[2019] NZARLA 214

UNDER	the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of an appeal pursuant to s 154 of the Act against a decision of the South Waikato District Licensing Committee granting a new on-licence for premises situated at 38-44 Bridge Street, Tokoroa known as 'Nexus Wine & Café'
BETWEEN	**COLIN RONALD BRIDLE** Appellant
AND	**NEXUS WINE AND CAFÉ LIMITED** Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Members: Ms J D Moorhead
Ms S L G Mehrtens

HEARING at TOKOROA on 14 October 2019

APPEARANCES

Dr G Hewison – for appellant
Mr R Davies and Mr J Lang – for respondent
Ms J Smale – Licensing Inspector – to assist

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DECISION OF THE AUTHORITY

Introduction

[1] On 23 May 2019, following a public hearing on 2 May 2019, the South Waikato District Licensing Committee (DLC) granted an application for an on-licence to Nexus Wine & Café Limited for premises at 38-44 Bridge Street, Tokoroa to be known as 'Nexus Wine & Cafe'.

[2] Mr Colin Bridle, a resident of Tokoroa, who was the sole objector before the DLC, now appeals the DLC decision to grant the licence.

[3] The Authority notes that Mr Bridle also objected to another application which was heard by the DLC on the same day, and subsequently granted. This second application relates to Kina's Sports Bar, which is proposed to be located in Mannering Street, Tokoroa. Mr Bridle also appealed that DLC decision, which the Authority heard the following day. While the applications differ, the Authority notes that three of the grounds of appeal are common to both appeals.[1]

Summary of result

[4] The Authority is satisfied that the DLC has properly evaluated the application having regard to the criteria in s 105 of the Act. Our response to each of the grounds of appeal is:

(i) Did the DLC err by deciding that the application could be made despite the applicant not being a legal person at the time of the application?

No

(ii) Did the DLC err by deciding that the application form was not deficient or inaccurate?

No

(iii) Did the DLC err by deciding that the applicant could amend its application beyond the scope and ambit of the original application?

No

(iv) Did the DLC err by not recording on the licence, or as a licence condition, that the on-licence was a tavern-style or tavern 'kind' of on-licence?

No

(v) Did the DLC err by not deciding that premises would operate as a tavern?

[1] Refer *Bridle v J & I Imports Limited* [2019] NZARLA 215 heard on 15 October with the Authority's decision issued on 1 November 2019

No

(vi) Did the DLC err in determining the application in the absence of an answer to its query about access?

No

(vii) Did the DLC err in deciding the application in the absence of a business plan or training programme being prepared and made available to it?

No

(viii) Did the DLC err by recording that the premises would operate as a tavern, but that parts of the premises could go undesignated for certain times of the day?

No

[5] We dismiss the appeal accordingly.

Background to the application

[6] The background to the application for a licence for Nexus Wine & Café is described by the DLC as follows:[2]

> The proposed business is to be situated in a block of three adjoining buildings that previously housed Pockets 8 Ball Club. That activity operated for many years under a Club Licence.
>
> Pockets 8 Ball was placed into liquidation in the Rotorua High Court on 10 December 2018. They ceased trading on that date and the premises, and the 18-gaming machines contained within, have been idle since that date.
>
> A consortium of local business people have formed a company and seek to reopen the complex as a tavern with a restaurant/café in one building, a lounge and function room in the second and retain the gaming room in the third building.
>
> They have purchased the land, buildings and chattels from the liquidator, KPMG, and renovations are underway in the restaurant/café side of the complex.

[7] Following the hearing, the Authority made a site visit to the Nexus Wine & Café.

[8] Whereas renovations were underway at the time of the DLC hearing, the premises are now open for business save that they are not yet able to sell alcohol and as a consequence, the gaming room remains closed.

[9] The Authority was struck with how the interior of the premises were tastefully refurbished, and how the three rooms of the premises had been well integrated by openings in the walls between each and by the overall colour scheme.

[2] DLC decision at [3] – [6]

Applicable criteria for evaluating application

[10] Section 105 of the Act sets out the criteria to which a DLC must have regard when deciding whether to issue a licence. We repeat s 105 in its entirety:

> **In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**
>
> **(a) the object of this Act:**
> **(b) the suitability of the applicant:**
> **(c) any relevant local alcohol policy:**
> **(d) the days on which and the hours during which the applicant proposes to sell alcohol:**
> **(e) the design and layout of any proposed premises:**
> **(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:**
> **(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-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:**
> **(h) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence:**
> **(i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—**
> **(i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but**
> **(ii) it is nevertheless desirable not to issue any further licences:**
>
> **(j) whether the applicant has appropriate systems, staff, and training to comply with the law:**
> **(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.**
>
> **(2) The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.**

[11] Relevant to s 105(1)(a), s 4 sets out 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 or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).**

[12] Section 106 of the Act also provides a legislation aide for considering s 105(1)(h) but the subsection is not in issue in this appeal.

Section 103 agency reports

Police & Medical Officer of Health

[13] According to the Inspector's s 103 Report, a "positive report" was received from the Police on 8 February 2019.

[14] Similarly, a "positive report" was received from the Medical Officer of Health on 20 February 2019.

[15] Neither the Police nor the Medical Officer of Health attended the DLC hearing to oppose the application.

Licensing Inspector

[16] Relevant to this appeal, the Licensing Inspector, Ms Julie Smale, noted in her s 103 report[3] that:

> The applicant is a company pursuant to s 28(1) of the Act.
>
> The company details are as follows: -
>
> There are five (5) directors and 29 shareholders.
>
> Their pre-amble states that the company was formed by a group of Tokoroa people who are passionate about the community and town and they had a vision to restore jobs back into the town [which] prevent a block of shops from becoming vacant.
>
> The group is made up of people who are highly regarded, have a passion for success which is evident inasmuch as they collectively employ or manage over 300 staff.
>
> The company was incorporated on 31 January 2019.
>
> The application was lodged 29 January 2019 and at that time the company initially had one (1) director and one (1) shareholder.
>
> The reason for this was it took just under a month to gather all the necessary paperwork from the remainder of the directors and shareholders and in no way tarnishes the suitability of the applicant.
>
> The group of people who have put together this proposal, in this inspector's opinion, are more than suitable to hold a liquor licence.

[17] The Licensing Inspector noted that two 'representatives' of the company volunteered that they had historic convictions: one being a conviction for careless use of a motor vehicle dating from 2004; and the other being a conviction for assault and disorderly behaviour, which was 40 years old. The Licensing Inspector reported that these convictions were 'historic', and in her opinion, were not of concern.

[18] In respect of the design and layout of the premises (s 105(1)(e)), the Licensing Inspector reported that it is her belief that the applicant is providing a quality environment that discourages crime and promotes safety for customers, and that the design and layout of the premises meets the Crime Prevention through Environmental

[3] undated s 103 report by Ms Julie A Smale

Design (CPTED) guidelines.[4] From its site visit, the Authority considers this to be an apt description of the premises.

[19] The Licensing Inspector set out in her report, the nature of the sole objection to the application, namely from the appellant, Mr Bridle. The Licensing Inspector reported, however, that she considers that most of Mr Bridle's objections "are frivolous and border on being vexatious".[5] The Licensing Inspector continued saying: "The objector has not proved in any way how s 105 applies in any of the matters he has raised – the objector has objected in the past to other premises and has used almost the same wording."

[20] The Licensing Inspector recommended that the DLC issue the on-licence for the days and hours requested by Nexus Wine & Café Limited.[6]

Mr Bridle's objection

[21] As already noted, the objection to the grant of the application was from Mr Bridle.

[22] Mr Bridle's objection dated 14 February 2019 states that Mr Bridle objects "under all of the criteria in section 105 of the Act", but sets out particular concerns, namely that:

(i) *inaccurate application*: the application is inaccurate and therefore invalid because it identifies several directors when the Companies Office records show only one shareholder and director;

(ii) *criminal conviction*: the application identifies a conviction for careless use of a motor vehicle but does not set out the date of that conviction — this raises concerns about whether Nexus Wine and Café Ltd is suitable to hold a licence;

(iii) *ownership of premises*: no title has been provided to show that Nexus Wine and Café Ltd owns the premises;

(iv) *South Waikato Alcohol Accord*: while the applicant intends to be a member of the Accord, Mr Bridle questions why Nexus Wine and Café Ltd is not already a member of the Accord and asks for details about how it complies with the Accord;

(v) *free courtesy van*: the applicant states it will consider a free courtesy van in the future — Mr Bridle asks why a free courtesy van is not already being offered;

(vi) *checklist and incomplete application*: the application requires documentary evidence of Nexus Wine & Café Ltd's authority to sell liquor or to hold a licence against which the applicant has written "to come" — as a result the application is incomplete and invalid under s 100 of the Act;

(vii) *menu*: there are no prices on the menu which renders the application incomplete and invalid under s 100 of the Act;

[4] undated s 103 report, above n 3, at [7.0]
[5] undated s 103 report, above n 3, at [21.0]
[6] undated s 103 report, above n 3, at [22.0]

(viii) *application of evacuation scheme approval:* the application for the evacuation scheme approval is in the name of Pockets 8 Ball Club Inc and this does not comply with s 100(d) of the Act — therefore the application is incomplete and invalid under that section;

(ix) *planning/building certificate:* neither a certificate that the premises meets the requirements of the Resource Management Act 1991 or the building code accompanies the application — therefore the application is incomplete and invalid;

(x) *suitability*: in light of the recent liquidation of Pockets 8 Ball Club Inc, there is concern about the financial viability of the premises — accordingly Mr Bridle asks for a thorough business plan confirmed by a chartered accountant to show that the business is viable; further without documentation of the legal arrangements between investors and the company, Mr Bridle is concerned that these arrangements may lead to serious financial difficulty for the company;

(xi) *gaming machine venue/tavern*: that the premises will be principally a gaming machine venue and not a tavern contrary to the Act — therefore Mr Bridle asks that the applicant demonstrate through a report from a chartered accountant that the revenue and accounts of the business show it is principally a tavern and not a gaming machine venue;

(xii) *hours*: Mr Bridle is concerned about the very long hours that the premises intend to be open; and

(xiii) *suitability – compliance with Council Class 4 Venue Policy:* Mr Bridle is concerned that the premises do not comply with the Council's Class 4 (gaming) Venue Policy as Nexus Wine and Café Ltd is not referred to in the appendix to that policy; and the policy states there shall be no new class 4 venues from the date of the adoption of the policy.

[23] In terms of his standing to object, Mr Bridle noted that he lives within 0.7 km from the venue and that: "In the past due to peoples' excessive alcohol consumption our property i.e. letter box and front garden has been damaged".

[24] Mr Bridle also said that he is an elder in the Elim Church in Tokoroa and people seek his assistance with alcohol and gambling issues. Accordingly, Mr Bridle says that he has a greater interest in the application than the public generally.

DLC decision

[25] The DLC decision canvasses the proposal for the premises, the applicant's evidence and the evidence from the Licensing Inspector.

[26] The DLC then considered the standing of Mr Bridle. While the DLC thought that it was finely balanced as to whether Mr Bridle had a greater interest in the application than the public generally, the DLC nevertheless granted Mr Bridle standing to object.[7]

[7] DLC decision at [40] – [42]

[27] After hearing from Mr Bridle, the DLC noted, amongst other things, that Mr Bridle adopted a 'somewhat misguided attack on the perceived inaccuracy and illegitimacy of the application".[8]

[28] The DLC, however, also said that Mr Bridle appropriately raised the issue of the principal activity of a tavern, noting that the Act requires a tavern to be principally in the business of providing alcohol and other refreshments to the public.[9] The DLC noted that Mr Bridle believed Nexus Wine and Café Ltd would struggle to prevent gaming revenue from becoming the principal revenue stream from the business, which would be contrary to both the Sale and Supply of Alcohol Act 2012 and the Gambling Act 2003.[10]

[29] After considering the criteria in s 105 of the Act, the DLC concluded that it had no difficulty in deciding that Nexus Wine & Café Ltd is a suitable entity to hold an on-licence despite the high-risk environment in which it chose to operate.[11]

[30] Relevant to this appeal, after turning its mind to the matter of designations under s 119 of the Act, the DLC said, amongst other things, that consistent with previous decisions of the Authority it would not be drawn into designating a gaming room as a restricted area purely in order to accommodate gaming machines.

Grounds of Appeal

[31] The grounds of appeal set out in the notice of appeal[12] are that:

(i) *Ground 1 'application not made by a legal person':* the DLC erred by deciding that the application could be made despite the applicant not being a legal person at the time of the application;

(ii) *Ground 2 'inaccuracies and deficiencies in the application'*: the DLC erred by deciding that the application form was neither deficient nor inaccurate given the Authority's previous emphasis on the importance of filing accurate application forms;

(iii) *Ground 3 'amendments to the application going beyond the original application'*: the DLC erred by deciding that the applicant could seek, and be allowed, to amend its application beyond the scope and ambit of its original application;

(iv) *Ground 4 'granting a generic on-licence rather than a tavern-style on-licence'*: the DLC erred by not recording in its decision that it granted a tavern-style or tavern 'kind' of on-licence despite requiring the applicant to operate within the parameters of the Act, including the requirement to operate a business as a tavern;

[8] DLC decision at [46]
[9] DLC decision at [47]
[10] DLC decision at [48]
[11] DLC decision at [98]
[12] dated 6 June 2019

(v) *Ground 5 'not determining whether the premises would operate as a tavern':* the DLC erred by deciding that the applicant was entitled to a presumption that the premises would operate as a tavern when the applicant had the onus of proving on the balance of probabilities that it would operate as a tavern; and not following the principles and requirements for determining whether a new premises is a tavern, or that the use of the premises would meet the definition of 'tavern' in s 5 of the Act;

(vi) *Ground 6 'issue of direct access to gaming room left unresolved':* that the DLC, after expressing a concern about separate access to the gaming area, and after asking the applicant to seek a response from the Department of Internal Affairs (DIA) about the issue of access to gaming rooms, then proceeded to determine that the application met the design and layout criteria in the Act notwithstanding that it had not received an answer to its query;

(vii) *Ground 7 'No business plan or training plan':* the DLC erred in deciding, in the absence of a business plan or training programme being prepared and made available to the DLC, that the application met the criteria in s 105(1)(j) of the Act; and

(viii) *Ground 8' 'permitted designation for a tavern':* the DLC erred by recording that the premises would operate as a tavern but then deciding, contrary to s 119 of the Act, that parts of the premises could go undesignated for certain times of the day.

Relief sought

[32] Before the Authority, Dr Grant Hewison for Mr Bridle sought by way of relief under s 158 of the Act, that the decision of the DLC be reversed and the application refused. Given the nature of the alleged errors, in response to a question from the Authority, Dr Hewison submitted that it would not be appropriate to remit the matter to the DLC for reconsideration.

Approach on appeal

[33] As the Authority has recently reiterated in *Shady Lady Lighting Limited v Lower Hutt Liquormart Ltd*[13] and *Capital Liquor Ltd v NZ Police*[14] it is well settled that an appeal brought pursuant to s 154 of the Act is by way of rehearing. The Authority does not repeat the applicable principles here save to say that the Authority will be slow to draw different factual conclusions from those of a DLC as the DLC will have had the advantage of hearing the evidence at first instance.[15]

[34] What the Authority is required to do in its appellate function is to determine issues which had to be determined in the proceeding of the DLC on the basis of the evidence

[13] *Shady Lady Lighting Limited v Lower Hutt Liquormart Ltd* [2018] NZARLA 198-199 at [54] – [65]
[14] *Capital Liquor Ltd v NZ Police and others* [2018] NZARLA 335 at [109] – [110]
[15] *Mangere-Otahuhu Local Board v Level Eighteen Limited*, [2014] NZARLA PH 627-228 at [17]

appearing in the DLC record.[16] It is only if the Authority considers that the decision of the DLC is wrong, however, that the Authority is justified in interfering with it.[17]

Ground 1: application not made by a legal person

Submissions for appellant

[35] The application for the on-licence was signed by Ms Karen Forbes on 24 January 2019 and was filed with the DLC a few days later on 29 January 2019.

[36] On the checklist located at the bottom of the application form, the form asks for additional documentation including "Where the applicant is Incorporated, a copy of the Certificate of Incorporation or other documentary evidence of its incorporation". Against this item, instead of ticking the box to indicate that the documentation had been included with the application, Ms Forbes wrote the words "to come".

[37] At the hearing on 2 May 2019, under cross-examination by Dr Hewsion, Ms Forbes confirmed that the date of incorporation of Nexus Wine & Café Ltd was in fact 31 January 2019, meaning that the applicant was incorporated two days after the application was filed.[18] The Authority also notes this was evident from the Licensing Inspector's s 103 report.[19]

[38] It is submitted by Dr Hewison for Mr Bridle, therefore that the first paragraph of the DLC decision which reads "In an application dated the 29th of January 2019, Nexus Wine & Café Limited applied for an On Licence...." is an error of fact because the company was not yet incorporated on that date.

[39] Mr Bridle says further that while s 100 of the Act requires an application for a licence to be made in the name of the person who will hold it if the application is granted, the scheme of the Act is that an application cannot be made by a company before it is incorporated because the applicant is not at that point, a legal person. This Mr Bridle submits is also reflected in the application form.

[40] In response to the questions from the Authority, Dr Hewison for Mr Bridle accepted that while there are practical difficulties in the case of providing resource and building consents with an application, that differed from a corporate applicant not yet being incorporated. Dr Hewison said that the matter is an important one because the status of the applicant goes to objectors being able to make informed objections.

[41] Further, before the Authority Dr Hewison said that s 381 of the Companies Act 1993 makes it an offence for any person who is not incorporated to carry on business under a name of which "Limited", or a contraction of that word, is the last word.

[42] Given that Nexus Wine and Café Ltd was not incorporated until two days after it filed its application, Dr Hewison submitted, the application is invalid.

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[16] *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124 at [16] citing *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 at p 490 per Somers J
[17] *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [146]
[18] DLC Transcript at page 21
[19] undated s 103 report, above n 3, at [4.0]

Submissions for respondent

[43] Mr Robert Davies for Nexus Wine & Café Ltd submits that there is no statutory restriction relating to the legal personality of applicants when an application for a licence is made. Rather, it is submitted that the Act provides that a licence cannot be issued or held by an unincorporated corporate applicant. It is submitted that it is not an error for a DLC to consider legal personhood at the time the application is determined.

[44] Indeed, Mr Davies submits that s 100 requires that the application is made in the name of the person who will hold the application. As is evident from other provisions of the Act, for example ss 26 and 28, the scheme of the Act is that a licence cannot be *held* by a person unless (in this case), they are a company within the meaning of the Companies Act 1993. That is, what is important is the date of issue of the licence.

[45] Furthermore, it is submitted that as Nexus Wine and Café Ltd was incorporated two days after the application was filed, the delay is minor and there is no prejudice to any party. That the application was made in the name of Nexus Wine and Café Ltd, it is submitted, did not prevent would be objectors from raising concerns.

[46] Mr Davies submits that the DLC was right to consider that the application for a licence was a process, rather than a one-off event.[20]

[47] It is also submitted that any delay would have qualified for a waiver by the DLC as is evident from *Re NZ LNQ Ltd*,[21] which decision Mr Davies submits shows a level of pragmatism being appropriate, and that here there is no miscarriage of justice. In this regard too, Mr Davies submits that at the time of public notification, the company was incorporated, and no one was misled.

Analysis

[48] Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.

[49] Section 100 of the Act reads, in part:

> 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; and
> (c) must contain the prescribed particulars; ....

[50] The prescribed form for an application for an on-licence is Form 3 set out in the schedule to the Sale and Supply of Alcohol Regulations 2013 (the Regulations).

[51] Form 3 requires that the "full legal name or names to be on licence" is required, as is the applicant's status by reference to s 28 of the Act. The words 'name or names to be on licence' in form 3 is consistent with s 100, which requires that the application must be made in the name of the person or club 'who will hold it if the application is granted'.

[20] DLC Transcript at page 23
[21] *Re NZ LNQ Ltd* [2014] NZARLA PH 229 at [4(b)]

[52] Form 3 further requires that where the applicant is a company, the full names of directors are required. A copy of the certificate of incorporation (or equivalent document) is to be attached to the application, along with copies of planning certificates and relevant building certificates and a floor plan.

[53] Section 26(1)(a) of the Act provides that a person cannot hold an on-licence unless by virtue of s 28 they are a person who can 'hold' that kind of licence. Section 28(1)(c), in turn, states that an on-licence 'can be held' by any company body within the meaning of the Companies Act 1993 that is not prevented by a restriction in its constitution (if any), from selling alcohol or from holding a licence.

[54] Neither s 100, s 26 nor s 28 expressly restrict when an applicant in the process of incorporation may apply for a licence. Rather, the scheme of the Act is simply that the application must be in the name of the person who will hold the licence, if granted; and companies may hold licences unless their constitution says otherwise. That is, the relevant date is the date the application is granted.

[55] Further cl 42(1) of the Regulations provides:

> **(1) The forms set out in the Schedule after forms 1 and 2 are prescribed for the matters to which they relate, and must be completed by—**
>
> **(a) the insertion of the particulars they require; and**
>
> **(b) the attachment of any documents they require.**

[56] Forms 1 and 2 relate to infringement notices.

[57] Clause 42(2) and (3), go on to say, however, that:

> **(2) Subclause (1)(a) does not require the insertion in a form of particulars that are not relevant to the application concerned.**
>
> **(3) In any particular case, any variations that the circumstances reasonably require may be made to any form, the particulars inserted, or both.**

[58] It is clear from cl 42(2) and (3) then, unlike in the case infringement notices, in any particular case variations to the particulars relevant to the application concerned may be made as the circumstances reasonably require, including the insertion of particulars.

[59] Put another way, it is envisaged that circumstances may change which may require the insertion by the applicant of required particulars without the need for a new application being made.

[60] This is entirely consistent with s 3(1)(a) of the Act, which is that one of the characteristics of the system of control over the sale and supply of alcohol embodied in the Act, is that it is reasonable (per s 3(2)(a)).

[61] While the Act does not require a company in the process of incorporation to be incorporated before an application is made for a licence, the Authority is also guided by what Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey*,[22] namely that "an overly grammatical or semantic approach to the text will undoubtedly yield where to interpret in that way would be anathema to the purpose of the Act."

[22] *Christchurch Medical Officer of Health v J & G Vaudrey* [2015] NZHC 2749 at [25]

[62] The concept of reasonableness in s 3(2)(a) imports considerations of proportionality, which in this case requires consideration of whether invalidation of the application would be a proportionate response to the fact that incorporation was in train at the time the application was filed and occurred a mere two days later.

[63] While not a matter that the High Court was required to determine, in *Vaudrey*, Gendall J noted that he was cognisant of there being some authority to suggest that a DLC may be willing to accept an application in the absence of either a building consent or resource consent. Dr Hewison has accepted as much before the Authority. Gendall J said in respect of this, "They are all practical matters which, more than anything, go to the requirement of reasonableness which pervades the entirety of the Act."[23]

[64] Consistent with how we read s 100, the same can be said of an application made in the name of a company incorporated two days later.

[65] The Authority does not consider that invalidation of the application is required on a plain reading of the Act, nor would invalidation of the application be a reasonable response to the issue. Moreover, s 26 of the Interpretation Act 1999 also provides that a form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading.

[66] The Authority agrees with the DLC that the process of applying for a licence is a process and is not an event.[24] Mr Bridle has not articulated any mischief to be avoided in this case, where the application for a licence is made almost contemporaneously with the applicant being incorporated, except in the broadest of terms.

[67] The point remains is that the relevant requirements for the issue of a licence must be in place before a licence is issued. There has been no prejudice to any party. The company was incorporated before the application was publicly notified. The company was incorporated before the time for objections closed. Mr Bridle was not thwarted in objecting and was not misled as to who the applicant was, or to whom the licence would issue. There is no evidence that the agencies reporting on the application pursuant to s 103 did not know who they were dealing with and the DLC itself had no issue understanding who the prospective licensee was. As noted, the DLC would have known this from the Licensing Inspector's report in any event.

[68] While s 381 of the Companies Act 1993 makes it an offence to carry on business under the title 'Limited', without being incorporated, the appellant has not satisfied the Authority that the respondent was 'carrying on business' except in the most precursory manner. A better characterisation is that the applicant was seeking to incorporate and obtain a licence in order that it could carry on business at some date in the near future. To require that a company must be incorporated before an application is made defies commercial reality where multiple processes are undertaken in tandem towards the company being in a position to carry on business.

[69] For the reasons stated, the Authority is not satisfied that this ground of appeal has been established.

[23] *Christchurch Medical Officer of Health v J & G Vaudrey*, above n 22, at [71]
[24] DLC Transcript at page 23

Ground 2: inaccuracies and deficiencies in the application

Submissions for appellant

[70] Mr Bridle's second ground of appeal is that the DLC erred by not determining that the application made by Nexus Wine & Café Ltd was deficient or inaccurate. Aspects of the application, Mr Bridle says, are false, or at least inaccurate, and misleading namely:

(a) the application form filed on 29 January 2019 contained the names of directors and shareholders who did not become directors and shareholders until 22 February 2019;

(b) the applicant used the word 'Limited' in breach of s 381 of the Companies Act 1993;

(c) the application said that the applicant owned the licensed premises, but the record of title under the Land Transfer Act 2017 shows that the land was only transferred to Nexus Wine & Café Ltd on 11 February 2019; and

(d) Ms Forbes signed the application, but as the company had not yet been formed, and Ms Forbes did not become a director until 22 February 2019, Ms Forbes had no authority to sign the application on behalf of the company.

[71] Further, on the application form, it is submitted that checklist asks the question "Is the applicant engaged, or intending to be engaged, in the sale or supply of any goods other than alcohol and food, or in the provision of any services other than those directly related to the sale or supply of alcohol and food?". It is submitted that in response, the applicant circled "No".

[72] Mr Bridle submits that where an application is false, or at least inaccurate in material respects (such as those just listed), the application is invalid.

[73] Alternatively, it is submitted that the false or inaccurate statements in the application go to the applicant's suitability to hold a licence. Dr Hewison referred the Authority to its decision in *Pangotra Holdings Ltd v Sargent*[25] as authority for the importance of filing an accurate application form.

[74] Before the Authority, Dr Hewison recognised that there is some confusion as to whether or not gaming is a service for the purposes of s 105(1)(g) of the Act[26] but it was important to answer the questions in the application accurately to ensure potential objectors are not confused and do not lose the opportunity to object to the application as a result as set out in *Pangotra*.

[75] In response to questions from the Authority, however, Dr Hewison acknowledged that in the present case the application referred to a 'gaming room' and a gaming room was shown on the plan accompanying the application. Dr Hewison also accepted that Mr Bridle was not confused as to the proposal in this application to have gaming

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[25] *Pangotra Holdings Ltd v Sargent* [2016] NZARLA 73

[26] for example, in *Café Liquor Limited* LLA PH 305/2001 the Liquor Licensing Authority was not satisfied that gaming machines could be brought within the dictionary definition of a service being the provision of a facility to meet the needs of or the use of a person, or assistance or benefit provided to someone by a person.

machines on the premises. Nevertheless, as a matter of principle, as others might have been confused, it is important that applications are accurate.

[76] Further in response to question from the Authority, Dr Hewison accepted there was no dishonesty or *mala fides* (i.e. bad faith) on the part of Nexus Wine & Café Ltd in making the application. Dr Hewison said that the only issue in respect of the response to the question in the form is whether, if gaming is to be available on the premises, the answer to the question ought to be 'yes' rather than 'no'.

Submissions for respondent

[77] Mr Davies for Nexus Wine & Café Ltd submits that before the DLC Ms Forbes gave reasonable explanations for the points referred to by Mr Bridle and that there was no evidence that Nexus Wine & Café Ltd had ulterior motives when framing its application.

[78] In respect of the points raised, Mr Davies submits that:

(a) Nexus Wine & Café Ltd was trying to be thorough in its recording of director and shareholder details and if anything, this disclosure would have assisted rather than hindered prospective objectors in their understanding of the nature of the application. Further, there was no evidence of Nexus Wine & Café Ltd intending to deceive, mislead or to deliberately include inaccurate information;

(b) Mr Bridle accepted that agreements to purchase property could become unconditional before settlement;[27] and

(c) the failure to circle 'yes' to the question about other services, namely the presence of gaming machines, is accepted but there was no dishonesty on the part of Nexus Wine & Café Ltd; further that question was only one part of the application and the DLC was not confused as to the intention to have gaming machines, and nor was Mr Bridle.

[79] Nexus Wine & Café Ltd submits that the DLC considered each of the matters raised by Mr Bridle and the explanations given by Nexus Wine & Café Ltd, and still decided to grant the application. It is submitted, that this was a decision open to a reasonable decision-maker and that the DLC followed a correct process in making that decision.

[80] It is also submitted that this application differs to that in *Pangotra*, where the inaccuracies were substantial and deliberate, or at least careless. Accordingly, it is submitted that that case does not assist the Authority.

Analysis

[81] We have already addressed the reference to the use of the word "Limited' in respect of the first ground of appeal. We do not repeat that here.

[82] The same reasoning applies to the names of directors and shareholders, and the dates on which they became directors and shareholders.

[27] DLC Transcript at page 67

[83] By the time of the hearing, the DLC was aware of who the directors and shareholders of Nexus Wine & Café Ltd were.

[84] What Mr Bridle is in effect saying is that the DLC ought to have put to one side the names of directors and shareholders of the company, because the company was not yet incorporated.

[85] Had the applicant not advised the DLC of the directors and shareholders, it may very well have faced criticism that the application was misleading for being incomplete as to the applicant's intentions. The applicant erred on the side of fulsome information and should not be faulted for that. To invalidate an application, for being more fulsome than Mr Bridle thinks it ought to have been given the company was not yet incorporated, would have been a disproportionate, and therefore unreasonable response on the part of the DLC. Once again, no prejudice has been established by Mr Bridle, and it is hard to see how the provision of more, rather than less information, could be prejudicial.

[86] Equally, the evidence is that Mr Bridle accepted under cross-examination that agreements to purchase property could become unconditional before settlement.[28] In any event, the hearing occurred after the 11 February 2019 transfer. By the time of the hearing, and the subsequent issue of the licence, there was no discrepancy with respect to the application. And again, on this point, there is no evidence of anyone being misled as to the tenor of the application.

[87] While Nexus Wine & Café Ltd has accepted that it perhaps should have indicated 'yes' where the application asks about whether the applicant intended to be engaged in the provision of any services other than those directly related to the sale or supply of alcohol and food, Dr Hewison himself acknowledged that there was some confusion as to whether s 105(1)(g) included references to gaming machines.

[88] In any event, the application states unequivocally in reference to proposed designations, that a gaming room would be part of the premises. The accompanying application for a certificate that the proposed use of the premises meets the requirements of the Resource Management Act 1991 specifically states that the proposed use of the premises is "Café Restaurant Tavern & Entertainment, gaming machine". The plan attached to the application also unambiguously shows that gaming is proposed. Further, as is evident from Mr Bridle's objection, which queries whether the premises are a tavern or a gaming machine venue, it is clear that Mr Bridle was not confused about the proposal to have gaming machines in the premises. Dr Hewison confirmed the same before the Authority. Whether others may have been confused about the application is a matter on which the Authority need not speculate, there being no evidence of that. Such a proposition, however, is highly unlikely.

[89] The Authority also agrees that *Pangotra* does not assist. That case involved the applicant failing to record accurately the convictions of both directors. Further, the directors of the company stated that they would be managers responsible for the premises when they had no such intention. Misleading statements were also made about the applicant's engagement with the community. Moreover, the DLC concluded that the applicant was unsuitable, lacked satisfactory systems, and that the amenity and good order of the locality would be likely to be reduced to more than a minor extent by the issue of the licence. When weighed against the object of the Act, the DLC had no choice but to decline the application.

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[28] DLC Transcript at page 67

[90] The application involving Nexus Wine & Café Ltd bears no similarity to the facts in *Pangotra*.

[91] For the reasons stated, this ground of appeal must also fail.

Ground 3: amendments to the application going beyond the original application

Submissions for appellant

[92] Mr Bridle submits that as Nexus Wine & Café Ltd responded 'No' to the question as to whether it intended to provide any services other than those directly related to the sale or supply of alcohol and food, it was prevented from offering gaming because an applicant is limited by the services identified in its application form.

[93] Further, Mr Bridle says that the DLC referred to an updated floor plan being provided as part of Nexus Wine & Café Ltd's closing submissions, which floor plan included a second small bar in the proposed gaming room that was not included in the original floor plan.

[94] It is submitted that because this second bar was not included in the original plan, potential objectors may have inspected the application and floor plan and relied on the absence of this second small bar as a reason for not making an objection.

[95] It is also submitted that Mr Bridle himself did not have an opportunity to object to the small bar in the gaming room. Mr Bridle said that had the application included this second bar in the gaming room, he would have objected to the application for this reason as well. It is also submitted that reporting agencies did not have the opportunity to report on the issue.

[96] Mr Bridle relies on the Authority's decision in *Davison v BBC Welles Ltd*[29] as authority for the proposition that the applicant is not entitled to more than it asked for in its application and that the DLC erred by deciding that the original plan could be amended to include this small bar.

[97] Mr Bridle also submits that as the plan was not introduced in evidence, he was denied the opportunity to cross-examine the applicant on it or give or make submissions in relation to the matter.

[98] Before the Authority, Dr Hewison accepted that an element of reasonableness applies, and the second small bar is of more concern than the response to the question in the form being wrong.

Submissions for respondent

[99] Mr Davies accepts that a licence can only authorise what is sought by a putative licensee but submits that here there was clarity in the application and there was nothing preventing any party from discussing the nature of the application if uncertain about it.

[29] *Davison v BBC Welles Ltd* [2016] NZARLA PH 69-70

[100] As already stated, Mr Davies submits that both the DLC[30] and Mr Bridle[31] were aware of the intention to have gaming machines. In respect of the second small bar, Mr Davies submits that what matters is less the scope and ambit of the application than the character and nature of the premises for which the licence is sought, being relevant to the design and layout of the premises which is a criterion in s 105 (1)(e) of the Act. It is also submitted that once again, Mr Bridle was not misled, and no prejudice was caused.[32]

[101] It is further submitted that the second small bar was a feature of the previous premises which was a club, and is not new to the premises, it not having been introduced by Nexus Wine & Café Ltd. While it is accepted that this second small bar was not on the original plan submitted with the application, it is submitted that the bar does not materially change the nature and character of the application any more than the proposed renovations which are also not shown on the plan. That is, the application is for a tavern, and the bar remains consistent with the application in that respect.

[102] Mr Davies submits further that in *SBS NZ Limited v Young*,[33] the Authority said that while it is the applicant who is required to specify the general nature of the business intended to be conducted pursuant to the licence, it is the decision-maker who is charged with determining how the premises are actually being used or will be used.

[103] Mr Davies notes this second small bar was not an issue before the DLC and that it has only been raised on appeal. Mr Davies submits that it was appropriate to consider the plan as part of the application process, and that retaining an existing feature cannot reasonably justify re-notification of the application on the basis that it may have changed the number of objectors.

Analysis

[104] For the reasons already stated, to read Nexus Wine & Café Ltd's isolated response to the question of whether it intended to be engaged in the provision of other services, is not considered by the Authority to be a departure from the application made by it.

[105] Again, we do not repeat ourselves on this point save to say that the evidence is that the DLC was not misled by what it considered to be a very common error where people do not realise that gaming machines are another service and therefore the answer to the question should have been 'yes'. The DLC was not acting under any misapprehension in respect of gaming machines.

[106] For completeness, the Authority does not find *BBC Welles* to be of assistance. That case involved an applicant for an on-licence stating that it only intended to sell craft beer. When the licence application was granted on the papers, however, the applicant then appealed a condition that held it to its stated intention to only sell craft beer. It was in that context, where the applicant was seeking, through an appeal, to broaden the range of alcohol, possibly with significantly increased volumes, that the Authority said the licensee is constrained by the terms of its application. That of course, is not the situation here.

[30] DLC Transcript at page 26
[31] DLC Transcript at page 67
[32] DLC Transcript at page 68
[33] *SBS NZ Limited v Young* [2019] NZARLA 175 at [108]

[107] In relation to the second small bar, the Authority notes that it was Dr Hewison who asked for an updated copy of the floor plan,[34] a copy of which was appended to Mr Davies' closing submissions for the applicant and which showed the premises as they were intended to be following planned renovations, including an indicative layout of tables and chairs.[35] In response to a question from the Authority, Dr Hewison accepted that he did not raise the issue of the second bar once he received the updated plan or seek leave to make submissions on it. Before the Authority Dr Hewison accepted that he should arguably have sought to reopen the hearing on that point in order to test any evidence about the effect of the second bar, but that he did not do so.

[108] The time to have objected to the second bar was at the time of the DLC hearing. In any event, the second bar was part of the previous club premises and from the Authority's visit to the premises, it is easily visible through the window. While the absence of a bar may have gone some way toward the premises being a gaming venue, the same cannot be said of its presence. The presence of the second small bar is entirely consistent with the application for a tavern.

[109] As Mr Davies has rightly submitted, in *SBS NZ Limited v Young* this Authority said it is the decision-maker who is charged with determining how the premises are actually being used or will be used. The second bar is not mentioned in the decision of the DLC and the Authority is satisfied that its inclusion would not have led to a perception that the venue is more in the nature of a gaming venue, or less in the nature of tavern, but there is no evidence on this point either way.

[110] The Authority is not satisfied this ground of appeal has been established.

Ground 4: granting a generic on-licence rather than a tavern-style on-licence

Submissions for appellant

[111] Mr Bridle submits that the DLC erred in granting a 'generic' on-licence when the application was for a 'tavern-style' on-licence. In response to questions from the Authority, Dr Hewison for Mr Bridle said that the issue is that the licence does not refer to it being a tavern either in the header to the licence, or as a condition imposed on the licence.

[112] Dr Hewison for Mr Bridle submits that in *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust,*[36] the Authority said that it is clear that a tavern on-licence is different in kind to other types of licences. Dr Hewison accepted that the intent was that the premises operate as a tavern but the DLC did not translate this intent into specific wording on the licence. The absence of such wording, Dr Hewison said, means that there is a risk that on renewal the DLC will ignore the fact that the premises is intended to be a tavern, rather than a gaming venue, and not apply the relevant criteria articulated by the Authority in *Kaiti Club Hotel Ltd.*

[113] Before the Authority, Dr Hewison submitted that where an application is for a tavern-style licence, where there is also gaming proposed on the premises, the DLC should say in its decision that the licensee is to operate the premises primarily for the sale of alcohol.

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[34] DLC Transcript at page 20
[35] Closing submissions of applicant dated 16 May 2019 at [41]
[36] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust* [2018] NZARLA 225 at [90]

Submissions for respondent

[114] Mr Davies for Nexus Wine & Café Ltd submits that s 13 of the Act provides that there are four types of licences under the Act, and the application for the appropriate type of licence was granted in this case. Further, the conditions imposed by the DLC reflect the type of conditions that are to be imposed for taverns. As a consequence, it is submitted that not much turns on the lack of the word 'tavern' in the conditions imposed by the DLC.

[115] Mr Davies accepts that the part of the decision that set out the conditions to be imposed on the ensuing licence does not incorporate the word 'tavern' but submits that the decision is not the form of the licence that is ultimately to be issued.

Analysis

[116] This ground of appeal is premised on a fundamental misunderstanding of the operation of the Act.

[117] Section 13 of the Act provides that there are four kinds of licences, including on-licences. No mention is made of 'tavern-style licences'.

[118] The word 'tavern' is mentioned eight times in five sections of the Act. Two of these sections (ss 349 and 350) relate to district and suburb trusts and are not relevant to this appeal. Section 32 provides that an off-licence may be issued to the holder of an on-licence issued for a hotel or tavern, which is also not relevant in this case.

[119] Section 119, however, is applicable and provides that:

> **(1) The licensing authority or licensing committee concerned must do one of the things described in subsection (3) when issuing an on-licence for a hotel or a tavern.**
> **(2) ....**
> **(3) The things referred to in subsections (1) and (2) are—**
>
> **(a) designate all of the premises—**
> **(i) an area to which minors must not be admitted; or**
> **(ii) an area to which minors must not be admitted unless accompanied by a parent or guardian:**
> **(b) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted:**
> **(c) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian:**
> **(d) both—**
> **(i) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted; and**
> **(ii) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian.**

[120] Section 5 then defines what a tavern is, namely premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public, but not including an airport bar.

[121] The Authority's decision in *Kaiti Club Hotel Ltd*, cannot be read as defining a further kind of licence under the Act contrary to s 13 of the Act, but says that as the restrictions in the Act do not equally apply to all types of on-licences, tavern on-licences are different in kind to other types of on-licences. That is, where premises operate as

a tavern, further restrictions apply, and in particular there is a requirement to designate the premises as set out in s 119 of the Act.[37] The factors set out in *Kaiti Club Hotel Ltd*, and previous decisions of the Authority canvassed in that decision, are factors which go to help determine whether the premises in question are a tavern.[38]

[122] Conceptually then, a licence does not define that premises are a tavern, but it is the nature of the premises that dictates what restrictions ought to apply to premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public. Having then imposed the relevant condition, namely one of the things described in s 119 of the Act, it is incumbent on licensees to comply with those conditions, the failure to do so exposing the licensee to an application under s 280(3)(a) of the Act.

[123] Moreover, as is clear from *Christchurch Medical Officer of Health v J & G Vaudrey*[39] and *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd*,[40] there is no presumption that a licence will be renewed. A licensee seeking a renewal will again need to specify the type of premises for which the licence is sought, which will also be included in the public notice of the application,[41] and the DLC will have to have regard to the criteria in 131 and s 105(1), as applicable. Objectors and reporting agencies will know by virtue of the application and public notification requirements in s 127(3) the type of premises for which the renewal is sought. It will be incumbent on the DLC to again, at that point in time, consider whether the premises are a tavern as defined in s 5 of the Act, and whether a s 119 designation ought to apply.

[124] Whether the premises are a tavern is a question of fact. If the premises are not a tavern, a further consequence may be that they cannot host gaming machines in light of the provisions of the Gambling Act 2003, but that is a matter for DIA and not the DLC or the Authority.

[125] While the proposal to host, or the presence of gaming machines, on the premises, may influence whether the premises are premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public (i.e. a tavern), again it is not the licence that determines whether the premises are a tavern. Rather, the conditions to be imposed on an on-licence, reflect the nature of the premises.

[126] Given this, it makes no difference whether or not the licence once issued, refers to the premises being a tavern. What matters is that the mandatory conditions under the Act are properly imposed. While it would undoubtedly be helpful if a tavern licence says this in its title, and this is helpfully done by a number of DLCs around the country, it is not a requirement of the Act.

[127] For completeness, the Authority notes that by virtue of this appeal no licence has yet been issued to reflect the decision of the DLC. That responsibility sits with the DLC (s 135) but in practice is usually undertaken by the secretary of the DLC. As the decision of the DLC has not yet been translated into an issued licence, it is presumptive of Mr Bridle to speculate as to whether the licence, once issued, would have contained the word 'tavern'.

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[37] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust*, above n 36 at [90]
[38] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust*, above n 36 at [97]
[39] *Christchurch Medical Officer of Health v J & G Vaudrey* Ltd, above n 22, at [55]
[40] *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123; [2018] NZAR 882 at [46]
[41] s 127(2)(c) and (d) and Forms 3 and 7 of the Sale and Supply of Alcohol Regulations 2013

[128] This ground of appeal too must fail.

Ground 5: not determining whether the premises would operate as a tavern

Submissions for appellant

[129] Mr Bridle submits that the DLC has erred by either:

(a) presuming that the premises would operate as a tavern rather than deciding that the applicant has an onus, on the balance of probabilities, to prove that it would operate as a tavern; or

(b) not following the principles and requirements in the Authority's decision in *L & H Graces Place Ltd v Abbott* (i.e. re Hi Sports Bar)[42] as to whether premises are a tavern; or

(c) not determining whether the premises are proposed to be used in the course of business principally for providing alcohol and other refreshments to the public (or meeting the definition of 'tavern' in s 5 of the Act).

[130] Mr Bridle submits that the DLC recorded in its decision that Nexus Wine & Café Ltd is required to operate within the parameters of the Act including the requirement to operate as a tavern.[43] Further, the DLC said that to be granted a tavern-style on-licence, the premises would have to operate principally in the business of providing alcohol and other refreshments, and that Ms Forbes confirmed that the premises would operate as a tavern.[44]

[131] It is also submitted that the DLC recorded Mr Bridle's arguments that *L & H Graces Place Ltd v Abbott* supports the proposition that licences cannot be granted, or applications should be refused, where the principal activity will be gambling and not principally for providing alcohol and other refreshments to the public.[45]

[132] Notwithstanding this, however, Mr Bridle submits that the DLC wrongly distinguished *L & H Graces Place Ltd v Abbott* and therefore erred in presuming that the premises would operate as a tavern rather than evaluating whether it would operate as such. It is submitted that in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd*,[46] and *Christchurch Medical Officer of Health v J & G Vaudrey*[47] the High Court has said that the grant of an application can involve no presumptive position.

[133] Further, it is submitted that to the extent that the DLC considered that *L & H Graces Place Ltd v Abbott* was effectively a 'reinvention' of previous premises, the present application effectively reinvents the previous Pockets 8 Ball Club application before it. As a consequence, it is submitted that the DLC should have applied *L & H Graces Place Ltd v Abbott.*

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[42] *L & H Graces Place Ltd v Abbott* [2018] NZARLA 273
[43] DLC decision at [97]
[44] DLC decision at [27] and [28]
[45] DLC decision at [57] – [58]
[46] *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd,* above n 40 at [46]
[47] *Christchurch Medical Officer of Health v J & G Vaudrey* Ltd, above n 22 at [55]

[134] Before the Authority, Dr Hewison accepted that on the basis of *SBS NZ Limited v Young*, it is not necessary for the DLC to refer to all of the factors for determining whether premises are a tavern and conceded that the nature and configuration of the premises was considered as was the business' proposed revenue. Dr Hewison also said that the imposition of a cover charge was not relevant.

[135] Dr Hewison submitted, however, that because Mr Bridle made submissions and gave evidence relating to the public perception of the premises, and about the reasons why patrons attend the premises, the DLC erred by not considering these. Further, Dr Hewison said that the DLC should have effectively listed the factors seriatim and should have indicated which factors it did not consider relevant.

Submissions for respondent

[136] Mr Davies for Nexus Wine & Café Ltd submits that the DLC properly inquired into the application and determined on the basis of the evidence adduced that the premises were intended to be operated as a tavern. It is submitted that this decision was reasonable in the circumstances.

[137] It is submitted that Nexus Wine & Café Ltd accepts that how it intends to operate the premises is relevant to the DLC's consideration of the s 105 criteria, and specifically whether the respondent intends to operate the premises in the course of business principally for providing alcohol and other refreshments to the public.

[138] Mr Davies submits, however, that the Authority in *L & H Graces Place Ltd v Abbott* was not seeking to fetter the discretion of a DLC in terms of the factors it ought to consider when determining the nature of the premises, and that a DLC has a wide-ranging discretion, which enables effective decision-making that takes account of local conditions.

[139] Further, it is submitted that not all the factors set out by the Authority will be appropriate to every application where the legal test for a tavern relates to the manner in which the applicant *intends* to operate the proposed premises. It is submitted that while a decision-maker must give careful attention and thought to all relevant matters, it need not exhaustively detail every independent consideration.

[140] Before the Authority, Mr Davies submitted that the public perception of the premises, and the reasons why patrons attend the premises could not be ascertained at that point in time as the premises had not yet opened for trading and that any perception would have been coloured by how the previous club operated notwithstanding that different restrictions apply to clubs and on-licences. For premises that are not yet open, it is submitted that the public perception of the premises, and the reasons why patrons attend the premises are factors that need not be considered in the same way that there is no cover charge. It is submitted, however, that the DLC did consider all other relevant factors.

[141] Mr Davies accepts that the DLC did refer to a presumption in its decision,[48] but submits that not much turns on this as the DLC did so in response to Mr Bridle's submissions about the application of *BBC Welles Ltd* and *L & H Graces Place Ltd v Abbott.* That is, what the DLC was seeking to point out was that the facts of this case differ from the facts in those cases. It is submitted that there is nothing to show that the

[48] DLC decision at [59]

DLC exercised a presumption in favour of the application being granted or that there was some foregone conclusion as to the outcome of its decision.

Analysis

[142] In *L & H Graces Place Ltd v Abbott*, unlike here, it was the appellant who asserted that the principal business of 'Hi Sports Bar' was to be to provide alcohol and other refreshments. By contrast, Mr Bridle in effect asserts that the DLC did turn its mind to whether the premises are a tavern by reference to previous decisions of the Authority, including *L & H Graces Place Ltd v Abbott.*

[143] In *L & H Graces Place Ltd v Abbott* we said:

> [74] The nature of the premises and how it intends to operate is a relevant consideration when considering the criteria in s 105 of the Act. In *Kaiti Club Hotel Ltd*, we said that where an applicant seeks a licence for a tavern, as the appellant has done in this case, it is necessary to consider whether the premises is a tavern. If the premises do not have as their principal purpose the sale of alcohol and other refreshments, then a tavern licence may not be issued. Having said that, it is not sufficient that the premises have as their principal purpose the sale of alcohol and other refreshments. The DLC is still required to have regard to the other relevant matters in s 105(1).
>
> [75] The term 'tavern' is defined in s 5 of the Act as premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public. This is a question of fact and degree. As we noted in *Kaiti Club Hotel Ltd* the authorities to date establish that this involves consideration of a number of factors including:
>
> a) the nature and configuration for the premises;
> b) the public perception provided it is referable to the legal definition;
> c) the reasons why patrons attend the premises;
> d) the revenue from various sectors of the business;
> e) the imposition of a cover charge;
> f) the current nights of the week when the premises are open;
> g) the trading hours and days requested; the nature of the entertainment; and
> h) the nature of food and beverages offered.
>
> [76] As we said in the appellant's previous appeal [34] , consideration of these factors remains the correct approach to take when determining whether premises are a tavern.

[144] Subsequently, in *SBS NZ Limited v Young*, having regard to *L & H Graces Place Ltd v Abbott*, we said that what is important is that the nature of the proposed premises is considered. Subject to being satisfied of the other criteria in s 105 (and in that case, s 131), if the DLC is satisfied the premises are intended to be used as a tavern as the applicant has said, by reference to the factors articulated in previous decisions of the Authority, then a licence may issue. We qualified this, however, as Dr Hewison has acknowledged, by saying that a DLC is not required in every case to refer to each factor.[49]

[145] We also noted that while it is the applicant who is required to specify the general nature of the business intended to be conducted pursuant to the licence, it is the

[49] *SBS NZ Limited v Young,* above n 33 at [120]

decision-maker who is charged with determining how the premises are actually being used, or will be used.

[146] If an applicant states that they intend to conduct the premises in the nature of a tavern, it is for the decision-maker to assess whether the premises are to be used principally for providing alcohol and other refreshments based on the evidence before it. This allows a decision maker to then impose controls, through conditions, depending on the nature of the premises and how they are managed and the nature of risk which will vary according to the nature of the premises being established. In doing so, a decision-maker is able to ensure, where an application is capable of meeting the object of the Act, that the provisions of the Act will be observed.[50]

[147] In the present case, the Authority is satisfied that the DLC was seized of the obligation on it to have regard to the nature and configuration of the premises for the purposes of imposing the appropriate conditions. The issue it was required to determine was whether it was a tavern such that s 119 restrictions ought to be imposed.

[148] The DLC was not required to make a binary choice between whether the premises were a tavern or a gaming venue. The DLC was only required to determine whether the premises were a tavern or not, given s 119 of the Act. Put another way, the DLC did not need to consider whether the premises was principally a gaming venue except in so far as the DLC found the premises not to be a tavern for that reason.

[149] The only criteria that Mr Bridle says were not considered were the public perception of the premises, and about the reasons why patrons attend the premises.

[150] Dr Hewison's submission in relation to public perception of the premises and why patrons will attend the premises, was that Mr Bridle's evidence was that the public of Tokoroa will perceive the premises and will attend the premises for pokie gambling.

[151] This evidence, Dr Hewison submitted before the DLC, was based on Mr Bridle's past perception and his many years as a social worker and as a manager of the Salvation Army Community Ministries office in Tokoroa. The evidence of Mr Bridle was that this public perception would be reinforced by the separate layout of the lounge and the bar from the gaming area as well as the separate entrance into the gaming area. Mr Bridle considered that the public of Tokoroa will still know the operation of this venue by its previous tenant, Pockets 8 Ball Club Inc, as being primarily a 'gambling/pokie venue'. Mr Bridle said that is why patrons attended Pockets 8 Ball Club Inc when it was open and that nothing much has changed in terms of the nature and configuration of the premises and that the public of Tokoroa will remember this as a 'gambling/pokie venue'.[51]

[152] For completeness, the Authority also notes that Dr Hewison's submission in relation to the nature and configuration of the premises was that:[52]

> ...the evidence of Mr Bridle that the way people used the premises when it was operated by Pockets 8 Ball Club Inc was that people used the separate entrance into the gaming room from Bridge Street. It is also Mr Bridle's evidence that customers of the gaming room rarely used the bar and lounge area, where food and alcohol was sold.

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[50] *SBS NZ Limited v Young,* above n 33 at [101] – [111]
[51] Closing Submissions for Colin Bridle, Objector signed by Dr Hewison at [49] – [53]
[52] Closing Submissions for Colin Bridle, Objector signed by Dr Hewison at [41]

[153] The Authority is satisfied that the DLC understood the nature of Mr Bridle's concern noting:[53]

> Nexus is a new entity and is entitled to the presumption that it will operate, and indeed must operate, as a tavern.
>
> Mr Bridle seeks to draw similarities between the previous operation of the venue and that proposed by Nexus.
>
> While they may be valid concerns, and will indeed be challenges for the new entity, they are matters for the future.

[154] The DLC also recognised, as Mr Bridle said, the access to the gaming room was potentially problematic:[54]

> The committee notes the intention of the applicant to retain the direct access in to the gaming room from 38 Bridge Street. We see this as potentially problematic in that it will likely provide unsupervised access for gaming customers and potentially will affect the applicant's ability to be principally in the business of selling alcohol and other refreshments.
>
> We asked the applicant, via way of a Minute, to specifically obtain a response from DIA on this issue. In their response to the Committee the DIA was strangely silent on the separate entrance way issue other than to say that they have yet to decide on the overall outcome of the Class 4 Gaming Venue Licence application they have received from the Tokoroa Club.
>
> We are also concerned that there is no intention to install pool tables or large screen TVs that are normally present in successful tavern style environments.
>
> In the updated plan provided we now see a TV and a small bar is planned for the gaming room.

[155] In light of this, the Authority is satisfied that the DLC did consider the public perception of the premises and why patrons will attend the premises but considered that as these were new premises those were matters that the licensee had to be conscious of in the future. The DLC also specifically turned its mind to the concern raised by Mr Bridle about the separate door to the gaming room, which the Authority now notes is closed such that there is but one principal entrance to the premises on Bridge Street.

[156] Beyond that, the weight to be given to the criteria in s 105, including the design and layout of the premises (s 105(1)(e)), and whether the applicant proposes to engage in the provision of other services (s 105 (1)(g)), is a matter within the discretion of the DLC.[55]

[157] While the Authority agrees that there can be no presumption that an application for a licence or an application for the renewal of a licence will be granted,[56] there is no evidence of such a presumption in this case. The 'presumption' that is being challenged is that the premises are a tavern. As already stated, however, that is a question of fact that is to be determined by the DLC. The Authority is not satisfied that it has been established that this is a conclusion which is not supported by the evidence.

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[53] DLC decision at [59] – [62]
[54] DLC decision at [76] – [79]
[55] *Christchurch Medical Officer of Health v J & G Vaudrey* Ltd, above n 22 at [16(a)(iv)]
[56] *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd,* above n 40 at [46]

[158] Finally, in respect of the contention that the DLC erred in not requiring Nexus Wine & Café Ltd to prove on the balance of probabilities, that it will operate as a tavern, the Authority considers there is no error. As Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,[57] the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one.[58] In this regard, as stated in *Re Venus NZ Ltd*,[59] *Auckland Medical Officer of Health v Birthcare Auckland Ltd*[60] and *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited*[61] the notion of standard of proof and onus of proof have little or no relevance and application to the inquisitorial, evaluative decision-making process when considering whether or not to grant a new licence.

[159] The Authority is not satisfied that this ground of appeal has been established.

Ground 6: issue of direct access to gaming room left unresolved

Submissions for appellant

[160] Mr Bridle submits that the DLC erred by identifying a potential problem around the proposed direct access to the gaming room but failed to resolve that problem before making its decision. In particular, Dr Hewsion submits for Mr Bridle that after asking the applicant, via a minute, for advice from the Department of Internal Affairs on the issue of unsupervised access for gaming customers, the DLC did not determine whether direct access meant that application did, or did not, meet the layout and design criteria in s 105 of the Act.

[161] Alternatively, it is submitted that the DLC erred by asking for a response, but then determined that the application met the layout and design criteria in s 105 of the Act in the absence of the requested information. Put another way, Dr Hewison submits on behalf of Mr Bridle that where a DLC asks an applicant to provide information or to answer a specific question, on a matter that it considers important, and the answer is not forthcoming, the DLC cannot make a decision in the absence of that information or in the absence of an answer. As Dr Hewison put it, "It must have that information or the answer to its question before making a decision or in order to make a decision."

[162] In response to a question from the Authority about why this was an error under this Act, Dr Hewison said that as the layout and design is a criterion under s 105 of the Act, the DLC needs to have acknowledged that it had imperfect knowledge when considering that matter. Dr Hewison said that the DLC could have made a decision if it recognised the limitation of not having a response from DIA, but because it did not get an answer, it could not decide.

Submissions for respondent

[163] Mr Davies for the respondent submits that the DLC heard from both Mr Bridle and Nexus Wine & Café Ltd, as well as from Mr John Anderson, the Chief Inspector for the South Waikato District Council on the issue of gaming.

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[57] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd,* above n 22
[58] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd,* above n 22 at [54]
[59] *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 at [60]
[60] *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689 at [52]
[61] *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited* [2018] NZHC 3100 at [73]

[164] It is submitted that the DLC resolved any concerns it had with the issue of direct access to the gaming room by confirming in its decision that compliance with the Gambling Act 2003 was a matter for DIA to monitor and determine, and by designating the gaming lounge as a designated area.

Analysis

[165] Once again, this ground of appeal is premised on a misunderstanding of the Act and the role of the DLC.

[166] The Act does not stipulate particular layouts or designs of premises that are to be 'met' before an applicant can be issued a licence. Rather, what is required is that the DLC "have regard to" the matters in s 105(1) of the Act.

[167] As Clark J reiterated in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*,[62] a decision maker's evaluative function is an assessment of the potential impact of granting the licence, in light of the criteria in s 105, upon the prospective risk of alcohol-related harm.[63]

[168] What a decision maker is required to do is 'to have regard to' the criteria in s 105. As Gendall J said in *Vaudrey Ltd*,[64] the principles relating to the requirement to 'have regard to' can be summarised as these:

(a) the phrase "have regard to" bears its ordinary meaning;

(b) the decision maker must actively and thoughtfully consider the relevant matters;

(c) to do so requires the decision maker to correctly understand the matters to which he or she is having regard;

(d) the weight to be given to such matters is generally within the discretion of the decision maker;

(e) there will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle.

[169] In the present case, the DLC recognised that direct, unsupervised access to the gaming room might have a bearing on whether the premises will principally be used for selling alcohol and refreshments. It is for this reason they sought information from DIA through Nexus Wine & Café Ltd.

[170] By way of a letter dated 9 May 2019, in response to a question about the department's position about the likely income streams that will be derived from each of the parties, DIA responded that it could not yet comment on the proceeds that will be generated from the gaming machines as the venue is not in operation and any

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[62] *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited,* above n 40 at [43] and [47]

[63] *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited,* above n 40 at [43] and [47],

[64] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 22 at [78] – while four questions of law were decided for appeal in the subsequent decision *Christchurch Medical Officer of Health v J & G Vaudrey Ltd [2016] NZHC 73*, this did not relate to the meaning of the words "must have regard"

comment would be speculative.[65] In response to a question about whether a separate entrance directly into the gaming room from outside is permitted under the department's rules, DIA simply responded that the application was being assessed and that it had not made a decision on the application.

[171] Finally, in response to whether there is a requirement that gaming machines are housed in a supervised or restricted area, designated under the Sale and Supply of Alcohol Act 2012, the department said that there is no such provision in the Gambling Act 2003. In responding, however, the DIA also said that the requirements of the Gambling Act 2003 include that the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue are minimised.[66]

[172] In respect of this letter, the DLC said in its decision the department was "strangely silent" on the separate entrance way issue other than to say that they have yet to decide on the overall outcome of the gaming venue licence applications they received from the Tokoroa Club.

[173] Notwithstanding this, the DLC went onto say:[67]

> … we confirm that the decision on whether a Class 4 Gaming Licence can be issued and be operated at these premises is a matter solely for the DIA. We note that Section 67(k) of the Gambling Act 2003 clearly states that "The Secretary (of the DIA) must refuse to grant a class 4 venue licence unless the Secretary is satisfied that … the class 4 venue is not used mainly for operating gaming machines."
>
> It should now be acutely obvious to Mr Bridle that this Committee will require the applicant to operate within the parameters of the Sale and Supply of Alcohol Act 2012, and that includes the requirement to operate this business as a tavern.

[174] To the extent that the appellant considers that the DLC needed to have regard to s 105(1)(e) when making its decision, the Authority is satisfied that the DLC did so.

[175] That the DLC sought more information which was not forthcoming does not preclude the DLC from exercising its evaluative function. It is often the case that a decision-maker has imperfect information when exercising its decision despite best efforts to obtain more information. Where a matter which the decision-maker is required 'to have regard' to is so fundamental or critical that it assumes an 'elevated mantle', it may be that the DLC ought to exercise its discretion to decline the application. But that is not what is argued here. What is argued is that the evaluation process cannot somehow be undertaken. The Authority does not agree that to be a correct interpretation of s 105 or of the words 'have regard to'.

[176] In any event, the Authority is satisfied that the DLC turned its mind to whether the venue was to be used in the course of business principally for providing alcohol and other refreshments to the public. The issue the DLC was concerned about was unsupervised access to gaming customers and the flow on effect of that in terms of the

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[65] Letter from Beth Datuin, Senior Gambling Regulator, Regulatory Services, Department of Internal Affairs dated 9 May 2019 to the DLC

[66] Letter from Beth Datuin, Senior Gambling Regulator, Regulatory Services, Department of Internal Affairs dated 9 May 2019 to the DLC, at page 2

[67] DLC decision at [96] and [97]

principal business of the premises. To address this, the DLC designated the gaming room as a 'supervised' area at all times.[68] The DLC also said:[69]

> If licensees choose to responsibly designate rooms as Restricted Areas under their obligations under the Gambling Act 2003 that is a matter for them.
>
> As the Function Room and the Gaming Room are to be part of the licensed premises the applicant must ensure that all patrons entering those areas of the building are properly assessed as to their status on the premises, including whether they are of age, and their level of sobriety. We imagine this will require dedicated staff in these areas and/or access to these areas will be only permitted via the main bar.
>
> The onus will, of course, be on the applicant to turn words in to actions. It is often said that the first year is the 'probationary period' for licensees to prove themselves as competent operators. The ball is firmly in the hands of Mrs Forbes, her fellow directors and their managers, to operate within the parameters of all legislation that is applicable to this business. We are sure the tavern will be closely monitored by the Police and the other agencies.

[177] The Authority notes from its site visit that Nexus Wine & Café Ltd appears to have taken heed of this caution and has closed the direct access to the gaming room such that it is now only through the principal entrance to the premises.

[178] The Authority is not satisfied this ground of appeal has been established. Regardless of the additional information that the DLC sought, it responded to the problem it identified through the designation of the gaming room and its recommendation that there be dedicated staff in the gaming areas, or that access to that area only be through the main bar. Nexus Wine & Café Ltd has elected the latter option.

Ground 7: No business plan or training programmes

Submissions for appellant

[179] Mr Bridle submits that the DLC erred by deciding that the application 'met' the requirements of s 105(1)(j) in the absence of a business plan or training programme being made available to the DLC, or that either could be prepared before the premises commenced.

[180] Mr Bridle relies on a previous decision of the Authority in *Liquor 2 Go*[70] as authority for the proposition that an applicant for an off-licence needs to prove its case on the balance of probabilities and that if the applicant fails to do so, the application is not able to be granted.

[181] Further Mr Bridle relies on the Authority's decision in *L & H Graces Place Ltd v Abbott*[71] as authority for the position that an applicant must outline what systems and training it intends to provide if it is to satisfy the DLC that it can comply with the law for the purposes of meeting the criterion in s 105(1)(j) of the Act.

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[68] DLC decision at [106]
[69] DLC decision at [107] – [109]
[70] *Liquor 2 Go* [2013] NZARLA 920 at [32]
[71] *L & H Graces Place Ltd v Abbott*, above n 42, at [93]

[182] Mr Bridle submits that in the absence of a business plan or training programme the DLC erred in deciding that the application 'met' the criterion in s 105(1)(j). Alternatively, it is submitted that in the absence of this information the DLC could not have had regard to whether Nexus Wine & Café Ltd had appropriate systems and training to comply with the law.

[183] As a further alternative, it is submitted that the DLC erred by deciding that a business plan or training programme could be prepared before the premises open and after the licence is granted.

[184] Before the Authority, Dr Hewison said that if no training plan was provided, regard could not have been had to it. Further Dr Hewison submitted on behalf of Mr Bridle that if the DLC expressed concern about a matter, and expressed a desire to see something, then it erred in not having regard to the matter.

Submissions for respondent

[185] Nexus Wine & Café Ltd submits that it provided evidence of its staff, systems and training at first instance. Specifically, it is submitted that Mrs Forbes's evidence is that Nexus Wine & Café Ltd employed Ms Elaine Dean as its general manager and that Ms Dean has previous experience in hospitality and would be responsible for training. The evidence, it is submitted, also shows how Nexus Wine & Café Ltd has been proactive in engaging with the local convenor of the district's alcohol accord and about how important effective staff training would be to the venture.

[186] Further, it is submitted that the Licensing Inspector was asked for her opinion on Nexus Wine & Café Ltd's proposed training systems and that she confirmed that those systems were reasonable and would comply with the Act.

[187] It is also submitted that Ms Forbes outlined the staff structure under cross examination by Mr Bridle.

[188] Accordingly, Nexus Wine & Café Ltd submits that the DLC had enough information on which to consider its systems, staff and training and that its decision is supported by the evidence.

Analysis

[189] As we have already noted, as Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,[72] the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one.[73] Accordingly, as stated in *Re Venus NZ Ltd*,[74] *Auckland Medical Officer of Health v Birthcare Auckland Ltd*[75] and *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited*[76] the notion of standard of proof and onus of proof have little or no relevance and application to the inquisitorial, evaluative decision-making process when considering whether or not to grant a new licence.

[190] The decision in *Liquor 2 Go* predates those decisions of the High Court, and as such, cannot still be considered to be good law on the question of whether an applicant

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[72] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd,* above n 22
[73] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* above n 22 at [54]
[74] *Re Venus NZ Ltd* , above n 59 at [60]
[75] *Auckland Medical Officer of Health v Birthcare Auckland Ltd,* above n 60 at [52]
[76] *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited,* above n 61 at [73]

must prove its case on the balance of probabilities. It does not, as the High Court has clearly said on multiple occasions.

[191] In terms of s 105(1)(j), as with the design and layout of the premises, there are no specific systems, or training requirements prescribed by the Act. Nor is there a requirement that an applicant for an on-licence have a documented business plan or training programme. What is required is that the DLC have regard to whether an applicant has appropriate systems, staff and training to comply with the law.

[192] The application by Nexus Wine & Café Ltd states that it will maintain a training and management policy to give staff the skills and support required to do their jobs responsibly. It also provides details of fire emergency training.

[193] Accompanying the application is a letter from the South Waikato Alcohol Accord advising that it had been proactively approached about becoming a member of the Accord. This Accord meets every two to three months and is attended by organisations including the South Waikato Licensing Group, and representatives of the Waikato Health Board and the local Police.

[194] Ms Forbes' evidence states that Ms Elaine Dean has been employed as the premises' General Manager and that she has experience in the hospitality industry as a chef, as well as in project management and business development. Ms Forbes said that Ms Dean's focus will be to help train staff, ensure quality processes and procedures are implemented, to work closely with the directors.[77]

[195] Ms Forbes herself is a director of Alan Forbes Transport Ltd where she is involved in administration, human resources, and health and safety. In her health and safety capacity, Ms Forbes was instrumental in drug and alcohol testing within the company for the last 17 years, which involved training in identifying issues with drugs and alcohol and monthly staff testing. Ms Forbes is also a member of the Hancock Forest Management Drug & Alcohol subcommittee with reviews monthly statistics reported by contractors nationwide, and reviews policies and procedures for Hancock Forest Management and their contractors. Ms Forbes holds a National Certificate in Health and Safety (level 4). Ms Forbes completed her Licence Controller Qualification in March 2019 and at the time of the application, had applied for her manager's certificate.

[196] The application states that two other managers, whose managers' certificates were appended to the application, would work in the premises. Before the DLC Nexus Wine and Café Ltd said that there was further work to be done to establish the premises, including the engagement of additional staff but that this could not sensibly take place before an outcome on the application was known.

[197] In response to questions from the Chair of the DLC, Ms Forbes said that both she and Ms Dean had applied for their manager's certificate and were in the process of seeking applications for employees and would be looking at whether some hold managers' certificates or whether the company would put them through their Licence Controller Qualifications and then have them apply for managers' certificates.[78]

[77] Forbes BoE dated 30 April 2019 at [13]
[78] DLC Transcript at page 45

[198] The evidence of Ms Smale, the Licensing Inspector, is that Nexus Wine & Café Ltd does have appropriate systems, staff and training to comply with the law. In response to a question from Mr Davies, Ms Smale said:[79]

> R Davies: You're satisfied the applicant has reasonable staff systems and training in place to comply with the Act.
>
> J Smale: Yes, I do. I believe that they have managers already but I believe that if they are granted this licence that there will be sufficient managers to undertake the operating the business.

[199] While the DLC did say it was concerned that there were no business plan or training programmes prepared and available at the time of the hearing,[80] the requirement here is similar to that which applies in respect of the response to the request for further information from DIA. The requirement is that the DLC have regard to whether the applicant has appropriate systems staff and training to comply with the law. This does not necessarily require that business plans and training programmes be provided, but that training will be in place to the satisfaction of the DLC. The DLC noted that there will be several staff with managers' certificates and that programmes will be developed.

[200] Moreover, the evidence is that the Inspector was satisfied that reasonable systems, staff and training would be in place to comply with the law. While the Authority may itself have wished to see more evidence of training, given that the Chair of the DLC expressly asked Ms Forbes about staff and qualifications, the Authority is satisfied that the DLC turned its mind to s 105(1)(j). That it did so, and there was evidence before it on which it could rely, the Authority is satisfied that the position reached by the DLC was one that was open to it.

[201] In terms of expressing a concern about business plans and training programmes, like the further advice sought from DIA, the lack of further information, given the evidence it had before it, did not mean that the DLC was somehow prevented from making a decision on the evidence it did have.

[202] This ground of appeal has not been established.

Ground 8: designations for a tavern

Submissions for appellant

[203] Mr Bridle finally submits that the DLC erred by deciding that the premises could operate as a tavern, but then deciding that parts of the premises could be undesignated for certain times of the day contrary to s 119 of the Act. Mr Bridle submits that s 119 of the Act requires that a tavern to have in whole or in part designations of either supervised or restricted.

[204] Further Mr Bridle relies on *Sporting Investments Ltd*[81] as authority for the proposition that gaming rooms per se will not be designated and that, where a room or place in which gaming machines are situated is not a bar within the confines of a

[79] DLC Transcript at page 51
[80] DLC decision at [88]
[81] *Sporting Investments Ltd* [2002] NZLLA 486 (6 September 2002)

tavern, a designation is inappropriate on the basis that the sale, supply or consumption of alcohol is not the principal or exclusive activity.

[205] In the present case, Mr Bridle submits that the gaming room is not situated in a bar within the confines of the tavern as it is a separate room. As a consequence, it is submitted that the DLC erred by designating the gaming room as a supervised area.

Submissions for respondent

[206] Mr Davies for Nexus Wine & Café Ltd submits that the DLC correctly applied s 119 which requires the DLC to do one of three things, namely to designate all or part of the premises an area to which minors must not be admitted. It is submitted that the DLC designated a part of the premises supervised in compliance with s 119.

Analysis

[207] As already noted, section 119 of the Act provides that a part or parts of taverns are to be designated as restricted or supervised. In the case of on-licences, s 119 continues the obligation that was found in s 14(4) of the 1989 Act.

[208] To the extent that Mr Bridle submits the DLC erred by deciding that parts of the premises could go undesignated for certain times of the day, he misreads s 119. Section 119 does not say that every part of tavern premises must be designated, but that the DLC must decide whether to designate all or parts of the premises.

[209] Mr Bridle then submits that because the gaming room is a separate room that is not a bar within the confines of the tavern it ought not be designated. The Authority disagrees. In *Sporting Investments Ltd*,[82] the Authority was concerned with premises where a separate room had been set aside for gaming machines, which were not a mere 'sideline' to the principal business of the sports café bar, and where the machines were not in a bar.

[210] Here the gaming room is not separate from the rest of the tavern and it contains a second bar as earlier discussed. As such, the decision to designate the gaming room is consistent with the second principle set out in *Sporting Investments*, namely that where a business is conducted within a tavern, then a bar which contains machines may receive a designation.

[211] On a plain reading of the Act, the DLC has designated a part of the premises as an area to which minors must not be admitted unless accompanied by a parent or guardian (that is, as a supervised area). There is, therefore, no breach of the Act.

[212] Accordingly, this ground of appeal must also fail.

Result

[213] The Authority is satisfied that the DLC has properly evaluated the application having regard to the criteria in s 105 of the Act in the manner set out by Gendall J in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*.[83] Having considered the evidence before the DLC, the Authority agrees with the DLC's evaluation of the

[82] *Sporting Investments Ltd,* above n 81
[83] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 22 at [55] – [56]

application and is not satisfied that Mr Bridle has established any error on the part of the DLC.

[214] The appeal is dismissed. Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

[215] As requested by the respondent, the Authority leaves open the issue of costs, which is to be the matter of submissions by the parties, if any, and to be determined on the papers. The Authority directs that any application for costs be received by the Authority within 30 days from the date of this decision.

DATED at WELLINGTON this 1st day of November 2019

District Court Judge K D Kelly
Chairperson
Alcohol Regulatory and Licensing Authority