

Northern Territory Licensing Commission

Premises: Rapid Creek Supermarket
Licensee: Mr Harold Edmund Lessig
Licence Number: 80900103
Date of Decision: 19 February 2007

Decision of Chairman Regarding Application by Ms Zhong for a Transfer of the Rapid Creek Supermarket Liquor Licence

Ms Jinxia Zhong, has applied to the Commission to have the liquor licence for Rapid Creek Supermarket, located at 29 Rossiter Street, Rapid Creek, (Licence Number 80900103) transferred to her. The current Licensee, Mr Lessig, opposes the application for transfer.

The application is made pursuant to s40 of the *Liquor Act*, which states:

40. Transfer of licence

- (1) *Subject to this Act and the Regulations, a licence may be transferred from the holder for the time being of the licence to another person.*
- (2) *A transfer of a licence does not take effect until the Commission authorizes the transfer or until such later date as the Commission specifies.*

The process for applying for and considering a transfer of licence is set out in sections 41 and 42 of the *Liquor Act*, which state:

41. Application for transfer

- (1) *The person to whom it is proposed to transfer a licence shall lodge an application for the transfer of the licence with the Director in a form approved by the Commission and accompanied by a fee of \$2.*
- (2) *The provisions of sections 25, 26A and 28 apply to and in relation to an application for the transfer of a licence as if that application were an application for the grant of a licence under section 24.*

43. Consideration of application

The Commission shall, as soon as reasonably practicable, consider an application for the transfer of a licence and after such consideration, having regard to the objects of this Act –

- (a) *authorize the transfer of the licence; or*
- (b) *refuse the application and direct the Director to forward notice of the refusal, together with a statement of the reasons for refusal, to –*
 - i. *the holder for the time being of the licence; and*
 - ii. *the person to whom it was proposed to transfer the licence.*

Under my delegated powers as Chairperson of the Licensing Commission, I must decide whether or not to approve this transfer.

Background

Ms Zhong and Jian Bao Liu (Mr Liu) are husband and wife and both are Directors of Liu Enterprises Pty Ltd. Prior to Mr and Mrs Lessig become involved in the Supermarket, Liu Enterprises Pty Ltd was the owner of the business, the Liquor Licensee, and the Lessee pursuant to an unregistered lease granted by the owner of the land, Mr Liu. Mr Liu has remained throughout the sole owner of the freehold title to the land on which the supermarket stands.

A contract of sale of the business known as Rapid Creek Supermarket was entered into between Liu Enterprises Pty Ltd and Mr and Mrs Lessig on 14 December 2005. A lease between Mr and Mrs Lessig as lessees and Mr Liu as lessor was registered in January 2006 with the lease period commencing on 1 January 2006 and expiring on 31 December 2011. Liquor Licence Number 80900103 was transferred from Liu Enterprises Pty Ltd to Mr Lessig on 2 February 2006.

It is understood that Mr and Mrs Lessig abandoned the premises sometime in October 2006, advising that he intended to lodge an application for substitution of the liquor licence to the Driver Supermarket. The Licensing Commission suspended the licence on 2 November 2006, pending the resolution of the situation. No formal application for substitution of the licence has been received to date.

Consideration of Transfer of Application

There are several problems with this application. The first is the manner in which the licence transfer application form has been executed. The transfer application seeks to transfer the liquor licence to Ms Zhong. The application appears to be signed by Ms Zhong in two places - both as proposed Licensee and purportedly on behalf of the current Licensee, Mr Harold Lessig.

Ms Zhong has purported to sign the application on Mr Lessig's behalf by exercising "*my power of attorney for this transfer pursuant to Clause 53 of the Lease.*"

Clause 53(3) of the lease agreement between Mr Harold Edmund Lessig and Jian Bao Liu grants the lessor the power "*to do, execute and perform any act, deed, matter or thing relative to the leased premises as fully and effectually as the tenant could do in and about the leased premises*". (Refer Attachment E).

It is quite clear that Ms Zhong has no authority under the clause 53 of the lease to sign any document relying on this power. Only Mr Liu can do so.

Even if the Application had been signed by Mr Liu on behalf of Mr Lessig, the question remains whether the execution of the licence transfer application transferring the licence to Ms Zhong is "*any act, deed, matter or thing relative to the leased premises*" as required by clause 53(3) of the lease. I do not consider that it is for the simple reason that Mr Liu at law is not and has never been a party to the contract of sale or the transfer of the liquor licence. A completely separate legal entity namely Liu Enterprises Pty Ltd (of which he is a director) was involved in those transactions. It is stretching the power of attorney provision in the lease too far to allow it to be used to assist in the transfer of a licence that did not belong to the lessor prior to the grant of the lease.

The next question is whether the contract of sale of the business from Liu Enterprises to the Lessigs provides any clarification as to what is to happen to the liquor licence should there be a default by the purchaser after settlement. The contract of sale is conditional upon the approval of the transfer of the liquor licence by the Commission and one would assume that the liquor licence is an integral part of the business being sold. Clause 16 of the contract of sale states:

"at settlement:

(a) all the vendor's right title and interest in the said business shall pass to the purchaser".

The liquor licence transfer was approved by the Commission and was transferred to Mr Lessig as a result. Under the terms of the contract of sale, title to the licence has now passed to the purchasers. Clause 23 of the contract of sale makes it clear that the vendor has no security for the

unpaid balance of the purchase price, and the contract does not provide any mechanism for the licence to be transferred back to the previous Licensee or to any other person in the case of a post settlement default by the purchasers.

I am most surprised that the Contract of Sale is silent on many important issues. Often in contracts of sale by instalments, for example, the parties will stipulate what is to happen to the licence and the business should there be a default at any stage before the full purchase price is paid. Regrettably, this contract is silent. In these circumstances, the Licensing Commission has approved the licence transfer from Liu Enterprises to Mr Lessig and Mr Lessig remains the Licensee.

Summary

Mr Lessig now holds the liquor licence. There is nothing in the contract of sale that requires him to transfer the licence back to Liu Enterprises Pty Ltd or to any other person following a default after settlement. The power of attorney in the lease granted to Mr Liu as lessor cannot be employed by him or anyone else to transfer the liquor licence on behalf of Mr Lessig.

For these reasons, the transfer application is refused.

NOTE: This liquor licence was suspended on 2 November 2006 and over ninety (90) days has now passed where the premises have not been used for the sale or supply of liquor. I refer the Licensee to Section 72(5)(a) of the *Liquor Act* and advise that a hearing will be conducted in the near future to decide whether this licence should be cancelled. Mr Lessig, as Licensee, will be advised of the hearing date.

Richard O'Sullivan
Chairman

20 February 2007