

**LICENSING COURT OF SOUTH AUSTRALIA**

TIN SHED DISTILLING CO

**JURISDICTION:** Application for Directions seeking a stay

**FILE NO:** 6215 of 2013

**HEARING DATE:** 26 February 2014

**JUDGMENT OF:** His Honour Judge B Gilchrist

**DELIVERED ON:** 27 February 2014

**CATCHWORDS**

*Application for an adjournment and stay of an application for a licence in which the issue is the fitness and propriety of the applicant pending resolution of Supreme Court proceedings that will concern similar facts - Relevant principles to be applied - Application refused - Oral application for summary judgment - Not entertained - If pursued should be done through an application for directions with a supporting affidavit - Rule 33 Licensing Court Rules 2012 - Ss 23 and 39A Liquor Licensing Act 1997.*

*McMahon v Gould* (1982) 7 ACLR 202

*Crown & Sceptre Hotel* [2013] SALC 9

*General Steel Industries Inc v Commission of the Railways (NSW)* (1964) 112 CLR 125

**REPRESENTATION:**

Counsel:

Applicant: Mr P Adams

Respondent: Mr J Firth

Solicitors:

Applicant: Norman Waterhouse

Respondent: Starke Lawyers

- 1 This is an application for a stay of proceedings. It is made pursuant to Rule 33 of the *Licensing Court Rules 2012*. That rule grants the Court the power to stay a proceeding if the justice of the case so requires.

### **Background**

- 2 Tin Shed Distilling Company Pty Ltd has made an application for a direct sales licence pursuant to s 39A of the *Liquor Licensing Act 1997*. The application identifies Mr Victor Orlow, Ms Rosemary Harvey and Salt Water (SA) Pty Ltd as its shareholders. Salt Water is owned by Mr Ian Schmidt.
- 3 Mr Anthony Fitzgerald lodged a notice of objection to the application. Under cover of a letter from his solicitors dated 18 October 2013 he indicated that the basis of his objection was his contention that Tin Shed is not a fit and proper person to be licensed.
- 4 Through further correspondence from his solicitors (letter dated 25 October 2013) Mr Fitzgerald alleges that he formerly had a commercial relationship with Messrs Orlow and Schmidt and that they have not acted fairly and indeed have been in breach of their legal duties and as a result have caused financial detriment to he and his wife. It is this alleged impropriety that underpins Mr Fitzgerald's objection.
- 5 In accordance with the Act, the Commissioner for Liquor and Gambling attempted to negotiate a resolution and having failed to do so the matter was referred to the Court.
- 6 The application for the licence is listed for hearing in this Court on 5 March 2014.
- 7 On 18 February 2014 Mr Fitzgerald filed an application for directions seeking an adjournment of that hearing and a stay of the within proceedings pending the determination of proceedings in another court.
- 8 The application is supported by an affidavit from Mr Fitzgerald's solicitor. The affidavit annexes a copy of a Statement of Claim filed in the Supreme Court of South Australia.
- 9 The Statement of Claim identifies Tin Shed, Mr Schmidt and his wife, Mr Orlow and Ms Harvey as defendants. Amongst other things it alleges that they collectively or individually caused Mr Fitzgerald and others loss and damage as a result of their breaches of fiduciary duties; unconscionable conduct; oppression of minority shareholders; and their knowing engagement in a dishonest and fraudulent design and breach of trust.

- 10 The affidavit asserts that the proceedings in the Supreme Court concern matters which are directly relevant and which cross over with matters that are the subject of Mr Fitzgerald's objection. It contends that a stay is necessary to avoid the re-litigation of issues that concern the same subject matter being tried in a superior court; the unnecessary expense associated to both parties conducting two trials that involve the same evidence and issues; and to avoid the necessity for the obtaining of an injunction from the Supreme Court preventing Tin Shed from trading.
- 11 The respondents oppose the application. They contend that the objection is a ruse and that at its heart is no more than a commercial dispute between former business colleagues that should be sorted out in an appropriate forum, not this Court. They contend that the objection should be dismissed.

### **The relevant legal principles**

- 12 In *McMahon v Gould*, Wooten J summarised the principles that should guide applications for a stay based upon the fact of concurrent proceedings. He wrote:
  - “(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court;
  - (b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds;
  - (c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with;
  - (d) Neither an accused nor the Crown are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
  - (e) The court's task is one of 'the balancing of justice between the parties', taking account of all relevant factors;
  - (f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors;
  - (g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's 'right of silence', and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding. I return to this subject below;

- (h) However, the so-called ‘right of silence’ does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules *merely* because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding;
- (i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings;
- (j) In this regard factors which may be relevant include:
  - (i) the possibility of publicity that might reach and influence jurors in the civil proceedings;
  - (ii) the proximity of the criminal hearing;
  - (iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;
  - (iv) the burden on the defendant of preparing for both sets of proceedings concurrently;
  - (v) whether the defendant has already disclosed his defence to the allegations;
  - (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him;
- (k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant’s obligation to the plaintiff;
- (l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed.<sup>1</sup>” (footnotes omitted)

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<sup>1</sup> (1982) 7 ACLR 202 at 206

- 13 Although that case concerned related civil and criminal proceedings and issues such as the right to silence and other matters pertinent to a criminal trial have no role to play, I see no reason why the principles identified should not provide a general guide as to how I should deal with the application before me.

### **Consideration**

- 14 Pursuant to s 23 of the Act, this Court is required to act without undue formality. Because it regularly deals with commercial interests that may involve considerable investment it can be expected to deal with matters expeditiously. I am entitled to know that it might be over a year before the Supreme Court proceedings will be heard by that court. In conformity with the usual practice of this Court the matter was given a date for trial as soon as one was available. As I said earlier, it is presently listed for hearing on 5 March 2014. It would be a grave thing to deprive Tin Shed of the opportunity to have the matter heard and dealt with at that time.
- 15 It is of no moment that to refuse this application the plaintiffs in the Supreme Court action might be forced to apply to that court for an injunction. If that is what is underpinning this application (and I make no finding that it is) then the application should be dismissed for that reason alone. For the reasons explained in *Crown & Sceptre Hotel* the pursuit of an application for that purpose would be an abuse of process.<sup>2</sup> It is inappropriate for the processes of this Court to be used for the purpose of securing a collateral benefit in proceedings in another court.
- 16 Mr Adams, counsel for Mr Fitzgerald, argued that the allegations contained in the Statement of Claim were so serious that they justified the granting of the stay. He referred me to a case in which this Court deferred accreditation pending the resolution of criminal charges and argued that by parity of reasoning the same should apply here.
- 17 There is a significant difference between criminal proceedings, which are between the State and the alleged offending entity, and civil proceedings between private entities. It is a fundamental principle that reflects the notion that “Crown counsel is concerned with justice first, justice second and conviction a very bad third”<sup>3</sup> that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured. Thus the fact that criminal charges are proceeding against a person seeking accreditation under the Act is of some significance. The Court is entitled to assume that an independent body, i.e. the prosecution, which is obliged to act in accordance with the principles applicable to the model

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<sup>2</sup> [2013] SALC 9.

<sup>3</sup> (1955) Crim LR 739 at 746.

litigant, has formed the reasonable opinion based upon the evidence available to it that there is a reasonable prospect of a conviction being secured. Armed with that information this Court, whose focus is the public interest, may, in connection with serious criminal charges, consider that the public interest would be better served by deferring consideration of accreditation until after the prosecution has concluded.

- 18 In contrast to this allegations made in private litigation create no presumptions. Without more they are mere allegations.
- 19 Mr Adams attempted to elevate the allegations made in the Statement of Claim to more than mere allegations by arguing that it was of significance that the allegations were also contained in the affidavit sworn by Mr Fitzgerald's solicitor. The flaw in that submission is that the affidavit does not purport to reflect the solicitor's own allegations. In paragraph three of the affidavit the solicitor states: "I was instructed ...on behalf of the objector...etc". Thus the affidavit does no more than reflect what the solicitor's instructions are.
- 20 In my view the only matter in support of the application for a stay is the fact of the burden of conducting two sets of proceedings in two separate courts.
- 21 But that is a burden that both parties will share and if Tin Shed is content to assume that burden I think it is entitled to have its day in this Court as scheduled.
- 22 As for Tin Shed's application, which is in effect an application for summary judgment, I note that it was made orally. If it is to be pursued it should be done by an application for directions and supporting affidavit.
- 23 I am not to be understood as encouraging it to take that course. If the claimed impropriety of Tin Shed and others is established it might provide grounds for finding that it is not a fit and proper person to be licensed. The bar in establishing summary relief is high.<sup>4</sup>
- 24 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.

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<sup>4</sup> See for example: *General Steel Industries Inc v Commission of the Railways* (NSW) (1964) 112 CLR 125.

- 25 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.
- 26 For now it is sufficient to indicate that the application for a stay and adjournment is refused as is the oral application for summary relief.