

Decision Number

LIQ-12161-OFF

IN THE MATTER of the Sale and Supply of Alcohol Act
2012 ('the Act')

AND

IN THE MATTER of an application by **Shri Hari
Enterprise NZ Limited** for the renewal
of an off-licence pursuant to s.127 of
the Act in respect of premises situated
at 564 State Highway 10, Taipa trading
as "**Taipa Food Market.**"

BEFORE THE FAR NORTH DISTRICT LICENSING COMMITTEE

Chairman: Murray Clearwater
Member: Martin Macpherson
Member: John Thorne

HEARING at TAIPA on 18 October 2023

APPEARANCES

Mr. Jon Wiles – for **Shri Hari Enterprise NZ Limited** ("the applicant")
Mr. Nimesh Kumar SHAH- for the applicant
Mr. Patrick Barber – Far North Chief Licensing Inspector ("the Inspector") to assist.
Mrs. Wendy Antrobus- for the Medical Officer of Health ("MOoH") – to assist.
Sergeant Michelle Row- for the Police (Alcohol Harm Prevention Officer) in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction

1. By an application dated the 6th of July 2022, the applicant has applied for the renewal of the off-licence 01/OFF/024/2014 that expired on 9 July 2023. It was duly advertised and reported on by the agencies.
2. No public objections were received; however, an adverse report was received from the Medical Officer of Health on 3 August 2023 expressing concern that the business had just failed a CPO operation on the 29th of July 2023 and that they had lodged the licence renewal only 3 days before expiry. The MOoH did not oppose the renewal but raised these matters with the DLC.
3. The Police report of 1 August 2023 carried no opposition despite the business failing a CPO only 3 days prior to the Police report.

4. The Inspector reported on the application on the 23rd of August 2023. On page 28 of the Agenda under the heading Applicant and Management he reports “ ***There have been no issues or concerns with the applicants management of the premises during the term of the Temporary Authority. There is no reason to believe that the applicant is not suitable to hold a licence.***”¹
5. He did not oppose the renewal despite the late filing of the application and the recent CPO failure. (we discuss this response, and his late disclosure of a previous CPO failure at these premises in July 2020 later in the decision.)

Applicant’s Evidence

6. Mr. Wiles called joint director of the company Nimesh Kumar SHAH to present evidence on behalf of the company.
7. Mr. Shah told the Committee he has operated Taipa Food Market since 2010 and has a similar business in Whangarei. The two directors spend 7-8 hours a week between them at the store. They have two certificated managers working appointed there.
8. He acknowledged the CPO failure on 29 July 2023. He said Sagar Panchal was the Duty manager at the time of the sale to the minor. Mr. Panchal was working in the storage area of the store, and it was his wife who made the sale to the 16 year old boy.
9. He said they have provided further training to Ms. Aneri Patel, the seller, as they want her to obtain a manager’s certificate in the future. They have also installed a new robust till system which prompts ID checks on alcohol sales. Mr. Shah said they had consented to a seven day suspension of the alcohol licence and a 28 day suspension of Mr. Panchal’s Managers Certificate. He formally corrected his Brief of Evidence that stated they had agreed to a two day suspension.
10. He believed that the business served the community well and he presented a brief from his accountant to explain how the excise tax is stripped off tobacco sales.
11. There were no questions put to him by the agencies.
12. Mr. Shah conceded to Mr. Macpherson that he does not have a copy of the Managers Guide in store nor does he have a copy of the Sale and Supply of Alcohol Act 2012. He had not heard of the Servewise on-line training tool. This raised 105(1)(j) concerns for the Committee.
13. To the Chair he confirmed he operates two licensed grocery stores and that they had created a separate company to operate the Vape Store that they had built in the side of the Food Market.

¹ Inspectors Report page 28 of the Agenda.

14. He was questioned about the correct way to check for the age of a suspected minor. After some prompting he was able to explain that if the purchaser looks under 25 they must ask for ID. No ID no service. They do not use the Health Promotion Agency (HPA) date of birth Chart.
15. He agreed that if that policy was rigidly followed no sales to minors would occur.
16. He told us that Sagar Panchal is currently buying into the business and the papers were with their lawyers.
17. Next we heard from Sagar Panchal who told the Committee that he had been working at Taipa Food Market for one year. He said the second certificated manager, Joban Singh, is leaving but is still currently working at the store.
18. He regretted the sale to the minor in the CPO and was questioned about other offences that could be committed in an off-licensed grocery store. Despite considerable prompting he was unable to state important offences such as serving an intoxicated person, selling outside of licensed hours, selling spirits under a grocery style licence.
19. He said they did have an Incident book but there was no entries in it. He confirmed however that they do ask for ID often and have turned away customers who have not produced ID.

Police Evidence

20. Sergeant Michelle Row told the Committee about the circumstances of the 29 July 2023 CPO failure. She said a 16 year old boy was able to purchase a 6 pack of VB beer and was not asked for ID. When she spoke to the seller and Mr. Panchal they appeared ashamed and embarrassed. She discussed the need for further training with them.
21. The Sergeant has prepared the Section 280 and 285 applications for an agreed resolution suspension but 12 weeks later has still not lodged them with ARLA for determination. (as we discuss later this is now fortunate as they are not first time offenders).

Inspector's Evidence

22. The Inspector reported that the application was lodged late, only 3 days before expiry, and he recommended a waiver be granted for this omission.
23. He then introduced a surprising new piece of evidence in that the applicant did have a previous CPO failure on 11 July 2020. They had their licence suspended by the Alcohol Regulatory Licensing Authority, Shri Hari Enterprise NZ Limited NZARLA 171 refers.

24. The Committee asked him why this evidence was not reported to the Committee and put to Mr. Shah when he was in the witness box.
25. He said he had not realised it was within the 3 year renewal period until very recently.

Medical Officer of Health Evidence

26. Delegated Officer for the MOoH, Mrs. Wendy Antrobus confirmed the MOoH stance was still unopposed.

Recall of Mr. Nimesh Kumar Shah

27. We recalled Mr. Shah to the witness box and confirmed with him that he was still under oath to tell the truth.
28. He was asked to confirm the previous CPO failure and explain why the offence had not been disclosed to the DLC in his evidence in chief.
29. His answer was not convincing at best, but he eventually admitted that he did recall the incident and subsequent suspension of licence.
30. Mr. Wiles was asked about his knowledge of the first CPO failure. He was of the view that if the Police did not raise evidence of it, the applicant was not obliged to do so. (The Committee disagrees, and we comment on this later in the decision.)

The Law

31. Section 3 of the Sale and Supply of Alcohol Act 2012 (“the Act”) states the purpose of the Act as follows:

- (1) *The purpose of Parts 1 and 3 and the schedules of this Act is, for the benefit of the community as a whole, –*
 - (a) *to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and*
 - (b) *to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.*

- (2) *The characteristics of the new system are that–*
 - (a) *It is reasonable; and*
 - (b) *Its administration helps to achieve the object of this Act.*

32. Section 4 states the object of the Act as follows:

- (1) *The object of this Act is that –*
 - (a) *The sale, supply, and consumption of alcohol should be undertaken safely and*

responsibly; and
(b) *The harm caused by the excessive or inappropriate consumption of alcohol should be minimised.*

(2) *For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes –*

- (a) *Any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and*
- (b) *Any harm to society generally or the community, directly or indirectly caused, or directly and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).*

39. Section 131 of the Act provides the criteria that the licensing committee must have regard to in deciding whether to renew a licence as follows:

- (a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):*
- (b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence:*
- (c) any matters dealt with in any report from the Police, and inspector, or a Medical Officer of Health made by virtue of section 129:*
- (d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.*

Criteria to be considered.

40. The Act requires that when deciding whether to renew a licence, the licensing committee must have regard to the matters contained in section 131 and 132 of the Act. These are:

Section 105(1)(a) The Object of the Act

41. Section 105(1)(a) of the Act requires that the licensing committee must have regard to the Object of the Act. The decisions of the higher courts have said that we must measure the application against the criteria for renewal with the aim of helping to achieve the Object of the Act.

42. Following the recent Supreme Court decision, we are also required to ‘read together’ both the **Purpose, and the Object of the Act**. Notably, Section 3 talks about the administration of the Act should be “**for the benefit of the community as a whole.**”

Section 105(1)(b) Suitability of the Applicant

42. Section 105(1)(b) provides that the applicant must be a suitable entity to hold an off-licence. In this regard, the suitability of the applicant has **not** been challenged by the agencies.

Suitability has been defined in many judicial forums.

In Page v Police (unreported) HC Christchurch AP 84/98 24 July 1998², Panckhurst J stated:

“Such suitability is not established in a vacuum but in the context of a particular case”.

In New Zealand Police v Casino Bar No. 3 Limited CIV 2012-485-1491; [2013] NZHC 44³ the High Court treated suitability as a broad concept.

The assessment of it includes the character and reputation of the applicant, its previous operation of premises, its proposals as to how the premises will operate, its honesty, its previous convictions and other matters. It also includes matters raised in reports under s.11 (now 103 under SASSA) of the Act. (our emphasis)

In Re Sheard [1996] 1 NZLR 751⁴ Holland J said :

“Obviously, the applicant’s past conduct will be very relevant to the consideration of suitability. The real issue is whether the evidence of that past conduct will indicate a lack of confidence that the applicant will properly carry out the obligations of a licensee.

And again, in Sheard...***“The real test is whether the character of the applicant has been shown to be such, that he is not likely to carry out, properly, the responsibilities that go with the holding of a licence.”***

The High Court in Christchurch Medical Officer of Health v J & G Vaudrey Ltd⁵ confirmed there is no presumption that a new licence or renewal of an existing licence will be granted: ***Thus, when the relevant body receives an application, they must consider it against s 105 in deciding “whether to issue a licence”. There is no presumptive position, and certainly no foregone conclusion. I think the reality of the position is that if the object of the Act cannot be achieved by the application, then it cannot succeed.***

43. The Committee must undertake an evaluative approach and adopt a merits-based assessment of the application. We determine our position on the suitability of the applicant later in our decision.

² Page v Police (unreported) HC Christchurch AP 84/98 24 July 1998

³ New Zealand Police v Casino Bar No. 3 Limited CIV 2012-485-1491; [2013] NZHC 44

⁴ Re Sheard [1996] 1 NZLR 751

⁵ Christchurch Medical Officer of Health v J & G Vaudrey Ltd

Section 105(1)(c) Relevant Local Alcohol Policy

44. The Far North Council does not have a Local Alcohol Policy. There is nothing for us to consider.

Section 105(1)(d) The days and hours of operation of the licence

45. The current licensed days and hours are **Monday to Sunday 10.00am to 9.00pm**. They are unremarkable in 'Off Licence' terms, and within the default national maximum trading hours for off licences.

Section 105(1)(e) The design and layout of any proposed premises

46. The design and layout of the premises is also unremarkable and is fit for purpose.
47. Overall, we were satisfied that the premises does operate as a Grocery Store. Notably the alcohol on offer was very 'mainstream' and there was no evidence of stocking high strength beers or conducting single sales that we saw during our site inspection.
48. We did query the sales revenue figures provided by the applicant's accountant. On the face of it, it appears that food products are the principal revenue stream for the store, and we signal that it is critically important that the sales revenue report is derived from prepared accounts clearly itemising all sales in to the five required categories.

Section 105(1)(f) Whether the applicant is engaged in or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods.

49. The applicant sells general hardware, fishing gear, bait and postal products and a range of tobacco and vape products. There is a separate Specialist Vape Retailer (SVR) Vape Store attached to the premises.

Section 105(1)(g) Whether the applicant is engaged in or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low and non-alcoholic refreshments, and food, and if so, which services.

50. A Lotto franchise and Post Shop are operated at the store.

Section 105(1)(j) Whether the applicant has appropriate systems, staff, and training to comply with the law.

51. The applicant told us they conduct regular training and have installed a new POS system to better capture sales and prompt ID checks.

52. The number of certificated managers attached to the premises was at the bare minimum of two.
53. We are concerned that the lessons that should have been learnt after the first CPO failure are still present although there is almost 3 years to the day between the failures.

Section 105(1)(k) Any matters dealt with in any report of the Police, an Inspector and the Medical Officer of Health under Section 129

54. The Inspectors Report recorded that the application was “*uncontested and may be dealt with by the Chairperson as provided for by s.191(2).*”
55. The Committee is surprised that none of the agencies have opposed the renewal. However, It is certainly not the role of the DLC to dictate whether agencies should oppose an application, or not.
56. But what we do expect them to do is to enquire into every application in a consistent manner. In the case of a renewal application, they must examine the past (three years in this case) performance of the applicant and report **all** incidents or offences that have occurred.
57. In Sergeant Row’s response to the revelation of the first CPO failure, and after giving her evidence-in-chief, she told the Committee she had no knowledge of the 2020 CPO failure and could not find any record of it in Police records. A pre-hearing tri-agency conference or meeting would have been helpful in this case.
58. For completeness we note the blatant error in the Inspectors report where he stated that there were no issues or concerns during the course of the **Temporary Authority**. Clearly a ‘cut and paste’ error but another example of a lack of attention to detail that we **do not expect** to see from a senior Inspector.

Section 131 of the Act says we must also have regard to whether the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence.

59. There was no evidence of public disorder, littering or graffiti presented to the Committee **that linked** this business to a reduction of the amenity and good order of the locality by more than a minor extent.
60. Clearly the sale of alcohol to minors is a serious offence and we would hope the CPO failures was not a sign that this business regularly sells to minors.

Reasons for the Decision

61. Section 3 of the Act requires us to act reasonably in the exercise of our duties with the aim of helping to achieve of the Object of the Act. We are also obliged to read Section 3 & 4 together.
62. This is a straight renewal with no requests for variation, but it does not restrain the agencies, or the Committee, from fully examining the application to renew as there is no 'right of renewal' as confirmed by the High Court in Vaudrey.
63. The assessment of intoxication and the identification of minors requires skill, knowledge, commitment, and a clear alert mind.
64. We are acutely aware of the Lyger decision from Tauranga where ARLA stated that with applications that the DLC determines will not meet the Object of Act they cannot be repaired by the arbitrary imposition of conditions.
65. The in ER BELLAS LIMITED CIV-2020-488-60 [2020] NZHC 2517 Gault J said at

[29] Ms. Chen submitted there is a two-step test. The first step is determining whether renewing the licence would be consistent with the object of the Act, or whether the application is capable of meeting the object of the Act. If so, the second step is whether, and what, conditions need to be imposed.

[30] I accept that the overriding question is whether granting the application is consistent with the object of the Act. But it does not follow that the issue of conditions is always irrelevant to that assessment and only to be considered at a second stage if the object of the Act can be met (effectively without conditions). It may be that in a particular case the object of the Act can be met by the imposition of conditions. In that sense, there may be an overlap between the two steps. For example, proposed hours of operation is a mandatory consideration in s 105(1)(d). If the only respect in which an application did not meet the object of the Act were its proposed hours of operating, and a condition limiting those hours would minimise the alcohol-related harm so that the application did meet the object of the Act, I consider it would be open to the decision-maker to grant the application subject to that condition.⁶

The Decision

66. This renewal would normally have been sent to ARLA to be considered along with the CPO failure. If we had been aware that this was a second failure within three years

⁶ ER BELLAS LIMITED CIV-2020-488-60 [2020] NZHC 2517

that would have been the preferred way forward. However, the renewal is before the DLC, and we will determine it.

67. After standing back and cross-checking the evidence and the submissions we have before us we have decided that we can approve a truncated renewal of the licence subject to conditions.
68. Clearly the goal for the applicant is to run a compliant, responsible business with no intoxicated persons or minors being served alcohol and the agencies not opposing the next renewal. That outcome is firmly in their own hands. Ongoing professional refresher training is required for all staff if they want to remain up to date in the retail alcohol sale business.
69. We note that the applicant is still to navigate the second CPO failure before ARLA. We suspect that ARLA will not deal with it on the papers and will call a hearing to hear the facts of the matter.
70. We can indicate to ARLA that we were otherwise satisfied that the store is a Grocery Store and should operate compliantly in times to come.
71. They will be back on a 'first strike' for the admitted 2023 CPO failure. Two more in the next 3 years will see the mandatory cancellation of the licence.
72. By a slim margin the licence is renewed for two (2) years from the date of expiry i.e. 9 July 2023, meaning that the licence will expire on 9 July 2025.
73. We will also refresh the licence conditions to reflect best practice.

The **Far North District Licensing Committee**, acting pursuant to the Sale and Supply of Alcohol Act 2012, approves an application by **Shri Hari Enterprise NZ Limited** for the renewal of an off-licence in respect of premises situated at 564 State Highway 10, Taipa trading as "**Taipa Food Market**", subject to conditions.

Conditions:

The licence is subject to the following conditions:

1. Alcohol may be sold on, or delivered from, the premises for consumption off the premises and supplied free as a sample for consumption on the premises, only on the following days and hours:

Monday to Sunday from 10.00am until 9.00pm

2. No alcohol is to be sold on or delivered from the premises on Good Friday, Easter Sunday, Christmas Day or before 1.00 pm on Anzac Day;
3. No alcohol may be sold other than –
 - i. beer that complies with the appropriate New Zealand food standard for beer; or
 - ii. mead that complies with the appropriate New Zealand food standard for mead; or
 - iii. fruit or vegetable wine that complies with the appropriate New Zealand food standard for fruit or vegetable wine; or
 - iv. grape wine that complies with the appropriate New Zealand food standard for grape wine;
 - v. or a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted;
4. While alcohol is being supplied free as a sample, water is to be provided to patrons at no cost from a water supply prominently situated on the premises;
5. The Licensee must have available for purchase on the premises, at all times when the premises are open for the sale and supply of alcohol, a reasonable range of non-alcoholic and low-alcohol beverages.
6. A properly appointed Certificated, or Acting or Temporary, Manager must be on duty, at or nearby the point of sale, at all times when the premises are open for the sale and supply of alcohol.
7. The Licensee must display signage as follows:
 - i. At every point of sale detailing restrictions on the sale and supply of alcohol to minors and intoxicated persons;
 - ii. A copy of the licence attached to the inside of the premises so as to be easily read by people entering each principle entrance to the premises; and
 - iii. A sign prominently displayed at the premises, which identifies by name the manager for the time being on duty.
8. The “single alcohol area” for the premises is as described on the plan attached at Appendix 'A' to this decision. The licensee must ensure that:
 - i. No alcohol is displayed, promoted or advertised outside the single alcohol area; and
 - ii. No products other than alcohol, low-alcohol and non-alcoholic beer, wine or mead are displayed, promoted or advertised inside the single alcohol area.

The renewal will be for 2 years from the expiry date of the current licence and a Replacement Licence is to be issued.

The renewed licence will expire on 9 July 2025.

DATED at Taipa this 25th day of October 2023



Murray Clearwater
Commissioner
For the Far North District Licensing Committee



NOTE

Sections 153 to 155 of the Act relating to the right to appeal against this decision are in effect.

This decision shall have effect from the date of issue.