

LICENSING COURT OF SOUTH AUSTRALIA

TIN SHED DISTILLING CO

JURISDICTION: Application for Directions

FILE NO: 6215 of 2013

HEARING DATE: 16 November 2018, written submissions received
4 December 2018

JUDGMENT OF: His Honour Judge B Gilchrist

DELIVERED ON: 22 February 2019

CATCHWORDS

*Application for Directions - An application for a direct sales licence was previously granted on an interim basis following an objection - The liquidator of a company related to that objector seeks to intervene in these proceedings and he seeks an order that an interim sales be suspended - Whether the liquidator has standing - **Held** that he could only have standing through a lodgement of an objection which is now well out of time - The Application for Directions is treated as an application for an extension of time to lodge an objection - Principles guiding an application for an extension discussed - Although the power is unfettered, relevant factors include the length of the delay, the explanation for the delay and the relative prejudice to the parties if the extension succeeds or fails, and where the interests of justice lie - Here the delay is great, the liquidator will not be denied the opportunity to pursue matters elsewhere if the extension of time is not granted, and the Court has a very real concern that its processes are being invoked for a collateral purpose - **Held** Application for an extension of time refused - **Held** that the Application for Directions must be dismissed - Liquor Licensing Act 1997.*

Tin Shed Distilling Co [2014] SALC 11

In re Majory (1955) Ch 600

Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509

REPRESENTATION:

Counsel:

Applicant: Mr L Rowley

Respondent: Mr D Starke and later Mr I Thomas

Solicitors:

Applicant: Charlton Rowley

Respondent: Starke Lawyers

- 1 By Application for Directions filed herein on 18 October 2018, Mr Nicholas Cooper seeks to intervene in these proceedings and he seeks an order that an interim sales licence that this Court granted to Tin Shed Distilling Co Pty Ltd on 8 April 2014, be suspended.
- 2 To put the application into context, it is necessary to trace some of the history of the proceedings in this Court.
- 3 Some years ago, Tin Shed Distilling made an application for a direct sales licence pursuant to s 39A of the *Liquor Licensing Act 1997*. The application identified Mr Victor Orlow, Ms Rosemary Harvey and Salt Water (SA) Pty Ltd as its shareholders. Salt Water is owned by Mr Ian Schmidt.
- 4 Tin Shed Distilling was purchased from its previous owner, Ms Jaqueline Schmidt
- 5 Mr Anthony Fitzgerald, allegedly, formerly had a commercial relationship with Messrs Orlow and Schmidt. He lodged a notice of objection to Tin Shed Distilling's application on the basis that Tin Shed was not a fit and proper person to be licensed. He alleged that Messrs Orlow and Schmidt had not acted fairly in their dealings with him and as a result had caused financial detriment to him and his wife.
- 6 Underpinning the allegations was the concern that Tin Shed Distilling intended to strip assets and sell liquor that it did not own or which was the subject of contested ownership.
- 7 The application for the licence was listed for hearing in this Court on 5 March 2014.
- 8 On 18 February 2014, Mr Fitzgerald filed an Application for Directions seeking an adjournment of that hearing and a stay of the proceedings pending the determination of proceedings he and other had issued in the Supreme Court of South Australia.
- 9 Both applications were refused and it was anticipated that the scheduled hearing in March would proceed.
- 10 At the conclusion of the reasons underpinning that refusal the Court volunteered the following:

If the parties were being practical the most sensible outcome would be for an agreement between them to invite the Court to grant Tin Shed an interim licence, adjourn these proceedings to await the outcome of the Supreme Court proceedings, either by way of an injunction or otherwise, and grant the parties liberty to apply. If the interim licence were granted, depending upon the outcome of the other proceedings there could be an application to revoke the

interim licence or an application to remove the interim status of the licence.

I understand that this would mean that Tin Shed could trade, but provided appropriate measures were put in place for it to account for any money generated by that trade pending the grant of an injunction or judgment in favour of the plaintiffs, I would have thought that might be enough and thought it to be an adequate outcome to avoid the costly burden of two trials. But that is a matter for the parties.¹

11 The parties took up this suggestion and the parties agreed to the grant of an interim licence, subject to the following conditions:

Condition 8: All proceeds from the sale of stock manufactured by SCD to be held in an escrow account until such time as judgment in the Supreme Court proceedings 219/2014 is delivered.

Condition 9: Any payment out to be made by order of the Licensing Court.

Condition 10: The applicant to provide to the Licensing Court and the objector with a monthly statement of account detailing all sales made and proceeds received with respect to the SCD stock.

12 This Court granted the application subject to the agreed conditions.

13 And, so far as this Court was concerned, there the matter lay until the within application.

14 The within application is primarily supported by an affidavit from Mr Luke Rowley, solicitor. Mr Rowley is the principal of Charlton Rowley, the solicitors for Mr Cooper. Mr Cooper is a liquidator, and in particular is the liquidator of Southern Coast Distillers Pty Ltd (in Liquidation). This is the “SCD” referred to in the conditions just mentioned.

15 Through the affidavit it is alleged that no proceeds from the sale of stock manufactured by Southern Coast Distillers were ever held in an escrow account and that Tin Shed Distilling has never provided to the Licensing Court or to Mr Fitzgerald a monthly statement of account detailing all sales made and proceeds received with respect to the Southern Coast Distillers’ stock.

16 As liquidator, Mr Cooper is concerned that Tin Shed Distilling may have disposed of assets owned by Southern Coast Distillers that it has failed to account for to the detriment of Southern Coast Distillers’ creditors. The

¹ *Tin Shed Distilling Co* [2014] SALC 11 at [24]–[25].

ultimate purpose of the within application is to have Tin Shed Distilling either assuage Mr Cooper's concern that Southern Coast Distillers' assets may have been disposed of or have it account for the disposition of those assets.

- 17 The preliminary issue that the Court raised when this matter was before it, was whether Mr Cooper has standing.
- 18 There are a number issues in respect of this.
- 19 In the first place, Southern Coast Distillers was not an objector to the original application that was made by Tin Shed Distilling. The only objector was Mr Anthony Fitzgerald.
- 20 Allied to this is a concern as to whether it is an appropriate use of the jurisdiction of this Court to be agitating commercial issues far removed from its general function of acting as a licensing authority.

Discussion

- 21 In exercising the civil jurisdiction conferred upon the Court by the Act, this Court is acting as a licensing authority. In exercising that jurisdiction it does not act like a typical civil court resolving disputes according to law between competing parties. In dealing with applications before it its task is to determine whether any relevant statutory criteria have been met and whether in the exercise of the Court's discretion the application should be granted. Licensed premises trade. It is therefore inevitable that the commercial interests of other parties can be affected by the decisions of the Court to grant licences or other applications that are brought before it.
- 22 Notwithstanding this, the Act does not give parties whose commercial interests might be affected by the decisions of the Court, a general right of audience. Such a party can only participate through the exercise of the right of objection provided for by s 77 of the Act, which provides as follows:

General right of objection

- (1) If an application has been advertised under this Part, any person may, by notice in the prescribed form lodged with the licensing authority at least 7 days before the day appointed for the hearing of the application, object to the application.
- (1a) Subsection (1) does not apply to an application for, or in relation to, a small venue licence.

Note-

There is, however, a right to make submissions in relation to such applications—see section 77A.

- (2) Subject to section 28A, a copy of the notice of objection must be served by the objector on the applicant at least 7 days before the day appointed for the hearing of the application.
- (3) However, the licensing authority may (in its absolute discretion) accept an objection even though it is lodged, or served on the applicant, out of time.
- (4) An objection may be made on behalf of an unincorporated association under this section by an agent duly appointed for the purpose.
- (5) An objection may be made on one or more of the following grounds:
 - (a) that the grant of the application would not be consistent with the objects of this Act or would be contrary to this Act in some other way;
 - (b) in the case of an application for the grant or removal of a hotel licence—that the grant of the application is not necessary in order to provide for the needs of the public in the area in which the premises or proposed premises to which the application relates are situated;
 - (c) in the case of an application for the grant or removal of a retail liquor merchant's licence—that the grant of the application is not necessary in order to adequately cater for the public demand for liquor for consumption off licensed premises in the area in which the premises or proposed premises to which the application relates are situated;
 - (d) in the case of an application by a natural person for the grant or transfer of a licence, or for the conversion of a temporary licence into an ordinary licence—that the applicant is of bad reputation or character or is in other respects not a fit and proper person to be licensed;
 - (e) in the case of an application by a trust or corporate entity for the grant or transfer of a licence, or for the conversion of a temporary licence into an ordinary licence—that the applicant is not a fit and proper person to be licensed or that a person who occupies a position of authority in the entity is of bad reputation or character or is in other respects not a fit and proper person to hold such a position in an entity that holds a licence;
 - (f) in the case of an application for the grant or removal of a licence—that the position, nature or quality of the premises renders them unsuitable to be licensed, or to be licensed under a licence of the kind to which the application relates;

- (g) that if the application were granted-
 - (i) undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises or proposed premises to which the application relates would be likely to result; or
 - (ia) the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises or proposed premises to which the application relates would be likely to be prejudiced; or
 - (ii) the amenity of the locality in which the premises or proposed premises to which the application relates are situated would be adversely affected in some other way.

(6) However-

- (a) the grounds of an objection cannot relate to entertainment that may be provided on the premises or proposed premises without the consent of the licensing authority under section 105 (and any objection relating to such entertainment will, to the extent that it so relates, be taken to be void and of no effect); and
- (b) the licensing authority must, in respect of the operation of this section, disregard any entertainment that may be provided on the premises without the consent of the licensing authority under section 105.

23 Although a commercial interest will often be the motivating factor behind a party's participation in proceedings before this Court opposing the grant of an application, an objector is limited to species of objections provided for by this provision. It is also notable that s 53(1) of the Act expressly forbids that Court from exercising its discretion to refuse an application because of concerns about the economic effect on other licensees in the locality affected by the application.

24 It follows that Mr Cooper can only participate in these proceedings through an objection. Strictly speaking unless and until he files a notice of objection and secures an extension of time within which to lodge the notice, he has no standing. He has made no such application.

25 Mindful, however, that under s 23 of the Act, this Court is expected to act without undue formality, I am prepared to deal with the matter as if such an application was lodged.

Consideration

- 26 The only conceivable ground that Mr Cooper could rely upon in support of an objection would be s 77(4)(f). It is arguable that if there has been a breach of the conditions of the licence or proof of sharp dealings these matters might support a finding that that a person who occupies a position of authority in the entity seeking a licence is of bad reputation or character or is in other respects not a fit and proper person to hold such a position in an entity that holds a licence.
- 27 It can be seen that the Act provides that the notice of objection must be lodged at least 7 days before the day appointed for the hearing of the application. That date has long since passed. Although the Court has to power to extend time, an extension is not there for the asking. Whilst the power is unfettered, relevant factors include the length of the delay, the explanation for the delay and the relative prejudice to the parties if the extension succeeds or fails, and where the interests of justice lie.
- 28 In this case the objection is many years late. I suppose it might be inferred that the liquidator only became aware of the potential need to object, once he delved into the records of Southern Coast Distillers. But it is a very late application.
- 29 As for prejudice, the only prejudice that the liquidator will suffer if the application is refused, is the inability to use the objection to lever out of Tin Shed Distilling the information that he seeks. It is reasonable to infer that the liquidator has no real interest in the fitness and propriety of Messrs Orlow and Schmidt, other than to achieve that purpose.
- 30 There are proceedings pending in the Supreme Court, through which Mr Cooper is seeking relief against Tin Shed Distilling. In other words, Mr Cooper will not be denied the opportunity to pursue matters against Tin Shed Distilling, if the extension of time is not granted.
- 31 And in terms of the interests of justice generally, there is this Court's very real concern that its processes are being invoked for a collateral purpose. In respect of this, it is sufficient to refer to the passage in the judgment of Lord Evershed MR in *In re Major*, where he said:

...that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.²

² (1955) Ch 600 at 623-624.

- 32 This passage was expressly approved of in the High Court by Mason CJ, Dawson, Toohey, and McHugh JJ in *Williams v Spautz*.³
- 33 The background facts underpinning the within application seem to have very much to do with a commercial dispute between the liquidator of Southern Coast Distillers and Tin Shed Distilling and very little to do with the exercise of this Court's jurisdiction as a licensing authority.

Conclusion

- 34 In all the circumstances, I am not persuaded to exercise the Court's discretion to grant Mr Cooper an extension of time within which to lodge an objection to Tin Shed Distilling's application.
- 35 The application for an extension of time within which to lodge the objection is refused. It follows that Mr Cooper has no standing and the Application for Directions that he has lodged must be dismissed. If the parties wish to be heard on the question of costs, I grant them liberty to apply.

³ [1992] HCA 34 at [39]; (1992) 174 CLR 509 at 528.