

Decision Number 60C [2016] 1601

IN THE MATTER of the Sale & Supply of Alcohol Act  
2012

AND

IN THE MATTER of an application by JUMBO CHINESE  
RESTAURANT LTD for renewal of an  
On Licence pursuant to s127 of the  
Act for premises known as Celine's  
Bar and Restaurant situated at 62  
Manchester Street, Christchurch.

RESERVED DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Chairperson Mr R.J.Wilson JP

Members Mr A.J.Lawn  
Mr D.L.Blackwell OSM

HEARING at Christchurch on 23<sup>rd</sup> June 2016

PRESENT Ms Shirllay Sun, Counsel for the applicant  
Ms J.Zhang, applicant Jumbo Chinese Restaurant Ltd  
Ms A Lavery, Alcohol Licensing Inspector, CCC  
Mr M.Ferguson, Senior Licensing Inspector, CCC  
Mr P.Shaw, representing the Medical Officer of Health  
Mrs J.Anderson, Hearings Adviser, CCC

INTRODUCTION

[1] This is an application by Jumbo Chinese Restaurant Ltd for renewal of an On Licence for premises known as Celine's Bar and Restaurant situated at 62 Manchester Street, Christchurch. This is the first renewal of the licence which expired on 27<sup>th</sup> August 2015. The application for renewal is opposed by the Inspector. The Police reported no opposition to the renewal application. The Medical Officer of Health has concerns which he wishes to draw to the Committee's attention but has not lodged a formal notice of opposition.

[2] The Inspector's opposition and the Medical Officer of Health's concerns are on the grounds of suitability of the applicant. This arises because of failure to appoint Duty Managers correctly, Duty Managers not being on the premises when alcohol is being sold and incorrect signage. There is an underlying issue in that the applicant and her staff have difficulty communicating in the English language thus making the monitoring role of the Agencies very difficult.

[3] This matter first came before us on 26<sup>th</sup> November 2015 when after hearing evidence from the parties we decided to adjourn the hearing for three months to enable the applicant to improve the management of the premises with respect to the sale and supply of alcohol. Specifically she was to take immediate steps to engage a sufficient number of Duty Managers to cover the entire period the restaurant is open for business and in the event that no certificated Duty Manager was available, to display suitable signage to the effect that alcohol was not for sale. We made it clear that we expected any Duty Managers appointed to be sufficiently fluent in the English language that they could engage with visiting Agency staff. We also told the applicant that she must be meticulous with regard to the administrative requirements of the Act specifically the appointment and notification of Duty Managers, Temporary Managers and Acting Managers and to the display of required signage.

[4] In our decision of 8<sup>th</sup> December 2015 we made it clear that we had no doubt that the applicant had failed to meet the administrative requirements of the Act. We noted that the Agencies had tried to help but over a period of several months no improvement had been seen. The applicant had pleaded for an opportunity to put things right and with some reluctance we acceded to this request. We did so on the clear understanding that the applicant would address her administrative failings and in the hope that if she did so in a timely manner the Inspector's opposition to the renewal might be withdrawn. Unfortunately the supplementary report we have received from the Inspector is not favourable and we must resume the hearing.

#### EVIDENCE OF THE APPLICANT

[5] Counsel for the applicant produced written opening submissions which the Committee had the opportunity to peruse before the hearing. Because they contained some evidential material, the applicant Ms Zhang was sworn and the document tabled. Ms Zhang produced evidence that she had notified the appointment of Khim-Ming Tan and herself as Duty Managers on 27<sup>th</sup> November 2015. She then advertised for a further Duty Manager (Exhibit "B") but had great difficulty finding a suitable person who spoke both English and Mandarin. She was finally able to notify the appointment of Yao Cheng Tu on 1<sup>st</sup> June 2016. The copies of the notifications were tabled as Exhibit "A" and a roster showing how the three Duty Managers would be used as Exhibit "C".

[6] Ms Zhang said that correct signage had been displayed and produced photographs of the various signs as Exhibit "D".

#### CROSS EXAMINATION

[7] Ms Zhang agreed with the Inspector that the third Duty Manager had only just been appointed and that Khim-Ming Tan was the same person who was employed at the restaurant at the time of the last hearing but who was understood to be returning to Singapore. Ms Zhang explained that Khim-Ming Tan had only visited his sick mother in Singapore and was now back at the restaurant. There was discussion regarding when the sign denoting that alcohol was not

for sale was displayed and whether the sign indicating the current Duty Manager was obscured by it or not. This exchange was characterized by a lack of understanding by the applicant of the questions put and long rambling answers which were not to the point.

[8] Mr Shaw for the Medical Officer of Health asked whether the applicant had seen his report of 28<sup>th</sup> April 2016. Ms Zhang agreed she had and accepted that of the four occasions Mr Shaw had visited only once was she fully compliant.

#### REQUEST FOR ADJOURNMENT

{8} By this stage of the hearing the applicant's facility in English had deteriorated and she was becoming confused as we had observed at a similar stage of the previous hearing. Counsel for the applicant then requested that the hearing be adjourned so that Ms Zhang could obtain the services of an interpreter. The adjournment was opposed by the Inspector and the Medical Officer of Health's representative on the grounds that the ability to understand and respond to basic questions about the requirements of the legislation was fundamental to the matter being considered. Mr Shaw added that in his previous contacts with Ms Zhang by telephone and in person he had not experienced difficulty in making himself understood.

[9] We took a short adjournment to consider the applicant's request. On our return we advised the applicant that we were not prepared to accede to it on the grounds that all parties were present and ready to proceed and that a further adjournment would impose unwarranted inconvenience. We also pointed out that an understanding of quite simple questions regarding the management of the premises was at the heart of the matter we had to consider. Agencies were however requested to keep their questions clear and simple.

#### CROSS EXAMINATION CONTINUED

[10] Mr Shaw wanted to know if Ms Zhang agreed that when he had visited and no Duty Manager was present the alcohol display had not been covered. Ms Zhang admitted that sometimes she forgot to do this. She also said that sometimes she was actually on the premises when Agency staff called but her staff did not advise her that there was an official visitor. She did agree however that sometimes she was absent for a short time while out purchasing vegetables or something else needed in the kitchen. She also confirmed that on one occasion when Mr Shaw visited the "We do not sell alcohol sign" and the "Duty Manager" were displayed at the same time.

#### EVIDENCE OF INSPECTOR

[10] Ms Lavery tabled her supplementary report which had previously been circulated. She confirmed that she had made seven visits to the premises since the last hearing. In summary she said that the applicant had not engaged a sufficient number of managers to cover the hours alcohol is being sold. While appropriate signage is displayed when there is no Duty Manager on the premises it is also displayed when a Duty Manager is on the premises. Notices of

management change have not been completed. She had visited the premises on seven occasions since the last hearing and on only three occasions was there full compliance. Ms Lavery expressed no confidence that the applicant could meet the required standards partly because of her lack of facility in the English language. She thought the applicant had taken on more than she can cope with when buying the restaurant. She had considered whether a BYO licence might be a solution to the applicant's difficulties but concluded she would have a problem complying with that also. She considered the applicant had had more than enough time to achieve compliance and she was doubtful there would be any further improvement.

#### EVIDENCE ON BEHALF OF MEDICAL OFFICER OF HEALTH

[11] Mr Shaw tabled his report dated 28<sup>th</sup> April 2016. He said representatives of the Medical Officer of Health had visited the premises on four occasions since the last hearing. On only one occasion were all the requirements of the legislation being met. He confirmed that the Medical Officer of Health continues to lack confidence in the applicant to comply with the legislation.

#### CROSS EXAMINATION

[12] Ms Shirllay Sun asked whether it was possible that Ms Zhang had actually been on the premises when official visitors noted her absence. She may have been out the back and not called by staff. It was agreed this was possible. Photographs of the signs suggest that it is not possible for the "We do not sell alcohol" and "Duty Manager" signs to be displayed at the same time. Mr Shaw did not agree. It was confirmed that the curtain over the alcohol display had only been installed a month ago and that previously the cabinet was covered at times by a newspaper.

#### FINAL SUBMISSIONS

[13] Counsel for the applicant acknowledged that lack of proficiency in the English language made it difficult for the applicant to understand her obligations. If told exactly what she had to do Ms Zhang will comply. She just needs more time. She would be prepared to accept reduced licensed hours of 6 pm to 12 midnight if this was seen as necessary.

[14] Mr Shaw said the sole issue was the suitability of the applicant. He considered inexperience and lack of knowledge of the English language combined to make her unsuitable. He thought she had ample time to have shown improvement but had not done so.

[15] Ms Lavery summed up her opposition by saying that the licence had been in force for two years but no improvement had been seen. It was not sufficient that Chinese speaking staff could converse with the Chinese speaking customers because some of the student customers were not Chinese. Duty Managers had to ensure compliance with the law by everybody. They also had to be able to interact with visiting Agency staff. She did not dispute Ms Zhang was a hard worker nor did she overlook that this family relied on the business for their sole income. However she was of the view that Ms Zhang was unsuitable to hold a licence.

## DISCUSSION

[16] The first point we have to make is that there has been no evidence whatsoever of alcohol abuse on these premises. The failings in the management of this business are solely in the area of the administrative requirements of the Act. We said in our last decision that we were satisfied that the applicant had failed to meet those requirements. We hoped that a short adjournment of three months would be sufficient for her to demonstrate considerable improvement. In fact a period of seven months has elapsed before the matter has come before us again. Counsel for the applicant has asked for a further period of time in which to demonstrate compliance. We agree with the Agencies that sufficient time has already been given.

[17] The evidence of the Agencies is of many visits in the intervening period. Compliance has been inconsistent to say the least. Nevertheless we are of the view that some improvement has been shown. Of the seven occasions on which the Inspector visited, only four revealed non compliance. The representative of the Medical Officer of Health visited on four occasions. On one occasion of the three the premises were compliant. This may not be an encouraging performance but it does show some improvement. The frustration for the Agencies and for this Committee is that what is being asked is not difficult. Essentially the applicant is being asked to ensure that if a Duty Manager is not present no alcohol is sold and a notice to the effect that it is not available for sale is displayed. It follows that the sign identifying the Duty Manager is covered or removed. The evidence before us was conflicting on whether this is happening and the photographs supplied were confusing. On balance we accept that on occasion when a Duty Manager is not present the "We do not sell alcohol" sign is not displayed. We accept also that on some occasions when the sign is displayed the "Duty Manager" sign is also displayed. The applicant has confirmed to us that the screen covering the alcohol display when a Duty Manager is not present has only been in place for a month. Previously the display was covered by newspaper.

[18] With respect to the appointment of Duty Managers we note that following the last hearing the applicant advised the appointment of herself and Khim-Ming Tan as Duty Managers. She provided evidence that around that time she had advertised for Managers who could speak both Mandarin and English. She had interviewed non Mandarin speakers but had not engaged them because they would be unable to communicate with the restaurant's mainly Mandarin speaking customers. We were told that the pool of English and Mandarin speaking Managers was very small and it was not until a month before this hearing that a suitable person was engaged. That person, Yao Cheng Tu, has now been formally notified as a Duty Manager for these premises. The applicant produced a roster which showed how the three people would cover the hours the restaurant was open for business. It occurs to us that there are some questions about this evidence. For instance it seems unlikely that the student clientele cannot speak sufficient English to interact with a non Mandarin speaking Duty Manager. They are after all receiving their education in the English language. We also note that the various tests undertaken before a Manager's Certificate can be granted are also conducted in English. We

have noted before that a better standard of English may be needed for Duty Managers but we cannot conceive of a case where one is totally unable to conduct everyday transactions in English. We are left not entirely satisfied that the applicant has made sufficient and timely efforts to appoint the required staff. Nevertheless we note that she now has three Duty Managers appointed who have some ability to converse in English and that appears to meet the requirements.

[19] The Inspector, supported by the Medical Officer of Health, has recommended that we should refuse the renewal of this licence. The Agencies have no confidence that the applicant is able to comply with some of the basic administrative requirements of the Act. The applicant's counsel points to some improvement and seeks more time for the applicant to demonstrate she can comply. We have no hesitation in saying that there has been time enough. The licence for these premises expired nearly a year ago and it is time for us to make a decision whether the continued instances of non compliance have been such that the high threshold for refusal of renewal has been reached.

[20] When considering an application for issue or renewal of a licence we are required to consider the criteria set out in s105 of the Act. In this case it is agreed that it is s105(1)(b) that is pertinent "*the suitability of the applicant*". However we must also take into account the Object of the Act which is set out in s4 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 minimized.*

Our attention is also drawn to the characteristics of the new system as set out in s3(2) of the Act that

*(a) It is reasonable, and*

*(b) Its administration helps to achieve the object of this Act.*

[20] Case law tells us that refusal to renew must meet a significantly higher threshold than that for granting the licence in the first place. This is largely based on the often serious economic consequences that ensue if an application for renewal is refused. Applicants for renewal have already committed themselves to a lease on premises, purchase of furniture and equipment, purchase of stock, responsibility for staff and the like. In this case the business is the sole income supporting an immigrant family. Applicants for a new licence do not usually expose themselves to such risks until they are sure they will get a licence.

[21] This was noted by Holland J in *Hayford v Christchurch District Licensing Agency, High Court Christchurch AP20/92* where he said

*“Cancellation of a licence or its non renewal will result in a substantial financial loss to the licensee, hence a decision for cancellation of a licence or its non-renewal should not be taken lightly”.*

We are also reminded that the administration of the Act must be reasonable. In *“Meads Brothers Ltd v Rotorua District Licensing Agency [2002] NZLLA 308 (CA) at [53]* the Authority said

*“It is to be remembered that the statutory object of the Act is to establish a reasonable system of control. This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing may become unreasonable in its pursuit of the aim of reducing alcohol abuse”*

Both cases cited were under the previous legislation but are equally relevant to the 2012 Act.

[22] We are required to weigh up whether the action recommended to us, that is refusal of the renewal of the On Licence of Jumbo Chinese Restaurant Ltd will contribute to the Object of the Act in that it will minimize the harm caused by the excessive or inappropriate consumption of alcohol. Immediately we are conscious that there has been no evidence whatever of any excessive or inappropriate consumption of alcohol. Therefore we are being asked to refuse the renewal solely on the grounds that the applicant is unsuitable because she has failed to meet the administrative requirements of the Act. The evidence before us was not of total or wilful non compliance but of muddle and confusion partly attributed to poor understanding of the English language. We note that some small improvement has taken place. There appear to be sufficient English speaking Duty Managers now in place and appropriate signs are being displayed if not always at the right times. We recognize that the applicant is making an effort although we acknowledge she has some distance to go to achieve the level of compliance sought by the Agencies.

[23] We ask ourselves whether if we refused this application we would be meeting the requirement of the Act that its administration be *reasonable*. The conclusion that we have reached is that to do so may well leave us open to the criticism that we are being unreasonable. This is not after all a case at the extreme end of the scale. However we are mindful that failure to meet the requirements of the legislation cannot be accepted in the longer term and the licensee must continue to strive to do better. She should be aware that the establishment of a pattern of breaches over a period of time may provide sufficient grounds for action in the future which might very well place her licence and consequently her business and her economic well being in serious jeopardy.

[24] We are going to grant renewal of the licence. Given that the existing licence expired on 27<sup>th</sup> August 2015 we are going to grant it for two years only. This effectively leaves a little over a year before the matter must be determined again. If sufficient improvement has not been evident in that time then the applicant may well have demonstrated her lack of suitability to a future District Licensing Committee such as to warrant non renewal at that time. We are also going to take the opportunity to reduce the licensed trading hours as already agreed to by the applicant.

## DECISION

[25] Having considered the matters we are required to take into account pursuant to s105 and taking into account the Object of the Act as expressed in s4 we grant the applicant, Jumbo Chinese Restaurant Ltd, renewal of an On Licence for a period of two years. The licence will be subject to the following conditions:

### Compulsory Conditions

- (a) No alcohol is to be sold or supplied on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1 pm on Anzac Day to any person not present on the premises to dine.
- (b) Alcohol may only be sold or supplied on the following days and during the following hours when the premises are being operated as a restaurant:

Monday to Sunday 6 pm to 12 midnight

- (c) Water must be freely available to customers on the premises while the premises are open for business.

### Discretionary Conditions

- (a) The following steps must be taken to ensure that the provisions of the Act relating to the sale and supply of alcohol to prohibited persons are observed:
  - Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.
- (b) The following steps must be taken to ensure that the provisions of the Act relating to the management of the premises are observed:
  - Alcohol must only be sold, supplied and consumed within the area marked on the plan submitted with the application.
- (c) The following steps must be taken to promote the responsible consumption of alcohol:
  - The licensee must implement and maintain the steps proposed in their host responsibility policy aimed at promoting the reasonable consumption of alcohol.
- (d) The premises are not designated.

Other restrictions and requirements to be noted on the licence

S51 Non alcoholic drinks to be available

S52 Low alcohol drinks to be available

S53 Food to be available

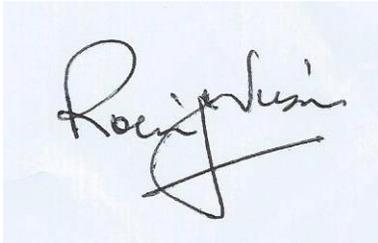
S54 Help with information about transport to be available

S56 Display of signs

S57 Display of licence

S214 Manager to be on duty at all times and responsible for compliance

DATED at Christchurch this 4th day of July 2016

A handwritten signature in black ink on a light blue background. The signature is cursive and appears to read 'R.J. Wilson'.

R.J. Wilson

Chairperson

Christchurch District Licensing Committee