

[2015] NZSHD 4

LASDP Number: 13 / 007655

IN THE MATTER

of the Secondhand Dealers and Pawnbrokers Act 2004 and the Commissions of Inquiry Act 1908

AND

IN THE MATTER

of an Application for Costs by **DAVID BERRY** of Whanganui in respect of a Complaint by the Police pursuant to section 29 of the Secondhand Dealers and Pawnbrokers Act 2004.

**BEFORE THE LICENSING AUTHORITY OF
SECONDHAND DEALERS AND PAWNBROKERS**

Decision

Introduction

[1] Mr DAVID BERRY of Whanganui (“**the licence holder**”) presently holds an Individual Licence (“**the licence**”) issued on 10 May 2013 under ss.8, 9 and 15 of the Secondhand Dealers and Pawnbrokers Act 2004 (“**the Act**”). The licence expires on 10 May 2018.

[2] On 11 July 2014 the Whanganui Police filed a Complaint against the licence holder with the Licensing Authority of Secondhand Dealers and Pawnbrokers (“**the Authority**”) under s.29 of the Act.

[3] The Complaint made certain allegations in respect of the licence holder and his business known as Wanganui Money Lenders, and in respect of the related actions of one of his employees.

[4] A copy of the Complaint was sent to the licence holder who responded on 30 July 2014. As he was entitled to do, the licence holder requested a ‘hearing in person’ (“**hearing**”) of the Complaint before the Authority pursuant to s.26 of the Act.¹

[5] On the same day the Authority advised the Police that it was preferable that any criminal charges in relation to their allegations should be filed in the District Court and finalised, before the Complaint was taken to a hearing.

¹ Although s.26 of the Act refers specifically to Police ‘Objections’ this section also covers Police ‘Complaints’ by virtue of s.29(2) of the Act

[6] Subsequently the Police notified the Authority that the employee referred to above had admitted a charge of Receiving Stolen Property (Crimes Act 1961) in the District Court and had been dealt with by way of Police Diversion and a Formal Warning.

[7] The licence holder himself was however not charged with any criminal offence.

[8] A date for the hearing of the Complaint was then set down to take place at the Whanganui District Court on 29 January 2015, and the parties were formally advised of this on 29 November 2014.

[9] The licence holder engaged Mr J H Waugh (barrister) of Whanganui to represent him at the hearing.

[10] The Authority travelled from Auckland to Whanganui for the hearing on the morning of 29 January 2015. The hearing was scheduled to commence at 10.00 am.

[11] Prior to the hearing commencing a Police prosecutor (Sergeant Butler) and Mr Waugh asked to see the Authority in Chambers. They advised the Authority that there would be an unopposed application by the Police to withdraw the Complaint and that the Police would instead be filing a charge under s.45 of the Act (which relates to dealers' obligations under the Act in respect to their records).

[12] The Complaint was then formally withdrawn by the Police before the hearing commenced.

[13] Mr Waugh advised the Authority that he would likely be filing an application for costs, which he did on 18 February 2015.

[14] Both parties have now filed written submissions in respect of costs.

Relevant legislation

[15] Section 27 of the Act imports sections 4 – 12 of the Commissions of Inquiry Act 1908 (“**COI ACT**”) for the purposes of a hearing into a Police ‘Objection’ or ‘Complaint’.²

[16] Section 11 of the COI Act provides the Authority with the power to award costs, and s.12 envisages how such an award would be enforced.

[17] These provisions remain in force in relation to the Authority, despite the enactment of the Inquiries Act 2013.³

Submissions on behalf of the Licence Holder

[a] There is clear jurisdiction under the COI Act which enables the Authority to award costs against the Police.

² Although s.27 of the Act refers specifically to Police ‘Objections’ this section also covers Police ‘Complaints’ by virtue of s.29(2) of the Act

³ See s.37 of the COI Act.

- [b] The Authority is a civil commission of enquiry and the District Court Rules 2014 apply, including Rules 14.2 and 15.20 which relate to costs where matters are discontinued or withdrawn.
- [c] It is clear from earlier decisions of the Authority that the Police continue to make Complaints against licence holders in circumstances where it is unlikely the Complaint will be upheld, and unlikely the licence holder would lose their licence.
- [d] An awards of costs in this case will likely lead to a reduction in the Police raising unmeritorious Complaints rather than following the criminal prosecution route.
- [e] Even if the proposed Police evidence in this case had been accepted it would fall far short of what was required to uphold the Complaint and cancel the licence holder's licence.
- [f] An order for the payment of counsel's costs amounting to \$2,000.00 (not including GST) against the Commissioner of Police is sought.

Submissions on Behalf of the Police

- [a] The hearing before the Authority was criminal rather than civil in nature; therefore the law governing costs in criminal cases is to be preferred.
- [b] The Police have no standing in the civil jurisdiction, so the issue of costs should be decided in the criminal jurisdiction.
- [c] At all times the Police acted in good faith and had a reasonable expectation that the Complaint would be upheld.
- [d] The Police brought the Complaint in the public interest and should therefore be treated more tenderly than a plaintiff in civil proceedings who brings an action for his own ends and to benefit himself. *R v Geiringer* is quoted.⁴
- [e] There is currently no Practice Note available from the Authority which would assist Police officers who are considering filing Complaints. Until such a Practice Note is available the award of costs against the Police should be rare.⁵

Discussion

[18] The parties are unaware of any previous cases involving an application for costs in respect of Complaints made by the Police under the Act.

[19] Although there may have been an oral decision on the issue of costs in the past by the former Authority and where costs were refused, there appears to be no available written record.

⁴ *R v Geiringer* (T.33/76, 20/8.76, Wellington Registry)

⁵ It is proposed that a power which will enable the Authority to issue a Practice Note will be included in forthcoming legislation. In the meantime the Authority is distributing Guidelines to the Police.

[20] It is clear however that it is within the powers of the Authority to award costs under the COI Act by virtue of s.27 of the Act.

[21] The discretion to award the whole or any portion of the costs of inquiry appears to be very broad.

[22] The District Court Rules 2014 while carrying persuasive weight and providing some guidance, are not binding upon the Authority.

[23] A Complaint hearing before the Authority under sections 26 and 27 of the Act is not a criminal trial.

[24] Whereas the hearing might have the outward appearance of a criminal prosecution before a District Court Judge, with a Police prosecutor and defence counsel representing the parties, the hearing is governed by the COI Act. The licence holder is not in danger of a criminal conviction being entered, and the issue of costs is specifically addressed in sections 11 and 12 of the COI ACT.

[25] The Police have standing at a hearing before the Authority by virtue of s.27(2) of the Act.

(2) *Without limiting subsection (1), at the hearing before the Licensing Authority,-*

(a) *the Commissioner of Police may be represented by any member of the Police or by counsel; and*

(b) *the applicant may appear in person or be represented by counsel, or both.*

[26] Complaint hearings and Objection hearings before the Authority are not a frequent occurrence. There have been only two in the past 18 months

[27] A hearing can only take place *after* the Police⁶ have filed a Complaint or an Objection, and only *if* the licence/certificate holder or the applicant *requests* a hearing under s.26 of the Act.

[28] Where there is no request for a hearing the Authority makes a decision on the papers on whether to uphold or dismiss a Complaint or Objection.

[29] Most Police Complaints and Objections are dealt with on the papers and without the involvement of a lawyer. Although a majority are not upheld, the Authority does not see the award of costs as being necessary to help reduce the number of Complaints which Mr Waugh describes as unmeritorious.

[30] The Police have duties, responsibilities and obligations in respect of secondhand dealers and pawnbrokers under the Act. Section 3(a) and (b) of the Act describes the purpose of the Act;

⁶ *Only the Police may bring a Complaint or file an Objection.*

(3) Purpose

The purpose of the Act is-

- (a) *to make it harder for criminals to dispose of stolen goods through secondhand dealers and pawnbrokers; and*
- (b) *to make it easier for the police to recover stolen goods and solve property crimes; and*
- (c)

[31] As part of their duties the Police vet all applicants for certificates and licences, and monitor licence and certificate holders.

[32] The Act provides the Police with powers to enforce the provisions of the Act and places obligations on dealers to comply with specific Police requests. Dealers can be prosecuted in the District Court for non-compliance and for other breaches of the Act, or the Police may decide to file an Objection or a Complaint with the Authority.

[33] While it is correct that there is no current official Practice Note issued by the Authority for the guidance of the Police and for licence/certificate holders or applicants, the Authority does not accept this as a valid argument against the award of costs. The Authority notes the following:

- [a] The Authority is not currently empowered to issue a Practice Note. There is however a current legislative proposal which would allow the Authority to regulate its own procedures in due course including the power to issue practice notes.
- [b] In the meantime the Authority is releasing *Guidelines* for the assistance of the Police, applicants for certificates/licences and certificate/licence holders.
- [c] The official Police website contains helpful information on the Complaints and Objections procedures under the Act.
- [d] Some Authority decisions have been posted in the Tribunals section of the Ministry of Justice website.⁷
- [e] Authority decisions can also be found at <http://nzlii.org/>.
- [f] Because of a certain lack of understanding by Police officers on the way Complaints and Objections are dealt with, the Authority now regularly sends relevant copies of recent Authority decisions to the parties when Complaints and Objections are filed. In the present case the parties were sent copies of the Pick-A-Part (Tauranga) Ltd decision.⁸

⁷ Unfortunately this is currently not completely up-to-date.

⁸ *Pick-A-Part (Tauranga) Ltd [2014] NZSHD 11 (LASDP 773034)*

- [g] Police officers who are charged with enforcing or monitoring secondhand dealers and pawnbrokers have access to Police legal advisers and Police prosecutors.
- [h] When preparing a Complaint in future Police officers may find some assistance in the detailed decision of *Beauchamp*⁹ which was dealt with by the Authority on the papers.

[34] In the present case the Police filed copies of briefs, statements and exhibits in respect of six witnesses in advance of the hearing as instructed. It seems also that the three civilian witnesses were appropriately summonsed pursuant to the COI Act. There were in addition three Police witnesses listed.

[35] Mr Waugh has however raised the issue of the sufficiency of the Police evidence and has suggested that, even if accepted, it falls far short of what was required to uphold a Complaint.

[36] Although not called upon to hear or assess the Police evidence or that of the licence holder (as filed in writing by Mr Waugh), or any submissions by the parties at the hearing, the Authority cannot say that this is a case where the Complaint was unmeritorious or that it had no prospect of success.

[37] On paper at least, the evidence of two of the civilian witnesses, who have admitted criminal behaviour, could be seen as implicating the licence holder to an extent in their actions.

[38] At the same time the Authority accepts the Police submission that the Police were acting in good faith, and that on the evidence available to the Police the Complaint was properly brought before the Authority for determination.

[39] Once Prosecutions Sergeant Butler received the file (at a very late stage) it seems that a prompt decision was made to withdraw the Complaint. This avoided the licence holder incurring further costs associated with a defended hearing.

[40] However there was no explanation from the Police as to why the Complaint was withdrawn other than the Complaint would be replaced with a criminal prosecution. Failure to provide an adequate explanation may count against the Police when an award of costs is being considered in the future.

Decision

[41] As far as the Authority can assess the situation there has been no previous award of costs in respect of a hearing set down pursuant to sections 26 and 27 of the Act.

[42] In respect of the District Court Rules 2014 the Authority is of the view that although they may carry persuasive weight they are not binding on the Authority, and the Authority declines to follow Rule 15.20 to the extent that it is suggested that costs *must* follow where a proceeding is discontinued.

⁹ *John Henry Beauchamp* [2014] NZSHD 4 (LASDP Number 725212). Available online at the Authority's website.

[43] In the broad discretion available to the Authority in respect of costs under the COI Act the Authority has decided after considering all the circumstances that this is not an appropriate case for the first award of costs under the Act.

[44] There is no misconduct or bad faith evident on the part of the Police. There is no need to set an example. There was adequate evidence to support the filing of a Complaint.

[45] The Police should now be on guard however, if they were not before, that when making a decision as to whether to file a Complaint or Objection, that an award of costs in appropriate cases is an ultimate option for the Authority.

[46] Because the Police have withdrawn their Complaint on this occasion the licence holder will retain his licence.

[47] In addition the Police have advised the Authority that, contrary to their earlier suggestion, the licence holder will now *not* face a charge in the District Court.

[48] At the end of the day it is business as usual for the licence holder. He may however consider it a wise course in the future to ensure he complies strictly with the Act.

[49] It is not appropriate in this case that costs be awarded.

[50] There will be NO Order for Costs.

DATED at AUCKLAND this 21st day of April 2015.

S L Cole

Licensing Authority of Secondhand Dealers and Pawnbrokers

Addendum

In terms of the late notice of the withdrawal of this case, and to avoid future occurrences the Authority would suggest that in situations where a Complaint or Objection is going to a hearing the officer in charge of the case makes early contact with the local Police Prosecutions section.