

[2014] NZARLA PH 511-512

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by **LINWOOD FOOD BAR LIMITED**, pursuant to s.18 of the Act for renewal of an on-licence in respect of premises situated at 35F Riccarton Road, Christchurch, known as “Richey Bar”

AND

IN THE MATTER

of an application by **LINWOOD FOOD BAR LIMITED**, pursuant to s.16 of the Act for variation of the conditions of an on-licence in respect of premises situated at 35F Riccarton Road, Christchurch, known as “Richey Bar”

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole

Member: Mr D E Major

HEARING at CHRISTCHURCH on 14 July 2014

APPEARANCES

Mr R W Maze – for the applicant

Constable S J Joy – NZ Police – in opposition

Miss J Davison – Christchurch District Licensing Inspector – in opposition

Mr P N Shaw – Medical Officer of Health – in opposition

Objectors: Mr Y Lallu

Mr N J Casey (Conference Trust)

RESERVED DECISION OF THE AUTHORITY

Application

[1] There are two applications for consideration. The first is an application dated 17 December 2013 for the renewal of the on-licence issued in respect of the premises at 35F Riccarton Road, Christchurch, known as “Richey Bar”. The second application is effectively the resumption of a hearing of an application by the applicant for the variation of conditions pertaining to the on-licence. The application sought to extend the closing hours pertaining to the premises from 2.00 am to 3.00 am. The Authority notes that the premises are subject to a resource consent which

requires the premises to close at 3.00 am. Thus, in order to comply with s.170 of the Sale of Liquor Act 1989, the maximum hours which the Authority could order is a closing time of 2.30 am.

[2] On 29 October 2013 five applications pertaining to the premises and its general manager were determined – [2013] NZARLA PH 1069-1073. Two applications were brought by the Police and the Inspector seeking the suspension of the on-licence and a variation of its conditions. Those enforcement applications alleged that the premises had been conducted in breach of ss.167(1) and 168(1) of the Act and condition (d) of the licence. Thus, it was clear that as at 29 October 2013 intoxication issues were of concern. Further, it was alleged that the food supplied in the premises did not comply with the licence.

[3] By consent, the on-licence was suspended for two days. The application seeking the variation of the terms of the on-licence was refused as it was appreciated that the current applications would shortly come before the Authority. The variation application brought by the licensee seeking a tavern-style licence (rather than an entertainment licence) was granted; but the balance of that application (seeking an extension of hours) was adjourned to this hearing.

[4] The Authority's decision notes that each enforcement application alleged the licensee's unsuitability. Thus, at that time suitability was an issue. It follows that suitability would also be an issue when the application for the renewal of the licence and a variation of its hours was determined by the Authority. Indeed, in respect of these applications suitability becomes an even greater issue as the applicant is obliged to establish its suitability if the applications are to be granted: see, for example, *Page v Police* (unreported) HC Christchurch, AP 84/98 – 24 July 1998 where Panckhurst J stated (*inter alia*) that:

“An applicant for an on-licence must demonstrate his or her suitability. In other words what is required is a positive finding. That implies an onus on the applicant to demonstrate suitability.”

Page v Police concerned an application for an on-licence; but the same principle applies to an application to renew an on-licence.

[5] Since the hearing of 29 October 2013 the applicant has reformed the way in which the premises operate in two important ways. First, the previous general manager has been replaced with a new and experienced manager: Nathan Wilkins. Second, security has been upgraded by the appointment of Absolum Security Limited which is operated by an experienced security guard, namely Duncan Absolum.

[6] Nevertheless, the sole director of the applicant, Yang Zhang remains inexperienced in the licensing industry. He has not undertaken any training to obtain his LCQ or a General Manager's Certificate. This is despite it being apparent as at 29 October 2013 that his personal inexperience was creating problems in the operation of the premises. Whilst Mr Zhang has appointed an experienced general manager, it is apparent that when the business is trading Mr Zhang is present undertaking duties such as cleaning, collecting glasses, cleaning up the car park at the end of the evening and similar activities. He acknowledged that he does not have a good relationship with the Inspector. Both he and Mr Wilkins insisted that the premises (principally a dance venue now for students and those under the age of 30) is not a high risk venue. In this regard, both Mr Zhang and Mr Wilkins thought that the premises would not be in the high risk category because of the management

systems employed. In this regard they misunderstood that the nature of the business itself is high risk: the risk can be alleviated by good management practices.

[7] It was disturbing to note that Mr Zhang in his evidence in chief acknowledged that on one occasion (it was 24 May 2014) he had put pressure on Mr Wilkins to permit a group of persons (affected by alcohol) to enter the premises notwithstanding that this was contrary to a voluntary one-way door policy instituted in respect of the premises by Mr Wilkins. In evidence, Mr Zhang claimed that this was the only occasion when he had overruled Mr Wilkins in his role as duty manager. Whilst there is no evidence to the contrary, the fact that Mr Zhang (whose company employs Mr Wilkins) was prepared to overrule a duty manager in a matter that was crucial to the management of the premises is disturbing. Amongst other things, it shows that Mr Zhang was either unaware of or ignored the duties inherent in a licensee as set out in s.214 of the Sale and Supply of Alcohol Act 2012 – especially s.214(4) where the licensee is required to take all reasonable steps to enable the manager to carry out his duties in terms of the section.

Intoxication Allegations

[8] The Police opposed the applications because notwithstanding [2013] NZARLA PH 1069-1073, intoxication issues remain live in respect of the premises. In this regard, the Police called evidence to prove three incidents. The first occurred on 4 January 2014. A young woman was so intoxicated that she vomited in front of the duty manager and Constable Hibbs. It transpired that she had smuggled into the premises a bottle of tequila and consumed it. It is clear that prior to her entering the premises the security officer had searched her bag. It seems she must have concealed the bottle of tequila on her person. Nevertheless, she was able to consume a sufficient quantity of the tequila to make her hopelessly intoxicated and her condition should have been noticed before the arrival of the Police by the duty manager and his staff. There are mitigating circumstances: they are insufficient for the licensee and general manager to avoid liability.

[9] The second issue involves a gang member named Edwards. Mr Wilkins acknowledged in evidence that (after he had perused the Police evidence pertaining to Edwards) Edwards was obviously very intoxicated. As a result he immediately issued written warnings to the two staff members who had served Mr Edwards with alcohol.

[10] The third complaint of intoxication involved another young woman. The Police evidence is that she was intoxicated and failed the “SCAB” test. Mr Wilkins saw the young woman at the time but considered that she was not sufficiently intoxicated to require him to remove her from the premises. Plainly, there is a difference of opinion as to how intoxicated the young woman was. In a situation such as this all that the Authority can do is to comment that the assessment of intoxication is a matter of judgement and the Authority recognises that sometimes there can be a genuine difference of opinion.

[11] Perhaps the most significant conclusion to be drawn from the two proved and one suspected intoxication incidents is that the premises are of a nature where intoxication of patrons will always be an issue. This confirms the evidence of the Police and Inspector to the effect that the premises are high risk requiring sophisticated management.

The Inspector

[12] Miss Davison is well known to the Authority as a conscientious Inspector with high standards. She expects licensees and managers to have similar standards.

[13] She raised a number of issues. She was concerned that there was a lack of cooperation existing between the applicant, Mr Wilkins and the Inspector. She recognised that there were personality problems in this regard; but this did not excuse the lack of cooperation. She noted that on one of her inspections the condition pertaining to food was not complied with. She was concerned that ss.231 and 232 of the Sale and Supply of Alcohol Act 2012 were not being complied with in that the requisite notices of appointment of managers and the requirement to keep a record of temporary and acting managers were not complied with. She noted that on 29 March 2014 and on other occasions the security staff were not displaying their Certificates of Approval. She was not satisfied that non-alcoholic and low alcoholic beverages were appropriately promoted. She doubted that the design and layout of the premises was appropriate to the use to which they were being put and in particular was concerned that there were two bars which she doubted could be adequately supervised. She was sceptical of the applicant's proposals (through its general manager) as to staff training and doubted that they would be properly adhered to. She noted an absence of training manuals. Finally, she stated that the reporting agencies in Christchurch meet formally on a weekly basis and that "Richey Bar" frequently is raised by all the agency representatives. It is regarded as one of Christchurch's significant problem premises.

[14] The Inspector summarised her opposition by stating that if the licensee was unable to get the small things right then it was unlikely to get the big things right. In support of this proposition she referred to *Hayford v Christchurch DLA*, 3/12/93 Holland J, HC Christchurch, A201/92. Holland J stated:

"A holder of a liquor licence under the Sale of Liquor Act 1989 is granted a privilege. It permits him to sell liquor when others are not permitted to do so. Deliberate failure to carry out conditions attached to the licence or the terms of the licence must be a strong factor justifying a conclusion that the holder of the licence is not a suitable person to hold the licence."

Objectors

[15] There were two formal objectors. Additional witnesses were called for the objectors by Mr Casey. The principal concern of the witnesses for the objectors (all of whom were either owners or tenants in the building owned by the Body Corporate containing the premises) was the amount of vandalism and rubbish (including vomit) which needed to be cleaned up most mornings after the premises had been operating. In this regard, Mr Zhang deposed that he cleaned up the car park and surrounds at the close of business each morning. On the objectors' evidence, if he did in fact do this, his efforts were inadequate.

[16] Without diminishing their concerns, it was apparent that to some degree the objectors and their witnesses were frustrated by the inability of the Body Corporate to vet occupants of the various units and control their activities. Because of this inability, the only avenue available to them to attempt to control "Richey Bar" was to object to this application. They relied, in particular, on s.131(1)(b) of the Sale and Supply of Alcohol Act 2012 claiming that *"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". They noted (and this was not disputed) that the problems which they deposed to only became apparent when "Richey Bar" came under the control of the applicant and that when "Richey Bar" ceased trading for a period of time in March 2014 the problems disappeared. They inferred, therefore, that the problems of vandalism and rubbish arose out of the operation of "Richey Bar".

Authority's Decision and Reasons

[17] The provisions of s.131(1) of the Sale and Supply of Alcohol Act 2012 apply. The Authority is obliged to have regard to the matters contained in s.105(1)(a) to (g), (j) and (k). In addition, the Authority must determine whether *"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"*. In terms of s.131(1)(c) the Authority is obliged to have regard to the matters raised by the reporting agencies. Finally, s.131(1)(d) of the Act states that the Authority must have regard to the manner in which the applicant has sold, displayed, supplied and advertised and promoted alcohol.

[18] Leaving aside the concerns of the objectors, in this case the most significant of the criteria to which the Authority must have regard are the object of the Act, and the suitability of the applicant.

[19] Section 4 of the Sale and Supply of Alcohol Act 2012 sets out the Act's object. Without going into the detail contained in s.4(2), it is clear that the object of the Act is that the sale, supply and consumption of alcohol must be undertaken safely and responsibly and that any harm caused by the excess or inappropriate consumption of alcohol should be minimised. The object of the Act is of paramount importance when determining suitability.

[20] Counsel for the applicant recognised the applicant's inexperience and poor history in respect of the premises. However, he submitted that an applicant could successfully overcome these difficulties by the employment of suitable people who administered the premises in accordance with the provisions of the Act. The Authority does not accept this submission unequivocally. The mere employment of a suitable general manager and security firm will only be successful if they are unfettered in the carrying out of their responsibilities. Further, a licensee has a duty (in accordance with s.214 of the Sale and Supply of Alcohol Act 2012) to take reasonable steps to enable its general manager to comply with the section. If a licensee does not have the requisite experience, knowledge or willingness to carry out its duties under s.214(4) then, regardless of the quality of its employees, this is evidence of its lack of suitability.

[21] The concept of suitability has been discussed by the Authority and the High Court on many occasions. Perhaps the most recent occasion is in the decision of *Nishchay Enterprises Limited*, [2013] NZARLA PH 837, where at paragraph [53] the Authority stated:

"The applicant sought to establish its suitability by adopting a narrow assessment of the meaning of that term. This approach was criticised in New Zealand Police v Casino Bar No. 3 Limited, (CIV 2012-485-1491; [2013] NZ HC 44). The High Court rejected the proposition that it was the manner in which the business would be operated as the determinate factor. Rather, suitability is a broad concept and the assessment of it includes the character and reputation of

the applicant, its previous operation of the premises, its proposals as to how the premises will operate, its honesty, its previous convictions and other matters. It also includes matters raised in reports filed under s.33 of the Act and those reports may raise issues pertaining to the object of the Act as set out in s.4. Thus, whether or not the grant of the licence will result in the reduction or increase in liquor abuse is a relevant issue.”

[22] That paragraph was written in terms of the Sale of Liquor Act 1989. It is equally relevant in terms of the Sale and Supply of Alcohol Act 2012. With reference to the object of the Act, whilst the 1989 Act referred to liquor abuse, s.4 of the 2012 Act specifically requires that the sale, supply and consumption of alcohol must be undertaken safely and responsibly and that any harm caused by the excess or inappropriate consumption of alcohol must be minimised. If an applicant is unable to satisfy the Authority that the sale, supply and consumption of alcohol in its premises will be undertaken safely and responsibly, then it follows that it is unlikely that the applicant will be found to be suitable.

[23] The Authority recognises that in terms of *P R Bartlett*, NZLLA PH 285/2002 a higher standard of suitability is required of managers than of licensees. Nevertheless suitability remains one of the criteria to which the Authority is required to have regard by virtue of ss.131 and 105(1)(b) of the Sale and Supply of Alcohol Act 2012.

[24] In *Nishchay Enterprises Limited* (Supra) at paragraph [54] the Authority referred to the recognised test for suitability as contained in *Re Sheard* [1996] 1NZLR 751 where Holland J said at 758:

“The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence.”

In this regard the Authority commented in *Nishchay*:

“Traditionally that test (the Sheard test) has been interpreted as meaning whether or not an applicant will comply with the penal provisions of the Act. In fact, the test is much wider. To carry out the responsibilities that go with the holding of a licence includes whether or not liquor abuse issues are likely to arise. Thus it includes the object of the Act as set out in s.4.”

In the context of the 2012 Act, suitability includes whether or not the licensee will ensure that the sale, supply and consumption of alcohol in its premises will be undertaken safely and responsibly.

[25] *Papanui Car Park Limited* [2012] NZLLA PH 842 is a decision which relates to premises similar to “Richey Bar”. The proposal was that the premises would be a nightclub involving young people dancing and consuming alcohol. Indeed, in *Papanui Car Park Limited* the premises had traded as a nightclub for a period of time with devastating results. In that case the Authority recorded that “*suitability is not established in a vacuum but in the context of a particular case*” (*Page v Police*, unreported, High Court, Christchurch AP 84/98, 24 July 1998 per Panckhurst J). In *Papanui Car Park* (as here) the target customers were in the 18 to 24 year old age group which was regarded in the liquor industry as being the most vulnerable age group to abuse liquor. The Authority concluded that the proposed “Club 22” premises should be regarded as problem premises requiring sophisticated management and

refused the application on suitability grounds. One of the critical factors was the lack of experience of the proposed directors of the applicant.

[26] Exactly the same problem arises in this case. Mr Zhang as the sole director of the applicant has little or no experience or knowledge of the licensed industry. He demonstrated his deficiencies when he overruled his general manager and permitted unsuitable persons to enter the premises. The Authority appreciates that only one incident has been proved in this regard. Nevertheless, that incident gives the Authority little confidence that in a similar situation Mr Zhang would not exert his authority over the general manager with possibly detrimental results.

[27] Mr Zhang's performance when giving evidence was not encouraging. Quite properly, counsel submitted that this should not be held against him. He was not assisted by his nervousness and poor English. The Authority accepts this submission as it relates to a licensee and recognises that Mr Zhang did not always understand concepts or questions. An example of this is his lack of comprehension of "high risk premises" as detailed in paragraph [6]. If this were an application for a general manager's certificate, the Authority's attitude might not be so condign: see *P R Bartlett* (supra). However, the Authority does not ignore the high risk nature of the premises as being relevant to its assessment of suitability.

[28] It is recognised that some positive changes have been made since the Authority's decision in [2013] NZARLA PH 1069-1073. The changes that have been made relate principally to the employment of a well qualified general manager (whose record is not impeccable) and security firm. Nevertheless the character of the applicant has not changed. Its director has done nothing to improve the applicant's suitability and its inexperience and lack of knowledge of the licensed industry and the rules pertaining to it are of concern.

[29] With this background, the two proven and one suspected incidents of intoxication do not assist the applicant notwithstanding some 50 inspections by the reporting agencies over the relevant period. Certainly, those matters are more appropriately in control of the general manager except that Mr Zhang was present in the premises when these incidents occurred. The regulatory failures as detailed by the Inspector emphasise the lack of experience and knowledge of Mr Zhang.

[30] The onus of establishing its suitability is on the applicant. When all the foregoing matters are taken into account the applicant has failed to establish its suitability to continue to hold an on-licence.

[31] The Authority accepts the general tenor of the evidence of the objectors and their witnesses to the effect that patrons and persons hoping to be patrons of "Richey Bar" have caused vandalism and rubbish to accumulate in areas owned by the Body Corporate. It notes that these problems were less severe before the applicant acquired the "Richey Bar" business. It is aware that the problems dissipated when "Richey Bar" was not trading in March 2014. The inescapable conclusion, therefore, is that it is "Richey Bar" and its patrons (and those hoping to be patrons) who cause the problems complained of by the objectors. Whilst the Body Corporate and its management have some responsibilities in this regard, nevertheless the Authority must consider the evidence in terms of s.131(1)(b) of the Sale and Supply of Alcohol Act 2012. The only issue in this regard is the extent of the problem and in that regard the Authority notes the frustration of the objectors and witnesses as to the ineffectiveness of the management of the Body Corporate. It is for this reason that

the Authority is cautious about reaching a conclusion that the amenity and good order of the locality would be varied “*by more than a minor extent*”.

[32] The problems raised by the objectors are relevant to the determination of the applicant’s suitability: see, for example, *Paihia Saltwater [2001] Limited*, NZLLA PH 391/2001. Whilst that decision related specifically to the escape of noise from licensed premises, nevertheless the comment at paragraph [30] is relevant: “*Many licensed premises have shown that they can operate in harmony with their residential neighbours. It is no coincidence that the managers and owners of such premises also show a commitment to the reduction of liquor abuse*”. The objectors’ evidence and that of their witnesses was sufficient to raise doubts as to the suitability of the applicant in this regard.

[33] The Authority has considered whether a reduction in the trading hours could result in a less damning conclusion in respect of the applicant’s suitability. In this regard it is aware of the comments of the Court of Appeal in *My Noodle v Queenstown Lakes District Council*, [2010] AC 152 at paragraph [73] et seq. However, in this case it agrees with the evidence of the Inspector to the effect that a reduction in trading hours would not resolve the overall problems of the applicant’s suitability. The applicant has not established its suitability and in those circumstances it should not be operating licensed premises. To turn the premises into premises of lesser risk (by a reduction in trading hours) does not cure the fundamental problem.

Conclusion

[34] The applicant has not established its suitability to hold an on-licence. In those circumstances the application for the renewal of the on-licence is refused. Likewise, the application to vary its hours.

[35] This decision will take effect as at 12.00 midnight on Saturday 30 August 2014. This will enable the applicant to deal with employment issues which will arise as a result of this decision and to dispose of its stock without having to engage in a fire sale.

DATED at WELLINGTON this 1st day of August 2014

A E Cannell
Deputy Secretary