

IN THE MATTER

Decision No.
of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **THE
LAKEHOUSE RESTAURANT
LIMITED** for the renewal of an
ON-Licence pursuant to s.127 of
the Act in respect of premises
situated at **246 Burnett Street
Ashburton** known as "**Braided
Rivers Restaurant and Bar**".

AND

IN THE MATTER

of an application by **JOSHUA
ALBERT MARTIN** for a
manager's certificate pursuant to
s.218 of the Act.

BEFORE THE ASHBURTON DISTRICT LICENSING COMMITTEE

Chairman: Mr A J Lawn.
Members: Mrs S Griffin
Mr G Lee

HEARING at Ashburton on 30 October 2017

APPEARANCES

Mr G Thwaites and Miss S Bennett – for applicant
Mrs H A Faass – Ashburton District Council Alcohol Licensing Inspector – in
opposition
Sergeant M Hamilton – NZ Police – to assist
Mrs K Webster – for the Medical Officer of Health – to assist

ORAL DECISION OF THE COMMITTEE

Introduction and Summary of Decision

Introduction

- [1] This case involves two inter-linked applications. The first matter is an opposed application by **The Lakehouse Restaurant Limited** for the renewal, with variation, of its on-licence in respect to premises situated at **246 Burnett Street, Ashburton**, known as “**Braided Rivers Restaurant and Bar**”. The business trades as a class one restaurant but operates more like a tavern on Friday and Saturday nights with security being employed to help control patrons. The authorised hours are, inside the premises Monday to Sunday 8.00am to 3.00am the following day, and outside the premises, Monday to Sunday 11.00am to 11.00pm. The only change sought to the present licence conditions is that the ‘courtyard area’ is to be changed from undesignated to supervised. This renewal application is the first to be dealt with since the business was established and is therefore the most important.
- [2] The second application before us is an application for a manager’s certificate by Joshua Albert Martin who is acting as a Temporary manager at Braided Rivers Restaurant and Bar. He works as the assistant manager at the premises. He previously worked as the chef at a premise owned by the applicant before they purchased this one. He was the manager during one of the alleged incidents where an intoxicated person was found on the premises.
- [3] Both applications are opposed by the Alcohol Licensing Inspector. Although the Police and Medical Officer of Health reported within the specified timeframe with no opposition to the premise application they now have concerns regarding the management of the premises. The Police had no opposition in relation to the manager certificate application of Mr Martin.
- [4] In her report the Alcohol Licensing Inspector raised the following issues
- intoxication,
 - recent convictions and Alcohol Regulatory and Licensing Authority (ARLA) sanction of one of the applicant company’s directors,
 - a failed Controlled Purchase Operation (CPO) and subsequent ARLA sanction,
 - poor management of the premises, an infringement notice for breaching s. 258(1) relating to a breach of s.214(3) for failing to have the name of the appointed manager displayed,
 - issues regarding one of the shareholders of the licensee company.
- [5] The Inspector called six witnesses, including herself.

Summary of Decision

Renewal of Licence - The Lakehouse Restaurant Limited

- [6] At the end of the public hearing the Committee adjourned for deliberations and returned with a decision which was issued orally and would subsequently be followed up with a more comprehensive written decision.
- [7] The Committee decided that after hearing all the evidence and submissions that the renewal of the licence would be granted for a reduced period of eighteen months and that a number of conditions would be placed on the licence. These conditions are detailed at the end of the decision.

Managers Certificate -

- [8] The Committee decided to adjourn the hearing of the Manager's Certificate application by Mr Martin for six months to allow him to gain more experience, show that he is committed to improving his management of licensed premises as well as showing that he has learned from the recent negative events at the premise. The Committee will call for updated reports in six months' time and if these are satisfactory then the matter may be dealt with on the papers without the need for a further public hearing.

Renewal Application for Lakehouse Restaurant Limited

- [9] The applicant in this matter is Lakehouse Restaurant Limited. It has two directors, Mrs Angela Kelly and her son, Aiden Kelly. The shareholdings are divided between Angela Ann Kelly and her husband Michael Phillip Kelly. The applicant has previously owned a number of licensed premises in the Canterbury area.
- [10] The premises consist of a large building which has its main frontage onto Burnett Street. The main entrance is near the centre of the frontage and to the left as one enters is the main dining area. Straight ahead is a bar with a small seated area and to the right is an open dining area which has a mezzanine floor on one side and a semi enclosed smoking area on the street side. There is a door to the front of the premises from the smoking area.
- [11] On Friday and Saturday nights the open area is used as a bar. The evidence shows that this is the main cause for concern from the agencies. It was colloquially referred to as a 'dive bar' by one of the witnesses.

Preliminary matters

- [12] Mr Thwaites, for the applicant, sought an order suppressing the details of the allegations made against Mr Michael Kelly by two witnesses called by the Inspector. Both witnesses are previous employees of the applicant. An order was made by the Chair under s. 203(5) prohibiting the publication of parts of the evidence of the two witnesses referred to by Mr Thwaites. The matters outlined in s.203(6) were considered and due to the nature of the allegations

the order was considered necessary to protect the witnesses, as much as the applicant in this matter.

- [13] Mrs Faass sought the exclusion of these two witnesses due to the evidence and the order discussed above. This was granted.
- [14] The Inspector noted that there was no current evacuation scheme on the file as required by s.127(2)(e)(i) and therefore the application was deficient and a renewal could not be issued. Mr Thwaites was not aware of this but after a discussion agreed that the statement must be provided as part of the application and that the renewal could not be issued without it. He agreed on behalf of the applicant to get this rectified as soon as possible.

Evidence for the applicant

- [15] Mrs Angela Kelly gave evidence for the applicant company and stated that she has been a licence holder for over 20 years in six different premises without ever having the licence opposed. She responded to the Alcohol Licensing Inspector's report by detailing that she employs seven fulltime staff including four duty managers. Training is provided where necessary but particularly for inexperienced staff. Some staff have 20 years' experience and have previously held managers certificates.
- [16] Mrs Kelly described the CCTV system, which operates on the premises. It has 17 cameras, which allow Mr Kelly to monitor staff at the premises from home. This system allows him to monitor both staff and patrons at the premises. The CCTV system was put in after a former staff member stole approximately \$11,000. Mr Kelly does not ever work behind the bar. When the couple brought the premises it was on the understanding that Mr Kelly would never have to work behind the bar. He goes to the bar about 7.00am and leaves around 10 or 11.00am and has nothing to do with the tills or selling alcohol. When questioned later by the Committee Mrs Kelly confirmed that Mr Kelly has convictions which would preclude him from being a licensee.
- [17] It was the opinion of Mrs Kelly that three of the staff who are duty managers thought that they could do as they liked and the use of the cameras by Mr Kelly seemed to annoy them. They took a dislike to Mr Kelly and made threats to lodge a personal grievance. Mrs Kelly stated these staff threatened that they would destroy her and the business. She advised them to go to the Police, which they did. No subsequent prosecution occurred. Mrs Kelly believed that the staff had a personal vendetta against her as they did not get what they were looking for. The staff said they would complain to the District Licensing Committee.
- [18] In regards to the incident on 27 May 2017, cited by the Inspector, Mrs Kelly stated that there was no evidence of lewd behaviour on the video and although she was not the duty manager on the night she did not believe that there were any intoxicated patrons on the premises. Out of respect for the Inspector she closed the bar early.

- [19] Mrs Kelly stated that since holding an on-licence they have never had an occasion where they have needed to call the local Police. If staff see any signs of intoxication patrons are immediately asked to leave the premises and security remove them. This usually happens on a Saturday night as the patrons have, in her view, pre-loaded and the alcohol hits them after they enter the premises and have a further drink. The staff are aware of this and are constantly looking for signs of intoxication when the premises are open.
- [20] In relation to the incident on 21 May 2017 where a patron was left in the toilets at closing time and later found in an extremely intoxicated state by Police, Mrs Kelly stated that Joshua Martin, who was duty manager on the night, did everything appropriately but that they have learned a valuable lesson. In regards to the other incident where a female staff member had been drinking on the premises after work and become extremely intoxicated Mrs Kelly believed her behaviour was not acceptable but also stated that the staff member had taken medicine and mixed this with alcohol.
- [21] On the matter of Mrs Kelly's drink drive conviction, Mrs Kelly stated that it was low level and was her first and last run in with the law. She has paid the fine and is serving the penalty. It was an error of judgement and she is contrite, apologetic and embarrassed. She does not believe it will happen again. She admitted that she does occasionally have a glass of wine with her lunch from time to time but has never become intoxicated while duty manager. She stated that she holds herself to a high standard and does not accept any statement to the contrary. In relation to the smoking area and access through this to the inside of the premises, Mrs Kelly confirmed that this is an issue and therefore a security person is stationed at the door to stop this access from happening. They are in negotiations with the landlord to sort this troublesome area out.
- [22] Regarding the sale to a minor during a Controlled Purchase Operation, Mrs Kelly believed that it was unfair to bring this up in respect to the renewal of the licence as it has been dealt with and a 48 hour suspension had been served. In respect to the infringement notice served on the premises for failing to have a manager on duty, Mrs Kelly stated that she had appointed Joshua Martin but omitted to fill in the form. The resulting fine has been paid.
- [23] Mrs Kelly, in questions from Counsel, stated that the premise has instigated a One Way Door Policy from 12.15am and do not serve shots or cocktails. They also serve free hot chips from 11.30pm to help with alcohol absorption. She also regularly reminds staff about not serving to minors and is looking at the 'Servewise' training for her staff.
- [24] In questions from Mrs Faass, Mrs Kelly confirmed that Mr Kelly would either call staff directly or her to resolve any issues that he saw on the CCTV cameras. He did not sit continuously in front of the screens monitoring the premises. She stated that there were issues with the availability of Ms Baxter and Ms Mills. In relation to staff training and the statement that Ms Mills would say regarding no training provided, she stated that Ms Mills had told her that she knew it all anyway.

- [25] It was put to Mrs Kelly that Ms Mills will state that Mr Kelly did quite a bit of drinking at the bar. Mrs Kelly responded that Mr Kelly is rarely at the bar on Friday nights and doesn't get drunk there very often. In regards to Ms Mills application form for a manager's certificate Mrs Kelly admitted that she had lied on the form noting that Ms Mills had worked on the premises longer than she actually had.
- [26] When it was put to Mrs Kelly regarding Mr Kelly telling security not to worry about those who were drunk and to let them in, Mrs Kelly responded that that was nonsense and that Mr Kelly was strict. It was also put to Mrs Kelly that Ms Mills will say that at New Year a large party was held on the premises after the bar was closed. That the manager on duty was drunk and fell asleep, another staff member was vomiting into a bin and another staff member had passed out. Mrs Kelly stated that she left the premises at 11.50pm and she only became aware of some of the party after being advised by the Police and reading some of it in the statement of Ms Mills. In questioning regarding who carried out staff interviews, she stated that normally she did them but if they were early in the morning Mr Kelly did them. He does not do them anymore.
- [27] In questioning from Mrs Faass about training Mrs Kelly stated that training takes place every three weeks with staff. In relation to 'Servewise' she stated that there is one staff member to complete the course but otherwise all staff have now completed it. She is also happy to provide a copy of the contract with the security firm that the premises use currently.
- [28] Mrs Kelly answered a number of other questions from the agencies and the committee. She confirmed that she had given a West Melton address when stopped for drink driving but she did not live there, she only stayed there occasionally. She did this as she was embarrassed and did not want the matter known in Ashburton. In relation to the premises she stated that the food to alcohol ratio is probably 50/50 and that it might be better to have a tavern style licence. The restaurant is closed about 9.30pm and bar snacks are available after this. There are regularly three people who have their manager's certificate working on the weekends. Mrs Kelly agreed that the bar training manual was the same one as was on the premises when they took over and that a copy was not given to staff members and that it has not been updated since 2005. She also confirmed that training is given by her and that 'ACADS' (Medical Officer of Health's representatives in Ashburton) had provided one training to staff.
- [29] When questioned about the incident where the Inspector had a male expose himself to her in the bar, that she had noted a number of people who appeared intoxicated in the bar and that she had spoken to Mrs Kelly about these incidents Mrs Kelly responded by saying that she accepted Mrs Faass's evidence.
- [30] The Committee sought Mrs Kelly's view on a number of conditions which, if the licence was to be renewed, may form part of the conditions of the licence or could be taken as undertakings. The first was a reduced renewal period and a reduced closing time of 1.00am. She stated that she would accept both.

In relation to providing an Alcohol Management Plan she stated that she would supply one if required and would also accept a One Way Door condition at 12.15am. In regards to a training manual she stated that she would provide an updated manual to the satisfaction of the agencies. She also agreed that it would be helpful if she completed the Licence Controller Qualification again.

- [31] Mr Thwaites, in re-examination, asked Mrs Kelly about her drinking and she advised she has stopped drinking and only started drinking last year in response to staffing issues.
- [32] Finally in response to questions from the committee in relation to the role which Mr Kelly undertakes in the premises Mrs Kelly agreed that he appears to act like he manages the place. She stated that she has an agreement with him now that he is not to be on the premises after 11.00am and that he is not to be on the premises in the evening to work or be there socially. She stated that she would agree to Mr Kelly having no involvement in the management of the premises.
- [33] The applicant called Joshua Albert Martin, who is also the applicant for a manger's certificate. He confirmed that he has worked for the Kelly's for almost five years. He started at the Lake House as a chef. He started work at Braided Rivers when it was part of the Ashburton Licensing Trust and continued when the Kelly's took it over in October 2015. He mainly worked as a chef but at Christmas 2016 he started to help out behind the bar on busy nights. He stated that he never witnessed the Kellys intoxicated whilst on duty and although Mrs Kelly would have a wine whilst her name was up but it was never 'anything over the top'. He also stated that there were times when the Kellys would become influenced on the premises but it was only when someone else had their name up as manager.
- [34] Mr Martin stated that he genuinely enjoys working for the Kellys, they can be strict at times but this is because of their passion for the industry. He further went on to explain the procedures that he and the Kellys have put in place since the start of the year in relation to preventing intoxication like no shots after 11.00pm and not selling to anyone you cannot observe from the point of sale, providing food later in the evening and putting staff through the 'Servewise' programme along with working with Health to get extra training for staff.
- [35] Finally Mr Martin stated that despite what people may say about the Kellys they have the best intentions and want what's best for the community and that the allegations levelled at both of them are unfounded and intended for personal gain.
- [36] In response to questions from Mrs Faass, Mr Martin stated that he works in the kitchen, and on Saturday nights he works out front. He is a Temporary Manager plus does some paperwork. In regards to the incident when he was duty manager when the male was found intoxicated in the toilets, he stated that he made a mistake not going back and checking the toilets again. He stated that he now looks more closely at intoxication levels and the signs of

intoxication. He stated that when he is the duty manager he does not prepare meals.

[37] When questioned by the committee Mr Martin stated that Mrs Kelly is the boss but he regularly meets with Mr Kelly to discuss the food. He stated that he does not drink after work as he does not drink alcohol. He also stated that he had previously worked at the Hotel Ashburton but he only was behind the bar 5% of the time.

[38] Mr Thwaites asked him if he accepted the Police evidence regarding the intoxicated male found in the bar's toilet on 21 May 2017. Mr Martin replied that he did. He also asked him why he should be granted a manager's certificate. He replied that he is trying his best and getting better at all forms of hospitality. He thinks he is responsible and honest and learns quickly. He stated that he had a mentor who is currently in the trade, Mrs Kelly.

Evidence of the Inspector

[39] Mrs Faass called Constable Richard John Glennie. He read his statement and detailed his account of what he had found when he attended a suspected burglary at Braided Rivers on 21 May 2017. He found an extremely intoxicated male in a toilet cubicle. The male was arrested and taken to the Ashburton Police station. The male said that he had been trapped in the restaurant with a friend. Constable Glennie stated that in his opinion the male was too intoxicated to form any criminal intent. He was released without charge.

[40] Mrs Faass called Constable Alex William Hooper. Constable Hooper read his statement. This detailed a visit he made to Braided Rivers whilst he was working nightshift on Saturday 22 April 2017. He stated that there were no door staff on duty at the front door. He noticed approximately 50 patrons inside. The manager approached him and stated that security had failed to turn up. Constable Hooper stated that he thought that there were at least 15 patrons whom he would have considered to be intoxicated. He stated that he spoke to three patrons whom he considered intoxicated and observed the other from inside the bar. He left the premises to attend another job.

[41] Constable Hooper further stated that he returned to Braided Rivers later at about 1.05am and dealt with a fight between two males whom he stated had been in Braided Rivers drinking. He gave evidence that both males were intoxicated. One smelt strongly of alcohol and the other was slurring his words. One could not walk in a straight line.

[42] When questioned by Mrs Faass he stated that he visited Braided Rivers on most Saturday nights and he had not come across anything like this before that he could recall. He stated that the manager on duty that night was Mrs Kelly. He would not classify Braided Rivers as a problem premise and had drunk in there himself whilst off duty. He was asked by the committee if he had raised the matter of the intoxicated males with the duty manager and he stated that he had not.

- [43] The Inspector called Ms Stacey Mills. She confirmed that she had previously worked at Braided Rivers as a duty manager. Ms Mills read her statement. She raised issues regarding intoxication at Braided Rivers, a lack of training and her application for her manager's certificate which Mrs Kelly offered to pay for. She stated that Mrs Kelly filled in the form and lied about how long she had worked at the premises. Ms Mills stated that Mrs Kelly had said that longer service would push it through quicker.
- [44] Ms Mills also detailed Mr Kelly's disregard for intoxication on the premises after the races just before Christmas. She stated that Mr Kelly had told bar staff to serve intoxicated patrons even though Ms Mills refused to serve them. She stated that Mr Kelly was drinking and drunk.
- [45] Further incidents were outlined of unqualified staff putting their names up as duty manager, Mrs Kelly being drunk whilst working, Mr Kelly driving home drunk, the New Year's incident with staff drinking and getting intoxicated, passing out and vomiting.
- [46] Ms Mills stated that she left Braided River in March 2017.
- [47] In cross examination Mr Thwaites put it to Ms Mills that she did not like Mr Kelly and she agreed. She confirmed that Mrs Kelly was her manager. She also confirmed that she did go to the bar when she wasn't working, about once a week initially but then just occasionally.
- [48] In questions from the Committee Ms Mills stated that she initially thought that Mr Kelly was the boss but after about a month she realised that Mrs Kelly was the boss. She also commented that 95% of the races crowd, as mentioned before, were not served but Mr Kelly had pushed other staff to serve them. She said that she was not pressured into serving intoxicated patrons but she felt other staff were.
- [49] In re-examination Mrs Faass asked Ms Mills if she thought the bar was a restaurant or a tavern. She replied that she thought it was a tavern.
- [50] Mrs Faass called Ms Angela Baxter. She read her statement. Ms Baxter confirmed that she had worked at Braided Rivers since October 2016. She was interviewed by Mr Kelly.
- [51] Ms Baxter stated that there was no training given to her. She confirmed that she enjoyed working with Mrs Kelly but also stated that Mrs Kelly would often drink whilst at work and on occasions would get a taxi to get Mrs Kelly home. She also stated that she thought Mr Kelly drove home on a number of occasions when he was intoxicated.
- [52] In relation to the management of the premises she thought that Mr Kelly was the boss when she first started. After confronting Mr Kelly about some of the issues she stated that he did not seem to be on the premises so much but started to call and order staff around. Ms Baxter detailed a number of incidents

where staff were intoxicated on the premises, including the New Year's incident.

- [53] In cross examination by Mr Thwaites Ms Baxter agreed that she enjoyed working with Mrs Kelly initially and had a good working relationship with her. She was asked about after work drinks on the house and how this worked.
- [54] When asked by a member of the committee how the place would run if Mr Kelly was not there she stated that if Mrs Kelly was not drinking then the place would run really well.
- [55] In relation to the witnesses called by the Inspector, both Ms Baxter and Ms Mills's evidence was subject to an order under s. 203(5) prohibiting the publication of certain matters. Both the Inspector and Counsel for the applicant sought the order. The Committee makes no comment in regards to this apart from its finding both witnesses to be credible. Their evidence in regards to these matters was not seriously challenged.
- [56] Mrs Kate Webster, ACADS, gave evidence. She read her statement and detailed her role as reporting officer for the Medical Officer of Health on licence applications. She detailed a visit she conducted of the premises on 10 February 2017. She found no issues.
- [57] On 25/26 February 2017 Mrs Webster carried out late night observations of the premises. She detailed persons she observed and the signs of intoxication that she observed. She did not approach any of these persons and confirm what she observed.
- [58] In her evidence Mrs Webster detailed a Controlled Purchase Operation in which she took part with Police. This took place on 7 April 2017 and a sale was made to the underage volunteers when they tested Braided Rivers. She confirmed that Mrs Kelly was the manager on duty. Another late night visit to Braided Rivers was detailed in Mrs Webster's evidence, 3 June 2017. Details of persons allegedly affected by alcohol were recalled. None of the patrons were spoken to. On one occasion the manager on duty was spoken to, this was Joshua Martin. He advised that he was a Temporary Manager and that he had submitted his documentation to the Council to become a duty manager.
- [59] Mrs Webster confirmed that she had carried out staff training at Braided Rivers at the request of Mrs Kelly on 29 June 2017. She also indicated that there were issues with the compliance of the smoking area but could not confirm at what point this was at as it was not her area of expertise.
- [60] Mrs Faass, the Alcohol Licensing Inspector, gave evidence. She read her statement and summarised her report. She noted that the fire evacuation scheme needs to be addressed as it is not currently in order.
- [61] In her report the Inspector detailed a number of issues including the failed Controlled Purchase Operation and subsequent licence suspension, Drink

Driving conviction of the director of the company and subsequent suspension of her manager's certificate. Intoxicated patrons found on the premises, staff intoxicated on the premises and an unsuitable shareholder involved in the management of the premises as well as an Infringement Notice issued for failing to notify a Temporary Manager appointment. The inspector opposed the renewal of the licence.

[62] In regards to what she has observed since filing her report she stated that Mrs Kelly seems to be trying to up the management levels at the bar although there are still some issues around security. She also noted that Mr Kelly had spent less time at the bar preceding the hearing.

[63] When cross examined by Mr Thwaites Mrs Faass stated that she would agree that the issues with the premises are limited to Friday and Saturday evenings and that there has been a substantial improvement in the venue in the last few months, however she was not convinced that the changes were permanent or a response to the matter going to a hearing. She also agreed that implementation of no shots, one way door and early finish should make a difference.

[64] When asked if she had a recommendation Mrs Faass stated that she was not recommending refusal of the renewal but believed that a shorter renewal and further licence conditions would be appropriate. She also stated that she would like to see a number of documents produced that would help the applicant run the business. These documents and conditions would include;

- Staff employment agreements
- Security contract
- Updated training policy
- Viewing of the incident book
- Certified sales figures to show what type of premises Braided Rivers is, Tavern or restaurant.

[65] The issues identified by the Inspector, and her witnesses, primarily relate to the inability of the applicant to manage the sale and supply of alcohol in a safe and responsible manner and minimise the harm caused by the excessive and inappropriate consumption of alcohol. They point to a lack of unsuitability.

[66] The evidence is summarised as;

- Mr Kelly's conduct towards female staff and his conduct in general in managing the premises when he is not suitable to do so. (Evidence of Ms Mills and Ms Baxter)
- Mrs Kelly's admission regarding providing false information on Ms Mill's Manager's Certificate application. (Admitted)
- 31st December 2016- 1st January 2017, staff intoxicated on the premises to the point of passing out. (Admitted)
- 26th February 2017- Mrs Webster's observations regarding intoxicated patrons leaving the premises.
- 4th April - Failing to notify Temporary Manager, infringement notice. (Admitted)

- 7th April – Failed Controlled Purchase Operation. (Admitted)
- 22nd April 2017- Intoxication. (Constable Hooper)
- 7th May 2017– Mrs Kelly Evidential Breath Alcohol offence. (Admitted)
- 21st May 2017– Intoxicated male found on premises by Police (Admitted)
- 27 May 2017– Mrs Faass’s evidence of intoxicated and offensive male on premises.
- 3rd June 2017– Mrs Webster’s evidence regarding intoxicated patrons.
- No current statement regarding Fire Evacuation scheme attached to the file as required by s.127(2)(e)(i).
- Training Manual provided is Australian and produced in 2005. (Produced by applicant).

[67] The above list of breaches of the Act and failures of management make sorry reading when one considers this is the first year of trading in these premises for this applicant.

[68] The evidence in regards to intoxication witnessed by Mrs Webster and Constable Hooper may fall short of that required to prove a breach of the Act when one considers an application under section 280 of the Act but in regards to the suitability of the applicant in a renewal hearing the evidence is sufficient and placed with other evidence to give an overall impression of the suitability of the applicant.

[69] On the matter of evidential sufficiency the agencies should take note of the standards required by the Authority when evidence of intoxication is adduced. The evidence should include;

- Notes taken at the time.
- Speaking to the alleged intoxicated person in person, preferably with the duty manager present and able to make their own assessment.
- Corroboration by another enforcement officer be it Police, Alcohol Licensing Inspector or Medical Officer of Health’s representative.
- The use of an assessment tool, such as the Police assessment tool.

[70] The matters which could be considered as mitigating were the admission of the failings by the applicant and the fact that when Mrs Kelly gave evidence she did so in a manner which lead us to believe she was contrite and genuinely motivated to improve the premises. The fact that there are no recorded instances of issues at the premises from June 2017 to the date of the hearing may attest to this. Credit must also be given for applicant’s previous good conduct as a licensee. The Kellys have extensive experience as licensees over many years.

[71] In light of the evidence of the Inspector and her submissions in regards to suggested undertakings, the applicant made the following undertakings;

- (i). An Alcohol Management Plan which addresses training, intoxication, managing the smoking area and an incident book to be completed and handed to the Inspector by 1 February 2018.
- (ii). Written confirmation that Mrs Kelly will work with Hospitality New Zealand to be provided by 1 February 2018.

- (iii). Employment contracts, Security Contract and an audited set of accounts for the business showing the percentage of alcohol sales relative to food sales to be handed to the Inspector by 1 February 2018.
- (iv). Statement certifying the Fire Evacuation scheme by 1 February 2017.
- (v). One Way Door placed on premises from 12.15am on each day.
- (vi). No shots after 11.00pm on each day.
- (vii). A written undertaking that Mr Kelly will not be involved in any way in the management of the premises and will have no authority over staff.

[72] As will be seen in the conditions of the renewal we have placed numbers (v) and (vi) as conditions of the licence. The other undertakings made by the applicant should be viewed by the applicant as if they were conditions of the licence and breaches of the undertakings will be regarded as serious and may affect the applicant's ability to retain the licence.

Committees Decision and Reasons

[73] When considering an application for the renewal of a licence the criteria which we must have regard are found at s.131 of the Act and includes matters in sections 105 of the Act. Sections.131 and 105 state;

131 Criteria for renewal

- (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.

105 Criteria for issue of licences

- (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:

And:

(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.

[74] In regards to reports made under s.129, only the Inspector reported in opposition to the renewal. The Alcohol Licensing Inspector, Mrs Helene Faass, was the only representative of the agencies to oppose the application, however she called both Police and Medical Officer of Health representatives to give evidence.

[75] The Inspector's opposition to the renewal application relates to three of the criteria.

(i) The suitability of the applicant s.105(1)(b)

(ii) Appropriate systems, staff, and training. 105(1)(j)

(iii) The manner in which the applicant has sold, supplied alcohol. S.131(1)(d).

[76] In this case we have heard extensive evidence from the agencies, and witnesses, in regards to the way the premises has operated and matters which seriously challenge the suitability of the applicant to be the holder of a licence.

[77] A case often referred to by the Authority in regards to the privilege of holding a licence is *Hooper v Clark* [1999] NZLLA PH 1169. It is very pertinent to this application and it states;

"A liquor licence is a privilege. It may colloquially be regarded as a "package deal". Both the burdens and the benefits run with the licence. Mr Clark as licensee must either accept those burdens and control the sale and supply of liquor in a satisfactory manner, or he will not continue to enjoy the privilege. Either the licensee can manage the premises and on-licence satisfactorily, or he cannot."

[78] Those words should ring in the ears of this applicant. The underlying issue in this case is the suitability of the licensee. All issues stem from the inability of the applicant to control the premises. It maybe the following is another very apt case to quote and especially very pertinent to Mr Kelly. In *Buzz & Bear Limited v Woodroffe* [1996] NZAR 404, McGechan J said:

"Times change. Communities and environments change. Social habits and levels of tolerance change. Obviously it would have been seen by the legislature to be wise to keep conditions imposed under review in light of potential social change. The licensee's submissions would have licence conditions frozen in some time warp while the world marches on; not, even in the arcane world of liquor licensing, a likely legislative intention. Section

4 interpretation directives align with common sense to point towards allowing the Authority to engage in a wider perspective. It can keep its eye on wider trends and needs in a specialist area where it has unique, and uniquely current, expertise. Any licensee takes a licence under risk that conditions may change, and a report may recommend adjustment. There is no asset protected for all time whatever may happen outside.”

[79] Mr Thwaites, for the applicant, submitted that the Controlled Purchase Operation (CPO) and drink driving conviction of Mrs Kelly should not be taken into account as they pertained to matters which had been dealt with by the Authority and no longer relevant. We beg to differ. They are very relevant when one is looking forward to the renewal of a licence where issues have been raised by the agencies. In the decision of the Authority *Linwood Food Bar Limited* [2014] NZARLA PH 511-512, which was upheld on appeal to the High Court, is relevant on this issue.

[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.

[80] This is the first renewal and therefore the most important as the applicant was granted a licence unopposed. The agencies and the Committee issuing the licence, placed faith in the applicant that it would act on what it stated in the application for the licence. It clearly has no ‘come up to brief’.

[81] The role of the Committee is to stand back and evaluate the evidence placed before it, weigh it against the criteria with which the application fits and return a decision which, in its opinion, will fulfil those criteria and ultimately fulfil the purpose and object of the Act. There are two fundamental questions we must ask ourselves when we evaluate a renewal;

1. Should the licence be renewed, in the light of the evidence placed before us?
2. If the licence is to be renewed should the licence be renewed on the conditions presently attached to the licence or should the conditions be altered?

[82] We came to the conclusion, by the smallest of margins, that with the undertakings made, and with conditions placed on the licence, that the licence could be renewed for a reduced period of 12 months. The applicant is warned that any failure on its behalf must be seen to place the continuance of the licence in serious doubt. We refer to *Deejay Enterprises Limited*, NZ LLA 531-532/97 where it is stated:

“The guiding hand or hands-on operator of any company or the potential holder of a General Manager’s Certificate now receive greater scrutiny from both the Police and other reporting agencies. Character and reputation are closely examined. The law and human desires of patrons frequently tug in different directions. The Police cannot be everywhere. Little but a licensee’s or manager’s character and suitability may stand between upholding the law and turning a blind eye. Self imposed standards in accordance with the law

must be set by licensees and holders of General Manager's Certificates who control and manage licensed premises."

[83] Though the comments were made under the old Sale of Liquor Act 1989 they hold even greater significance in light of the objects of the Sale and Supply of Alcohol Act 2012 which is not just the reduction of alcohol related harm but the minimisation of such harm.

[84] The issues placed before us, clearly show the suitability of the applicant in a poor light. The lack of a cohesive training package delivered regularly by an experienced well trained person has also, in our opinion, been a serious error and needs to be addressed if any positive changes are to be embedded into the business. We believe that Mrs Kelly would benefit from sitting the Licence Controller Course again.

[85] We are satisfied as to the matters to which we must have regard as set out in s.105, 106 and 131 of the Act, the licence is granted for 18 months, with the conditions as below and the variation to the courtyard dining room which shall now be designated as a supervised area. **The renewal shall not issue until a statement as required under s.127(2)(e)(i), regarding an evacuation scheme, has been submitted.**

[86] The following conditions shall be placed on the licence, as discussed and agreed to by the applicant;

- One Way Door shall be in effect from 12.15am on each day.
- No shots shall be served from 11.00pm on each day.
- The hours of trade are reduced to Monday to Friday 8.00am to 1.30am the following day (Inside the premises) and Monday to Friday 11.00am to 11.00pm (Outside the premises).
- The renewal period shall be 18 months.

[87] **The licence will not issue until the expiry of 10 working days from the date this decision is given to all parties.** That period is the time provided by s.155 of the Act for the lodging of a notice of appeal.

Managers Certificate of Joshua Albert Martin **Decision of the Committee**

[88] The process for Mr Martin gaining his manager's certificate will be a journey rather than an event. His admission in regards to the incident on 27 May 2017 where an intoxicated male was found after hours in the toilet cubicle of the premises shows that he still lacks the ability to run a premise which will uphold the object and intentions of the Act. His lack of experience in managing a challenging late night venue is obvious and to grant his certificate in the light of the evidence placed before us would be placing a responsibility on him that we are not persuaded to do.

[89] Given the evidence regarding Mrs Kelly, and the issues at the premises, one must wonder whether it is wise for Mr Martin to continue to have Mrs Kelly as

a mentor. If this venue was only trading as a restaurant we may think otherwise but in its current trading form we are convinced that Mr Martin should consider gaining some experience in a well-run late night venue and then bring that experience back to this establishment.

[90] The application for a manager's certificate by Mr Martin is adjourned for six months. Further reports shall be called for at this time and the Committee will either grant the matter on the papers if there are no reports seeking a hearing or if there are we shall reconvene a hearing and hear the matter.

The renewal and conditions of the on-licence

The applicant must comply with all conditions specified on a licence.

The licence will be subject to the following conditions:-

Compulsory conditions – section 110 (2)

The following conditions are compulsory:

(a) No Alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1pm on ANZAC Day to any person who is not present on the premises to dine.

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

Inside the premises.

Monday to Sunday 8.00am to 1.30am the following day

Outside areas.

Monday to Sunday 11.00am to 11.00pm.

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

Discretionary conditions – section 110 (1)

(a) the following steps must be taken to ensure that the provisions of the Act relating to the sale of alcohol to prohibited persons are observed:

- Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.

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

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

Section 117 – Other discretionary conditions.

(1) the following steps must be taken to promote the responsible consumption of alcohol:

- (a) The licensee must implement and maintain the steps proposed in their host responsibility policy aimed at promoting the reasonable consumption of alcohol.
- (b) Water will be available by way of reticulated water stations in every bar area.

(2) A One Way Door shall apply to the premises from 12.15am on every day.

(3) No shots shall be served from 11.00pm on every day.

Section 119 – Restricted or Supervised areas

- The whole of the premises shall be designated as a **supervised** area excluding the lobby, restaurant and outside areas.

Other restrictions and requirements

Section 50 – One Way Door restrictions in Local Alcohol Policies to be complied with.

Section 51 - Non-alcoholic drinks to be available

Section 52 – Low alcoholic drinks to be available

Section 53 – Food to be available

Section 54 – Help with information about transport to be available

Section 56 – Display of signs

Section 57 – Display of licences

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

A copy of the licence setting out the conditions to which it is subject is attached to this decision.

THE LICENSED PREMISES

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

DATED at ASHBURTON this 8th day of January 2018.



Chairperson
Ashburton District Licensing Committee