

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: MILLNER SUPERMARKET

LICENSEE: Katherine Poppy Prior

LICENCE NUMBER: 80901707

PROCEEDING: Cancellation hearing
Application for revocation of suspension
Application for approval of transfer

HEARD BEFORE: Mr Mr John Withnall (presiding)
Ms Jill Huck
Mr Paul Costigan

DATE OF HEARING: 02 October 2003

DATE OF DECISION: 02 October 2003

APPEARANCES: Mr Robert Perry, for Director of Licensing
Mr Lex Silvester, for proposed transferee

1. In this matter the hearing panel has been selected by the Chairperson under s.51(2A)(b) of the *Liquor Act* to hear an application by the Director of Licensing for the cancellation of the liquor licence of the Millner Supermarket. The Chairperson has also confirmed that in the event that the panel should determine not to cancel the licence, the panel members have also been selected pursuant to s. 15(2) of the *Northern Territory Licensing Act* to constitute the Commission in dealing with all other currently outstanding issues in relation to this licence.
2. The licence had been indefinitely suspended on 20 June 2003 pursuant to s.66(1)(c) of the *Liquor Act* ("the *Act*"), upon a report from the Director of Licensing that the supermarket was apparently no longer trading. By letter dated 23 June 2003 the Director advised the licensee that should the premises not be used for the sale or supply of liquor for 90 days the Director would apply to the Commission for the cancellation of the licence under s.72(5)(a) of the *Act*. It is relevant to what follows to note that s.72(5)(a) empowers the Commission's

cancellation of a licence on those grounds, not the Director's application for that power to be exercised. The Director's power to apply on his own initiative for cancellation on those grounds is contained in s.69.

3. By letter dated 4 July 2003 solicitors for Rockbeat Pty Ltd, a company of which Mr Jimmy Lay is Managing Director, advised the Director's office that the company was proposing to bid for the purchase of Lot 9240 Nightcliff (within which the licensed premises are situate) and if successful to redevelop the site into an upmarket shopping centre at considerable expense. As part of the redevelopment the licensed premises would be "expanded to suit a National Supermarket chain operator". The letter sought an indication of the Commission's attitude to Rockbeat taking a transfer of the liquor licence and having it remain in suspension for two years pending completion of the development.
4. In line with other Commission decisions in recent years, the Chairperson indicated that the Commission would not accede to that proposal. In notifying this refusal to Rockbeat's solicitors the Senior Licensing Inspector Mr Perry wrote that the Chairman had directed the Director of Licensing to seek cancellation of the licence after 90 days from the date on which the licence was suspended, pursuant to section 72(5) of the *Liquor Act*. It is relevant to what follows to note that at this point no application for transfer had actually been made. The solicitors' letter had sought "an indication of the Commission's attitude".
5. By letter dated 29 August 2003 to the Director's office the same solicitors advised that Rockbeat had become the owner of the property on 21st August 2003, and intended to re-open "the Supermarket previously conducted on the property". The letter advised that an application for transfer should have been lodged at the office of the Director by the time the letter had been received, and concluded as follows:

"The purpose of this letter is to request an extension of the suspension of the existing licence for a period of six weeks so that the licence is not cancelled before our clients application is processed and considered."
6. By letter dated 02 September 2003 Licensing Inspector Christine Cakebread notified the solicitors that the Chairman of the Commission had not approved the request for an extension of the suspension. The letter went on to note that "this does not prevent your client from lodging an application to transfer the licence".
7. By email dated 19/09/2003 to the Director of Licensing (and to the members of the Commission), the Chairman advised that he had been requested to approve the transfer of the Milner Supermarket licence, and that "my decision is that the Director should seek the cancellation of the licence".

8. Mr Silvester of Counsel appeared at the subsequent cancellation hearing representing the proposed transferee of the licence, who we agreed had standing in the hearing as a person acknowledged by the Commission (by way of a Notice of Hearing) to have an interest in resisting the licence's cancellation.
9. At the outset Mr Silvester submitted that there was no application by the Director before the Commission. That proposition was argued on several grounds:
 - The Director had not actually made any application to cancel the licence. The closest he came was with his report of 26 September 2003 (folio 19 of the hearing brief) reciting the Chairperson's direction but only *recommending* that the Commission conduct a hearing "pursuant to Section 75(5)(a) of the *Liquor Act* with regard to cancelling the liquor licence....."
 - The Chairperson's decision of 19/09/2003 (folio 16) which contained the direction to the Director was not a refusal of the transfer, which could therefore be dealt with within the hearing. Not only did the decision not actually contain a refusal within its terms, but the Chairperson had not implemented the measures set out in s.43(b) which he had been bound to do if he had intended his decision to be a refusal of the transfer application. (S.43(b) requires the Commission to direct the Director to forward a notice of the refusal together with a statement of reasons to both the current licence holder and the person to whom it had been proposed to transfer the licence).
 - In the absence of a refusal of transfer, the decision of the Chairperson could not have been a direction to the Director pursuant to s.44, the only section of the *Act* which empowers the Commission to direct the Director to apply for cancellation of a licence. The power to issue such a direction is predicated upon there having been a refusal of a transfer application. Without the prerequisite of such a refusal having occurred and been processed in accordance with the terms of the *Act*, there can be no valid direction to the Director. A refusal cannot be an inference from such direction as was given because the very validity and effect of the supposed direction is itself dependent on that which is being inferred from it.
10. Each of the foregoing submissions was persuasive. In totality they were irresistible. We did not accept Mr Perry's argument that the Director's recommendation for the Commission to conduct a s.72(5)(a) hearing could be taken to be an application for the same by the Director. We ruled at that stage that not only was there no application by the Director which was before us, but even if there had been an application by the Director in purported obedience to a perceived direction from the Chairperson it would have been an invalid process. We carefully pointed out that the *obiter* as to invalidity related only to a cancellation application by the Director purportedly under s.68(b), ie. as a direct consequence of a supposed direction from the Chairperson. It remained open to

the Director to make any *other* application (vide s.69), but he had not done so and Mr Perry confirmed that he did not do so.

11. Mr Perry's position being that the Director's involvement in the cancellation hearing was solely as a consequence of a perceived direction from the Chairperson, we ruled that we were unable to consider the cancellation of the licence as an outcome of the hearing.
12. Mr Silvester then sought to have the Commission deal with the transfer application itself, but after much argument the Commission confirmed the stand it had taken in June 2002 in relation to a statutory application in respect of the Petty Sessions licence and ruled that the Millner Supermarket licence was incapable of transfer while suspended. S.66(3) of the Act provides that a licence which is suspended "shall have no effect" until the suspension is revoked by the Commission. Mr Silvester argued valiantly, and we do not disagree with him that a suspended licence continues to exist – s.66(3) itself confirms that – but if as a creature of statute a licence is to have no effect then in the Commission's view it cannot be given any effect by any statutory process other than as provided by s.66(3), ie. not until it has been restored by the Commission to statutory effect.
13. Through Mr Silvester we then received a written application from the current licence holder to revoke the suspension. The issue then became whether the reason for the suspension could now be regarded as having been sufficiently addressed.
14. Mr Silvester called evidence and made submissions in support of both the application to revoke the suspension and the application for transfer. Mr Perry had updated the transfer application for the Commission, and tendered the Director's investigatory documentation in support of his position of having no objection to either the revocation of the suspension or the approval of the transfer on terms as to future satisfactory inspection. He also advised that the NT Police had been invited to comment on the proposed transfer of the licence but had not availed themselves of such opportunity.
15. At the conclusion of the hearing the Commission delivered the following decision *ex tempore*. It's transcription below has been edited and in part amplified in aid of clarity, and paragraph numbers continue in sequence for the sake of convenience of reference.
16. We have arrived at a decision to revoke the suspension, and to approve the transfer.
17. There are many factors which have been taken into account in shaping that decision. First and foremost of course there is our earlier ruling in this proceeding that there is no valid application for cancellation before us, so cancellation cannot be an outcome of this hearing in any event, and the matter should not be left hanging in any sort of undetermined limbo – the present panel of the Commission

was appointed by the Chairperson to finalise the present position as regards this licence. In that context we have noted that the Director did not seek to make any other application, and neither objects to nor takes any issue with either the revocation of the suspension or the transfer of the licence.

18. We have also noted that the Police were specifically given an opportunity to comment and have not done so. We might note in passing that we cannot and do not speculate on what standing any adverse police comment may have been allowed, nor on what weight, if any, any such comment may have been given. The other side of that coin is that we do not automatically read anything favourable to an applicant into police silence in relation to any application. However, the fact that a specific invitation to comment was not taken up, while not a determinative factor, has nevertheless been one of the many relevant factors which in total have influenced this present decision.
19. The application to begin trading again from mid-October was actually made within the first 90 days of suspension. Admittedly even after that 90 day period has elapsed cancellation remains a discretionary matter, but within the 90 day period referred to in s.72(5)(a) there is no discretion: within that period no decision to cancel, nor even an intent to cancel the licence at some future time, can properly be arrived at on the ground only that the premises are not trading in liquor. (We are not overlooking that the non-use of the premises must have pre-dated the commencement of the suspension which it triggered, and that s.72(5)(a) is referring to 90 days of non-use rather than 90 days from the date of suspension, but Mr Perry's letter of 7 July 2003 specifically allowed 90 days from the suspension and the Commission would be estopped from attempting to foreshorten that period in any way for any reason). We regard it as a relevant factor that this current proposal for a re-opening by 15 October was lodged for consideration by the Commission within the 90 day buffer period.
20. The issue of course is whether the Commission can be persuaded that the reason for the suspension is being sufficiently addressed, and in this respect the evidence of Mr Jimmy Lay was significant.
21. Mr Lay is the Managing Director of the company that bought the real estate of the premises, specifically inclusive of the business of the supermarket and the liquor licence (the latter subject of course to the Commission's approval). He was able to demonstrate a fully recorded continuity of proprietorship of the business as a business, by which we mean as distinct from the real estate. The purchaser transferred the business name to Mr Nelson Lay, who in turn transferred it to another Lay company, Nazoo Pty Ltd, the company now applying for the transfer. The transferee will not be starting a new business, but implementing its contractual right to conduct the business sold by the Priors.
22. However, it will certainly *look* new: Mr Lay gave evidence of already having undertaken a substantial upgrade of the licensed premises. The photographs (Exhibit 4) confirm that upon re-opening there will have been quite visible

improvements rendered to premises which would seem to have been allowed to become somewhat rundown. Further though, we accept that Mr Lay genuinely intends to engage in further development of the whole site over the next eighteen months to two years; the price paid would also seem to confirm that such must be the intention. His proposals can only improve the area in the longer term, and in the meantime the supermarket will have been refurbished and restored to (an improved) operation in any event. He does not now seek to keep the liquor licence in abeyance pending redevelopment; the upgrading and stocking of the existing supermarket will be finalised within a fortnight of this decision, and that timeframe will be a condition of our decision.

23. We accept that the new licensee is a reliable operator, already known to the Commission, with a good record in the operation of licensed neighbourhood supermarkets.
24. We noted Mr Lay's obvious awareness of the requirement that operation of the liquor licence must be demonstrably ancillary to the operation of the general store. He will be aware that he can anticipate no flexibility in the strict enforcement of this requirement.
25. We also record Mr Lay's intention not to sell the large casks of Barunga Ridge white wine, known to the Commission as the popular fuel for much anti-social public behaviour. While we have decided that it would not be appropriate to enshrine that undertaking into the conditions of the licence, we do carefully note it as a factor in this decision. Mr Lay would know that if the Commission's expectations in relation to matters of good faith should prove to have been misplaced, our disappointment would likely find expression in a review of licence conditions.

Effective Determination

26. The suspension of licence no 80901707 will stand revoked upon satisfactory inspection by the Director revealing the premises to be ready to trade, provided that the licensee so satisfies the Director no later than close of business on 17 October 2003. The Director's satisfaction will need to be in writing for the revocation of suspension to be activated. It should be clearly understood that if this decision has not been utilised by close of business on Friday 17 October, the decision will thereafter be of no effect and will be unable to be activated.
27. We authorise the transfer of the licence from the current licensee Mrs Katherine Prior to the current applicant Nazoo Pty Ltd, with Mr Nelson Lay as nominated manager, to take effect immediately following the revocation of the suspension of licence having taken effect as above.
28. With the agreement of Nazoo Pty Ltd, confirmed by Mr Silvester, upon the transfer of the licence a new condition shall be included in the licence in the following terms:

The licensee shall cause to be removed or withdrawn any signage, advertising or promotional material or hoarding which in the opinion of the Commission, notified in writing to the licensee, shall be offensive, excessive, inconsistent with the concept or nature of the premises or the liquor licence or unacceptable to the Commission in any other way or for any other reason whatsoever.

29. A transcript of the ex tempore decision should be placed on the Director's file as the Commission's warrant for the approved processes until such time as a formalised record of our Reasons for Decision shall be published.

John Withnall
(Presiding Member)
Delivered 02 October 2003
(These reasons published 07 October 2003)