

Decision Number: 60F [2023] 14785

IN THE MATTER OF

the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER OF

an application by RJ BROTHERS LIMITED for a New Off-Licence in respect of premises situated at 3/1 Musgrove Close, Christchurch to be known as 'Big Barrel Wigram')

BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Chairperson: Mrs M S Redstone  
Members: Mr D Ivory  
Mr G Clapp

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DECISION OF THE DISTRICT LICENSING COMMITTEE

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Decision of the Committee

The Committee grants the new off-licence subject to conditions on advertising of the 'Mates Club' loyalty programme. The external-facing advertising of the loyalty programme on the windows of the premises, together with the advertising on any company vehicle and on social media such as Facebook of the 'Mates Club' breaches the provisions of sections 237(1)(e) and 237(2) of the Sale and Supply of Alcohol Act 2012 ('the Act'). The Committee's reasons for reaching this decision are set out below.

Introduction

[1] RJ BROTHERS LIMITED ('the Applicant') applied for a new Off-Licence in respect of premises situated at 3/1 Musgrove Close, Wigram, Christchurch, known as 'Big Barrel Wigram'.

[2] The general nature of the business is that of a bottle store.

[3] The application was received by Christchurch District Licensing on 1 November 2022. The application was publicly notified on 1 November 2022 and remained on the website for a minimum of 15 working days. No public objections were received.

[4] There is no objection from the New Zealand Police nor from the Medical Officer of Health.

[5] The application was not opposed by the Inspector, but he requested that the Committee determine whether the external advertising of the 'Mates Club' loyalty programme is in breach of section 237(1)(e). The Inspectorate has not opposed the renewal application on any of the considerations outlined in sections 105(1)(a) – 105(1)(j) of the Act.

[6] The Application was referred to the District Licensing Committee ('the Committee') on 24 April 2023, at which time the Committee issued a Minute, advising the parties that it was minded to hear the matter on the papers and seeking submissions from Counsel for both the Inspectorate and the Applicant as to the law relating to section 237(1)(e) of the Act. The Committee will address the matter of the advertising of the loyalty programme before making a substantive decision on the application as a whole.

## MATES CLUB ADVERTISING

### Inspectorate Submissions

[7] Counsel for the Inspectorate, Mr Wade Morris, submits that the advertising of the loyalty programme falls within section 237(1)(e) of the Act which makes it an offence to offer any goods or services, or the opportunity to obtain any goods or services, or the opportunity to win a prize, on the condition that alcohol is bought.

[8] Mr Morris relies on the decision of the Alcohol Regulatory and Licensing Authority ('the Authority') in *Alicious v LNDLU*<sup>1</sup>. *Alicious* was a case where an offer was made on social media inviting readers to enter a promotion where a car could be won by purchasing a certain amount of alcohol at premises owned by LNDLU known as 'The Bar'.

[9] Mr Morris submits that the 'Mates Club' sits within the class of loyalty programme that Parliament intended to be captured by the wording of section 237(1)(e) and that the points received are a good.

[10] He sets out the terms and conditions of 'Mates Club' which specifies that one point is earned for every \$25 spent in store (including the online store).<sup>2</sup> The spend in store is only required to be on *products*, excluding tobacco products.

[11] Mr Morris accepts that the signs are affixed to the interior of the premises and that this could lead to a conclusion that the offer is made *on* licensed premises even though they are facing outward across the

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<sup>1</sup> *Alicious v LNDLU* [2021] ARLA 37

<sup>2</sup> Clause 1, Mates Club Reward Points, Bonus Points and Reward Vouchers, accessible: <https://bigbarrel.co.nz/en/matesclub-terms>

premises' carpark. It is submitted that approach would defeat the purposes for which section 237 of the Act has been enacted.

[12] Counsel submits that the exception set out in section 237(2) is aimed at larger loyalty programmes, such as FlyBuys or Airpoints, where rewards are able to be used at outlets not concerned with alcohol. However, in this case 'Mates Club' rewards can only be exclusively earned and used at Big Barrel stores, *"and therefore apply primarily to alcohol"*.

#### Submissions on behalf of the Applicant

[13] Counsel for the Applicant, Mr Alastair Sherriff, submits that Big Barrel Group is a well-established and reputable licence holder and a responsible and compliant operator. The Committee accepts that is not in dispute. He submits that this licensing process is not the appropriate forum nor the appropriate time to raise an issue about a possible breach of section 237(1)(e) in respect of 'Mates Club' branding. However, he further submits, and the Committee agrees, that the only "live" issue for the Committee is whether or not the *"Mates Club branding on the Wigram store building premises is a breach of section 237(1)(e) of the Act"*.

[14] The relevant portion of the Applicant's submissions are therefore from paragraph [13]. Counsel contends that the signage is affixed to the inside of the premises and is therefore 'on' licensed premises. He goes on to summarise how points are accumulated and how they may be spent. Mr Sherriff points to the fact that nowhere in the 'Mates Club' advertising is there a condition that alcohol is bought either to acquire the points or to spend them. The only offer in the 'Mates Club' branding signage is to join the loyalty programme, nothing else.

[15] Counsel correctly points out at paragraph [20] of their submissions that a passer-by does not have to enter the store to sign up - they can do so online. He goes further to say that *"it is far-fetched and unreasonable to conclude that the Mates Club branding/signage either 'seeks to induce patrons into the premises to purchase alcohol' or 'the purchase alcohol in greater volumes'. Nor is there any condition attached to the Mates Club points that they can only be used to buy alcohol as s237(1)(e) requires"*.

[16] At paragraph [25], Mr Sherriff submits that the 'Mates Club' loyalty programme is relatively recent, but it has reached a critical membership mass to the point that the company will take the programme nationally and include other non-alcohol licence retail partners.

#### Finding of the Committee

[17] It is beneficial to record the portions of section 237 that are relevant to this application: They are:

(1) *A person commits an offence if, in the course of carrying on a business, that person—*

*(e) offers (otherwise than by means of an offer made only on licensed premises, and made only in relation to the buying of alcohol on those premises) any goods or services, or the opportunity to obtain any goods or services, or the opportunity to win a prize, on the condition that alcohol is bought;*

(2) *Subsection (1)(e) does not apply to a loyalty programme that provides rewards or discounts, unless the rewards or discounts apply only or primarily to alcohol.*

[18] *Alicious*, whilst not on all fours with the application before the Committee, does give guidance to the Authority's position on external advertising.

[19] In *Alicious*, the Authority says:

*"Again, the offer is not of alcohol per se, but of the opportunity to enter the promotion. While the alcohol in the present application could only be purchased at The Bar, the offer was not made only on licensed premises to those in the premises. The offer was made to the world via social media."*<sup>3</sup>

*"It matters not that all of the terms and conditions may not have been known or understood by patrons. The focus of the paragraph is on the offer being made by the licensee and whether or not it is subject to conditions, it remains an offer which seeks to induce prospective patrons into the premises to purchase alcohol. That is precisely the mischief to which s 237 is directed."*<sup>4</sup>

*"Section 237(1)(e) is not directly concerned with the sale or supply of alcohol. Where alcohol is the subject of an offer, other sections regulate when those may be appropriately made ..."*<sup>5</sup>

*"Section 237(1)(e) is focused instead on offers of an 'opportunity to win a prize (predicated on the condition that alcohol is bought)'. It is the opportunity to win a prize that constitutes what the Parliament has determined to be an irresponsible promotion of alcohol. As the Licensing Inspector has rightly said, it is the inducement to purchase alcohol that is of concern, regardless of whether any alcohol-related harm of the kinds specified in s 4(1)(b) results from that promotion."*<sup>6</sup>

[20] Although helpful, *Alicious* was not directed at loyalty programmes covered by s237(2).

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<sup>3</sup> Paragraph [94]

<sup>4</sup> Paragraph [95]

<sup>5</sup> Paragraph [83]

<sup>6</sup> Paragraph [84]

The Text of the Legislation is the starting point for Interpretive Exercises

[21] Section 10 of the Legislation Act 2019 describes the approach that should be taken to ascertaining the meaning of legislation:

- (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context,
- (2) Section (1) applies whether or not the legislation's purpose is stated in the legislation.
- (3) The text of legislation includes the indications provided in the legislation.

[22] The purpose and context of the Sale and Supply of Alcohol Act 2012 is to provide guidance on the supply of alcohol in light of the dual objects of the Act, being the safe and responsible sale, supply and consumption of alcohol and to minimise the harm caused by the excessive or inappropriate consumption of Alcohol.

[23] The text of section 237 creates offences and penalties for certain 'irresponsible' alcohol promotions or activities. One of those offences is at section 237(1)(e):

*"offers (otherwise than by means of an offer made only on licenses premises and made only in relation to the buying of alcohol on those premises) any goods or service or the opportunity to obtain any goods or service ..."*

[24] Section 237(2) specifically states:

*"Subsection (1)(e) does not apply to a loyalty programme that provides rewards or discounts"*

and then goes further by adding:

*"unless the rewards or discounts apply only or primarily to alcohol"*

[25] To cut to the chase, the text of the legislation is clear in relation to loyalty programmes. If it were not, subsection (2) would not have been added as a qualifying subsection to section 237.

[26] There is no doubt here that an offer is made to join a loyalty club/programme and to receive points from purchases made solely from within the business conducted by the Offeror. The offer, according to the loyalty programme's terms and conditions is, amongst other benefits, to *"Receive 1 Mates Club Reward Point*

for every \$25 spent" and also to "Receive special Bonus Point offers". A condition of membership is "you must also subscribe to our Newsletter so you won't miss out on any of our special Mates Club offers".

[27] A copy of the newsletter was not provided but a review of 'specials' on the company website on 29 May 2023 reveals that the only non-alcohol products offered are three 'Mates Club' branded hats on special at a price of \$5.99, together with two soft-drink offerings at under \$4.00, the purchase of which would be insufficient, on its own, to obtain one point. These five non-alcohol products were alongside 489 alcohol-related products.

#### Site Visit

[28] A visit to the premises on 30 May showed that the 'Mates Club' advertising, whilst adhered to the inside glass of the premises, is facing outwards towards the carpark and street. The advertising on the company vehicle would clearly be visible to those using the same road as the vehicle at any given time.

[29] The advertising of 'Mates Club' was not readable on the premises, but only visible and readable from outside the premises.

[30] There are products for sale, mostly under \$4.00, such as shopping bags and cigarette lighters, with 'Mates Club' branding and, once taken out of the premises, that advertise the loyalty programme to the public at large. 'Mates Club' is also advertised on the Big Barrel Facebook page, together with offers of alcohol at a cheaper rate for 'Mates Club' members.

[31] During the site visit the Committee was shown an example of the weekly newsletter which is signed up to when joining the loyalty programme. This example contained only alcoholic products. The Committee asked if the points could be used for products from other businesses and the answer was that the rewards must be used at Big Barrel Wigram.

#### Relevant Issues

[32] The questions for the Committee are:

[33] Is there an offer made to join a loyalty programme where the rewards or discounts apply *only or primarily* to alcohol? Using the 'reasonable person test', the Committee finds that a reasonable person of ordinary prudence would be led to believe:

- (a) that Big Barrel Wigram holds an off-licence and, as such, is in the business of primarily selling alcohol, albeit along with some non-alcohol products, such as soft drinks;

- (b) that all branded products sold (for example: bags, cigarette lighters, hats) are alcohol-related as the loyalty club they advertise is associated with a premises whose primary business is the sale of alcohol; and,
- (c) the 'Mates Club' loyalty programme relates solely to premises which hold an off-licence and is in the business of the sale of alcohol, leading to the conclusion that goods purchased to gain points would primarily be alcohol, and further that those points would then be spent for the purchase of alcohol.

[34] It is accepted that the word "alcohol" is not mentioned in the advertising or in the terms and conditions for joining 'Mates Club'. As recorded in paragraph [33](c) above the reasonable person of ordinary prudence would assume that if they gained points by buying alcohol, those points would then be spent for the purchase of alcohol. Further, as noted in paragraph [25], the company website offering two non-alcohol related product, three non-alcohol products with Mates Club branding, alongside 489 products containing varying percentages of alcohol leaves one in no doubt that the loyalty points offered by the Club will be gained primarily by the purchase of alcohol.

[35] Having concluded that the rewards or discounts apply *only or primarily* to alcohol, the remaining question for the Committee is whether or not the offer is made 'only' on licensed premises. Paragraphs [28] to [30] above address that issue and the Committee finds that the offer to join the loyalty programme, situated as it is attached to the inside window of the building but facing outwards towards the world at large, together with extensive advertising on Facebook, and on a company vehicle, is not made only on the licensed premises as envisaged by section 237(1)(e) of the Act.

[36] Further, the offer constitutes advertising to the world an inducement to purchase alcohol to obtain rewards. One reward, according to the promotions, is cheaper alcohol than what is available to a non-member and the second is bonus reward points gained by the purchase of goods, such goods only being alcohol products.

[37] While there is no evidence that any alcohol-related harm ensues from the promotion, that is of little consequence. Sections 237(1)(e) and 237(2) of the Act are focused instead on the opportunity to gain goods and services or rewards and discounts provided alcohol is bought, regardless of whether any alcohol-related harm of the kinds specified in s 4(1)(b) results.

[38] The claim that because the advertising is adhered to the inside of the window it is "*an offer made only on licensed premises*" is mischievous and is not within the spirit of the Act.

## DECISION

[39] For the reasons outlined above, the Committee finds that the outward facing promotion of the 'Mates Club' together with the advertising on the company vehicle and on social media/Facebook, is not "*only on licensed premises*" within the meaning given to that phrase in section 237(1)(e) and is therefore in breach of section 237 of the Act.

[40] Subject to the above matter being addressed by the Committee, the Inspector recommended the grant of the off-licence for 12 months subject to conditions.

[41] The Committee is satisfied after standing back and evaluating all the matters placed before it, and having had regard to the criteria as set out in section 105 (and informed by section 106) of the Act that the granting of the application, subject to conditions, achieves the purpose and objects of the Act.

[42] Accordingly, pursuant to section 104(1) of the Act the Committee grants the application for an off-licence for a period of 12 months subject to the following conditions:

### The Licensed Premises

The premises are identified on the plan provided with the application for a licence.

### Restricted and Supervised Areas - section 147(2)

The licensed area is designated as a supervised area.

### Discretionary conditions – section 116 (1)

The following steps must be taken to ensure that the provisions of the Act relating to the sale 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.

The following steps must be taken to ensure that the provisions of the Act relating to the management of the premises concerned are observed:



Alcohol must only be sold, supplied and consumed within the area marked on the plan submitted with the application.

#### Compulsory conditions – section 116 (2)

No alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1pm on Anzac Day to any person who is not present on the premises to dine.

Alcohol may only be sold the following days and during the following hours:

Monday to Sunday, between the hours of 9.00am and 10.00pm.

Water will be freely available to customers on the premises while the premises are open for business.

#### Section 117 – Other Discretionary conditions

The following steps must be taken to promote the responsible consumption of alcohol:

The licensee must implement and maintain the steps proposed in RJ Brothers Limited's Host Responsibility Policy<sup>7</sup> aimed at promoting the reasonable consumption of alcohol.

There will be no outward or public-facing promotion of the 'Mates Club' loyalty programme on the premises, or on any company vehicle, or on social media, such as Facebook and Instagram.

#### Conditions applying to all remote sales and supply of alcohol

The following information must be displayed on the internet site in a prominent place, in any catalogue used by the licence holder and on every receipt issued for any alcohol sold via the internet site.

The licence holders name, the licence number, and the date on which the licence expires.

A copy of the licence or a clearly identified link to such image must be displayed in a prominent place on the internet site.

The following steps must be taken to verify that people are over the purchase age:

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<sup>7</sup> As attached to the application.

In the case of an order made using an internet site, telephone order, or physical order –  
The prospective buyer must declare that he or she is 18 years of age or over (and where  
the prospective receiver is involved that the prospective receiver is also 18 years of age  
or over)-

1. Once, when the prospective buyer first commences the order process; and
2. Again, immediately before the sale of alcohol is completed.

#### Other restrictions and requirements

Section 56 – Display of signs

Section 57 – Display of licences

Section 214 – Manager to be on duty at all times and responsible for compliance

DATED at CHRISTCHURCH this 19<sup>th</sup> day of June 2023



Merelyn Redstone  
Chairperson  
Christchurch District Licensing Committee