

Date	19 February 2024
Application	016/ON/004/2023
<u>IN THE MATTER</u>	of the Sale and Supply of Alcohol Act 2012
<u>AND</u> <u>IN THE MATTER</u>	of an application by Night Pearl (2021) Limited for the renewal of an on- licence in respect of the premises situated at 815 Franklin Street, Pirongia, known as Five Stags Restaurant and Bar

HEARINGS at Waipa District Council Chamber on 1 September 2023 and 2 February 2024

WAIPA DISTRICT LICENSING COMMITTEE

Chairperson: Mrs S Grayson
Members: Cr Gower, Dr P Davies

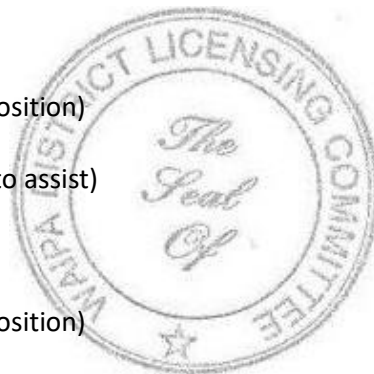
APPEARANCES

1 September 2023

Ms N Fu, Night Pearl (2021) Limited
Ms M Berry – Licensing Inspector (in opposition)
Constable R Fleming – Police (to assist)
Mrs N Zeier – Medical Officer of Health (to assist)

2 February 2024

Mrs N Fu, Night Pearl (2021) Limited
Ms M Berry – Licensing Inspector (in opposition)
Senior Sergeant D Hall – Police (to assist)



DECISION OF THE WAIPA DISTRICT LICENSING COMMITTEE

1. The application for the renewal of an on-licence is declined. The on-licence 016/ON/018/2021 will expire on 19 May 2024.
2. The Waipa District Licensing Committee prohibits publication of the photos and any written information presented in evidence by the Licensing Inspector that identify the volunteers who participated in the Controlled Purchase Operation conducted on 11 November 2023.

REASONS

Introduction

1. An on and off-licence was issued to Night Pearl (2021) Limited (Night Pearl) trading as Five Stags Restaurant and Bar at Pirongia on 4 March 2022. An application for the renewal of both licences was received on 3 February 2023. There was no opposition from Police or the Medical Officer of Health. The Licensing Inspector raised concerns but did not report in opposition. No public objections were received.
2. At the site visit conducted prior to the first hearing on 1 September 2023, we became aware that Night Pearl was selling alcohol in the front and left side outdoor dining areas, which were not licensed areas in the site plan dated 9/02/22 (referred to in condition (c) of the on-licence). In addition, we observed that the accommodation area, including bathrooms and laundry, was included in the licensed area. The bedrooms are small and do not have any kitchenette facilities that would normally be present in a licensed hotel and would allow guests to have food to accompany alcohol. These concerns were raised with Ms Fu at the first hearing. Ms Fu appeared to be unaware of the site plan she had submitted with the initial application and said she was just selling alcohol in the same areas as the previous licensee.
3. We accepted Ms Fu may have been confused about the extent of the licensed area and gave her an opportunity to submit an application to vary the licensed area to include the front and left side outdoor dining areas, along with an amended plan. This effectively gave Ms Fu a pathway to include the front and left side outdoor dining areas in the licensed area. We advised Ms Fu that Five Stags Pirongia was not permitted to sell alcohol in the front and left side outdoor dining areas until the application to vary the licensed area had been granted.
4. In addition, at the first hearing we explained that we had become aware of an adverse finding of the Employment Relations Authority (ERA) regarding the unjustified dismissal of an employee. We considered that the finding of the ERA is a relevant matter when deciding whether Night Pearl is a suitable entity to hold an alcohol licence. Therefore, the reporting agencies needed to have an opportunity to consider the decision and to submit a supplementary report about its relevance to the on and off-licence application. In addition, Night Pearl was entitled to have an opportunity to provide a response to any supplementary reports. Therefore, the hearing was adjourned.
5. An application to vary the licenced area was submitted on 27 September 2023. It included the front and left side outdoor dining areas, included a new supervised area containing two tables to the left of the bar and excluded the accommodation area. The application was advertised and no objections from the public were received. No report was received from the Medical Officer of Health and Police reported no opposition. However, the Licensing Inspector reported in opposition, raising concerns about the ERA decision and breaches of licence conditions and the Act since the first hearing on 1 September 2023.



- Ms Fu surrendered her off-licence on 18 October 2023, therefore the application for the renewal of the off-licence has been withdrawn.

Relevant Law and Approach

- An application for the renewal of an on-licence requires us to have regard to the criteria in sections 105 and 131 of the Sale and Supply of Alcohol Act 2012 (the Act), and then stand back and decide whether granting the application is consistent with object of the Act. We must have regard to any matters raised in any report from Police, the Licensing Inspector, and the Medical Officer of Health¹. The object of the Act is to ensure that the sale and supply of alcohol is undertaken safely and responsibly, and the harm caused by excessive or inappropriate consumption of alcohol is minimized². We must take an evaluative and merits-based approach³. There is no presumption that a licence will be renewed.⁴
- We will consider the relevant submissions and evidence provided by each party in relation to the criteria in section 105 in turn below.

Suitability (s 105(1)(b))

- The object of the Act is of paramount importance when determining suitability. Suitability includes whether the licensee ensures that the sale, supply, and consumption of alcohol in its premises will be undertaken safely and responsibly. High Court and the Licensing Authority decisions indicate suitability is a broad concept and that matters such as: previous convictions, character, reputation, experience in the hospitality industry, management ability, previous unlawful operation of a licensed premises and personal integrity should be taken into account when assessing suitability⁵. In essence the licensing committee must consider whether the applicant is likely to properly carry out the responsibilities associated with the holding of licence⁶.
- The sole director of Night Pearl is Mr Bao, Ms Fu's husband. Mr Bao did not attend any hearings and Ms Fu says that he is mostly responsible for IT related matters. Ms Fu is the sole shareholder and the General Manager of the premises. Mr Bao and Ms Fu hold manager's certificates. The evidence we heard from Ms Fu is that she has 20 years' experience running businesses in China. In New Zealand Ms Fu also operates a business exporting wine to China and has run a hotel. Mr Bao and Ms Fu did not have any hospitality experience prior to purchasing Five Stags Restaurant and Bar.
- We have carefully considered the submissions and evidence presented by Ms Fu, the Licensing Inspector, Ms Berry, Senior Sergeant Hall, and witness Senior Constable Hann, and conclude that Night Pearl, under the management and control of Ms Fu, is not a suitable entity to continue holding an on-licence. We make this finding for the following reasons:

¹ Section 105(1)(k) SSAA

² Section 3

³ *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749, at [54]

⁴ *Ibid*, at [55].

⁵ *Police v Casino Bar (no 3) Ltd* [2013] NZAR 267 (HC), *Re Jays* LLA 994/94 (15 July 1994), *Re Sheard* [1996] 1 NZLR 751 (HC), and *Re Nishchay's Enterprises Ltd* [2013] NZARLA 837.

⁶ *Re Sheard* [1996] NZAR 61



Non-compliance with the conditions of the licence and the Sale and Supply of Alcohol Act 2012

a) Ms Fu admits that she continued to permit alcohol to be served in the front and left side outdoor dining areas until 13 December 2023 following a phone call with Ms Berry. Ms Fu explained that when she took over the premises, she did not check the plan she submitted with the application, she just followed what the previous owner did. She did not understand what the Licensing Committee explained at the first hearing and was confused. Ms Fu says she did not carefully read the agency reports that were sent out prior to the hearing or the adjournment decision following the first hearing. The Licensing Committee did ask Ms Fu whether she would like the assistance of an interpreter. She said no.

b) However, condition (c) of the on-licence clearly states that no alcohol can be taken outside the licensed area indicated in the plan dated 9 February 2022. The clear advice given at the first hearing on 1 September 2023 was that no alcohol could be sold at the front and left side outdoor dining areas. The adjournment decision clearly stated: "To include the front and left side outdoor dining areas in the licensed area, Night Pearl (2021) Ltd will need to submit an amended application to vary the licensed area."

c) A Controlled Purchase Operation (CPO) was carried out on 11 November 2023 and alcohol was sold to a minor. Ms Fu does not dispute any facts about this incident. The minor was not asked for ID or questioned about his age and was then allowed to sit outside the licensed area to consume the drink. The minor was served by a 16-year-old staff member. In addition, the name of the Duty Manager displayed was Serena Yu, however she was not the holder of a Manager's Certificate or appointed as an Acting or Temporary Manager. When interviewed by Ms Berry, the seller and the person named as the Duty Manager did not know they were not allowed to let people drink outside and could not remember the last time they had training on the Act, the licence conditions or host responsibility principles.

d) Ms Fu explained that she was working in the kitchen and at the time of the CPO and was following the instruction of the Licensing Inspector that she could not be a Duty Manager while working in the kitchen. She named Serena Yu as a Duty Manager because she appointed her as an Acting Manager. However, she did not record this in the Manager's Register. When asked at the hearing who Serena Yu was replacing due to illness or absence (as required by section 230(1)), Ms Fu said she did not know and admitted she was "totally confused".

e) Ms Fu says that when Ms Berry spoke to her after the CPO on 11 November 2023, she did not tell her that patrons were not allowed to consume alcohol outside. However, Ms Berry recalls that this was discussed. The Licensing Committee called Senior Constable Hann to give evidence about this conversation because she was also present. Senior Constable Hann confirmed that Ms Berry made it clear to Ms Fu during the conversation after the CPO, that she was not permitted to sell alcohol in the outside area until the amended application to include the outside area had been approved. The Licensing Committee finds the evidence of Ms Berry and Senior Sergeant Hann to be credible and reliable.

f) On 23 November 2023, the Licensing Inspector, Mrs Fernandez, visited the premises for a compliance check. She observed a person drinking alcohol in the outside area and the Duty Manager was once again Serene



Yu, who said she was the Temporary Manager. This appointment was not listed in the Manager's Register. Ms Fu was in Auckland at the time and when contacted she was unable to say who Serena Yu was replacing.

g) Senior Sergeant Hall has made a section 280 application to Alcohol Regulatory and Licensing Authority (ARLA) for suspension of the licence for selling to an underage person on 11 November 2023. Mrs Fernandez has made a section 280 application to ARLA for suspension of the licence for not having a correctly appointed manager on duty on 23 November 2023. Neither application has been determined by ARLA.

h) Senior Sergeant Hall has issued an infringement fine for serving alcohol outside the licensed area on 11 November 2023. Mrs Fernandez has issued two infringements fines relating to failing to have a properly appointed manager on duty and serving alcohol outside the licensing area on 23 November 2023.

i) Ms Fu has received information and assistance on the requirements of the Act and the licence from two Licensing Inspectors, Senior Sergeant Hall and the Secretary of the Waipa District Licensing Committee, Mr Tutty. However, there appears to be an ongoing disregard for the assistance given or an inability to understand the obligations of a licensee.

Non-compliance with the law

12. An Employment Relations Authority Determination [2023] NZERA 231 that found an employee of Night Pearl (2021) Ltd was unjustifiably dismissed and ordered the company to pay \$21,017.67 in compensation. The ERA found that "The employment agreement contained a comprehensive provision about disciplinary processes, which Night Pearl entirely failed to comply with" and that Night Pearl had not acted as a fair and reasonable employer.
13. ARLA has confirmed that breaches of employment law are a relevant consideration when deciding about suitability to hold a licence.⁷ This is because a license holder must be an entity/person with high standards of integrity who can be trusted to uphold the law and do the right thing at all times. If employment law has been breached, it raises a question about whether a licensee will comply with alcohol licensing requirements.
14. We have considered the ERA decision and have formed an opinion that it reflects poorly on the integrity of Ms Fu and her management of the premises. It calls in question her ability to comply with the law and to follow rules about proper practice in relation to how to manage employees.

Local Alcohol Policy (s105(c))

15. The application complies with the Waipa District Local Alcohol Policy 2015.

⁷ [2021] NZARLA 32

Proposed Days and Hours of Operation (s 105(d))

16. In the amended application Night Pearl does not request to change the current licensed hours of:

Current hours

April to September:

Monday to Sunday, from 11am to 2 am the following day

October to March:

Monday to Thursday, from 11am to 2am the following day

Friday to Sunday, from 9.30am to 2am the following day

17. Senior Sergeant Hall suggests the hours could be reduced to 11am to 12 midnight, Monday to Friday. However, he doesn't present any evidence or submissions in support of this request.
18. The current licensed hours comply with the maximum hours permitted in the LAP. The licensing committee is not persuaded that the licensed hours should be reduced.

Design and Layout (s 105(e))

19. The licensing committee agrees that the licensed area represented in the amended plan is appropriate. It includes the left and front outside areas which have been licensed in the past. These areas can be supervised appropriately by staff by looking through the windows and regularly walking through these areas. However, further signage may be required to advise patrons of the limits of the licensed area. The plan includes the accommodation, bathroom, and laundry areas, which is appropriate.

Good and Services Sold Other Than Alcohol (s 105(f)&(g))

20. Night Pearl does not intend to sell any products other than food and alcohol and does intend to continue providing accommodation in the adjacent building. We do not have any concerns about this.

Amenity and Good Order (s 131(1)(b))

21. Amenity and good order of the locality means the extent to which, and ways in which, the locality in which the premises concerned are situated is pleasant and agreeable.⁸
22. The Licensing Inspector reports that there have been two complaints about live music being too loud since the licence was granted. No detail about the complaints was provided in the Inspector's report, however, at the hearing the Inspector explained that one complaint was made on 18 July 2022 at 8.20pm and when the Noise Control Officer arrived at 10.40pm the noise issue had been resolved. A second complaint was



⁸ Section 5 of the Act.

made on 16 January 2023 at 10.25pm and when Noise Control attended at 11pm the Bar Manager was asked to turn the music down, which was complied with.

23. There have been no other issues raised about amenity and good order. Senior Sergeant Hall says Police have not been called to attend any issues at the premises and it is not located in a deprived area.
24. The noise complaints are reasonably minor and were easily resolved. There have been no further noise complaints for the past 12 months. Therefore, we are satisfied that the amenity and good order of the locality would not be increased by more than a minor extent by refusing to renew the licence.

Manner Applicant has Sold, Displayed, Advertised or Promoted Alcohol (s 131(1)(d))

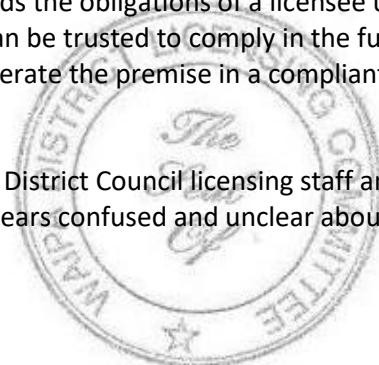
25. No concerns have been raised about the sale, display, advertising, or promotion of alcohol at this premises.

Appropriate Staff, Systems and Training (s 105(j))

26. Night Pearl presented staff training records showing training conducted by a previous Duty Manager and by Mr Bao up to August 2023. This includes on the job training, on-line learning, or discussion of a range of licensing topics, such as conditions of the licence.
27. Mr Bao did not attend the hearing therefore it was not possible to assess his understanding of the obligations of the licensee or the needs of staff. However, it has become obvious during the hearing that Ms Fu has a lack of understanding of the Act and the conditions of the licence. It appears that the staff are not well trained. A sale to a minor occurred because ID was not checked, and age was not verified. The 16-year-old seller and other staff member with her could not remember having any training. Staff were not aware of the extent of the licensed area or the site plan (which should form an essential part of regular training) during compliance visits on 11 and 23 November 2023.

Will granting the application be consistent with the object of the Act? (s 105(1)(a))

28. We have carefully considered the extensive submissions and evidence presented by all parties. We have undertaken an evaluative approach and considered the merits of the application for the renewal of the off-licence when weighed against the criteria in sections 105 and 131 and ultimately against the object of the Act. Standing back and assessing the application, we have formed an opinion that granting the application will be contrary to the object of the Act.
29. Our primary concern is the suitability of Night Pearl, under the control and management of Ms Fu. We are not confident that Ms Fu understands the obligations of a licensee under the Act or the conditions of the licence, or that she can be trusted to comply in the future. Ms Fu's confusion and lack of clarity about how to operate the premise in a compliant manner was evident at both hearings.
30. Ms Fu has been well assisted and educated by Waipa District Council licensing staff and Police over the past 12 months, however she still appears confused and unclear about



how to run the premises in a compliant manner. One of the most basic requirements is to have a qualified Duty Manager or properly appointed manager on the premises, and during two compliance checks in November 2023, this did not occur. We wonder how many other times the premises has not had proper oversight by a Duty Manager.

31. These issues are intertwined with a lack of appropriate staff training. It follows that if the General Manager is confused, the staff will be confused. This leads to opportunities for alcohol related harm such as serving minors or allowing patrons to become intoxicated, with the risk of driving drunk.
32. In conclusion, the application for the renewal of the on-licence is declined. Pursuant to section 135(2) of the Act, the licence will expire on 19 May 2024, which is the maximum time allowed by the Act. This gives the applicant time to dispose of the business and/or the current stock on hand.
33. We have made an order prohibiting publication of the photos presented in evidence by the Licensing Inspector that identify the volunteers who participated in the Controlled Purchase Operation conducted on 11 November 2023, to protect their privacy.⁹



Sara Grayson
Commissioner
Waipā District Licensing Committee



Sections 153 to 155 of the Act relating to the right to appeal this decision are in effect.

This decision shall have immediate effect. The sale and supply of alcohol must cease 3 months from the date of this decision, even if an appeal is lodged, unless a stay is sought and granted by the Alcohol Regulatory and Licensing Authority.

⁹ Section 203(5) & (6) of the Act