

## Director-General of Licensing

### Decision Notice

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<b>Matter:</b>	Review of Delegate Decision – Refusal to transfer liquor licence
<b>Applicant:</b>	<b>The Bark Hut Inn</b> Arnhem Highway Annaburoo NT
<b>Legislation:</b>	Section 43 of the <i>Liquor Act</i> and Part 3 of the <i>Licensing (Director-General) Act</i>
<b>Decision of:</b>	Director-General of Licensing
<b>Date of Decision:</b>	27 July 2017

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#### BACKGROUND

- 1) By application dated 8 February 2017 Colin E Fink and Jaye L Fink, in partnership, applied pursuant to section 41 of the *Liquor Act* (the Act) for the transfer of the liquor licence for the Bark Hut Inn (the Premises). That liquor licence is currently held by The Bark Hut Inn Pty Ltd (TBHI) with the nominee/manager being Mr Andrew Armstrong who is also a director of the company.
- 2) Mr and Ms Fink are the registered proprietors of the Premises and TBHI conducted business at the Premises under a lease between the parties that expired on 1 December 2016 (the Lease). The Lease was not renewed after that date and TBHI subsequently relinquished possession of the Premises to Mr and Ms Fink following the demise of the Lease.
- 3) Following the demise of the Lease Mr Armstrong, on behalf of TBHI, refused to consent to the transfer of the liquor licence to Mr and Ms Fink and advised Licensing NT of his intention to conduct business under the liquor licence at alternative premises. However, to date Mr Armstrong has not identified any alternative premises nor has he lodged an application for substitution of the liquor licence to new premises.
- 4) In the application for the transfer of the liquor licence Mr and Ms Fink acknowledged that the licensee does not consent to the transfer and sought to rely on the power of attorney contained in the Lease which, they submit, authorises them in their capacity as landlords under the Lease, to act on behalf of and in the name of the licensee with respect to matters relating to the liquor licence.
- 5) TBHI has held the liquor licence under which it conducted business at the Premises since 28 October 2009, following a transfer of the liquor licence from the former licensee Spicedew Pty Ltd. On 29 October 2009 Mr and Ms Fink executed a lease assignment consent agreement (the Consent) authorising the assignment of the Lease over the Premises from Spicedew Pty Ltd to TBHI.
- 6) By letter dated 13 April 2017 Mr Tony Morgan of HWL Ebsworth Lawyers, legal representative for TBHI, advised Licensing NT that the dispute between his client and Mr and Ms Fink was ongoing and that the parties continue to engage in negotiations to attempt to resolve the dispute. He also confirmed that TBHI was in the process of identifying suitable alternative premises from which to carry on its business and that an application for substitution of the

licence to new premises may be lodged at a future date. Mr Morgan confirmed that TBHI, as licensee, does not consent to the transfer of the licence to Mr and Mrs Fink.

- 7) By decision dated 19 May 2017 a delegate of the Director-General of Licensing refused, pursuant to section 43(1)(b)(ii) of the Act, to authorise the transfer of the liquor licence to Mr and Ms Fink. In her reasons for decision the delegate noted that whilst not presently conducting business under the liquor licence the licensee, TBHI, had communicated an intention to apply to substitute the liquor licence to alternative premises, noting that no such application had been lodged at the time of publication of the decision.
- 8) In reaching her decision the delegate made the following observations at paragraphs 27 and 28 of the Decision Notice:
  27. *Unresolved commercial disputes between the applicant and the licensee arising from the previous operation of the licence which was subject to the lease agreement existing between the two is not a matter for determination in this application or, pursuant to the Act.*
  28. *I am not persuaded that the transfer of the liquor licence in the present circumstances should be authorised; that is, in the absence of the consent of the current licensee, and where the applicant is not precluded from applying for a licence in accordance with section 24 of the Act.*

## CURRENT SITUATION

- 9) By application dated 13 June 2017, Mr Marcus Spazzapan of Ward Keller Lawyers applied, on behalf of Mr and Ms Fink for a review by the Director-General of the delegate's decision. In support of that application Mr Spazzapan made the following submissions:
  - The Applicants are the registered owners of the Premises and liquor licence number 81200994 attaches to the Premises. In 2003 the Applicants leased the Premises and facilitated the transfer of the liquor licence to Spicedew Pty Ltd which was evidenced by the lease agreement registered with the Land Titles Office. In 2009 Spicedew Pty Ltd assigned the lease and facilitated the transfer of the liquor licence to TBHI with the consent of the lessors. In furtherance of the said consent TBHI its directors and guarantors executed the Consent.
  - TBHI pursuant to clause 5 (Power of Attorney) of the Consent irrevocably appoints the lessors to be the lawful attorneys of TBHI generally to do execute and perform any act, deed, matter or thing relative to the demised premises as fully and effectually as TBHI could do, in the event the Lease was determined by the lessor.
  - The Lease was determined by the Lessors/Applicants on or about 1/12/16.
  - The Applicants pursuant to the irrevocable power of attorney granted to them by TBHI made application as licensee of the liquor licence pursuant to the power of attorney to transfer the liquor licence to itself as it was entitled to do pursuant to clause 14 of the Lease and clause 5 of the Consent.
  - Clause 14 of the Lease sets out the rights duties and obligations of the lessee TBHI in relation to the liquor licence between TBHI and the Applicants.
  - The fact that the Applicant is not precluded from making an application for a liquor licence pursuant to section 24 of the *Liquor Act* is not a relevant consideration.

## CONSIDERATION OF THE ISSUES

- 10) The primary issue to be resolved in the context of this review of the delegate's decision is whether an enduring power of attorney that existed under both the Lease and the Consent can continue to have effect after the termination or expiry of the Lease. Mr and Mrs Fink, the lessor and donee of the power of attorney, have purported to exercise the power of attorney

contained in the Lease to apply to have the liquor licence for the Premises transferred from TBHI to themselves. TBHI does not consent to the transfer and has advised of the intention to apply to substitute the liquor licence to alternative premises.

- 11) In executing the application to transfer the liquor licence on behalf of TBHI, Mr and Ms Fink rely on the power of attorney contained in clause 14.4 of the Lease agreement which provides:

**14.4 Lessee's Attorney**

*In consideration of the Lessor entering into these presents, the Lessee irrevocably appoints the Lessor and each of the officers of the Lessor (if the Lessor is a corporate body) jointly and each of them separately the attorney and attorneys of the Lessee for and on behalf of and in the name of the Lessee to do all acts, matters and things:*

- 14.4.1 necessary to keep a valid Licence in force in respect of the Premises;*
- 14.4.2 required to be done pursuant to the Liquor Act or by the Commission in respect of the Licence;*
- 14.4.3 required to cause the Licence to be transferred to any person (including the Lessor);*
- 14.4.4 necessary to renew the licence;*
- 14.4.5 required in order to appear personally or by counsel or lawyers before the Commission or any court having jurisdiction in respect of any hearing or proceeding affecting the licence.*

- 12) In addition, the Consent also includes a power of attorney clause at clause 5 which provides:

**5. POWER OF ATTORNEY**

*TBH irrevocably appoints the Lessor and its solicitors in the Northern Territory of Australia and, if the Lessor is a Company, its secretary and each of its directors for the time being and their and each of their several attorneys and all duly authorised officers of the Lessor, jointly and in each of them severally to be the true and lawful attorney and attorneys of TBH on behalf of and in the name of and as the act and deed of TBH:*

- 5.1 to execute a surrender or assignment of the Lease and to do all such things and sign all such documents as may be necessary to obtain the registration thereof;*
- 5.2 to appoint from time to time a substitute or substitutes and to revoke at pleasure such appointment or appointments; and*
- 5.3 generally to do, execute and perform any act, deed, matter, or thing relative to the Demised Premises as fully and effectually as TBH could do:*

*PROVIDED THAT these powers shall not be exercised until the lease is determined by the Lessor (sufficient proof whereof shall be a statutory declaration of the attorney or attorneys exercising the power) and TBH covenants to ratify and confirm all such acts, deeds, matters and things of the attorney or attorneys or any substitute or substitutes and to keep the Lessor indemnified for all fees, costs, charges and expenses in any way incurred or payable by the Lessor or attorney or attorneys or substitute or substitutes in the exercise of these powers or as a result of the default of TBH under the lease or under this Deed.*

- 13) The terms and conditions included in the Lease agreement constitute a contract between the lessor and the lessee. The Lease also creates a "privity of estate" between the lessor and the lessee. The contractual obligations between the parties may continue in effect even though the estate in the land which is the subject of the agreement comes to an end. That is, whilst the Lease may be terminated or expire, the contract may remain in force with some of the terms still to be performed.

- 14) Also, where an assignment of a lease occurs, as in the present case, a distinction may need to be drawn between covenants that run with the land and those which are purely personal. Covenants that run with the land are deemed to be assigned with the lease itself.
- 15) The Bark Hut Inn at all times operated with a liquor licence attached to it. Lawyers representing Mr and Mrs Fink have advised that the Lease was terminated on 1 December 2016 and the lessee is no longer in possession of the Premises. The Lease created an estate in favour of the lessee in the Premises. The Lease included personal covenants in favour of the lessor by the lessee and, in addition, personal covenants in favour of the lessor by named guarantors, who were also parties to the Lease but who did not acquire any estate or interest in the Premises.
- 16) The Lease included terms and conditions which constituted personal covenants, and the nature of those terms and conditions are such that their continued operation, even after the termination of the Lease, was clearly the intention of the parties.
- 17) By a Deed dated 29 October 2009, the Consent was agreed between the original parties to the lease, including the guarantor, the assignees and new guarantors. Pursuant to the Consent, the assignor and outgoing guarantor were released from the covenants contained in Lease. The new lessee, TBHI, covenanted with the lessor, Mr and Mrs Fink:

*"that TBH will carry out, observe, perform, fulfil, keep and be bound by all the covenants, conditions and restrictions whether positive or negative and whether running with the land or otherwise expressed or implied in the Lease and on the part of the lessee thereunder to be carried out... and TBH acknowledges that the covenants, conditions and restrictions contained in the Lease apply in all respects to its lease of the Premises from the Lessor."*
- 18) The Lease contained a number of clauses relevant to the liquor licence. Firstly, it specified the Lease Purpose of the Premises as being *"the use for which the Premises are leased being Wayside Inn, Caravan Park Tourist Centre and Tourist operations and associated activities"*. A further clause provided that if the Premises were at any time rendered unfit for occupation or use, then the rent would be suspended and cease to be payable for so long as the premises were unfit for occupation or use. I note that if the Premises, for whatever reason, ceased to have a Roadside Inn liquor licence it is likely that the Premises would be unfit for use for at least part of the Lease Purpose. The Lease included a further covenant by the lessee not to use or permit the premises to be used for a purpose other than the Lease Purpose without the prior consent of the lessor.
- 19) Of particular significance in respect of this review, the Lease contained provisions specifically relating to the liquor licence. The Lease was expressed to be subject to and conditional upon *"and shall be of no effect unless and until"* a transfer of the existing liquor licence to the lessee, TBHI. It is apparent that the Lease contemplated two fundamental facts – firstly, that the Premises had a current liquor licence applicable to them and, secondly, that until such time as the lessee received the benefit of the liquor licence, the Lease would not come into effect. Those provisions evidence the clear intention of the parties that the Premises should come with a liquor licence and without it there was no Lease.
- 20) The lessee covenanted with the lessor that it would at all times comply with, observe and perform in all respects any obligation on the part of the lessee under the *Liquor Act* with respect to the liquor licence. That covenant provides a further, clear indication of the intention of the parties that the liquor licence should attach to the Premises at all times and that the lessee should do nothing to put at risk the continuation of the liquor licence for the benefit of the Premises.
- 21) Similarly, by Clause 14.3.2 of the Lease the lessee was required to keep the licence renewed so that at all times during the term of the Lease, the lessee would hold a liquor licence in respect of the Premises and the lessee was required to immediately notify the lessor of any material

communication from the "Commission"<sup>1</sup> and authorised the lessor to appear before the "Commission" itself should it wish to do so.

- 22) These covenants evince a clear intention of the parties that the lessor retained an interest in the liquor licence and may take steps necessary to protect and preserve the licence's continued operation in respect of the Premises. Although the interest could not be proprietary, it was nevertheless a contractual interest. The grant by the TBHI of a power of attorney in respect of the liquor licence in favour of the Mr and Mrs Fink under clause 14.4 of the Lease further reinforces the continuing interest of the lessor in the protection and preservation of the liquor licence for the benefit of the Premises.
- 23) By the terms of the Lease the parties agreed that any breach of the clauses in respect of the liquor licence would be a breach of an essential term of the Lease and a repudiation of the Lease by the lessee. Once again such a provision reflects the importance of the continuation of the liquor licence for the Premises and reflects the lessors' continued interest in the liquor licence, notwithstanding that it was held in the name of the lessee alone.
- 24) Two further terms of the Lease are fundamental to the proper determination of this review of the delegate's decision. Firstly, clauses 14.6 and 14.7 of the Lease agreement provided alternative mechanisms by which the lessor could enforce a transfer of the liquor licence from the lessee to the lessor. By clause 14.6, if the lessee was in breach of an essential term of the Lease, the lessor could demand the delivery of a blank transfer of the liquor licence. This again evinces an intention of the parties that in the event that the Lease were to be terminated, the licence should revert to the lessor or its nominee, including a future lessee. By clause 14.7, the lessee was actually required to provide a liquor licence transfer form at the commencement of the Lease, to be held in escrow by the lessor but exercisable upon breach of an essential term or upon expiry, termination or surrender of the Lease.
- 25) Secondly, by clause 14.3.5 of the Lease the lessee was restricted from transferring, assigning or parting in any way with the liquor licence and from applying to the "Registrar of Licensing"<sup>2</sup> for the transfer of the licence without the prior consent of the lessor. In effect, this prevented the lessee from ever exercising any right to apply for substitution of the liquor licence to alternative premises.
- 26) Under the provisions of the Act dealing with transfer of licences, the only application in which a current licensee makes an application is one for substitution of premises. Applications in respect of the transfer of a liquor licence to another person are made by the prospective transferee. Clause 14.3.5(a) of the Lease prohibits the lessee, TBHI, from transferring the liquor licence to another party. As a result, to give clause 14.3.5(b) any work to do, it must be construed as a reference to an application for substitution of premises.
- 27) As noted above, the lawyers acting for Mr and Mrs Fink have stated that the Lease was terminated by the lessor on 1 December 2016. It is also apparent from advice provided to Licensing NT by the parties that TBHI no longer occupies the Premises. The lawyers representing TBHI have not disputed that the Lease has been terminated and it is material to note that the lessor, who would otherwise be the donee of the power of attorney, is the party which asserts that the Lease has come to an end.
- 28) In my view the power of attorney in favour of the lessor survives the termination of the Lease agreement for two reasons. Firstly, the express terms of the Lease contemplate that the parties would continue to have obligations and powers in relation to the liquor licence even

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<sup>1</sup> The reference to the (Licensing) Commission now refers to the Director-General of Licensing following the repeal of the *Northern Territory Licensing Commission Act* in 2015

<sup>2</sup> Again, the reference to the "Registrar of Licensing" is now to be read as a reference to the Director-General of Licensing following the creation of that statutory position in 2015.

after termination. This is evidenced by the express words of clause 14.7.2 of the Lease but is also the plain effect of the combination of subclauses relating to the liquor licence.

- 29) Secondly, the interest of the donee lessor is its interest in the liquor licence, which is reflected in the specified terms of the Lease referred to above. That interest in the licence is what is protected by the power of attorney. In those circumstances, as long as the licence is in existence, then the power remains in force and is irrevocable<sup>3</sup>.
- 30) In those circumstances, it is my view that the power of attorney is still capable of being exercised by the lessor. My view in that regard is reinforced by the terms of the Lease which make it clear that:
- The parties intended that the liquor licence should remain for the benefit of the Premises after the expiry of the Lease (unless they agreed in writing to a different course); and
  - The lessee could not at any time (including after expiry of the Lease) apply to substitute the licence to alternative premises.
- 31) Accordingly, in my view, the application for transfer of the liquor licence is one which the Director-General may approve on the basis that the authority of the owner of the Premises to apply for the transfer of the liquor licence was provided by the licence holder and is irrevocable. As a consequence the Director-General is entitled to take into account that under the terms of the Lease the lessee could not apply for a substitution of premises without the consent of the lessor, which consent is not given. As a consequence the lessee's stated basis for resisting or opposing the transfer the liquor licence is not available to it in any event.
- 32) Also of relevance, under the terms of the Lease the lessee provided numerous covenants to the lessor intended to ensure that the licence would be transferred to the lessor or its nominee on the termination or expiry of the Lease, as has occurred in this instance.

## DECISION

- 33) On the basis of the matters set out above, and in accordance with section 14(2)(c) of the *Licensing (Director-General) Act*, I have determined to set aside the decision of the delegate dated 19 May 2017 to refuse to transfer the liquor licence for the Bark Hut Inn from TBHI to Mr and Mrs Fink. The decision of the delegate to refuse to transfer the liquor licence pursuant to section 43 of the Act was contrary to the terms of the Lease and, in particular, the exercise of the power of attorney contained within the Lease by the lessor. On the basis of the reasons set out above the decision of the delegate must therefore be overturned.
- 34) As a consequence I intend to authorise the transfer of liquor licence number 81200994 which is attached to the Premises from TBHI to Mr and Mrs Fink as applied for under the power of attorney.

## REVIEW OF DECISION

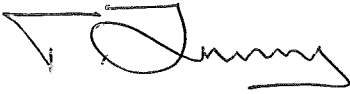
- 35) The Director-General has delegated her power to review the delegate's decision to me pursuant to section 7 of the *Licensing (Director-General) Act*. As a consequence of that delegation the within decision is a decision of the Director-General and not a delegate decision as that term is defined in the *Licensing (Director-General) Act*.
- 36) Section 120ZA of the *Liquor Act* provides that a decision of the Director-General, as specified in the Schedule to the Act, is a reviewable decision. A decision by the Director-General to refuse an application to transfer a liquor licence pursuant to section 43(b)(ii) of the Act is specified in the Schedule and is therefore a reviewable decision. However, a decision by the Director-

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<sup>3</sup> *Slatter v Commissioner for Railways NSW* (1931) 45 CLR 68; *R v Victorian Licensing Court; ex parte Beggs* [1964] VR 48

General to authorise the transfer of a liquor licence pursuant to section 43(1)(b)(i) of the Act is not specified in the Schedule to the Act and is therefore not a reviewable decision.

- 37) As a consequence this decision is not a decision for which a review may sought before the NT Civil and Administrative Tribunal.



**Philip Timney**

Under delegation from  
the Director-General of Licensing

27 July 2017