

BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

IN THE MATTER of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an application for renewal of an On licence by Hospo Group Limited (*Applicant*) in respect of premises at 32 Allen Street, Christchurch (the *premises*) to be known as "Déjà Vu".

DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Chairperson: G B Buchanan

Members: R J Wilson and T J Surrey

HEARING: at Christchurch on 19 June 2017

PRESENT:

The Applicant:

Daniel Beker, legal counsel acting for Hospo Group Ltd
Kevin Johnson, Director, Hospo Group Ltd

Reporting Agencies:

Heather McKenzie, legal counsel for Licensing Inspector
Jennifer Davison, Christchurch District Licensing Inspector (in opposition)
Senior Constable Genevieve Craddock, NZ Police, (in opposition)
Paula Williams, for Medical Officer of Health (in opposition)

Introduction

[1] Before the Christchurch District Licensing Committee ("the Committee") is an application by Hospo Group Limited ("Hospo Group") for renewal of the on-licence in respect of premises situated at 32 Allen Street, Christchurch. The application was received by the Committee on 26 October 2015.

- [2] When the on-licence was originally issued, the trading name of the premises was “The Cotton Club”. The premises has recently been rebranded and is currently known as “Déjà Vu”.
- [3] The application for renewal has been opposed by the Alcohol Licensing Inspector, Christchurch Police and the Medical Officer of Health. The opposition relates to a number of matters including applicant suitability, the manner in which the premises has been operating and the issue of tenure.

Background

- [4] The application has a convoluted background. An on-licence was issued to Hospo Group on 7 November 2014. The licence was due to expire on 7 November 2015 and an application to renew the on-licence was filed.
- [5] However, on 23 December 2015, before the application was determined, Hospo Group sold the business to the S I Giles Family Trust (“the Giles Trust”).
- [6] The reporting agencies were subsequently advised that on the same day, the business was on-sold to Casino Bar (No 5) Limited. Two temporary authorities were issued to Casino Bar (No 5) Limited between January 2016 and July 2016.
- [7] The sale of the business from the Giles Trust to Casino Bar (No 5) Limited was subsequently cancelled. The application from Casino Bar (No 5) Limited for a further temporary authority was withdrawn as was the application for a substantive on-licence.
- [8] In July 2016, the ownership of the business reverted to the Giles Trust. Throughout this time, the on-licence issued to Hospo Group on 7 November 2014 had remained in place in respect of the premises at 32 Allen Street, Christchurch.
- [9] Hospo Group then entered into an operating agreement with the Giles Trust whereby the Giles Trust would continue to own the business and Hospo Group would operate the premises pursuant to the operating agreement.
- [10] The application from Hospo Group filed on 25 October 2015 must now be determined.

Procedure

[11] In a report dated 26 April 2017, the Council's Alcohol Licensing Inspector Ms Davison recommended that the Committee determine the matter of tenure prior to hearing the substantive application. Ms Davison's report referred to both physical tenure and business tenure.

[12] Section 203(9) of the Sale and Supply of Alcohol Act 2012 ("the Act") states as follows:

Subject to the provisions of this Act and of any regulations made under this Act, the authority or committee may regulate its procedure in such manner as it thinks fit".

[13] The Committee considered that the request from the Inspector had merit. It was decided to convene a hearing on the issue of tenure.

[14] On 11 May 2017, a Notice of Hearing was issued in respect of the matter. The Notice of Hearing stated as follows:

"Please note that the hearing will be concerned with the issue of tenure only. At the conclusion of the hearing the Committee's decision will be reserved and if tenure is found to have been established a new date will be set to hear and determine the application for renewal of the licence".

The applicant - Hospo Group Limited

[15] Hospo Group Limited is a company incorporated under the Companies Act 1993. It was registered with the Companies Office on 9 September 2013.

[16] There have been various changes to the directorship and shareholding of the company since the licence was originally issued. Not all of these changes have been notified in accordance with section 69 of the Act.

[17] At the date of the hearing on 19 June 2017, the sole director of the company was Kevin Johnson. The shareholders are Kevin Johnson (600 shares) and GCA Trustees Limited (400 shares).

The evidence

Applicant's evidence

[18] The applicant called evidence from Kevin Johnson, the sole director of Hospo Group.

[19] Mr Johnson stated that in his view Hospo Group is entitled to occupy the premises.

[20] As noted above, Hospo Group currently operates pursuant to an Operating Agreement between Hospo Group and the Giles Trust.

[21] Clause 2.3 of the Agreement states:

"After retaining a reasonable sum to meet operational requirements (as agreed between the parties) HGL will upon demand pay any surplus revenue received from operating the business to the Trust".

[22] The Trust referred to here is the Giles Trust. Hospo Group began operating the premises pursuant to the Operating Agreement in July 2016. However, the Operating Agreement was not signed until 5 September 2016.

[23] Mr Johnson stated in his evidence to the Committee that all income received from the sale of alcohol is paid to Hospo Group. He stated that after all expenses are paid, including staff costs and an \$800.00 management fee that he receives, Hospo Group makes payments to the Giles Trust if there are surplus funds.

[24] Mr Johnson's evidence was that the requirement for payments to be made to the Giles Trust is discretionary. He likened the payment arrangement to one that may be in place with a bank or other private lender. He stated that if there are no surplus funds once all overheads and the management fee are paid, then the Giles Trust does not receive any revenue.

[25] He stated under cross-examination that he answered to nobody and he made all the decisions concerning the business. Mr Johnson's evidence was that he operates the premises on a day-to-day basis and he controls the licensee company.

[26] James Samson was referred to on several occasions in the course of evidence and cross-examination. Mr Samson is involved in the day to day

management and marketing of another licensed premises known as “Calendar Girls”. It is an adult entertainment venue.

- [27] When questioned as to the involvement of James Samson in the operation of “Déjà Vu”, Mr Johnson’s evidence was that Mr Samson is involved in a marketing and promotional role only. He stated that Mr Samson is not an employee of Hospo Group.

Alcohol Licensing Inspector’s Evidence

- [28] Ms McKenzie appeared for the Council Inspector, Ms Davison. Several witnesses were called.

- [29] Ms Wendy Alfeld gave evidence relating to her enquiries into buying the Cotton Club business. Ms Alfeld had signed a Sale and Purchase Agreement for the business however, the sale did not proceed. Under cross-examination from Mr Beker, Ms Alfeld admitted that there is a dispute as to the \$20,000.00 deposit which she paid for the business. She stated that she was at the hearing in order to get her \$20,000.00 back.

- [30] The Committee places little weight on Ms Alfeld’s evidence given that by her own admission she was not objective about the matter and her willingness to give evidence was motivated by self-interest.

- [31] Five members of the Christchurch Police Team Policing Unit gave evidence.

- [32] The Christchurch Team Policing Unit is headed by Senior Sergeant Gordon Spite. Senior Sergeant Gordon Spite, Constable Jared Stevens, Constable Steele, Constable Scott Morris and Constable Stephen Tudehope all gave evidence regarding their inspections of the premises at 32 Allan Street.

- [33] The police officers outlined their experience when inspecting the premises and discussions with various people including Kevin Johnson, James Samson and various duty managers. The overall thrust of the police evidence was that there seemed to be a number of people involved in the day to day running of the premises.

- [34] It was difficult for police staff to ascertain exactly who owned the business and several of those involved gave the impression that they had the effective control of the business. James Samson had told Constable Stevens that if the rebranding of the business as “Deja Vu” was not successful then he would be turning the premises into a strip club.

- [35] Ms Davison gave detailed evidence in respect of the application and her dealings with Hospo Group and Kevin Johnson. She expressed her concern that the applicant did not have tenure over the business. She also outlined the communication with the company over the last 18 months.
- [36] Ms Davison's key concern was the Operating Agreement. In response to questions from the Committee, she confirmed that she did not have an issue with operating and management agreements per se however she had an issue with the Operating Agreement between Hospo Group and the Giles Trust.
- [37] Ms Davison appeared to accept that the documents provided in the lead up to the hearing and in the course of the hearing confirmed that Hospo Group had physical tenure of the premises. However, in Ms Davison's view Hospo Group did not control the business and was in practical terms a front person for individuals and companies who may not be granted an alcohol licence by the Committee.

Submissions

Applicant's Submissions

- [38] Mr Beker submitted that the applicant must demonstrate to the Committee that it has the right to occupy the premises. The applicant submitted that when the Giles Trust purchased the business from Hospo Group the lease was assigned to the Giles Trust. The landlord subsequently agreed to a further assignment of the lease to Casino Bar (No 5) Limited. The assignment to Casino Bar (No 5) Limited was never completed as the sale agreement was cancelled.
- [39] Hospo Group began operating the premises under the Operating Agreement. A deed of sublease has now been entered into between the Giles Trust and Hospo Group. Mr Beker submitted that the applicant's right to use the premises was clear.
- [40] It was submitted that the issues relating to "lifting the corporate veil" and "identifying the guiding hand" behind the business are matters to be considered under section 105(1)(b) of the Act. Mr Beker submitted that Hospo Group has full control over the operation of the licensed premises and while the Operating Agreement is in place it is Mr Johnson who holds the reins.

[41] Mr Beker on behalf of applicant, submitted that the applicant must only establish that it has the right to occupy the premises.

[42] The evidence was that while there was an operating agreement between Hospo Group and the Giles Trust, the revenue is received by Hospo Group.

Alcohol Licensing Inspector's Submissions

[43] Ms McKenzie submitted that as well as establishing it has physical tenure of the premises, the Licensee must establish tenure over the business. It was submitted that the Licensee must be the person in control of the day to day operation of the business.

[44] Ms McKenzie submitted that assessment of tenure of the business includes consideration of:

[a] Who benefits from the sale and supply of alcohol by taking the profits; and

[b] Who in practice is the guiding hand, controlling and making day to day decisions relating to the operation of the business.

[45] The key submission was that Kevin Johnson does not control the operation of the licensed business due to the arrangements in place with both the Giles Trust and James Samson. As a result, Hospo Group has no tenure of the business and the on-licence.

Police and Public Health

[46] Christchurch Police and Canterbury Public Health both support the submissions of the Licensing Inspector.

Tenure under the Sale and Supply of Alcohol Act 2012

Physical tenure

[47] Any applicant for a licence must establish tenure before a licence can be issued. The concept of tenure has traditionally related to physical control of the premises.

[48] Section 100 of the Act governs the form of an application for a licence. Form 3 of the Sale and Supply of Alcohol Regulations 2013 ("the Regulations") must be completed by an entity applying for a new licence or to renew an existing licence.

[49] Form 3 of the Regulations requires an application to provide the following information:

- details of premises
- address
- any name, trading name or name of building
- if not owned by applicant – state whether (a) to be held as leasehold or under tenancy agreement or license or (b) full name and address of owner
- whether licence conditional on completion of building works.

[50] In the current case the applicant had identified the landlord as Kahikatea Country Retreat Limited. It was noted that the form of tenure was a lease for six years with a right of renewal of two times three years.

[51] The property at 32 Allen Street is owned by a private company, called Kahikatea Country Retreat Limited.

[52] On 25 November 2016 Ms Davison sent an email to Kevin Johnson requesting information as follows:

- [a] A copy of the Sale and Purchase of a Business Agreement when Hospo Group sold the premises to the Stacey Giles Family Trust;
- [b] All lease documents relating to 32 Allan Street;
- [c] A copy of the Sale and Purchase of Business Agreement between Stacey Giles Family Trust and Hospo Group or confirmation that the company intended to continue operating under the Operating Agreement; and
- [d] A copy of the Operating Agreement.

[53] When Hospo Group sold the business to the Giles Trust, the lease was assigned to the Giles Trust. A Deed of Sublease between Hospo Group and the Giles Trust was supplied to the Council on 9 June 2017.

[54] While not pertinent to our decision it is disappointing that it took some time for the documents requested by Ms Davison to be supplied. These documents would have clarified the position with respect to the physical tenure of the licensed premises. It was not until after the notice of hearing was issued that the documents were supplied.

Business Tenure

- [55] It is accepted that the entity that holds a licence must be the entity that receives the revenue from the sale of alcohol. The licensee must sell and supply the alcohol. That is a fundamental premise of the Act. However, the term “business tenure” is not specifically referred to in the Act.
- [56] Ms McKenzie submitted that Hospo Group does not have tenure over the business and that it was open to the Committee to make a ruling on this issue as the question of who controls a licensed premises is integral to the operation of the Act.

Case Law

- [57] Ms Kenzie referred the Committee to the decision of the previous Licensing Authority in *Re Murray*¹. In this case, the Authority took issue with the fact the questions relating to tenure were not answered. The submission was that the fact that an applicant is required to answer such questions about tenure supports the Authority’s view that tenure of the premises is a fundamental factor when considering applications for licences.
- [58] The Committee does not dispute the fact that tenure of the premises must be established. However, the Murray decision refers to physical tenure.
- [59] The issue of tenure was considered in the case of *Flaxmere Café & Casino Ltd.*² In that case, the applicant had stated in its application that it would lease the premises. The owner of the proposed licensed premises had signed a letter stating that there was no objection to the issue of an on-licence. However, no written lease was provided.
- [60] Another business sought to extend its operations into the proposed licensed premises, and the applicant intended to lease another site within the complex. However, there was no resource consent authorising the sale of liquor at the alternative site.
- [61] The Authority subsequently requested confirmation that the applicant had tenure over the proposed licensed premises. It came to light that there was never a formal lease in place. The Authority concluded that there must be tenure established in the form of a lease or other proof otherwise an

¹ Re Murray LLA 976-94 13 July 1994.

² PH 4401/2001 11 July 2011

application cannot proceed or succeed. As the tenure of the premises could not be established the Authority held that the application was “fundamentally flawed”.

[62] In an application by *Dave Stewart Maxwell-McGinn*³ the Authority stated:

"Form 2 in the Sale of Liquor Regulations 1990 being the form of application for an on-licence, requires an applicant to indicate whether or not he or she owns the proposed licensed premises and if that question is answered in the negative there are further questions, including:- "What form of tenure of the premises will the applicant have (including term of tenure)?"

The fact that an applicant is required to answer such a question tends to support the Authority's view that tenure of premises is a fundamental factor when we consider applications for licences".

[63] The cases referred to above all relate to physical tenure of licensed premises.

[64] We are unaware of any case law dealing with the concept of “business tenure” in the context of the Act.

Conclusion and decision

[65] The notice of hearing gave the parties an opportunity to be heard on the issue of tenure. When the notice of hearing was issued there was no information before the Committee to confirm that Hospo Group had physical tenure of the premises.

[66] Having heard the evidence and received additional documents, the Committee has reached the conclusion that on the balance of probabilities, Hospo Group has established that it does have physical tenure of the premises.

[67] We have concluded that the requirement to establish tenure relates solely to the physical tenure over a premises.

[68] Based on the evidence that was received by the Committee, the nature of the Operating Agreement is certainly an unusual arrangement, but it would

³ Dave Stewart Maxwell-McGinn LLA 976-977/94

be going too far to state that the arrangement was outside the boundaries of the law.

- [69] The concept of business tenure is not specifically referred to in the Act. If Parliament had intended to include the concept of “business tenure” in the criteria for an application for an alcohol licence, this would have been provided for in the legislation.
- [70] The Sale and Supply of Alcohol Act 2012 was introduced following a detailed review of the licensing laws by the Law Commission in 2010. The Law Commission produced an extensive report to the government after a comprehensive report.
- [71] The Government had the opportunity to change both the law and the prescribed forms and regulations when the law was reviewed. The Law Commission review did not result in this concept of “business tenure” being added to the legislation.
- [72] The evidence presented to the Committee raised issues as to who is controlling the company. It is not common for the entity holding the licence to not own the businesses. In the majority of cases, the entity that owns the business holds the licence.
- [73] The Committee is well aware of the concerns of the agencies regarding the day to day control of Hospo Group and the licensed premises.
- [74] The evidence called by the Licensing Inspector has raised questions which require further consideration by the Committee.
- [75] However, these are matters which fall squarely within the realm of suitability and should be considered at a later hearing in accordance with an assessment of the criteria in section 105(1)(b) of the Act.
- [76] All concerns relating to lifting the corporate veil and identifying the guiding hand of a licensee must be assessed when considering the issue of suitability. There is a plethora of case law that considers this issue. These include the decisions of the Authority *Ferguson v McCullough*⁴, *Miklos v Le Box Auckland Limited*⁵ and *Re KR Entertainment Limited*⁶.

⁴ *Ferguson v McCullough* LLA PH 995/07 19TH September 2007

⁵ *Miklos v Le Box Auckland Limited* [2017] NZARLA 89

⁶ *Re Kr Entertainment Limited* [2014] NZARLA 167

[77] It is a matter that the authorities take seriously as well they should. The suitability of a licensee is integral to achieving the object of the Act.

[78] It is unfortunate that the information sought by the Inspector in November 2016 was not supplied by Hospo Group until the eleventh hour. If the information had been provided earlier, the Committee could have considered the substantive application at the hearing on 19 June 2017.

[79] However, the information was eventually provided. On the face of it, Hospo Group has established that it has tenure of the premises and it can continue trading.

[80] A further hearing will be convened to consider the substantive application for the renewal of the on-licence.

DATED THIS 4TH DAY OF SEPTEMBER 2017

A handwritten signature in black ink, appearing to read 'S. Budge', is written over a faint, circular official stamp.

Chairperson
Christchurch District Licensing Committee