

[2015] NZSHD 02

LASDP Numbers: 775253 / 716694

**IN THE MATTER**

of the Secondhand Dealers and  
Pawnbrokers Act 2004

**AND**

**IN THE MATTER**

of a Police Complaint against  
**BASEPA ENTERPRISES LIMITED**  
**(now Superloans Napier Limited)**  
pursuant to s.29 of the Act

**AND**

**IN THE MATTER**

of a Police Complaint against **BARRY**  
**CUMMING** pursuant to s.29 of the Act

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

**DECISION**

***Introduction***

[1] This is a joint Complaint by the Hawkes Bay Police against Basepa Enterprises Limited (which trades as “Superloans Napier”) in respect of a Company Licence (“the licence”) issued to this company on 18 August 2011 by the Licensing Authority of Secondhand Dealers and Pawnbrokers (“the Authority”), and against Mr Barry Cumming (“Mr Cumming”) in respect of a Certificate of Approval (“the certificate”) issued to him on 18 July 2011 by the Authority, under the Secondhand Dealers and Pawnbrokers Act 2004 (“the Act”).

[2] Basepa Enterprises Limited changed its name to Superloans Napier Limited on 12 January 2015.

[3] Mr Cumming is the full-time manager of the company and one of its three directors.

[4] The company premises are located in Carlyle Street, Napier.

[5] The joint Police Complaint was received by the Authority by way of various email correspondence in January 2015.

[6] In their Complaint the Police say that they carried out a routine inspection of Superloans Napier in December 2014. They discovered a number of potential breaches of s.64(4) of the Act, in that Superloans Napier had not been contacting the pledgers of goods in writing advising them they were entitled to the excess of the sale proceeds in situations where their pawned goods were sold for a price that was \$10.00 or more than the redemption price of those goods.

[7] Contrary to the scheme of the Act it appears that the Police expected the Authority to use the material comprising their Complaint to be the basis of further investigations *by the Authority* into the activities of Superloans Napier and Mr Cummings.

[8] As was clearly explained to the Police during the course of this case, and which it seems the Police have still not appreciated - the Authority does not *investigate* or *prosecute* breaches of the Act. The Authority is independent of the Police. It is the Police who investigate and where appropriate file criminal charges in the District Court in circumstances where breaches of the Act are alleged.

[9] This Complaint will now be determined in the normal manner on the basis of the written material filed by the Police, and on behalf of Superloans Napier/Mr Cumming, and without further enquiries by the Authority.

### ***Relevant Provisions of the Act***

[10] Complaints against licensed pawnbrokers, as opposed to licensed secondhand dealers, are a rarity.

[11] Part 3 of the Act (Subparts 1 and 3) spells out the obligations for licensed pawnbrokers under the Act.

[12] Licence holders are required to display their licences, keep proper employee records and comply with certain requests from the Police. They have obligations to report and hold suspected stolen goods, keep proper dealers records, label pawned goods and verify the identity of pledgers. There are provisions relating to buyback contracts, the redemption price and redemption date of pawned goods, the use of pledge tickets, and rights in respect of redemption.

[13] Under s.60 of the Act a licensed pawnbroker may not dispose of pawned goods on or before the redemption date (which is the later of 3 months from the date on which the pledge was entered into, or a date agreed between the pawnbroker and the pledger).

[14] Under s.62 of the Act a pledger may at any time redeem the pledged goods on payment of the redemption price.

[15] A licensed pawnbroker has the right under s.63 of the Act, subject to certain conditions, to sell unredeemed goods at auction if they are not redeemed on or before the redemption date.

[16] Where a licensed pawnbroker sells pawned goods to recover the redemption price in cases where the pledger has not redeemed them on or before the redemption date, and the sale generates more than the redemption price, s.64 of the Act provides for how the excess amount is to be distributed. For example a pledger is entitled to 90% of any excess received by the pawnbroker on the sale of the pledger's goods if the pledger makes a claim within 6 months of the date of sale.

[17] Under s.64(4) of the Act there is also an obligation on a licensed pawnbroker, where there is a sale of goods at an excess of \$10.00 or more than the redemption price, to advise the pledger in writing as soon as practicable after the sale, that the pledger is entitled to part of this excess.

[18] A number of offences relating to pawnbroking are described in s.67 of the Act. The offences described in s.67(1) carry a maximum penalty of \$10,000.00.

[19] Under s.67(2) of the Act a licensed pawnbroker commits an offence and is liable on conviction to a maximum fine of \$2,000.00 if he or she fails, without reasonable excuse, to comply with any other obligation under any of the sections 55 to 65 of the Act.

[20] A breach of s.64(4) of the Act, - i.e. a licensed pawnbroker failing to write to a pledger at his or her last known address as soon as practicable after the sale of the pledger's goods, where the sale resulted in an excess of \$10.00 or more, advising the pledger of the amount of excess to which they are entitled and the date by which it must be claimed – would be covered by s.67(2) of the Act.

[21] The Police Complaint was filed under s.29(1) of the Act on 19 January 2015. A copy was sent to Superloans Napier/Mr Cumming on 21 January 2015. At the same time they were advised, in terms of s.26(1) of the Act, that they could request a *hearing in person* before the Authority, or could instead make written submissions in response to the Complaint.

[22] It is noted here that sections 26 and 27 of the Act, although referring specifically to Police 'Objections' are also applicable to Police 'Complaints' by virtue of s.29(2) of the Act.

[23] Superloans Napier/Mr Cumming have chosen to forgo the right to a *hearing in person* before the Authority and have instead filed written submissions through their counsel Mr Bell pursuant to s.26(1)(b) of the Act.

[24] Section 26(3) of the Act provides that in such a situation the Authority must, on the basis of the written material before him or her, determine whether to uphold or dismiss the Police Complaint.

[25] The question for the Authority is whether, after consideration of the written information communicated to it, Superloans Napier and Mr Cumming are *fit and proper* to continue to hold a licence and a certificate respectively.

[26] In the event that the Authority upholds the Police Complaint against Superloans Napier, s.29(3)(b) of the Act directs that the Authority *must* cancel the licence of Superloans Napier.

[27] In the event that the Authority upholds the Police Complaint against Mr Cumming s.31 of the Act authorises the Authority to cancel or suspend his certificate, or the Authority may take no action at all.

### ***The Police Evidence***

[28] The initial Police Complaint consists of emails from the Hastings Police summarising the Police evidence, copies of various documents completed in respect of the Police visit to Superloans Napier, a record of an interview by a Detective Sergeant with Mr Cumming on 17 December 2014, and a spreadsheet recording 119 instances of pawned goods in respect of which the Police say the goods were sold for \$10.00 or more than the redemption price, and where there had been no attempt made to advise the pledgers that they were entitled to the part of the excess received.

[29] The Police indicate that the spreadsheet was compiled from Superloans Napier's records (as copied by the Police) which amount to 350 pages of documents, and that while not included in the documentation sent by email to the Authority they could, if required, be supplied in due course by mail.

[30] The Police say that it is likely that a review of Superloans Napier's records for previous years would reveal excess money had also been retained for those years.

[31] The Police conclude their initial Complaint with the comment that they "*believe that this matter warrants further investigation by the licensing authority.*"

[32] In his Police interview on 17 December 2015 it is recorded that Mr Cumming told the Police *inter alia*;

- [a] All items are sold through Trademe with a \$1.00 reserve
- [b] Mr Cumming contacts pledgers by phone and text as the redemption date approaches. If there is no response the items go up for sale, usually 4 weeks after the 3 month period.
- [c] Pledgers are told in the week of the Trademe sale that their goods are being sold but after the sale pledgers are generally not told how much their pawned goods sold for.
- [d] Mr Cumming has no system in place to reimburse or pay pledgers if their goods are sold for a price in excess of the redemption price and where they are entitled to 90% of this excess.
- [e] He has not been notifying pledgers in writing where their goods have been sold for more than \$10.00 over the redemption price.
- [f] He has been with Superloans Napier as full-time manager since 2011.

### ***Submissions on Behalf of Superloans Napier and Mr Cumming***

[33] Mr Cumming acknowledges that he has been unaware of the nature of his obligations under s.64 of the Act and acknowledges that his conduct was "*in error*" but he says it lacks any aggravating features of intent.

[34] An informal practice has developed whereby Superloans Napier holds goods for 4 months despite the 3 month redemption date because customers prefer to recover their pledged goods rather than have them sold at auction.

[35] Mr Cumming texts or phones customers to remind them of their redemption dates. During the week of the auction Mr Cumming further reminds customers that their goods are being sold.

[36] According to the Police data 63% of the sales by auction result in a loss to Superloans Napier.

[37] The majority of transactions are concluded by redemption rather than by sale.

[38] Superloans Napier has comprehensive systems in place for minimising the potential for stolen goods to be traded in its store and to aid Police investigations if required.

[39] Upon opening his store Mr Cumming contacted the Police with the aim of minimising the trade in stolen goods, aiding in Police investigations and to emphasise Superloans Napier's commitment to lawful trading.

[40] During the Police check Mr Cumming was helpful and honest and the Police acknowledge that under Mr Cumming's management the premises were "*well set out – organised and items were easily accessible*" and staff were "*helpful and co-operative*".

[41] The Police spreadsheet does not record the reference numbers and contract numbers necessary for Superloans Napier to be able to verify the accuracy of the recorded transactions in the time allotted for submissions. Therefore the spreadsheet is not accepted. However even if it is accepted there is an explanation for the issues revealed.

[42] Mr Cumming was honest when interviewed by the Police. It is apparent that he did not properly understand his responsibility.

[43] In the scheme of daily transactions, incidences requiring refund are rare. This has led to a lack of emphasis on training in this area and the absence of alerts and warnings in the system.

[44] The errors identified by the Police are less than 0.1% of the business transacted by the store and the responsibility of Mr Cumming.

[45] Repeat custom is actively fostered with 89% of customers being repeat customers.

[46] The unintended potential prejudice arising from a compliance failure means that all the identified issues will be corrected immediately.

[47] Although Mr Cumming has erred in his compliance with s.64 of the Act, his conduct does not violate the central purpose of the Act as contained in s.3 which is to make it harder for criminals to dispose of stolen goods through secondhand dealers and pawnbrokers.

[48] Mr Cummings is now making every effort to ensure he understands s.64 of the Act and is now receiving legal advice in this respect. Alerts and warnings will be incorporated in the IT system related to s.64 compliance.

[49] In terms of money already owed to customers, Mr Cumming undertakes to write to all customers entitled to an excess. If a customer claims their s.64 entitlement this will be promptly actioned. Where customers have relocated, efforts will be made to find them.

### ***Police Complaints Generally***

[50] As referred to earlier, it seems there is a misconception on the part of some Police officers that the Authority is actually responsible for prosecuting alleged breaches of the Act by licensed secondhand dealers and pawnbrokers or their employees. This is not the case. It is the Police who investigate and where appropriate file charges in the District Court against companies or individuals whom they have good cause to suspect have breached the Act.

[51] A successful Police prosecution under the Act resulting in a conviction may then provide good grounds to support a Police Complaint to the Authority with the result that the Authority may cancel the licence or certificate involved.

[52] It seems also that some Police officers are of the view that a bare minimum of evidence is sufficient to support a Police Complaint. This is not the case. A Complaint should contain full details justifying the view of the Police that the licence/certificate

holder is not a fit and proper person to hold a certificate and that the licence or certificate in question should be cancelled. The licence or certificate holder is entitled to see the strength of the Police evidence so as to properly consider their options including whether a lawyer should be instructed.

[53] It seems also that some Police officers do not realise that where the Authority upholds a Complaint against a *licence* holder the licence concerned *must* be cancelled.<sup>1</sup> There is no discretion to suspend or otherwise deal with the licence.<sup>2</sup>

[54] Unfortunately the Act does not permit the Authority to issue a Practice Note at this time to assist Police officers with the way in which they should approach filing Objections and Complaints, or on how they should prepare for *hearings in person* under sections 26 and 27 of the Act. Hopefully this will be rectified under proposed new legislation.<sup>3</sup> This may take some time however to come into effect, so in the meantime the Authority is preparing to release some interim guidelines in the very near future for the assistance of Police officers.

### ***Analysis of the Evidence***

[55] The Authority must decide under s.25 of the Act (which relates to Objections *and* Complaints by virtue of s. 29(2) of the Act) whether or not Superloans Napier and Mr Cumming are fit and proper to hold a licence and certificate.

[56] In the present case the Authority is directed by s.26(3) of the Act to determine whether to uphold or dismiss the Police Complaint on the basis of the written material submitted by the Police and on behalf Superloans Napier and Mr Cumming.

[57] If the Complaints are upheld Superloans Napier will lose its company licence and Mr Cumming may lose his certificate.

[58] Should therefore Superloans Napier and Mr Cumming lose their licence and certificate respectively on the strength of the available evidence?

[59] The Police evidence is not particularly comprehensive or well organised and is based on a misunderstanding of the Act. Although the Police offered to provide copies of Superloans Napier's records still in their possession the Authority is of the view these documents would not have affected the final result in the circumstances. Nor should the Authority have to assimilate a mass of company records without these being carefully prepared, indexed and summarised.

[60] The Police have calculated that there are 119 instances in the year 2014 where items were sold for \$10 or more above the redemption price. They say the total amount involved is \$14,652.61 and that no attempt was made by Superloans Napier to advise the pledgers.

[61] The Police say that a review of the records of Superloans Napier for previous years would likely reveal that excess money had also been retained for those years. There is no evidence to support this assertion however and it seems that it is still the view of the Police that it is for the Authority to undertake further enquiries in this regard.

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<sup>1</sup> *Whereas a licence must be cancelled when a Complaint is upheld, the Authority has the power to suspend or cancel a certificate under s.31 of the Act.*

<sup>2</sup> *This situation described in this paragraph is likely to change when the Act is amended. See the Courts and Tribunals Enhanced Services Bill.*

<sup>3</sup> *The Courts and Tribunals Enhanced Services Bill.*

[62] The Police say also (incorrectly) that they do not have the ability to file charges in respect of breaches of s.64 of the Act in the District Court.

[63] The Police were supplied with a copy of Mr Bell's submissions and given the opportunity to respond. They have chosen not to file full submissions in response or to take issue with the submissions.

[64] On 19 March 2015 however in a brief email to the Authority in response to Mr Bell's submissions, the current Police officer in charge of the case points out once again that Superloans Napier and Mr Cumming have acknowledged a breach of s.64 of the Act and that there may well be further breaches by Superloans Napier in the years since 2007.

[65] In this email message the current officer in charge indicates also that the Police would support the Authority imposing a sanction such as "*a fine and/or a formal warning, which is recorded appropriately*". The Authority notes however, as the Police were advised only a month before this, that "*The Authority has no power to fine persons or warn them. This may only be done by a District Court Judge if criminal charges are admitted or proven*".

[66] The Police have supplied no negative material as to the general state of the business at Superloans Napier and in fact the general comments on the Police file refer positively to state of the business.

[67] There is no evidence as to whether compliance by Superloans Napier with the Act over the years has been good, bad or otherwise. Nor is there any evidence of a Police follow up visit to check compliance since the Police attended in December 2014.

### **Discussion**

[68] In the past the Authority has been reluctant to prejudice the livelihood of secondhand dealers and pawnbrokers for failure to comply strictly with the requirements of Part 3 of the Act. Usually, when the failures or omissions in regard to compliance with these requirements are brought to the attention of the licence holders, the quality of compliance improves.

[69] The Authority has cancelled a licence for failure to comply with the record keeping requirements of the Act where there was persistent failure to comply and some intentional acts of deception.

[70] More recently a licence was cancelled where there were serious breaches of the Act by a scrap metal dealer who was receiving and dismantling stolen cars and not keeping accurate records.<sup>4</sup>

[71] In the present case there is no evidence of intentional infringements or that Superloans Napier has been warned in respect of non-compliance in the past.

[72] The Authority is very aware that many licence holders face losing their livelihood if a Police Complaint is upheld and accordingly a Complaint needs to be carefully considered and prepared by the Police if they hope to effect the cancellation of a licence.

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<sup>4</sup> *Re Beauchamp* [2014] NZSHD 4

[73] If the Police do not wish to see a licence cancelled they are able to issue a warning and then make subsequent compliance checks where appropriate, rather than filing a Complaint.

[74] Superloans Napier and Mr Cumming have admitted through counsel that they have not complied with their obligations under s.64 of the Act. This is the central concern of the Police and a proper one.

[75] Does it follow that Superloans Napier and Mr Cumming are not fit and proper persons to hold a licence and certificate under the Act?

[76] The Police Complaint does not allege specifically that they “are not fit and proper persons” in terms of s.29 of the Act.

[77] Nor does the Police Complaint or any of the supporting material call for or suggest that Superloans Napier or Mr Cumming should lose their licence or certificate. The Authority notes here once again that in the event that the Authority finds that Superloans Napier is not a fit and proper person, its licence *must* be cancelled.

[78] The Police may not be aware that at present a successful Police Complaint must result in the mandatory loss of licence for a company.

[79] Further, it seems clear from the more recent Police correspondence in this case that in the event the Complaint is successful the Police are content if Superloans Napier and Mr Cumming are dealt by the Authority by way of a fine and/or a formal warning<sup>5</sup> (although such sanctions are not within the power of the Authority).

[80] The breach of s.64 of the Act by Superloans Napier and Mr Cumming are serious and may well have resulted in a Police prosecution as well as or instead of the Police Complaint procedure before the Authority.

[81] On the other hand it seems that Superloans Napier and Mr Cumming have not breached previously nor have they been warned by the Police in respect of their past practices, and they are presently taking steps to ensure compliance in the future, and to pay out those pledgers who have not been paid as a result of past failures.

[82] The Authority notes here that the Police were given the opportunity to respond to Mr Bell’s submissions, and in particular it is noted that the Police have not contradicted nor commented adversely on any of the current steps being taken, nor any of those proposed by the company in the future to rectify failures and to prevent future problems.

[83] The breach of s.64 of the Act does not violate the central purpose of the Act which is essentially to make it harder for criminals to dispose of stolen goods and to make it easier for the police to recover stolen goods and solve property crimes.

[84] Previous decisions of the Authority demonstrate a high threshold that must be met by the Police in order to justify the cancellation of a certificate or licence.

## **Decision**

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<sup>5</sup> “Whatever sanction the Authority arrives at will be supported by Police. If the breach is deemed to be at a level of a fine and/or formal warning, which is recorded appropriately, then we would accept this”.

[85] The Police do not ask that the licence and the certificate be cancelled. As the Authority assesses the situation the Police actions have been directed at ensuring that the company complies fully with all of its obligations in the future.

[86] Superloans Napier has undertaken to ensure future compliance, to rectify past failures and to compensate those who have not received their due where redemption prices were exceeded at auction.

[87] Superloans Napier has fallen significantly short of what is required in terms of its obligations under the Act and would do well to ensure its operation is totally compliant in the future. The Police will no doubt be watching carefully.

[88] Taking into account all the factors referred to above the Authority is not satisfied in the circumstances that Superloans Napier Limited (formerly Basepa Enterprises Limited) or Mr Barry Cumming are at present not fit and proper persons to hold a licence and certificate.

[89] It is the view of the Authority therefore that the Police Complaint against both persons should be dismissed

[90] The Police Complaint is Dismissed.

**DATED** at AUCKLAND this 28<sup>th</sup> day of March 2015.

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S L Cole

**Licensing Authority of Secondhand Dealers and Pawnbrokers**