

Decision Notification

Application Details

Application no.	217495
Licence No.	57501900
Licence Class	Small Venue
Premises Name	NYX Lounge
Premises Address	Level 1, 116 Hindley Street Adelaide SA 5000
Applicant	NYX LOUNGE PTY LTD
Application Type	Application for a Liquor Licence

Outcome

Decision	Refused
Effective Date	15 Nov 2022

Reasons for Decision

Background

This is an application for a Small Venue Licence to be located at Level 1, 116 Hindley Street Adelaide. In accordance with section 51A of the *Liquor Licensing Act 1997* (the Act), the application was provided to the Commissioner of Police who subsequently lodged an intervention against the application under section 28AA of the Act on the grounds that to grant the application, unconditionally, would be contrary to the public interest.

SAPOL note that both directors of the applicant company are also approved under other liquor licences which have been subject to multiple disciplinary action before the Licensing Court:

- Lui Chien Yang is currently approved in a position of authority at K Illusion Lounge (57101726). In September 2021 the court revoked the ongoing approval of Mr Yang and granted an interim approval for 24 months to be reinstated on an ongoing basis if no matters brought to the attention of the Court that causes it concern.
- Shang [Wesley] Ju Yang is currently approved in a position of authority at The Voice Karaoke (57101970). This premises has been subject to multiple disciplinary matters before the Licensing Court, however Mr Yang's approval is still ongoing and there are no matters currently before the Court in which Mr Yang is a party to.

SAPOL have submitted that, if the application is granted, it ought to be done on an interim basis (ending 23 September 2023), and that Lui Chen Yang's approval in a position of authority should also be granted on an interim basis (ending 23 September 2023).

Adjournment

The Commissioner of Police lodged an application for disciplinary action against K Illusion Pty Ltd and Lui Chien Yang in July 2022 for a number of alleged breaches under the *Liquor Licensing Act 1997*. Previously, all parties agreed to an adjournment of the current application for a small venue licence until the disciplinary matters before the Court were resolved.

The applicant has since contacted our office and has requested that the matter be brought back on and determined prior to the disciplinary matters being resolved.

I note that the Licensing Authority considered whether it would be in the public interest to refer the matter to the Licensing Court, so that it could be determined in light of the disciplinary action, however due to the restrictions that exist under section 21 of the Act against application relating to a small venue licence, this option was not available to the Licensing Authority. At the request of the applicant, I will therefore proceed to determine this matter based on all the information before me at this time.

Procedural Matters

I note that the applicant received a copy of the notice of intervention lodged by the Commissioner of Police on 17 August 2022. After making the request to bring the matter back on to be determined, our office wrote to the applicant on 19 October 2022 and invited them to make submissions as to why the application should be granted (even on an interim period) while one of the directors is subject to an interim approval and disciplinary action before the Court. Our office received written submission from the applicant on 25 October 2022. A copy was also provided to SAPOL.

Approval of Shang [Wesley] Ju Yang

In their submission the applicant notes that Mr Shang Ju Yang was found to be fit and proper to occupy a position of authority by the Licensing Court in 2017 and there are no reasons to disturb this finding. I agree with this submission. The Court has dealt with Mr Yang on a number of occasions, however the Court has not considered the matters to be of such a nature that he ought to no longer be considered a fit and proper person as a result. With no new information at hand there does not appear to be any reason for the Licensing Authority to disturb this finding.

Approval of Lui Chien Yang

In their submission the applicant notes that Mr Lui Chien Yang is only a shareholder in the company and therefore will not be involved in the management or operation of the licensed premises. They claim that for the purpose of being a shareholder in a company holding a licence, his interim approval and the disciplinary proceeding are 'effectively irrelevant'.

I do not agree with this submission. Under section 6 of the Act a shareholder is considered to occupy a position of authority in a body corporate. Under section 56(1)(b) of the Act an applicant for a licence must satisfy the Licensing Authority that each person who occupies a position of authority is a fit and proper person to do so. The criteria which governs whether a person is fit and proper, as set out in section 55 of the Act, does not make distinctions between the type of position the person holds - the test remains the same.

If Parliament held the view that a shareholder is "insignificant" or does not need to meet the same fit and proper test as a director of a company, then the legislation would reflect as such, but that is not the case. Rather, Parliament deemed that a shareholder ought to be considered to be in a position of authority and subject to the same assessment as a director of a company. I also note that Mr Lui Chien Yang and Mr Shang Ju Yang are 50% shareholders and therefore no decision concerning the company could be made without the other's agreement. To that extent, Mr Lui Chien Yang is therefore in a position of considerable influence in the company. I am therefore of the view that Mr Yang's interim approval and current disciplinary matters, in relation to his position as a director at K illusions, are acutely relevant to the application before me.

In their submission, the applicant also points to the recent decision of our office to grant the transfer of the Rob Roy Hotel to a company in which Mr Shang Ju Yang and Lui Chien Wang were the only two persons approved in a position of authority upon the transfer of the licence. They submit that the circumstances surrounding the transfer of the Rob Roy Hotel and this application are effectively the same. I note that the application to transfer the Rob Roy Hotel was granted for an interim period until 23 September 2023. I further note that at the time the application for Rob Roy was determined, there was no current disciplinary matters before the Licensing Court (SAPOL lodged their complaint for

disciplinary action against Mr Lui Chien Yang 2 months after this application was granted). The circumstances are therefore not the same, and the Licensing Authority is not bound to follow its previous decision in relation to these individuals.

The question now turns to whether this application for a small venue licence ought to be granted.

It is not appropriate for the Licensing Authority to pre-determine the outcome of the disciplinary action to allow a decision to be made on this application. However, it is relevant that a complaint for disciplinary action has been lodged, and accepted, by the Licensing Court against Mr Lui Chien Yang, and this ought not to be disregarded just because there has been no outcome. When the Licensing Court revoked Mr Lui Chien Yang's approval, and replaced it with an interim approval in September 2021, Gilchrist J issued a stark warning to the licensee when he noted "K Illusion needs to understand that if it continues to come back before the Court it and Mr Yang's time in the hospitality industry is going to come to an end".

K Illusion, and Mr Yang have now found themselves back before the Court less than 12 months later. I think it is therefore reasonable to assume that there is a likelihood that Mr Yang's approval may be revoked should the matter be determined in favour of the Commissioner of Police. It follows that should the Court decide to revoke Mr Yang's approval, and disqualify him from holding a position of authority under the Act, this will extend to his ability to be a shareholder in a company holding a licence.

The Licensing Authority must also be guided by what is in the public interest when determining applications under the Act and, pursuant to section 53(1a) of the Act, must refuse an application if satisfied that granting the application would be contrary to the public interest. Consideration must therefore be given as to whether it is in the public interest for the Licensing Authority to continue to issue approvals to a person whose ability to hold positions of authority under the Act is currently under scrutiny by the Licensing Court.

Having considered all the information before me, I am of the opinion that it would be contrary to the public interest to grant an application in which Mr Lui Chien Yang would also be approved to occupy a position of authority, even if it was only on an interim basis. Based on all the circumstances, I consider that a member of the public would hold reasonable concerns with the Licensing Authority granting Mr Lui Chien Yang further approvals under the Act, given the serious nature of the alleged breaches, and his history of disciplinary action before the Licensing Court.

I note that this application is not in relation to an existing licensed premises, the refusal of which, would result in an existing licensed premises closing and no longer being accessible to the public. This is an application for a new licence in a high risk area of the CBD, in which there are many other options for the public to attend. Therefore I do not consider there to be a compelling public interest argument in favour of allowing the premises to open so that the public can have access to a licensed premises. This extends to consideration to the question of whether to grant the application on an interim period.

I am of the opinion that to grant this application would be contrary to the public interest and the application is therefore refused under section 53(1a) of the Act.

Under Delegation from the Liquor and Gambling Commissioner



Ashleigh Hughes
Team Leader
15 Nov 2022