

[2014] NZARLA PH 953-955

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of an application pursuant to s.280 of the Act for suspension or cancellation of on-licence number 030/ON/26/08 issued to **THIRSTY WHALE BAR & RESTAURANT LIMITED**, in respect of premises situated at 62 West Quay, Ahuriri, Napier, and known as "Thirsty Whale"

AND

IN THE MATTER

of an application pursuant to s.280 of the Act for variation of on-licence number 030/ON/26/08 issued to **THIRSTY WHALE BAR & RESTAURANT LIMITED**, in respect of premises situated at 62 West Quay, Ahuriri, Napier, and known as "Thirsty Whale"

BETWEEN

RAYMOND KEITH WYLIE
(Police Officer of Hastings)

Applicant

AND

THIRSTY WHALE BAR & RESTAURANT LIMITED

Respondent

AND

IN THE MATTER

of an application by **THIRSTY WHALE BAR & RESTAURANT LIMITED** pursuant to s.18 of the Sale of Liquor Act 1989 for renewal of an on-licence for premises situated at 62 West Quay, Ahuriri, Napier, and known as "Thirsty Whale"

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Mr R S Miller

HEARING at NAPIER on 4 and 5 December 2014

APPEARANCES

Senior Sergeant S D Sargent – NZ Police – applicant and in opposition to renewal of on-licence

Mr M E J MacFarlane – for respondent and applicant for renewal of on-licence

Mr J P Sheehan – Napier District Licensing Inspector – to assist and in opposition to renewal of on-licence

Mr D B Buckley – objector

RESERVED DECISION OF THE AUTHORITY

The Applications

[1] This decision relates to two enforcement applications and an application by Thirsty Whale Bar & Restaurant Limited (the licensee) for a renewal of its on-licence.

[2] The first enforcement application seeks the suspension or cancellation of the on-licence issued to the licensee. The second enforcement application seeks a variation of the conditions of the licence issued to the licensee. Both enforcement applications are brought on the same grounds: viz. breaches of the following sections of the Sale and Supply of Alcohol Act 2012: s.248 (sale or supply of alcohol to intoxicated persons), s.249 (allowing people to become intoxicated on the premises) and s.252 (allowing intoxicated persons to remain on licensed premises). The applications allege that on 15 February 2014 at about 1.30 am the Police conducted a routine compliance check at the premises. They observed the sale of alcohol to a group of four persons. Before the alcohol was consumed one male person from that group was taken outside and assessed by Police as being intoxicated. Subsequently another male person from the same group was assessed by Police as intoxicated. In each case the duty manager (Michael Stephen Dickerson) disagreed with the Police assessment. The first patron was readmitted to the premises and allowed to remain there. The duty manager refused to permit the second patron to enter the premises.

[3] In the first enforcement application it was submitted that the on-licence should be cancelled. In the second application it was submitted that there should be a variation to the conditions of the on-licence in respect of its hours, the imposition of a one-way door restriction, and that the on-licence should be renewed for one year.

[4] The application for the renewal of the on-licence was opposed by the Police and the Inspector generally upon the same grounds as those alleged in the enforcement applications.

Application for Renewal of On-licence

[5] The application for the renewal of the on-licence is dated 6 November 2013. In accordance with s.407 of the Sale and Supply of Alcohol Act 2012 the application is considered under the Sale of Liquor Act 1989 except that the criteria set out in s.131 of the Sale and Supply of Alcohol Act 2012 apply. When considering conditions, the provisions of s.132 of the Sale and Supply of Alcohol Act 2012 apply. It seems that s.132(1)(a) of the Sale and Supply of Alcohol Act 2012 refers to the restrictive s.14 contained in the Sale of Liquor Act 1989. Nothing turns on this as the agreed conditions pertaining to the renewal application can be imposed under s.14(5)(e) of

the Sale of Liquor Act 1989 as well as ss.111 and 117 of the Sale and Supply of Alcohol Act 2012.

[6] The “Thirsty Whale” premises are located at 62 West Quay, Ahuriri, Napier. They are situated in the middle of a number of restaurants and bars on West Quay. Unlike the other licensed premises on West Quay “Thirsty Whale” habitually sells and supplies alcohol to patrons until 3.00 am each day. The premises comprise a large bar and attract patrons from most sectors of the community. The very nature of the premises makes them problem premises and they have attracted more attention from the regulatory authorities than most other licensed premises in Napier.

[7] The on-licence became due for renewal on 24 December 2013. Thus it has approximately 24 months to run if this application succeeds.

[8] Realistically, if both enforcement applications were granted, it was always unlikely that the grounds stated in them would be sufficient for the Authority to refuse this renewal application. The licensee has agreed to the imposition of a one-way door restriction. If the licensee was obliged to cease the sale and supply of alcohol earlier than 3.00 am, it is inevitable that at least one other on-licensed premises in the vicinity would extend its hours to accommodate the market and the magnetic nature of a bar that remains open for longer than others would remain. In any event, the one-way door restriction will achieve almost the same as a reduction in licensing hours: viz. a reduction in people milling about in the vicinity of the premises and creating trouble including alcohol-related harm. As the on-licence (if renewed) will have just over two years to run, little would be achieved by renewing it for a term less than two years. Indeed, it would be useful if this on-licence became due for renewal within a short time after the Napier District Council’s Local Alcohol Policy comes into existence. It seems that this is unlikely to occur within 12 months.

[9] One of the concerns of the regulatory authorities in respect of the renewal application was the failure of the licensee to enter into a risk management plan which was acceptable to the authorities. The fact that the licensee was prepared to consider a risk management plan is laudable. However, whilst the reporting agencies can attempt to influence and advise on the contents of a risk management plan, ultimately, it is for the licensee to adopt such risk management plan as he considers suitable. Sensibly, a licensee will adopt such a plan that will enable him to operate the premises and comply with the provisions of the Act. However, ultimately the contents of the plan are for him to determine: not for the reporting agencies.

[10] The application meets the criteria set out in s.131 of the Act. Accordingly the application for the renewal of the on-licence is granted for a term of three years from 24 December 2013. The following are the agreed conditions which are to be included in the licence:

- [a] A one-way door condition is to operate each morning commencing at 2.00 am; and
- [b] No persons are to be permitted to enter the “Harpoon Bar” through the side door from midnight onwards provided that the side door may be used at all times for egress only.

Enforcement Application for Variation of Conditions

[11] The enforcement application seeking a variation of the conditions of the licence is refused. One of the proposed conditions has been included in the on-licence by virtue of the successful application for its renewal. Further, if proved, the grounds for the application do not warrant the imposition of any conditions except those contained in the on-licence by virtue of the renewal application.

Enforcement Application for Suspension or Cancellation of On-licence

[12] Details of this application are contained in paragraph [2] of this decision. Pursuant to s.280(3)(a) of the Act the application alleges that the licensed premises have been conducted in breach of the provisions of ss.248, 249 and 252 of the Act.

[13] The application does not allege, pursuant to s.280(3)(b) of the Act that the conduct of the licensee is such as to show that it is not suitable to hold the licence.

[14] Section 248(1) of the Act reads:

“The licensee or a manager of any licensed premises who sells or supplies alcohol to an intoxicated person commits an offence.”

[15] Section 249(1) of the Act reads:

“The licensee or a manager of any licensed premises who allows any person to become intoxicated on the premises commits an offence.”

[16] Section 252(1) of the Act reads:

“The licensee or a manager of any licensed premises who allows an intoxicated person to be or remain on the licensed premises commits an offence.”

[17] *“Intoxicated”* is defined in s.5 of the Act and means:

“Observably affected by alcohol, other drugs, or other substances (or a combination of two or all of those things) to such a degree that two or more of the following are evident:

- [a] Appearance is affected;**
- [b] Behaviour is impaired;**
- [c] Co-ordination is impaired;**
- [d] Speech is impaired.”**

[18] Senior Constable Duane Coffin has 14 years experience in the Police. He has been a frontline officer throughout his Policing career which means that he has dealt with drug and alcohol-affected persons on a regular basis. He joined the Alcohol Harm Prevention Group in August 2012.

[19] Sergeant Raymond Wylie is the Alcohol Harm Prevention Sergeant for the Napier, Hastings and Central Hawke’s Bay areas. He joined the Police in 1996 and has worked in several frontline policing roles for the last 18 years. He has worked for more than eight years as a General Duties Constable attending incidents involving intoxicated and alcohol or drug-affected persons. As the holder of a General Manager’s Certificate, he worked in licensed premises from 1992 to 1996. On 7 and

8 February 2014 he was seconded to assist the Wellington Police at the Westpac Stadium and then in the Wellington CBD. This was during the Wellington Sevens tournament. He was required to identify and assess many intoxicated persons at the Westpac Stadium. Another Alcohol Harm Prevention Officer completed an independent secondary assessment on each occasion. Each person who was assessed by Sergeant Wylie was brought to the attention of the duty manager and on each occasion that duty manager accepted that the patrons Sergeant Wylie identified were indeed intoxicated. Sergeant Wylie's assessments were agreed as being accurate and were confirmed by the other Alcohol Harm Prevention Officer.

[20] On 15 February 2014 at 1.30 am Senior Constable Coffin and Sergeant Wylie conducted a compliance check at the licensee's premises. They noticed a group of people on the dance floor and that several of them were showing signs of intoxication such as being unsteady on their feet, looking sleepy and untidy in appearance. The two Police officers were approximately five or six metres from the group. To both of them it seemed that at least one member (O'Connor) was intoxicated to the extent that he should not have been on licensed premises.

[21] Shortly afterwards, the Police observed the group (which consisted of three males and a female) approach the bar. O'Connor produced his wallet and seemed to be placing an order for drinks. The barperson (Ms Tuapawa) did not serve him alcohol. Fifteen or thirty seconds later she gave him a glass of water.

[22] In evidence, Ms Tuapawa said that she was asked if 'Jack Daniels Honey Liqueur' was stocked. She shook her head and indicated that it was not. Then one of O'Connor's friends asked for water which she gave him. She stated that the group did not seem intoxicated and was not certain that it was the same group who subsequently approached the other barperson, Ms Rebecca Brown.

[23] The two Police officers observed that the group moved further along the bar and ordered a round of drinks from Ms Brown. Ms Brown filled shot glasses with 'Sambuca' which contains 38% alcohol by volume. She placed a full shot glass of 'Sambuca' in front of each person. The drinks were paid for.

[24] It was only then that Ms Brown appeared to notice the Police officers watching the transaction. She removed the glasses of 'Sambuca' from the group and placed them out of reach. She gave members of the group water.

[25] The Police then decided to assess some of the members of the group to determine if they were intoxicated in accordance with the definition contained in s.5 of the Act.

[26] Ms Brown says (and in this respect her evidence seems to be confirmed by CCTV footage) that the reason that she removed the 'Sambuca' from the group was that one of the group, (Ryan Gittings) tried to light the 'Sambuca'. She did not remove the 'Sambuca' because she thought that members of the group were intoxicated. Indeed, she stated that the only sign of intoxication with respect to Ryan Gittings was his slightly glassy ("squinty") eyes. She thought that he might have been "*on something*" (drugs). There was some evidence that Ryan Gittings had been, and was still, ill.

[27] The two Police officers independently assessed O'Connor and Gittings. Their notes are recorded on Licensed Premises Patron Reports.

[28] Senior Constable Coffin recorded in respect of O'Connor:

"He had regular slurring speech, difficulty forming words, was repetitive, very slurred, and unintelligible. He was swaying. He had glassy eyes, looked dishevelled and tired, there was a strong smell of alcohol on his breath. He was argumentative."

[29] Sergeant Wylie noted in respect of O'Connor that:

"His speech was repetitive and very slurred. He was swaying. He was unable to focus and looked tired. There was a strong smell of alcohol on his breath. He was argumentative."

[30] Thus both Police officers noted that O'Connor's speech was repetitive and very slurred. They both noticed that he was swaying. They both thought he looked tired. They both noted a strong smell of alcohol on his breath. They both noted that he was argumentative.

[31] Senior Constable Coffin observed that Gittings' speech was loud and repetitive. He was swaying. His eyes were bloodshot and glassy looking. There was a strong smell of alcohol on his breath.

[32] Sergeant Wylie noted that Gittings' speech involved him having difficulty forming words and was very slurred. He was swaying and very unsteady on his feet. He had glassy eyes and looked tired. There was a strong smell of alcohol on his breath.

[33] The assessments of O'Connor and Gittings were undertaken independently. Neither Police officer knew what the other had written on the respective Licensed Premises Patron Report. In each case, the assessments showed that Gittings and O'Connor were intoxicated in accordance with the definition in the Act. However, if one compares the assessments against what is known as the SCAB Intoxication Assessment Tool, on these assessments it is clear that O'Connor was intoxicated to the extent of requiring to be removed from the premises and denial of service of alcohol, whereas Gittings could either have been affected by alcohol to the extent that intervention was required or intoxicated to the extent that a denial of service of alcohol and the removal from the premises was required to comply with the provisions of the Act.

[34] Both Police officers had considered that O'Connor was intoxicated when he was dancing inside the premises. Although Mr Dickerson denied that O'Connor showed signs of intoxication, significantly he refused to permit him to re-enter the premises. Mr Dickerson says that this was because the one-way door was now operating and he was concerned that if O'Connor were to enter the premises he might become intoxicated. However, he did permit Gittings to re-enter the premises as in his opinion Gittings was not intoxicated. According to Mr Dickerson neither Gittings nor O'Connor showed any signs of intoxication.

[35] Mr Dickerson's evidence was self-serving. Even Ms Brown had noticed something odd with Mr Gittings' eyes: one of the intoxication signs. On the Police evidence, the actions of Mr Dickerson in attempting to put words into the mouth of Ms Brown when she was being interviewed by the Police almost amounted to obstruction. He was lucky he was not charged. Whilst it was acceptable for him, as the duty manager, to be present with a staff member when she was being

interviewed by the Police, it was not acceptable for him to attempt to influence the answers that she gave. The evidence, in this regard, was quite conclusive.

[36] The fact that Gittings attempted to light the 'Sambuca' together with his glassy eyes should have put Ms Brown on enquiry as to his condition. However, the lighting of the 'Sambuca' occurred after the sale and supply of alcohol had been effected. Nevertheless, she should have permanently have removed the alcohol from him at that point: yet the evidence of Mr Dickerson is that the members of the group (including O'Connor) had access to the 'Sambuca' after Ms Brown had removed it from them. Whether this included Gittings is not clear.

[37] Sergeant Wylie's assessment of Mr Gittings' co-ordination is questionable. He recorded him as being "*very unsteady on feet*". His other evidence is that Mr Gittings was not unsteady: he required Gittings to stand on one foot and was surprised that he did not fall over. Gittings paid for the drinks using an EFTPOS card which he managed without drawing attention to himself. Dion Whatuira who is an experienced doorman observed both Gittings and O'Connor from approximately two metres away when they were being assessed by the Police. He thought that Gittings showed no signs of being intoxicated and had managed to walk up and down the stairs without drawing attention to himself. He was not so sure about O'Connor but subsequently told Sergeant Wylie that one of the men was not intoxicated; but the other was but not so sufficiently intoxicated as to not be on the premises. Under cross-examination the two metres referred to earlier became a somewhat greater distance.

[38] Other "independent" witnesses were called to give evidence for the licensee. In some instances the evidence seemed to be self-serving. It did not assist either way.

[39] With reference to the SCAB tool, Mr Gittings' lighting of the 'Sambuca' could either be regarded as an inappropriate or risky action (requiring intervention) or "seriously inappropriate action" (requiring a denial of service and his removal from the premises). The assessments by the two Police officers of him certainly show that he was affected by alcohol requiring intervention but if intoxicated, was only marginally so. Sections 248, 249 and 252 all use the defined word "intoxicated". The word was not defined in the Sale of Liquor Act 1989. The definition supercedes the case law definitions previously employed. The offence sections all involve an element of mens rea. On that basis, there is not enough evidence to show that the licensee (through the actions or inactions of Ms Brown and the duty manager) could have observed at the time of sale that Gittens was intoxicated. Thus in respect of Gittens, the evidence is not sufficiently strong to show that ss.248 and 249 of the Act were breached.

[40] The SCAB assessments of Gittens did show that he was intoxicated as defined in the Act. Whilst his degree of intoxication was not great, he was still intoxicated and Mr Dickerson knew this. Accordingly, when he was permitted by Mr Dickerson to re-enter the premises, s.252 of the Act was breached.

[41] As indicated previously, the evidence of O'Connor's intoxication is conclusive. If Ms Brown did not notice his condition, then she should have. It was certainly observable at the time she sold the alcohol. His actions were even more suspicious by reason of the fact that he and other members of the group had previously moved along the bar after having ostensibly been refused service by Ms Tuapawa. Had the duty manager (Mr Dickerson) been observing what was happening at the bar (as he should have been in terms of s.214 of the Act) then there was enough evidence of O'Connor's intoxication to have put him on enquiry and ultimately have him removed

from the premises. These matters reflect on the licensee. The Authority is satisfied on the evidence (which reaches the *Triveni Puri Limited v Commissioner of Police* [2013] NZAR 88 standard) that in respect of O'Connor ss.248, 249 and 252 of the Act were breached.

[42] Accordingly, the application has been proved and is granted. In terms of s.280(5)(c) of the Act it is desirable that an order for the suspension of the on-licence be made. Aggravating features are:

- that at the time the sale took place Mr Dickerson (the duty manager) was at the front desk and did not observe what was happening in the bar. This could indicate a systemic problem if s.214 of the Act is to be complied with.
- the circumstances surrounding Gittens' re-entry to the premises.
- the failure to permanently remove the sambucca from O'Connor. By that time his intoxicated condition must have been obvious to Ms Brown.

[43] This is the first time that a successful enforcement application has been brought against this licensee in respect of the premises. Other than that, there are no mitigating circumstances. Accordingly, the on-licence issued to the licensee in respect of the premises is suspended for 24 hours commencing at 8.00 am on Saturday 17 January 2015.

[44] This order is a negative holding in terms of s.289 of the Act. If the licence has not already been cancelled, three negative holdings incurred within a three year period will result in an application to the Authority for cancellation of the licence.

DATED at WELLINGTON this 24th day of December 2014

A E Cannell
Deputy Secretary