

[2014] NZARLA PH 741-742

**IN THE MATTER**

of the Sale of Liquor Act 1989

**AND**

**IN THE MATTER**

of an application by **BACIO BAR LIMITED** pursuant to s.18 of the Act for renewal of an on-licence in respect of premises situated at 31 Bank Street, Whangarei known as "Bacio"

**AND**

**IN THE MATTER**

of applications by **REI WHANGAREI LIMITED** pursuant to s.18 of the Act for renewal of an on-licence in respect of premises situated at 3 Water Street, Whangarei known as "Head Office"

**BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY**

Chairman: District Court Judge J D Hole

Member: Mr R S Miller

**HEARING** at WHANGAREI on 16 and 17 September 2014

**APPEARANCES**

Mr D C Wallace – for Bacio Bar Limited

Mr C S Shaw – for Rei Whangarei Limited

Mr J C Dawson – for Whangarei District Licensing Inspector – in opposition

Sergeant H P Clement – NZ Police – to assist

**RESERVED DECISION OF THE AUTHORITY**

***Introduction***

**Bacio Bar Limited**

[1] The on-licence issued to Bacio Bar Limited in respect of the premises at 31 Bank Street, Whangarei known as "Bacio" expired on 31 October 2012. On 3 October 2012 Bacio Bar Limited applied for a renewal of its on-licence. It did not seek any variation in the conditions of the on-licence.

[2] The Inspector opposed the renewal application upon the grounds that he considered that an additional condition should be added to the on-licence providing for a one-way door restriction to apply from 1.00 am until closing each day. Bacio Bar Limited refused to accept the proposed condition. Ultimately the file was referred to the Authority for a public hearing.

## Rei Whangarei Limited

[3] The on-licence issued to Rei Whangarei Limited in respect of the premises situated at 3 Water Street, Whangarei known as “Head Office” expired on 2 December 2013. By application dated 2 December 2013 Rei Whangarei Limited applied for a renewal of the on-licence. It did not seek any change in the conditions pertaining to the on-licence.

[4] The Inspector opposed the application as he considered that an additional condition should be added to the on-licence imposing a one-way door restriction to operate from 1.00 am each day. Rei Whangarei Limited refused to accept the proposed condition. Accordingly the file was referred to the Authority for a public hearing.

### **Statutory Provisions**

[5] The application for the renewal of the on-licence issued to Bacio Bar Limited was dated and was filed before the date of the enactment of the Sale and Supply of Alcohol Act 2012. The provisions of the Sale of Liquor Act 1989 apply to the application. Section 4 of that Act sets out its object which was to establish a reasonable system of control over the sale and supply of liquor “*with the aim of contributing to the reduction of liquor abuse*”. The criteria for renewal are contained in s.22 which provides that the Authority must have regard to (inter alia)... “(b) *the conditions attaching to the licence:*” and “(d) *any matters dealt with in any report made under s.20*”. In terms of s.23 of the Act the Authority is entitled to renew the licence “*on such different conditions (relating to any matters specified in s.14(5) as the Licensing Authority thinks fit*”. The Authority is not entitled to renew on different conditions unless one of the reporting agencies has submitted a report under s.20 of the Act. Section 14(5) sets out the sort of conditions that the Authority may impose and, in particular, s.14(5)(e) refers to “*any other matter aimed at promoting the responsible consumption of liquor*”.

[6] The application by Rei Whangarei Limited was executed and filed after the enactment of the Sale and Supply of Alcohol Act 2012. Section 407 of that Act applies as the application was made between six and 12 months after the date of assent. Section 132 of the Sale and Supply of Alcohol Act 2012 permits the Authority to vary any conditions applying to the licence before its renewal. Section 132(1)(a) seems to refer to s.117(1). It states that the Authority may issue a licence “*subject to any reasonable conditions not inconsistent with this Act*”. Section 117 was not in force at the date of the application. Presumably s.132(1)(a) refers to the more restrictive ss.14 and 37 of the Sale of Liquor Act 1989. Thus, if after considering the criteria in s.131 of the Act the Authority considers it appropriate to vary the conditions, then the only sort of condition that can be imposed is that permitted by s.14(5)(e) of the Sale of Liquor Act 1989.

[7] The criteria for renewal set out in s.131 of the Act require the Authority to (*inter alia*) consider the amenity and good order of the locality and whether that would be likely to be increased by a refusal to renew the licence. In addition, the Authority must consider any matters dealt with in any report by one of the reporting agencies. Finally, as a consideration of the object of the Act is mandatory in terms of s.131(1)(a) and s.105(1)(a) of the Act, s.4 of the Act requires consideration. Without setting out s.4 in full, it provides that the object of the Act is that:

- “(a) The sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
- (b) The harm caused by the excessive or inappropriate consumption of alcohol should be minimised.”

This object is different from that contained in s.4 of the Sale of Liquor Act 1989. As the Authority stated in *Penoy Spirits Limited* [2014] NZARLA PH 697 at paragraph [19]:

*“Now the aim is the minimisation of alcohol-related harm; not merely its reduction. Minimisation means ‘reduced to the smallest amount, extent or degree’ (New Shorter Oxford English dictionary)”.*

### **Inspector’s Position**

The Inspector claims that in each case the conditions of the on-licence should be varied. The proposed additional condition arises out of a report by one of the reporting agencies, namely the Inspector himself. The relevant reports refer to the alcohol policy adopted by the Whangarei District Council in August 2010 which provided that the use of a one-way door system was one of the mechanisms that could assist in the reduction of liquor abuse. Further, the imposition of such a condition would be consistent with the object of both the Sale of Liquor Act 1989 and the Sale and Supply of Alcohol Act 2012.

### **Council’s Alcohol Policy**

[8] The status of the Council’s Alcohol Policy was discussed in *Killer Prawn Limited and others* [2014] NZARLA PH 176, 177, 178, 179 and 180. In *Killer Prawn Limited* the Authority referred to *H L and W J Walker v New Zealand Police* 31 May 2001, High Court, AP 87/10 and, in particular, *My Noodle Limited v Queenstown Lakes District Council* CA 340/2009; [2009] NZCA 564. In the latter decision, the Court of Appeal confirmed that a report by a reporting agency could rely on a Local Authority’s alcohol policy as the sole reason for the opposition to a renewal of a licence. Further, the Authority is entitled to alter the condition to a licence by reference to the Council’s policy, notwithstanding the absence of any specific problems associated with the operation of the premises. Finally, the Court of Appeal recognised that by applying a Council’s policy, the Authority would not be abdicating or restricting its statutory decision-making role and discretion. Accordingly, it follows that where there is an alcohol policy of a Territorial Authority in existence, and where it has been formulated after appropriate local consultation, the Authority should be wary about granting applications that fail to conform with that policy. Nevertheless, the Authority must still ensure that injustice is not caused in the way a policy may be implemented. Finally, *My Noodle* confirmed that when preparing an alcohol policy a Territorial Authority does not need to be sure that a particular aspect of it will reduce alcohol abuse or minimise alcohol-related harm. A precautionary approach can be used to see if the proposed provision will achieve the statutory object.

### **Applicant’s Case**

[9] A generalised challenge was made to the Council’s alcohol policy. It was suggested that appropriate consultation had not been undertaken: although, when analysed it transpired that Mr Wallace (a director of Bacio Bar Limited which made the submission) was not in the licensed industry at the time the alcohol policy was

being prepared. Mr Shaw (for Rei Whangarei Limited) did not pursue this submission.

[10] Both applicants contended that the proposed one-way door would operate for too long and that this would create safety concerns in respect of each of their premises. In particular, it was contended that if the one-way door restriction was for too long, some men would fail to escort women to their cars because those men would be prevented from returning to the premises. It was felt that if the restriction was for a shorter period of time the gallant gentlemen would appreciate that they only lost a small amount of drinking time by escorting their womenfolk to their cars as the premises were about to close in any event.

[11] Staff safety was another joint concern. It was considered that it would be more difficult for staff to ask a person to leave the premises if the person being evicted understood that he would be unable to enter any other licensed premises because of a blanket one-way door restriction affecting all premises in the CBD. In such a situation it could be anticipated that the person being evicted might be more disruptive than might otherwise be the case.

### ***The Authority's Decision and Reasons***

[12] With the status of the alcohol policy having been confirmed in *Killer Prawn*, the only issue that arises in these cases is whether the Council policy should be invoked and a restrictive one way door condition be imposed commencing at 1.00 am.

[13] The one-way restriction is intended to apply for two hours before closing time. This is a long time. Some of the difficulties mentioned on behalf of each applicant concerning safety of women leaving the premises and similar matters are valid. If the one-way door restriction were for a shorter period some of those problems might not arise. Nevertheless, when considering those matters against the overall intent of the policy, the matters raised on behalf of the applicants pale into insignificance. Indeed, the evidence of Mr Dell as to the alcohol-fuelled disorder that still occurs within the Whangarei CBD was compelling. So also was the evidence of alcohol fuelled migration to the CBD from premises required to close at 1.00 am which are sited outside the CBD. The Council evidence outweighed the hypothetical concerns of the applicants.

[14] The same considerations apply to the concerns of the applicants as to the safety of staff. As Mr Shaw conceded, the number of occasions when a person would be evicted from the premises and where he would (without a blanket one-way door policy in existence) be able to enter other licensed premises is relatively few.

[15] Not only does the Council policy support the proposed one-way door conditions, but also support can be gained from the object of each statute. As indicated previously, the evidence pertaining to the alcohol-fuelled disorder that occurs from time to time within the Whangarei CBD was compelling. Whilst there was some evidence that this has reduced recently, it remains a real concern. The object of each Act is that alcohol-related harm be reduced or minimised (as the case may be).

[16] The safety concerns raised by each applicant arising out of the length of the one-way door restriction could be obviated by the licensee voluntarily reducing the hours of operation. In each case the licence provides that the premises are to close for the sale and supply of alcohol at 3.00 am. The Authority recognises that the proposal contained in this paragraph may not be palatable to either applicant as a

voluntary early closure could cause a loss of market share to competitors (who would continue to close later). However, if the hypothetical concerns of the applicants are realised, then the same concerns will apply to the other late night bars operating in the Whangarei CBD. In such a situation, there is nothing to prevent all the licensees of the late night bars operating within the Whangarei CBD from reaching a common accord as to an earlier closing time.

[17] Recognising the alcohol abuse and alcohol-related harm that presently occurs within the Whangarei CBD, the Authority concludes that a condition in each case imposing a one-way door restriction commencing at 1.00 am each day is appropriate. It does not constitute an unreasonable or oppressive exercise of its discretion. Indeed, given the evidence adduced at the hearing, the only alternative would be for the Authority to reduce the closing hours of each premises from 3.00 am to either 2.00 am or, possibly, 1.00 am. The imposition of the proposed one-way door condition is a much more reasonable option.

### ***Conclusion***

[18] The application by Bacio Bar Limited for the renewal of its on-licence is granted on the same conditions as previously but with the additional condition that a one-way door restriction is to operate in respect of the premises each day from 1.00 am until closing time.

[19] The application for the renewal of the on-licence issued to Rei Whangarei Limited is granted upon the same conditions as previously. However, there is an additional condition that a one-way door restriction is to operate in respect of the premises each day from 1.00 am until closing time.

[20] In each case, the condition imposing the one way door restriction will not take effect until six weeks after the District Licensing Committee has advised in writing that all outstanding renewal applications in respect of CBD on-licensed premises presently filed have been resolved with similar one way door conditions.

**DATED** at WELLINGTON this 3<sup>rd</sup> day of October 2014

A E Cannell  
Deputy Secretary