

[1991–92 Gib LR 26]

**CEPSA (GIBRALTAR) LIMITED v. TRADE LICENSING  
AUTHORITY**

SUPREME COURT (Kneller, C.J.): March 22nd, 1991

*Trade and Industry—trading licence—refusal of licence—needs of community—Authority obliged under Trade and Licensing Ordinance to grant licence unless satisfied by objector or from own knowledge that s.16(1)(f) condition met—if so, irrelevant that applicant will benefit commercially from grant—incontrovertible reasons for refusal to be shown—no refusal of second licence merely because applicant has existing one*

*Trade and Industry—trading licence—refusal of licence—needs of community—onus on objectors to prove that s.16(1)(f) condition applies—no reversal of burden of proof merely by finding that no “evidence of need” for another licence in proposed trading area*

The appellant applied to the defendant Authority for a licence to trade in petroleum and petroleum products from Waterport House.

The appellant’s business was the supply of fuel to ships, transport contractors and retail dealers and it held an existing trading licence in respect of rented premises at Pitman’s Alley. Its administrative headquarters were already based at Waterport House and it proposed that an additional licence would allow it to accept orders for fuel there, though not to store or deliver any from the premises.

Three other Gibraltar oil companies objected to the grant of a licence, primarily on the ground that, for the purposes of s.16(1)(f) of the Trade Licensing Ordinance, the needs of the community either in Gibraltar or in the specific area in which the appellant proposed to trade were adequately provided for. The defendant Authority refused to grant a licence and the appellant appealed to the Stipendiary Magistrate under s.22(1) of the Ordinance.

Extensive evidence was adduced before the Magistrate, including a list of trading licences for petroleum products issued by the Authority and of storage licences issued by the relevant authorities, and the Authority stated that the number of licence-holders in the area of business proved that it was adequately provided for. The appellant stated that another licence would not only benefit it commercially by enabling it to increase its business, but would also benefit the community by promoting competition within the industry.

The Magistrate noted, *inter alia*, that only the unrestricted trading licences held by the appellant itself and one of the objectors (Shell) were worked in a substantial manner. He outlined the appellant's and Shell's operations in Gibraltar, and expressed the view that granting the appellant a second licence would not enhance competition. He found that there was no evidence that the existing licence hampered the appellant in carrying on its business, which in any event would be an improper ground on which to apply. He upheld the Authority's refusal, stating that he was not persuaded on the evidence that there was a need for another licence, and the Authority had therefore properly arrived at the conclusion that the needs of the community were adequately provided for by the existing licence-holders.

The appellant submitted that the Magistrate had erred in finding that the needs of the community were adequately provided for, since (a) he had misdirected himself on where the onus of proof lay; (b) he had misdirected himself on the matters to be taken into account under the Ordinance, such as *how* other issued licences were operated and whether their operation met the community's needs; (c) he had taken account of, or been influenced by, the fact that Cepsa already had one trading licence; (d) he had failed to take into account Cepsa's commercial need and convenience to have a second licence; and (e) Cepsa had a right to such a licence unless one of the grounds specified in s.16 of the Ordinance was established.

**Held**, dismissing the appeal:

(1) The Trade Licensing Authority could only refuse a licence if it were satisfied by an objector or from its own knowledge that one or more of the grounds set out in s.16 was made out, *e.g.* that the needs of the community were adequately provided for. Incontrovertible reasons had to be shown for the refusal. Accordingly, the Magistrate had a discretion to dismiss the appeal against the Authority's refusal if he were satisfied that those needs were met. Neither the Authority nor the Magistrate could refuse a licence on the basis that the applicant already had one licence (para. 19).

(2) The Authority and the Magistrate were aware of the number and locations of premises to which licences had been granted. There was no suggestion by either the objectors or the appellant that the needs of the community in the proposed Waterport trading area were not already adequately provided for. The fact that a second licence would benefit the appellant by allowing increased efficiency and expansion did not in itself justify the grant of such a licence if one of the s.16(1) grounds was satisfied. Similarly, there was no error of law in considering that competition would not increase as a result (paras. 21–22; para. 24; paras. 27–28).

(3) Accordingly, strong reasons and uncontroverted evidence underpinned the exercise of the discretion by the Authority and by the Magistrate against Cepsa. By stating simply that there was no need for

another licence, the Magistrate had not used the phrasing of s.16(1)(f), which would have been preferable, but he had not expressly or impliedly reversed the burden of proof by the wording he chose. He had considered all admissible evidence and had not disregarded irrelevant matters. The appeal would be dismissed (paras. 25–26; paras. 29–30).

**Cases cited:**

- (1) *Furniture Centre Ltd. v. Stipendiary Magistrate*, Supreme Ct., Civ. App. No. 27 of 1985, unreported, applied.
- (2) *Jupiter Electrical (Overseas) Ltd., In re*, Magistrates' Ct., October 22nd, 1974, unreported, applied.
- (3) *Seruya (Moses S.) Ltd. v. Stipendiary Magistrate*, Supreme Ct., Civ. App. No. 8 of 1985, unreported, applied.

**Legislation construed:**

Trade Licensing (Appeal) Regulations (1984 Edition), reg. 6: The relevant terms of this regulation are set out at para. 17.

reg. 9: The relevant terms of this regulation are set out at para. 17.

Trade Licensing Ordinance (1984 Edition), s.4: The relevant terms of this section are set out at para. 16.

s.12(1): The relevant terms of this sub-section are set out at para. 16.

s.15(1): The relevant terms of this sub-section are set out at para. 16.

s.16(1)(f): The relevant terms of this paragraph are set out at para. 16.

*J.J. Neish* for the appellant;

*J. Nuñez, Crown Counsel*, for the respondent;

*D.J.V. Dumas* for the objectors.

1 **KNELLER, C.J.:** Cepsa (Gibraltar) Ltd. applied for a general licence to trade in petroleum, petroleum products and their by-products at its main office at Waterport House. Its application was refused by the Trade Licensing Authority on November 23rd, 1989. It appealed unsuccessfully to the Stipendiary Magistrate. Undaunted, it now appeals to this court to reverse the learned Magistrate and the Authority, and to grant it the general licence.

2 Shell (Gibraltar) Ltd., Mobil Oil (Gibraltar) Ltd., J.L. Imossi & Co. Ltd., the agents for BP (Gibraltar) Ltd. (“the objectors”) opposed Cepsa’s application to the Authority, supported the Authority’s decision in the first appeal and, as might be expected, opposed Cepsa’s appeal before this court. The Authority was represented by Crown Counsel, Mr. Joseph Nuñez, in both appeals and he sought to maintain its decision to refuse Cepsa’s application.

3 Cepsa is part-owned by Cepsa (UK) Ltd. which, in turn, is owned by Cepsa S.A. of Spain. The objectors are licensed wholesalers or retailers of the same products in Gibraltar.

4 The Authority was established by the legislature with the assent of the Governor under s.26 of the Trade Licensing Ordinance, which became law on January 1st, 1979. The long title of this Ordinance reads thus: “AN ORDINANCE TO MAKE PROVISION FOR THE LICENSING OF TRADERS AND PERSONS CARRYING ON CERTAIN BUSINESSES.” The Authority consists of the Chairman and six other members appointed by the Governor, two of whom are appointed after consultation with the Gibraltar Chamber of Commerce, and two after consultation with the Gibraltar Trades Council (s.26(1)). It may, by rules or otherwise, regulate its own procedure (s.26(6)). It has to exercise a discretion. It may refuse to issue a first-time licence if it is satisfied “that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for,” according to s.16(1)(f).

5 The Authority, in its discretion, refused Cepsa’s application for the reason set out in s.16(1)(f). Cepsa’s first appeal was dismissed for the same reason on March 9th, 1989. The learned Stipendiary Magistrate considered Cepsa’s application afresh and recorded evidence from its Director, Mr. John Bassadone, and the Authority’s Chairman, Mr. Ronald Barabich, but not from the objectors. So, both the Authority and the Magistrate have held that “the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for.”

6 A brief background to all this is necessary. An earlier application was made by a company called Oxy Ltd., which was owned 25% by Cepsa Oxy Ltd., Gibrepair Ltd., Gibunco Ltd. and Cepsa (UK) Ltd., to which all the licensed retailers and wholesalers of the same products in Gibraltar objected. The matter was debated in the House of Assembly and there were allegations made about a Government Minister’s involvement in the matter through Cepsa Oxy Ltd. The Trade Unions and the Chamber of Commerce also objected because they believed Oxy Ltd.’s application was on behalf of Cepsa Oxy Ltd. and it was thought that it would fail, since the unions and the Chamber were represented on the Authority.

7 Cepsa Oxy Ltd. sold all its interests to Gibunco, and Cepsa Oxy Ltd. changed its name to Cepsa (Gibraltar) Ltd. and purchased a licence to import and sell these products wholesale from Mateos Ltd., conducting its business thereafter from offices in Pitman’s Alley which are sub-let to it. That licence expired at the end of 1989. Cepsa sells petrol and diesel oil wholesale to Shell (sometimes), Mobil, visiting ships and a transport contractor.

8 Cepsa wants a second licence to import and to deal wholesale in the same products for the same local market from its one-room main office at Waterport House. It would not and did not wish to supply those products from there. It would only order those products from its office in Waterport

House. Shell then, as now, had the right to import, set up its installations and sell its fuels at its prices to its satellite companies and its rivals. There were other importers of lube oils. Shell supplied 75% of the visiting ships with lube oil. Cepsa supplied the rest. Shell was the only supplier of fuel at the airport. Cepsa S.A. provides aviation fuel by pipe-line to various aerodromes in Spain.

9 Cepsa wanted competition so that its rates would cut Shell's prices and increase Cepsa's total sales to Mobil and to visiting ships. Cepsa had already increased the market volume of these products entering Gibraltar. Its supplier was not Shell but Cepsa (Spain) through the nearby refinery, which cut out any need for bulk storage. Its competitive rates would diminish the supplies from Ceuta.

10 Cepsa would renew its existing Pitman's Alley licence because its trade for ships' bunkers was better done from there. It would be convenient to have a second licence to trade from Waterport House in which Cepsa had its main office.

11 The Authority's members believed they knew what the interests of the community were. They recalled those of the ships visiting Gibraltar. They knew more or less who or what had licences to import and supply petroleum, diesel and their products. They had not forgotten that only Shell and Cepsa supplied bunkers. No complaints about that had reached them. They realised Cepsa was not asking for a licence to retail goods. They did not take into consideration the fact that Cepsa already had one licence covering its *importation* and supply from its place in Pitman's Alley. Nor were they concerned to defend a near monopoly or create competition. They are not of the view that the needs of the community are always best supplied by competitors. Price is not the sole criterion when they ponder whether they should grant or refuse a licence.

12 The hearing took two hours and then they deliberated for an hour. They decided that the objectors had shown that "the needs of the community either generally in Gibraltar or the area thereof where the trade or business is to be carried out are adequately provided for," and, in the exercise of their discretion, they rejected Cepsa's application. They had not made up their minds before they heard the case for each party.

13 The Chairman of the Authority produced to the Magistrate lists of licences for petroleum and petroleum products in use at the time. The Stipendiary had much the same evidence of fact before him as the Authority had. The Magistrate found, *inter alia*, the following facts:

“(e) There are several unrestricted licences similar to that sought by the appellant in existence. Only two licence-holders work these licences in a substantial manner: the two are Shell and [Cepsa].

(f) Shell is the major importer and wholesaler of petroleum and petroleum products. Shell supplies some 70–75% of bunkers for shipping, is the sole supplier of aviation fuel at the airport, the sole supplier to the generating station and supplies the bulk of petroleum products to Mobil Oil and BP. Shell is the only company which has storage facilities for fuels on land in Gibraltar. Shell also imports and supplies lubricating oil.

(g) [Cepsa] imports and supplies petroleum and petroleum products (bunkers) for shipping. It supplies Mobil Oil and to a transport contractor and sometimes supplies to Shell.

(h) There are several importers of lubricating oils apart from the before-mentioned entities.

(i) Fuel, automobile fuel, petrol and diesel comprise the important and substantial market in petroleum matters.”

14 The Magistrate reminded himself that he was to consider everything afresh. He rejected the submission that Cepsa’s connections with Spain had influenced the Authority emotionally and politically. He, too, had arrived at the conclusion that the needs of the community either generally in Gibraltar or in the area where the trade or business was to be carried on were adequately provided for by two suppliers, Shell and Cepsa. He found no evidence to support Cepsa’s claim that convenience and commercial benefit would clearly redound to the advantage of that community. Nor did he have any evidence that Cepsa suffered from contractual and commercial limitations as a consequence of having only one licence. He rejected both contentions. He did not take into account the fact that Cepsa already had the Pitman’s Alley licence. He rejected the notion that because Cepsa’s Pitman’s Alley licence had expired on December 31st, 1989, Cepsa was entitled to one for its Waterport House office later. The failure to renew the first one was an oversight and Cepsa was bent on renewing it.

15 Cepsa’s grounds of appeal were these (I paraphrase them): The Magistrate erred in law by—

1. holding that the needs of the community, either in Gibraltar generally or in the area where this trade or business is carried on, are adequately provided for;
2. misdirecting himself on what matters he could take into account in dealing with Cepsa’s application under the Ordinance;
3. taking into account, or being influenced by the fact, that Cepsa already had one licence for this trade;
4. not taking into account Cepsa’s commercial need and convenience to have a second licence;

5. overlooking Cepsa’s right to such a licence unless one of the grounds specified in s.16 of the Ordinance is established; and

6. misdirecting himself on where the onus of proof lay to establish that the needs of the community are adequately provided for.

16 So far as the Ordinance is concerned the relevant provisions for this case are:

Section 4(1):

“The licensing authority may issue licences to trade or to carry on business.”

Section 12(1):

“Where a notice of intention to apply for a licence has been published in accordance with the provisions of section 11(2), any person who wishes to object to the issue of such licence shall give notice of his objection within fourteen days thereafter in the prescribed form to the licensing authority, and to the person named as the applicant in such notice, of such intention.”

Section 15(1):

“The licensing authority shall, for the purpose of considering an application for a licence, have power—

. . .

- (c) to make such investigation as may be necessary in order to ascertain any of the matters which it is required to consider under section 16 . . .”

Section 16(1):

“. . . [T]he licensing authority may in its discretion refuse to issue a licence, if it is satisfied—

. . .

- (f) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for . . .”

17 The Trade Licensing (Appeal) Regulations include two that are relevant. Regulation 6 reads: “On hearing an appeal the magistrate shall consider the matter on its merits and shall have all the powers . . . the duties and obligations of the licensing authority under sections 15, 16 . . . of the Ordinance.” Regulation 9 reads: “On the hearing of an appeal both parties may adduce evidence in support of their case.”

18 Three decisions by the courts of Gibraltar were cited. The first was

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one of Mr. J.E. Alcantara (as he then was), the Stipendiary Magistrate, on October 22nd, 1974 in *In re Jupiter Electrical (Overseas) Ltd.* (2) under the Trade Licensing Ordinance 1972. The second was that of Alcantara, A.J. (as he had become), on September 23rd, 1985 in *Furniture Centre Ltd. v. Stipendiary Magistrate* (1), under the Trade Licensing Ordinance 1978. The third was that of Davis, C.J. on February 13th, 1986 in *Moses S. Seruya Ltd. v. Stipendiary Magistrate* (3). The parties did not rely on any English cases.

19 The principles stated in the Gibraltar authorities amount to these:

(a) There must be incontrovertible reasons before a licence can be refused (*In re Jupiter Electrical (Overseas) Ltd.* (2)).

(b) The Licensing Authority must issue licences to trade or to carry on businesses because it can only refuse a licence if it is satisfied by an objector to the application for a licence or on its (the Authority's) or his (the Magistrate's) own knowledge of one or more grounds set out in s.16, including "(f) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for" (*Furniture Centre Ltd. v. Stipendiary Magistrate* (1); and *Moses S. Seruya Ltd. v. Stipendiary Magistrate* (3)).

(c) A licence cannot be refused on the ground that the applicant already has a licence because that is not a ground set out in s.16 for refusing one (*Furniture Centre Ltd. v. Stipendiary Magistrate* (1)).

(d) The Magistrate has a discretion to dismiss the appeal against the Authority's refusal to issue a licence if (in the context of this case) he is satisfied that the needs of the community were adequately provided for as set out in s.16(1)(f).

20 It is clear to this court that in the re-hearing of the matter conducted by the Stipendiary Magistrate, the Chairman of the Authority, in his evidence, had adequately covered the points that the objectors wished to make and no adverse mark can be made against the objectors' case because they did not repeat them on oath.

21 The market for these products generally in Gibraltar is in providing bunkers for visiting ships in the harbour, the aircraft using the Airport, the electricity generating station and the petrol stations dotted around on the Rock. Shell did not have a monopoly of this market because Cepsa was in competition for some of it. Cepsa was not a new competitor. Shell still had the larger share of the market, it was true, but Cepsa had a licence to do what Shell does in and around the port, the fortress, the city and Bay of Gibraltar.

22 The Authority and the Magistrate were aware of the number of licences that had been granted to retailers and the location of the latter.

There was no suggestion by the objectors or by Cepsa's Mr. Bassadone that the needs of the community in Gibraltar in the area where Cepsa wished to trade or carry on its business at Waterport were not already adequately provided for.

23 Although a second licence could be transferred, without prior advertisement of an intention to do so, to, among others, Cepsa S.A., both the Authority and the Magistrate denied this was a factor or the decisive one in their deliberations or their decision, and this court can find nothing in the record to dispel its belief that that is true.

24 The undoubted fact that Cepsa would find a second licence of commercial benefit and convenience could not make it right for the Authority or the Magistrate to grant it if each was satisfied that the needs of the community generally in Gibraltar or in the area where Cepsa wished to trade or carry on its business under a second licence were already catered for adequately. It would, perhaps, be otherwise for a grocer with a licence for expensive exotic groceries in Town Range, who applied for a second licence for the sale of similar goods in another area, say, Scud Hill, where such goods were unobtainable.

25 Strong reasons and uncontroverted evidence were all there before the Authority and the Magistrate to underpin the exercise of their discretion against Cepsa.

26 Ideally, the Authority and the Magistrate should record their decision to refuse to issue a licence in phrases which echo the provisions of s.16, *e.g.*:

“In the exercise of the discretion vested in the Authority (or the court) the issue of a licence is refused because it is satisfied that the needs of the community generally in Gibraltar and in the area thereof where the trade or business is to be carried on are adequately provided for.”

The Magistrate wrote: “I am not persuaded on the evidence before me that there is a need for any other licence.” The result is the same. The Magistrate has not in terms said that it was for Cepsa to satisfy him that a second licence for it to trade or carry on its business in Gibraltar generally or at Waterport was necessary because the needs of the community in either location were not adequately provided for, but I do not accept that he directly or impliedly reversed the onus of proof by using the phrases he did.

27 Clearly, he took into account the fact that a second licence would not increase the competitors for this market. He accepted that Cepsa believed it could trade or carry on its business more efficiently and expand if it were handed a licence for Waterport. He went on, however, to point to the terms of s.16, and rightly so.

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28 The Authority and the Magistrate were mindful of the fact that their policy should be to see that the needs of the community in Gibraltar generally and in the area where the applicants were to trade or carry on business were adequately provided for. They said so more than once. There was evidence before them of where Cepsa's products could be retailed. They learnt where the diesel and petrol pumps were. The potential competition between Cepsa for Shell was noted.

29 The learned Magistrate considered all the relevant evidence that was admissible and did not consider any that was not so. I find that none of the grounds of appeal, taken singly or in combination with any others, persuades this court that the Magistrate's decision was wrong in law or on the merits. The appeal is dismissed. The costs of the appeal are to be paid by the appellant to the respondents.

*Appeal dismissed.*

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