

Decision No. 60B [2017] 1102

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012.

AND

IN THE MATTER

of an application for an Off-licence under s. 99 and s. 40 (remote sales) of the Sale and Supply of Alcohol Act 2012 by **Vodka Plus Limited** in respect of premises at **15 Buchanans Road, Christchurch**, known as **Vodka Plus**.

RESERVED DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Chairperson: P R Rogers

Members: Mr P Buttell and Mr A Lawn

HEARING at Christchurch on the 1 May 2017

PRESENT: **Andrew Thorn** – Director of Vodka Plus Limited
Anneke Lavery – Licensing Inspector – to assist
Constable Genevieve Craddock – NZ Police – in opposition
Paula Williams – On behalf of the Medical Officer of Health – in opposition
Janet Anderson – Committee Adviser

INTRODUCTION

[1] This matter concerns an application by Vodka Plus Limited (VPL) for a new Off-licence at 15 Buchanans Road, Christchurch to be known as Vodka Plus. This is to be an internet operation under s. 40 of the Act allowing for remote sale of alcohol.

[2] The NZ Police were in opposition to the application with the Licensing Inspector and the Medical Officer of Health (MOH). The Licensing Inspector and the MOH were there to assist at the Hearing. In this Decision these organisations will be referred to as the Agencies.

[3] There were no objections from the public or other parties.

[4] The parties to the proceedings were identified. An explanation was given as to how the Hearing would proceed and Mr Thorn as sole director of VPL would give evidence on behalf of the company and give evidence in support of this application. The Agencies would then have the opportunity to cross examine. Members of the Committee could ask questions at any time and each of the witnesses could be cross-examined by the other parties.

[5] The opposition from the Police related to criminal convictions of the sole director Mr Thorn of VPL and other matters relating to his suitability subject to s. 105(1)(b) of the Sale and Supply of Alcohol Act.

THE HEARING

Evidence of Applicant

[6] Andrew Thorn gave evidence on behalf of the company as the sole director and owner of Vodka Plus Limited and described himself as the CEO of the company for all of New Zealand. (For the purpose of this decision Mr Thorn will be called the applicant). He was not represented by Counsel and read an opening statement to the Committee. This was brief and he said that he had been going through a rough time and people known to him had been vindictive. VPL was going to be selling a premium grade RTD via a remote website based business.

CROSS EXAMINATION

Licensing Inspector

[7] The Inspector opened her cross examination by asking the applicant who Kristin Thomson was. This person was listed on the application as the sole holder of a general manager's certificate. It was put to the applicant did he know this person and if so what was the person's sex. Mr Thorn replied she is a female. The Inspector put to him that she had rung the person Kristin Thomson and had found out that in fact Kristin is a male. The applicant was asked how he got this person's name and he said he was given the details including the manager's certificate number by a friend of the family but had never met Kristin.

[8] The Inspector said in a conversation with Kristin this person did not want anything to do with Vodka Plus. Mr Thorn expressed surprise at this. The applicant was asked if he had a Licensed Controller Qualification (LCQ). He replied he did not and when questioned about the Act he had vague knowledge of the Object of the Act but had a good knowledge of host responsibility.

[9] The applicant was asked questions concerning the address on the application form, as to the location of the licensed premises. He replied that it was his mother and father's address

but he does not live there. When questioned why he had put this address he replied that as this was going to be a total internet operation all the transactions would be automated through a website. For that reason he did not see that a physical address was important to the application.

[10] He was questioned about his occupation as he called himself an entrepreneur with various business interests. When questioned about his experience in the alcohol industry it seemed it was limited to part-time work.

[11] Concerning the current operation of VPL, the company is currently operating distributing to Off-licenses and wholesalers etc. He said they were not selling direct to the public and were in effect an on-line distributor for Christchurch and Auckland to the trade.

Constable Craddock – NZ Police

[12] The Police put it to the applicant that he had been charged with a number of offences and had pleaded guilty. He replied this was correct.

[13] The Constable put it to the applicant that the current position was that he was distributing Vodka to Off-licenses, the applicant replied 'yes' but he needed to sell it direct to the public. He said this is an on-line distribution business in Christchurch and Auckland. When asked did he intend to run the business himself he replied 'yes'. When asked his reasons why he was seeking a section 40, remote licence, he replied it was easier than face to face selling when you are not dealing with identity issues around age and such things as intoxication.

[14] When asked about the manager's name Kristin Thomson he confirmed how he got the licence number and commented that the person runs a bar in Rolleston. The applicant stated that for the type of licence he was applying for, it was his belief that the manager could just sit back and there were only about five procedures that a web-based alcohol company needed to be aware of.

Paula Williams - Medical Officer of Health representative

[15] The MOH representative asked how many Off-licenses and bars was Vodka Plus currently distributing to and he replied about 50 stores. When questioned about his host responsibility he showed good knowledge and commented that the alcohol distributed through a remote outlet could not be more than 25% of alcohol. The applicant was asked about the website design and he confirmed that this was done in Australia and he agreed some of the documentation produced to the Committee showed Australian legislation.

Committee questions

[16] The applicant was asked to confirm if it was correct that he was currently selling five different types of product. He was also asked when the business started and he said about eight weeks ago, (that is prior to the Hearing). He was questioned as to how Vodka Plus was dealing with the companies they were currently supplying, to make sure they were legitimate, he replied they have to fill out their company details, company registration number etc.

[17] He confirmed to the Committee that he was just selling RTD's at 5% in 330ml bottles but was also looking to supply in a 750ml bottle. He confirmed that distribution was carried out by a company called On-Line Distribution in Chapmans Road, Christchurch. When asked did they only distribute for Vodka Plus he replied, they deal with numerous companies.

THE AGENCIES

Evidence of Constable Craddock

[18] The constable gave evidence that she had received the file concerning VPL and as a matter of course checked the police intelligence application. Upon doing this she discovered Andrew Thorn had been charged with three offences in 2016 and convicted of two of these on the 9th of February 2017.

[19] As a result, on the 17th February 2017 the constable said that she opposed the application for a new Off-licence due to the recent convictions of Mr Thorn. The constable produced a Summary of Facts for the charges laid against the applicant, two of which he had pleaded guilty to in the Christchurch District Court. The two charges he had pleaded guilty to consist of: Driving a vehicle in a dangerous manner and secondly: Owner or hirer failed to give information. The third charge of Assaulting person with a blunt instrument was withdrawn prior to a Hearing in the District Court.

[20] The constable produced as an exhibit the Summary of Facts to the Committee. The Court was told that the applicant was known to the victim having previously worked together at a commercial business. The relationship had become strained. On the day in question the victim was leaving a property and was crossing the road to her car. She heard a vehicle revving and looked around to see a vehicle known to her to be one the applicant's work vehicles.

This vehicle accelerated rapidly and drove onto the wrong side of the road in the direction of the victim. The victim identified Mr Thorn as the driver and believed that he was trying to hit her with the vehicle. The victim leaned hard up against her car and the applicant's vehicle missed her by 15 to 20 centimetres.

[21] Subsequently as the registered owner of the vehicle involved he was requested by the police to identify the driver at the time of the offence on the 22 June 2016 and he failed to do so within the statutory time limit. This resulted in him committing the offence of failing to supply information on the 6 of July 2016.

[22] The victim was not physically injured but according to the Summary of Facts that was presented to the Court and which the applicant pleaded guilty to, the victim genuinely feared for her life and suffered emotional harm from the incident. At no time has Mr Thorn admitted the offences but pleaded guilty and whilst not fined on the charge of dangerous driving, he was ordered to pay emotional harm reparation to the victim of \$2500.00.

Cross Examination by Applicant

[23] The applicant put it to the Constable that suitability could be different depending on the type of licence and a remote licence is not face to face and there are not the intoxication

issues. The witness replied that she could see what Mr Thorn was getting at but when looking at suitability you should look across the board and it did not matter what type of licence you are looking at.

[24] The applicant put it to the witness that she should have decided his suitability depending on the licence he was applying for and the Constable replied it was up to the Committee to decide his suitability and that she just lodged her opposition on his convictions.

[25] Mr Thorn cross examined the witness on what were the responsibilities that he needed to carry out given that they did not include identification or intoxication issues and why then would that prevent him from being unsuitable to carry out his duties. The constable again replied it was not her job to decide his suitability.

Evidence of Constable McFarlin

[26] The constable gave evidence; he said he was on duty at the reception counter at the Christchurch Central Police Station on the 28 June 2016, when an allegation came to his attention concerning an Andrew Thorn having failed to pay for diesel at a Mobil Service Station. It was alleged that the applicant had told the staff at the Service Station that he only had his Caltex card and could not pay and would be back later to pay for the diesel. Subsequently despite promising to do so, he didn't pay for the diesel.

[27] The constable on the 18 July 2016 rang and spoke to Mr Thorn, who said he had already paid for the diesel. The constable then checked with the service station to be told the diesel had not been paid for and they still had his driver's licence in their possession. Mr Thorn said he would return to the service station, pay for the unpaid diesel and email a copy of the receipt through to the constable. The constable informed him prosecution would be considered if not paid. No emailed copy of the receipt was received.

[28] Again on a later date the 2 August 2016 he was spoken to by the Police on unrelated matters and when questioned about the diesel it had still not been paid for. He then admitted the theft of the diesel and he told police that if he was given a warning he would make prompt payment. On the same date the diesel was paid and this was confirmed by the service station and no charges were laid.

Cross examination by the Applicant

[29] The applicant cross examined the Constable and the main thrust of his cross examination was that the applicant believed that he had been given 7 days to pay for the diesel. This was put to the witness and the constable said the diesel should have been paid for at the time. The applicant put to the witness that in the circumstances of what happened at the service station it could not be considered a theft. The witness said he still considered it to be a theft.

End of Evidence from Witnesses

SUBMISSION from the Inspector

[30] The Inspector submitted that the reason she had not opposed this application was that up until the time that the police advised her of the convictions she did not believe that suitability was an issue. This was the reason why the application was not opposed initially.

[31] The Inspector made the point that it was up to the applicant to show their suitability and she referred to the *Sheard* case that held previous conduct which was very relevant. The real test is not the convictions it is the character of the applicant and whether it has been shown that the applicant is not likely to properly carry out the responsibilities that go with the holding of a licence.

[32] The Inspector went on to say she was only fully aware of the particulars held by the police at today's Hearing and it transpired a few days previously that there was no manager to fill the position required by legislation. The applicant admitted he had not completed the LCQ course and has little knowledge of the Sale and Supply of Alcohol Act 2012.

[33] The Inspector referred to the *Linwood Food Bar Limited* case law where the Judge held if a licensee cannot get the little things right then they are unlikely to get the big things right. In this case the applicant could not get a general manager who was prepared to act for him and did not know the sex of the person he was going to employ as a general manager. The applicant has failed to show that he had the experience to run this licence. Despite the applicant's assertion that he will not be dealing directly with the public, the running of the licence falls directly on the licensee. She referred the Committee to the Liquor Licensing Authority case where it was held that holding a licence is a privilege not a right.

SUBMISSION from the Police

[34] The applicant has two convictions and the convictions for owner failing to give information should be treated as a separate matter as he had 14 days to comply with the request and he failed to do so. The Authorities have treated matters associated with violence to be serious enough to call into question a person's suitability to hold a licence.

[35] The police submitted that dangerous driving in any circumstances is serious as indicated by the penalty. This can include imprisonment and referred to the Osbourne decision referred to later in this Decision. This decision indicated that a minimum of 2 years stand down is to be expected with a 5 year stand down for a more serious offence. If there is a second offence as in this case then it is expected it will be a 5 year stand down. If the Committee does not consider it serious enough to warrant a 5 year stand down then at least a 2 year period should be imposed.

[36] The constable drew the Committee's attention to the situation as the applicant did not know the manager he was going to employ to manage the licence if issued and did not even know the person's sex.

[37] As a result of the evidence produced the Police believed that the application should be refused.

SUBMISSION on behalf of Medical Officer of Health

[38] The representative of MOH brought to our attention the following decision;

In **Page v Police** (unreported HC V Christchurch AP 84/98 24 July 1998), Panckhurst J commented on the issue of suitability in this way:

“Section 13(1)(a) provides that the applicant for an on-licence must demonstrate his or her suitability. In other words what is required is a positive finding. That implies an onus upon the applicant to demonstrate suitability. Such suitability is not established in a vacuum but in the context of the particular case: for example, the place, the intended business (here in a difficult central city location), the nature of the business itself, the hours of operation and the intended activities, provide the basis for the assessment of the individual.”

[39] This decision is discussed later in this document under the heading “Decision”. Ms Williams went on to say that suitability is not established in a vacuum and that the applicant had not shown his suitability at the Hearing today. He also had no experience in the industry and if he had he would be able to meet the Object of the Act. Likewise, he has not completed a LCQ course and had no idea of its purpose.

[40] Ms Williams for the MOH pointed out that Mr Thorn was able to carry out the business of distributing alcohol wholesale which does not require a licence, and should consider gaining experience and qualifications should he consider applying for a licence in the future. She went on to say the applicant has little or no knowledge of the role of the Agencies and on that basis was not suitable to hold a licence.

SUMMING UP by Applicant

[41] The applicant said the Agencies have said I don't have a good knowledge of the Act but as far as he could see all he needed was knowledge of the Act for the part he was applying for, which is section 40. He said it was a shame that the general manager on the application form had pulled out and if he had known prior to the Hearing I would have ensured I had a person to fill that role. He raised again the issue in relation to what he is applying for there are only a few key aspects the company needs to be aware of to meet the Act under section 40.

[42] He then came back to the issue of the manager and was that on the application and does that refer to a manager just to run the business or to have a general manager's certificate. He said he would need guidance from the Committee. It was the applicant's contention that the LCQ courses are superseded by what VPL are applying for and he appreciated that alcohol is a dangerous market in one way or another but to him it is just commercial business dealing.

That ended the Hearing.

DECISION OF THE COMMITTEE

[43] The Committee has considered this matter and firstly should comment that the applicant Mr Thorn appeared without the assistance of Counsel and presented himself well as an intelligent articulate man.

[44] This Hearing turns on the question of suitability of the applicant and the legislation concerning this can be found at s. 105(1)(b) of the Act which reads:

Criteria for issue of licences

In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:-

(b) the suitability of the applicant:

[45] In proceedings before this Committee it is the responsibility of the applicant to prove on the balance of probabilities that they are suitable to hold a licence. In the case of a company it is the directors or persons having a controlling interest in the company. Conversely it is the responsibility of the Agencies if they have evidence to the contrary to oppose the application and produce evidence at the Hearing.

[46] The police when notified of an application check if the applicant has any criminal convictions or other dealings they may have had with the police. In this instance Mr Thorn was charged with three offences relating to an incident on the 22 June 2016 when he drove a vehicle at a female acquaintance narrowly missing her, causing her to fear for her life.

[47] As a result the following charges were laid in the District Court:

- (1) Drove a vehicle in a Dangerous Manner, Land Transport Act 1998, penalty 3 months imprisonment or a \$4,500.00 fine or 6 months disqualification.
- (2) Assault a Person with a Blunt Instrument, Crimes Act 1961, penalty 5 years Imprisonment.
- (3) Owner of Hirer Failed to Give Information (as to who the driver of a vehicle was at a particular time), Land Transport Act, penalty \$20,000.00.

[48] Mr Thorn, the Director of the applicant company Vodka Plus Limited pleaded guilty to charges one and three, the second charge was withdrawn immediately prior to the Court Hearing. The Committee's view is that it is entitled to look at the whole picture and while the charge of Assault of a Person with a Blunt Instrument was withdrawn it does not change the fact that this was an act of violence intended to scare the victim. In the Committee's view this is not the behaviour expected of a person who is seeking the privilege of holding an alcohol licence.

[49] It seemed to the Committee that the applicant based his evidence on the fact he was suitable to hold a licence by attempting to show that a section 40 remote licence somehow exempts him from the usual attributes expected of a licensee or manager. He made much of the fact that he would not be dealing with the public in a face to face situation. He gave the Committee the impression that the web-based business, described as the "cloud" could run itself. It seemed he thought the requirement to name and have a person prepared to be a general manager with certification was just a name and number on the application form and this person had no function in a section 40, remote sales internet site. To have never had a

conversation with the person he was putting forward as a general manager was in our view negligent to the extent of bringing his suitability into question.

[50] Likewise the naming of his parents' address as the licensed premises was cavalier; this address had nothing to do with the business, the applicant not even living there. It seems he had no functional address such as an office, stating under cross examination he works from various addresses. Why he did not put down his own address is a mystery, at least it would have had more validity than his parents'. Once again this goes to what the Committee considers his mistaken belief that this was a business that could exist with virtually no human input and operated as he put it "in the cloud", the Committee took this to mean somewhere in cyber space.

[51] The Police produced evidence concerning the non-payment of fuel at a service station after he filled up his vehicle and then told the staff he had no money to pay. He was spoken to by the police and then given ample opportunity to pay including giving undertakings to the police to pay the amount. It was only when he was threatened with being charged with theft that he promptly paid the bill.

[52] The Committee is not overly concerned that he put fuel in his vehicle and then was unable to pay. It is the undertakings he had given to the police and the service station to pay for the diesel and the failure to follow through with these undertakings that concerns the Committee. This raises the question to the Committee should he in the future give undertakings to the Agencies if he were to obtain a licence and could that undertaking be relied on? While this is only a minor matter and not directly associated to the selling of alcohol it is an issue that goes onto the scales against the applicant's suitability.

[53] In the case ***The West Pack Limited*** PH 562/2007, the Authority made the following comments:

"[18] In this case the primary issues are the company's suitability particularly in relation to whether it has kept to the terms of its undertaking.

[24] We are required to determine the appropriate response to the breach of undertaking. In this case, we have taken into account a number of factors".

[54] Whilst this was a renewal application the Authority held it to be unreasonable to cancel the licence, instead giving a shorter renewal period for this breach of an undertaking. The Committee takes the view that in light of this decision a person failing to carry out an undertaking, no matter whether in every day dealing with people or agencies can bring into question their suitability.

[55] There is extensive case law concerning suitability and one of the leading cases and particularly appropriate in these circumstances is the ***Page decision*** – *Pankhurst J HC A84/98*.

"That implies an onus upon the applicant to demonstrate suitability. Such suitability is not established in a vacuum but in the context of the particular case: for example the place, the intended business (here in a difficult central city location), the nature of the business itself the hours of operation and the intended activities, provide the basis for the assessment of the individual".

[56] The applicant wishes to start a new business, he has been cross examined and the Committee has considered the factors mentioned in Pankhurst J judgement. This matter has not been considered in a vacuum and as previously stated we believe the applicant has not established his suitability.

[57] Likewise in ***Re Sheard*** [1996] NZAR 61, Holland J made these comments on the issue of suitability:

“To refuse an application for an on-licence on grounds of suitability the Authority has to be satisfied on the balance of probabilities that the character of the applicant has been shown to be such that he is not likely to carry out the responsibilities that go with the holding of a licence.”

[58] The leading case law when considering an applicant’s suitability when criminal convictions or other matters are involved is:

Osbourne decision LLA PH2388/95 at page 5.

“Without fettering ourselves in this or other applications, it may be helpful if we indicate that we commonly look for a five year period free of any serious conviction or any conviction relating to or involving the abuse of alcohol, or arising in the course of an applicant’s duty on licensed premises”.

“Less serious convictions are also weighed. By way of example is an isolated excess breath/blood conviction, or a single driving offence disclosing no pattern of offending. Nevertheless all convictions must be weighed as required by s. 121(1)(b). In these and similar cases we frequently indicate that a minimum of two years from the date of conviction may result in a subsequent favourable decision.”

[59] The Police in their summing up suggested to the Committee that we deal with the matter of the applicant’s convictions as being two separate convictions, the offences being on different dates. The dangerous driving charge being on one date and the failing to give information charge being completed on the date he failed to give the required information as to who the driver was. This was on 6 July 2016 this therefore is the date of the applicant’s last offence.

[60] The following case law is significant as it gives the authority for any period for what could be called a stand-down period:

Jeffrey Dennis Saunders LLA Decision No. PH 502/2004 paragraph 6

“The previous Authority regarded time as running from the date of conviction although in our view the date of the offending is how more appropriate”.

[61] The Police pointed out that the Osbourne case was considered to be a guideline and there were other factors to be taken into consideration where a person has been convicted of two offences within 5 years. In the Police submission at paragraph 22 the police note the applicant is not yet 2 years free of conviction and hence they submitted that a period less than 2 years would not be appropriate. Case law has held that the start period for any stand down should be from the date of offending not conviction. The Committee does not consider that the offending warrants a 5 year period free of convictions.

[62] In **Dejay Enterprises Limited** LLA 531 — 532/97 it was stated:

“The guiding hand or hands-on operator of any company or the potential holder of a General Manager’s Certificate now receive greater scrutiny from both the Police and other reporting agencies. Character and reputation are closely examined. The law and human desires of patrons frequently tug in different directions. The Police cannot be everywhere. Little but a licensee’s or manager’s character and suitability may stand between upholding the law and turning a blind eye. Self-imposed standards in accordance with the law must be set by licensees and holders of General Manager’s Certificates who control and manage licensed premises.”

The above paragraph encapsulates the Committee’s view of this matter, and to quote from above “*Self-imposed standards in accordance with the law must be set by licensees*”.

[63] Likewise in **Horse and Trap Tavern Limited** Judge Unwin Decision No. PH 880/2005- PH 881/2005 at para 25 made the following comment:

“We believe that raising the bar for the holders of General Manager’s Certificates, and keeping it at a certain height, has the potential to bring about a reduction in the abuse of liquor nation-wide. If certain otherwise meritorious applicants suffer in the process, that may not be too high a price to pay in order to achieve this long-term goal”.

This is very much the Committee’s view of the facts presented to us.

CONCLUSION

[64] The Committee, after hearing all the evidence on the balance of probabilities is of the view that this application should be declined. Mr Thorn as sole director of Vodka Plus Limited has shown himself to be unsuitable to be the holder of a section 40, Off-licence.

[65] Even though a section 40 endorsed licence does not have any direct contact with the public, to lower the standard for a licensee or manager who controls such a company sends the wrong message to the industry and has the potential to bring the licensing system into disrepute. We believe maintaining the standard of those who have the control of any licensed premises upholds the object of the Act.

[66] While the Committee cannot set a period in the future when Mr Thorn could apply for an Off-licence it does consider that a two year period from his last offence would need to pass before it was likely an application before a District Licensing Committee would be successful.

DATED at Christchurch this 14th day of May 2017.



P R Rogers

Chairperson

CHRISTCHURCH DISTRICT LICENSING COMMITTEE