

60D [2014] 1014

**IN THE MATTER**

of the Sale and Supply of Alcohol Act 2012

**AND**

**IN THE MATTER**

of an application by **Southern Sun Distillery 2012 Limited** for a Temporary Authority pursuant to s.136 of the Act in respect to premises situated at **317 Pages Road, CHRISTCHURCH**, Trading as '**Thirsty Liquor Pages Road**'.

**BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE:**

Chairman : Mr G B Buchanan  
Members: Mr A J Lawn  
Mr R J Wilson

HEARING at The Christchurch City Council Civic Building, 53 Hereford Street, Committee Room 2, CHRISTCHURCH on the 9<sup>th</sup> of April 2014.

**APPEARANCES**

Ms J Davidson; Christchurch City Council Licensing Inspector  
Constable J Joy for NZ Police  
Mr P Shaw On Behalf of the Medical Officer of Health

**APPLICANT**

Mr S Joseph  
Mr P Egden Appearing for the applicant

**Introduction**

- (1) This decision relates to an application for a Temporary Authority under section 136 of the Sale and Supply of Alcohol Act 2012 to operate an off-licence.
- (2) This application relates to the premises situated at Shop 6, 317 Pages Road, Christchurch. trading as "Thirsty Liquor Pages Road". The business at these premises was purchased by Thirsty Liquor Pages Road from Southern Sun Distillery Limited on the 3<sup>rd</sup> of December 2013.

### **Background**

- (3) The business known as “Swiggers South Brighton Ltd” operated an off-licence from the premises situated at 91 Estuary Road, Christchurch. Following the earthquakes in Canterbury in 2010 and 2011, the building at this address became so damaged that the operator of the off-licence had to vacate the building. They applied and were granted by the Alcohol Regulatory Authority, a Temporary Licence under section 228 of the Sale of Liquor Act 1989 to operate at Shop 6, 217 Pages Road.
- (4) “Swiggers” encountered some problems before opening their new store, which are unrelated to the matter before the Committee and subsequently sold the business to Southern Sun Distillery Limited. Mr Joseph applied for a Temporary Authority under section 47 of the Sale of Liquor Act 1989 to operate the business until such time as an application for an off-licence was determined. This Temporary Authority was granted by the Christchurch City Council District Licensing Agency. Mr Joseph subsequently applied for an off-licence for the premises at Pages Road.
- (5) When the original Temporary Authority was due to expire, Mr Joseph was required to reapply for another Temporary Authority as the off-licence had not yet been determined. This application was made under section 136 of the Sale and Supply of Alcohol Act 2012.
- (6) The Licensing Inspector objected to the issue of this Temporary Authority and submitted after obtaining advice from ALAR, that the Temporary Licence was not transferable to Mr Joseph and because of this no Temporary Authority could be issued. The original Temporary Authority was issued in error.

### **The Application**

- (7) Mr Joseph is the applicant for the licence. He is represented by Mr Egden.
- (8) Mr Joseph’s evidence was that on the 3<sup>rd</sup> of December 2013 he purchased the business from “Swiggers South Brighton Ltd, which, though not yet open, had intended to operate from 6, 317 Pages Road , Christchurch. He signed a lease with the landlord for these premises for a period of 4 years. He had intended to operate permanently from these premises.
- (9) On the 5<sup>th</sup> of December 2013, he applied to the DLA for a Temporary Authority under section 74 of the Sale of Liquor Act 1989. This was subsequently granted on the 17<sup>th</sup> of December 2013.
- (10) Mr Joseph has now applied for an Off-Licence for these premises, which has attracted a number of objections.

- (11) A second application for a Temporary Authority has now been made as the original temporary authority was due to expire on the 19th of March 2014. This application has been made under Section 136 of the Sale and Supply of Alcohol 2012 Act
- (12) Mr Joseph said that he did not know that the licence that "Swiggers" had was a Temporary Licence required them to reoccupy their original site in 91 Estuary Road. He accepted, when questioned by the Licensing Inspector that he thought that "Swiggers" could operate permanently from the Pages Road site. He said that while he did not obtain legal advice on the liquor matters, he did get advice which was largely confined to the business and the lease.
- (13) He made enquiries with the landlord of the property at 91 Estuary Road. The Landlord has agreed that he will re-establish this property at some time in the future and that a lease will be made available to Mr Joseph. Mr Joseph advised the Committee that the previous building has been demolished and not yet rebuilt and that there was no time frame available for this.
- (14) Evidence was given that Mr Joseph has also considered other premises in Estuary Road, which are available to him. He accepted that it would be difficult to obtain a substantive Off-Licence at Pages Road considering the large amount of opposition to his application.

### **Reporting Agencies**

#### **The Licensing Inspector**

- (15) The Inspector gave evidence outlining the circumstances that brought the matter before this Committee. Her evidence was that being unable to find any authoritative decisions to assist her, she sought advice from the Alcohol Licensing and Regulatory Authority.
- (16) That advice was from Mr Bird :

*" At temporary licence issued pursuant to s228 of the Sale of Liquor Act 1989 enables the holder to carry on business at other premises in the various circumstances specified in the aforesaid section until such time as the premises in respect of which the substantive licence was issued are fit for re-occupation. The base licence in respect of which the temporary licence issues continues in force of the original premises.*

*The temporary (s228) licence is not transferable to any other person, and a temporary authority can only be issued (in this instance, Estuary Road). In other words, the person currently occupying the Pages Road premises, unless they have a substantive licence of their own, have no right to sell liquor".*

- (17) To questions from Mr Egden the Inspector accepted that the advice from Mr Bird was given without the benefit of Mr Bird giving evidence to the Committee. Her view, as the Licensing Inspector was that she concurred with the assessment of the situation, and rejected that a

Temporary Authority could be issued for a Temporary Licence. She said that the Temporary Licence was in fact related to both Estuary Road and Pages Road and that Mr Josephs' application was in respect simply to Pages Road.

- (18) She said that Mr Joseph has tenure that was only for the Pages Road address. He did not have tenure for the Estuary Road premises. Her evidence was that a Temporary Licence cannot be sold. What was pertinent is that the Off-Licence applied to Estuary Road. When Mr Joseph purchased the business at Pages Road there was no licence available to purchase and so therefore no ability to issue a Temporary Authority to operate a licence.
- (19) In a submission to the Committee the Inspector said that the Committee must be satisfied with two elements;

That the applicant has the right, title, estate or interest in the premises or business in question ; and  
That there is a licence in force at that premises..

### **Police**

- (20) Constable Joy did not object to the suitability of the applicant. He said that the Police supported the submissions of the Licensing Inspector in respect to the application for a Temporary Authority.
- (21) To questions from the Committee, Constable Joy said that a licence could not be transferred with the sale of the business. That the operation of a business was through a Temporary Authority to operate the original licence.
- (22) To questions from Mr Egden, Constable Joy said that Mr Joseph did not have tenure over the Base licence and therefore he had no licence to sell alcohol.
- (23) When asked by the Commission, Constable Joy said that a Temporary Licence would "fall over" when the decision was made that they could not go back to Estuary Road.
- (24) The Constable also gave evidence that if "Swiggers" was still at Pages Road, but decided that they could not return there, they could apply for a off-licence for the new premises.

### **Canterbury Medical Officer of Health**

- (25) Mr Shaw, representing the Medical Officer of Health. They do not object to the suitability of the applicant.
- (26) In his submissions presented to the Committee, Mr Shaw supported the Licensing Inspector and said that there had not previously been licensed premises occupying the site at 317 Pages Road.
- (27) He expressed concern about the effects that an off-licence would have in this community. Particularly the aggressive nature of the "Thirsty Liquor" brand and its marketing of RTDs.

- (28) He supported his concern with two “screen shots” from the Thirsty Liquor internet site advertising cheap alcohol and seeking new franchise owners.

### **Decision**

- (29) All the evidence presented to the Committee was considered.
- (30) In considering the application for the Temporary Authority, the Committee had particular regard to the provisions of section 228 of the Sale of Liquor Act 1989 and section 74 and 136 of the Sale and Supply of Alcohol Act 2012.
- (31) There were no objections from the agencies regarding the suitability of the applicant. The Committee agreed that these were not issues of concern.
- (32) Mr Egden pointed out to the Committee that a number of objections had been received for the substantive Off-licence that the applicant had made in respect to these premises. The Committee did not consider the objectors in respect to the Temporary Authority. It felt that their concerns were best represented in any full hearing of that licence.
- (33) The issue for the Committee was whether the Temporary Authority could operate the Temporary Licence issued for 317 Pages Road.
- (34) We are grateful to the parties for the helpful submissions and acknowledge the difficult circumstances for business which arose following the Canterbury earthquakes of 2010 and 2011. We also acknowledge there are questions of law that arise in this application, which have not previously been determined.
- (35) The original Temporary Authority issued to Thirsty Liquor Pages Road, was granted under section 47 of the Sale of Liquor Act 1989, this was made before the new Sale and Supply of Alcohol Act 2012 came into effect.
- (36) The application before the Committee is under the new Act ( section 136).

### **136 Temporary authorities: on-licences and off-licences**

*(1) A licensing committee may, on the application of a person who appears to the committee to have any right, title, estate, or interest in any premises, or any business conducted in any premises, for which an on-licence or off-licence is in force, make an order authorising the applicant (or some suitable person nominated by the applicant) to carry on the sale and supply of alcohol for a period, not exceeding 3 months, stated in the order.*

*(2) The application must be made in the prescribed form and manner and be accompanied by the prescribed fee.*

*(3) The committee may hear and determine the application without notice, or direct that notice of the application and the time and place fixed for any hearing be served on any persons and in any manner the committee specifies.*

*(4) On making an order, the committee—*

- *(a) must impose any conditions that this Act requires an on-licence or off-licence (as the case requires) to be issued subject to; and*

- *(b) may impose any conditions that this Act enables an on-licence or off-licence (as the case requires) to be issued subject to; and*
- *(c) may impose any other reasonable conditions it thinks fit.*

*(5) The person authorised by the order has for the purposes of this Act the same duties, obligations, and liabilities as the holder of the on-licence or off-licence concerned.*

### Boomerang Inn Ltd LLA 851 (Aug 2009)

*[75] In granting the application an Agency must be satisfied that the person making such an application appears to have a right, title, estate, or interest in any premises for which an on-licence is in force.*

- (37) The section requires that the applicant must first have a “right, title, estate or interest in any premises” from which the applicant will be trading. Mr Joseph gave evidence that he has signed a four year agreement with the landlord of Shop 6, 317 Pages Road, Christchurch. This gives him the first part of the requirement to be considered for a Temporary Authority.

The Temporary Authority also requires that there is in place an existing On or Off Licence in respect to these afore mentioned premises. Specifically the act says:

*“for which an on-licence or off-licence is in force”.*

- (38) Mr Egden submitted that the Temporary Licence issued to “Swiggers”, allowed the operation of the Off-Licence at Pages Road. That licence was due to expire on 30 June 2014 and that was it is a suitable licence, able to be transferred to Mr Joseph.
- (39) We do not agree. In our view the Temporary Licence granted is for a specific purpose and directed at a specific licensee. Its purpose is, in the event of major damage to the premises it allows a licensee to continue his business while they get ‘back on their feet’ and find a way forward from their troubles. The options appear to be: return to the previous premises, closes altogether, or seek a new off-licence at new premises.
- (40) After their building was significantly damaged, Swiggers were rightfully granted the Temporary Licence to allow them to operate a bottle store at 317 Pages Road. This Temporary Licence however only allows them to operate at these premises until they can return to the original premises, in Estuary Road after repairs have been completed, or the expiry time of this licence. (30 June 2014). We do not believe that there was a substantive licence that could be sold to Mr Joseph.
- (41) We accept the conditions of this Temporary Licence remain the same of the original off-licence as originally issued to Swiggers. This is stated on the Temporary Licence. “The conditions of Off Licence number 060/OFF/4/2012 continue to apply”. However this is a statement of the manner in which they can operate their Special Licence. In this case as an Off-Licence. It is not an actual Off-licence as described in the Act.
- (42) Mr Joseph purchased the Bottle Store in Pages Road with the intention of operating permanently from this address. Indeed that was certainly his intention when he signed his lease to take over the business from Swiggers. He also gave evidence that the owner of the premises at 91 Estuary Road were unable to say when they were likely to rebuild and be available to lease. We do not think that

Mr Joseph could ever be said to have any intention to be able to comply with the conditions of the Temporary Licence.

- (43) In considering the application for the Temporary Authority we must first question whether a temporary authority can be issued when a temporary licence is in force. We must look at the Act and determine if it is expressly forbidden by the section or the wording of the section.
- (44) Sec 228 (SoLA) states that the Licensing authority (or in the case of a Temporary Licence) the DLA may authorise the licensee to sell liquor pursuant to the licence on or from any other premises or conveyance for such a period as the secretary may from time to time determine.
- (45) The wording is similar to both section 7 (on licences) and section 29 (off licences) where the licence authorises the holder of the licence (the licensee) to sell and supply liquor ....
- (46) In both cases it is the holder (or licensee) that is authorised to sell and supply liquor. The same applies to the granting of a Temporary Licence. The licensee is authorised and they are the holder of the licence. If there is an exclusion for suitable applicant to apply for a temporary authority when a licence is in force then the same applies for a normal on or off license as the wording is the same. The intent of the act is to allow the temporary running of a business, by way of an authority to do so, so that matters can be settled, businesses sold etc.
- (47) A temporary authority , section 136 SASA states that the DLC may make an order 'authorising' the applicant who meets the said criteria to carry the sale and supply of alcohol for a period not exceeding 3 months. The order authorises and therefore makes them as if they were the licensee for that period.
- (48) We therefore conclude that a temporary authority can authorise a suitable applicant to carry on the sale and supply of alcohol for a period not exceeding three months when a temporary licence is in force as long as the applicant meets the criteria of both temp licence and temporary authority.
- (49) If one can issue a temporary authority for a temporary licence then what is the criteria and conditions it must meet. For one to use the authority that a temporary licence gives the 'licensee' then one must have tenure for both the current premises (the premises that the temporary licence has allowed to be the temporary location of the base licence) AND (our emphasis) the premises for whatever reason has had to be vacated. When these two pre-conditions are met then a Temporary Authority can, in our opinion, be issued. Tenure is one of the foundational pre-conditions.
- (50) The applicant in this matter does not meet the second criteria as he does not hold tenure for both premises.
- (51) In *Flaxmere Café and Casino Ltd LLA Ph 401/2001* the authority stated at [18]
- "If an application for an on-licence is in respect of premises which are currently occupied, and if the applicant is unable to produce a lease or other proof of its tenure, then in our view the application cannot proceed."
- (52) Mr Egden invited us to be reasonable and grant the Temporary Authority.
- (53) All decisions of a DLC must first be legally tenable before they can be reasonable.
- (54) In the decision of the LLA *Clement v White Horse Inn PH LLA 1117/2006* the Authority stated at [32]

Regrettably, the application for renewal of the base on-licence must be refused. While we accept that there may have been cases in the past where an application for renewal may have been placed on hold to enable the incumbent to continue to trade, the fact is that we are seized of the matter. It has been called before us and we are bound to adjudicate according to law and not emotion.

**Conclusion**

(55) The Committee concludes therefore that the application for a temporary authority is refused for the reasons we have been tried to articulate.

A handwritten signature in blue ink, appearing to read 'G. Buchanan', is written in a cursive style.

Mr G Buchanan  
Chairman