

[2015] NZSHD 12

SHD Number 711989

IN THE MATTER

of the Secondhand Dealers and
Pawnbrokers Act 2004

AND

IN THE MATTER

of a complaint in respect of a
certificate held by **CLIFFORD**
WILLIAM GORDON McNAB

BEFORE THE LICENSING AUTHORITY OF
SECONDHAND DEALERS AND PAWNBROKERS

HEARING at Wellington on 18 November 2015

APPEARANCES

C W G McNabb (licence holder) with counsel S A Leith
Constable C E Robson and D V Kumeroa – NZ Police

DECISION

[1] The Police have filed a complaint against Clifford McNab in respect to a licence issued to him under the Secondhand Dealers and Pawnbrokers Act 2004. Mr McNab operates Xtra Cash in Palmerston North.

[2] The Police allege that Mr McNab has breached various provisions of the Act. While they have chosen not to lay charges under the Act they are seeking the cancellation of Mr McNab's license. In particular they allege that during the period from January to May 2015 investigated:

- Mr McNab did not record the identity details and checks required by s52(2) of the Act on numerous sales agreements.
- The description of many of the articles purchased or pawned was inadequate and insufficiently detailed to match stolen items.
- Several sale contracts were not signed as required.
- Mr McNab traded with people who themselves should be licensed as a second hand dealers.
- Mr McNab failed to prominently display or produce the relevant license and certificates.
- Mr McNab is known as someone who will accept stolen property without asking questions.

[3] McNab accepts that some of his record keeping has been substandard. However he has taken considerable steps to improve his records since first advised of this by the Police. He also says that most of the information the Police allege was lacking from the paper records is available on his computer. He says that his computer record, rather than his hard

copy documents, fulfils the requirements of s 42 of the Act. Mr McNab categorically denies the allegations that he knowingly receives stolen property.

[4] With every objection or complaint laid the question for the Authority is whether the certificate holder is a fit and property person to hold a certificate¹. Therefore the key issues for me to decide are:

- Has Mr McNab complied with the provisions of the Act?
- If not are the breaches sufficient to establish that he is not a fit and property person to hold a certificate, and in turn a licence?

Failure to carry out and record identify checks

[4] Section 42(2) of the Act requires dealers to obtain identity information from vendors of all articles acquired during the course of their business. This information includes full names, addresses, dates of birth and signatures as well as verification of the person's identity. Constable Robson provided copies of more than 30 purchase agreements for each of the months from January to March 2015 on which there was no verification of identity.

[5] Mr McNab accepts that this information was not printed on the hard copies of the purchase agreements obtained by Constable Robson. However he says that the computer records for all but one of the January and two of the February and March agreements have complete identification information recorded on them. Mr McNab explained that there is a programming error in the database system which results in information being present in the database not printing out on the hard copy agreements. The five occasions where inadequate identification information is recorded in the electronic record arose either due to staff error or due to a software fault with occasionally deletes information from the system.

[6] Mr McNab brought a computer and printer to the Authority hearing. He demonstrated logging into the system and brought up several records demonstrating that the identification information was in fact obtained and recorded on the system at the time of purchase. Mr McNab has tried to get the errors in the system fixed so information was not deleted and to ensure that the printed paper record also provides the identification details. However the programmer engaged has been unable to find the source of the error. Mr McNab has therefore commissioned the writing of a new piece of software for an initial development cost of \$11,000. In the interim he has implemented a manual workaround whereby staff duplicate the identification information in the serial number field of the database so that it is now recorded on any paper copies of purchase agreements.

[7] Mr McNab also outlined how he has introduced the practice of taking photographs of all persons from whom goods are obtained and attaching the photograph to the electronic record. This is not a requirement of the Act but is designed to assist the Police and support the purposes of the Act by making it harder for criminals to dispose of stolen goods and easier for the Police to recover stolen goods.

[8] I am satisfied that appropriate identification checks are made and recorded in the computer system for all but a very small number of trades. I am also satisfied that recording that information on the electronic record is sufficient to meet the requirements of s 42 of the Act. The very few occasions where there is either no, or inadequate, identification information appears to be as result of an oversight by one of Mr McNab's staff members. Mr McNab has taken all appropriate steps to ensure this does not occur again. In any event I do not consider the occasional error negatively impacts on Mr McNab's fitness to hold a licence. This part of the Police complaint is therefore dismissed.

Insufficient description of articles purchased and pawned

¹ S 25 – 29 of the Act

[9] The Police allege that a number of the descriptions of goods are too vague or generic and therefore it is difficult to match goods traded through Xtra Cash Palmerston North with stolen property.

[10] Constable Robson's main complaint in this regard was the number of entries where Mr McNab has recorded goods as 'scrap gold'. Mr McNabb advised that he had been in the practice of describing items made of gold as scrap gold when they were purchased to melt down. He explained that in the past when he received broken jewellery or other goods made of gold that had no value to him as the original article traded he recorded it as scrap gold. However Mr McNab changed this practice after Constable Robson's visit.

[11] Constable Robson was also critical of several entries for groups of items traded where there were only general descriptions such as "4 gold rings". Mr McNab however considered that his practice was consistent with s 49(2)(a) of the Act. Section 49 provides that an article in a group only needs to be separately identified if any of the single items in the group has an apparent resale value of more than \$40 or has a unique identifier. I accept that it extremely unlikely that any one item in the group purchases criticised had a resale value or over \$40 or had a serial number. Therefore Mr McNab complied with the Act.

[12] Constable Robson also referred to other trades where serial numbers were not recorded when she considered numbers would have been available. Mr McNab however showed that serial numbers were generally recorded and that it was unlikely the goods had serial numbers on the contracts Constable Robson queried.

[13] There were also a number of other items where Constable Robson and Mr McNab disagreed about whether the description of the goods was sufficient to meet the requirements of the Act. Constable Robson was critical of descriptions such as "Oakley glasses" for a pair of plain Oakley brand clear glasses, Tonka x2 for two old Tonka toys purchased from a regular and well known customer and "tools in a red tin" for a number of tools traded in a red box. However I accept that in the circumstances of the individual trades that the descriptions, while they could have been more detailed, were adequate to meet the purposes of the Act.

[14] In relation to other records criticised by Constable Robson Mr McNab accepted the descriptions were not adequately recorded. These were largely in relation to trades carried out by other staff members and not Mr McNabb. Mr McNabb advised that these items only made up a small percentage of trades.

[15] Mr McNab said that he had been in business for over ten years and over that time had had regular visits from police to check his records. In particular Constable Robson's predecessor visited the store fortnightly for over 12 months and reviewed the dealer and pawnbroker records. None of the police who checked his records prior to Constable Robson raised any concerns with his descriptions. However Mr McNab understands now how generic descriptions and referring to jewellery as scrap gold made it difficult for the police to match stolen items with those traded through his shop. Therefore after receiving Constable Robson's letter of 28 April 2015 he put steps in place to ensure he and his staff record more accurate or specific descriptions of goods traded where appropriate. This included taking photographs of goods and also placing jewellery items in sealed plastic bags and stapling the bag to the hard copy of the record.

[16] In summary I accept that there were a number of items purchased or pawned during the time investigated where the description of goods was inadequate or insufficiently specific. There were accordingly occasions where Mr McNab or his staff did not fully comply with s 42(2)(b) of the Act. The non compliance was however at a low level and the percentage of non-complying records was relatively small. I am also satisfied that Mr McNab has taken steps to improve both his level of compliance and that of all staff working at Xtra Cash.

Therefore I do not consider that the established breaches are sufficient to show that Mr McNab is not a fit and proper person to hold a certificate.

Unsigned sale contracts

[17] Constable Robson produced four contracts with Mrs Ross which were not signed by her. The unsigned records are in breach of s 42(2) of the Act. Mrs Ross appears to have been a regular customer and there are also a large number of signed contracts recording to purchases from Mrs Ross.

[18] Mr McNab accepted that there were some unsigned contracts. He said sometimes staff were busy and got sidetracked by other customers. Therefore he and his staff sometimes forget to either sign or obtain the signature of the person from whom they are acquiring an article. All the unsigned contracts clearly recorded the name of the person selling the article and appropriate identification checks had been made.

[19] I am satisfied that there were occasions of non compliance with the signature compliance provisions of the Act. However again the non compliance was at a low level and the percentage of non-complying records was small. The non-compliance was a result of oversight or human error. I do not consider that the breaches established are sufficient to establish in their seriousness or their extent to suggest that Mr McNab is not a fit and proper person to hold a certificate

Purchased goods from individuals whose level of trade was such that they should have obtained a licence as a second hand dealer

[20] Constable Robson alleges Mr McNab was negligent in continuing to trade with people who should also be licensed such as Mrs Ross and a Mr B. As an example she said that Mr McNab purchased 5 different late I phone 6s from a Mr B in a four week period. She considered that Mr McNab should be sanctioned for trading with persons whose level of trade suggested they themselves might be in breach of s 6(3)(b) of the Act by trading without a license.

[21] When questioned on this issue Constable Robson accepted that the Act does not place any requirement on a license or certificate holder to either make checks as to whether people trading items should have a licence, or refusing to purchase items from people who should themselves have a license. She however considered that Mr McNabb had a moral obligation to do something about it.

[22] I do not accept that Mr McNab has breached his obligations under the Act by trading with people such as Mrs Ross or Mr B. In any event reporting the I phone trades to the police would have served no useful purpose as there is no evidence the phones were stolen or dishonestly obtained by the vendor.

Failure to display or produce the relevant license and certificates

[23] Constable Robson alleges that the license issued under the Act was not prominently displayed when she visited the Xtra Cash premises. Section 26(2) requires a certified copy of the license to be prominently displayed so as to be readily visible to the public at the place of business. Mr McNab disputes this allegation. He says the license was on a door clearly visible from the public counter. However to address Constable Robson's complaint he has moved the license to closer to the counter and it is now clearly visible behind the staff member serving at the counter.

[24] Constable Robson also alleges Mr McNab was in breach of the Act as he was unable to produce a copy of one of his staff member's certificates when she requested to see a copy. The particular member was not at work at the time but she was able to locate her certificate on return to work.

[25] Section 32 of the Act requires a certificate holder engaged in second-hand dealing or pawnbroking to show his or her certificate on request by a constable. There is no requirement in the Act for the license holder, or manager of a business, to produce an employee's certificate when that employee is not at work and not engaged in second-hand dealing. The only obligation Mr McNab had under s 32 is to produce his certificate. There is no evidence or even allegation that he failed to do this.

[26] After considering all the information filed I am satisfied that Mr McNab has not breached the provisions of Act in relation to the prominent display of the license or to show copy of his certificate.

Being known as someone who will accept stolen property without asking questions

[27] The Police allege that Mr McNabb is not a fit and proper person to hold a certificate as he is known in the criminal community as someone who will accept stolen property without asking questions and without complying with his obligations under the Act. The only evidence produced to support this allegation is a statement by a Mr Ross and a copy of part of a transcript of a text exchange between two people under investigation by the police. While both pieces of evidence were filed neither can be given any weight for the following reasons:

- The statement by Mr Ross is internally inconsistent and is also inconsistent with the hard copy evidence produced by the Police which was available to the Police at the time Mr Ross made his statement.
- The most significant part of Mr Ross's statement is hearsay and talks about an arrangement between Mrs Ross and Mr McNabb. The police did not obtain a statement from Mrs Ross and nor did they call her to give evidence at the hearing.
- The text messages produced are potentially open to a number of interpretations. In addition it is possible that the individuals were exaggerating or bragging rather than giving a factual account of events.
- Neither Mr Ross nor the individuals between whom the text messages were exchanged were available to be questioned by Mr McNabb or by the Authority.
- There is no other evidence to support the submission made by the police as to what these statements were produced to establish. To the contrary Mr McNab's records tend to refute the allegations made in these statements.

[28] There is accordingly no reliable evidence to support the allegation that Mr McNab failed to comply with the Act by entering into informal arrangements that allows stolen property pass through his premises without being detected. This part of the Police complaint is not established.

Summary and Conclusion

[29] Many of the breaches of the Act alleged have not been established. However some breaches of s 42(2) of the Act are established particularly in relation to the requirement to obtain signatures and to describe the articles purchased or pawned

[30] The Act leaves it to the Authority to decide whether a person is a fit and proper person to hold a certificate. In making this decision the purpose of the Act as set out in s 3 must be my primary consideration. Therefore I must decide whether Mr McNab's actions make it

easier for criminals to dispose of stolen goods, and harder for the Police to recover stolen goods and solve crimes.

[31] The Authority has generally taken the view that an example of a fit and proper person under the Act is someone who can be trusted to comply with his or her obligations as a secondhand dealer and pawnbroker under Part 3 of the Act, and who is aware of the need to be vigilant and to use their best endeavours to ensure stolen goods to not pass through their business. On the other had a person who actively encourages the transit of stolen property through their premises or who turns a blind eye when stolen property is offered to them is clearly not a fit and property person.

[32] The number and seriousness of the breaches are relatively low and were largely a result of human error or staff oversight. I do not consider that the established breaches were a deliberate attempt to fail to comply with the requirements of the Act or intended to circumvent the purposes of the Act. The Police have not established that Mr McNab either encourages the transit of stolen property through his premises or turns a blind eye when stolen property is offered to him.

[33] When Constable Robson first raised her concerns with Mr McNab's record keeping he took prompt action to improve his practice and to address the concerns raised. I consider Mr McNab is aware of his obligations under the Act and generally uses reasonable endeavours to comply with the Act and to ensure stolen property does not pass through his business.

[34] I therefore conclude that the police have failed to establish that Mr McNab is not a fit and proper person to hold a certificate. The Police complaint and the application to cancel Mr McNab's license is therefore dismissed.

DATED at Wellington this 26th day of November 2015

P A McConnell
Licensing Authority of Secondhand Dealers and Pawnbrokers