the beer – although he was a tenant under an agreement of the house – and they were selling it as beer which they had bought and which they were retailing to their customers, with which Newton had no connection, then in that case it appears to me that an offence was committed."

31. Counsel referred the Court also to the judgment of Palles C.B. in *James J. Murphy & Co. Ltd v. Crean* [1915] 1 I.R. 111 as correctly summarising the nature of an intoxicating liquor licence as follows:

> "As the licence is an authority to a named person to carry on trade in a described house, it is not only essentially personal to the named licensee, but is also attached to the described premises; and, if by reason either of the licensee's death, or of his ceasing to occupy the described house during the period covered by the licence, trade cannot be lawfully carried on in the house without further authority, and if that authority is conferred by transfer, it is confined to trade in the specified house."

32. Counsel submits that this makes it clear that the holder of the licence must be the person in lawful occupation of the premises from where the liquor is sold, and carrying on the trade in the sense of taking the profit from the trade, and not, as in the case of Triode, simply the owner of the premises (leasehold owner in the present cases) in which some other person is selling the liquor on his/her own account, and specifically and uncontrovertibly not as agent for the franchisor, albeit that a "management fee" calculated by reference to an agreed percentage of total sales is payable monthly to Triode.

33. Counsel has submitted that the case law makes clear that on the facts of the present cases it is only the franchisee who may be the holder of the licence, being the party carrying on the trade in intoxicating liquor on its own account, and in actual possession of

the premises, and that therefore the franchise agreement as presented to the District judge precludes the licence being transferred to Triode, which is what was being sought on the applications before the District Judge. In these circumstances it is submitted that the trial judge was in error in answering the question posed in the Case Stated in the negative.

Respondent's submissions
34. The respondent accepts that the applicant for an ad interim transfer of a licence must satisfy the District Court that it holds at a minimum the lowest estate and interest in the premises to which the licence will attach. In this regard it points to the fact that it has a leasehold interest in these premises, and therefore satisfies that requirement. It is submitted also that it is uncontroversial that such an applicant may be a limited liability company, and also that such a company may hold its licence through a nominee should it choose to do so, but that it unnecessary that it does so. These two matters are indeed uncontroversial. It is unnecessary to dwell upon the case law which has dealt with those questions some of which has been referred to in submissions, and indeed there is explicit recognition of the nominee role in s. 28 of the 1960 Act, as explained above.

35. The respondent accepts also that the case law to which the Court has been referred to by the notice party stretching back a hundred years and more has always held that a nominee of a body corporate which the latter wished to hold the licence on its behalf had to be an employee or agent of the company. But counsel has submitted that there is no statutory provision that states that a nominee must be the servant or agent of the company in order to hold the licence as the company's nominee. Accordingly, it is submitted that there is no statutory provision that specifically precludes Triode from naming the franchisee as its nominee on the licence, so that both names appear on the licence.

36. Much play is made by the respondent of the fact that for upwards of 20 years District Judges have without objection from any quarter been granting *ad interim* transfers of licences in precisely the present situation where the applicant for the transfer is the franchisor and where the franchisee is named on the transfer application as its nominee, notwithstanding that the nominee is not the servant/agent of the franchisor. It is submitted that this is a practical method of dealing with a commercial reality that is of more recent origin than the case law to which the Court has been referred when franchise agreements did not exist. It is submitted that where there is nothing in the statutory code which prohibits a nominee from being a person or company that trades in the premises under a franchise agreement, the Court should not hold that it is prohibited simply on account of the fact that no master/servant relationship exists as such.

Section 1094 of the Taxes Consolidation Act, 1997
37. I have referred earlier to the fact that the respondent seeks support for these submissions from the provisions of s. 1094 of the Taxes Consolidation Act, 1997, and indeed from Manual issued by the Revenue Commissioners entitled Liquor (Excise) Licence Compliance Procedures Manual which was last reviewed by Revenue in May 2018.

38. Section 1094 of the 1997 Act repealed a previous provision, namely s. 242 (1) of the Finance Act, 1992 which had provided a definition for "beneficial holder of a licence" as follows:

> " … the person named on the licence or, where that person is a nominee, the person on whose behalf the nominee holds the licence".

39. Section 1094 (1) of the 1997 Act provides, as relevant:

> "(1) In this section … 'beneficial holder of a licence' means the person who conducts the activities under the licence and, in relation to a licence issued under the Auctioneers and House Agents Act, 1947, includes the authorised individual referred to in section 8 (4), or the nominated individual referred to in section 9 (1), of that Act.

40. The "licence" referred to in s. 1094(1) includes an intoxicating liquor licence, and the section then goes on to require the beneficial holder of such licences to obtain a tax clearance certificate from Revenue. By virtue of the definition of "beneficial holder of the licence" in this section it is the franchisee being the "person who conducts the activities under the licence" who is required to obtain a tax clearance certificate. However, reliance is placed by the respondent on what Revenue themselves have said in this regard at para. 2.2 of the Manual referred to, as follows:

> "2.2. Licence Holder and Premises:
>
> A license may be issued to a Sole Trader, Partnership or Corporate entity.
>
> The licence is an authority to a named person to carry on the trade in a certain specified premises. The licensed activity must be strictly confined to the place or mapped area mentioned in the Court Certificate attaching to that licence.
>
> The name on the licence must be the name of the person/entity that conducts the activities under the licence i.e. "the beneficial owner of the business". No person can carry on a licensed business for sale or supply intoxicating liquor other than the person whose name is on the licence, his/her employees or agents.
>
> The majority of franchise arrangements require the beneficial owner of the business (franchisee) to be the licence holder. However, there are exceptions for certain franchise arrangements, where the beneficial owner of the business (franchisee) is not required to be the holder of the licence.
>
> These franchise arrangements, pre-approved by the Revenue Solicitors Office and NELO [National Excise Licence Office] are dealt with in the following manner:
>
> • The franchisor is the licence holder, and
>
> • The Franchisee (beneficial owner of the business) is named as a nominee on the licence.
>
> In the circumstances both the franchisor and franchisee must hold a valid Tax Clearance Certificate."

41. The respondent has referred to the distinction between the repealed section – s. 242 of the 1992 Act – and s. 1094 of the 1997 Act, and submits that whereas the former section made it clear that the beneficial holder of the licence was not the nominee named on the licence, but rather the person on whose behalf the nominee was holding the licence (*i.e.* the owner of the business), the new

provision in s. 1094 of the 1997 Act makes clear that thereafter the beneficial holder of the licence is the person who actually conducts the business (i.e. the franchisee). It is submitted that this is an express recognition of the new type of commercial arrangement being entered into nowadays by parties to a franchise agreement, and an acknowledgement by Revenue that the arrangement whereby the franchisor and the franchisee as its nominee are each named on the licence is lawful and within the statutory scheme.

42. It is submitted that in such circumstances this Court should, as did the trial judge, consider this to be simply a new or more modern form of management structure in the licensing trade (as opposed to the traditional employee manager arrangement) and which should be seen as coming within the statutory code – there being no express provision to the contrary.

43. The respondent has referred also to the judgment of O'Flaherty J. in *Re Application of Oshawa Limited* [1992] 2 I.R. 425 who, at pp. 434-435, stated:

> "It is clear that the function of the 'licensing authority' is divided between the courts and the administration. The court investigates any objections, the suitability of the proposed licensee and the premises and must see that there is compliance with the law; once a certificate issues then it is for the Revenue Commissioners to grant the appropriate licence."

44. The respondent submits that the licensing function therefore must be seen as a shared function between the District Court and Revenue, the former being required to ensure that the statutory requirements are complied with before issuing the necessary certificate, and the latter being required to actually issue the licence to the applicant upon production of that certificate from the District Court. It is submitted that therefore the licensing legislation and the excise legislation, including s. 1094 of the 1997 Act should inform each other's interpretation, and accordingly that weight should be attached to the interpretation given by Revenue in its Manual to 'beneficial holder of the licence' (i.e. the franchisee).

Body corporate as Nominee

45. At para. 18 above I referred to the trial judge's conclusion that under the current state of the law "there is no strict need for a nominee but there is no prohibition on appointing a nominee; a natural person *or a company may be a nominee*. The respondent supports that conclusion, and in doing so refers to s. 28 of the 1960 Act which makes provision for the transfer of a licence held by a nominee on behalf of a body corporate "to such other person as the body corporate may nominate" [Emphasis provided]. Counsel has then referred the Court to Part 4 of the Interpretation Act, 2005 and to the definition of "Person" contained in s. 18 thereof which provides as relevant:

> "18. The following provisions apply to the construction of an enactment
>
> …
>
> Person. "Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly."

46. It is submitted therefore that insofar as s. 28 of the 1960 Act provides for the transfer of the licence from the existing nominee named on the licence to "such other person as may be nominated by the body corporate may nominate", such a nominee may be a body corporate, and that the trial judge was correct in this conclusion in this regard.

47. Although making these submissions, the respondent makes the point also that this particular objection by the notice party that a nominee cannot be a body corporate was not made to the District judge when these transfer applications came before him

Conclusions

Body corporate as nominee:

48. It is correct to say, as the respondent submits, that this particular matter was not raised in the District Court as an objection to the franchisee being named as nominee on the licence in addition to the franchisor. Nevertheless, this appeal relates to a Case Stated by the District Judge, and the question posed by him is whether a franchise agreement *"in the terms presented to me"* preclude the granting of the applications before him. In so far as the franchisee in each agreement is a body corporate, I think it is reasonable for the Court to have considered that question, since if the correct position in law is that a nominee may only be an individual and not a body corporate, then that alone would justify answering the District Judge's question in the affirmative, and it would perhaps be unnecessary to go further by addressing all the other issues that have arisen both in the High Court and on appeal to this Court.

49. There is no doubt that a licence may be held in the name of a body corporate. By now that proposition needs no further elaboration, or authority to be stated. Neither is it controversial that should it choose to do so, the body corporate licensee may choose to appoint a nominee to hold its licence on its behalf, and that in such a situation the licence remains the licence of the body corporate, albeit held in the name of the nominee, so designated on the licence. In such cases the licence would issue to A.B as nominee of C.D. Limited, or some such phraseology to indicate the name of the nominee and on whose behalf he/she was nominated to hold the licence.

50. The practice adopted by some companies of holding their licence through a nominee developed over time but without any statutory authority. Indeed, there has been judicial doubt expressed strongly over the years that it is unnecessary for a company to hold its licence through a nominee, and that doing so can give rise to unnecessary complication and consequences. For example, in his judgment in *The State (Hennessy and Chariot Inns Ltd) v. Commons* [1976] I.R. 238 Kenny J. in the Supreme Court stated at p. 251:

> "There is a myth – widely accepted by members of the District Court bench and by branches of the legal profession – that a company incorporated under the Companies Acts cannot be granted a licence to sell intoxicating drink and that, when it seeks to be licensed in respect of premises or when it acquires licensed premises, the licence must be granted to its nominee. The basis of this myth is a passage at p. 86 of O'Connor's Licensing Laws of Ireland which was published in 1904; but a Divisional Court of the King's Bench in Ireland decided two years after the date of publication that a company could be granted a licence: *R (Cottingham) v. Justices of County Cork*. An examination of the relevant sections in the Licensing Act convinces me that the court was right and that the passage in O'Connor was wrong."

51. Similarly, in his judgment in *McMahon v. Murtagh Properties Ltd* [1982] ILRM 342, Barrington J. stated:

> "… the present practice of companies holding their licences through nominees has no basis in sound logic. Second the practice has however received statutory recognition so that it is now too late to say that it is wrong. Third the practice, not being based on sound logic, will necessarily give rise to difficulties in administering the licensing code so that one can sympathise with the position in which the learned District Justice found himself.
>
> Nevertheless, I drew the following practical conclusions. First, a limited liability company is entitled itself to hold its licence without resorting to the device of having a nominee.
>
> Secondly, it is not incorrect to refer to the nominee as being the 'holder' of the licence as long as it is remembered that the company is the beneficial, and as previously indicated, the real holder of the licence. …".

52. Of some relevance to the question whether the nominee can itself be a body corporate are the further comments of Kenny J. in *The State (Hennessy and Chariot Inns Ltd) v. Commons* at p. 251 where he stated:

> "The illusion that a company cannot be licensed under the Licensing Acts springs from the belief that a company cannot have a character and hence is not a person. The word "person" may have been inappropriate in 1833 to include a joint-stock company without corporate personality, but it certainly includes the modern company with corporate personality. The latter can sue and be sued: it can be prosecuted in the District Court and can be indicted: injunctions may be granted against it and its property may be sequestered. For tax purposes it may be resident in a country and it, as distinct from its directors and shareholders, may have a reputation and so a character".

53. These comments have a relevance to whether a nominee holding a licence as nominee on behalf of a body corporate licence holder may itself be a body corporate. In my view there is nothing in the legislation, the case law or indeed logic, as to why the nominee may not be a body corporate. Leaving aside altogether for the moment the other question as to whether a nominee must be the servant or agent of the corporate licence holder as opposed to an independent body such as the franchisees under present consideration, I see no objection to a nominee nominated by a body corporate licence holder to hold the licence on its behalf to itself be a body corporate.

54. Section 28 of the 1960 Act allows a company to transfer the licence to "such other person as [it] may nominate". But counsel is correct to draw attention to the provisions of the Interpretation Act, 2005 which includes a body corporate within the definition of "person". It is perhaps worth noting also that the Interpretation Act, 1937 in force at the time that the 1960 Act was enacted contained the same definition of "person" except that the relevant section included the words "unless the contrary intention appears". However, s. 4 (1) of the 2005 Act provides:

> "(1) a provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made."

55. I do not perceive any contrary intention in the licensing Acts generally. So, quite apart from any case law or even logic, it seems to me to be clear that when enacting s. 28 of the 1960 Act the Oireachtas must be taken as having in mind the definition of "person" in the 1937 Act which includes a body corporate when providing that a body corporate may transfer the licence to "such other person as [it] may nominate. I would uphold the trial judge's conclusion in that regard.

Section 1094 of the Taxes Consolidation Act, 1997:

56. The trial judge does not make reference to the submissions made concerning this provision and upon which counsel for the respondent has placed considerable reliance. In fact, she has stated to this Court that were it not for this provision the arguments being advanced would face "a more uphill battle". Nevertheless, it was certainly referred to in written submissions provided to the trial judge, and in my view it is appropriate that this Court should consider this argument, and reach a conclusion in relation to it, even though it does not form part of the ratio of the trial judge.

57. While the respondent argues that this section changed the landscape by defining the "beneficial holder of the licence" as being the person who conducts the activities under the licence", and therefore for present purposes the franchisee, thereby confirming that the franchisee nominee is an appropriate person to be named on the licence in addition to the owner of the premises, I do not believe that the section assists the respondent's argument in the manner contended for.

58. Firstly, the section itself commences with the words "In this section …". The definition of "beneficial holder of a licence" is therefore confined to its use within s. 1094 which itself is confined to authorising the Collector General to issue a tax clearance certificate to a beneficial holder of a licence when application is made to him/her in that regard. This was clearly a way of dealing with the development of franchise arrangements such as those under consideration herein, so that both the owner of the premises and the person or entity actually carrying on the licensed activity at the licensed premises both needed to have a tax clearance certificate before the licence would issue. It provides no statutory basis for the proposition that the franchisee may be named as the nominee of the applicant for the licence, irrespective of whether that person, be it an individual or a body corporate, is not the servant or agent of the company applying for the licence, or for any proposition that Triode in the present cases may be issued with a licence to trade in the premises even though it does not itself do so. That would be extending its application farther than is permissible. In my view it does not alter the pre-existing position as established by the case law, namely that the nominee holds the licence in trust for and under the direction of the applicant for the licence where that application is granted.

59. I reach the same conclusion in relation to the submissions made by reference to other statutory provisions referred to by the respondent related to the National Concert Hall and National Convention Centre.

60. Having addressed those two issues, I now turn to the gravamen of the appeal which is whether or not the trial judge was correct to answer the District Judge's question in the negative.

61. The trial judge concluded, inter alia, that the franchise agreement created only a licence enabling the franchisee to use the premises, since (i) by certain clauses in the franchise agreement (*e.g.* the right of entry reserved to Triode) Triode had maintained its interest in the premises, (ii) neither party had exclusive possession given Triode's right to enter the premises at any time, and (iii) there is no rent reserved.

62. It is convenient to leave over to a later point in my judgment a consideration of these conclusions, as well as the consideration of whether actual and lawful possession of the premises entitles a party in such possession to apply for the licence, as opposed to possession on foot of a lease or tenancy.

Can a party who is not the servant/agent of the body corporate applying for the licence be named as its nominee?
63. I will first address the question whether a nominee (be it an individual or a limited company) who is not the servant or agent of the licence holder, such as a manager of the premises, may yet be named on the licence as the nominee. If the position is that by law the nominee named on the licence must be the servant or agent of the licence holder, and not somebody carrying on the business in the premises on their own account such as under a franchise agreement, then the District Judge's question must be answered, for the purposes of these cases at least, in the negative. I say "in these two cases at least" since the question posed is in relation to the particular franchise agreements presented to the District Judge. It goes without saying that there is no standard form of franchise agreement, and parties may agree terms as they choose in any particular case.

64. I have already set forth in some detail the conclusion reached on this question by the trial judge. Understandably he had no difficulty concluding that a company may hold the licence itself, or may choose to do so through a nominee. That is by now absolutely clear. He was also satisfied that such a nominee itself may be an individual or a company. For reasons I have already stated above I agree that this is so. However, I would disagree with what the trial judge stated at para. 11 of his judgment when he said in parentheses "(there is no reason why a nominee cannot be a company: that this is so is recognised by s. 28 of the Intoxicating Liquor Act 1960 which provides for a transfer of '[a] licence held by a nominee of a body corporate in respect of premises in which the lowest estate or tenancy is held by the body corporate'). It does not seem to me that what is stated in parentheses supports the conclusion that a nominee may be a company, as he has stated. It is not clear to me why his conclusion is said to follow from the portion of s. 28 referred to. However, as I have said, I agree with the overall conclusion that a nominee may be a company, but do so for the different reasons which I have stated above.

65. Having agreed with the trial judge that a company may be named as a nominee, albeit for different reasons, I respectfully disagree with the conclusion reached from his consideration of the judgment of Palles C.B *in R (Cottingham) v. Justices of County Cork* and the "six precepts" which he identified from that judgment as being of special relevance, as expressed at paras. 18 and 19 of his judgment (see paras. 24-26 above).

66. While the trial judge recognised that the manager referred to in *R. (Cottingham)* by Palles C.B was a servant or agent of the licence holder, whereas under a franchise arrangement the position is different, he went on to state that "when one has regard to the various observations made by Palles C.B. and referenced above, the difference of legal capacity does not have any 'real world' consequence under the licensing laws". I respectfully disagree. In my view the status of the nominee as the servant or agent and therefore under the control and command of the employer/licence holder is central to the judgment of Palles C.B. and to the legal position that a company may hold its licence through a nominee if it so chooses.

67. As has been made clear in cases such as *McMahon v. Murtagh Properties Limited* [1982] ILRM 342, and *DPP v. Roberts* [1987] I.R. 268 it is still the company that is what Barrington J. in *McMahon* described as the "real holder of the licence" even though it issues to the nominee. As I have already stated, s. 1094 of the 1997 Act does not alter this basic precept. In *DPP v. Roberts*, Finlay C.J. (with whom Walsh J. and McCarthy J. concurred; Griffin J. and Hederman J. dissenting) held that the nominee holding a licence for a company "does so entirely in trust for and under the command of the corporate body which owns the licensed premises". I should at this point perhaps repeat what I noted earlier, namely that in these cases there was just one applicant as such for the licence in the District Court, namely Triode, albeit that the franchisee's name as nominee followed that of Triode on the notice of application. Triode was described as the applicant and its registered office only was given as the applicant's address.

68. The reasoning of Palles C.B in *R (Cottingham)* has survived intact during the century or so since it was first articulated. The nominee may hold the licence for the company only where the nominee is under the command and control of company, being its servant or agent as those terms are understood. In my view that remains the position in law, and if it to be altered to permit some party other than a servant or agent to be named as nominee, as some form of convenient device to accommodate a different relationship such as that of franchisor/franchisee as prescribed in the agreements in these appeals where the party seeking to apply for the transfer of the licence will not be carrying on the business in the licensed premises, then some legislative intervention is required.

69. The trial judge in his reasoning has referred to the arrangements under these franchise agreements as being a management structure of a kind contemplated by Palles C.B in *R (Cottingham)*. I disagree respectfully. The franchise agreements do not create a structure whereby the franchisee is managing Triode's business. The agreements say quite the opposite, making it clear that the franchisee is trading on its own account, is responsible for all the debts of the business, is not the agent of Triode, and is not in any manner in partnership with Triode. Unless words are to mean nothing at all, it cannot be correct to conclude that these agreements constitute some form of management agreement whereby the franchisee can be deemed to be managing Triode's business, and thus equate that relationship with that of a servant or agent, and in that way seek to bring the situation within the licensing code, and in particular the recognised company/nominee concept.

70. The respondent argues that this is a method of dealing with the franchise relationship that works and has been accepted in the District Courts throughout Ireland for upwards of 20 years, and has the blessing of Revenue as evidenced by the up to date Manual referred to. But administrative convenience cannot determine what is the law of the land. I note with interest a comment in similar vein made by Palles C.B. in *R (Cottingham)*. In that regard at p. 418 he stated:

> "It has been stated to us by the Solicitor-General that the practice in Ireland of the Inland Revenue, since 1864, has been to grant these licences to the managers of incorporated companies, and not to the companies themselves; but that in England, where there is no statutable provision similar to sect. 8 of our Licensing Act, 1874, the licences are usually in the name of the companies themselves. I need not, however, state that the statutes of 1864 and 1874, on the construction of which the question depends, are quite too modern to allow the practice under them to be taken into consideration as *"contemporanea exposito"* in aiding their construction. Our judgment must be based upon the construction of those statutes, without regard to the practice."

71. To those words I would add that neither should the Court be deterred from doing what the law demands by considerations of inconvenience, administrative or otherwise, that the Court's conclusions may cause to either or both parties, or indeed a wider audience. Where practice and the law are not aligned, it is the law which must prevail.

72. A basic precept in licensing law reflected in both statute and the case law for many decades, and longer, is that a licence carries with it an authority to the person licensed to carry on the trade in intoxicating liquor, and that the certificate which issues from the District Court entitling that person to a licence, may not be given to a person other than the person who will carry on that trade. See for example s. 1 of the Intoxicating Liquor (General) Act, 1924, and also the judgment of Palles C.B. in *R (Cottingham)* in which at 419-420 he refers to *Williamson v. Norris* [1899] 1 Q.B. 7 where at p.13 Lord Russell of Killowen stated when referring to s. 3 of the Licensing Act, 1982:

> " … it becomes necessary to examine the provisions of s. 3, and on reading that section I think it is impossible not to see that, in order to bring the innocent act of a waiter or a barman within the penal clause, it is necessary to put a strong gloss on the words of the section. I am of opinion that the true meaning of the section is, that the sale which is prohibited must be assailed by the person who ought to be licensed. Everyone knows that a barman or a waiter is not a person licensed. The sale struck at is a sale by the master or the principal.

73. In the year that followed *R (Cottingham)* Ridley J. in *Peckover v. Defries* stated at p. 886:

> "It appears to me that the legislature intended that the sales of liquors are to take place through the licensed person, not necessarily by himself, but if not by himself then through somebody who is his agent or his servant. That is, in my opinion, the position of things which is contemplated by the section."

74. These statements are not controversial, even nowadays so many years later. More recent legislation within the licensing code, and the case law, continues to reflect same.

75. One must then consider where the provisions of these franchise agreements, and what it is sought to be achieved as far as the licences are concerned, fit into this legislative framework, if indeed they do.

76. When one considers the historical origin of the idea of a company holding a licence through a nominee (even though it has been found later to have been unnecessary) it is clear that it was considered desirable because of a view taken at the time that a company could have no character as such for the purpose of obtaining a certificate of good character, and possibly in relation to a potential prosecution for breach of the licensing code. Despite the lack of any real need to appoint a nominee, some companies continued to do so, and maybe still do, even outside the context of a franchise agreement. The practice has certainly not been outlawed by statute, just as it was never in fact provided for by statute (s. 28 of the 1960 Act apart).

77. But the purpose of Triode applying for its licence and at the same time naming the franchisee as its nominee is for a very different purpose. It is seeking to overcome the obstacle presented by the fact that Triode does not intend to, and indeed cannot, carry on the licensed trade at the premises. While it holds the lowest estate and tenancy in the premises (subject to what I may say later as to the nature of the franchise agreement), it does not and will not carry on the business at the premises. That is an insuperable difficulty given that, as already stated, that it has long been held that a licence is an authority to the holder to carry on the licensed trade at the specified premises, and therefore it is the person who is to carry on that trade who must apply for the licence.

78. That obstacle suggests that the appropriate applicant for the licence transfer in the light of the franchise agreement is the franchisee. But an obstacle facing such an application (and overlooking altogether whether Triode would wish the licence to be held by the franchisee in its own name and not as its nominee), arises from the very clear terms of the agreement itself, namely that the franchisee itself cannot satisfy the second requirement, namely that it must hold the lowest estate or tenancy in the premises licensed. On Triode's own case, the franchisee holds no estate or tenancy in the premises, and merely has a licence to use the premises for the purpose of carrying on the franchisee's own trade.

79. The marrying together of Triode and the franchise holder on the licence application by simply naming both (the latter as nominee) in order to satisfy those twin requirements by this artifice is not something which is within the licensing code. The party seeking to be licensed is Triode. The application is made in its name, as I have indicated. It must therefore be the holder of the lowest estate or tenancy in the premises and be the party which will itself be carrying on the licensed trade in the specified premises. The franchise agreements presented to the District Judge preclude the second requirement from being satisfied. Unless Triode is going to be carrying on the trade in the premises it is precluded from being the holder of the licence. No argument of administrative convenience can overcome this legal barrier.

80. For these reasons I would allow the appeal and answer the question posed by the District Judge in the affirmative.

81. I stated earlier that I would leave over two further questions until I had addressed the nominee issue, those being (i) whether the trial judge was correct to conclude that the franchise agreement constitutes only a bare licence allowing the franchisee to use the premises, and does not constitute a lease (or tenancy), and (ii) the further question whether or not actual lawful occupation, although falling short of possession on foot of a lease or tenancy, would be sufficient to entitle the franchisee to apply for a licence in its sole name, given that it is the entity that satisfies the first requirement that it carries on the trade from the premises.

82. However, the resolution of those questions is not necessary for the purpose of addressing the question posed by the District Judge, and is relevant only in the event that an application might be made in the future seeking to have the licence transferred to the franchisee in its sole name on the basis of the existing franchise agreement. This Court should not reach a conclusion on something that is hypothetical at this stage. In fact, the second question does not arise from the judgment of the trial judge. As for the first question, the trial judge found that the agreement created just a bare licence. I would not wish to reach a definite conclusion as to whether or not that conclusion is correct on the basis of the reasons that he gave. Certainly there could be arguments advanced that the management fee payable might be considered to constitute a rent, and that the right of Triode to enter upon the premises is no different to the right reserved to a landlord or lessor to enter upon the demised premises for the purpose of inspection, and does not dilute or otherwise deprive the lessee or tenant to exclusive possession. There could well be arguments capable of being advanced by the franchisee, under the principles stated by Lord Templeman in his judgment in *Street v. Mountford* [1985] UKHL 4, that the terms of the franchise agreement in fact, regardless of the label given to the occupation by the terms of the agreement, create more than a bare licence, amounting in reality to a tenancy in the premises for the purpose of satisfying the requirement that they hold the lowest estate or tenancy in the premises. In my view this Court should not advance any view as to the quality of such potential arguments. Any view should await any case in which it arises directly for decision, and after full legal arguments have been made.