

Decision Number **095/2023**

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012 ('the Act')

AND

IN THE MATTER

of an application by **Sswastik NZ
LIMITED** for the renewal of an off-
licence pursuant to s.127 of the
Act in respect of premises situated
at 143 Fitzherbert Street, Hokitika
trading as "Coasters
Supermarket."

BEFORE THE WESTLAND DISTRICT LICENSING COMMITTEE

Chairman: Murray Clearwater
Member: Alan Stobie
Member: Jacqui Low

HEARING at Hokitika on 28 August 2023

APPEARANCES

Mr. Ankitkumar Ashokbhai (Ankit) Patel- for the applicant Sswastik NZ Limited ("the applicant")

Ms. Sandra Cudmore – for the applicant

Mr. Wayne Knightbridge – Westland Alcohol Licensing Inspector ("the Inspector") – to assist.

Sergeant Russell Glue –Police Alcohol Harm Reduction Officer ("AHRO") – to assist.

Mr. Rodney Beckett- delegated officer for the Medical Officer of Health ("MOoH") – to assist.

RESERVED DECISION OF THE COMMITTEE

Introduction

1. By an application dated as received on the 19th of August 2022, **Sswastik NZ Limited** applied for the renewal of a grocery style OFF licence for premises situated on Fitzherbert Street, Hokitika. The company has been operating the store since September 2018. This is its second renewal application.

2. It was duly advertised and reported on by the agencies. No public objections were received but adverse reports were lodged by the delegated officer for the Medical Officer of Health and the Police.
3. Both agencies believed there were issues that required remediation and the applicant, largely via on site store manager, Sandra Cudmore, set about resolving those outstanding matters.
4. The concerns were largely alleviated, and the opposed reports of both agencies were withdrawn.
5. Two or three versions of annual sales figures were eventually provided that created more questions than answers.
6. When presented to the DLC, we were not satisfied whether the business was in fact a grocery store, or whether it was a Convenience Store, and on that basis it could not be considered on the papers.
7. The application was set down for a public hearing.

Applicant's Evidence

8. We heard from Mr. Ankit Patel, who was assisted by his on-site manager Sandra Cudmore. He had no prepared evidence in chief and told us that he believed the store was a grocery store and not a convenience store.
9. He said he bought the business in June 2017. In 2018 he bought Brockville Supermarket in Dunedin and Ranfurly Supermarket. In 2023 he has acquired the Palmerston Supermarket and the adjacent Thirsty Liquor Store.
10. The Thirsty Liquor Store is currently closed as he does not have the staff to man it.
11. Palmerston does not currently hold an alcohol licence. He said all four stores were Four Squares when he bought them, but he has opted out of the Four Square franchises and operates them as independent stores. In the last two months he has separated off a small corner of the Coasters Store and installed a separate Specialist Vape Retail (SVR) store.
12. He was then subjected to questioning by the Committee members. He was asked about the incident when the regulatory agencies had conducted an inspection and there was no certificated manager on duty. He told us he was driving over to the store from Christchurch and was late due to weather and road conditions for his shift at the store.
13. He said he currently lives in a campervan and travels from store to store and may only be in Hokitika once or twice a month. With the help from the agencies, he

has started up a Managers Register and now has sufficient certificated managers to cover the opening hours.

14. He said the in-house training was done by Sandra Cudmore. We were surprised to find out that he does not have a copy of the **Sale and Supply of Alcohol Act 2012** and has never read it. He had trouble identifying some of the offences his staff could commit in off-licensed premises. We discuss this later in our decision.
15. We asked him about the annual sales revenue figures that he provided. He said he created them from his own financial POS system and acknowledged that they were not in the required format and that they showed that the principal income streams were tobacco products and convenience foods.
16. It was not until the week before the hearing that he produced verified figures from a chartered accountant, Jatin Patel, that showed the sales revenue in the correct format. Unfortunately, the accountant had not removed excise tax from the tobacco sales as required by the 2017 amendment to the Act.
17. The new figures, as presented, showed the stores principal income stream as tobacco and cigarettes at more than 38%. Ankit Patel did not understand what excise tax was in relation to tobacco products. We discuss this gap in his knowledge later in this decision.
18. He was questioned about his **Host Responsibility Policy**. He was unsure of its origins but conceded it was not appropriate for an off-licensed premises that should have a **Social** Responsibility Policy.
19. In his closing remarks he promised he would learn more of the rules pertaining to the business and would employ more managers and provide more training.
20. It was put to him, by the Committee, that one option for us, should we decide to renew the licence, would be to impose a shortened renewal period for him to get things right. He consented to that option if we thought it was necessary.

Police Evidence

21. Sergeant Glue told us he has had concerns with what appears to be an absentee licensee, and he has had to work with Sandra Cudmore with most of the issues he has found.
22. He paid tribute to her and said that she always tried to comply and put in place any of the measures required of them. However, he felt he had made too many visits to the store and was concerned that the problems would re-emerge if the licence was renewed. It was his gut feeling that it traded as a convenience store and not as a grocery store.

23. These comments were quite strong considering that the Police had withdrawn their opposition and appeared before us in an assisting capacity.

Medical Officer of Health Evidence

24. Delegated Officer for the Medical Officer of Health, Mr. Rodney Beckett, then spoke to the Committee. He too, commended Sandra Cudmore on her commitment to working with the agencies. He told us that when the SVR was first set up, staff from the grocery store were serving in both areas. He confirmed that the SVR now has a dedicated staff member.
25. He was not impressed when he found alcohol stored in an area outside of the Single Alcohol Area. This was promptly resolved by Ms. Cudmore.
26. In closing he thought staff need more training on the provisions of the Act and he too thought the business leaned more towards a convenience store rather than a grocery store. He had not seen customers exiting with “loads of groceries.”
27. Again, as we noted with the Police evidence these were strong words from an agency that had withdrawn its opposition.

Inspector Evidence

28. Mr. Wayne Knightbridge was the reporting alcohol licensing inspector. It was his view that the issues raised had been resolved to his satisfaction, but he was concerned that the responses from the company were re-active and not pro-active.
29. He expected licensees to know what they need to know and put the required measures in place to comply with the law without being prompted by the agencies. We agree.
30. Again, we had to take these comments in the context of an agency that was not in opposition.

Relevant legislation

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

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

consumption of alcohol so that its effect and administration help to achieve the object of this Act.

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

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

- (1) *The object of this Act is that –*
 - (a) *The sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and*
 - (b) *The harm caused by the excessive or inappropriate consumption of alcohol should be minimised.*
- (2) *For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes –*
 - (a) *Any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and*
 - (b) *Any harm to society generally or the community, directly or indirectly caused, or directly and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).*

26. Determining whether premises are a grocery store

- (1) *In this section,—*
 - food product—*
 - (a) *does not include—*
 - (i) *alcohol, confectionery, ready-to-eat prepared food, or snack food; or*
 - (ii) *a drink (other than milk) sold in a container with a capacity of 1 litre or less; but*
 - (b) *includes delicatessen items that are not ready-to-eat prepared food or snack food;*

grocery store means a shop that—

- (a) *has the characteristics normally associated with shops of the kind commonly thought of as grocery shops; and*
- (b) *comprises premises where—*
 - (i) *a range of food products and other household items is sold; but*
 - (ii) *the principal business carried on is or will be the sale of food products*

ready-to-eat prepared food—

- (a) *includes food for the time being declared by regulations under this Act to be ready-to-eat prepared food; and*
- (b) *does not include food for the time being declared by regulations under this Act not to be ready-to-eat prepared food;*

snack food—

- (a) *includes food for the time being declared by regulations under this Act to be snack food; and*
- (b) *does not include food for the time being declared by regulations under this Act not to be snack food.*

- (2) In forming for the purposes of this Act an opinion on whether any premises are a grocery store, the licensing authority or a licensing committee—
- (a) must have regard to—
 - (i) the size, layout, and appearance of the premises; and
 - (ii) a statement of the annual sales revenues (or projected annual sales revenues) of the premises, produced in accordance with any regulations in force under this Act prescribing what information such statements must contain and how it must be set out; and
 - (iii) the number, range, and kinds of items on sale (or expected to be on sale) on the premises; and
 - (b) may have regard to any other matters it thinks relevant; and
 - (c) may determine that the premises do not have the characteristics normally associated with a shop of the kind commonly thought of as a grocery shop by virtue of characteristics that the premises and the items on sale there lack or will lack, characteristics that the premises and the items on sale there have or will have, or a combination of both.
- (3) Paragraph (a) of the definition in subsection (1) of food product is for the avoidance of doubt only, and does not extend the generality of the term. (underlining our emphasis)

27. Section 36 of the Act says:

No off-licences for petrol stations, certain garages, dairies, convenience stores, conveyances, or shops within shops

The licensing authority or licensing committee concerned must not direct that an off-licence should be issued for any premises if (in its opinion)—

- (a) the principal business carried on there is—
 - (i) the sale of automotive fuels; or
 - (ii) the repair and servicing of motor vehicles and the sale of automotive fuels; or
- (b) they are a shop of the kind commonly thought of as a dairy; or
- (c) they are a shop of the kind commonly thought of as a convenience store;
or
- (d) they are a conveyance; or
- (e) they are situated (wholly or partially) within a shop; or
- (f) the public can reach them directly from a shop, or directly from premises where the principal business carried on is a business of a kind described in paragraph (a).

28. Regulation 12 says:

Requirements for statements of annual sales revenue (existing businesses)

(1) *Requirements for statements of annual sales revenue (existing businesses)*

(1) *In the case of premises to which subclause (2) applies, the statement of annual sales revenue to which, by virtue of section 33(2)(a)(ii) of the Act, the licensing*

authority or a licensing committee must have regard in determining for the purposes of the Act whether any premises are a grocery store must contain—

- (a) a statement of the gross sales revenue of the business being carried on, on the premises for the period of 12 months ending no more than 90 days before the time at which the application for the issue or renewal of an off-licence for the premises is made,—*
 - (i) excluding GST; and*
 - (ii) excluding excise duty and excise-equivalent duty on tobacco products; (our emphasis) and*
 - (iii) after deduction of all revenue from sales of lotto, Keno, Instant Kiwi, or any other New Zealand lottery promoted by the New Zealand Lotteries Commission; and*
 - (b) a statement assigning the remainder of that revenue to the following categories:*
 - (i) the sale of food products:*
 - (ii) the sale of alcohol:*
 - (iii) the sale of tobacco:*
 - (iv) the sale of convenience foods:*
 - (v) other revenue; and*
 - (c) a statement from a chartered accountant verifying the figures given as correct according to prepared accounts.*
- (2) This subclause applies to premises where, as at the time at which an application for the issue or renewal of an off-licence for the premises is made,—*
- (a) business has been carried on for 12 months or more; and*
 - (b) the business being carried on has not changed materially for at least 12 months before that time.*

Further Considerations and Reasons for our Decision

- 29. Pursuant to section 33(2) of the Act, the Committee needs to be satisfied that the business is that of a grocery store and not a dairy or convenience store.
- 30. Firstly, we make the comment to Mr. Ankit Patel that the store is **NOT** a supermarket and never will be. Supermarkets are defined in the Act as premises of more than 1000 square metres, containing multiple aisles and departments with shopping baskets and trollies etc. This store is only 250-270 sq metres.
- 31. At best the store is a grocery store bordering on a convenience store.
- 32. We are mindful of the Alcohol Regulatory Licensing Authority (ARLA) decision [2016] **NZARLA PH 486 UDAY INVESTMENTS LIMITED**¹ in which the Authority made it clear that **food products must be ‘first in rank’ in sales**

¹ [ARLA] decision [2016] NZARLA PH 486 UDAY INVESTMENTS LIMITED

revenue for a grocery store style OFF Licence to be granted or renewed. **We discuss this in depth shortly.**

33. The first consideration under Section 32 is the size, layout and appearance of the premises. This store is about 250-270 square metres that we believe to be medium in size and contains 5 aisles surrounding 4 free standing racks of food products and other household goods. The area now housing the Vape Shop is about 3 square metres and is separated off from the licensed area.
34. Chilled cabinets and drink fridges take up the sides of the shop and groceries, cleaning products and hardware are on the racks. There is a wide range of confectionery and convenience items and a significant "\$2 Shop" area out the back.
35. The Single Alcohol Area (SAA) is as compliantly situated as can be expected in a medium sized 'grocery' store.
36. There is a large sign on the front of the shop stating "Coaster's Supermarket" giving it the overall appearance from the outside of a Grocery Store. It is not a supermarket has we have explained elsewhere.
37. The second consideration is the provision of accurate, verified, annual sales revenue data created from prepared accounts. The data initially provided was not to the standard expected by the agencies, or the Committee, but was subsequently 'rectified' to where it was accepted by agencies as sufficient.
38. As we pointed out during the hearing, the initial set of figures were totally unsatisfactory. Even when, with assistance from the agencies, verified figures were prepared and presented by a chartered accountant they were still inaccurate.
39. It is unacceptable for a chartered accountant to verify figures that did not have the excise tax removed from tobacco products. The amendment to the Act was over 6 years ago and is well known in accounting practices and should be standard practice now.
40. It should not be left to the Committee, as an act of reasonableness, to strip the excise tax off the tobacco sales to correct the sales revenue to show that the principal revenue stream appears to be food products.
41. The third consideration is the number, range and kinds of items on sale. The file contains a helpful set of colour photographs of the store and its contents. Members of the Committee also independently visited the store and gained their own impressions.
42. We found from the photos supplied, and our own observations, that there was a

good range of food products and grocery items.

43. In regard to ice cream, confectionary and single serve drinks we agree that there was a large range, quantity and variety of products.
44. However, overall, it appeared to us that the store has the characteristics normally associated with a grocery store.

Other criteria to be considered.

45. The Act provides that in deciding whether to grant a licence, the licensing committee must have regard to the matters contained in section 131 of the Act. In light of the recent Supreme Court ruling, we are also required to read the **Purpose of Act** together with the **Object of the Act**.
46. The Purpose of the Act tells us that the characteristics of the 'new system' will be that it is to be reasonable, and its administration helps to achieve the object of the Act.

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

47. Section 105(1)(a) of the Act requires the licensing committee to have regard to the Object of the Act. The licensing committee is satisfied that the renewal of the licence, if the business can be described as a Grocery Store, would not offend against the Object of the Act. The Act prescribes that genuine grocery stores can be granted a licence to sell beer, wine and mead for consumption off the premises.

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

48. Section 105(1)(b) provides that the applicant must be a suitable entity to hold an off-licence. In this regard, the suitability of the applicant is not challenged by the agencies other than the concerns around being an absentee licensee and deficiencies around manager appointments.
49. Fortunately, there have not been any sales to minors or intoxicated persons reported to the Committee. Evidence of such behaviour might well have tipped the balance.
50. Mr. Ankit Patel's lack of knowledge of the law and the requirements of the renewal process are of concern to the Committee. He must immediately obtain a copy of the Act and learn the provisions of the Act that apply to him and his businesses.

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

51. There is no Local Alcohol Policy. There is nothing for us to consider.

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

52. The days and hours sought are **Monday to Sunday 7.00am to 10.00pm**. They are unremarkable and within the default national maximum trading hours for off licences.

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

53. The design and layout of the premises has remained largely unchanged for the period it has been in operation. It is a medium to large grocery store and there are sufficient aisles and bays to be considered as such. Mr. Patel needs to be acutely aware that if he diversifies the business away from food products e.g. the \$2 shop, this can take the business away from the definition of a grocery store.

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

54. The applicant also sells a large range of other products including magazines, toys, novelty items, phone cards, cleaning products and hardware.

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

55. The business holds a Lotto franchise at the store.

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

56. We are sure it has become very clear to Mr. Patel of the need to maintain an accurate floor plan of the licensed area and to ensure that all products sold are properly coded to fit within the five categories required under this Act. Comprehensive, accurate accounts must be prepared in the proper format and verified by a **competent** chartered accountant as correct at each renewal.
57. Equally he must ensure that adequate numbers of well-trained certificated managers are employed at the store to ensure compliance. We were presented with evidence that there are four certificated managers appointed to the store and

two more in training. These levels must be maintained into the future.

58. Sergeant Glue recommends that the company be required to submit fortnightly staff rosters to the Licensing Inspector. We agree that this must be done until the Inspector advises Mr. Patel that he is satisfied.

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

59. There have been concerns raised by the agencies but as they have not opposed this application we must consider their position is to assist the Committee.
60. However, their interactions with the applicant, and their submissions have been helpful to our determination of this application.

Reasons for the Decision

61. Section 3 of the Act requires us to act reasonably with the aim of contributing to the Object of the Act in the exercise of our duties. We are also bound to comply within the procedures and provisions of this Act.
62. Overall, **by a slim margin**, we are satisfied that the premises has the characteristics normally associated with a grocery store.
63. The applicant must ensure that the sale of food products **always** generates the principal revenue stream at the store. As with all stores, the demands of the community will see them look to local grocery stores to carry more general items in their range. To do so will put his alcohol licence at risk at the next renewal.
64. We want to see a vast improvement in the knowledge and hands on management from Ankit Patel. We expect to see an **expansion in the range and types of food products** stocked for sale.
65. **The licence will be renewed for 2 years only** from the date of expiry of the current licence. That means the licence will expire again on the **7th of October 2024**.
66. Mr. Patel has 13 months to demonstrate to the agencies, and this Committee, that he understands and respects the privilege that he has been granted to sell alcohol to the public.
67. As said in **Hayford v Christchurch DLA, 3/12/93 Holland J, HC Christchurch, A201/92**². Holland J stated: "*A holder of a liquor licence under the Sale of Liquor*

² Hayford v Christchurch DLA, 3/12/93 Holland J, HC Christchurch, A201/92

Act 1989 is granted a privilege. It permits him to sell liquor when others are not permitted to do so.

68. In **Nishchay Enterprises Limited (Supra)**³ at paragraph [54] the Authority referred to the recognised test for suitability as contained in *Re Sheard* [1996] 1NZLR 751 where Holland J said at 758:

"The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence."

69. The ball is firmly in the court of Mr. Patel to respect the privilege we are granting him today.

The Decision

The **Westland District Licensing Committee**, acting pursuant to the Sale and Supply of Alcohol Act 2012 approves an application by **Sswastik NZ Limited** for the renewal of the off-licence in respect of premises situated at 143 Fitzherbert Street, Hokitika, trading as **"Coaster's Supermarket."**

The following **refreshed conditions** shall apply to the licence.

1. Alcohol may be sold on, or delivered from, the premises for consumption off the premises, and supplied free as a sample for consumption on the premises, only on the following days and hours: **Monday to Sunday 7.00am to 10.00pm;**
2. No alcohol is to be sold on, or delivered from, the premises on Good Friday, Easter Sunday, Christmas Day or before 1.00 pm on Anzac Day;
3. No alcohol may be sold other than –
 - a. beer that complies with the appropriate New Zealand food standard for beer; or
 - b. mead that complies with the appropriate New Zealand food standard for mead; or
 - c. fruit or vegetable wine that complies with the appropriate New Zealand food standard for fruit or vegetable wine; or
 - d. grape wine that complies with the appropriate New Zealand food standard for grape wine; or
 - e. a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted;

³ Nishchay Enterprises Limited (Supra)

4. While alcohol is being supplied free as a sample, water is to be provided to patrons at no cost from a water supply prominently situated on the premises;
5. **A properly appointed Certificated, or Acting or Temporary, Manager must be on duty, within the licensed area, at all times when the premises are open for the sale and supply of alcohol.**
6. The Licensee must display signage as follows:
 - a. At every point-of-sale signage detailing the restrictions on the sale and supply of alcohol to minors and intoxicated persons;
 - b. A copy of the licence attached to the inside of the premises so as to be easily read by people entering each principal entrance to the premises; and
 - c. A sign prominently displayed at the premises, which identifies by name the manager for the time being on duty.
7. The "single alcohol area" for the premises is as described on the plan provided. The licensee must ensure that:
 - a. **No alcohol is displayed, promoted or advertised outside the single alcohol area;** and
 - b. No products other than alcohol, low-alcohol and non-alcoholic beer, wine or mead are displayed, promoted or advertised inside the single alcohol area.

The Licence is renewed for 2 years from the expiry of the current licence, i.e. **7 October 2022 to 7 October 2024.**

DATED at HOKITIKA this 1st day of September 2023



Murray Clearwater
Commissioner
For the Westland District Licensing Committee



NOTE

Sections 153, 154 and 155 relating to the right to appeal this decision are in effect.

Any appellant has 10 working days after the date, on which notice of this decision is given to the parties, to lodge an appeal with the Alcohol Regulatory Licensing Authority.