

Decision No. *PH1026/99 - PH1028/99*

IN THE MATTER of the Sale of Liquor Act 1989

AND

IN THE MATTER of an application pursuant to s.132 of the Act for suspension of on licence number 007/ON/134/96 and off licence number 007/OFF/34/96 issued to PARKE AND PENNEY HOLDINGS LIMITED in respect of premises situated at 39 Morrin Road, Mt Wellington, Auckland, known as "Tainui Tavern"

BETWEEN RICHARD WARNE McDOWELL of  
Auckland, Police Officer

Applicant

AND PARKE AND PENNEY HOLDINGS LIMITED

Respondent

AND

IN THE MATTER of an application pursuant to s.135 of the Act for suspension of General Managers Certificate number GM 497/94 issued to GRANT WILLIAM PENNEY

BETWEEN RICHARD WARNE McDOWELL of  
Auckland, Police Officer

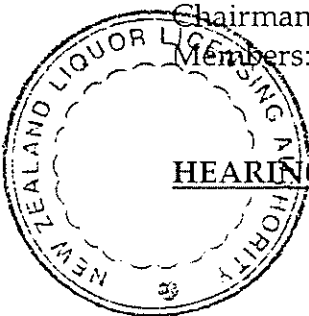
Applicant

AND GRANT WILLIAM PENNEY  
Respondent

BEFORE THE LIQUOR LICENSING AUTHORITY

Chairman: District Court Judge J P Gatley  
Members: Mr R J S Munro  
Mr J W Thompson

HEARING at AUCKLAND on 10 May 1999



## APPEARANCES

Sergeant M J Lopdell – NZ Police – applicant  
 Mr W J Perring – Auckland District Licensing Agency Inspector - to assist  
 Mr P D Swain as agent of respondent licensee and manager

## DECISION

By applications dated 27 November and 10 December 1998 pursuant to ss.132 and 135 of the Act the Police seek suspension of:-

1. On and off-licences issued to Parke and Penney Holdings Limited in respect of tavern premises situated at 39 Morrin Road, Mt Wellington, Auckland known as "Tainui Tavern"; and
2. General Managers Certificate GM 497/94 issued to Grant William Penney.

Mr Penney is the sole director and shareholder in the respondent licensee company. Following issue of the on and off-licences on 15 July 1996 Mr Penney was appointed as a manager of the subject premises pursuant to section 130 of the Act.

### Grounds of Police Application

#### On and Off-Licences

That the licensed premises have been conducted in breach of the following provisions of the Act:

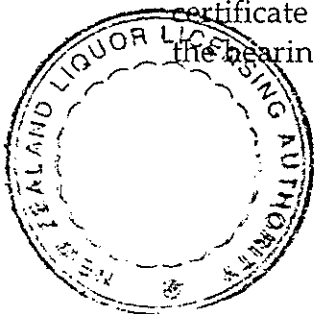
Section 4(1) object of the Act

Section 165 unauthorised sale or supply

#### General Managers Certificate

That the manager has failed to conduct the licensed premises in a proper manner and that the conduct of the manager is such as to show that he is not a suitable person to hold the certificate.

All three applications - i.e. for suspension of on-licence, off-licence and manager's certificate detailed allegations addressed in evidence given by Police witnesses at the hearing.



### Police Evidence

Mrs D M W Tamoua gave evidence of her husband having purchased 24 cans of beer at the Tainui Tavern and brought them home on Sunday 13 September 1998. Mr Tamoua gave his wife a Tainui Tavern receipt dated 13 September 1998 for \$45. Mrs Tamoua said:

*"I have lived in Glen Innes all my life, it has been well-known over the years if you want to buy booze on a Sunday, go to the Tainui Tavern".*

Mr V Tamoua confirmed going to the tavern on Sunday 13 September 1998 to purchase beer; on being told the price was \$45 he had said *"that's too much"* and was told to ask for a receipt which he did. The witness said he saw about 15 other people in the bar playing pool and that none of them were eating.

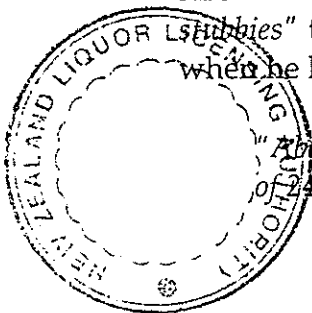
Constable J T Cassidy gave evidence of having been briefed to go to the Tainui Tavern on Sunday 8 November 1998 in relation to breaches of the Sale of Liquor Act. Accompanied by another Constable in plain clothes between 4.30 pm and 7.20 pm they observed a notice stating *"Sunday service of liquor only to patrons dining at the tavern"*. The two constables purchased beer without being asked if they were dining. The constable said he observed approximately 50 patrons in the premises. A blackboard menu in the kitchen area had attached a sign saying *"closed"*; at no time during the constable's visit did the kitchen status change. Two plates of smoked fish and crackers were freely available on the bar but once that food was consumed it was not replenished. The only food observed purchased by patrons was snacks such as potato chips and peanuts.

At about 5.15 pm Constable Cassidy approached the *"bar lady"* having inquired as to the *"chance of getting some takeaways"*. On being asked what he wanted he said *"a tray of red"*. The bar lady replied *"see me later"*. The Constable noted that the bar manager's name was not displayed as required by the Act.

Around 5.45 pm Constable Cassidy approached Mr G W Penney whom he identified at the hearing asking *"can I get my takeaways now"* but Mr Penney shook his head. While seated in the bar Constable Cassidy noticed on two occasions Mr Penney proceed to a storeroom and returned carrying a box of 24 lion red cans. *"On both occasions he handed these boxes to patrons at the tavern"*. At a different time the Constable saw Mr Penney hand a patron a plastic bag containing *"what looked to be a bottle of spirits"*.

Around 6.30 pm the bar lady told Constable Cassidy it would be *"\$45 for a tray of 24 bottles of lion red"* to take away. The witness paid and indicated he would pick the tray up when he left. The Constable's evidence concluded:-

*"About 7.20 pm I approached the bar lady. She lifted from under the counter a box of 24 bottles of lion red bottles which she handed over to me."*



*We then left the premises noting that less than 20 patrons were still present, and 7 cars were now left in the carpark.*

*Once at Auckland Central Police Station the box of lion red was placed in the property and exhibit store".*

Constable R W McDowell gave evidence as the applicant and told us of having briefed the previous witness as a result of a complaint received from Mrs Tamoua of her husband having purchased liquor to take away on a Sunday. Constable Cassidy was told that off-licence sales on a Sunday would be in breach of the licence conditions.

About 2.30 pm on Monday 16 November 1998 Constable McDowell had telephoned the Tainui Tavern regarding the price for 24 cans of lion red beer and was told \$29.90. He noted that an earlier witness Mr V Tamoua and Constable Cassidy had both been charged \$45 on a Sunday.

On Wednesday 18 November 1998 Constable McDowell interviewed Mr Penney. It was the Constable's evidence:-

*"Penney made no comment about the sale to Tamoua and the price of the beer. Penney stated he would get me the details of the manager on duty on that occasion. He did not.*

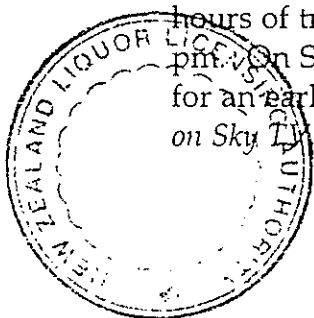
*During our conversation Penney admitted being the manager on duty on Sunday 8 November 1998. He stated the kitchen should have been open, but did not categorically state that it was not.*

*Penney said things had obviously slipped a little, although he and his staff were aware Sunday off-licence sales were a breach of his liquor licence".*

#### Respondent's Evidence

Mr G W Penney said that he was not present on Sunday 13 September 1998 when the illegal sale for off premises consumption was made to Mr Tamoua. (It was not put to Mr Tamoua whether or not Mr Penney had been present). He said he had severely reprimanded the staff member who had made the sale who no longer worked for the company.

Mr Penney described how a "husband and wife" team undertook catering at the tavern without being employed by the licensee. There is no written contract to ensure their attendance at the premises. It was Mr Penney's evidence that all times when the premises are open "food is available from the kitchen". Normal hours of trade under the licence on a Sunday are from mid-day to 6.00 pm or 7.00 pm. On Sundays the tavern has a regular clientele who come either for lunch or for an early dinner; some come for both. "They have lunch and then watch live sport on Sky TV, have an early dinner and then go home".



Mr Penney acknowledged being present on Sunday 6 November last doing "routine maintenance" and as he was not going to be actively supervising the sale of liquor he had appointed a staff member, Megan Riddell "as an acting manger to comply with the Act".

Mr Penney said he recalled a male person coming up to him at the bar and asking for liquor to take away. "I shook my head and said I was not permitted to sell liquor to take off the premises on a Sunday". He subsequently gave the staff member who had sold liquor to Constable Cassidy to take away "a written warning". Mr Penney's evidence included:-

*"Constable Cassidy refers to the kitchen being closed as a sign saying same was attached to the menu board. I made inquiries from my chef regarding this. He told me that he had run out of some ingredients and had gone to the local supermarket to replenish supplies. Before going down to the supermarket he had told the duty manager and hung a sign on the board. On his return some 30 minutes later he omitted to remove the sign. As I recall he left about the same time as I did".*

(Steps taken since the matters complained of to ensure patrons attending on Sundays dine).

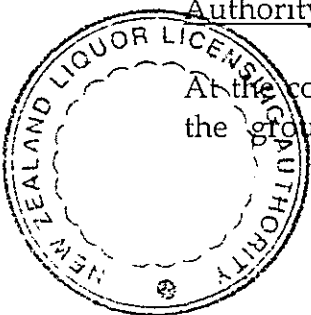
*"In my discussions on that day with Constable McDowell he asked me who the duty manager was on 8 November 1998. I told him that I did not know. He said that unless he heard from me that day he would assume that I was the duty manager. When I came and checked I found that I had appointed Megan as an acting manager for that day as I have already said. I rang Constable McDowell at 2.38 pm that afternoon to advise him of this but was told he had gone for the day.*

*Constable Cassidy acknowledges that it was not me who sold him liquor. I refused to sell it to him. He also refers to me handing over two cartons of lion red cans to two different customers. These two persons had purchased and paid for the beers on Saturday evening and had asked me to keep them in the chiller for them to pick up after lunch on Sunday. Prior to that event I had checked the matter with my solicitor who referred me to a High Court decision which he said permitted this. In the light of these events I have stopped such service".*

Mr Penney was asked by the Authority whether he could say on oath that he had never sold liquor (at the Tainui Tavern) on a Sunday for off-premises consumption. Mr Penney's initial response was that he gave liquor to some of "our clients" who paid for it on Saturday. His further responses were "possibly" and "yes, I could have at one time or other".

#### Authority's Conclusion and Reasons

At the conclusion of the hearing the Authority had no hesitation in finding that the grounds of the three police applications had been established to our



satisfaction on the balance of probabilities. We did not find Mr Penney to be a credible witness.

On lifting the corporate veil Mr Penney is in effect the licensee and manager of the subject premises. In the course of the hearing it became obvious that Mr Penney does not understand the provisions regarding appointment of acting managers. Section 129(1) of the Act provides:-

*"129. Acting manager – (1) Notwithstanding any other provision of this Act, a licensee may appoint an acting manager –*

- (a) For any period not exceeding 3 weeks at any one time where the licensee or a manager is unable to act because of illness or absence; and*
- (b) For periods not exceeding in the aggregate 6 weeks in each period of 12 months to enable the licensee or a manager to have a vacation or annual leave."*

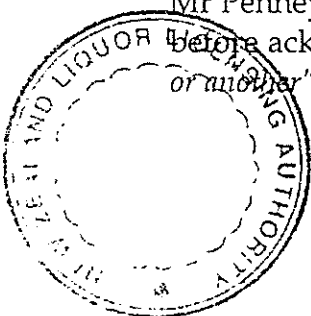
From evidence given and responses to questions we learnt that it was Mr Penney's practice when he was not behind the bar to tell whoever was that they had been appointed an acting manager.

Mr Penney said that it was his practice to make sales of beer on a Saturday then keep the beer in the chiller for patrons to collect on a Sunday. However it was also his evidence that it was only after being spoken to in connection with the alleged sale to Mr Tamoua on Sunday 13 September 1998 that Mr Penney had discussed with Mr Swain, "as his solicitor" whether such a practice was legal.

On being asked why a two dozen tray of beer that normally sold for \$29.50 was \$45 on a Sunday Mr Penney gave an explanation of different prices for "wholesale" sales from a bottle shop and sales at a later hour from "across the bar". We did not find this evidence convincing with the produced receipt of Mr Tamoua's purchase on a Sunday for \$45 and the evidence of Constable Cassidy having made a similar purchase on a Sunday at the same price, when Mr Penney was present, even though Mr Penney did not effect the actual sale.

It was Constable Cassidy's evidence that on asking Mr Penney if he could have his takeaways "now" (ie around 5.45 pm) Mr Penney "declined by shaking his head". In contrast Mr Penney's evidence was "I shook my head and said I was not permitted to sell liquor to take off the premises on a Sunday". We do not find it credible that Mr Penney used those words to Constable Cassidy without the Constable remembering.

Mr Penney's credibility was further diminished by the inconclusive answers before acknowledging that he could have made off sales on a Sunday "at one time or another".



In similar vein Mr Penney's sworn testimony that at all times when the premises are open "*food is available from the kitchen*" was not credible when weighed against the evidence of Mr Tamoua and Constable Cassidy of patrons drinking on a Sunday without dining and purchasing liquor without any inquiry as to their intention to dine. The total absence of any contractual commitment from non-employee caterers to be present only serves to confirm our conclusion on the evidence that Mr Penney has only paid lip service to his obligation to ensure that patrons present on a Sunday do not consume liquor without dining.

The Authority has previously pointed out, and it was accepted by Sergeant Lopdell in his closing submissions, that s.4 of the Act cannot technically be breached as if it were an offence provision. Nevertheless, we accept Sergeant Lopdell's contention that the operation of the Tainui Tavern could not be said to reflect a reasonable system of control over the sale and supply of liquor to the public.

It is obvious from the above that the Authority accepts that under both the on and off licences unauthorised sale or supply at the Tainui Tavern has been established on the balance of probabilities. Mr Swain as agent of the licensee and manager submitted that in terms of s.181 of the Act the licensee could not be found to be in breach of s.165 for off-sales on a Sunday and sales to other than diners unless it was proven that Mr Penney had been a "*party*" in terms of s.66 of the Crimes Act 1961. The two sections provide:-

Section 181 Sale of Liquor Act 1989:

*"Liability of licensee for offences by manager: The licensee of any licensed premises shall not be responsible for any offence against this Act committed by any manager of those premises except where the licensee is a party to the offence".*

Section 66 Crimes Act 1961:

*"Parties to offences:- (1) Every one is a party to and guilty of an offence who –*

- (a) Actually commits the offence; or*
- (b) Does or omits an act for the purpose of aiding any person to commit the offence; or*
- (c) Abets any person in the commission of the offence; or*
- (d) Incites, counsels, or procures any person to commit the offence.*

*(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the*



*commission of that offence was known to be a probable consequence of the prosecution of the common purpose".*

Sergeant Lopdell in our view correctly responded that here the licensee and manager are not been prosecuted for an offence against the legislation. No finding of being a "party" to an offence is needed when pursuant to ss.132 or 135 of the Act the Authority is considering whether, on the balance of probabilities, an applicant has established that premises have been operated in breach of the Act or that a manager has failed to conduct premises in a proper manner.

The grounds of the Police applications have been established to our satisfaction. We are also satisfied in terms of subsections 6 of ss.132 and 135 that the proven unauthorised sale or supply by the licensee and manager was sufficiently serious to make it desirable that we should make orders suspending the on and off-licences and Mr Penney's General Manager's Certificate.

### Orders

On-licence 007/ON/134/96 and off-licence number 007/OFF/34/96 issued to Parke and Penney Holdings Limited are both suspended for the period from 3.00 a.m. on Saturday 12 June 1999 to 7.00 am on Saturday 19 June 1999.

General Manager's Certificate No. GM 497/94 issued to Grant William Penney is hereby suspended for the period from 3.00 am on Saturday 12 June 1999 to 7.00 am on Saturday 19 June 1999.

DATED at WELLINGTON this 15<sup>th</sup> day of June 1999

  
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Judge J P Gatley  
Chairman

