

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by **NZ LNQ LIMITED** for an on-licence pursuant to s.9 of the Act in respect of premises situated at 21 Broadway Avenue, Palmerston North, known as "Gengy's"

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole

Member: Mr D E Major

HEARING at PALMERSTON NORTH on 2 April 2014

APPEARANCES

Mr N S P Laing – for the applicant

Sergeant J Veale – NZ Police – in opposition

Mrs L D Kroll – Palmerston North District Licensing Inspector – in opposition

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] This decision relates to an application dated 7 June 2013 in respect of premises at 21 Broadway Avenue, Palmerston North, known as "Gengy's". It is intended that the business will trade as a restaurant with hours sought for the sale of liquor as follows:

Sunday to Thursday 5.30 pm to 11.00 pm

Friday and Saturday 5.00 pm to 11.00 pm

[2] The premises have not previously been licensed.

[3] The Medical Officer of Health did not oppose the application. However, the Police did oppose the application on two grounds:-

[a] That the then sole director of the company, Kun Woong Lee had two drink-driving convictions in 2007 and 2011; and

[b] Between 5 and 8 November 2013 the applicant sold liquor at the premises without having a liquor licence.

Procedural Difficulties

[4] At the hearing a number of problems emerged in respect of the application. These included:-

[a] The application appeared to have been dated 7 June 2013. It transpired that the American system of dating documents had been employed by the

franchisor and, in fact, the date of the application was 6 July 2013. In any event the application was received by the Palmerston North City Council on 12 July 2013.

- [b] The application was not complete. It failed to comply with s.9(1)(e) of the Sale of Liquor Act 1989 as at the time of filing there was no certificate by the Local Authority that the proposed use of the premises met the requirements of the Building Code. Technically, therefore, it was not an application. Nevertheless, this situation frequently arises and the Authority considers that it was correct to treat the application as a valid application, merely noting that before any licence could issue an appropriate Building Certificate would be required. The Authority appreciates that s.9(1)(e) is impractical as frequently an applicant is not prepared to complete a building until it knows whether or not a licence will be granted. Plainly the situation qualifies for a waiver in terms of s.111 of the Act.
- [c] The Police failed to file a report in opposition to the application within 15 working days after receiving the application: contrary to s.11(3) of the Act. In these circumstances, as no report had been received within 20 working days it could have been assumed that the Police had no matters in opposition to the application. In fact, the Police did; and endeavoured to pursue their opposition. Given the problem associated with the application and as to whether or not, technically, it was a valid application, it is questionable whether the failure by the Police to file their opposition in time prevented them from pursuing their opposition.
- [d] Aware that the Police opposed the application, contrary to s.12(2) of the Act, the complete file was not forwarded to this Authority expeditiously. This was because both the Police and the Inspector were endeavouring to resolve matters with the applicant. Whilst the Authority appreciates that both reporting agencies were endeavouring to help the applicant, that is not a reason not to comply with s.12(2) of the Act. The failure to comply strictly with s.12(2) of the Act ultimately created some delay in the application being heard by the Authority.
- [e] At a meeting with Mr Lee representing the applicant, the Police indicated that they intended to oppose the application upon the grounds that Mr Lee had two previous drink-driving convictions. Mr Lee understood this to mean that so long as he was a director of the applicant the application would not succeed. The decision in *G L Osborne* NZLLA 2388/95 and subsequent authorities indicate that an applicant for a General Manager's Certificate is unlikely to be granted such a certificate until at least two years have elapsed conviction-free after a drink-drive conviction. Where there are two drink-drive convictions, the period is usually extended to five years. In their discussions with Mr Lee, the Police erroneously thought that the principle established by *G L Osborne* and other cases applied to a licensee. Whilst previous convictions are relevant to the suitability of a licensee, they are merely one of the factors that are taken into account when determining the suitability of a licensee. This is because the duties inherent in a General Manager are quite different from the responsibilities of a licensee. As a result of this erroneous advice Mr Lee resigned as the sole director of the company and transferred his shares in it to his partner. The new director does not speak English and it was clear from the evidence that Mr Lee

remained in charge of the operation: not the new director or the new shareholder. This meant that the Authority was being asked to approve an application where the person in charge of the proposed business was not an officer of the applicant and accordingly had no responsibility, either for the application or, if the application were granted, for the operation of the premises. On this ground alone, the applicant was unsuitable.

- [f] Whilst the reporting agencies contributed significantly to the problems associated with the application, the Authority recognises that it was Mr Lee who was responsible for it (notwithstanding that the application was filed by the franchisor). Mr Lee's lack of knowledge as to business affairs and as to licensing requirements contributed significantly to the problems associated with the application. Nevertheless, the Authority appreciates that Mr Lee has the capacity and ability to be in charge of licensed premises provided he undertakes appropriate education and training. It also recognises that the unlawful sales of alcohol occurred as a result of incorrect advice given to Mr Lee. Finally, the Authority appreciates that the proposed premises would be low risk.

[5] Once all the foregoing matters were appreciated, the applicant, the Inspector and the Police all agreed with the Authority that the matter should be dealt with in the following manner. Accordingly the Authority orders:-

The application is adjourned to 31 July 2014. On that date the application will be granted on the papers provided that both the Inspector and the Police are satisfied that:-

- [a] The applicant company has been restructured so that Mr Lee is one of the directors and that the directors are able to carry out the duties and responsibilities that go with the position of a company director. This may involve Mr Lee taking a controlling interest in the company.
- [b] The directors have completed to the satisfaction of the Inspector:
- (i) A course of instruction as to the duties and responsibilities of a company director; and
 - (ii) A course of instruction as to the duties and responsibilities of a licensee.

If either the Police or Inspector notifies the Authority prior to 31 July 2014 that the applicant has failed to carry out any of the foregoing matters or that there is some new impediment to the granting of the licence, then a further public hearing will be held.

DATED at WELLINGTON this 15th day of April 2014