

Decision Number 60C [2015] 626

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of an application by
WUNDERBAR (2006) LTD
for renewal of an On Licence for
premises known as Wunderbar
situated at 17 London Street,
Lyttelton.

BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

Chairperson Mr R.J.Wilson JP
Members Mr A.J.Lawn
Mr D.L.Blackwell OSM

HEARING at Christchurch on 17th March 2015

APPEARANCES Mr Andrew Bishop and Ms Deborah Coupland for Wunderbar (2006) Ltd
Mr Paul Spang Alcohol Licensing Inspector
Mr John Alps Environmental Compliance Officer
Mr Mark Fitzgerald Objector

INTRODUCTION

(1) We are dealing with an application by Wunderbar (2006) Ltd for renewal of its On Licence for premises known as Wunderbar situated at 17 London Street, Lyttelton. The matter was first heard at a public hearing on 3rd July 2014. The hearing was required because the application was opposed by the Inspector (with respect to a full renewal for three years) and by a local resident Mr Mark Fitzgerald who objected to the renewal on the grounds of excessive noise. Following evidence from all parties the Committee concluded that Mr Fitzgerald was suffering from excessive noise from the bar but that at least in part this was beyond the applicant's control given the delay in refurbishment of the building necessitated by serious earthquake damage. The Committee therefore adjourned the matter for six months so that the applicant could obtain the services of an acoustic engineer and for the work on the building to be completed with noise mitigation work in accordance with the acoustic engineer's recommendations.

(2) It was the Committee's hope that the building renovations would solve the noise problem and in the absence of further complaints the matter could be finalised by the Committee without the need for further public hearing. Unfortunately despite the work carried out Mr Fitzgerald still considers he is being subjected to excessive noise from the bar so a further hearing is required. The Inspector has now withdrawn his objection.

(3) By way of introduction the Chairperson referred those present to the Committee's previous decision and expressed the hope that evidence submitted would not go over old ground but should focus on the work that had been undertaken to mitigate the noise issue and the outcome of that.

FURTHER EVIDENCE OF APPLICANT

(4) Mr Bishop tabled a copy of an email from Mr Paul Wilson, the building owner. This outlined the work that had been carried out to the building as a whole. We should record that Wunderbar is but one of several business premises which occupy the building. Mr Wilson reported extensive work including new cladding, new wall lining, a new floor, new fire doors and extensive use of batts for insulation. While much of this work was aimed at meeting new fire code standards it has also had the effect of contributing to noise abatement.

(5) Mr Bishop also tabled a report from Marshall Day Acoustics on a noise survey it carried out on the evening of Thursday 20th November 2014. The purpose of the survey was to establish the status of the activity with regard to compliance with applicable local noise standards. The report concluded that noise levels measured during this survey indicate that noise from Wunderbar complied with the applicable noise standards given in the Banks Peninsula District Plan during the survey period.

CROSS EXAMINATION

(6) Mr Spang, Alcohol Licensing Inspector asked Mr Bishop whether he had changed the times bands play at the bar. Mr Bishop confirmed that 11.30 pm to midnight was now the usual finishing time but said that sometimes if there is a private function it can go later. Mr Fitzgerald questioned the use of the fan. Mr Bishop responded that it was mainly used on Friday and Saturday nights when needed. To Mr Lawn he confirmed that Marshall Day had assured him that the fan had nothing to do with any noise issue at Foster Terrace. The Chairperson asked about the cost of the renovations. Mr Bishop said it would be in the order of \$1,000,000 overall with perhaps \$100,000 on the bar. That was the owner's outlay. He himself had paid for the new sound system. He confirmed that while most bands use it some still bring their own.

FURTHER EVIDENCE OF MR JOHN ALPS

(7) The Inspector had Mr Alps, Environmental Officer with the Christchurch City Council give evidence. Mr Alps as the officer responsible for noise complaint response stated that there had been 15 complaints about noise emanating from Wunderbar since the last hearing, 14 of those

from Mr Fitzgerald. The only other complainant withdrew his complaint after admitting he was unsure whether the noise had in fact come from Wunderbar. The 15 complaints were followed up, 13 were assessed as not excessive while 2 were not assessed as the Noise Control Officer followed instructions not to do so when he appeared to be followed by a vehicle.

(8) Mr Alps went on to give his professional opinion that the work carried out on the Wunderbar building and the review carried out by Marshall Day led him to the conclusion that noise from Wunderbar complied with the applicable noise standards. His view was that this work and the lack of confirmation of excessive noise was evidence that the applicant had successfully addressed the issue.

CROSS EXAMINATION

(9) Mr Fitzgerald queried whether the Armourguard staff went to Foster Terrace to check noise levels. Mr Alps confirmed that they had and had also taken measurements in the cemetery below. All had complied. Mr Fitzgerald then queried how it was that with two bulk ships unloading, four cranes operating and numerous trucks passing he could still hear the bass sounds from Wunderbar. Mr Alps responded that the Noise Control Officer noted that the band sounds were audible but not excessive. When asked about the fan, Mr Alps said that that sometimes it was in use and sometimes it was not but it appeared to make no difference to the release of noise.

EVIDENCE OF MR MARK FITZGERALD

(10) Mr Fitzgerald tabled details of complaints he had made including the type of music being played at the time of each complaint. He also noted the response he had observed from Noise Enforcement Officers. Mr Fitzgerald acknowledged that there had been improvement in the situation since the last hearing but said that he was still being subjected to excessive noise on occasion, particularly the deep bass sounds which penetrated his home. He sought an independent noise survey given his lack of confidence in the Council's Noise Enforcement team and in the work carried out by Marshall Day.

CROSS EXAMINATION

(11) Mr Spang asked whether noise had reduced since the last hearing to which Mr Fitzgerald replied that it was only the frequency that had decreased. It was not just the bass sounds but these could be heard through his double glazing. He said he did not believe he was particularly sensitive to bass sounds, if he was he would not live in Lyttelton. Mr Spang then asked whether Mr Fitzgerald agreed that the applicants had done all that was asked of them. Mr Fitzgerald disagreed. He said they had not got advice on how to minimize the noise.

(12) Mr Bishop disputed Mr Fitzgerald's view that the port would be less busy and thus quieter in the future. Mr Fitzgerald disagreed. Mr Bishop said that of 4000 households in Lyttelton Mr Fitzgerald was the only complainant. Mr Lawn pointed out that there had been no instances of

excessive noise established. Was Mr Fitzgerald concerned about all noise? Mr Fitzgerald said that he only complained if it was very noisy.

(13) Mr Blackwell thought that Mr Fitzgerald might have come with his own expert opinion. Did he contest the reports given in evidence? Mr Fitzgerald responded that he did not know what they were measuring and whether a band was even playing at Wunderbar when they took their measurements. It seemed they only took one measurement then went away. Mr Wilson questioned whether it was Mr Fitzgerald's view that all the noise measurements had been taken from behind buildings. Mr Fitzgerald confirmed some measurements had been taken from his front deck but there had been no problem on that occasion. In response to Mr Bishop who said that different music required different volumes and it was not simple, Mr Fitzgerald said all he had to do was to turn the volume down.

CLOSING SUBMISSIONS

(14) Mr Bishop said that he had done what had been asked of him and all that he could. He believes Mr Fitzgerald is conducting a vendetta against Wunderbar. For his part Mr Fitzgerald denied any vendetta, acknowledged some improvements but reiterated that he was still suffering from the noise particularly the bass sounds. He sought an independent noise assessment as he had little confidence in the Council's Environmental Health team.

(15) The hearing then closed with the Committee reserving its decision.

DISCUSSION

(16) We regret that the issue between the applicant and the objector has not been resolved during the period of the adjournment. There is clearly ill-feeling between the two which may be irreconcilable. In particular we are disappointed that the applicant did not follow the course outlined by the Committee in its previous decision. That is that it should obtain the services of an acoustic engineer and follow any recommendations made. We were of the view that such professional oversight of the refurbishment of the building could lead to resolution of the noise problem at minimal additional expense. Instead the applicants have relied on the general refurbishment work carried out on the building by the landlord to solve the problem. We clearly advised the applicant to discuss the importance of the matter with the landlord so that noise concerns could be at the forefront as building work progressed. This apparently did not happen either and this is made clear by the comment of the landlord in his email of 16th March 2015 to the applicant where he says "I thought this issue was resolved months/ a year ago??" This suggests to us that there was no ongoing dialogue between the two and that the building owner was unaware that the issue of noise mitigation was critical to the application for renewal of the bar's licence.

(17) However we acknowledge the work that has been done and have no doubt this has contributed greatly to the containment of noise within the building. Nevertheless it is clear that

some noise still escapes and that at times this is intrusive. As we have said we consider the applicant has missed an opportunity to resolve this longstanding matter once and for all.

(18) Instead of obtaining acoustic engineering advice to guide the work on the building the applicants have opted instead to obtain an acoustic report on completion. The Marshall Day report tabled is unfortunately of limited value. It details tests carried out on one particular Thursday evening last November and concludes that on that occasion noise from the bar met the standards set out in the Banks Peninsula District Plan. This assessment does not seem to have coincided with any complaints made to Noise Enforcement officers.

(19) In his evidence Mr Alps tabled details of the complaints made about noise from Wunderbar since the last hearing and the outcome. We note that no complaints resulted in a finding of excessive noise. We also note for the record that Mr Fitzgerald has reservations about the way those assessments were carried out.

(20) Mr Fitzgerald has been described by the applicants as having a vendetta against the bar and that he has an obsession. For our part we found Mr Fitzgerald a fairly credible witness. If there is an obsession we can understand how this has developed and we make allowances for it. We do however have a concern that Mr Fitzgerald's actions may have at times been ill-advised. Further we are puzzled that there are not numerous other complainants as we would have expected if the problem is as Mr Fitzgerald has stated. We can only speculate that Mr Fitzgerald may be a person who is particularly sensitive to noise or that his property or the topography in some way contribute to the problem. That does not alter the situation that he does suffer from the noise and the applicant has a responsibility to do its best to minimise the disturbance. When asked by the Chairperson to state clearly what he wanted the applicant to do Mr Fitzgerald replied "Turn down the volume". We will return to this in a moment.

(21) Mr Fitzgerald drew the Committee's attention to s106 (1)(a)(i) of the Act where we are required in forming our opinion to take account of " *current, and possible future, noise levels.*" He said that it was expected that in the future there would be less shipping berthed at the inner harbour at Lyttelton as ships were to be redirected to the more distant Cashin Quay facilities as repairs following the earthquakes are completed. The point is that ambient noise from the port has the effect of masking noise coming from other sources. Mr Fitzgerald told the Committee that on one night two bulk carriers were unloading in the port and he could still hear noise from Wunderbar. He was of the view that as the inner port became less busy the noise from Wunderbar would become more intrusive. Mr Bishop for Wunderbar disputed that the port would be less busy in the future. We have no evidence one way or the other but we acknowledge Mr Fitzgerald's point and will take it into account.

(22) In evidence given at the earlier hearing Mr Bishop said that one of the problems had been bands bringing their own sound equipment and being able to adjust the sound levels to suit themselves. We acknowledge Mr Bishop's observation that it is difficult for a Duty Manager to intervene and turn the sound down while the band is playing. To counter this situation Mr Bishop told us that he had spent \$16,000 on a new sound system and that when installed it

would have controls locked away in a cabinet which visiting bands would be unable to access. At the resumed hearing Mr Bishop's position appeared to have changed. He now says that sometimes bands bring additional sound equipment of their own and adjust the levels of the various sounds. This is somewhat different from the impression we gained from earlier evidence that all bands would have to use Wunderbar's own sound system and that this would be set to an acceptable noise level and then secured so that it could not be tampered with during the performance. This is where Mr Fitzgerald's request of Mr Bishop that he "*turn down the volume*" is pertinent. In our earlier decision we cited relevant case law in *Pahia Saltwater 2003* where the then Liquor Licensing Authority observed "*Noise is not just a resource management issue. The escape of noise (particularly music) is an example of bad management.*" In our view it is open to the applicant to require bands performing at Wunderbar to use the sound system provided and to ensure that it is set at a level that will not permit significant noise to escape from the premises. To use Mr Fitzgerald's words it is open to the applicant to "*turn down the volume*".

(23) We now turn to consider our decision. The recommendation we have from the Inspector is that we should grant the renewal under the previous conditions (as only amended by the mandatory requirements contained in the 2012 legislation). The only opposition to this course is from Mr Fitzgerald who although he has not said as much, we assume would want a further adjournment so that the independent noise assessment he seeks could be obtained. Unfortunately we have no power to order such a further noise assessment. We are bound to consider the matter in a judicial way, that is we must decide the matter on the evidence placed before us. The evidence we have consists of a report on the quite extensive work that has been carried out, a report from Marshall Day who are a reputable acoustics firm and an expert opinion of both provided by the Council's Environmental Officer. To counter that evidence we have only Mr Fitzgerald's testimony that he is still being disturbed by noise from the bar. While we have no difficulty in accepting that evidence, it is not backed up by the conclusions of the officers who assessed his complaints. Nor has Mr Fitzgerald been able to present any other evidence either independent noise measurements or corroborating statements from neighbours.

(24) We have already said that we regret that the acoustic engineer's report we recommended was not obtained. We have also said that the Marshall Day report does not help very much as it is only an assessment of the situation on one particular night. We note that an amplified band was playing at Wunderbar that night but we have heard no evidence that its particular output caused any disturbance. To the contrary Marshall Day tell us that music was barely audible in the Foster Terrace area where the complainant lives. We would have liked to question the provider of the Marshall Day assessment but that person was not called to present the report in evidence. We therefore give the report what weight we can but must treat its conclusions with caution.

(25) The conclusion we have reached is that on the evidence before us we have no grounds for refusing the application for renewal of the On Licence for Wunderbar. We are far from happy that the disturbance to Mr Fitzgerald has not been addressed as we would have hoped. We

would expect the operators of the bar to continue to monitor the sound levels at the bar and as Mr Fitzgerald has requested "*turn down the volume*" when necessary. This is a step clearly open to a responsible manager. We note in this respect that although we will be granting the renewal for the full three year term, one year of that has almost passed and we would expect to see a further renewal application within two years. The outcome of that may well depend on how well the noise issue has been addressed in the interim.

DECISION

(26) The applicant, Wunderbar (2006) Ltd, is granted renewal of its On Licence pursuant to s104(1) of the Act for a period of three years. The licence will be subject to conditions as follows:

Compulsory Conditions – s110(2)

- (a) No alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day or before 1 pm on Anzac Day to any person who is not present on the premises to dine.
- (b) Alcohol may only be sold on the following days and during the following hours while the premises are operated as a tavern:

Monday to Sunday 11 am to 3 am the following day.

- (c) Water will be freely available to customers from the bar area while the premises are open for business.

Discretionary Conditions – s110(1)

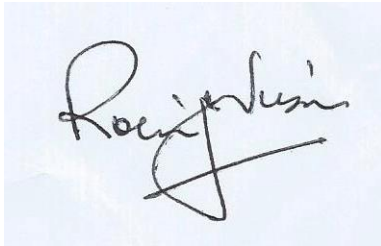
- (a) The following steps must be taken to ensure that the provisions of the Act relating to the sale of alcohol to prohibited persons are observed:
 - Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete 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 are observed:
 - Alcohol must only be sold, supplied and consumed within the area marked on the plan submitted with the application.
- (c) The following steps must be taken to promote the responsible consumption of alcohol:
 - The licensee must implement and maintain the steps proposed in their host responsibility plan aimed at promoting the reasonable consumption of alcohol.
- (d) The whole of the premises is designated a supervised area.

Other restrictions and Requirements

The following restrictions and requirements are to be noted on the licence:

- s.51 – Non alcoholic drinks to be available
- s.52 - Low alcoholic drinks to be available
- s.53 - Food to be available
- s.54 - Help with information about transport to be available
- s.56 - Display of signs
- s.57 - Display of licences
- s.214- Manager to be on duty at all times and responsible for compliance

DATED AT CHRISTCHURCH THIS 31st Day of March 2015

A handwritten signature in black ink on a light blue background. The signature is cursive and appears to read 'R.J. Wilson'.

R.J.Wilson
Chairperson
Christchurch District Licensing Committee