

**IN THE MATTER**

of the Sale and Supply of  
Alcohol Act 2012

**AND**

**IN THE MATTER**

of five applications by  
**BEAVER LIQUOR LIMITED**  
pursuant to s.127 of the Act  
for the renewal of off-  
licences in respect of  
premises situated in  
Queenstown, Frankton,  
Arrowtown and Wanaka, and  
known generally as "Bettys  
Liquor Store"

**BEFORE THE QUEENSTOWN DISTRICT LICENSING COMMITTEE**

Chairman: Mr E W Unwin  
Members: Mr L A Cocks  
Mr J M Mann

**HEARING** at QUEENSTOWN on 29<sup>th</sup> August 2016

**APPEARANCES**

Messrs R W K Gray and F D Spary – representing the Applicant  
Sergeant T D Haggart – NZ Police – to assist  
Dr D W Bell – Medical Officer of Health – in opposition  
Ms S H Swinney – Licensing Inspector – to assist

**INTERIM DECISION OF THE COMMITTEE**

**Introduction.**

[1] This is a cautionary tale about the law of unintended consequences. There are five renewals of off-licences for bottle stores for consideration. The brand "Bettys Liquor store" has been operating in the district since 2000. The present licensee, Beaver Liquor Limited, (the company), purchased the business in 2012. There is no evidence to suggest that the businesses have not been operated otherwise than in a professional manner.

[2] When Parliament passed the Sale and Supply of Alcohol Act 2012, it added a condition to the kind of premises that could be granted a 'bottle store' or a 'liquor

store' styled off-licence. (See s.32 (1)(b)). It is now the law that an off-licence may be issued **only** for retail premises where (in our opinion) at least 85% of the annual sales revenue is expected to be earned from the sale of alcohol for consumption somewhere else.

[3] The Act effectively gave Parliament's legislative endorsement for the policy that had been adopted by the Licensing Authority not to licence convenience stores. (See s.36 (a)(c)). It may well be that the thinking behind the 85% requirement was to prevent bottle stores from selling more non-alcohol items, thereby changing the character of the business into the kind of store Parliament did not want licensed. It seems to us that this scenario is likely, given that a further direction to Licensing Committees was given in the new Act preventing Committees from renewing off-licences, unless the premises were premises that qualified for an off-licence under the 85% rule (s.125 (a) of the Act) Accordingly, any bottle store that sold more than 15% of non-alcoholic items was potentially faced with a new legislative pincer movement that could effectively put them out of business.

[4] In the course of writing her report, the Inspector had become aware of a comment made at a previous Committee hearing by a former (and possibly disgruntled) employee, that 'Bettys Liquor stores' were little more than "glorified convenience stores", selling more newspapers and cigarettes than alcohol. As a result of the comment, the Inspector asked the applicant company for its annual sales revenue for each store. Figures from a firm of accountants were duly received along with a letter of explanation.

[5] The figures showed 'gross profits' rather than gross sales revenue. The argument was that because of the high cost of cigarettes (attributable to Government excise and taxes), the top line or gross revenue from the sale of cigarettes and other non-alcohol products ranged anywhere from 16% to 33% of total revenue. In other words the five businesses would all fail the 85% rule, depending on what was meant by the words 'annual sales revenue'.

[6] If the cost of sales including taxation was deducted from the annual revenue, then the percentage figures for non-alcohol products slumped to a range of 9% to 15% over the five stores. If we accepted the gross profit figures we could grant the renewals without further consideration. On the other hand, if we took the view that we needed to rely on the gross revenue (the actual takings from the till), and then the future of the five off-licences was seriously in jeopardy.

[7] Not only that, but the evidence disclosed that Parliament in its May 2016 Budget had set a 10% increase in cigarette tax for the next four years as part of a measure to have New Zealand smoke free by 2025. In other words the problem was not only, not going to go away, it was going to get worse. Given the report from both the Inspector and the Medical Officer of Health, we elected to have the issue determined at a public hearing,

### **The Application.**

[8] The company had taken legal advice on the issue, and when the figures were first released we were given the benefit of the lawyer's opinion. The letter dated 23<sup>rd</sup> June 2016, argued that the Act had not specified how the Committee should calculate 'annual sales revenue.' It was contended on behalf of the company, that

we had a discretion in the matter. Indeed it was suggested that the omission to define annual sales revenue, was in sharp contrast to the clear and specific direction given to the Committee on how it must calculate 'annual sales revenue' when assessing whether a business qualified as a grocery or not. (see Regulation 12 of the Sale and Supply of Alcohol Regulations 2013).

[9] It was also argued that if we found against the company, then this would be a perverse outcome which would mean that the company would then have to increase its gross revenue from alcohol sales in order to meet a "narrow" interpretation of the Act, and one which could arguably be inconsistent with the object of the Act. Counsel then went on to argue that if we did not consider that 'annual sales revenue' could be interpreted in this way, then we should have regard to s. 35 of the Act, and issue a licence on the grounds that alcohol would be an appropriate complement to goods of the kind sold in the shop (i.e. cigarettes and newspapers). In summary, we were urged to adopt net revenue percentages rather than gross revenue percentages in order to produce a result that might be consistent with the Act's object.

[10] At the hearing we received submissions and argument from Mr R W K Gray (Chairman of the company's board) and Mr F D Spary (Managing Director). Both have an extensive involvement in the industry. They sought confidentiality in respect of the company's turnover and margins, and we made an order under s. 203(5) and (6) of the Act. The company's representatives suggested that the hearing had been brought about solely as a result of the objection from the Medical Officer of Health, and questioned his right to object and appear, given that initially there were no matters in opposition raised by him.

[11] It was contended that the range of products other than alcohol had reduced over a period of time, and now consisted of such items as non -alcoholic drinks, tobacco, bar accessories (bottle openers, plastic cups and the like), phone cards and ice. They argued that the Committee had discretion as to how it interpreted the threshold for sales revenue compliance, or even whether the threshold was relevant, and re-iterated that the Act was not specifically prescriptive, as to how threshold revenue is assessed for retail stores as opposed to grocery stores where there is a high level of detail.

[12] The representatives referred to a Departmental Report that had been prepared for the Justice and Electoral Committee of Parliament in July 2011 when the Act was being considered, and which addressed the proposal to establish the 85% threshold in this way:

*The purpose of the 85% threshold is to limit the ability for stores that were granted an off-licence on the basis that they would be a specialist alcohol retailer (with the associated right to sell spirits and spirit-based drinks) to diversify into other goods, contrary to the policy intention. The 85% threshold allows for the sale of a small proportion of complementary goods, which provides convenience for customers, while ensuring that the original basis for the grant of the licence is not eroded by inappropriately altering the core nature of the business.*

[13] They argued that rather than diversify, they had reduced their range of non-alcohol goods, although tobacco has been sold with the alcohol since 2000, when the

first store was opened. They submitted that tobacco was a low margin product, and that sales of cigarettes had increased because of the absence of other shops selling the products, as well as the massive increase in excise over the years. It was suggested that if we accepted the net revenue figures rather than the gross revenue figures, then this would be a fairer way to assess the annual revenue, and the company would be compliant.

[14] Mr Gray contended that the five stores were first and foremost specialist liquor stores. He suggested that Christchurch had renewed off-licences where the thresholds had been challenged but no specific examples were given. Finally, he argued that an adverse ruling would force the company either to lower prices and try and increase alcohol sales with promotional campaigns, or reduce cigarette sales dramatically, and be forced to revise their business model, and promote the sale of alcohol in order to make up for the lost revenue.

### **The Licensing Inspector.**

[15] In her report, the Licensing Inspector gave us an excellent overview of the five premises. Unlike the applicant she suggested that the stores also sold fruit (lemons and limes), confectionery, snack foods and newspapers. She noted that the hours of operation for all premises were to be between 8.00am and 11.00pm daily. She confirmed that in respect of the first three applications, the Medical Officer of Health had initially reported no opposition, but within the reporting time (17<sup>th</sup> June 2016), Dr Bell had withdrawn his comments and opposed all five applications on the basis that they were in breach of s. 32(1) (b) of the Act.

[15] Ms Swinney had completed an analysis of the figures provided by the company's accountants, and was able to show that all five were in breach of the 85% threshold. On the other hand, in her final submission she accepted that the principal business of all five premises was the sale of alcohol.

### **Medical Officer of Health.**

[17] Dr D W Bell has been the designated Medical Officer of Health in the Otago and Southland Health Districts since 1998. He had opposed the renewals when he was advised of the annual sales revenue figures for the five bottle stores. He suggested that the figures did not appear to meet the new criteria in s.32 (1) (b) of the Act. He argued that we had little discretion in the matter given that the sales revenue figures had come from 'well-established accounting records'. He also argued that under the Sale of Liquor Act 1989, gross revenue had traditionally been used by the Authority when trying to establish the principal purpose of a business.

[18] Dr Bell argued that the probable purpose behind the new wording was to limit the number of retail stores selling alcohol. He suggested that the Act had limited supermarkets by their size, grocery stores by their revenue from grocery products, and specialist bottle stores by the 85% threshold. He contended that the wording of the new Act was designed to halt the proliferation of bottle stores, given the current wisdom that one of the triggers for alcohol related harm was the pre-loading of alcohol sold from bottle stores. Finally Dr Bell referred us to s.125 (a) of the Act which effectively prevents the Committee from renewing an off-licence which does not qualify under the 85% threshold law.

## The Committee's Decision and Reasons

[19] Before considering the renewal application we need to clarify Dr Bell's status given that he initially indicated that he had no opposition to the first three applications, and then withdrew his lack of opposition when he became aware of the annual sales revenue figures. The decision of *Stephen Dennis Sargent v Kapiti Supermarket Limited* [2015] NZARLA PH 174 is authority for any Agency representative to change his or her position provided it is within the 15 working day reporting period. The Authority said this at para [15]:

*In terms of s.103(3)(b) of the Act the Police must decide within 15 working days after receiving a copy of the application whether or not they have any matters in opposition to it. Whether or not the Police have matters in opposition must be determined within the timeframe stated in the Act and the Police are bound by the indication that they give. There is nothing in the Act to prevent the Police altering their stance within the 15 day period.*

[20] Accordingly Dr Bell was entitled to change his mind, and entitled to be present and examine and cross-examine witnesses. The company needs to understand that we did not make a decision to hold a public hearing solely because of the report of the Medical Officer of Health. As it happens the report from the Inspector had greater detail and provided just as much incentive to find out whether or not the five shops were compliant.

[21] We turn to the renewal applications. The criteria to which this Committee must have regard are contained in s.131 of the Act. There is little point in reciting these criteria because the applicant is suitable and meets all the tests except in respect of the Agency reports, and the sales of non-alcohol products. The real issue is whether we have a discretion to decide what the Act means when it states that 85% of the annual sales revenue must be earned from the sale of alcohol.

[22] The relevant section of the Act is s.32 (1)(b):

**An off-licence may be issued only -**

**for retail premises where (in the opinion of the licensing authority or licensing committee concerned) at least 85% of the annual sales revenue is expected to be earned from the sale of alcohol for consumption somewhere else;**

[23] The Eleventh Edition of the Concise Oxford English Dictionary defines 'revenue' as:

*Income, especially when of a company and of a substantial nature – a state's annual income from which public's expenses are met.*

and 'income' as:

*Money received, especially on a regular basis, for work or through investments.*

[24] We are more than satisfied that annual sales revenue refers to money that is received through the till. It is the gross figure or the income received. It is not possible to apply a different standard given the plain and ordinary meaning of revenue. What the customer pays for the item is what produces the revenue. We gained considerable support for our view (apart from the definitions above) from Regulation 12 of the Sale and Supply of Alcohol Regulations 2013. This regulation came into force not to define the words 'annual sales revenue' but to prescribe the process that a grocery must go through to obtain a licence.

[25] A business that is seeking a 'grocery style off-licence' must produce a statement of **annual sales revenue** produced in accordance with regulations prescribing what information such statement must contain and how it must be set out. What is of great importance here is that the Act uses the same words – 'annual sales revenue' for grocery stores as well as bottle stores. Regulation 12 requires a verified statement of the gross sales revenue after deduction of all income derived from sales of tickets promoted by the New Zealand Lotteries Commission. The remainder of the revenue is then allocated to five categories including food, tobacco and alcohol. It is clear that the Regulation is talking about gross revenue.

[26] In short we have no discretion in the matter. It may be more difficult to assess the figures for a business that has yet to start operating. But in a case such as this, when the businesses have been trading for some time, and the statements produced are authentic, that is the end of the matter. The figures are not capable of manipulation. We must apply the law.

[27] There are two recent relevant cases that need to be considered. The first is a decision of the Auckland Licensing Committee in the name of **Cockle Bay Enterprises Limited** OF211 dated 18<sup>th</sup> April 2016 which was for the renewal of a grocery style off-licence. This is a Four Square business that has been operating since 2008. The statement required by s.33 (2)(a)(ii) of the Act showed that cigarettes (due to Government excises and taxes) was now 34.22% of gross sales revenue for the business, the highest of any category (including groceries). Pursuant to Regulation 6(1) (c) (Ascertaining Principal Business) the Committee was required to declare that the principal business was the sale of tobacco. It did so and therefore refused the renewal. The decision is currently under appeal to ARLA.

[28] In its decision, the Committee made these comments:

*[45] The committee records that this is an unfortunate result for the applicant which is otherwise worthy of gaining a renewal of its off-licence. It is a result that has occurred because of the requirement to apply a strictly mathematical formula set out in the regulation. The regulation does not allow a discretion to consider other matters where the result is caused by factors outside the control of an applicant. In this case the factor is the ever increasing rate of taxes on the sale of tobacco products leading to a distortion against the sale of other products.*

[29] The second decision was delivered the day after the present hearing. It was an appeal to ARLA from a decision of the Dunedin District Licensing Committee granting the renewal of an off-licence to "West's Southern Liquor". In the decision of **Marion Rosalind Poore & anor v West's (NZ) Limited** [2016 NZARLA PH 347-348] the Authority reversed the Committee's decision and refused the renewal. The issue was whether 85% of the company's revenue was from the sale of alcohol. The

company had been established as a cordial and soft drink factory in 1976, and in 1906 it began brewing beer.

[30] The company's problem was that it retailed its cordials plus sweets and ice-creams from a small shop separated by curtains from an adjacent area that sold alcohol. There was a single counter with the one till attended by the same staff. The Authority had no difficulty in accepting that the total area was effectively one shop, and further, that the company was unable to show that the revenue from alcohol represented at least 85% of total annual revenue. In this case excise tax was not relevant. The Authority was dealing with annual sales revenue, and accordingly the company lost its licence to sell alcohol.

[31] In this case, there may have been some room for the argument that the company had not diversified into other product lines during the previous three years, but Parliament made the position quite clear when it passed s.125. We are prevented from renewing the off-licence because the five premises no longer qualify for a licence.

[32] We turn to the question of options. While we have difficulty in accepting Dr Bell's submission that these consequences were intended by Parliament, the company must face the fact that changes are necessary for survival. What the company must appreciate is that its licences are privileges and as a specialist bottle store operator, it has the right to sell spirits and spirit based products unlike supermarkets or groceries. A licence does not guarantee profitability, and there are associated rules that should and will be enforced.

[33] We refer to the Law Commission's review of the Sale of Liquor Act 1989 entitled "Alcohol in our Lives – Curbing the Harm". In Chapter 2 "The Context for Reform" at paragraph 2.21 it was noted that the most recent Alcohol Advisory Alcohol Monitor put the figure of alcohol consumption away from licensed premises at 68%. In its 'Summary – A new Approach to the Regulation of Alcohol' at page 5, the Law Commission stated at paragraph 4 that New Zealanders now spend an estimated \$85 million a week on alcohol. At paragraph 36 the Commission listed 12 main features of the system designed to drive down alcohol related harm. Two of these features were (a) preventing a growing proliferation of alcohol outlets, and (b) tightening the law about off-licences.

[34] Availability of alcohol does matter, and the company needs to be aware that the alcohol products that it sells from its five stores contributes to the harm caused by caused by the excessive or inappropriate consumption away from licensed premises.

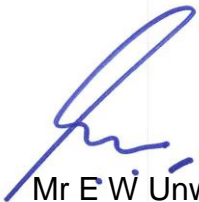
[35] In this context we are unimpressed by the suggestion that the company will be forced to sell alcohol at discounted prices to make up any shortfall in cigarette sales. The company does not have a licensed right to sustain its current revenue. Given that the purpose of the new Act is **for the benefit of the community as a whole** to put in place a new (but reasonable) system of control over the sale and supply of alcohol, it may well be that a revised business model could have unforeseen advantages.

[36] But these options or issues are now matters for the company. First and foremost it has the right to appeal this decision. For this to happen we will issue a final decision refusing the renewals. Secondly it may persuade us that it will comply

with the new law. This can be done by presenting us with a new business model that will result in sales of alcohol achieving the 85% threshold. The company may decide not to sell cigarettes or even to become a convenience store in which there are no sales of alcohol. Either way when we receive a new business plan we will call for reports, and then make a decision either to grant the applications on the papers or to schedule a further public hearing.

[37] The company foreshadowed that it might apply for licences under s.35 of the Act, and try and argue that the sale of alcohol would be an appropriate complement to the kind of goods being sold in the shop (alcohol and cigarettes etc.). We would suggest that it obtains legal advice before doing so, because any such applications would be likely to attract strong opposition. In the meantime the applications stand adjourned. We have given our decision as to what we believe is meant by the words 'annual sales revenue'. The company has 25 working days to advise what it now intends to do.

**DATED** at QUEENSTOWN this 22<sup>nd</sup> day of September 2016



Mr E W Unwin  
Chairman