[2017] NZARLA 445

IN THE MATTER	of 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 Waikato District Licensing Committee refusing an application for the renewal of an on-licence in respect premises at 9 Bow Street, Raglan, known as "The Yot Club"
BETWEEN	**ROCKAWAY BEACH LIMITED**
	Appellant
AND	**JOE MORGAN KEE** (Waikato District Licensing Inspector)
	First Respondent
AND	**JAMES ROBIN DALZIELL-KERNOHAN** (Police Officer of Hamilton)
	Second Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Member: Mr R S Miller

HEARING at HAMILTON on 6 November 2017

APPEARANCES

Mr R L M Davies – for appellant
Mr A Meek – appellant
Mr J M Kee - first respondent
Sergeant J R Dalziell-Kernohan – second respondent
Miss N D P Petersen – for Medical Officer of Health - to assist

DECISION OF THE AUTHORITY

Introduction

[1] On 9 May 2017, the Waikato District Licensing Committee (DLC) declined an application by Rockaway Beach Limited for the renewal of an on-licence for premises known as "The Yot Club" situated at 9 Bow Street, Raglan.

[2] The decision of the DLC would have resulted in the on-licence expiring on 31 May 2017. On 29 May 2017, however, pursuant to s 153 of the Act the Authority ordered that pending the determination of the appeal the decision of the DLC shall not take effect and that the appellant's on-licence shall continue to have effect subject to the same conditions that applied immediately prior to the DLC's decision.

Outcome of Appeal

[3] The appeal is allowed. Pursuant to s 158 of the Act, the decision of the DLC is reversed save that the Authority directs that licence be renewed for a term expiring on 10 July 2018, to ensure that a noise management plan, if it is not already completed, is implemented to the satisfaction of the DLC.

Background to Appeal

[4] On 10 July 2015, the appellant was first granted an on-licence by the DLC. This licence had an initial term of one year often referred to as a 'probationary' term. The licence was due to expire on 10 July 2016. On 7 June 2017, through its consultant Liquor Concepts Limited, the appellant applied for a renewal of the licence pursuant to s 127 of the Act. The general nature of the business, for which the renewal was sought, is that of a tavern and night club.

[5] The renewal application was opposed by the Licensing Inspector and the Police. The Medical Officer of Health reported on the application out of time and therefore the application was deemed not to have been opposed by the Medical Officer of Health.

[6] Following a hearing on 1-3 March 2017, by way of a decision dated 9 May 2017, the DLC refused the application for renewal. In doing so, the DLC said:

> "*In the opinion of the Committee, through his operation of the premises in the time since receiving his first Temporary Authority, the applicant has failed to demonstrate that he has the ability to operate the premises, known as The Yot Club Raglan, at an appropriate level and in accordance with legislation. To the contrary, the consistent failure to adhere to administrative requirements such as maintaining a current Building Warrant of Fitness, maintaining a current food hygiene certificate, and complying with the conditions of the licence in respect of submitting a professionally produced Noise Management Plan, all during a period of time where the applicant could reasonably expect to be under scrutiny, point to the unsuitability of the applicant to continue to hold an on-licence.*"

[7] Rockaway Beach Limited appealed the decision of the DLC to the Authority.

Grounds for Appeal

[8] The grounds for appeal set out in the appellant's notice of appeal are that:

(a) the DLC erred in law by finding that the appellant had breached conditions of its licence when such findings can only be made by the Authority pursuant to applications having first been made under s 280 of the Act;

(b) the DLC failed to take into account relevant considerations when having regard to s 105(1)(j) of the Act notably the appellant's systems, staff and training at the premises to ensure compliance with the Act;

(c) the DLC took into account irrelevant considerations when having regard to s 105(1)(j) of the Act by considering system failures of the appellant that related to non-compliance with legislation other than the Act;

(d) the DLC failed to take into account relevant considerations when having regard to s 105(1)(b) of the Act specifically the previous operation of other premises operated by the appellant's director including his reputation, level of honesty, number of convictions, and past compliance with the Act;

(e) the DLC failed to have regard to the matter set out in s 131(1)(d) of the Act namely the manner in which the appellant has sold, supplied, advertised or promoted alcohol while holding an on-licence;

(f) the DLC's refusal is disproportionate and an unreasonable response to the adverse findings of the DLC; and

(g) the DLC's decision is plainly wrong in light of the evidence.

[9] At the hearing before the Authority, Mr Davies, counsel for the appellant, summarised these grounds as follows:

(a) the DLC erred in law by making ultra vires findings, by failing to take into account relevant considerations, and by taking into account irrelevant considerations; and

(b) the DLC's decision is disproportionate, unreasonable and plainly wrong, so as to amount to an error of law and a miscarriage of justice.

Law

[10] Section 131 provides:

> **(1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**
>
> **(a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):**
>
> **(b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence:**
>
> **(c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129:**
>
> **(d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.**
>
> **(2) The authority or committee must not take into account any prejudicial effect that the renewal of the licence may have on the business conducted pursuant to any other licence.**

[11] Paragraphs (a) to (g), (j), and (k) of section 105(1) of the Act read:

> **(1) 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:**
>
> **…**
>
> **(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.**

[12] Section 106(2) adds:

> **(2) In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew a licence, the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality):**
>
> **(a) current, and possible future, noise levels:**
>
> **(b) current, and possible future, levels of nuisance and vandalism.**

Appellant's Submissions

Suitability

[13] The appellant submits that the renewal was refused on the basis of the appellant's suitability. The DLC said the appellant was unsuitable to hold a licence because its director, Mr Meek, did not demonstrate his ability to operate the premises in accordance with the law. Underpinning this finding, the appellant submits, the DLC reached conclusions about Mr Meek's judgement which were untenable on the evidence and about the appellant's alleged failure to comply with s 105(1)(j) of the Act.

Lack of judgement?

Alleged drinking on premises

[14] In reaching its decision, the DLC said at [168]:

> "*Hearsay evidence was produced during the hearing that Mr Meek was intoxicated on the Yot Club premises on 22 November 2015. The Committee discounted the hearsay evidence and gives it no weight*."

[15] Nevertheless, it is submitted that the DLC made an adverse finding based on this alleged incident saying:

> "*However, the issue of Mr Meek seeking to be allowed to consume alcohol while on the premises raises the same issues as dealt with in 2015 and continues to show a lack of judgment on his part*."

[16] It is submitted that the evidence shows that Mr Meek no longer drinks on the premises but that he asked for a 'middle ground' when undertaking not to do so, seeking to be able to have a beer when not working. Saying that the appellant lacked judgement by seeking a 'middle ground', it is submitted, is not supported by the evidence and that the finding contributed to the appellant's lack of suitability is untenable.

Failure to comply with s 105(1)(j)?

[17] The DLC said that the appellant failed to submit a professionally produced noise management plan as required by a condition of its initial licence, failed to comply with fire trial evacuation schemes, failed to renew a food safety licence, failed to renew its annual building certification, and had a lack of food on the premises.

[18] In making adverse finding on these matters, it is submitted that the DLC exceeded its jurisdiction, and misdirected itself, and made an error of law in then relying on these findings.

(i) Noise management Plan and availability of food

[19] It is submitted that the DLC made an adverse finding when considering s 105(1)(j) of the Act, in forming the view that the appellant failed to have in place a professionally produced noise management plan within 12 months as required by condition (h)(iv) of its initial licence, that is, by the submission of the next renewal and at the latest by 9 July 2016.

[20] It is submitted that contrary to the DLC saying "*it should have been quite clear to the applicant what the condition meant*", the wording of the condition is ambiguous and not clear and does not refer to a 9 July 2016 date. Instead, it is submitted that the condition required the appellant to implement a plan within 12 months, but then referred to the need for the DLC to approve the plan prior to the licence renewal. Until that time the appellant was required to comply with its undertakings as to noise management, with the plan being considered as part of the renewal process, which it is submitted is what happened.

[21] It is submitted that the DLC also made an adverse finding that the range of food available at the premises was below the minimum standard required and contrary to the conditions of the licence.

[22] It is submitted by Mr Davies that only the Authority can consider enforcement applications and make adverse findings of fact where it is alleged that a licensee is in breach of its licence. It is submitted that a DLC has no such powers to make these adverse findings of fact. No applications have been made to the Authority in respect of any purported breach of the conditions of the appellant's initial licence, and the appellant has neither had the opportunity to prepare a defence, nor have the charges heard by a competent authority. In the absence of a finding by the Authority, it is submitted that considering the alleged non-compliance in the context of a renewal application was legally wrong and led to an unreasonable result.

(ii) Trial evacuation scheme, food safety and building compliance

[23] It is submitted that the evidence before the DLC is that Mr Meek implemented what he believed to be an alternative to holding six-monthly evacuations as required by the Fire Service Act 1975 and the Fire Safety and Evacuation of Building Regulations 2006. It is submitted that this alternative was based on a presentation by the region's Fire Safety Officer. It is further submitted that the Fire Safety Officer, in his evidence before the DLC accepted Mr Meek's understanding of his requirements may have been a genuine mistake.

[24] While it is accepted that he had failed to renew the premises' food hygiene certificate as required by the Food Act 2014, the appellant submits that a mitigating factor is the fact that the premises' food grade is the lowest possible allowing for the reheating of food.

[25] It is also accepted that the premises' building warrant of fitness, required by the Building Act 2004, was expired for approximately five months between 27 February 2016 and 28 July 2016, for which the appellant was fined $1000.00.

[26] It is submitted that while the DLC may legitimately take into account other matters when considering an application for the renewal of an on-licence, the matters in ss 131 and 105 are central to the DLC's evaluative task. As the DLC purports that the appellant has not met one of the elements of ss 131 or 105, it is submitted that any alleged breach must be justified in the context of those elements. Mr Davies for the respondent argued that the DLC has conflated the appellant's compliance with other enactments with its consideration of s 105(1)((j) of the Act relating to the appellant's systems, staff and training, and argued that the reference to "*comply with the law*" in s 105(1)(j) is intended to mean the law relating to the sale, supply and consumption of alcohol, and not other unrelated laws more generally. Compliance with the Fire Service Act 1975, the Food Act 2014, and the Building Act 2004, it is submitted, do not contribute to the object of the Act of minimising alcohol-related harm because they do not concern or relate to the sale and supply of alcohol. Further, these Acts have enforcement provisions to which an authority can avail itself in the event of a breach. Litigating compliance with these enactments, it is submitted, is not appropriate in the context of a renewal application.

[27] By making adverse findings about the appellant's compliance with the requirements of the Fire Service Act 1975, the Food Act 2014, and the Building Act 2004, for the purposes of assessing the element in s 105(1)(j), it is submitted that the DLC erred in law by taking into account irrelevant considerations.

(iii) Alleged failed controlled purchase operation

[28] The DLC said in its decision at [170] that:

> "*While the Committee heard about a controlled purchase operation during the hearing, the Committee discounted it when considering the evidence as it is currently before ARLA*."

[29] It is submitted that in contrast to where the DLC said it gave no weight to the hearsay evidence of Mr Meek allegedly drinking on the premises, the DLC only 'discounted' this controlled purchase operation (which was eventually withdrawn), indicating that the DLC considered the matter of the enforcement action when considering the appellant's suitability, albeit with a discounted weighting.

(iv) Failure to regard the previous operation of the premises

[30] In reaching its decision, the DLC noted at [174]:

> *"… that the applicant has undertaken steps to address, in the future, the many systemic failures that have been reported during the hearing. However, as noted in the decision New Zealand Police v Casino Bar No 3 Limited, (CIV 2012-485-149; [2013] NZ HC44), assessment of suitability includes not only the applicant's "proposals as to how the premises will operate", but also "its previous operation of the premises"*.

[31] The appellant submits that despite recognising the need to look at how the premises have been operated in the past, the DLC said at [164]:

> "*Mr Meek gave evidence of being a bar owner for some 17 years. Throughout the period from November 2013, when he purchased the Yot Club and where he traded under several Temporary Authorities until this hearing, Mr Meek has had issues with compliance. Mr Meek held himself up to be an experienced bar owner and operator. The Committee has seen little evidence of that throughout this hearing.*"

[32] It is submitted that the DLC's conclusion that it had seen little evidence of the appellants' experience as an operator of licensed premises is based on the so-called "issues of compliance" outweighing Mr Meek's 17 years' experience in operating licensed premises and his unblemished record despite the high risk nature of night club premises.

Standard of proof in evaluating evidence

[33] It is also submitted that the effect of refusing to renew an on-licence is equivalent to its cancellation. The seriousness of this outcome is such that the DLC ought to have applied a higher standard of proof as part of its evaluative function. It is submitted that after having afforded the evidence before it a proper weighting on the basis on this higher standard of proof, the DLC was then required to step back and consider the renewal application in light of the object of the Act. That is, having regard to the criteria in ss 131 and 105, and having balanced the evidence before it, the DLC was required to consider whether the grant of the renewal was consistent with the Act's object of minimising alcohol-related harm.

[34] In summary, the appellant submitted that:

> "*Taking into account the reasonable system of control envisioned by the Act's purpose, the seriousness of the consequences of not granting the renewal, the appropriate standard by which the evidence should have been assessed*

against, and the object of the Act, in our submission, the DLC erred in law when finding against the Appellant's suitability, for the following reasons:

(a) The DLC did not fairly balance the evidence it heard against the higher standard of proof required given the seriousness of the consequences of the decision to refuse the renewal, in accordance with the dicta in Spring[1] and GS Entertainment[2].

(b) The DLC failed to take account of relevant considerations, such as the Appellant's past conduct, experience, and previous operation of premises, as well as those other matters set out in Casino Bar[3] and section 131(1)(d) of the Act.

(c) The DLC failed to then step back and consider the properly weighted evidence and other matters against the object of the Act, and in particular, whether the grant of the renewal application would still achieve the Act's object."

[35] The appellant also submits that a reasonable licensing system invokes concepts of proportionality. It is submitted that the DLC determined the refusal to grant the renewal application was justified because of purported unsuitability of the appellant company's sole director. However, as the DLC erred in its evaluation of the evidence before it, the decision is disproportionate and unreasonable given the seriousness of the outcome of refusing to renew the on-licence.

First Respondent's submissions

[36] Mr Kee submits that he reviewed the s 129 report of the Licensing Inspector, Ms Cindy Norris (who reported on the application), and in his view the non-compliance matters highlighted in Ms Norris's report collectively show a pattern of non-compliance with the law and raise the issue of suitability.

[37] It is submitted that noise was a significant issue and was discussed broadly in the DLC hearing based on the noise complaints received by the DLC and the evidence of Mr Ross Shilling, witness for the applicant Rockaway Beach Limited, that the applicant will not comply with the District Plan.

[38] Mr Kee submitted that:

"*In the Inspector's view from the information submitted in the DLC hearing; there is a pattern of poor administration management leading to non-compliance issues. Therefore the suitability of the applicant is in question; and does this translate to being unsuitable to hold an alcohol licence as a privileged position" (sic)*.

[39] Mr Kee also submitted that a further probationary period of twelve months from the determination of the Authority's decision might be a balanced consideration. But such a truncated period, Mr Kee submits, should be subject to conditions to ensure a strong collaborative working relationship between the appellant, the Inspector and the Raglan Police.

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[1] *Spring v King* NZLLA 1414/93
[2] *G S Entertainment Limited* [2014] NZARLA 168
[3] *New Zealand Police v Casino Bar (No3) Ltd* [2013] NZHC 44

Second Respondent's submissions

[40] Sergeant Dalziell-Kernohan submitted that the Police do not believe that the DLC erred in its decision having considered all of the evidence put before it. In his submission, Sergeant Dalziell-Kernohan submitted that "*Police believe that significant evidence was presented to the Committee and the committee properly canvased all the criteria in 131 in reaching its decision.*"

[41] The Police also referred the Authority to a range of previous decisions of the Authority. In doing so, however, the Police made no submissions on the application of these various decisions to the present appeal.

Authority's Decision and Reasons

Onus on Appeal

[42] An appeal brought pursuant to s 154 of the Act is by way of rehearing (s 157). The applicable principles are set out in *Mangere-Otahuhu Local Board* v *Level Eighteen Limited* [2014] NZARLA PH 627-228 where this Authority said at [15]:

> *"The onus lies on an appellant to satisfy the appellate body that the decision in the original hearing was wrong. Often the ultimate issue is whether or not the error complained of resulted in a miscarriage of justice."*

[43] *Mangere-Otahuhu Local Board* reflects what the Supreme Court said in *Austin, Nichols & Co Inc v Sichting Lodestar* [2008] 2 NZLR 141, at 146:

> *"Perhaps the most familiar general appeals are those between courts. …. Similar rights of general appeal are provided by statute in respect of the decisions of a number of tribunals. The appeal is usually conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged. … In either case, the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.* (emphasis added)

Evaluative function

[44] While the appellant bears an onus of satisfying the Authority that we should reverse the decision of the DLC, the approach that was required to be taken by the DLC, and now the Authority on appeal, is an evaluative one. In *Re Venus NZ Ltd* [2015] NZHC 1377 Heath J said at [52][4]:

> *[52] With respect, the conclusion that there is an onus on an applicant to satisfy the Authority that the issue of a proposed off-licence is unlikely to reduce the amenity and good order of the locality to more than a minor extent is not justified by the extract from Kós J's judgment in Utikere v IS Dhillon & Sons Ltd, on which the Authority relied. As I read that extract, the Judge is emphasising the need for the Authority to consider cogent evidence when forming its opinion*

[4] citations omitted

about the likelihood or otherwise of a reduction in the amenity and good order of the locality.

[53] … It seems to me that question whether amenity and good order will not be materially reduced is one on which a judgment must be formed by the Authority, on the facts of a specific case, as opposed to something that an applicant is required to prove on a balance of probabilities. The difficulties inherent in proving a negative support that view.

…

[56] Section 106(1)(h) of the 2012 Act requires the Authority to form an opinion that "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". That is one factor to be taken into account in determining whether a licence should be granted. To the extent that Re Hari Om held that there was an onus on an applicant to demonstrate that there would be no material reduction to the good order and amenity of the location, I consider that it was wrongly decided. In my view, no such onus exists.

[57] First, s 105(1)(h) and (i) of the 2012 Act, both of which deal with "amenity and good order" considerations, requires the Authority to form an "opinion". The need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance of probabilities that a relevant fact has been proved.

[58] Second, the existence of an onus on some aspects of the s 106(1) criteria is inconsistent with the nature of the evaluative task contemplated by s 106 of the 2012 Act, to determine whether the amenity and good order criterion has been met. Section 106(1) refers to factors to which the Authority "must have regard".

[59] Third, s 105(1) of the 2012 Act contemplates the same type of evaluative exercise as is undertaken under s 106(1). The factors listed in s 105(1) are taken into account by the Authority in determining whether the application succeeds.

[60] There is an underlying assumption (which I take from the way in which criteria are expressed) that the Authority will exercise an inquisitorial role in determining the appropriateness of the grant of a particular licence having regard to all relevant factors. Although the 2012 Act does not express the powers of the Authority in that way, the breadth of its functions, (which go beyond judicial determinations) suggests that the application of rules involving onus of proof may not be appropriate. For example, powers of investigation are explicitly conferred by s 174, albeit ones that are delegated to one of its members or some other qualified person.

[61] In my view, the Authority erred in requiring Venus to establish that the amenity and good order criterion had been established. It was obliged to inquire into that consideration and to form its own opinion on the basis of the evidence adduced.

[45] It is clear from *Venus* that it is for the DLC, and now the Authority in this appeal, to evaluate the criteria in s 131 (including the relevant criteria in ss 105 and 106), and form an opinion on whether a licence should be granted. The DLC's and Authority's opinions, however, are to be based on facts. This raises a question about the standard of proof, to which the respondent refers.

Standard of proof

[46] The appellant submits that because the effect of refusing to renew an on-licence is equivalent to its cancellation, the DLC ought to have given a '*higher standard of proof*' to the evidence it considered as part of its evaluative function, and in particular, the evidence that related to alleged breaches by the appellant as applicant.

[47] The Appellant has referred the Authority to *Spring v King* NZLLA 1414/93, which involved an application by the Police seeking the cancellation of a manager's certificate. *Spring v King* involved a ruling that a prima facie case was not made out against Mr King in prosecutions under the Act. This raised a question of 'double jeopardy' in the context of a subsequent application for cancellation of a manager's certificate. There, the Authority rightly noted that the cancellation of a General Manager's Certificate on the grounds set out in s 135 of the 1989 Act (which is equivalent to s 285 of the present Act), is not a punishment in respect of an offence. Nevertheless, the Authority said:

> *"When assessing the evidence on a Police application for cancellation or suspension of a manager's certificate the Act does not require that the Authority be satisfied beyond a reasonable doubt as to the alleged wrong doing. However, when the result of the Authority being satisfied that someone is not suitable to hold a manager's certificate can be loss of employment, then the seriousness of the consequences of the Police succeeding on such an application means the standard of proof must be very close to that of a criminal prosecution. In this instance there is a very real doubt in our minds as to whether Mr King knew that liquor was going to be sold from the premises of "The Club" on the night of 7 July 1992 in his absence. He is entitled to be given the benefit of that doubt and accordingly the Police application for cancellation is refused."*

[48] In *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, the Supreme Court held that stronger evidence is required of more serious allegations before the issue in question can be proved to the reasonable satisfaction of the decision maker. As McGrath J put it at [98]:

> "*The civil standard of proof generally applies in civil proceedings even if the facts in issue, including the consequences if they are proved, are serious. As Dixon J put it in a classic passage in Briginshaw v Briginshaw:*[5]
>
> > "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law

[5] (1938) 60 CLR 336 at pp 361 – 362

> no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

[49] This is why the standard of proof is that described in *Triveni Puri* [2012] NZHC 2913, namely civil standard of 'on the balance of probabilities' but applied more flexibly with allegations productive of sanctions requiring 'stronger evidence'. As stated by Kós J at [25]:

> "…*And it is clear also such an approach – requiring "stronger evidence" – applies in this jurisdiction when considering the cancellation of a licence or certificate."*

[50] The application before the Authority, of course, is not an enforcement action. Nevertheless, the risk of error (to which the standard of proof is a safeguard), is the risk of an erroneous sanction in the form of non-renewal. The outcome is not merely a civil redistribution of resources where the risk of error can be regarded with relative equanimity as Elias CJ put it in *Z* at [50].

[51] The appellant has also referred the Authority to *G S Entertainment Limited* [2014] NZARLA PH 168, which involved an application for the renewal of an existing on-licence which was objected to by a trade objector. The objections involved allegations of the owners of the premises frequently being intoxicated in licensed premises under their control. There were allegations of the management of premises ignoring alcohol abuse incidents such as an intoxicated dancer vomiting in a changing room in the presence of an owner who was said to have just ignored her. And there were allegations of dancers being encouraged to ply intoxicated patrons with alcohol to the extent that they would fall asleep in the private rooms and then be charged for staying in the rooms for an extended period. There the Authority said at [31 -32]:

> *"… if the allegations made by the various witnesses for the objector could lead to the refusal of these applications on suitability grounds then this must be regarded as a "serious case" where stronger evidence is necessary.*
>
> *Suffice to state, that the evidence adduced by the objector fell well short of the Triveni Puri standard. The fact that none of the reporting agencies opposed this application detracted enormously from the case for the objector".*

[52] *G S Entertainment* is consistent with *Z* in that in a renewal application such as this, where allegations are made which may result in the application being refused, the DLC or Authority must be persuaded of the occurrence or existence of the facts underlying the allegation before it is to be relied upon.

"Must have regard"

[53] Having established a relevant fact, however, is not the end of the matter. As stated by Heath J in *Venus* (supra) at [57], the need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance of probabilities that a

relevant fact has been proved. What the decision maker is required to do when granting a renewal is actively and thoughtfully consider the relevant matters in ss 131. This, of necessity, requires the decision maker to correctly understand the matters to which he or she is required to have regard. Where a relevant fact is relied on in support of such considerations, 'stronger evidence' is required where the consequence is cancellation or non-renewal of the licence.

[54] The starting point when considering an application for a renewal is s 131 of the Act. Section 131 sets out the matters to which the DLC '*must have regard*'. The words "must have regard" were extensively canvassed by Gendall J in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* ([2016] 2 NZLR 382 at [75] et seq):

> *"[75] It is trite to say that having regard to something does not put the position as high as giving effect to it, which is synonymous with a directive to "implement". Care must be taken not to elevate a requirement to "have regard to" to the standard of giving effect to. The standard "have regard to" has been described as a "jurisdictional prerequisite" to the exercise of a discretion, and involves an "active intellectual process" in which relevant factors are afforded the decision maker's genuine consideration.*
>
> *[76] In Canada it has been held that while the decision maker is not bound to follow something in relation to which it is required to have regard, it must consider that matter carefully in relation to the circumstances at hand, the objectives and statements as a whole, and what they seek to protect. In New Zealand it has held there is not "any magic" in the words and that they require the decision maker to give genuine attention and thought to the required matters.*
>
> *[77] This necessarily requires the decision maker to correctly understand the matters to which he or she is directed to have regard. However, in having regard, the weight to be given to statutory criteria will generally be a matter for the decision maker. Though in some cases it is apparent that there may be one or more factors which are "critical or fundamental" to the making of a decision. However, the requirement to have regard to a set of factors does not preclude having regard to other relevant matters, such as the purpose and object of an Act.*
>
> *[78] From this discursive analysis, in my view 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."*

[55] Similar considerations apply to s 131 of the Act in the case of a renewal. The underlying assumption which can be taken from the way in which the criteria in s 131(1) are expressed, is that the DLC (and the Authority on appeal), is to exercise an evaluative function role in determining the appropriateness of renewing a licence "*having regard to*" all relevant factors.

[56] Having said that, even where an allegation which goes to one of the criteria in s 131 or s 105 is considered serious, as Gendall J said in *J & G Vaudrey Ltd* (supra), the weight to be given to the criterion in question (as opposed to the underlying allegation informing the criterion) is generally within the discretion of the decision maker. And, as we said *in Jason Peter Loye* NZLLA PH 300/2006, the exercise of a discretion is not generally appealable, but is subject to judicial review on administrative law grounds.

[57] After having regard to the criteria in ss 131 and 105, and having balanced the evidence before the DLC, the Authority is then required to ask of itself whether the grant of the renewal application is consistent with the Act's object? The role of the appellant is to satisfy the Authority that in asking this question, the decision of the DLC is wrong and the Authority is justified in interfering with it.

Criteria in the Act

[58] The criteria in question in this appeal, are the suitability of the applicant and whether the applicant has appropriate systems, staff, and training to comply with the law. The criterion "suitability of the applicant", it is submitted, has been conflated with the latter "issues of compliance" relating to the appellant's systems, in that these issues have also been used by the DLC in considering the appellant's suitability, and that these have outweighed Mr Meek's 17 years of experience and his unblemished record.

I. Section 105(1)(b) – Suitability of applicant

Lack of Judgement

[59] The appellant's essential complaint here is that the DLC formed the view that the appellant lacked judgement in asking for a middle ground, accepting the restriction on him drinking while working, but being able to have a drink when not working.

[60] The Authority agrees that without more, the mere asking of a question about having a drink after work does not demonstrate a lack of judgement on the part of the appellant. Having said that, the Authority is not satisfied this issue contributed to the DLC's assessment of suitability or that this was an overwhelming consideration by the DLC in assessing the appellant's suitability.

[61] The question of the appellant's director drinking on the premises was an issue when the appellant company was first granted a licence in 2015. At that time the decision of the Authority in *Ranfurly Hotel Limited* [2013] NZARLA PH 490-491 was discussed by the DLC where the Authority said at [24]:

> *"There was a suggestion that Mrs Jenkins and Mr Adams drank alcohol on the premises. There was no direct evidence that they did so whilst either of them was acting as a duty manager. Nevertheless, whilst there is no statutory prohibition, the Authority takes a dim view of licensees or persons associated*

with licensees drinking on their own premises. This is because s 115(4) of the Act requires licensees to take all reasonable steps to enable duty managers to comply with their obligations in terms of s 115. Where licensees or persons associated with them drink on their own premises, difficulties can arise for the duty manager. Licensees should not put duty managers in a position where they are unable to comply with s 115 of the Act."

[62] This position is not challenged by the appellant. The DLC said that should it the application be granted, the condition preventing Mr Meek from consuming alcohol while on the premises would remain in place. That is, had the application not be refused for other reasons, this would simply have been a condition on the licence. In this way, the issue of drinking on the premises and the questioning of the judgement of the appellant on this matter does not appear to have been a contributing factor in respect of the 'suitability' criterion in s 105.

[63] The other complaint is that the DLC has failed to consider other relevant factors when forming a view of suitability. As the appellant pointed out, the "suitability" element was considered in *New Zealand Police v Casino Bar (No3) Ltd* [2013] NZHC 44 where Dobson J said at [34-35]:

"[34] …submissions for the Police cited a checklist of matters likely to be relevant to an assessment of suitability from the text Dormer & Sherriff Sale of Liquor. The list is as follows:

(a) previous convictions, especially those involving liquor or those raising questions as to honesty or propensity for violence;
(b) character, reputation;
(c) matters raised in reports filed under s 11[6];
(d) previous unlawful operation of premises;
(e) any of the above in relation to a person other than the applicant who is involved in the application (as a director, manager, etc) or is intended to be employed by the applicant;
(f) breach of an undertaking; and
(g) misleading information in an application and/or misleading public notice.

[35] Not all of the criteria from Dormer & Sherriff will be relevant in every application where objection is raised to the suitability of an applicant. However, it is an appropriate starting point for the range of matters that the LLA would need to traverse in assessing whether the onus on an applicant to establish suitability, where it is challenged, has been discharged. These matters are significantly wider than the applicant's proposal as to how the business will operate."

(footnotes omitted)

[64] The Authority is satisfied that the DLC knew that Mr Meek has no convictions. The Inspector's report states this and the DLC expressly discounted an alleged failed controlled purchase operation that was then before the Authority (and later withdrawn).

[6] Now s 103

[65] The DLC also had before it letters provided by Mr Meek including supportive letters from Rachel Bidois a hospitality peer of Mr Meek's, Mr Young of the Raglan Surfing School, and Ms Patty Michlie. Amongst other things, these go to Mr Meek's character and reputation. Accordingly, the Authority is satisfied that the DLC considered the appellant's character and reputation.

[66] In respect of the Inspector's s 103 report, the Inspector states that the issues of compliance with the Fire Service Act 1975, Food Hygiene Regulations 1974 and Building Act 2004 as well as the initial licence condition relating to the need for a noise management plan "*demonstrate Mr Meek's poor attitude to legislative compliance matters and his own licence conditions, even after reminders*." The Police, in their report, refer to issues potentially impacting on amenity and good order but do not challenge the appellant's suitability. In this regard the DLC found that there was insufficient evidence to confirm that the amenity and good order is likely to rise by more than a minor extent should the application be refused.

[67] Before the Authority, the appellant accepted that he had failed to renew the premises' food hygiene certificate as required by the Food Act 2014. He also accepted before the Authority that premises' building warrant of fitness as required by the Building Act 2004, was expired for approximately five months between 27 February 2016 and 28 July 2016. And, it was accepted that the requirement to hold a six-monthly fire evacuation as required by the Fire Service Act 1975 and the Fire Safety and Evacuation of Building Regulations 2006 was not met.

[68] The Authority is satisfied that the matters set out by Dobson J in *Casino Bar* have been considered by the DLC albeit perhaps not in an overt 'checklist' fashion.

[69] The DLC's concern with the appellant's compliance with this other legislation does not mean that the appellant's past record was ignored or that the DLC did not have regard to the appellant's unblemished record. As stated in the Inspector's report:

> "*Mr Andrew Meek is the sole Director of the applicant company, Rockaway Beach Limited. Mr Meek's experience extends over 13 years, he has owned and operated night clubs and taverns within the central business district of Auckland. In addition to the Yot Club, he owns Ink, a night club located in Karangahape Road in Auckland. Mr Meek holds a current manager's certificate which he has held for a number of years.*
>
> *No criminal convictions have been recorded against the applicant."*

[70] The concern that past issues of compliance with these other Act having overpowered Mr Meek's otherwise unblemished record of operating premises in compliance with the Act goes to the weight to be given to those matters when assessing suitability. This is a matter of discretion for the DLC which is, as already noted, not generally appealable.

II. S 105(1)(j) - Systems, staff, and training

Noise Management Plan

[71] Condition (i)(iv) of the appellant's initial licence provided that:

> "*The licensee shall implement a professionally produced Noise Management Plan within 12 months from the date of issue. A copy of the plan shall be submitted to the Secretary of the Waikato District Licensing Committee, for approval by the Committee, prior to the renewal of the licence. In the meantime the licensee shall abide by the undertaking given to the Committee on 20 March 2015 in respect to noise levels. That undertaking, set out both at paragraph 74 and 110 of this decision, includes:*
>
> - *That there shall be no outside music after 10.00pm on any day, and*
> - *That there shall be no music anywhere on the premises after 1.00am on any day."*

[72] The Authority does not accept that the DLC was wrong in making an adverse finding on the issue of the noise management plan. The intent of the condition in the licence is clear. A noise management plan was to be implemented by 9 July 2016 being 12 months from the date of the issue of the licence. It was also required to be submitted prior to the renewal, which if granted, would have run from 10 July 2016.

[73] The evidence before the Authority of Mr Ross Shilling, an audio engineer with Red Tech Ltd, a firm engaged by the appellant "*to lock down the noise levels at the premises to an acceptable level*" stated that the premises is unlikely to meet the District Plan Noise levels. In a report dated 22 February 2017, Mr Shilling sets out the steps to be taken, however, to ensure that noise limits can be met. In doing so he says "*A robust NMP will be written once the sound system has been reengineered with the DSP and will include the following…".*

[74] In response to a question from Ms Norris as to whether the report compiled by Mr Shilling is to form the noise management plan, Mr Meek said "*It's my Noise Management Plan, yes*".

[75] Annexed to Mr Meek's affidavit in support of his application for renewal, Mr Shilling has provided a progress report dated 24 March 2017. In that progress report Mr Shilling says that he can confirm that "*some of the interim noise management plan was implemented prior to the 9th of March*" and that "*The final NMP will be locked down over the coming weeks as we continue to monitor and lock systems down…. A draft NMP is included with more detail to be included over the coming weeks. The items in red may change slightly. Please note that the NMP will change and be updated from time to time as we work through the process"*.

[76] At the hearing before Authority, Mr Kee said that the evidence of noise complaints annexed to Ms Norris's s 129 report did not raise any issue of noise with the premises. The evidence shows that three out of 13 noise complaints received by the Council over approximately 21 months resulted in an 'excessive noise direction'. That is, the licensee was told to turn the music down and this was done. There is no evidence of further action having been taken. The Authority is not satisfied that the evidence establishes a problem with noise from the premises.

[77] This issue of noise, however, is a matter that expressly goes to amenity and good order in s 106 of the Act on renewal. It is for this reason that the DLC looked to have a noise management plan in place. While the amenity and good order of the premises is not in question in this application, the failure to comply with a condition of

the initial licence is, and the compliance with that condition, in the Authority's view, is relevant to what systems are in place.

[78] The Authority is satisfied on the evidence that as at 9 July 2016 there was no noise management plan in place. As late as 22 February 2017, based on the report by Mr Shilling, while elements of the plan were certainly in place, a "*robust NMP*" had not yet been written. The Authority simply does not find it credible that Mr Meek understood the condition in the initial licence to mean that he only had to have a plan ready for the hearing of the renewal. Given that the hearing date was adjourned, the appellant cannot interpret, in hindsight, that the time required to comply was also extended accordingly.

[79] Nor does the Authority accept that the DLC could not consider this matter because no enforcement action had been taken in the interim period and a determination made by the Authority. There could have been no breach amenable to enforcement action until 9 July 2016. That does not mean that the lack of a noise management plan could not have been considered by the DLC. The fact that there was no management plan in place as per the conditions of the licence, following the discussions in the 2015 application hearing, is a matter that the DLC was able to consider when considering s 105(1)(j) of the Act in order to be satisfied the appellant was able to address potential noise issues.

[80] The Authority does not find the consideration of the failure of the appellant to implement a noise management plan condition to be unreasonable or an error of law.

Availability of Food

[81] Condition (d) of the licence provides that:

> "*A range of food choices must be readily available at all times that the premises are open. Menus must be visible and food needs to be actively promoted. A minimum of three types of food should be available. Alternatively, the range of food should include such items as panini, pizza, lasagne, toasted or fresh sandwiches, wedges, pies, filled roll, and/ or salads".*

[[82] In *Empire Hotel Petone Limited* [2008] NZLLA PH 1652, which was relied on by the DLC, the Authority said at [38]:

> "*We believe that it is time to introduce minimum food standards for licensed premises (other than restaurant style licences), along the following lines:*
>
> - *The range of food must be readily available at all times that the premises are open.*
> - *Menus must be highly visible and food should be actively promoted using a variety of mediums, e.g menus on the tables, a board, or food on display. Food should also be advertised in any outdoor areas.*
> - *Bar staff are expected to actively promote the range of food options.*
> - *A minimum of three types of food should be available. e.g paninis, pizzas, lasagne, pies, toasted or fresh sandwiches, wedges, filled rolls, and/or salads. (This does not mean three types of pie.)*
> - *It is acceptable to have a menu from neighbouring premises to provide for one or two of these options, however, there must be a back up option that could be produced on site.*

- *A minimum standard to be accepted on site would be a microwave or fryer and utensils, and a supply of a variety of 'long life' meals that do not require temperature control, or tins of soup and rolls. There should be an area for preparation of food and utensils for service of the food."*

[[83] What is relevant to an application for renewal is that the applicant is able to satisfy the DLC that food is available at all time in accordance with s 53 of the Act. Proven breaches of the Act are relevant to the DLC's consideration. Even without breaches of the Act, however, systems for making food available is a relevant consideration for a decision maker under s 105(1)(j).

[84] In the present case, the evidence before the Authority is that the "*Yotty's Food Menu*" consists of two types of meat pies (which retail for $5.00), sausage rolls ($5.00) and pizza ($10). That is, in the absence of any breaches of s 53 having been established, food appears to be available. While the Authority has concerns over whether this is sufficient for the purposes of the Act, the Authority has not has the benefit of any argument on the point.

[85] There has been no enforcement application brought against the appellant for breach of the condition of the licence. Unlike the condition relating to the noise management plan, the avenue was open for enforcement action to be taken following the Inspector's monitoring visits to the premises. No findings as to a breach of this condition have been made. While the Inspector may have been frustrated as to what she perceived to be excuses by the appellant, no action was taken by her. In this regard, the Authority agrees that in the absence of a finding by the Authority, these alleged breaches are not something that evidences a lack of systems on the part of the appellant. The evidence around a lack of food is not sufficiently strong.

Trial Evacuation scheme, food safety and building compliance

[86] The appellant has further submitted that the words "*comply with the law*" in s 105(1)(j) is restricted to systems, staff, and training which relate to the sale or supply of alcohol specifically, and not to the law more generally.

[87] Section 5 of the Interpretation Act 1999 requires the meaning of an enactment to be ascertained from its text and in the light of its purpose.

[88] The appellant formed the view that s 3 of the Act is the most helpful when interpreting s 105(1)(j) in that s 3 sets out the Act's purpose and is closely related to its object. The reference in s 3, it was argued, was intended to mean the law relating to the sale, supply and consumption of alcohol and not to other laws more generally.

[89] The Authority does not find this compelling. The reference in s 3 relates to the law relating to the sale, supply and consumption of alcohol for no other reason than that is to what the reform of the law relates. The Act is not intended to reform all law. Section 3 does not assist, therefore, in understanding what the words "the law" mean in s 105(1)(j).

[90] For similar reasons, the contrasting words "this law" in s 105(1)(a) do not provide much assistance as the object referred to can only be the object of "this" Act. Section 105(1)(a) would make little sense if the drafters referred instead to the object of "the law".

[91] The Authority agrees with the appellant that generally words will be given their natural and ordinary meanings. In this regard, s 105(1)(j) does not refer to appropriate systems, staff and training to comply with "this Act". On their face, therefore, the words in s 105(1)(j) have a wider meaning than just those systems and training relevant to the Act.

[92] The appellant submitted that in *Social Group Limited v Zander* [2016] NZARLA PH 457, the Authority considered that s 105(1)(j) related to the Act specifically and not the law more generally. The Authority does not find *Zander* to be of assistance. There the Licensing Inspector opposed a variation to the layout of premises where it was proposed that the licensed area include an outdoor area adjacent to the footpath to be licensed. The Inspector's' opposition was based, inter alia, on the appellant not having appropriate systems to prevent patrons from drinking outside the licensed area, which happened to be an alcohol ban area. The appeal failed because the appellant sought to convert the appeal into a second application in light of developments since the decision of the DLC.

[93] In any event, the appellant was not able to satisfy the Authority how it would prevent patrons from drinking in the liquor ban area. In doing so, the Authority was focused on how the applicant would restrict drinking to the premises (rather than breaches of the local authority's alcohol ban area), and heard no argument as to the interpretation of the words "this Act" for the purposes of s 105(1)(j).

[94] The purpose of the Act is designed so that its effect and administration helps to achieve the object of the Act which is that the sale, supply and consumption of alcohol should be undertaken safely and responsibly, and that the harm caused by the excessive or inappropriate consumption of alcohol should be minimised. The object of the Act has two limbs. The first limb, that the sale, supply and consumption of alcohol should be undertaken safely and responsibly, is wide and is not constrained by the definition of harm caused by the excessive or inappropriate consumption of alcohol.

[95] As set out in s 100, an application for a licence must be accompanied by statement that the owner maintains an evacuation scheme as required by s 21B of the Fire Service Act 1975, and that the proposed use of the premises meets the requirements of the Resource Management Act 1991 and the building code. As these requirements apply in any event, the Authority considers that it was intended by Parliament that these enactments are specifically relevant to the purpose of helping to achieve the object of the Act. In particular, these requirements are salient to the first limb in the object of the Act as regards the safe and responsible sale, supply and consumption of alcohol on the premises.

[96] Similarly, ss 51 to 53 specifically require the holder of an on-licence to ensure that at all times when the premises are open for the sale and supply of alcohol that a range of non-alcoholic and low-alcohol drinks are available, along with a reasonable range of food. The fact that food hygiene certificates are required goes to provision of food for the purposes of s 53 and an applicant's systems, for complying with the law. The provision of food to the public, that has been hygienically prepared, is of relevance when granting an application or its renewal.

[97] Before the Authority, the appellant accepted that he had failed to renew the premises' food hygiene certificate as required by the Food Act 2014. The Authority does not consider the fact that the premises' food grade is the lowest possible allowing for the reheating of food to be a mitigation. It may mean that the

requirements are lower than others, but it does not of itself provide an explanation for non-compliance.

[98] It was also accepted before the Authority that premises' building warrant of fitness as required by the Building Act 2004, was expired for approximately five months between 27 February 2016 and 28 July 2016.

[99] And, it was accepted that the requirement to hold a six-monthly fire evacuation as required by the Fire Service Act 1975 and the Fire Safety and Evacuation of Building Regulations 2006 was not met.

[100] The reasons why these failures occurred goes to the weight to be given to each failure under s 105(1)(j), rather than the fact of failure. Having acknowledged these failures, the Authority considers they are relevant and able to be considered when having regard to s 105(1)(j) of the Act.

[101] The evidence shows, however, that a building warrant of fitness was in place on 22 February 2017, that is, before the hearing. A certificate of registration from the Environmental Health Officer is dated 12 January 2017, and the Fire Service confirmed on 22 February 2017 that the premises comply with an approved evacuation scheme. The evidence of Mr Meek is also that he took some steps to confirm that having staff fully conversant with the fire evacuation scheme, in lieu of undertaking evacuations every 180 days, was a way of ensuring compliance.

[102] The Authority is satisfied that any breaches were remedied before the hearing.

Controlled purchase operation

[103] The Authority is not satisfied that the DLC wrongly had regard to the enforcement action which was made to the Authority (but which had not yet been heard and which was eventually withdrawn), when assessing the appellant's suitability, albeit with a discounted weighting. The appellant is reading too much into what the DLC has said in its decision. It was unnecessary for the DLC to then go on and say it gave no weight to the controlled purchase operation (as it did in respect of hearsay evidence about Mr Meek allegedly drinking on the premises). There is nothing before the Authority to persuade it that the DLC meant anything other than what it said:

> "*While the Committee heard about a controlled purchase operation during the hearing, the Committee discounted it when considering the evidence as it is currently before ARLA*."

[104] Similarly, the Authority takes no notice of that application and the fact that it was made and withdrawn is given no weight either way.

Previous operation of the premises

[105] In reaching its decision, the Authority agrees that an assessment of suitability includes consideration of the appellant's previous operation of the premises. In this regard, the fact that Mr Meek has owned bars with an unblemished record for some 17 years stands in his favour when assessing suitability. The weight to be given to that, however, remains a matter for the DLC, and now the Authority for the reasons already addressed.

[106] By way of summary, the Authority considers that:

(a) the mere questioning by the appellant about his ability to drink when off duty, of itself, does constitute a lack of judgement sufficient to go to suitability but nor was it a significant contributing factor going to the issue of suitability;

(b) the character and reputation of Mr Meek is not in question beyond the issues raised about compliance with the Food Act 2014, Building Act 2004, and Fire Service Act 1975;

(c) the appellant has failed to meet the requirements of his licence to have a noise management plan in place by the time of his licence renewal;

(d) the appellant appears to have had food available in compliance with s 53 of the Act;

(e) the appellant has failed to meet the requirements of s 21B of the Fire Service Act 1975 as regards evacuation procedures, and the requirements of the Food Act 2014 and Building Act 2004, but these matters of compliance do not appear to have been done deliberately and have been remedied;

(f) an unproved failed controlled purchase operation is not relevant and is given no weight; and

(g) Mr Meek has a 17-year history of managing high-risk licensed premises with no breaches of the Act;

[107] Stepping back and considering the renewal application in light of the object of the Act, after having regard to the criteria in ss 131 and 105, the concerns of the DLC centred around the appellant's lapses relating to Food Act 2014, Building Act 2004, Fire Service Act 1975, and its initial licence as regard a noise management plan being implemented. Against this is the experience of the licensee's sole director and the fact that he has not breached the Act over the course of his career.

[108] The Authority does not consider that the evidence shows these lapses to have been deliberate or wilful. On balance, however, based on the evidence before the DLC the Authority is satisfied that grant of the renewal is consistent with the Act's object. In forming this view, the decision of the Authority is finely balanced.

[109] For the reasons set out above, the appeal is allowed. Pursuant to s 158 of the Act, the decision of the DLC is reversed

[110] The outstanding issue is the licensee's noise management plan. It is apparent from the evidence that steps have been taken to complete this plan. The evidence of Mr Shilling before the DLC is that as at 24 March 2017 a draft noise management plan is in place and a final plan was expected to be "locked down over the coming weeks". It is not apparent that the noise management plan has been completed as requested by the DLC. The plan needs to be completed as a matter of priority.

[111] Recognising that the licensee has continued to trade pending this appeal, the Authority directs that licence be renewed for a term expiring on 10 July 2018, which would have been a period for two years since the expiry of the initial licence, in order

to enable the DLC to be satisfied that a noise management plan is in place by that date. Condition (i)(iv) is modified accordingly to read:

> *"The licensee shall implement a professionally produced Noise Management Plan approved by the Waikato District Licensing Committee, no later than 10 July 2018. In the meantime, the licensee shall abide by the undertaking given to the Committee on 20 March 2015 in respect of noise levels. That undertaking, set out at paragraph 74 and 110 of the 2015 decision of the DLC includes:*
>
> - *That there shall be no outside music after 10.00pm on any day; and*
> - *That there shall be no music anywhere on the premises after 1.00 am on any day."*

DATED at WELLINGTON this 27th day of November 2017

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