

Decision Number: 048/2022/HCDLC/499

IN THE MATTER of section 136 of the
Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER of an application by
Adzuki Bean House
Limited for a
Temporary Authority
for the Adzuki Bean
Café and Restaurant
situated at 164 Jackson
Street, Petone

BEFORE THE LOWER HUTT DISTRICT LICENSING COMMITTEE

Chair: Cr Simon Edwards
Members: Rachel Palu, Peter Glensor

HEARING held at Hutt City Council Chambers, 30 Laings Road, Lower Hutt on
12 December 2022.

APPEARANCES

Michael Robertson, sole Director and Shareholder of the Applicant
Tracy Gibson, Alcohol Team Lead, Hutt City Council (representing Dipal Dhanani, the
Licensing Inspector, who is on leave)
Melissa Harward, City Solicitor, Hutt City Council (appearing for the Alcohol Team
Lead)
Senior Sergeant Bengel, NZ Police

IN ATTENDANCE

Annie Doornebosch, Democracy Advisor, Hutt City Council
Heather Clegg, Minute Taker

DECISION OF THE DISTRICT LICENSING COMMITTEE

Decision

- [1] The Lower Hutt District Licensing Committee acting pursuant to the Sale and Supply of Alcohol Act 2012 **DECLINES** the application for a Temporary Authority from Adzuki Bean House Limited for the Adzuki Bean Café and Restaurant at 164 Jackson Street, Petone.

Introduction

- [2] Adzuki Bean House Limited has applied for a Temporary Authority (TA) to operate the premises currently trading as Adzuki Bean Café and Restaurant at 164 Jackson Street, Petone (the premises) with an on-licence. The application was lodged on 1 September 2022.

- [3] Michael Robertson is the sole director and shareholder of Adzuki Bean House Limited (ABH). This company was incorporated under the Companies Act 1993 on 28 June 2021. Since 2011, Mr Robertson has been employed as a chef at Adzuki Bean Café and Restaurant. Mr Robertson purchased the Adzuki Bean Café and Restaurant business in July 2021 (as evidenced by a copy of the Sale and Purchase agreement), from B & T Co. (2011) Limited (in liq) (BTC). Under the agreement, Mr Robertson took possession of BTC's business on 5 July 2021 and from that point, his company, ABH, has received the proceeds of sales from the business.
- [4] BTC was incorporated under the Companies Act 1993 on 30 September 2011. Since its incorporation, Jian Zhou Tan was BTC's sole director and shareholder. BTC was placed into liquidation by Mr Tan on 7 June 2022.
- [5] The person who holds the current on-licence for the Adzuki Bean Café and Restaurant is Ms Bin Du, the wife of Mr Tan. Ms Du is not a shareholder or director of BTC. Ms Du holds a Manager's Certificate and is the sole certified manager working at the Adzuki Bean Café and Restaurant.
- [6] In 2011, Ms Du applied for the original on-licence held for the Adzuki Bean Café and Restaurant as a natural person. Since then, the on-licence has been renewed in the same manner, with the most recent renewal being in November 2021.
- [7] In September 2022, the Licensing Inspector became aware that BTC (and not Ms Du) was the recipient of all the proceeds received from alcohol sales from the Adzuki Bean Café and Restaurant. Before then, neither the inspectorate nor the District Licensing Committee had been made aware of the existence of BTC.

The Applicant

- [8] Mr Robertson was provided with the Licensing Inspector's report and he attended the hearing. He confirmed the agreement to purchase the Adzuki Bean Café and Restaurant and said the purchase price was being paid off by way of various weekly payments. He said that the sale had come about at the suggestion of Mr Tan, who had asked him if he would purchase the café and restaurant business and he had agreed. He said he had not received professional advice and was mostly guided by BTC and its accountant. Mr Robertson said he had also used BTC's accountant for his business, until recently.
- [9] Mr Robertson said that initial purchase payments had been made to BTC directly, but then to a creditor of BTC or its former owner after BTC went into liquidation. He confirmed that BTC had run the café and restaurant, but he understood that Ms Du held the on-licence on behalf of BTC. Mr Robertson confirmed that the roles of Ms Du, Mr Tan and himself were more or less the same as they were when BTC owned the business. He thought that because the same personnel was involved, he did not need to notify the change in ownership. In responding to questions from the Alcohol Team Lead, Mr Robertson said that the change in ownership was not raised when the on-licence was renewed in November 2021 as this was not considered necessary due to the licensee being the same.

- [10] Mr Robertson said that the business did stop selling alcohol after it was told to by the Inspectorate but he could not explain why it had also continued to sell alcohol after that.
- [11] Mr Robertson said he was in the process of obtaining his own manager's certificate. He has completed Licence Controller Qualification (LCQ) training and had applied for a manager's certificate however he had been told by the Inspectorate to reapply after the application for the TA had been heard.

Reporting Agencies

- [12] The application was referred to the Licensing Inspector and NZ Police for comment in accordance with the Alcohol Regulatory and Licensing Authority (ARLA) Practice Directions and Statement issued on 26 November 2013. Both the Licensing Inspector and the NZ Police have concerns about the applicant's suitability and have opposed the application.

District Licensing Inspector

- [13] We received a detailed report from the Licensing Inspector, which extensively covered the complex and perplexing monetary and company situation presented by this application.
- [14] The Licensing Inspector undertook a detailed review of ABH's bank statements and met with Mr Tan, Ms Du, Mr Robertson and the accountant who acted for BTC and ABH. She had noted confusion around the actual entity operating, running and receiving the sales proceeds of the Adzuki Bean Café and Restaurant, and had concerns around the actual interest or extent of control by the former owner, Mr Tan (BTC) and Ms Du.
- [15] The Licensing Inspector also raised concerns about the ability of the business to operate within the requirements of the Sale and Supply of Alcohol Act 2012 (the Act) and the suitability of the applicant.
- [16] The Alcohol Team Lead reiterated concerns with the management of the café and restaurant. She highlighted the delayed disclosure regarding the change of ownership. She further highlighted the Licensing Inspector's unchallenged evidence recording several recent occasions where the café and restaurant had continued to display and sell alcohol despite the sale of the business, the lack of a TA or new on-licence, and explicit instructions and repeated warnings from the Licensing Inspector to discontinue the sale of alcohol without the appropriate licence. There was also an instance of no certified manager being on the premises when alcohol sales were taking place. The Alcohol Team Lead maintained that this showed a history of non-compliance.

NZ Police

[17] Senior Sergeant Bengé expanded on the NZ Police's opposition to the application, which was primarily made in support of the opposition from the Licensing Inspector. The NZ Police were concerned with the number of anomalies that had arisen as a result of the investigations by the Licensing Inspector. Senior Sergeant Bengé referred to the following concerns:

- [17.1] that Mr Robertson did not appear to understand his obligations under the Act and had little understanding or knowledge of the business; and
- [17.2] that Mr Robertson seemed to be acting on behalf of the previous owner, whose company was now in liquidation; and
- [17.3] that all the evidence presented brought into question whether the safe sale and supply of alcohol could occur at the Adzuki Bean Café and Restaurant. Upon questioning, the Senior Sergeant acknowledged the risk of serious harm caused by the misuse of alcohol at the Adzuki Bean Café and Restaurant was low, however, they maintained that the previous owners and management had demonstrated a blatant disregard for repeated instructions from the Licensing Inspector, and that those same personnel appeared to still be the operators of the Café and Restaurant; and
- [17.4] that there were authenticity concerns regarding the Sale and Purchase Agreement and Deed of Lease documentation.

Licensing Committee Decision and Reasons*Legislation*

- [18] The general purpose of the Act is for the benefit of the community as a whole and is to put in place a new system of control over the sale and supply of alcohol.¹
- [19] The object of the Act is to ensure that alcohol is sold and supplied safely and responsibly, and that any harm caused by the excessive or inappropriate consumption of alcohol is minimised.²
- [20] Section 136 details the requirements regarding Temporary Authorities.
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.*

¹ Sale and Supply of Alcohol Act 2012 (the Act), s 3

² As above, s 4(1)

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 purpose of this Act the same duties, obligations, and liabilities as the holder of the on-licence or off-licence concerned.

Case Law

- [21] In *KNJ's -Hotel Ruawai Limited*,³ ARLA considered that the suitability of an applicant for a TA is only relevant in serious cases. We understand that this is because the licensee who holds the underlying base licence remains responsible for ensuring the premises are operated in accordance with the Act.
- [22] The Licensing Inspector also referred to the former Licensing Authority's decision in *Bentleys Bar and Café Limited (in liq)*⁴, which considered the suitability of a company in liquidation for an on-licence. The Licensing Authority considered that a company in liquidation was not well fitted or appropriate to be granted an on-licence.

Discussion and Findings

- [23] Under s 136(1) of the Act, there must be an on-licence or off-licence in force (a base licence) before a TA can be granted. Despite the former business arrangements between Ms Du and BTC, both the Inspectorate and the NZ Police considered that a base licence existed. For the Licensing Inspectorate, the Solicitor, Hutt City Council acknowledged that there may be issues with the enforcement of the licence. However, as the licence had not been voided, removed or extinguished, the Inspectorate considered that it remained in force.
- [24] The majority of the Committee accepts that there is an existing base licence upon which a TA may be granted. The minority view is set out below in the dissenting decision of Committee member, Rachel Palu.
- [25] The Licensing Inspectorate also considered that the applicant, ABH, has an interest in the new business. Senior Sergeant Bengé expressed concern around Mr Robertson's actual interest and whether he had an actual business interest or was acting on behalf of the prior owners, although his concern was considered to impact on the safe sale and supply of alcohol.

³ *KNJ's Hotel Ruawai Ltd vs Graeme Leslie Wright [2014] NZARLA PH 914*

⁴ *Bentleys Bar & Café Ltd (in liq) LLA 500/97. 9 April 1997*

- [26] The majority of the Committee is satisfied that the applicant, ABH, has a right or interest in the Adzuki Bean Café and Restaurant business conducted at the premises. An agreement for sale and purchase confirmed the sale and purchase of the Adzuki Bean Café and Restaurant from BTC to Mr Robertson. Mr Robertson appears to have effectively nominated ABH as the purchaser. This intent is referred to in the agreement and ABH has operated the business and received the sales proceeds since the date of possession. ABH's bank statements also show amounts totaling approximately \$105,227.90 as having been paid to BTC. Mr Robertson confirmed that approximately \$7000 of the purchase price was still to be paid to BTC.
- [27] The majority of the Committee then considered the suitability of ABH. While Mr Robertson's training in the responsibilities of the Act and his efforts to obtain a manager's certificate is favourable, there are various aspects of this application that raise serious concerns. The Committee is satisfied that there have been repeated breaches of the Act, which have not been satisfactorily explained. It also finds that neither Mr Robertson nor ABH has demonstrated sufficient knowledge of their responsibilities under the Act. This is illustrated by the lack of knowledge about the importance of obtaining a TA or ABH's own substantive licence. There are also issues surrounding the operation of the business and the Committee considers that Mr Robertson and ABH are heavily reliant on and influenced by the former owner, Mr Tan, and also Ms Du in operating the business.
- [28] The Committee accepts that the premises are low risk and that beyond the issues referred to above, there is no evidence of alcohol-related harm. However, the majority considers that the issues identified raise serious concerns around the suitability of ABH and Mr Robertson and the impact on ABH's ability to hold a TA. There are also concerns about the ability to enforce the underlying base licence held by Ms Du. This is demonstrated by the recent compliance issues.
- [29] After considering the application and evidence provided against the object of the Act in ss3 and 4 of the Act, we decline to grant a TA.
- [30] While this outcome means that ABH is unable to sell and supply alcohol under a TA, ABH can still apply for its own licence. We observe that when such an application is made, the overall suitability or otherwise of ABH to hold an on-licence can be further investigated against s 105 of the Act. A decision on whether to grant an on-licence will ultimately be a matter for the District Licensing Committee at that time.
- [31] We also note the apparent confusion on the part of Mr Robertson and the former operators of the business about the overall structure and effect of their business arrangements. We encourage Mr Robertson to obtain independent legal and accountancy advice going forward.

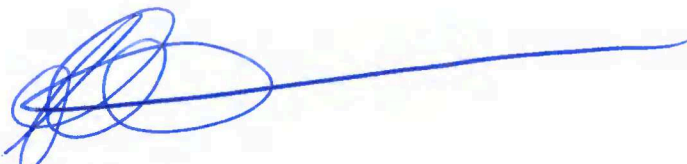
Dissenting Decision of Committee Member, Rachel Palu

- [32] I have read the decision of the majority of the Committee. While I agree that the applicant has demonstrated an interest in the business conducted at the premises, I am not satisfied that the business in which the applicant has obtained an interest includes an on-licence. As the on-licence has been issued to Ms Du, the business purchased from BTC did not have a right or title to a licence. In my view, ABH did not acquire a right or interest in a business for which an on-licence is in force.
- [33] A written lease agreement was also provided with the application. However, the leasing arrangements between ABH and the landlord are unclear. While some rent payments have been made from ABH's account, the lease is unsigned. The landlord consent provided by ABH was also signed off by Mr Robertson and not the landlord.
- [34] Overall, I am not satisfied that the criteria in s 136(1) of the Act is established.
- [35] I also observe that the status of the on-licence renewed by Ms Du in November 2021 is problematic. As stated above, despite being the holder of the on-licence since 2011, Ms Du did not trade the business or receive the proceeds of the sale and supply of alcohol. Consequently, and as acknowledged by the Inspectorate, any ability to enforce an underlying base licence could well have difficulties. This is also demonstrated by the heavy involvement of Ms Du and the continued sale of alcohol despite the Inspector's clear instructions that there is currently no ability to do so.

Conclusion

- [36] Having considered the application and relevant criteria under s 136 of the Act, and the purpose and object of the Act, the majority of the Committee is satisfied that the overall considerations fall against the granting of a TA to ABH, for the Adzuki Bean Café and Restaurant at 164 Jackson Street, Petone.
- [37] The minority view of the Committee also considers that the TA should not be granted, although it is for different reasons that the criteria in s 136(1) are not met.

Dated at Lower Hutt this 20th day of December 2022



Signed
Cr Simon Edwards
Chair, Lower Hutt District Licensing Committee