

Decision No. 1169/99

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by JASON MALCOLM CLARK pursuant to s.18 of the Act for renewal of an on-licence in respect of premises situated at the corner of George and Queen Streets, Blenheim, known as "Bar Navajo"

AND

IN THE MATTER

of an application pursuant to s.132 of the Act for variation, suspension or cancellation of on-licence number 052/ON/6/98 issued to JASON MALCOLM CLARK in respect of premises situated at the corner of George and Queen Streets, Blenheim, known as "Bar Navajo"

BETWEEN

KEVIN JOHN HOOPER
(Police Officer of Blenheim)

Applicant

AND

JASON MALCOLM CLARK

Respondent

BEFORE THE LIQUOR LICENSING AUTHORITY

Quorum

Mr R J S Munro
Mr J W Thompson

HEARING at BLENHEIM on 3 June 1999

APPEARANCES

Mr M Hardy-Jones – for applicant, and for respondent in s.132 application
Sergeant K J Hooper – NZ Police - in opposition to renewal and applicant under s.132
Mr M J Hunt – for Marlborough District Licensing Agency and Mr G J Hodgetts
Marlborough District Licensing Agency Inspector
Dr M Leonard - District Medical Officer of Health – to assist
Mr C J Knowles - objector

DECISION

This is an opposed application for renewal of an on-licence held by Jason Malcolm Clark in respect of premises situated at the corner of George and Queen Streets, Blenheim, known as “Bar Navajo”. In addition, an application has been made by a Police Officer pursuant to s.132 of the Act for variation, suspension or cancellation of the same licence. Both proceedings were set down for public hearing.

Preliminary Application

Sergeant Hooper first sought leave to withdraw the application for variation, suspension or cancellation of the licence. There was no opposition from other parties to that request. Following discussion between parties and the Authority, it was common ground that although neither cancellation nor suspension of the licence would be sought in these proceedings, the suitability of the licensee would be examined. Mr Hunt pointed out that an Inspector’s report pursuant to s.23(2)(b) was available which would enable the Authority, if it thought fit, to renew the licence on different conditions.

Following a brief adjournment, the Authority granted leave for the s.132 application to be withdrawn. In other applications where factual matters (as distinct from the inferences from these facts) are in dispute between parties that may not always be appropriate. The wider powers conferred on the Authority by s.132(6) might well be of greater utility in such circumstances.

Renewal Application

Mr Hardy-Jones first called the licensee, Mr J M Clark, who told us that he believed the Police allegations to be baseless. He told the Authority that he has made every effort to prevent breaches of the Act and had gone to considerable lengths and great expense to minimise the output of noise from the bar. He believed it would be fair for the bar’s closing time to be extended to 3.00 am, in keeping with other bars of a similar nature in Blenheim.

Mr Clark outlined the steps he had taken to reduce noise following discussions with Mr C Knowles as an objector and Proprietor of the Hotel D’Urville, a hotel approximately 80 metres from the Bar Navajo. These included discussions with a

District Licensing Agency Inspector, employment of a Wellington-based noise consultant, the installation of noise bats and an air conditioning system which cost \$9,900. Mr Clark suggested that Mr Knowles objection *"is motivated by other factors than noise levels."*

Mr Clark told the Authority that since November 1998 there has not been one minor or intoxicated person found in the bar. There are strict procedures which are rigidly enforced to prevent incidents of disorder and control intoxication. On Friday evenings an average of 300 persons visit the bar and on Saturday evenings, 500. The business is successful in financial terms, with peak trading around midnight on Friday and Saturday evenings. At closure at 2.00 am a large number of people then move out on the street who are not ready to go home.

"This opens the door for potential problems. I believe if the bar were permitted to be opened until 3.00 am these problems would reduce"

On the other hand if closing time were reduced to 1.00 am I believe greater problems could result."

Mr Clark produced a number of references from patrons of his establishment and neighbouring businesses in support of his application.

Mr L Butt, the head of security at Bar Navajo, told us he has 8 years security experience having worked both in Christchurch and Blenheim. Security is provided on Friday and Saturday evenings from 9.00 pm onwards when two security officers are rostered. The bar is permitted to have only 172 people present at one time; the security officers monitor total admissions as well as preventing intoxicated persons entering the bar. Mr Butt outlined the procedures for excluding minors (prohibited persons); all are screened if they are thought to be under 25, rather than under 20.

Ms J M Higgins, the Assistant Manager of Bar Navajo told us she has held her position for the last 12 months and has 9 years experience in the hospitality industry. There are meetings every 6 weeks of all staff to discuss procedural problems and deal with general queries. Ms Higgins outlined procedures to prevent intoxication and control minors on the premises. Ms Higgins described Bar Navajo as *"unquestionably the most professionally run bar I have worked in"*.

DLA Submissions and Evidence

Mr M J Hunt, counsel for the Marlborough District Licensing Agency, and its Inspector Mr Hodgetts, provided helpful submissions covering all aspects of the application. Pursuant to s.99(1) of the Act, each local authority is the District Licensing Agency for its district. In answer to a question from the Authority, Mr Hunt indicated that his instructions came from the General Manager of the Marlborough District Council who acted by delegation from the full Council although neither the Council nor any Committee has considered this particular application. Mr Hunt submitted that at present any extension of hours was not

appropriate. A closing hour of 1.00 am is recommended with the premises designation being changed from “supervised” to “restricted” after 10.30 pm.

Mr Hunt noted that the application was lodged late and not accompanied by prescribed particulars. “That lateness was excused by the Marlborough District Council”, Mr Hunt said. In view of the provisions of s.18(2)(b) of the Act, Mr Clark is perhaps fortunate that this aspect of jurisdiction was not argued in the application.

Mr Hunt submitted that the Hotel D’Urville is affected by the manner in which the licensee has conducted the sale and supply of liquor, contrary to Mr Clark’s viewpoint. He cited a letter from the applicant to the Council dated 16 November 1998 when Mr Clark said:

“Offensive behaviour, language and excessive noise by members of the public in public streets is a matter for the Police, and not the Licensing Inspector.”

Mr Hunt also drew to our attention a decision of the Authority in Three Brothers Limited (LLA 1371/96) where the Authority said:

“We stressed then that it is a matter for a licensee in the conduct of its business to have a management pattern which is concerned about emerging patrons so that nuisance to the nearby residents is minimised and the evidence there before us suggested that buildings operations would be effective in substantially reducing any noise emissions from the premises.”

Mr Hunt then submitted that

“an operator is to ensure that standards of behaviour are maintained by guests and that intoxicated guests do not make a nuisance of themselves in public places.”

Mr Hunt called Mr G J Hodgetts, a Liquor Licensing Inspector, as first witness. Mr Hodgetts has exercised a degree of responsibility for liquor licensing matters on behalf of Marlborough District Council and its predecessor since 1982. As an Inspector Mr Hunt has rights independent of the Local Authority pursuant to ss.106 and 108 of the Act.

Mr Hodgetts told us that the original application for Bar Navajo was made in June 1997 and attracted objections from the proprietors of the nearby Hotel D’Urville. Following a meeting convened on behalf of the Marlborough District Council, the objection was withdrawn and trading hours of 10.00 am to 2.00 am the following day were agreed. Mr Hodgetts produced a copy of a letter dated 5 August 1997 signed by Mr Clark and Mr Knowles including:

“... Jason Clark has also agreed to monitor all noise emanating from his premises and surrounds, paying particular attention to hours after 1.00 am and agrees that on request, noise be further reduced.

Subject to the amendments and agreements, Chris Knowles of Hotel D'Urville will withdraw his objection to the on-licence for Bar Navajo."

Mr Hodgetts said that his Local Authority had placed reliance on Mr Clark honouring his assurances, and that when the noise complaints from the Hotel D'Urville were subsequently received, further meetings were held and letters written in an effort to try and address the ongoing concerns. The most significant factor is the combination of the music, young people and alcohol and the open windows at the front of the premises onto Queen Street and George Street. Mr Hodgetts concluded, after considering the complaints made, that they *"do reflect adversely on the appropriateness of Mr Clark as a suitable person to hold a liquor licence"*. As a result, in his view, appropriate trading hours would be:

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|---------------------------------------|---------------------------------------|
| Monday to Saturday | 10.00 am to 1.00 am the following day |
| Sunday, Good Friday and Christmas Day | 10.00 am to 11.00 pm (no change) |

Mr Hodgetts also recommended that the designation of the premises be changed from *"supervised"* to *"restricted"* after 10.30 pm and that the on-licence be renewed for one year only. Mr Hodgetts noted:

"If the pattern of conduct improves, it may be such that the Council would need to review its position and accept a later closing time."

Mr Hodgetts also produced copies of extensive correspondence to and from the applicant, the Hotel D'Urville and his report on the application dated 8 April 1999 which recommended 1.00 am closure. He reported:

"Despite meetings, discussions and correspondence with Mr Clark, he has been reluctant until very recently to act responsibly and address the problem of ongoing excessive noise emanating from his premises."

Mr Hunt then called Mr G R Congdon an Environmental Health Officer of the Marlborough District Council. He told us he was aware of various complaints regarding excessive noise and of the August 1997 agreement. He produced details of complaints made and dealt with by the Council's after hours noise monitoring service *"Securitas"*. Twelve complaints had been received, two of which resulted in excessive noise directions being issued pursuant to s.327 of the Resource Management Act 1991. Mr Congdon had also monitored noise outside the premises on 6 December 1997 and 16 January 1998 and told us:

"The consistent pattern to be observed from Council's files is that there are complaints regarding the noise from operators of the neighbouring hotel and that on most occasions when noise was found to be excessive, it was a requirement of the enforcement officers to close the front windows of the premises and to reduce the music levels. The monitoring which was done confirms at times that the noise levels exceed the proposed standards in respect of the zone in which the bar is situated."

Mr Congdon told us that the Council has resolved to vary the applicable noise standards by varying the existing specified level (65 dBA L10 at all times) to 55 dBA L10 at all times. This variation has not yet come into force.

Medical Officer of Health

Dr M Leonard, the District Medical Officer of Health, referred to her report dated 12 March 1999. In it she noted that an extension of hours to 3.00 am would be consistent with that held by other premises operating in the commercial zone. She commented:

"If the applicant is found by the Authority to be a 'suitable person' to hold a liquor licence, it would seem that he should be competent to operate at hours consistent with those of other similar premises in the area."

Dr Leonard supported the change in designation to "restricted" commenting:

"I am not convinced that it is a suitable environment for minors to be socialising in, even if they are there, 'for the purposes of dining'."

Dr Leonard concluded that the licence should be renewed for one year only.

Police Report

Sergeant Hooper produced evidence of an incident on 13 November 1998 when he visited the premises and found two persons he considered intoxicated to have been supplied with further liquor. Both were subsequently tested at the Police Station on an evidential breath testing device, and found to have 989 and 831 micrograms of alcohol per litre of breath.

Sergeant Hooper accepted that improvements have been made to the operation of the premises in recent times. Earlier Police concerns related to the finding of minors in a supervised area, intoxication on the premises, and to disorder.

Those incidents were recorded by the Police in a report as follows:

"Minors in a Supervised Area

In each of the following situations, minors were found by Police unaccompanied in the supervised area of Bar Navajo:

- (a) *At about 00:10 am on 28 March 1998, Amy Elizabeth O'Sullivan, then aged 16 years, found unaccompanied.*
- (b) *At about 01.54 am on 5 April 1998, Samuel Raymond Sheehan, then aged 17 years, found unaccompanied consuming liquor.*

- (c) *At about 00:30 am on 22 November 1998, Kurt Leyton Wilson, then aged 18 years, found unaccompanied consuming liquor.*
- (d) *At about 00:30 am on 25 October 1998, Jessie Heberd, then aged 16 years, spoken to by Police at Wairau Hospital after she was assaulted inside Bar Navajo.*

Intoxication

The following persons were found by Police intoxicated inside Bar Navajo:

- (a) *At about 06:00 pm on 27 May 1998, a member of the public entered Bar Navajo in a highly intoxicated state. The Duty Manager, Robyn Clarke, served this person a pint of beer. Police were called to remove the patron after he had fallen asleep.*
- (b) *At about 01:00 am on 13 November 1998, two members of the public, Sean Graham and Jason Thorp, were seen entering Bar Navajo in an intoxicated state. They entered the bar and both were served with an alcoholic beverage. [Direct evidence by Sergeant Hooper.]*
- (c) *At about 10.40 pm on 12 November 1998, Craig Anthony Newman entered Bar Navajo in a highly intoxicated state and was allowed to remain on the premises. Newman was arrested by Police shortly after leaving the bar for urinating in a public place.*

Disorder

- (a) *At about 00:30 am on 25 October 1998, Jessie Heberd, a 16 year old girl, was consuming alcohol unaccompanied in Bar Navajo. She was assaulted by another female, aged 19 years, inside the bar. Heberd was taken to hospital with moderate injuries.*
- (b) *At about 09:52 pm on 17 April 1998, a female patron was seen by Police leaving Bar Navajo carrying a bottle of alcoholic beverage. The patron threw the bottle, causing it to break on the footpath and was arrested.*
- (c) *At about 01:50 hours on 5 April 1998, Police were called to a fight at the rear of Bar Navajo. One intoxicated male involved in a fight was taken home by Police.*
- (d) *At about 02:00 am on 5 April 1998, Police were called to a fight outside Bar Navajo. Persons were dispersing as Police arrived.*

.....

On the 14th of December 1997 Sarah Cosgrove a female patron was assaulted inside the bar and treated for a large laceration to her lower left leg which severed an artery. Richard McCreedy a 30 year old male was arrested and convicted for assault with intent to injure."

Other than Sergeant Hooper, the Police did not produce any direct evidence to support those details which were contained in the original s.132 application dated 7 December 1998. Not unexpectedly, Mr Hardy-Jones sought to argue that none of the situations constituted any offence under ss.164(1), 166(1) or 168(1) of the Sale of Liquor Act 1989.

For reasons which will shortly become apparent, we did not consider that argument. The Police report and concerns (which we admitted as relevant hearsay evidence pursuant to s.109(1)) is background material which assists the Authority. That Police evidence is directly relevant to one of the criteria to which we are directed to have regard:

“the manner in which the licensee has conducted the sale and supply of liquor pursuant to the licence.” (Section 22(c) of the Act.)

As Fisher J commented in dismissing an appeal against cancellation of a licence by the LLA in 1996:

“The standard of proof required for a prosecution is of course proof beyond reasonable doubt whereas a lesser standard applies in an application for cancellation. In strict law therefore, there would be nothing inconsistent with dismissal of the charges in the prosecution context and an adverse finding of fact in the licensing context on the same factual issues. Other considerations are that the hearing before the Authority involves a much wider range of considerations (Super Star Bar (NZ) Ltd v Kaveney (HC 100/96 High Court Auckland 17 December 1996 Fisher J).

Mr Knowles Objection

Mr C J Knowles, proprietor of the Hotel D’Urville appeared as an objector to the renewal. He told the Authority that agreements reached in 1997 had been broken on numerous occasions.

Although the situation has improved since air conditioning was installed at Bar Navajo, drunkenness and vandalism remains a problem in an incident as recently as 29 May 1999, Mr Knowles said. In response to questions Mr Knowles did not oppose a renewal of the licence and trading until 2.00 am.

Authority’s Conclusion and Reasons

Following the withdrawal of the application pursuant to s.132 of the Act for variation, suspension or cancellation of the on-licence, all parties submit that the on-licence should be renewed. Whilst any decision to renew or not to renew an on-licence is made by this Authority, as we have said in a number of similar applications, the Authority is generally slow to disregard an agreed viewpoint reached at local level following proper consideration of the evidence and of the circumstances in each application.

In this application we find that the licensee's actions in 1998 raise a serious question as to his suitability to continue to hold a licence. The written statement of 5 August 1997 encouraged Mr Knowles to withdraw his original objection to the issue of an on-licence. Difficulties with noise remain. The other problems alleged in the Police report reinforce our concerns.

Nevertheless it is clear that at least since towards the end of 1998 improvements have been made to the manner in which Mr Clark has conducted the sale and supply of liquor. That is one of four matters to which the Authority is directed to have regard under s.22. The other matters are the suitability of the licensee, the conditions attaching to the licence, and reports made by the Police, the Inspector, and the Medical Officer of Health. In addition, we are directed by s.4 of the Act to exercise our powers and discretion under the Act in the manner most likely to contribute to the reduction of liquor abuse.

During the course of the hearing we took a view of the premises. The site is in the commercial heart of Blenheim. It is sufficiently close for the proprietor of Hotel D'Urville to have a greater interest in the application than the public generally and thus able to object to the manner in which the licensee has conducted the sale and supply of liquor as required by ss.19(3) and 22 of the Act. In this respect we accept Mr Hunt's submissions. The pattern of noise complaints in the evidence of Mr Congdon shows, in our view, that the applicant has not honoured the spirit and intent of the understanding reached when the licence was first issued. Although the Police report and wider concerns expressed by Sergeant Hooper were not supported by direct evidence, the Authority finds that Mr Clark by his actions did not operate the licence satisfactorily for much of 1998. The usual consequence of such a conclusion would be to refuse renewal. In this application all parties submitted we should not adopt that course.

The Result

We will accept that submission but are not prepared to consider any additional late night hours. Neither should the hours be reduced in our view. 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.

We were favourably impressed by both Mr Burt as Head of Security and Ms Higgins, the Assistant Manager, when they explained the manner of operation. Standards have clearly improved in recent months. In the small hours of the morning greater vigilance is clearly required, together with management skills. Licensees in other cities and towns are able to provide these even at hours of high risk. If Mr Clark can do likewise, it may be possible for him to extend the hours at some future time. Mr Hodgetts foresaw this possibility in his evidence.

If Mr Clark cannot properly exercise his responsibilities, the remedy may be much more severe than closure at 1.00 am or earlier. It may be non-renewal, immediate cancellation or suspension.

In these circumstances, contrary to the recommendation of the Inspector, we are not prepared to renew the licence for 12 months. A shorter period is appropriate to prevent problems from drifting on. The applicant must show that he is capable of meeting in full the appropriate standards required in relation to intoxication, disorder, minors and noise, or his failure to do so will tip the balance and show that he is not a suitable licensee.

The premises are relatively small, and with proper management able to be controlled to prevent the entry or continued presence of prohibited persons. In these circumstances a change of designation at 10.30 pm is problematic. The need for that change, as well as changes to other conditions, can be examined afresh if a further application for renewal is made.

The on-licence is renewed for six months from the date of this decision. Its conditions are unchanged. At that time, if renewal is again sought, we request full reports from the Police, an Inspector, and the Medical Officer of Health.

DATED at WELLINGTON this 1st day of July 1999

R J S Munro
Member

J W Thompson
Member