

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of two applications by McCashin's
Brewery Limited pursuant to s. 125
and s.127 of the Act for renewal of
an on and off-licence in respect of
premises situated at 660 Main Road
Stoke, known as McCashin's
Taproom

BEFORE THE NELSON DISTRICT LICENSING COMMITTEE

Chair: Rohan O'Neill-Stevens

Members: Derek Shaw
Laurie Gabites

HEARING at NELSON on 5 August 2024

APPEARANCES

Mr Scott McCashin – representing the applicant

Mr Colin Lott – witness for the applicant

Mr Ian Jones – Nelson City Council Licensing Inspector

Ms Anne Price – under delegation from the Medical Officer of Health

Sergeant S Savage – NZ Police Alcohol Harm Reduction Officer

RESERVED DECISION OF THE COMMITTEE

Introduction

[1] There are two applications before the Committee. The applications, lodged on 6 September 2023, are for the renewal of on and off-licences (ON162 and OF016) held by McCashin's Brewery Ltd trading as McCashin's Taproom which is located at 660 Main Road, Stoke. The applicant Scott McCashin is a director of McCashin's Brewery Ltd with the on-licence and part of the off-licence being operated by Stoke Hospitality Ltd under a lease agreement. The premises have operated on this site as a restaurant since 2015.

[2] Section 100 (a) provides guidance to making an application or renewal of an off or on licence. Section 100 Sale and Supply of Alcohol Act states:

An application for a licence—

- [a] must be made in the name of the person or club who will hold it if the application is granted; and
- [b] must be made in the prescribed form and manner.

[3] Public notice of the licence renewal applications did not attract any objections however the tri-agencies opposed the application, so the matter was set down for hearing on Monday 5 August 2024.

The Applicant

[4] Both Mr McCashin, a Director of McCashin's Brewery Ltd, and Mr Lott, a Director of Stoke Hospitality Ltd, emphasised that McCashin's Brewery Ltd were seeking to continue operating the business with the best interests of the area and as an asset to the Stoke and surrounding community. They told the Committee that the operation included a brewery, a restaurant with food and alcohol and non-alcoholic products and sales of alcohol for consumption off the premises. The applicant wished to continue operating in this way and submitted to the Committee their record of compliance was not an issue in this matter.

[5] Mr McCashin in his evidence went on to indicate that the business model they operated was that the licences were in the name of McCashin's Brewery Ltd which currently allowed sales from the restaurant along with sales on-line and to other customers. The model was based on profit sharing as restaurant staff also took responsibility for sales to customers visiting the site. He further clarified to the Committee that Stoke Hospitality Ltd (owned by Colin and Deborah Lott) traded as McCashin's Taproom and had day to day responsibility for the restaurant operation along with retail alcohol sales

[6] Mr McCashin in answer to a question told the Committee that in his view the application met the criteria and the Sale and Supply Act 2012 and worked well with the business model and agreement that McCashin's had with Stoke Hospitality Ltd. He also pointed out that McCashin's had made considerable investment in the restaurant part of the business and any changes would result in significant further financial investment.

[7] In his evidence Mr Lott told the Committee that Stoke Hospitality Ltd contributed to the local community and was a gathering point for events and celebrations. He indicated that over the time the restaurant had been operating there had been no questions regarding breaches of the Sale and Supply of Alcohol Act 2012.

[8] He further emphasised that the Restaurant and the Tap Room worked well together, and the operation of Stoke Hospitality Ltd worked well, and any suggested change would be problematic with the business plan and have financial implications.

[9] In answer to further questions from the Committee regarding business details both Mr McCashin and Mr Lott emphasised the lease agreement worked in the current set up and did not see any need for further change. They both asked the committee to consider renewing the licences in the current format with both the on-licence and off-licence continuing to operate in the same way as it is at present.

The Licensing Inspector

[10] Mr Ian Jones, the Licensing Inspector with the Nelson City Council, provided a report on this application. Mr Jones has been involved in the role of a Licensing Inspector for the

past 12 months and has responsibility for reporting on all applications under the Sale and Supply of Alcohol Act 2012. In his evidence Mr Jones advised the Committee that in his opinion the application falls at the first hurdle as the owners of the licensed premises have not completed an application. In relation to the off-licence, a restaurant cannot hold an off-licence.

[11] Mr Jones went on to say that in his view, it was a question of who was responsible for the licensed premises. In the case of the restaurant, it clearly was with Stoke Hospitality Ltd, but they have not made the application. In relation to the off-licence he indicated that there is no provision in the Sale and Supply of Alcohol Act 2012 section 32 for a restaurant to hold an off-licence.

[12] Mr Jones further advised the Committee that along with the other agencies a couple of discussions had been held with Mr McCashin and Mr Lott including the option of potential remedies. While these discussions have been in good faith, the suggested options did not appear to have been taken any further.

[13] In his view the current applications had not been made by the right company/organisation and should have been in the name of Stoke Hospitality Ltd. He submitted to the Committee that there needs to be two separate licences. If that was the path forward, then the application would be looked at differently by the Licensing Inspectorate. In his view the current applications were not being made by the person or company who is responsible for the management of the premises. Mr Jones submitted that he was not persuaded that any conditions exist that permit the current licensing regime to persist in relation to McCashins Brewery Ltd.

[14] In his evidence Mr Jones submitted that where the lease agreement stated the Tenant will operate under the Landlords existing licences, this suggested the Landlord (McCashin's Brewery Ltd) will lease the alcohol licence to the Tenant (Stoke Hospitality Ltd). He submitted that such a lease arrangement would be contrary to section 14 of the Sale and Supply of Alcohol Act 2012.

[15] Section 14 States:

On-licences generally

On any premises an on-licence (other than an on-licence endorsed under section 37 is held for, the licensee—

- (a) can sell and supply alcohol for consumption there; and
- (b) can let people consume alcohol.

[16] He further advised the Committee that currently Stoke Hospitality Ltd do not have an on-licence so cannot sell alcohol and the lease agreement does not permit them to evade the provisions of the Act.

[17] Mr Jones informed the committee that as far as he was aware there had been no complaints and the premises had not come to the attention of the Inspectorate since significant changes to the operation in 2015. There had been some concerns raised about noise over time which had been resolved.

[18] In response to questions, Mr Jones observed that he expected good licensees to be proactive in the management of their alcohol licence rather than reactive. He suggested that the concerns around defining the licensed area, access and the current plan for the Tap Room that had been raised could not be alleviated by the imposition of conditions on

the licence. In further comments he indicated there could be different remedies to his opposition to the applications, such as a separately operated on and off-licences with Stoke Hospitality Ltd holding the on-licence, or Stoke Hospitality Ltd applying for a Tavern Licence. A further potential suggestion was Stoke Hospitality Ltd becoming employees of McCashin's Brewery Ltd.

The Police

[19] Sergeant Savage in his role as Alcohol Harm Reduction Officer for Nelson Bays Police was responsible for reporting on applications or renewals for licences. In this case he had reviewed the licence application and had attended meetings with the applicant and the other reporting agencies.

[20] Sergeant Savage provided a report, and like the other agency reports, it was taken as read with a summary of the issues raised provided at the hearing. Sergeant Savage informed the Committee that Police did not question the ability to operate premises as it had not come to Police attention in recent years. There had been three Control Purchase Operations failures between 2011 and 2013, which had incurred penalties, but since then management and staff training had improved.

[21] However in his view, given the application had been made by someone other than the operator then the application could not satisfy the object of the Act. He did not believe that the Act allowed a licensee to 'lease' out any licence issued to them and was not aware of any other premises operating in these circumstances in the Nelson Bays area.

[22] Sergeant Savage informed the Committee that he supported the view of the Licensing Inspector regarding the appropriate person who should be making the application. He agreed that there were other options including separate licences or applying for a licence as a tavern which would allow on and off sales to occur. In his view the premises would reach the definition of a tavern.

[23] He further stated that in his view the current application could not be granted as it fell short of meeting the object of the Act and other criteria as set out in section 105. Given the current proposal the applicant would not be accountable for any issues as it is proposed the premises will be managed by another entity. He further suggested that given these circumstances the Committee should not issue the licence.

The Medical Officer of Health

[24] Ms Anne Price is an Alcohol Licensing Officer under delegation from the Medical Officer of Health in accordance with section 151 of the Sale and Supply of Alcohol Act 2012. She has held that position for nine (9) years and reports on applications made under the Sale and Supply of Alcohol Act 2012.

[25] Ms Price submitted a report on the applications and had also attended two (2) site visits and shared the concerns of the other agencies that the applications had been made by someone other than the operator and manager of the premises. She was further concerned that the on-licence did not allow for the sale of alcohol from a restaurant. A restaurant cannot sell alcohol to take away to be consumed elsewhere.

[26] In her evidence Ms Price submitted that you cannot hold an off-licence as a restaurant.

[27] Ms Price indicated that the second onsite meeting discussed possible options for the licence applications that would meet the requirements of the Sale and Supply of Alcohol Act 2012.

Final Submissions in Reply

[28] In his written evidence in reply, Mr McCashin reiterated that the applicant believed the application did comply with the relevant requirements for renewal as outlined in sections 131 and 105 of the Act. He believed that their track record demonstrated compliance with all the relevant provisions as the premises had not come to the attention of agencies and should be evaluated on these specific criteria rather than the general provisions of section 14 of the Act. He reiterated the operation made positive contributions to the community and that they wanted to continue operating in the same way going forward.

[29] In this verbal right of reply near the end of the hearing, Mr McCashin advised the Committee that they would consider the option of McCashin's Brewery Ltd taking a shareholding in the McCashin's Taproom (Stoke Hospitality Ltd). When questioned by the Committee on what sort of percentage, he indicated that they would need to take a look at this and also indicated that they had already invested in the restaurant and various chattels.

[30] He urged the Committee to grant both the on- and off- licences.

The Committee's Decision and Reasons

[31] To a large extent the issues that were raised by the reporting agencies relate to the incorrect company making the applications. This means, in submissions by the agencies, that the object of the Act could not be met. The agencies had offered several ways this could be resolved in discussions between them and the applicant. No agreed option had been reached.

[32] The Committee was persuaded by the evidence of the Licensing Inspector, Mr Ian Jones, that a licence under the Act cannot be leased and further a restaurant cannot hold an off-licence as it would be contrary to section 14 of the Sale and Supply of Alcohol Act 2012.

[33] When considering an application to renew a licence, the criteria to which the Committee must have regard are contained in section 131 of the Act.

[34] In deciding whether to issue an off-licence and an on-licence or not, the Committee is also required to have regard for section 105 of the Act.

[35] The Committee is required to consider sections 105 and 106 of the Sale and Supply of Alcohol Act 2012. It has been found by the Supreme Court in their decision relating to the hearing of the Auckland Council Provisional Local Alcohol Policy (PLAP) that District Licensing Committees take a precautionary approach. The precautionary principle (or precautionary approach) is a broad epistemological, philosophical and legal term which emphasises caution, pausing and review.

[36] The Committee did have regard for the criteria set out in section 105.

[37] Given the acceptance by the reporting agencies that suitability was not an issue, the Committee focussed its attention on the object of the Act as set out in section 4 of the Act.

The Committee considered the recent Supreme Court Decision¹. It is clear from this unanimous decision, that as a Committee we need to consider the object of the Act in section 4 but not exclude section 3 which explains the purpose of the Act. In other words, the Committee has considered that the Act in section 3 introduces a reasonable system of sale and supply of alcohol, which seeks to achieve closely related outcomes, namely that alcohol is sold, supplied and consumed safely and responsibly, and harm from excessive and inappropriate drinking is minimised.

[38] The Committee believed it has a responsibility to look at the purpose and object at the same time. In its view it needed to ensure to meet the object of the Act, it had to first achieve the purpose under section 3. Alcohol related harm is widely defined in the Act and our role is to consider whether in this case the greater availability will have an associated increase in harm.

[39] The Committee has taken the approach that was set out by the Minister when this legislation was introduced to Parliament. It clearly signalled a new system of control. The object of the Act was not about reduction but minimisation of harm. The Oxford English Dictionary defines minimisation as harm reduced to the smallest amount, extent, or degree. This further means it has a responsibility to consider all the evidence and then to be satisfied that this premises meets the requirements of the Act and to also reach an opinion regarding whether the application meets the object of the Act.

[40] In any event we believe that the licences should not be renewed in their current format. There are two basic reasons. Firstly, one of the purposes of the Sale and Supply of Alcohol Act 2012 (s.3(1)(a)) is, to put in place a new system of control over the sale and supply of alcohol and that the new system is reasonable.

[41] The Committee finds that the on-licence application being made by McCashin's Brewery Ltd has very little to do, except for a lease agreement, with the operation of the restaurant and its sale of alcohol for consumption off the premises. In our view this does not meet the requirements of section 14 of the Sale and Supply of Alcohol Act 2012.

[42] The Committee also finds that this current arrangement does not provide the required oversight expected of the holder of a licence under the Sale and Supply of Alcohol Act 2012.

[43] While the applicant (McCashin's Brewery Ltd) has the onus of establishing its appropriateness to have its licences renewed, in our view it has not reached that threshold of compliance with the purpose and object of the Act. Reliance on previous decisions relating to these licences or the impositions of conditions does not reach those requirements. The Committee supports the view of the Licensing Inspector that no appropriate conditions exist for the current licencing regime in relation to McCashin's Brewery Ltd to persist going forward.

[44] The Committee further finds that given the applicant is not responsible for the day to day operation there is no ability for oversight of the premises to ensure compliance with the provisions of the Sale and Supply of Alcohol Act 2012.

¹ Woolworths & Foodstuffs v Auckland Council [2023] NZSC 45 (5/5/23).

[45] Secondly, we refer to the decision of Moore J in **Auckland Medical Officer of Health v Birthcare Auckland Limited** [2015 NZHC 2689²] and in particular to the comments at paragraph [50] as follows:

There is no reason in principle why the “causal nexus” approach adopted under the 1989 Act and approved in decisions of this Court, should not continue to be relevant and applicable under the new Act. Indeed, it was not suggested in argument that a different legal test should be adopted. Under both Acts the relevant enquiry is the same; the Authority is required to have regard to the s.105 criteria (or in the case of a renewal the s. 105 criteria as modified by s.131) and then step back and consider whether there is any evidence to suggest that granting the application will be contrary to the object of the Act contained in s.4(1). Namely that the sale supply and consumption of alcohol should be undertaken safely and responsibly, and the harm caused by excessive or inappropriate consumption of alcohol should be minimised.

[46] We have had regard to the criteria in section 105 (as modified by section 131), as well as the evidence and submissions from the applicant and the reporting agencies. We have then stood back and considered whether there was any evidence to suggest that granting the application for the on-licence and an off-licence would be contrary to the object of the Act in section 4(1). In this case, in terms of suitability it is not an issue, but it is the ability of the applicant to fulfil the role of ensuring the sale, supply and consumption of alcohol is undertaken safely and responsibly.

[47] Section 4 of the Act states:

4 Object

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.

[48] 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).

[49] The High Court applying the *Venus NZ Ltd*³ dicta of the Authority to refuse renewal came to the conclusion at [18] that:

Both the Authority and this Court must have regard to reducing alcohol related harm to the smallest amount, extent or degree, when making decisions on the grant or renewal of a licence.

² Auckland Medical Officer of Health v Birthcare Auckland Limited 2015] NZHC2689

³ Venus NZ Ltd [2014] NZARLA 762

[50] In this case, there is no evidence provided that the structure of the operation associated with McCashin's Brewery Ltd, McCashin's Taproom and Stoke Hospitality Ltd that indicates the object of the Act would be met.

[51] In the High Court they found that alcohol related harm will be minimised in this section, does not yield to the licensee's commercial or equitable interests as found in Medical Officer of Health v Lion Liquor Retail Ltd.⁴

[52] It seems to the Committee that there are a number of issues that could be resolved that would enable the requirements of the Act to be met and, in the view of the Committee, enable licence(s) to be issued.

[53] Although the applicant indicated some shareholding change could be considered, the Committee did not see this as a solution to meeting the requirement of section 14 of the Sale and Supply of Alcohol Act 2012. Further, the committee decided that financial arrangements were outside the Committee's considerations.

[54] The Committee also considered applying conditions to the licence but had regard for submissions made by the Licensing Inspector and also referred to the matter Young v Lyger Investments Ltd⁵ in which ARLA found, if granting an application is inconsistent with the object of the Act, or will or will not achieve the object of the Act, then the application must be declined/refused/dismissed. It is not possible to cure an application that is inconsistent with the object of the Act by granting the application and then imposing conditions on the licence.

[55] With respect to the current applications, the Committee confirms it declines the renewal of both the off-licence and the on-licence applications lodged by McCashin's Brewery Ltd. The licences will expire on 20 November 2024.

DATED at NELSON this 21th day of August 2024

A handwritten signature in black ink, appearing to read 'Rohan', with a long horizontal flourish extending to the right.

Rohan O'Neill-Stevens
Chair

⁴ Medical Officer of Health v Lion Liquor Retail [2018] NZHC1123

⁵ Young v Lyger Investments Ltd [2018] NZARLA 299.