

Decision No.PH 915/2007

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application pursuant to s.132 of the Act for the cancellation of on-licence number 060/ON/116/06 issued to **COREY ADAM McCULLOUGH** in respect of premises situated at 192 Moorhouse Avenue, Christchurch, known as "Christina's"

BETWEEN

MARTIN FERGUSON
(Christchurch District Licensing Agency Inspector)

Applicant

AND

COREY ADAM McCULLOUGH

Respondent

BEFORE THE LIQUOR LICENSING AUTHORITY

Chairman: District Court Judge E W Unwin

Member: Dr J Horn

HEARING at CHRISTCHURCH on 3 September 2007
Last day for the filing of financial records 17 September 2007.

APPEARANCES

Mr M Ferguson – Christchurch District Licensing Agency Inspector – applicant

Mr C A McCullough - respondent

Sergeant A Lawn – NZ Police – to assist

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] On 28 September 2006, Mr C A McCullough was issued with an on-licence enabling him to sell and supply liquor on premises situated in Moorhouse Avenue, Christchurch, and known as "Christina's". The on-licence was issued after a public hearing in Christchurch on 21 August 2006. It authorised trading hours at any time on any day.

[2] Mr McCullough's application for a licence had been opposed by Mr M Ferguson the District Licensing Agency Inspector. The grounds for his objection were that Mr McCullough would not personally be operating the premises. Alternatively it was argued that he was acting as a front person for other persons namely Peter Machirus, and/or Linda Westbury, and/or Vincent Clayton.

[3] After hearing the evidence, we issued a reserved decision on 30 August 2006 in the name of *Corey Adam McCullough* LLA PH 632/2006. In that decision we gave Mr McCullough the benefit of the doubt. We stated that we were satisfied that the delays in providing information, the apparent about face about residing on the premises, the use of Peter Machirus as a guarantor, and the presence of Ms Westbury, did not disclose an attempt to front the business on behalf of others. We accepted that the monitoring agencies had every reason to be suspicious, but concluded that Mr McCullough had earned the right to hold an on-licence.

[4] On 10 July 2007, the Authority received this application for the cancellation of the licence. The grounds for the application were that Mr McCullough's conduct had been such as to show that he was not a suitable person to hold the licence. The application argued that Mr McCullough had no involvement with the operation of the premises. It was alleged that all matters relating to the running and operation of the premises were being carried out under the direction of a third party. The Inspector contended that Mr McCullough may well have sold the business, but was carrying on for the purpose of deceiving the reporting agencies as to the name and nature of the real operator.

[5] At the same time as he filed the application, the Inspector sought an order for the production of documents. A document was prepared by the Authority's staff. It was dated 14 August 2007 and was addressed to Mr C A McCullough C/- Christina's, 192 Moorhouse Avenue, Christchurch. The order required Mr McCullough to produce to the Authority and the Inspector, copies of the following documents by 29 August 2007.

1. Employment records of staff employed at "Christina's" 192 Moorhouse Avenue, Christchurch since 28 September 2006.
2. Any contract or lease agreement entered into by Mr McCullough in relation to "Christina's", 192 Moorhouse Avenue, Christchurch.
3. Bank records kept in respect of "Christina's", 192 Moorhouse Avenue, Christchurch since 28 September 2006.
4. Mr McCullough's personal bank records for the period 28 September 2006 to 31 July 2007.

[6] There was no response to the order. At the hearing Mr McCullough stated that he had never received the order. The order was sent by courier post to Mr McCullough at "Christina's". It appears to have been signed for by Mr V Clayton. Although it seems to us highly unlikely that Mr McCullough was unaware of the order, a copy was handed to him in the witness box. He was given 10 working days to respond. He stated that there had been a fire in the garage of his house at 579 Worcester Street, and that some records had been destroyed, but he would do his best. He was advised firmly that he was expected to do more than his best.

[7] As at 18 September 2006 at 5.00 pm there has been no response to the order. Judging by Mr McCullough's reaction to the request, and his comment that there had been a fire, we would have been most surprised to have received a timely and professional response. The lack of action simply confirms our belief that Mr McCullough has never had a personal interest in the business. As the objector to the issue of the on-licence, Mr Ferguson has been vindicated. The hearing satisfied us that Mr McCullough was a licensee in name only. He was acting as a front to others.

The Hearing

[8] The applicant called Ms Victoria Ann Franklin as a witness. Ms Franklin is the manager of the "Worcester Tavern" and had been served with a witness summons. The "Worcester Tavern" is located at 372 Worcester Street in Christchurch. Ms Franklin confirmed that she had employed Mr McCullough at the tavern for a period of three months from March to June 2007. During that time he was on call, and generally worked one or two days a week. It was put to her that she had told Mr Ferguson that Mr McCullough was out of "Christina's", but she denied making this statement.

[9] Mr Robert John Brook is a Senior Gambling Inspector with the Gambling Compliance Group for the Department of Internal Affairs. His duties include the investigation of key personnel involved in gaming machine venues such as "Christina's". He stated that Mr McCullough was a key person being a Venue Operator and a Venue Manager in respect of 18 gaming machines owned by a corporate society known as Caversham Foundation Limited, (hereafter called the foundation).

[10] Mr Brook produced the venue agreement between the foundation and Mr McCullough. Under the agreement and pursuant to the Gambling Act 2003, Mr McCullough is required to bank the proceeds from the machines on a weekly basis into the foundation's dedicated account. The funds must be deposited within five working days of the amount being calculated. The foundation is required to notify the Secretary of Internal Affairs when a venue fails to bank the proceeds and it must also switch off the machines until the funds are banked.

[11] The Internal Affairs Secretary was advised that Mr McCullough had banked funds late on 10 occasions between April 2006 and January 2007. Mr Brook produced a spreadsheet for the year January 2006 to January 2007, showing bankings into the account. The account was in credit for only five weeks of the year. The amount outstanding at the end of the year was \$15,919. This figure represented community funds unbanked as at January 2007. Mr McCullough produced a statement to the effect that there are now no arrears.

[12] Mr Brook conducted an analysis of "Christina's" bank statements and found that 17 payments had been made to another Trust that operated gaming machines in respect of another venue known as "Harry's on Gloucester". This was the premises where Mr McCullough had worked prior to taking over "Christina's". This premises is apparently owned and operated by Ms Mavava Nadia Pelenato, a former partner of Mr Peter Machirus. The total amount banked by Mr McCullough into the wrong trust account for the "Harry's on Gloucester" venue was \$43,850. Mr Brook also found a payment of \$1,500 paid by Mr McCullough into yet another venue known as "The Aranui Bar & Café" ostensibly owned and operated by Ms Pelenato.

[13] In the course of his investigations Mr Brook discovered that Ms Pelenato had given evidence in criminal proceedings in the District Court in May 2007. We understand that Ms Pelenato had been charged with offences relating to receiving a benefit to which she was not entitled. It was alleged that she was the owner/operator of two licensed premises. Her evidence was to the effect that she had simply been the front person for Peter Machirus. A copy of the transcript of her evidence was produced. After being sworn in, Ms Pelenato was cross examined as follows:

- Q** *You also purchased Harry's on Gloucester from Linda Westbury.*
- A** *That's what's in the evidence, but I didn't purchase any money or buy any pub, all I do is apply for the licence.*
- Q** *In particular Mr Ferguson let you know very clearly that he didn't want any involvement in the bars by Peter Machirus, didn't he.*
- A** *Yeah, he ask me those questions most of the time.*
- Q** *I think you said, on three or four occasions he made it clear to you that Machirus wasn't to be involved and on those occasions you would always tell him that Mr Machirus was not involved in running the bars. Do you remember that you did that.*
- A** *I remember saying that to him. That was a lie, I lied to him. I did lie to him, I did. I did lie to him.*

[14] In her evidence, Ms Pelenato also recounted how she had lied to the Authority when she had given evidence in respect of an enforcement action brought against "Harrys on Gloucester" for trading on Anzac Day. See *Martin Ferguson v Nadia Mavava Pelenato* LLA PH 522/2002.

[15] Mr Brook stated that in mid 2006 there were concerns that others were involved in the running of "Christina's". He stated that he had visited the premises on three occasions and each time Mr V Clayton and Ms L Westbury were behind the bar or in the bar. He said that on one occasion Ms Westbury was shown as the duty manager. Mr McCullough was never present. Several requests were made to have Mr McCullough contact Mr Brook but there was no response.

[16] In order to expedite his application for the renewal of his venue licence, Mr McCullough was asked to sign a declaration that Peter Machirus, Vince Clayton, Nadia Pelenato and Linda Westbury were not involved in the management, ownership or running of "Christina's". Mr McCullough did so on 24 October 2006, and a copy of his declaration was exhibited. The venue licence was renewed.

[17] Mr McCullough was asked to supply financial information about the tavern as well as the gaming machines. A copy of a CD-ROM was supplied by Mr V Clayton. There were concerns about these accounts as they did not reflect the payments by the foundation for site rentals, nor did they show the source of the \$43,850 paid to designated gaming account for "Harrys on Gloucester". The accounts showed that the business was in a loss situation each week.

[18] Mr Brook advised that in May 2007 the Secretary of Internal Affairs cancelled the venue licence for "Christina's" on the grounds of Mr McCullough's unsuitability. The foundation appealed the decision. On 3 July the foundation's legal counsel sent a facsimile letter to the Department. In the letter he stated:

“Cory McCullough who was acting as the venue manager, appears to have left the venue and is no longer acting as the venue manager.”

Caversham understands that there may have been a change in the venue operator in that the venue may have been sold, or is in the process of being sold, or is subject to an offer to purchase.”

[19] Mr Brook confirmed that subsequently the foundation abandoned the appeal, and the venue licence issued to “Christina’s” was cancelled.

[20] Sergeant A J Lawn is the Officer in Charge of the Christchurch Liquor Licensing Section. He argued that in order to maintain the integrity of the licensing system, all licensees were expected to deal with the monitoring agencies in an honest and transparent manner. He stated that the Police had no confidence in Mr McCullough. He gave evidence of visits to the bar made in August, October, and November 2006, and February 2007. There were allegations of licensing breaches. It was noted that Mr McCullough was not present on any of the occasions, and that Mr Clayton was present in February 2007.

[21] On 23 August 2007 Sergeant Lawn was present when the Police visited the premises. A person working behind the bar stated that she was the acting duty manager and had been appointed that day by Linda Westbury. Ms Westbury was phoned and she came down to advise that she was not working that night. Two days later the Police re-visited the premises. A Mr K Edwards was behind the bar. As soon as he saw the Police he rang for Ms Westbury who came downstairs to speak with the Police. The evidence was that Ms Westbury was less than cordial in her dealings with the Police.

[22] Mr Ferguson stated that he had brought the application because new information had come to light since the original decision was issued. He referred to the first hearing when Mr McCullough advised that neither Mr Clayton nor Ms Westbury would have any connection or involvement with the business. The evidence showed that they both live on the first floor of the premises. The evidence also showed that Ms Westbury not only operates as a duty manager from time to time, but had appointed another member of staff as a temporary manager, a function only reserved for a licensee.

[23] Mr Ferguson pointed out that after Mr McCullough had signed the statutory declaration referred to in paragraph [16] above, he gave notice of the appointment of Ms Westbury as duty manager. It will be noted that the declaration stated that Ms Westbury was not involved in the “running” of “Christina’s”. Mr McCullough stated that the declaration was true at the time but that since then he had changed his mind and decided to employ her. In the face of the previous decision, it is difficult to follow his reasoning.

[24] Mr Ferguson advised that the Agency received an application for temporary authority to operate “Christina’s” on 7 March 2007. The applicant was Mr Kurt Edwards who is the son of Ms Westbury. He also resides on the premises. The application was opposed by the Agency because of the belief that Mr Edwards was acting as a front for Ms Westbury and Mr Clayton. The application was declined. It will be recalled that in our original decision granting the licence we had referred to the fact that P Machirus, L Westbury, and V Clayton were facing up to 90 charges of dishonesty.

[25] Faced with such a large amount of culpable evidence Mr McCullough was very relaxed. He confirmed that he was entitled as licensee not to be on the premises. He said that becoming a single parent had made it a long hard struggle to cope with the business particularly because CYFS had prevented him from living on the premises with his daughter. Accordingly he had appointed duty managers. He said he was trying to sell the business and had a buyer who had applied for a temporary authority.

[26] Mr McCullough explained that he had borrowed money from Mr Peter Machirus from time to time, and the deposits totalling \$43,850 represented the loan repayments (presumably plus interest). This evidence confirmed that Mr Machirus was receiving the benefit of funds paid into the designated poker machine account for "Harrys on Gloucester". When asked what he had borrowed the money for, Mr McCullough mentioned \$2,000 for a car. He stressed that the loans were personal. Later he was asked whether he might have a gambling problem and readily acknowledged that he did, although he stated that he had not gambled in the last two months. There was no documentary evidence to support any of his assertions. He said that Mr Machirus was a father figure to him and would never turn him down when he needed money.

[27] When asked why he had worked at the "Worcester Tavern", he said that he was stressed and needed a break so he worked at other premises as a barman. He also said that he had not included the site rentals in the accounts because the machines had been turned off during the major part of the year. In summary he stated that he had tried his hardest but had been unable to bring up his daughter as well as run a business. Under cross-examination, Mr McCullough disclosed significant debts against the business, including non-payment of rent.

The Authority's Decision and Reasons

[28] Sections 132 of the Act requires a two step approach. First the evidence must be examined to see whether we are satisfied that the allegations have been established to our satisfaction. If that is the case then we must then decide whether it is desirable to make an enforcement order. In this case the issue is cancellation of the licence.

[29] We regard a licence as a privilege not a right. However the privilege comes with obligations, one of which is to be honest with the reporting agencies and with the Authority. When he last appeared before us we gave Mr McCullough the benefit of the doubt. On this occasion, Mr McCullough forfeited that right. We regret to report that his evidence was patently implausible. It was our considered opinion that Mr McCullough gave his evidence without regard for the need to be open and honest.

[30] It seemed to us that Mr McCullough would have said anything to avoid revealing the true nature of the situation. The suggestion that he would work for minimum wages at other premises because of the stress of looking after his own business had no credibility whatsoever. Having what may be called a 'busman's holiday' is not unknown. However, in this case Mr McCullough was able to leave his daughter on a regular occurrence over a period of three months. This was at a time when he would have been paying for the services of a duty manager. We have no doubt that if "Christina's" was his business at that time, he would have been there.

[31] His explanation for paying over \$45,000 into an account for the benefit of another front person (Ms Pelenato) lacked common sense as well as formal detail. It shows however, that Mr McCullough must have known that Ms Pelenato was also acting as a frontperson for Mr Machirus, because the money was not for her benefit.

[32] Mr McCullough knew that the appointment of Ms Westbury would not have been acceptable. Why would he risk the wrath of the reporting agencies unless he was under other orders?

[33] As we listened to him, we became satisfied that the reason Mr McCullough seemed to be unconcerned was because it was not his money that was at stake. He was indeed acting as a front person for others. To treat the licensing system with such contempt is quite intolerable. As we indicated in our earlier decision, we had not expected such duplicity. If a licensee is unable to be honest and transparent in his dealings with the reporting agencies, and in his appearance before us, then there is a complete absence of suitability. Such a person will bend and break other rules at will.

[34] The suitability of a licensee is fundamental to the licensing system. To act as a front for others, (because they would be unable to obtain a licence), undermines the integrity of the Act. We are satisfied that the original application for a licence was a deliberate attempt to circumvent the system. Once the licence was granted, all parties (including Mr McCullough), continued to act in this dishonest way in order to keep the business going. They abused the privilege of a licence. They brought the system into disrespect. No licence could be allowed to continue in such circumstances.

[35] For these reasons we order that on-licence number 060/ON/116/06, issued to Corey Adam McCullough, will be cancelled on Wednesday 26 September 2007.

DATED at WELLINGTON this 19th day of September 2007

Judge E W Unwin
Chairman