

**Decision No. 60B [2020] 4929**

**IN THE MATTER**

of the Sale and Supply of Alcohol Act 2012.

**AND**

**IN THE MATTER**

of application under s. 99 of the Sale and Supply of Alcohol Act 2012, for an off-licence by **Caliente Kitchens Limited** in respect of premises at **1/98 Victoria Street, Christchurch, trading as Boo Radley's**.

**RESERVED DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE**

Chairperson: Mr P R Rogers  
Members: Ms C Robinson  
Mr D Blackwell QSM

**HEARING**

at 53 Hereford Street, Christchurch on the 9 September 2020.

**PRESENT:**

**Brent James Giddens** – Applicant – Caliente Kitchens Limited  
**Martin Ferguson** – Licensing Inspector  
**Constable Graeme Jolliffe** – NZ Police  
**Helen Barbour** – Ministry of Health  
**Dr Cheryl Brunton** – Medical Officer of Health  
**Mark Saunders** – Assisting the Committee

**INTRODUCTION**

[1] This is an application by **Caliente Kitchens Limited (the applicant)**, for an off-licence in respect of premises situated at 1/98 Victoria Street, Christchurch, trading as Boo Radley's Food and Liquor.

[2] The premises already trade as a tavern and the applicant is seeking an off-licence to sell alcohol 'across the bar' and by remote sales for the same footprint of Boo Radley's, the whole premises being already designated 'Supervised' under the on-licence.

[3] This hearing is as a result of opposition from the Medical Officer of Health (MOH) concerning in the main section 105(1)(j).

## **EVIDENCE OF APPLICANT**

[4] Mr Giddens, the sole director of the company represented himself and spoke from a prepared brief of evidence. He said that Boo Radley's Food and Liquor was established in 2014 as a Tavern and he indicated that 75% of the total sales were from alcohol.

[5] He commented that the Covid-19 pandemic had been tough on his business and this had led him to think of other options to retain financial sustainability. As a result, he made an application in April 2020 for an off-licence at Boo Radley's. The general intention was to diversify his offerings and bring in a new income stream. He states he was not interested in operating a bottle shop but something that would cater to the needs of his customers.

[6] He said as a result of opposition from the Canterbury District Health Board (CDHB) he had taken account of issues raised and will refer to them throughout his brief of evidence. The Committee notes here that Mr Giddens has incorrectly equated the Medical Officer of Health as the CDHB. It is the Medical Officer of Health who performs statutory functions under the Act. To avoid confusion, we refer to the Medical Officer of Health (MOH) hereafter. The applicant commented that the [MOH] had not opposed his application for a new On and off-licence for another bar he owns, to be known as Gin Gin and the company name being Little Chuck Little Limited in New Regent Street, Christchurch. The issue of the current application appears to be around "remote sales". He said his suitability had not been questioned and in his mind his Host Responsibility Policy is certainly "sound".

[7] Mr Giddens referred to the object of the Act under section 4 and commented that excessive or inappropriate consumption of alcohol should be minimised. He did not see the granting of an off-licence would do anything to complicate how he undertakes his host responsibility management for the on-licence.

[8] He commented that he has had no enforcement actions against him personally or any of his premises. He said, that in some of the issues of the [MOH] concerning the Host Responsibility Policy for the off-licence they seem to have overlooked the fact that he had a Host Responsibility Policy already in place and implemented for his on-licence. He pointed out the same systems and host responsibility principles apply to an off-licence.

[9] Mr Giddens commented on signage and his need to advise customers of the off-licence options and the hours off-licence sales are available. It was his belief

that the cumulative effect of him being granted an off-licence will be indiscernible from the others in the area as he expected it to be a small component of his business.

[10] Mr Giddens questioned the representative of the [MOH] over the need for a business plan and it was his view that the [MOH] had not made a similar request for a document in recent times, from other applicants. He did not consider a plan was required and given his track record he considered the request offensive. As he stated previously, he did not see that off-licence sales will not be a significant proportion of the overall sales.

[11] Mr Giddens expressed concerns about remote sales which legislation allows for and are allowed under an off-licence and he fails to see why he can't operate in the same manner as imposed on other off licenses.

[12] In conclusion he stated he is a responsible licensee with a proven track record and has existing systems in place, primarily through his Host Responsibility Policy which allows him to meet the object of the Act. In his view the opposition by the [MOH] has no substance and resulted in a waste of resources by both parties, the [MOH] when they have to deal with the Covid-19 matters and his time could have been better spent on his business.

### **CROSS EXAMINATION BY MOH**

[13] Mrs Barbour on behalf of MOH questioned Mr Giddens on the need for an off-licence. He replied it was primarily in relation to the Covid-19 situation and the ability to act as a remote seller of alcohol should Christchurch go into another lockdown. Mrs Barbour put to Mr Giddens that the Host Responsibility Policy was just for an on-licence and really all he had done was 'cherry picked' it, for the off-licence. He denied this.

### **CROSS EXAMINATION BY POLICE**

[14] Constable Joliffe questioned Mr Giddens on the bottled cocktails and he described them as homemade, made on the premises and rather like RTD's. He was asked what percentage of alcohol would be normal for that type of drink and he confirmed ingredients and percentages of alcohol would be on a label on the bottle. The constable asked about signage and he replied this was likely similar to other premises. He was questioned as to how he was going to make patrons aware of the liquor ban. He replied the staff would tell them.

## **QUESTIONS FROM THE COMMITTEE**

[15] The Committee asked Mr Giddens about the extent to which he was involved with the business. He replied, pre Covid-19 he would spend 1 to 2 weeks in Christchurch looking at issues that may have arisen such as intoxication and staffing issues; post Covid-19 he was spending 2 to 3 weeks in Christchurch. The Committee asked him who would be responsible for the remote sales and he said he was responsible for the set up and there was not much else that needed to be done, but a further lockdown could change that. When asked about advertising for the off-licence he stated it would be minimal such as at the bar and there would be mention on the menu of off-licence sales and it could be advertised on Facebook. Concerning advertising on the street he said there would not be any and commented that he only has a small stock room. He confirmed for the Committee that he was a Tavern and the whole of the premises was designated as supervised.

[16] The issue of advertising was put to the applicant as the Committee wished to explore a condition concerning external advertising. The applicant replied he did not wish to portray the premises as a bottle store, and while he questioned the need for a condition in the licence, he was happy if it was included as a condition that there was no external advertising other than on the menu. The menu would show that off-licence sales were available. The applicant commented that the front entrance to his building was relatively narrow and a menu currently filled part of the space and it was likely that on the menu it would show off-licence sales were available. When asked by the Committee, he confirmed he would not have sandwich boards or flags on the street to advertise off-licence sales.

## **QUESTIONS TO MEDICAL OFFICER OF HEALTH BY THE APPLICANT**

[17] Dr Cheryl Brunton, the Medical Officer of Health, had not prepared a brief of evidence but had attended the Hearing to answer any questions on her Report. She was sworn in and the Committee allowed Mr Giddens to ask questions. Dr Brunton was asked about what the issues were around section 105(1)(j). Dr Brunton replied there was a lack of detail around some of the systems for the off-licence.

[18] Mr Giddens put to Dr Brunton that it seemed to him his application was being picked on and a similar application, Long Dirt Road which was an application for an on and off-licence was not questioned by the MOH. Dr Brunton replied each application was considered on its merits and evidence presented showed that the applicant wished to continue seeking a licence to allow for remote sales after having advised the MOH he was not intending to conduct on line sales.

[19] The applicant asked Dr Brunton how the concerns raised about s105(1)(j) related to the object of the Act, section 4. Dr Brunton replied, it is in the criteria of the Act indicating which matters should be weighed in considering an application.

## **COMMITTEE QUESTIONS**

[20] The Committee asked Dr Brunton what the function of a Host Responsibility Policy was in relation to an off-licence. Dr Brunton explained that it is a document relating to the staff and patrons and what their responsibilities are. She said it may be used in training for all to see and it is also relevant to enforcement. The MOH would look at if the Host Responsibility Policy was being complied with if there were any issues. Dr Brunton accepted that the concerns about the adequacy of the Policy could be resolved if the Committee required amendments to address the differences between on and off-licences.

[21] The Committee asked the MOH representative Mrs Barbour if there was a template for Host Responsibility Policies for remote sales and were told there was not.

## **SUBMISSIONS FROM INSPECTOR**

[22] The inspector stated that this premise was a Tavern and that an applicant for an off-licence had the right to apply for a remote sales provision on their licence. The inspector believed that the issue of the Host Responsibility Policy was a “red herring” and a policy could have provisions for both on and off licenses in one policy. He said the business plan was a small part of the business and the applicant does not wish to be seen as a bottle store.

## **SUBMISSIONS FROM MOH**

[23] Mrs Barbour submitted that the grounds for the opposition were as a result of section 105(j) as to whether the applicant had appropriate systems, staff, and training to comply with the law. She commented that the reappearance of the remote sales came as a surprise because in correspondence before the hearing the applicant he said he was no longer planning remote sales. Ms Barbour said that the applicant had provided copies of the Host Responsibility Policy for an on-licence which was not acceptable to the MOH and there should be one covering an off-licence.

[24] MOH commented that Mr Giddens still appears to believe that the same systems for an on-licence are applicable to an off-licence.

## DISCUSSION

[25] This matter is an application for an off-licence to sell alcohol 'across the bar' and by remote sales at a tavern called Boo Radley's Food and Liquor. The premises have operated with an on-licence since 2014 trading about 75% of the total sales from alcohol.

[26] With the Covid-19 pandemic situation the applicant has considered steps to look to diversify in his business and particularly if there were another lockdown to have the ability to have an off-licence to allow for remote sales and also to supply off-licence sales over his bar.

[27] The applicant lodged the application on 8 April 2020 and subsequently there was no public objection and no opposition from the licensing inspector or the NZ Police.

[28] The MOH reported opposition to the application on the grounds they had little confidence in the viability of the additional licence, no consideration had been given for a business plan for an off-licence, the company had not provided any evidence how they would operate in compliance with the law and finally the application did not meet the object of the Act. At the Hearing the chief concern of the MOH seemed to be the Host Responsibility Policy and the absence of a business plan.

[29] The applicant gave evidence concerning his running of this, and other, licensed premises he owns. On the basis of the application documentation we did not have concerns about the applicant's suitability to hold an off-licence, however, as discussed below the manner in which he approached his communication with the MOH and his response to the Committee's Minute requesting that he consider conditions regarding signage and an updated host responsibility policy, demonstrated a lack of judgment and did not impress us. But for his experience in the industry and otherwise good track record this could well have counted against the applicant's suitability.

[30] As stated in the Hearing the concerns of the MOH were around section 105(j) of the Act which states under the criteria for issue of licenses that "where the applicant has appropriate systems, staff, and training to comply with the law:" In this instance the applicant's application was being opposed chiefly on the grounds of an inadequate business plan and host responsibility policy. The business plan is not a requirement which has to accompany an application for an off-licence or an on-licence for that matter. The Committee noted the comments of the Inspector in his report at para 11 concerning business plans having more significance for new entrants to the industry and is in agreement with those comments. We were satisfied with the explanations Mr Giddens gave at the Hearing regarding his

systems and processes in response to questions about them from the Police and the Committee.

[31] A lot was made at the Hearing by the MOH around a host's responsibility particularly for an off-licence premise, or premises that also hold an on-licence for a tavern and they should be two distinct policies. The Committee does not consider this necessary and it appears to us to be emphasising 'form over substance'. In our view as long as all the points for both an on and off-licence are covered it would not be right to find a policy to be inadequate if it mentioned for example food in relation to a policy for an on and off-licence. We do not see that this would either confuse staff or patrons as clearly common sense would prevail as to what provisions of the policy applied.

[32] The Committee requested an updated Host Responsibility Policy in a pre-hearing Minute and this was supplied by the applicant. In relation to the off-licence part of the Policy the applicant included the following bullet point:

"If you overlooked the sign at the bar, off license sales must cease by 11pm. If you pressure our staff to try and sell to you after this time, you will be forced to read 148 reports from the CDHB between 2019-2020 until you find the one application that they opposed."

[33] The Committee considers that this was inappropriate and disrespectful to the MOH. We expect the applicant to delete the second sentence from the Host Responsibility Policy.

[34] The Committee also requires the Policy to include a provision that staff make patrons aware when they leave the premises, that they are entering an alcohol ban area. Although the Inspector and the applicant did not consider it necessary to include this in the Policy, the Committee are of the view that in this locality with the number of licensed premises and nearby residential area that it is appropriate to include this in the Policy as a responsible host.

[35] An issue arose at the hearing in relation to the inhouse packaging for sale of cocktails mixed at the bar pursuant to the off-licence. The Committee was concerned about whether there was any additional risk associated with the sale of alcohol in this manner due to possible inconsistency in the alcohol content of the pre-mixed drink when compared to a premanufactured drink. The Inspector clarified that the applicant would be required to meet food health standards for labelling of the drinks and their alcohol content. Mr Giddens accepted that was the case and commented that he thought it unlikely that staff would make an error as all drinks sold in the bar are made to a recipe. It is not in his interest to add more alcohol than is required. The Committee was not aware that alcohol was sold in this form across the bar or on line. The Inspector said that there was nothing in the Act to

restrict the practice and provided that the relevant safety requirements are adhered to then there is little concern from a licensing perspective. The applicant explained his standard auditing and monitoring processes that are in place to ensure that his staff are not 'over pouring drinks' and he said the same process would be adopted for any off-licence sales. In the end the Committee have accepted the advice of the Inspector and concluded that the applicant has appropriate systems in place to monitor the quality and quantity of the alcohol sold in this form. Correct labelling is essential.

[36] In terms of advertising the off-licence, the applicant indicated that this would be limited to inside the bar and on the menu, including the menu which is external facing at the entrance to the premises. The applicant did not consider a condition was required to restrict external advertising to meet the object of the Act and he confirmed it was not his intention to operate a bottle store. He accepted that sensitivity of the locality with regards to proximity of residential areas and the alcohol ban area may make it appropriate to impose a restriction on external advertising, but that was a matter for the Committee. We are concerned that there is the potential for the premises to be treated as a bottle store by passers-by and that there may be unintended consequences in this locality. We want to ensure that if granted an off-licence the premises operate as Mr Giddens has explained and therefore, we consider that the condition is reasonable and meets the object of the Act.

[37] We note that the Inspector has recommended that the off-licence carry a supervised designation in accordance with s119(2) of the Act. In line with *Davidson v BBC Welles Limited [2016] NZARLA 69-70* a designation is not necessary here because the whole premises is already designated as supervised pursuant to the on-licence for the tavern.

## **DECISION**

[38] The Committee adopts the approach outlined by the High Court in *Otara-Papatoetoe Local Board v Joban Enterprises Limited CIV 2011-404-007930 [2012] NZHC 1406* and consistently applied since, for example see *Re Venus NZ Limited [2015] NZHC 1377*:

- (a) The relevant statutory criteria under consideration, in this case [s105(1)];
- (b) The reports presented by the Agencies; and
- (c) Public Objections, of which there are none in this case.



[39] In the **Otara-Papatoetoe Local Board** decision the Court held that then (referring to the then object of the Act):

*Having considered all of that information, the Authority must stand back and determine whether the application should be granted (whether on conditions or not) or refused. This step requires the Authority to form a view on whether there is evidence to suggest that granting the application will be contrary to s 4 (1), increase the risk of alcohol abuse. While a causal nexus is required between such evidence and the relevant risk, it is unnecessary to qualify the nature of the link by reference to such words as ‘powerful’ or ‘direct’.*

[40] In this case we must stand back and determine whether the application should be granted or refused after forming a view on whether there is evidence to suggest that granting the application will be contrary to the dual objects of the Act 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 minimized.

[41] All the evidence presented to the Committee has been considered, and the Committee have considered the relevant sections of the Act. In particular the sections listed below:

**Section 3(2) The purpose of the Act.**

*The characteristics of the new system are that—*

- (a) it is reasonable; and*
- (b) its administration helps to achieve the object of this Act.*

**Section 4**

*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 or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).*

[42] Having considered the application, Agency reports and the matters in s105(1) of the Act, we are satisfied after standing back and evaluating all the matters placed before us that the application does not offend against either the purpose or object of the Act.

[43] We hereby grant the application for an off-licence pursuant to s.104(1) for 1 year subject to the following conditions:

Discretionary conditions – section 116(1) the following discretionary conditions:

- (a) The following steps must be taken by the licensee to ensure that the provisions of the is Act relating to the sale and supply of alcohol are observed:
- The licence holder must display appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.
- (b) The following steps must be taken by the licensee to ensure that the provisions of the is Act relating to the management of the premises concerned are observed:
- Alcohol must only be sold and supplied within the area marked on the plan submitted with the application.

Compulsory conditions – section 116(2) the following conditions are compulsory:

- (a) No alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1pm on Anzac Day.
- (b) Alcohol may only be sold or delivered under the licence only on the following days and during the following hours when the premises are operating as a tavern:

**Monday to Sunday, between the hours of 8.00 am to 11.00 pm**

- Under s59(1) Delivery to the buyer is not permitted at anytime after 11.00 pm on any day and before 6.00 am on the next day
- (c) Drinking water will be freely available on the premises as specified in the application.

#### Section 117 – Other Discretionary conditions

- (a) The following steps must be taken to promote the responsible consumption of alcohol:
- The licensee must implement and maintain the steps in their Host Responsibility Policy submitted with the application, including the following provisions aimed at promoting the reasonable consumption of alcohol:
    - (i) Advice that the off-licence sales must cease at 11.00 pm.
    - (ii) Direction to staff to advise patrons of the existence of the Alcohol Ban Area outside the premises.
- (b) There shall be no advertising of the off-licence on the exterior of the building or out on the footpath except on the display menu attached to the entrance to the building.

#### Conditions applying to all remote sales for the sale and supply of alcohol:

- (a) The following information must be displayed on the internet site in a prominent place, in any catalogue used by the licence holder and on every receipt issued for any alcohol sold via the internet site:
- The licence holders name, the licence number, and the date on which the licence expires.
  - A copy of the licence or a clearly identified link to such image must be displayed in a prominent place on the internet site.

- (b) The following steps must be taken to verify that people are over the purchase age:
- (i) In the case of an order made using an internet site, telephone order, or physical order – The prospective buyer must declare that he or she is 18 years of age or over (and where the prospective receiver is involved that the prospective receiver is also 18 years of age or over)-
- Once, when the prospective buyer first commences the order process; and
  - Again, immediately before the sale of alcohol is completed.

Other restrictions and requirements

Section 56 – Display of signs

Section 57 – Display of licenses

Section 214 – Manager to be on duty at all times and responsible for compliance

**DATED** this 25 September 2020

A handwritten signature in blue ink, appearing to read 'P R Rogers', is written over a light blue grid background.

**P R Rogers**

Chairperson

**CHRISTCHURCH DISTRICT LICENSING COMMITTEE**