

IN THE MATTER

of the Sale and Supply of Alcohol Act
2012

A N D

IN THE MATTER

of an application from **HOROWHENUA
HOSPITALITY LIMITED** pursuant to
s127(2) of the Act for the Renewal of
an On-Licence
Decision 24/2015

BEFORE THE HOROWHENUA DISTRICT LICENSING COMMITTEE

Chairperson: Cr Ross Brannigan
Members: Mr Philip Comber
Mr Martyn Slade
Mr Roger Perring

HEARING at Levin on 11 March 2015.

APPEARANCES

- (a) Mr Kelvin Campbell, Cooper Campbell Law – Solicitor for the Applicant
- (b) Ms Rachel Dalton, Duty Manager – for the Applicant
- (c) Mr William Eru, Head of Security – for the Applicant
- (d) Ms Terri Webber, Duty Manager – for the Applicant
- (e) Ms Rachael Watkins, Duty Manager – for the Applicant
- (f) Mr Ben Gaby, Security Guard – for the Applicant
- (g) Ms Lisa Roiri, Liquor Licensing Inspector – in opposition
- (h) Senior Sergeant Jeff Veale, NZ Police – in opposition
- (i) Senior Constable Graeme Jarvis, NZ Police – in opposition
- (j) Constable Carole Strydom, NZ Police – in opposition
- (k) Constable Alastair Finn, NZ Police – in opposition
- (l) Mrs Megan Bolton, The Building and Property Centre – in opposition

DECISION OF THE DISTRICT LICENSING COMMITTEE

Introduction

This decision relates to an application by Horowhenua Hospitality Ltd for renewal of an on-licence in respect of the premises trading as Boardroom, One Wish and Event Centre, Levin.

The application was filed on 12 November 2014, with the hearing held on 11 March 2015.

A renewal of licence is sought for seven days a week from 11.00 am to 3.00 am the following morning.

Reporting agencies

Both the Police and the Liquor Licensing Inspector opposed the application on the basis that the Applicant was unsuitable under s105(1)(b) of the Act. The Police also opposed the application as the object of the Act was not being met by the Applicant, specifically that there had been harm caused by the excessive and inappropriate consumption of alcohol.

Having not met the current director, Tracey Mawson, the Licencing Inspector was unable to comment on her suitability, although it was noted that Ms Mawson does not have a current Managers certificate. Further, although during the tenure of another director, the company failed a controlled purchase operation on 29 August 2014. If the Committee was minded to renew the licence, the Licencing Inspector therefore recommended that the trading hours be reduced from 3.00am to 1.00am, with a one way door policy from midnight.

There was no opposition from the Medical Officer of Health.

There is a safe and operable fire evacuation scheme, although only in very recent times and since the appointment of an Operations Manager (Ms Dalton).

Background

There has been a hotel operating from this site for many years under various names and licensees.

The company was incorporated on 5 February 2013, with a capital of 100 shares. The shareholders on incorporation were:

- (a) Jessica Mary Aitchison – 70 shares;
- (b) Tracey Lynette Mawson – 20 shares;
- (c) Melissa Terese Stoner-Lendel – 10 shares.

Since incorporation there have been five (5) changes of Directors:

- | | |
|-------------------------------------|---------------------------------------|
| (a) Dennis Hall (founding director) | 5 February 2013 to 14 August 2013; |
| (b) Jessica Aitchison | 12 August 2013 to 10 October 2014; |
| (c) Shaun Duffy | 10 November 2014 to 15 December 2014; |
| (d) Jessica Aitchison | 8 December 2014 to 12 January 2015; |
| (e) Tracey Mawson | 12 January 2015 to present time. |

Evidence

Mr Campbell appeared for the applicant, stating that he represented the applicant, as allowed for by the Act. He acknowledged that there had been previous issues; however with this Manager, Rachel Dalton, issues that had caused concern in the past have been addressed. Mr Campbell then produced his witnesses (see below).

No representative of the applicant company appeared in support of the application. Further, little, if any, information was provided relating to the governance of the applicant company. The Committee heard no evidence from any of the above-named shareholders or directors.

Mr Campbell's submissions canvassed the issue of governance. It was submitted:

- (a) In effect, so long as there is a suitable manager, and the director has no power to overrule that manager on matters relating to the sale of alcohol, then that is evidence of suitability. Mr Campbell relied on the employment agreement with Ms Dalton (unexecuted on behalf of the company) which provides that the director (named as Tracey Mawson) is to defer to Ms Dalton in all matters related to alcohol.
- (b) In reliance on a decision of the Alcohol Regulatory and Licensing Authority (ARLA) in *Re Nischay Enterprises Ltd*¹ that: *"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."* A text of the decision was not

¹ *Re Nischay Enterprises Limited* [2013] NZARLA 837

made available to the Committee but we note it was a decision relating to the old Act. The Committee note that the discussion of *Nischay* in the *Linwood* case where it is said that in the context of the 2012 Act the case informs the view that an applicant must show that the sale and supply of alcohol in its premises will be undertaken safely and responsibly. Otherwise the applicant is unlikely to be suitable.

- (c) The decision of the ARLA in *Re Linwood Food Bar Ltd*² was relevant: *“Further a licensee has a duty (in accordance with section 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 s214(4) then, regardless of the quality of its employees, this is evidence of its lack of suitability.”*

Ms Dalton works at the Boardroom Bar and gave evidence for the applicant. She has been Operations Manager since Mr Duffy (a director at the time) was evicted from the premises on 18 December 2014. Ms Dalton advised the Committee of the changes she has put in place since her appointment, including systems to manage staff, security and patrons. A number of statements in support of Ms Dalton’s management accompanied her evidence.

Also giving evidence for the applicant was Mr William Eru. Mr Eru is the head of security for the Oxford Event Centre and Boardroom. He gave evidence of the scope of his role, as well as an incident which occurred on 10 January 2015. The incident involved an altercation in the vicinity of the premises which resulted in a patron being knocked unconscious. The matter is presently the subject of criminal proceedings before the Courts.

16. Ms Terri Webber, Ms Rachael Watkins and Mr Ben Gaby gave evidence speaking to the positive changes that had been made since the appointment of Rachel Dalton.
17. The Police appeared in opposition. Senior Constable Jarvis gave evidence in relation to alcohol related offences and breaches of the Act, as well as his concerns about the numerous changes in directors since incorporation of the applicant company. It was the view of SC Jarvis that a lack of experience in the sale and supply of alcohol by those overseeing the company, and a lack of consistency in governance, means that the applicant is unsuitable. The Senior Constable also referred to a meeting with Ms Dalton on 12 February 2015 (at her request) where he learned that the building owner, John Morgan, and his niece, Jessica Aitchison, had been to the hotel the previous day and asked Ms Dalton to become the new director as they were not happy with director, Tracey Mawson.
18. The District Licensing Inspector, Ms Lisa Roiri gave evidence and spoke to her report reinforcing her opinion that the applicant was unsuitable to hold a licence, which is based on her concerns of the operation of the premises outlined in her report. Further she has still not been able to meet with the applicant at the time of this hearing.
19. There was also one public objection by the neighbouring business at 279 Oxford Street Levin. Ms Megan Bolton gave evidence to the Committee on this matter citing examples that extended to her concerns relating to litter, damage and unsanitary practices that were regularly found outside her premises, which related directly to the good order and amenity of the locality if the licence was renewed.
- 20; Whilst the Committee notes that there is no obligation on Ms Mawson (the sole Company Director) to give evidence, and it is for the applicant to determine how to run its case, there must be sufficient evidence to enable a positive finding as to suitability. The Committee were disappointed that there was no attempt to address its questions and concerns regarding governance, despite the Committee understanding Ms Mawson to be present at times during the course of the hearing.

² *Re Linwood Food Bar Limited* [2014] NZARLA PH511-512, p [20]

Legal framework

21. The criteria the Committee must use in considering renewal of this licence are set out in section 131 of the Act. These criteria largely repeat those under section 105 relating to issue of new licences, including having regard to the objects of the Act as set out in s 4.
22. More particularly, the Committee must consider:
 - (a) the matters set out in section 105(1)(a) to (g), (j) and (k) of the Act;
 - (b) 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;
 - (c) any matters raised by reporting authorities; and
 - (d) the manner in which the applicant has sold, displayed, advertised or promoted alcohol.

Committee's decision

Section 105 matters

23. The Committee has considered the object of the Act in reaching its decision on the application. In the absence of evidence as to the suitability of the applicant (addressed below), as well as concerns about past operation of the site, we cannot be satisfied that the sale, supply and consumption of alcohol will be undertaken safely and responsibly, with harm caused by excessive or inappropriate alcohol consumption minimised.

Suitability – s105(1)(b)

24. The Applicant is a limited liability company, yet the Committee has very little evidence before it in respect of governance. What is clear is that the company structure has been very unsettled with a number of changes since February 2013. There has however been no evidence as to why or with what resultant impact.
25. For example, the Committee has been left with many questions regarding Mr Duffy's eviction from the premise Duffy was at the time the sole director of the company so it seems that someone else must have, in fact, had the decision making power. Mr Duffy then ceased to be a director the following day. How? Did he provide a signed resignation? Was there a meeting of shareholders to vote him out of office? All the Committee is left with is the view that directors are hired and fired at the will of some unknown person.
26. As far as the Committee is aware Ms Mawson is the current director. Without hearing from her, the Committee only knows from others that she has worked in a hotel, that from time to time she comes in to the hotel and has discussions with the manager, and that there has been a proposal (not apparently carried into effect at least to this point) to remove her.
27. The Committee is still left in the position where it knows virtually nothing about the governance of this company. Nothing is known about the directors as people, their experience in the industry, or their knowledge of the legislation or their duties under it. Given the unexplained changing pattern of directors, the Committee Members have little confidence in the governance structure moving forward. Further, deference to Ms Dalton on matters relating to sale and supply of alcohol under the employment agreement only applies in respect of the current director, Ms Mawson and might not endure in the not unlikely event of another change of directors.
28. It is for the applicant to demonstrate his or her suitability. In other words, the Committee must make a positive finding on the evidence put before it. As held in the *Linwood* case cited by

the applicant, there must be evidence that an applicant has the requisite experience, knowledge or willingness to carry out its duties under s214(4) of the Act, otherwise regardless of the quality of the manager, that is evidence of lack of suitability.

29. It is the Committee's view that there has been no demonstration of suitability in this case.

30. Further, the serious incident on 10 January 2015 occurred while Ms Dalton was in charge. As this matter is still before the criminal courts, some matters of fact remain to be determined, but on any view of the matter there was disorder and intoxication. Other breaches of the Act were also before us in evidence, including a failed Controlled Purchase Operation that occurred on 29 August 2014, and we note that Ms Rachael Watkins who gave evidence today, was the Duty Manager at the time of the failed CPO.

31. *Any relevant local alcohol policy*

There is no Local Alcohol Policy in force for the area.

32. *The days upon which the Applicant proposes to open – s105(1)(d)*

The hours proposed by the applicant are within the national maximum opening hours as set out in Act, as well as the guidelines within the Horowhenua District Council's Sale of Liquor Policy 2006, and are considered reasonable.

33. *The design and layout of the premises – s105(1)(e)*

There are no issues with the design and layout of the premises.

34. *Sale of goods and services other than those relating to alcohol and food – s105(1)(f) & (g)*

There are no issue arising under this heading.

35. *Appropriate systems, staff and training – s 105(1)(j)*

Ms Dalton appears to be addressing these issues, but prior to her appointment the evidence suggests that there were many deficiencies in the systems, staff and training.

36. *Reporting agencies – s105(1)(k)*

As noted at paragraphs 4 to 7.

37. *Amenity and good order*

(i) The Act is concerned with effects of alcohol but also extends to people's enjoyment of their environment. The neighbouring business has objected to litter, damage and unsanitary practices associated with the premises. These issues are likely to arise because of the business's location on a migration route from other premises that close earlier, as well as its vicinity to nearby fast food outlets.

(ii) Although it is possible these issues could be addressed by a reduction in the hours of sale on renewal of a licence, the question the Committee must answer is whether or not the refusal to renew the licence will increase the amenity and good order of the area. We believe this would be the case.

38. *Manner of sale*

There are no issues associated with this matter.

Conclusion – renewal of licence

39. The Committee does not believe a reduction in trading hours would cure the fundamental issue, that being that the applicant has not established its suitability under the Act.
40. The Committee is aware that in the usual course, the standard of proof is the civil standard of the balance of probabilities. Equally, however, case law suggests that stronger evidence is required where the cancellation of a licence or certificate would be the outcome of a decision regarding suitability. The Committee has considered the issue of proof, that being that there was strong evidence swaying the Committee in favour of refusal on the basis of suitability.
41. The evidence suggests an unstable governance structure with a poor track record. The Applicant has given no evidence of being suitable and given the issues of the past eighteen months, we do not believe the purpose and object of the Act have been or will be met. Accordingly, our decision is to refuse the application for the renewal of an on-licence.
42. Under s135(2) of the Act, in refusing to renew the licence, the Committee must state the day on which the licence expires, and that day must be no later than three (3) months after the date of its decision. Three (3) months is believed appropriate in this case and therefore the on-licence will expire on 9 July 2015.

DATED at LEVIN this 9th day of April 2015

R J Brannigan
Chairperson