

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2016-004-000731
[2016] NZDC 10150**

IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTIONS 103-105 OF THE LAND
TRANSPORT ACT 1998 FOR A
LIMITED LICENCE

BETWEEN RICKY LEE CAVE
Applicant

AND NEW ZEALAND POLICE
Respondent

Hearing: 26 May 2016

Appearances: Ms Pratap (on behalf of Ms Coxon) for the Applicant
Ms Sarah Allen for the Respondent

Judgment: 15 June 2016

RESERVED JUDGMENT OF JUDGE J JELAS

[1] Mr Cave was suspended from driving for three months commencing on 17 April 2016. On 25 May 2016, after the first month of his suspension had passed, he applied for a Limited Licence. Mr Cave makes the application upon the grounds he requires his licence for work purposes and will suffer extreme hardship if a licence is not granted.

[2] The application first came before me on 26 May 2016 at which time I adjourned it to the following day to consider the application and to enable counsel to locate any relevant decisions of assistance. I heard brief submissions on the issue of whether the applicant satisfied the threshold test of extreme hardship. When the application was called again on 27 May 2016, Mr Cave submitted his second affidavit. I reserved my decision.

[3] I have already issued a results decision and determined the application should be declined upon the grounds that it does not meet the threshold test of extreme hardship.¹ The following are the reasons for my determination.

Background

[4] This is Mr Cave's second demerit point's suspension. His first was in 2004, also for a three month period.

[5] His present suspension results from two instances of driving well in excess of the 50 kph posted speed limit and an infringement offence of driving with excess breath alcohol. These three infringement offences occurred within a relatively short period of time.

| Date of offence | Description | Demerit points |
|------------------------|------------------------------------|-----------------------|
| 10 June 2014 | Exceeded 50km/h posted speed limit | 40 |
| 7 March 2015 | Exceeded 50km/h posted speed limit | 20 |

¹ Reserved Judgment 1 June 2016.

| | | |
|------------------|---|----|
| 15 November 2015 | Breath alcohol level exceeded 250 mcgs but not more than 400 mcgs | 50 |
|------------------|---|----|

[6] Mr Cave was served with his suspension letter of 17 April 2016.

Land Transport Act 1998:

[7] Under s 105 of the Land Transport Act 1998 the Court may order the granting of a Limited Licence if the Court is satisfied that the disqualification or suspension has resulted or will result in

- (a) Extreme hardship to the applicant (whether in relation to employment or otherwise); or
- (b) Undue hardship to a person other than the applicant (whether in relation to employment or otherwise); and
- (c) The applicant meets other criteria specified in s 103 and 104 and
- (d) The granting of a Limited Licence is not contrary to the interests of public safety.²

The Application

[8] Mr Cave's application was supported by two affidavits filed by him dated 17 May 2016 and 27 May 2016. In addition, Megan Jaffe, the director of Ray White Remuera, filed an affidavit dated 20 May 2016. I was also provided with written confirmation that Mr Cave had enrolled in a defensive driving course on 26 May 2016.

[9] The Police do not oppose the application.

The Grounds

[10] Mr Cave is a real estate agent. He contracts to Ray White Remuera. His income is commission based.

² Section 105(2) Land Transport Act 1998.

[11] Mr Cave attests that he will suffer extreme hardship if he is not permitted to drive for the remainder of his suspension period being approximately six weeks. He states that if he is unable to drive it will affect his ability to fulfil his work commitments as a real estate agent which will in turn affect his income. I was advised from the bar the estimated income specified in his affidavit is based upon his 2015 income.

[12] In addition, Mr Cave states it is not practicable for him to hire a driver. He states his insurance company will not permit a hired driver to drive his Aston Martin Virage.³ In addition, he states it is both costly and impractical to arrange a temporary driver.⁴ He estimates it would cost him approximately \$55 per hour to hire a temporary driver. Finally, because of the insurance difficulties with his car he would need to hire a lease vehicle for the temporary driver to utilise.⁵ Mr Cave states he cannot financially sustain these expenses.

The Applicant's Finances

[13] Mr Cave is a real estate agent with an average monthly after tax income of \$25,000. His income is derived from commission earned from the sale of properties, primarily residential. His specified income is based upon his 2015 sales figures. It was not suggested his sales during the first half of 2016 would be less than the 2015 average. Given the buoyancy of the Auckland property market it could be expected his income level would be substantially similar to 2015.

[14] In Mr Cave's first affidavit he particularises his monthly expenses totalling \$21,050. His expenses include costs relating to his mother who he provides for. Sixty four percent of Mr Cave's monthly expenses is allocated to mortgage repayments and associated running costs for his home, holiday house and three rental properties.⁶ Mr Cave did not disclose his level of equity in any of these properties.

³ Affidavit dated 17 May 2016, para 19.

⁴ Affidavit dated 27 May 2016, para 7.

⁵ Affidavit dated 27 May 2016, para 8 and 9.

⁶ Total monthly expenses for these properties is \$13,600.

[15] His other significant monthly expenses relate to car repayments, petrol and insurance on two vehicles being his personal vehicle (the Aston Martin Virage) and his mother's vehicle (Range Rover).⁷

[16] Mr Cave stated the following in respect of his monthly expenses:

... I barely have enough savings and any extras gets put back in to a property management business that has only been operating for a few months, but we are not making any money at the moment, we are actually losing money. Until we start to get more management on our books I still have to pay the staff. This expense is shared with my business partner who is handling this business.⁸

[17] On 27 May 2016, when the application was recalled, Mr Cave submitted a second affidavit.⁹ In his second affidavit he included additional costs and expenses being the following:

| Expense | Expense Per Annum | Average Monthly Expense |
|---|-------------------------------|---------------------------------|
| Contribution to wages of PA | \$8,000 | \$666.66 |
| Wages for Database Manager | \$50,000 (plus commission) | \$4,166.66 (plus commission) |
| Property management business employee costs (wages of five staff members) | \$255,000 | \$21,250 |

⁷ Almost 17% of Mr Cave's monthly expenses relate payments towards these two vehicles and their associated running costs.

⁸ Affidavit dated 17 May 2015, para 37.

⁹ Affidavit dated 27 May 2016.

[18] The wage cost for the PA and Database Manager are new costs, not included in Mr Cave's first affidavit. The property management business costs were mentioned in the first affidavit but not specified. In Mr Cave's second affidavit he describes the property management staff costs as expenses he alone incurs. He does not describe them as shared expenses; this is in contrast to his first affidavit.¹⁰ In his second affidavit he states:¹¹

I also have a property management business which I started, has not been making money at present but I still have to pay staff wages.¹² [emphasis added]

[19] Mr Cave's monthly expenses differ greatly between his first and second affidavit. In his first affidavit he specifies the sum of \$21,050 and then puts the surplus towards his property management business. In his second affidavit his monthly expenses total \$47,132 which is well in excess of his stated monthly income of \$25,000.

[20] There is a significant difference between the two affidavits as to Mr Cave's monthly expenses. The reason for that difference was not explained to me. In the absence of verification of these expenses I treat them cautiously.

[21] I note the property management business has only been in operation for a few months and those expenses were entered into when Mr Cave would have been well aware a second period of suspension of his licence would occur. The final infringement offence occurred on 15 November 2015 being well before the period when the property management business was said to commence.¹³ Mr Cave has therefore elected to enter into a new business at a time when his license was about to be suspended.

¹⁰ Refer paragraph [15] above.

¹¹ Affidavit of 27 May 2016, para 5.

¹² Affidavit dated 27 May 2016, para 5.

¹³ Affidavit dated 17 May 2016, para 37.

Case Law

[22] The onus is upon Mr Cave to demonstrate the remaining six weeks without his licence will result in extreme hardship. In *Barbara v Auckland City Council*¹⁴ Barker J stated:

“every case must depend on its own facts and there are no guidelines as to the meaning of the word “extreme” ... The onus of proof is clearly on ... [the applicant]. Clearly “extreme” means something more than “undue”.”

[23] In the subsequent decision of *Fallwell v The Ministry of Transport*¹⁵ Vautier J adopted the meaning given to extreme in the concise Oxford Dictionary being:

“Furtherest or very far advanced in any direction, utmost, uttermost; going to great lengths”.

[24] A distinction was also made between undue and extreme hardship in *Hedge v Police*¹⁶ by Pennington J who cited with approval the author to *Graham’s Law of Transportation* where the author submitted that all of the circumstances surrounding the offence and the offender must be taken into account. In respect of the meaning of extreme, again the dictionary meaning was referred to and the author stated:

“Extreme hardship could be described as hardship which is so excessive that it could not be foreseen as a natural consequence of a conviction of drink and driving”.

[25] Finally, in *New Zealand Police v Rihari*¹⁷ Lawrenson J made reference to the above earlier authorities and determined extreme hardship, for the purpose of determining if a vehicle should be confiscated,¹⁸ required consideration of a number of factors including the following:

- (a) By prescribing a standard in terms of “extreme” hardship, the legislator clearly indicated that a very high level of hardship had to be demonstrated by a qualifying offender.
- (b) A determination of what amounts to “extreme hardship” must be determined in the common sense way and in relation to the facts of a particular case. It is to be determined objectively and not on the

¹⁴ *Barbara v Auckland City Council* HC Auckland M393/80, 13 May 1980.

¹⁵ *Fallwell v The Ministry of Transport* HC Auckland M1248/84, 1 November 1984.

¹⁶ *Hedge v Police* HC Rotorua AP61/92, 31 July 1992, page 4.

¹⁷ *New Zealand Police v Rihari* HC Whangarei AP10/98, 25 June 1998.

¹⁸ Under Section 84(2)(A) of the Criminal Justice Act 1985.

basis of how the particular offender may perceive the extent of extreme hardship.

- (c) To constitute “extreme hardship”, the hardship must be such that in the particular circumstances it is excessive even when viewed in relation to the concerns underlying the enactment of s 84.

[26] In addition, His Honour noted two factors which could be indicative as to whether or not “extreme hardship” is likely to arise being:

- (a) If the hardship is such that it arises from a consequence which goes beyond those normally attendant on the loss of the ability to drive a motor vehicle.
- (b) If the consequence relied on to establish “extreme hardship” is such that a particular offender would have known that it would be in peril to which he was subjecting himself if he chose to drive in contravention of the sections. If the consequence was such that the offender knew that it could eventuate, then it could be said to be an element of *volenti* arises. Hence in my view it is more difficult for an offender to claim “extreme hardship”.

Analysis

[27] I am not satisfied Mr Cave will suffer extreme hardship if a Limited Licence is not granted.

[28] Mr Cave’s application is partly premised on the problematic situation of his insurance company refusing to cover an alternative driver for his personal vehicle. Mr Cave submits part of his *brand* as a Real Estate Agent in the high-end residential market is reflected in his vehicle.¹⁹ His car is also a medium through which he markets himself (the vehicle has a personalised number plate). Mr Cave states being unable to drive his car over the last few weeks has been *a really bad look*.²⁰

[29] Somewhat unusually, no written verification has been provided from the insurance company confirming the limits upon drivers for Mr Cave’s vehicle. Mr Cave’s own driving record would normally be affecting his insurance policy, or at least his premium. The absence of details from the insurance company is unsatisfactory.

¹⁹ Affidavit dated 17 May 2016, para 17.

²⁰ Affidavit dated 17 May 2016, para 17.

[30] In any event, I do not find the use of Mr Cave's vehicle in the remaining six weeks of his suspension period is necessary to prevent extreme hardship. Mr Cave will be able to provide an explanation to those customers who might be expecting him to arrive in his Aston Mirage. Presumably he has already been doing this during the first six weeks of his suspension.

[31] In order to maintain his income Mr Cave will need to transport himself primarily around the Central Auckland and Eastern Suburbs Districts for work. I accept that would be problematic and time consuming on public transport. Mr Cave will need to find an alternative means of transport.

[32] In Mr Cave's second affidavit he states he would have to incur the costs of leasing a vehicle and hiring a driver. The driver costs are estimated to be \$55 per hour and would be required from 6.30am to 9pm, six days per week.²¹

[33] It is a matter for Mr Cave to determine how best to approach the issue of a temporary vehicle and temporary driver. He pays for his mothers Range Rover and this type of vehicle could be a suitable short term solution to the issue of temporary vehicle. The Range Rover brand is consistent with Mr Cave's business brand. Mr Cave refers to his mother presently undergoing treatment for cancer and being unwell most days which impacts upon her ability to drive for Mr Cave.²² Given that information, it would appear Mr Cave's mother's vehicle could be available to Mr Cave. Alternatively, Mr Cave could lease a more modest vehicle for his mother while he utilises hers.

[34] In addition, I'm cautious in accepting the quoted costs for a temporary driver or the hours required for such a driver. The driver hourly rate strikes me as very high and in the absence of verification I am not prepared to accept it. Mr Cave certainly does not need a driver from early mornings until 9pm at night.²³ There are numerous inconsistencies within Mr Cave's affidavits as to when he needs to drive.²⁴

[35] In Mr Cave's first affidavit he describes being in the office from 7.30am for office meetings Tuesday – Friday. Some days these meetings conclude by 11.30 –

²¹ Affidavit 27 May 2016, para 7.

²² Affidavit 27 May 2016, para 21.

²³ Affidavit 27 May 2016, para 7.

²⁴ Affidavit 27 May 2016, para 7, and Affidavit of 17 May 2016, paras 15 -17.

12pm²⁵ other days he is free for client meetings from 10am.²⁶ It would seem most unnecessary for Mr Cave to hire someone from 6.30am simply to drive him to the office and wait for up to three hours before he heads off to client meetings. Similarly, Mr Cave's affidavit refers to generally completing his work day at 7pm (Tuesday to Thursday) and 6pm on a Friday.²⁷ The weekend Open Home hours are generally held between 11am and 4.30pm.

[36] I appreciate Mr Cave may prefer to remain completely flexible in his work day. That is a matter of choice for him but I find the estimated hours said to be required by a temporary driver are overstated and excessive. It must be remembered that a Limited License can only be granted to the extent that it is necessary to alleviate extreme or undue hardship.

[37] This is Mr Cave's second period of suspension and is the result of three infringement offences within a period of 17 months. His loss of license was inevitable and the granting of a limited license discretionary. The fact Mr Cave will incur costs if he wishes to drive during the remaining six weeks of his suspension does not mean he will suffer extreme hardship. Mr Cave has sufficient income and assets²⁸ to enable him to meet these short term additional costs. He has a substantial income and substantial assets. This is partly reflected in the fact he spends almost 80% of his income building upon and maintaining his asset base.

Conclusion

[38] Mr Cave's application for a limited license is declined.

Signed at this day of at am/pm.

J Jelas
District Court Judge

²⁵ Tuesday to Thursday refer affidavit 17 May 2016, para 15 and 16.

²⁶ Refer Affidavit 17 May 2016, para 14.

²⁷ Affidavit 17 May 2016, para 16.

²⁸ Mr Cave did not disclose this level of savings to the court.