

**Decision Number: 60D [2020] 5275**

**IN THE MATTER OF** the Sale and Supply of Alcohol Act 2012

**AND**

**IN THE MATTER OF** an application by **PAPANUI ROAD LIMITED** for a renewal of an On-Licence pursuant to s127 of the Sale and Supply of Alcohol Act 2012 in respect of premises situated at 1 Papanui Road, Christchurch, known as Carlton Bar and Eatery

**BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE**

Committee: Ms C E Robinson (Chair)  
Mr R Wilson JP  
Ms T Surrey

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**CORRIGENDUM**

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[1] Counsel for the objector has brought to the Secretariat's attention that there is a typographical error regarding the date of the death of the objector's partner recorded in our decision. The error appears in *Robertson v Papanui Road Limited* [2019] NZARLA 262-263 at [13] which we have replicated in our decision 60D [2020] 5275, dated 23 November 2020 at [7].

[2] At para [7] we recorded that:

Most seriously on 10 May 2018 an incident occurred on the premises which resulted in the suspension of the licence and a manager's certificate (May 2018 incident), following proceedings before the Alcohol Regulatory and Licencing Authority (ARLA). The May 2018 incident is described in *Robertson v Papanui Road Limited* [2019] NZARLA 262-263 as follows:

[...]

[13] *After being admitted to intensive care, the man died on 13 May 2019. The cause of death was 'head injuries from a short distance fall while intoxicated with alcohol'.*

[3] Our decision is hereby amended to add in square brackets [sic] after the date 2019 in the quote from the Authority's decision and further add in square brackets following paragraph [13] of the quoted passage. [*Our correction: The man died on 13 May 2018*] as follows:

Most seriously on 10 May 2018 an incident occurred on the premises which resulted in the suspension of the licence and a manager's certificate (May 2018 incident), following proceedings before the Alcohol Regulatory and Licensing Authority (ARLA). The May 2018 incident is described in *Robertson v Papanui Road Limited* [2019] NZARLA 262-263 as follows:

[...]

[13] *After being admitted to intensive care, the man died on 13 May 2019 [sic]. The cause of death was 'head injuries from a short distance fall while intoxicated with alcohol'. [Our correction: The man died on 13 May 2018.]*

[4] In all other respects the decision remains unaltered.

**DATED** at Christchurch this 26<sup>th</sup> day of November 2020.



Cindy E. Robinson

Chairperson of the Christchurch District Licensing Committee

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**BEFORE THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE**

Committee: Ms C E Robinson (Chair)  
Mr R Wilson JP  
Ms T Surrey

Hearing at Christchurch on 20 and 21 October 2020

Appearances: Mr K Cook, counsel for the applicant  
Mr A Lawn, assisting the applicant  
Ms M Sewell, counsel for the public objector  
Sergeant D Robertson, NZ Police  
Ms H Barbour, on behalf of the Medical Officer of Health  
Dr C Brunton, Medical Officer of Health  
Mr P Spang, Christchurch District Licensing Inspector

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**DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE**

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## Introduction

[1] This is an application for the renewal of an on-licence by Papanui Road Limited (the applicant) in relation to the premises known as the Carlton Bar and Eatery (Carlton). The premises is located at 1 Papanui Road on the edge of the Christchurch Central Business District.

[2] The applicant describes the business as being a Restaurant/Tavern and Entertainment premises.<sup>1</sup> The existing licence expired on 13 December 2019 but continues due to the renewal application having been made on 19 October 2019 (the existing licence). The licensed area comprises a ground floor restaurant, bar, covered courtyard and first floor function room. The existing licensed trading hours are Sunday to Wednesday 8am to 12 midnight and Thursday to Saturday 8am to 2am the following day. The applicant seeks renewal on the same terms and conditions as the existing licence.

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<sup>1</sup> Application form 19 October 2019.

[3] The premises is located on the corner of a busy intersection of Papanui Road and Bealey Avenue which is predominantly commercial in character, however there are residential activities in the vicinity.

[4] The application was opposed by one public objector, Ms Trudi Johnston (the objector) on grounds that the applicant is unsuitable due to an incident that resulted in the death of her partner.<sup>2</sup> The objection was received out of time, however, following a hearing on the papers the Committee allowed the late objection and accepted the objector as a party to the application.<sup>3</sup>

[5] The application is also conditionally opposed by the Inspector, whose concerns may be addressed through a shorter renewal period and/or conditions relating to the prevention of one of the applicant company directors, Mr James Murdoch, from consuming alcohol on the premises.<sup>4</sup> The application is opposed by the Medical Officer of Health.<sup>5</sup> The application is not opposed by the NZ Police.

[6] There is a significant and serious background to this renewal application. During the last renewal period the licensee has received sanctions relating to intoxicated persons on three occasions. At the time of making the application for renewal the applicant had two holdings in relation to the licence.

[7] Most seriously on 10 May 2018 an incident occurred on the premises which resulted in the suspension of the licence and a manager's certificate (May 2018 incident), following proceedings before the Alcohol Regulatory and Licencing Authority (ARLA). The May 2018 incident is described in *Robertson v Papanui Road Limited* [2019] NZARLA 262-263 as follows:

[7] By way of an agreed statement of facts dated 5 November 2019 and signed by the Police and counsel for each of the respondents, the respondents have agreed that on Thursday 10 May 2018 at 5.00pm, a local businessman who was known to staff and who was a friend of Mr James Murdoch, the sole director and a shareholder of Papanui Road Limited, was drinking at the Carlton Bar & Restaurant. The man was tall, with a large frame, and a number of people known to him described him as being capable of drinking a large amount of alcohol without necessarily showing the effects of alcohol.

[8] The man socialised in the bar over the period of about four and a half hours, during which time he consumed seven 500 ml glasses of beer, and eight

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<sup>2</sup> Letter of Objection, 31 January 2020.

<sup>3</sup> Minute recording decision to allow late objection, 6 March 2020.

<sup>4</sup> Inspectors Report, 3 July 2020.

<sup>5</sup> Letter of opposition, 25 November 2019 and 28 May 2020.

glasses of wine (which the Police have determined equates to about 1.5 - 1.7 litres of wine).

[9] CCTV footage shows that the male's movements and coordination were affected by alcohol and his movements were unsteady.

[10] After moving to an outside smoking area with another man at about 9.33 pm, the remaining bottle of wine and his glass were brought out to him although he did not consume the wine any further.

[11] At about 9.42 pm the male fell directly backwards and struck his head on the ground and was knocked unconscious for a short period before being assisted back up. About five minutes later he left the premises with another man in an uber. The uber driver described him as 'very drunk'.

[12] Subsequently, his condition deteriorated, and he was taken to hospital. A blood sample taken four hours after the incident occurred found that he had a blood alcohol level of 265 milligrams of alcohol per 100 millilitres of blood (by way of comparison, the lower limit which attracts a fine for drink driving purposes is 50 milligrams per 100 millilitres of blood).

[13] After being admitted to intensive care, the man died on 13 May 2019. The cause of death was 'head injuries from a short distance fall while intoxicated with alcohol'.

[8] Prior to the May 2018 incident the applicant had been brought before ARLA in relation to three other incidents relating to intoxicated persons. The first was in June 2016 which was adjourned subject to a period of close monitoring.<sup>6</sup> During that period of close monitoring and after the licence was renewed on 4 December 2016 two further incidents occurred on 22 and 24 December 2016. All three incidents resulted in suspensions of the licence and manager's certificate and is recorded in *Re Papanui Road Limited*.<sup>7</sup>

[9] Our hearing of the application is not a re-litigation of the facts that led to the suspension of the licence and manager's certificate; our role is to evaluate whether the grant of a renewal for the licence would achieve the object of the Act. In making our evaluation we are required to have regard to, amongst other things, the suitability of the applicant and the systems and processes in place to meet the object of the Act. The May 2018 incident is an example of the ultimate failure of a licensee and their staff to meet the object of the Act.

[10] As ARLA recorded in the *Robertson v Papanui Road Limited* decision at [60]:<sup>8</sup>

The circumstances of this application are ones where the very caution made in *Hooper v Clark*<sup>9</sup> is particularly appropriate, both in respect of the licence and

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<sup>6</sup> *Re Papanui Road Ltd* [2016] NZ ARLA 496.

<sup>7</sup> *Re Papanui Road Limited* [2017] NZARLA PH 414-415.

<sup>8</sup> *Robertson v Papanui Road Limited* [2019] NZARLA 262-263.

<sup>9</sup> *Hooper v Clark* LLA 1169/99.

the second respondent's manager's certificate: 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. [A] licensee must either accept those burdens and control the sale and supply of liquor in a satisfactory manner, or [it] will not continue to enjoy the privilege. Either the licensee can manage the premises and on-licence satisfactorily, or [it] cannot.

[11] The May 2018 incident calls into question the suitability of the applicant to hold a licence. As ARLA said at [55]:<sup>10</sup>

This is the third time that the first respondent has come before the Authority for issues relating to intoxication. It is disappointing that it took an earlier breach of the Act to prompt changes being made. These were clearly insufficient. The fact that it took a further appearance before the Authority for additional changes to be proposed is an aggravating feature of this application. This will undoubtedly be the subject of further scrutiny before the DLC given an application for the renewal of the licence is pending.

[12] This decision follows our careful scrutiny of the applicant's suitability to hold a licence and their processes and systems over the course of a two-day hearing on 20 and 21 October 2020.

[13] We record our concern that the renewal application, lodged in October 2019, took a year to get to a hearing. In part this was due to the interruption of the COVID-19 Pandemic but also the unavailability of parties at various times. It is now two and a half years since the May 2018 incident.

### **Preliminary matters**

[14] At a prehearing meeting we made orders that the name of the deceased and family members were not to be published under any circumstances subject to our requirements to record parties to proceedings in s203(5) of the Act.<sup>11</sup> That order remains in place in perpetuity to protect the privacy of the individuals concerned.

[15] At the commencement of the hearing the applicant's legal counsel requested interim suppression of commercially sensitive material, including financial details included in the exhibits to company director Mr Gareth Bull's evidence. We agreed subject to receiving a list of particulars from Mr Cook which he agreed to provide. We have not received any further particulars. Notwithstanding that we confirm that it is appropriate for orders of non-disclosure

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<sup>10</sup> *Robertson v Papanui Road Limited* [2019] NZARLA 262-263.

<sup>11</sup> Committee Minute in relation to prehearing meeting, 3 September 2020.

to remain in place to the extent that they relate to the financial details of the applicant company's turnover and details of employment contracts for reasons of commercial sensitivity.

## **Submissions and evidence**

### *The Applicant's submissions*

[16] Mr Cook had filed opening submissions which we have read. Mr Cook submitted that we had before us a high quality, well thought out and well-presented application that supports the grant of the licence renewal. He noted that since the May 2018 incident two and a half years have passed and since that time the applicant has engaged with the tri agencies and been monitored by the Police. Mr Cook submitted that only one incident, in June 2020, where during a Police routine visit a person was assessed outside the premises as being intoxicated, had arisen which had been handled appropriately with the person being refused entry. He submitted that the May 2018 incident was "tragic, regrettable and we were at fault", this has been accepted and the applicant has served its punishment for it. Mr Cook submitted it was a relevant factor, but it was not a determinative factor. He indicated it has been a "pivot" point for the applicant and has resulted in "significant learnings" from the events that took place. He said the applicant has not ignored advice and has tried to engage and collaborate with the agencies to improve things. He submitted that the Act is not about the avoidance of harm, but the minimisation of harm.

[17] Mr Cook referred to the fact that recently the applicant had engaged the Alcohol Consulting Group (ACG), a group of consultants headed by Mr A Lawn, a former Alcohol Licensing Commissioner and retired Police Officer,<sup>12</sup> to better staff training and systems. He explained that following the ARLA hearing the applicant had identified that there was an issue with communication and that whilst the applicant had been improving the business there had not been communication to those involved which he said led to a change in representation and involvement of the ACG so that "we could show those involved in the industry that we have made changes and that is what we are doing because the safe sale supply and consumption of alcohol is at the heart of our business."

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<sup>12</sup> Mr Lawn was the Chair of the Licensing Committee that issued the last renewal of the licence for the Carlton in 2016.



*Mr Gareth Bull*

[18] Mr Gareth Bull, the General Manager of the applicant company read from a detailed brief of evidence.<sup>13</sup> Mr Bull has some 23 years of experience in the hospitality industry in a number of countries and has held the position of General Manager since July 2016. Mr Bull became a director and shareholder of the applicant company on 10 August 2020.

[19] Mr Bull is also a director and the General Manager of Goldi Group Limited which is the overarching entity which looks after the management of the Carlton and is responsible for the employment of staff and other premises owned by the Goldi Group. Mr Bull said that his taking ownership in the business was a natural progression of his career development over a period of time.

[20] Mr Bull explained that he had not been present during the May 2018 incident and only heard of it in the days following. Mr Bull had not been employed during the June 2016 enforcement matter which resulted in the premises being subject to detailed monitoring, but he was the General Manager at the time of the two subsequent December 2016 incidents that led to the suspension of the licence over the new year period in December 2016 and January 2017.

[21] Mr Bull's evidence was that when he joined the company in July 2016 it was highlighted to him by the licensee Mr James Murdoch that systems and training needed to be improved and that staffing needed to be reviewed. At that time, the profile of the business changed to be more food focused and the functions part of the business was expanded rather than "walk up" late night drinking and trade.

[22] Mr Bull said that in the days following the May 2018 incident the applicant company reached out to the Police and reviewed the incident and reviewed its processes and procedures to minimise the potential for recurrence. The lessons learned included, provision of a separate duty manager for the functions space upstairs and the need to make food and water more available, even when not requested by a customer. This was done to take away the choice from the customer so that staff could monitor consumption of alcohol more objectively. Mr Bull recognised that during the May 2018 incident there had been the opportunity to slow service of alcohol but that had not occurred. As a consequence the applicant's policy for wine service has now changed to requiring a minimum of two people sharing a bottle of wine, which must be identified at the point of sale, or if table service, a

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<sup>13</sup> Evidence in Chief Gareth Michael Bull.

single server is to be responsible for monitoring consumption and appropriate handover if shifts change. Mr Bull indicated that the May 2018 incident had provided “renewed focus on their processes and learnings”, particularly in the area of observations of customers intoxication levels and the experience and skill that is required of its staff. Mr Bull acknowledged that during the May 2018 incident “we got it wrong”.

[23] Mr Bull produced various exhibits including a detailed Alcohol Management Plan that is dated September 2020 prepared by ACG, Policies and Procedures including a host responsibility policy, Duty Manager Register, Training Manual, Staff training test, Staff Meeting Minutes, Staff training records, Manager Toolkit, Incident Reports, Induction Plan, Individual Employment Agreements and a Crime Prevention Through Environmental Design Report. Nightly Management Reports were provided for the period June 2020 to August 2020.<sup>14</sup>

[24] Mr Bull explained that when he filed the renewal application in October 2019, he had attached an outdated Alcohol Management Plan that was pointed out by the Medical Officer of Health’s representative. We observe that it was worse than that as it did not appear to even relate to the full extent of the business of the Carlton as it referred to ‘tastings’, wine consumption only and to a ‘spittoon’.<sup>15</sup> This was rectified and a more comprehensive management plan provided when the issue was raised.<sup>16</sup>

[25] Mr Bull went to some length to show how he had tried to “collaborate” with the Medical Officer of Health to produce a better Alcohol Management Plan, however the interruptions of COVID-19 lockdown and priorities of the MOH limited the opportunity to do so. Mr Bull said:

We found it somewhat frustrating that there is no road map for this, there is no industry standard on how to write, produce or update an Alcohol Management Plan, we sought guidance from our former legal counsel and from Hospitality New Zealand to update our submissions and still fell short of the authority’s expectations.

[26] We record here that we found it surprising given Mr Bull’s extensive experience in the industry and the evidence he gave about the otherwise good management practices of the other businesses he was responsible for, which have no compliance issues, that he would not have access to or the required knowledge to compile policies and an alcohol management plan that ensured compliance with the obligations under the Act.

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<sup>14</sup> Exhibits GB009.

<sup>15</sup> Application for renewal of licence and attachments October 2019.

<sup>16</sup> Alcohol Management Plan 5 December 2019.

[27] Mr Spang asked Mr Bull about whether he had talked to staff about their attitude to Mr Murdoch drinking alcohol on the premises. Mr Bull maintained that he had spoken to all staff individually and they would speak up if they had concerns. Mr Bull did not agree that staff may be less vigilant if the licensee was drinking with friends on the premises. No staff were called to give evidence of their attitude or experiences.

[28] Sergeant Robertson asked Mr Bull about the hours he was present at the business and he said it depends on needs of businesses but he was involved 80% of the time and present there on Thursday to Saturday “hands on” with the team, at the busier times including evenings and at nights.

[29] Sergeant Robertson asked Mr Bull about aspects of the management plan around appointment of duty managers and communications between the duty manager and the service staff. Mr Bull referenced the CCTV footage from the May 2018 incident and noted that the deceased had both purchased alcohol himself and was served at the table and they had learnt from that. Mr Bull agreed that communication had improved since then. Mr Bull explained that a “long standing” protocol has been to provide complimentary food as an intervention. He explained that changes that occurred since 2018 are that food is now far more readily available as opposed to just another tool of duty management host responsibility. The approach now is that they identify customers based on duration of stay and consumption who would benefit from having food even if they do not request it. Mr Bull said the process is “consistent and compulsory” for all managers, he said it was “mandatory” to provide it where they deemed it necessary on their assessment.

[30] Ms Barbour asked Mr Bull about the systems that had been said to be in place following the December 2016 incidents as recorded in the ARLA 2017 decision<sup>17</sup> and specifically the fact that there was already a process in place to offer free food. When asked why this failed Mr Bull said that it was because the choice remained with the customer.

[31] Ms Barbour asked Mr Bull whether at the time he joined the business there were systems in place similar to the management plan that was originally submitted with this renewal application. Mr Bull said there had been as it was the same document that was submitted in the 2016 renewal and had been resubmitted in error. The extensive information provided with Mr Bull’s evidence in chief was not all provided at lodgement of the renewal.

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<sup>17</sup> [2017] NZARLA PH 414-415.

[32] Ms Barbour asked Mr Bull if he has ever been working when Mr Murdoch is socialising. Mr Bull said he does and has done. He was not aware of any incidents where Mr Murdoch has been influenced. He said staff had not raised concerns about Mr Murdoch's group of friends when they had been on the premises.

[33] Ms Barbour asked if he knew about "Thirsty Thursdays", which had been referred to by the objector. He said it was not something he was aware of and it was not an event that the Carlton organised.

[34] When asked about the timing of involvement with Hospitality NZ and Pinnacle, another hospitality training provider Mr Bull explained they had engaged with these providers since the renewal application was lodged and ACG became involved more recently. Mr Bull explained that they had reflected a lot since the renewal was lodged on systems, processes and how they communicated them. They were told about the ACG so they took the opportunity to get their independent advice. He would like to think they could continue to be involved going forward.

[35] Ms Sewell asked Mr Bull why he had not produced the nightly report for the 10<sup>th</sup> of May 2018, or any others apart from the 10 week period from June to August 2020.<sup>18</sup> Mr Bull said he had not produced three years' worth just the 10 weeks to show as a recent example of communication with the team.

[36] Mr Bull also said in answer to cross examination from Ms Sewell, that as a duty manager and if he had been present during the incident, based on what he has seen on the CCTV footage he would have called an ambulance or gotten the deceased medical attention.

[37] Ms Sewell pressed Mr Bull to give an explanation in "simple terms" how he tells his staff to recognise intoxication and at what point they decide someone should be served no more alcohol. In answering the question Mr Bull kept to returning to the "processes" and training of staff but was not able to articulate what occurs in practice in his own words. When pressed again by Ms Sewell, Mr Bull read from the "SCAB" test card he had with him and added that they also take into account duration of stay and rate of consumption. He accepted that the list is not exhaustive.

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<sup>18</sup> Exhibit GB009.

[38] Mr Bull accepted that the deceased had consumed a substantial amount of alcohol but was initially reluctant to accept Ms Sewell's suggestion that no one should be served that amount of alcohol. His answer was that every individual is different as to how much alcohol they can process depending on duration of stay and food consumption, but he did eventually accept her proposition in general. He agreed that the applicant had accepted through the ARLA process that the volume consumed by the deceased was not acceptable.

[39] Ms Sewell asked Mr Bull about an incident on Thursday 16 July 2020 involving another member of the group of friends that met on Thursdays, where the daily report records the patron as being assessed as "not too bad".<sup>19</sup> She asked what that meant. Mr Bull explained that was "internal reporting" and meant it was likely he was still able to be sold alcohol, but the intervention method was slowing him down.

[40] The incident is recorded as follows:

Had [ ] book in for drinks and nibbles at 4pm. Spent approx. \$800 incl. Everyone in this group left just after 7pm with [ ] staying on and put him on water a few times through the night. He wasn't too bad but were slowing him down since he'd been here since 4pm, he was compliant and had no issues.

[41] Ms Sewell put to Mr Bull the fact that the patron was a friend of Mr Murdoch so it was unlikely he would have removed him. Mr Bull emphatically disagreed. He was asked if he had ever removed any of Mr Murdoch's friends for being intoxicated. He said "no" but they may have refused service or slowed service but not for intoxication, but for intervention. Mr Bull said when re-examined by Mr Cook that friends of Mr Murdoch are not treated any differently and if they are intoxicated, they would be asked to leave or not allowed entry.

[42] Mr Bull did not support the suggestion that Mr Murdoch should be prohibited from consuming alcohol on the premises. He did not accept the observation from ARLA that generally staff are placed in an invidious position. He said he could understand the concerns but does not accept that was the case here or in his business. He does not accept that the safest option to minimise harm is the prohibition.

[43] The Committee asked how the applicant reconciled the fact that they are committed to providing complimentary food, but they are also running a restaurant. The Committee identified that in the management minutes of 20 August 2020,<sup>20</sup> a meeting attended by Mr Bull the following is recorded:

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<sup>19</sup> Nightly Reports, Evidence in Chief Gareth Bull, (at Attachment G, page 94 of the "Submissions Bundle").  
<sup>20</sup> Evidence in Chief Gareth Bull (at Attachment AG, page 186 of the "Disclosure Bundle").

We are not here to feed them for free, this is an intervening / alcohol management strategy.

[44] Mr Bull explained that they are in the business of selling food, but they identify those who are there to dine or those who are just there to drink.

[45] Further Mr Bull clarified that the offer of food was based on the discretion of staff and dependent on a number of things such as duration of stay and number of drinks. It is not offered to all patrons who are only there for a drink, but food is available for purchase.

[46] After hearing from Mr Murdoch and his lack of involvement in the day to day running of the business, as set out below, we recalled Mr Bull to clarify his understanding that, putting legal responsibilities of directors aside, he was essentially now assuming the significant, if not the main, responsibility for complying with the licence as general manager and a director. He confirmed that was the case. Further he accepted that if the licence were to be renewed it would be appropriate to include, and he would welcome, a condition that required adherence to the terms and undertakings within the management plans. Mr Bull gave the Committee the assurance that if Mr Murdoch were to be intoxicated on the premises then he would remove him.

*Mr James Murdoch*

[47] Mr James Murdoch, until recently the sole director of the applicant company, gave evidence at the request of the Committee. Mr Murdoch read from a prepared brief outlining his family's involvement in the hospitality industry over many years, he said "Hospitality runs in my blood". Mr Murdoch produced his statement to the NZ Police following the May 2018 incident. Mr Murdoch spoke of the May 2018 incident, for which he was present and socialising with the deceased and others but did not witness the deceased's fall, but he heard it. The deceased was his best friend, and he is very sad about his death.

[48] Mr Murdoch's evidence was that he was not actively involved in the day to day running of the business, he said he was not "*hands on*". He has delegated the management of the premises to Mr Bull and to his duty managers and he does not interfere with their authority. He is actively involved in a construction business that occupies much of his time. He has until recently held a manager's certificate continuously from 2002, but in the lead up to the hearing he withdrew his application for a renewal. He said in reality he has not had a need to use it in recent years.

[49] In relation to the May 2018 incident he responded to the suggestion by some people that as licensee and the holder of a manager's certificate he should have intervened. He said he was not aware of how much the deceased had been drinking and he had understood that he had been there to dine. After the fall he said he had organised an Uber (which he later said when cross examined by Sergeant Robertson that he thinks he may have done for himself but then offered it to the deceased to get home). He said that he had been there in "a social capacity and I do not intervene and override staff to the point that staff lose trust in the senior management team." He went on to say:<sup>21</sup>

What I do need to make clear is that if I am on the premises and see a patron that needs assessing or something that the duty manager needs to be aware of I bring it to the duty manager's attention either directly or via other staff. This is not to override them or because I do not trust them, it is because I am another pair of eyes if I am there, I am still part of the team because I am a licensee.

[50] We have no reason to doubt that Mr Murdoch did not see the incident, and we accept the finding of ARLA that until at least the last 45 minutes prior to the incident that the deceased may not have exhibited classic signs of intoxication. Mr Murdoch also indicated that he had observed a change of behaviour about an hour before the fall, noting in his police statement that "he didn't seem to be as engaged in the conversation as much as he had been" and commented on his lack of response to banter with friends.<sup>22</sup> We find it difficult to understand how a licensee who sees himself as being "another pair of eyes" was not aware of the amount of alcohol being consumed by his friend, whom he spent 4 hours socialising, either with or in close proximity to. The consumption of alcohol was excessive and inappropriate in our view. This is particularly concerning given Mr Murdoch also gave evidence under cross examination that he was aware of the fact the deceased could consume significant quantities of alcohol and posed a risk to his licence.

[51] Mr Murdoch has accepted that there were failures on the part of the Carlton and him personally in relation to the May 2018 incident. Mr Murdoch said he failed to assess his surroundings and failed to advise the duty manager that an intervention was probably necessary. Mr Murdoch did not advise the Duty Manager of his observations about the deceased's behaviour or the fall. With the benefit of hindsight Mr Murdoch accepted, having put his friend in an Uber because of the incident, he ought to have advised the duty manager of the incident, contacted the objector, and if he had seen the fall, would have taken him to

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<sup>21</sup> Evidence in Chief James Murdoch at [26].

<sup>22</sup> Evidence in Chief James Murdoch, Exhibit JM002 (Attachment BO of the "Disclosure Bundle": Police Statement at paras [24] and [25]).

the hospital or called an ambulance. He reiterated that at the time he did not appreciate the seriousness of the fall or injury.

[52] Mr Murdoch disagreed that some staff may be less vigilant about his friends' intoxication when he was drinking on the premises. Mr Spang put to him that the duty manager would naturally expect him to help control and monitor alcohol consumption of his friends he was socialising with. He replied:

...we have systems in place..., and I put all my trust in the duty managers to make the decision if I decide to consume alcohol while I'm there.

[53] There is no evidence that Mr Murdoch was himself intoxicated, although he had been drinking beer during the evening, however his lack of attention to his surroundings, is contrary to his assertion that when he is on the premises he is another pair of eyes and part of the team because he is a licensee.

[54] Mr Murdoch confirmed that he agreed with the statement of facts before ARLA that recorded:

3.5 [The deceased] was known to be a gregarious man, who was a large consumer of alcohol. He was a tall man , with a large frame – and a number of people known to him described him as capable of drinking a large amount of alcohol without necessarily showing the effects of it.

[55] Mr Murdoch agreed that the deceased was “capable of consuming 3 bottles of wine.” Mr Murdoch has seen him drunk on a number of occasions and agreed that he would sometimes consume too much alcohol.

[56] Sergeant Robertson asked Mr Murdoch about his awareness of the quantity of alcohol the deceased could consume and whether he considered that to be a risk to him as a licensee. Mr Murdoch agreed it was a risk. When asked if he had discussed this with staff, he said he had not, but he said they were aware of it. We note here that Mr Bull's evidence was that staff had not ever raised any issues with him about the deceased or Mr Murdoch's other friends. If Mr Murdoch had concerns about the risks around the deceased's consumption, we would have expected a responsible licensee to have raised the issue with his general manager or duty managers in order to ensure the object of the Act is met.

[57] Sergeant Robertson asked Mr Murdoch, as the deceased's best friend, whether the deceased had a problem with alcohol. After a lengthy pause he said “I guess it depends what you call a problem...No... I would say no because he could say no if he didn't want to have a



drink.” Mr Murdoch said that the deceased did not always drink until intoxicated. Mr Murdoch said that there had been interventions by him and his staff in the past with the deceased.

[58] Mr Murdoch was asked by Mr Spang, Ms Sewell, and the Committee whether he would undertake not to drink on the premises. Mr Murdoch did not offer such an undertaking, referencing the practices and procedures now in place to address any issues.

### *The Inspector*

[59] Mr Paul Spang presented his report to the Committee and was available for cross examination.<sup>23</sup> Mr Spang initially opposed the renewal, however he indicated support for a truncated renewal period and a condition being included that prevented Mr Murdoch from consuming alcohol on the premises if the Committee were minded to grant the licence. He agreed with the observations of ARLA that licensees who socialise on the premises can put staff in an invidious position when it comes to enforcing the requirements under the Act.

[60] After hearing the applicant’s evidence, he was satisfied that the licensee now had proper systems in place that enabled it to meet the object of the Act. The challenge was implementation. He indicated that the tri agencies would carry out more detailed monitoring of the premises if the licence were to be renewed.

[61] Mr Spang would support a shorter renewal period as a ‘probationary period’. After hearing the applicant’s evidence, he concluded that they have shown that things appear to have been improved and there have been no significant incidents since 2018. However, Mr Spang said he wants to see that the systems are working, and they are doing what they are saying that they are doing and “walking the walk”.

[62] Mr Spang floated the possibility of a more formal monitoring programme to keep them focused for the period of any renewal. He suggested something arranged between the applicant and the agencies and possibly the District Licensing Committee. He agreed in answer to questions from Mr Cook that it would serve as a reminder that they are being closely watched. Mr Spang considers that because of the past transgressions that the Carlton needs to be closely monitored for any renewal period to ensure compliance.

[63] Mr Spang accepted that the engagement of ACG was a positive step. Although he indicated that care needs to be taken not to make promises that cannot be kept. Mr Spang

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<sup>23</sup> Inspector’s Report 3 July 2020.

said the key improvements are having a separate duty manager for the functions and the provision of food for customers, accepting there is an element of subjectiveness as to when to make food available.

[64] Mr Spang would now expect that the requirements of the Act would be complied with. Leaving aside the issue of Mr Murdoch drinking on the premises he accepted that with the systems and training now in place, for a shortened renewal that the application would meet the objects of the Act.

[65] In terms of the condition he recommended prohibiting Mr Murdoch from drinking on the premises, Mr Spang accepted that there was no evidence before ARLA or this Committee that the fact that Mr Murdoch was consuming alcohol contributed to the May 2018 incident or that Mr Murdoch had influenced staff actions. However, Mr Spang noted that any alcohol consumption can affect decision making and he emphasised that it raises the possibility that a duty manager would expect that the licensee might keep an eye on the people they were with. Prior to becoming an Inspector Mr Spang said he worked in hospitality and this was his experience. He felt the condition was reasonable and proportionate on this occasion. Mr Spang sees a condition to be common sense and reduces the risk. He said he was surprised there was resistance to the condition.

[66] The Committee asked Mr Spang as to whether there was any evidence of the May 2018 incident being a “wake up call” for the applicant. He said there was an argument that perhaps the applicant could have been seen to do more. Mr Spang has seen some “big attempts” made to improve things since the ARLA decision, but he is still supporting a precautionary approach. Mr Spang was surprised about the standard of the renewal application, but this had been redressed. Mr Spang is confident that the applicant is now taking the matter seriously and on the right track, but he is still pushing for a shorter renewal period and a condition prohibiting Mr Murdoch from drinking on the premises. He is recommending a renewal period that equates until 13 December 2021 (which would be 2 years from the date of expiry).

### *The Police*

[67] The NZ Police did not oppose the application for the renewal. Sergeant Robertson appeared at the hearing to assist the Committee. He gave evidence of the incident from May 2018 as observed from CCTV footage which he had extensively reviewed.<sup>24</sup> His evidence in

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<sup>24</sup> Evidence in Chief Sergeant David Robertson.

relation to the footage was undisputed and consistent with the agreed statement of facts from the ARLA proceedings. Sergeant Robertson did not play the footage at the hearing and nor did we ask him to. It was not necessary in our view, given what occurred was largely uncontested.

[68] Of particular concern to the Committee was the evidence that between arriving at the premises at 5.00pm and 7.40pm the deceased consumed seven 500ml pint glasses of beer and then in the period 7.41pm to 9pm the deceased and an associate were served four 750ml bottles of red wine. Three of the four bottles were consumed and one glass from the remaining bottle. They were the only two people consuming the wine that was served. The deceased's glass was filled by himself or staff nine times and the associate's glass seven times. Sergeant Robertson observed from the CCTV footage that the deceased was consuming wine at more than twice the rate of his companion. This was an excessive quantity of alcohol for any person in our view.

[69] Also, of concern is the observations made by the Sergeant as to the noticeable deterioration in movement and coordination of the deceased over the course of the evening as he becomes more affected by alcohol with this being more obvious from 8.45pm. The Sergeant concluded that offences under the Act occurred including the deceased was allowed to become intoxicated on the premises, allowed to remain in the premises whilst intoxicated and he was served further alcohol whilst intoxicated. He produced the agreed statements of facts for both the applications under ss280 and 285 of the Act for suspension of the licence and manager's certificate.

[70] Sergeant Robertson noted the cooperation of the applicant since the incident, improved policies and procedures and the increased monitoring by the tri agencies. He accepted that since that time there is evidence that the applicant is complying with the objects of the Act.

[71] Sergeant Robertson, in response to questions from Mr Cook, accepted that there was no evidence that he was aware of that Mr Murdoch was habitually intoxicated, or that he was dominant over his staff, or that he or his friends were treated any differently. Sergeant Robertson accepted in cross examination that there was anecdotal evidence from people who knew the deceased that the deceased was quite a heavy drinker, he said it was clear that it was "well known".

[72] Ms Sewell asked Sergeant Robertson how he came to know about Mr Murdoch's relationship with staff. He confirmed that his answer was that there is no evidence that he is

aware of. He had not investigated this but said it is a question he would have asked the duty manager, however the duty manager on the night, having taken legal advice, had elected not to comment.

[73] Ms Sewell asked Sergeant Robertson about whether the deceased's companion, who he left with in the Uber was also intoxicated. Ms Sewell took him through the Uber driver's statement to Police. The Sergeant accepted the accuracy of what was read to him by Ms Sewell from the statement. The Uber driver had described the deceased being "really drunk" and the associate as being a little drunk but not as bad as the deceased.<sup>25</sup>

[74] The Committee asked Sergeant Robertson why the Police had only sought suspension of the licence from the Authority and not cancellation. Sergeant Robertson told us he had considered cancellation but having looked at another Christchurch case where cancellation was before the Authority, the Authority had refused cancellation but was unable to suspend the licence because no application had been made to suspend the licence. He believed it was one or the other, so he decided to seek a suspension.

[75] Sergeant Robertson was asked why the Police had not opposed the renewal. He explained it was about the time lapse and had the matter before the Authority been heard quicker there would have been a result before he was required to report. He acknowledged that it was his first s280 application. He was not certain of the result of the application to the Authority so he chose to clearly signal that the Committee would be likely needing to consider the outcome when making a decision on the renewal. He noted the Authority was surprised by the lack of opposition from Police but there was no suggestion that a cancellation should have been lodged. His view was that if he was not seeking a cancellation it was almost "double jeopardy" to oppose the renewal. He said if he thought the licence should be at an end then the appropriate course should have been to apply to cancel the licence.

[76] Sergeant Robertson commented that the premises was in an unusual situation because it is considered to be a "suburban tavern" but is extremely close to the central city. Particularly at the time after the earthquakes when the area was busier with licensed premises. He described the premises as being "in between" as they are both a destination premises as well as a transient destination where people stop on the way home or go before going onto the Terrace in the CBD. He considered they are potentially at a higher risk than other premises; he would expect that their processes would reflect that. He was not surprised to hear that

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<sup>25</sup> Exhibit DR005 (produced at the hearing).

people may suggest they are stricter, but he had no direct knowledge of what others thought. He suspected it was likely to be how they were viewed.

[77] Sergeant Robertson was asked to explain the monitoring that occurred after May 2018. The Sergeant pointed out that there are over 1000 licensed premises in Christchurch as well as those in Selwyn and Waimakariri, and he only has two staff. He said it had been challenging with COVID-19 requirements but when his staff are monitoring he provides a list of preferred premises that he would like them to look at and the Carlton had featured on that including Thursday nights as a result of the Authority decision. He told us that he would have expected that if the matter had been heard earlier that there would be a probationary period with closer monitoring. He said he can see value in a shorter renewal period, however, if breaches are detected then enforcement will follow so he was not sure the duration of renewal mattered. He said the holding from 2018 remains in place.

[78] The Committee asked the Sergeant about his experience with licensees drinking on the premises. He said that the Police take no position on the proposed condition. He answered by saying that what he sees from a practical point of view is that licensees often are on the premises and will sometimes drink on the premises as part of doing business. Where he has seen clear evidence of problems, he has sought conditions of that kind where appropriate. He sees more of an issue when licensees reside on the premises. In this case he said there was no clear evidence available to him that Mr Murdoch has influenced staff managing that group. He said it does not mean he has not influenced them, but there is no clear evidence to him.

#### *The Medical Officer of Health*

[79] Ms Helen Barbour, the representative for the Medical Officer of Health, detailed her concerns regarding the initial filing of incomplete documentation and the applicant's compliance history. Ms Barbour was concerned that it was not until immediately prior to this hearing that the applicant had taken steps to engage consultants to assist with the required documentation. There was no issue with the quality of the documentation that had been produced for this hearing, but she expressed a degree of cynicism that it had only been produced in the lead up to the hearing.

[80] Mr Cook cross examined Ms Barbour on the attempts of the applicant to "collaborate" with the Medical Officer of Health in the preparation of the documentation. Quite apart from the Covid-19 Pandemic Ms Barbour pointed out that there are only a few staff who are responsible for Canterbury and the West Coast. Ms Barbour explained her view that it was

important that the Medical Officer of Health was seen not to 'negotiate' on the basis if you do this then [we will take this approach]. She highlighted that it was important and useful for an applicant to demonstrate what they have learned rather than them leading an applicant through. Ms Barbour made a very important point when she said

it is very necessary for an applicant to be proactive, responsible and responsive to situations, particularly ARLA decisions that have outlined specific fill ins or improvements that could be implemented specifically in relation to their premises.

[81] Ms Barbour believed that Mr Bull had in his evidence demonstrated an understanding of the management plan which was in contrast to where Mr Bull and Mr Murdoch were at in January 2020, where in her view the approach was "read the management plan" rather than being able to explain what it meant in practice. Ms Barbour agreed that there is now a much more considered management plan. She acknowledged they had help from others to draft it, so she hopes it becomes a document that the licensee owns and takes it forward, rather than "this gets us over the line at this point." Her expectation is that licensees are responsible for getting themselves up to speed with their documentation rather than rely on agencies.

[82] On the issue of a shorter renewal period Ms Barbour accepted that may be a valid response, she noted that this year with the Covid-19 restrictions the premises has not been trading in the same way as it would have in that time period. A shorter renewal period is a good step.

[83] The Medical Officer of Health accepts there is no evidence that the restriction on a licensee regarding drinking on the premises will make a difference but her personal view is that if the applicant is to make steps forward in ensuring it is seen as a "bell-weather of change" then it is not a hard ask.

### *The Objector*

[84] The objector is the partner of the deceased and together they have two small children. She is understandably devastated by the loss of her partner and the children's father. Her evidence detailed issues with the consumption of alcohol by her late partner and her understanding that he was a regular patron at the Carlton on a Thursday night when he was in town and that this was known to the partners and wives of the group as "Thirsty Thursday." Her evidence was that the way in which he was described by Sergeant Robertson from the CCTV footage prior to the incident was typical of his behaviour when he was intoxicated from her experience. She said that "he would drink until he was unable to speak or move easily".

Her evidence on that point was not challenged. She also described the associate who came home with her partner in the Uber to be “incoherent and drunk”. Her partner was collapsed on the driveway. She described the associate as swaying, with very enlarged pupils and slurring his words. The objector referred to the associate’s statement to Police where he says he has no memory of various events in the evening.<sup>26</sup> She said that the associate did not mention the earlier fall or injury.

[85] Mr Cook challenged the objector on her evidence of the deceased’s attendance and drinking habits at the Carlton on the basis that she did not attend on those occasions. He also challenged her evidence that the associate who accompanied the deceased in the Uber was intoxicated on the basis that the man had a stuttering condition. Mr Cook put to the objector statements to Police from the duty manager on the night, and another staff member to contradict the objectors’ evidence.<sup>27</sup> We observe that neither person (nor the Uber driver) were before us and at least part of the duty manager’s statement were found to be inaccurate, such as the fact that four bottles of wine had been served rather than two. The bar staff member had only worked at the Carlton for a brief period. We are also conscious that the statements were made as part of the Police responsibility for the Coronial Inquiry not as part of an investigation under the Act.

[86] Notwithstanding the cross examination, and submissions from Mr Cook we do not doubt the sincerity of the objector’s evidence and we found her account of the deceased’s habitual alcohol consumption and her belief that her partner was part of a group who drank regularly at the Carlton on a Thursday compelling, regardless of whether this coincided with drinking at other locations. Her understandings are not inconsistent with Mr Murdoch’s evidence about the regular meeting of friends on a Thursday that the deceased also attended from time to time when he was in town. The applicant accepts that the deceased was intoxicated in the last 45 minutes prior to his fall at the Carlton and he had consumed an unacceptable amount of alcohol without intervention by the Carlton staff or the licensee who was present. We find on the evidence from the objector, Mr Murdoch (and anecdotal evidence of others) that the deceased was likely a heavy drinker, who habitually overconsumed significant quantities of alcohol at home and when out on a Thursday evening with friends which included visiting the Carlton from time to time. He was known to get drunk on other occasions and other settings in the presence of Mr Murdoch. The deceased could consume significant quantities of alcohol and Mr Murdoch knew he was a risk to his licence and alcohol management interventions had occurred in the past. Mr Murdoch said staff were aware of the risk too. The deceased was

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<sup>26</sup> Exhibit DR006 (produced at the hearing).

<sup>27</sup> Exhibit TJ001 (produced at the hearing).

allowed to purchase and consume excessive quantities of alcohol on 10 May 2018 at the Carlton.

### **Closing submissions**

[87] We received written closing statements from all parties following the hearing.

[88] Ms Sewell submitted that during the May 2018 incident there was no consideration given by the licensee to the responsibilities that exist under the Sale and Supply of [Alcohol] Act and that any practices that were meant to be in place to reduce alcohol related harm were being ignored. Ms Sewell submitted that the deceased was actively encouraged to overconsume. The two aspects of the applicant's case that Ms Sewell highlighted were: a) the lack of responsibility for the events of May 2018 by both Mr Bull and Mr Murdoch; and b) the management plans and related evidence which were at first inadequate.

[89] The objector is supportive of a condition that Mr Murdoch be precluded from consuming alcohol on the premises. Ms Sewell points to an evidential basis for the culture of heavy drinking amongst Mr Murdoch's friends and Mr Murdoch's presence during the May 2018 incident. Ms Sewell points to the comments of ARLA in the *Robertson v Papanui Road Limited* case at [27]. She describes the condition prohibiting Mr Murdoch from drinking on the premises as common sense.

[90] Mr Spang reiterated his position and the justification for requesting a condition regarding the exclusion of Mr Murdoch. Mr Spang referred to the *Balhae Limited* case where the death of an intoxicated patron occurred following a head injury on the premises.<sup>28</sup> In that case the Director had been consuming alcohol in the kitchen, rather than socialising with the deceased. The licence was suspended, and a renewal granted (both matters were heard together before the Authority). That case was determined under the previous legislation and, despite the seriousness of the incident it was the first occurrence of a breach by the licensee. Mr Spang said he expected that the licence was far more likely to be complied with going forward by Papanui Road Limited than in the case of *Balhae*. We are not clear what he means by that.

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<sup>28</sup> *Lawn and Spang v Balhae Limited and others* [2006] NZLLA 223 (31 March 2006).



[91] Mr Spang submitted in opening that he considered a condition prohibiting Mr Murdoch from consuming alcohol on the premises was reasonable, proportionate, and justified in the circumstances.

[92] In closing Mr Spang advised that after hearing the evidence produced by the applicant, he now believes the applicant is capable of meeting the object of the Act and that the licence should be renewed with conditions. He recommends that the licence be renewed for 2 years (from the date of the expiry) bringing the renewal date to 13 December 2021.

[93] The Police emphasised that ARLA had challenged the applicant to become a “bell-weather of change in respect of New Zealand’s drinking culture” and had an expectation that the agencies would closely monitor the situation. There had been no issues in the 10 months since the ARLA decision (although we note COVID-19 restrictions have limited the operation of the premises for a period of that time) and Mr Bull’s evidence had shown a far greater practical understanding of the Alcohol Management Plan and highlighted that he now has a personal stake in the business. Sergeant Robertson submitted the Committee could have some reassurance that the premises will be operated in an improved manner, but the proof will be in the performance of the premises moving forward if the licence is renewed.

[94] Ms Barbour on behalf of the Medical Officer of Health continued to show a degree of cynicism in the late improvements to its systems, procedures and processes in time for the hearing and is critical of the lack of responsiveness since the 2016 incidents despite assurances to ARLA that improved systems were in place.

[95] Mr Cook replied, he reiterated his opening submissions that the applicant has demonstrated its suitability by its response to the ARLA decision and engagement with the agencies and with ACG to produce high quality systems, staff training and processes.

[96] Mr Cook emphasises that the past 2.5 years the Carlton has operated without incident establishes that the plans and processes are working.

[97] Mr Cook accepts that past incidents are contextually important and noted they are being used in the training of staff and as a basis for improvements. He submitted that the Act does not operate a “one strike” policy, if it did Parliament would have made that clear. The 2.5 years without fault is a factor. The quality of the individuals involved is a factor. The documentation is a factor. Considered in totality he submitted that this is an organisation committed to upholding the Act.

[98] Mr Cook submitted that the May 2018 incident has brought about “real change” as did the 2019 ARLA hearing. He highlighted the focus on the provision of food to drinkers, provision of water, no happy hours, the increase in duty managers for functions. He submitted:<sup>29</sup>

These changes are indicative of an organisation focussed not merely on compliance but with a core focus on the safe sale, supply and consumption of alcohol. These changes and systems come at a cost to the applicant which the applicant is willing to bear in order to exceed their obligations under the Act and promote the objects of the Act. Once again, these are the types of licensees that should be encouraged.

[99] In closing Mr Cook went through various evidential matters and was critical of the objector’s evidence which he questioned as to its relevance and reliability.

[100] Mr Cook continued to resist the imposition of a condition regarding Mr Murdoch’s consumption of alcohol on the premises as not meeting the test of being proportionate and reasonable in the circumstances.

### **Site Visit**

[101] Following the conclusion of the evidence we undertook a site visit. We observed the layout of the premises. One observation we did make is the premises is not as large as we had expected and that most parts of the ground floor bar areas of the premises are visible from the bar, although the spaces are broken up with pillars and wall openings.

### **Evaluation and findings**

[102] Section 131(1) of the Act requires that:

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.

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<sup>29</sup> Applicant’s Closing Submissions at [42].

(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.

[103] The relevant matters in section 105 are:

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:

...

(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.

[104] The role of s 105 and how it is to be approached in relation to applications has received plenty of judicial attention.<sup>30</sup> The approach, when considering the licence application, is succinctly summarised as follows:<sup>31</sup>

“Is the decision-maker satisfied, having regard to all the relevant factors set out in s 105(1)(b)–(k) that the grant of the licence is consistent with the object of the Act?”

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<sup>30</sup> *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 per Heath J; *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689 per Moore J; and *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382 per Gendall J.

<sup>31</sup> *Re Venus NZ Limited* at [20] and *Auckland Medical Officer of Health* at [60] see Westlaw NZ, SA 105.02

[105] The duty to “have regard to” requires that we turn our mind to the listed criteria. We are required to give them “genuine attention and thought”. The weight to be attached to each is a matter for us to decide.<sup>32</sup> In *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited* [2018] NZHC 1123, Clark J summarised the applicable principles in respect of the renewal of a licence:

- (a) There is no presumption that an application will be granted.<sup>33</sup>
- (b) A DLC, and the Authority, after having regard to the criteria in the Act, is then to step back and consider whether there is any evidence indicating that granting the application will be contrary to the object in s4 of the Act. The test is as articulated in *Re Venus NZ Limited* above.
- (c) The application of rules involving onus of proof may be inappropriate<sup>34</sup>, and similarly, there is no onus on the reporting agencies to prove the application should not be granted;
- (d) The criteria for the issue of licences, and for renewal, are not to be interpreted in any narrow or exhaustive sense. The Authority (and DLC) may take into account anything, which from the terms of the statute as a whole, appears to be regarded by the legislature as relevant to conditions and the terms on which they should be granted;<sup>35</sup>
- (e) The Authority is not required to be sure that particular conditions will reduce alcohol abuse. We are entitled to apply the equivalent of the precautionary principle in environmental law. If there is a possibility of meeting the statutory objective then we are entitled to test whether that possibility is a reality.<sup>36</sup>

[106] The evaluative function is an assessment of risk.<sup>37</sup>

The factors to be considered in the course of assessing an application for a licence or for renewal, as the appellants submitted, stand to be assessed in terms of their potential impact upon the prospective risk of alcohol-related harm.

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<sup>32</sup> *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC).

<sup>33</sup> *Christchurch Medical Officer of Health v G and J Vaudry Limited* [2016] 2 NZLR 382 at [54].

<sup>34</sup> And see *Lower Hutt Liquormart Limited v Shady Lady Lighting Limited* [2018] NZHC 3100 at [39].

<sup>35</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, at [46].

<sup>36</sup> *My Noodle Ltd v Queenstown Lakes DC*. [2009] NZCA 564.

<sup>37</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, [43] and [47].

[107] In terms of the risk profile the Court held:<sup>38</sup>

The Act looks to minimise alcohol-related harm. Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimised not ignored or condoned.

[108] Further:<sup>39</sup>

It is not necessary to establish, ..., that the proposed operation “would likely lead to” alcohol-related harm. To require demonstration of a link to this degree of specificity is not much different from requiring proof. Requiring proof of “a causative link is not only unrealistic but is contrary to the correct legal position”.

[109] The object of this Act is that—

(1)(a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and

(b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

(2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—

(a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and

(b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

[110] In moving the first reading of the then titled Alcohol Reform Bill, the Hon Simon Power said (11 November 2010) 668 NZPD 15251:

New Zealand needs a safe and responsible drinking culture. The late 1980s saw liberalisation of the sale of alcohol to create a so-called European-style moderate drinking culture. Further changes followed in 1999. It is clear that those changes have not worked. Excessive drinking and intoxication contributes to our crime rate and our injury rate, and affects our general health. It impacts on workplace productivity and contributes to family violence and child abuse. The direct cost to the Government of alcohol-related harm in New Zealand has been put as high as \$1.2 billion per year. The costs to New Zealand society are significantly greater. But we must achieve a balance. Addressing harm must be weighed against the positive benefits associated with responsible drinking. The Government’s approach is, therefore, a considered, integrated, and balanced package that targets harm without penalising responsible drinkers.

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<sup>38</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, at [67].

<sup>39</sup> *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, at [68].

This is a large bill, but its objectives are simple. It zeroes in on alcohol-related harm, crime, disorder, and public health problems, especially where our young people are concerned. It aims to reduce excessive drinking and improve the operation of the alcohol licensing system, including community input on licensing, and to support the responsible sale, supply, and safe consumption of alcohol. Licences will be harder to get and easier to lose. There will be more scope to object to applications and more grounds to decline them. ...[our emphasis]

[111] We return to the object of the Act once we have had regard to the other relevant matters in ss 131(1) and 105.

### *Suitability of the applicant*

[112] Suitability carries its ordinary meaning as being “well fitted for purpose, appropriate”.<sup>40</sup> It is a broad concept and includes the character and reputation of the applicant and matters such as the past and present operations of the premises are relevant considerations.<sup>41</sup> A positive finding on suitability is required. An applicant must demonstrate his or her suitability. Suitability is not established in a vacuum, so context is relevant.<sup>42</sup>

[113] In applying the *Page* principle in *Re TK Sodhi Holdings Ltd LLA PH12/09*, 14 January 2009, the former Authority said at [46]:

“If we are to achieve the object of the Act and help encourage a social change where tolerance of liquor abuse is no longer acceptable, then we must have faith in the ability of operators of licensed premises to uphold the provisions of the Act. ....”

[114] In the case of a corporation we are required to consider the suitability of the directors involved.

[115] In *Deejay Enterprises Ltd LLA 531-532/97* the Authority summarised its general approach to suitability:

Little but a licensee or manager’s character and suitability may stand between upholding the law or turning a blind eye. Self-imposed standards in accordance with the law must be set by licensees and by holders of general manager’s certificates.

[116] The Authority went on to state:

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<sup>40</sup> *Re Sheard* [1996] 1 NZLR 751, [1996] NZAR 61 (HC) at 755.

<sup>41</sup> *Re Nishchay’s Enterprises Ltd* [2013] NZARLA 837.

<sup>42</sup> *Page v Police* HC Christchurch AP84/98, 24 July 1998, Panckhurst J.

“The overall standard of the suitability for the holder of an on-licence is higher than (sic) the standard required of a general manager’s certificate... ultimate responsibility remains with the licensee.”

*Mr James Murdoch*

[117] Although still the majority shareholder and a director in the applicant company, Mr Murdoch is not hands on in the business day to day. Mr Cook characterised him as being still involved and interested but defers to Mr Bull. He has previously held a manager’s certificate for 18 years but prior to the hearing elected not to renew it. Mr Murdoch is by all accounts personable and cooperative with the agencies.

[118] From the evidence we heard we have concluded that Mr Murdoch is a central character in the culture of the Carlton. He gave evidence as to how he had rebuilt the business after the building was destroyed in the Canterbury Earthquakes and his clear vision for the type of business to become a high-end steak house. He is present at the Carlton between 1 and 2 times a week, socialising with friends or conducting other business meetings, often on a Thursday late afternoon and into the evening. He said it is well known amongst his friends and associates that if you go to the Carlton on a Thursday you will find others of the regular group there.

[119] Mr Murdoch’s evidence acknowledges a balance he must find between acting as a responsible licensee and not undermining staff. His lack of awareness of the alcohol consumption by his friend in May 2018, and possibly that his friend’s drinking companion was highly influenced by alcohol (if not intoxicated) and the decisions he made, which now with the benefit of hindsight he regrets, serves to illustrate the difficult position that he and his staff find themselves in when he is socialising on his own premises. As a licensee he has responsibilities under s214(4) of the Act:

At all times when alcohol is being sold or supplied on licensed premises the licensee must take all reasonable steps to enable the manager to comply with this section.

[120] The consumption of alcohol or socialising by licensees on the premises has been discouraged by ARLA.<sup>43</sup>

[121] We do not find that Mr Murdoch acted as a responsible licensee during the evening of the May 2018 incident and that his and his staff’s lack of attention to the alcohol consumption

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<sup>43</sup> *Re Ranfurley Hotel Limited* [2013] NZ ARLA 490 at [24]; and *Robertson v Papanui Road Ltd* [2019] NZ ARLA, 262 at [58].

of the deceased that evening raises a real question about the extent to which staff did at the time (and may still) find themselves compromised when their employer is socialising on the premises. We were told that there was no evidence that was the case, but neither did we hear from any members of staff that they do not feel compromised. We agree with Mr Spang that it is reasonable to assume that a duty manager would expect that the licensee was looking out for his friends (and others) when socialising on the premises. We agree with ARLA that it likely puts staff in an invidious position.

[122] In addition to the May 2018 incident there were two other incidents which involved the sale and supply of alcohol to intoxicated persons during the last renewal period, and those both occurred during a period of close monitoring by ARLA following an incident months prior to that. Mr Bull said that Mr Murdoch advised him when he was newly appointed as the General Manager at the Carlton that systems and training needed to be improved and staffing reviewed. Notwithstanding Mr Bull's evidence that there were improvements, but they had just not been communicated, we heard no direct evidence that the systems and practices that were said to be in place (except the materials submitted with the renewal application) were actually being followed in the period December 2016 to May 2018. We received extensive documentation as part of Mr Bull's evidence, and he said they were already in place, but they had not been communicated. We only received minutes from nightly reporting for the period June 2020 – August 2020. Of those reports there was a lack of clarity in how intoxication or "intox" was described and recorded. We had no other reports available to compare how the applicant has improved the implementation of its processes.

[123] Mr Murdoch told us he understood that his responsibility as licensee was to ensure the systems were in place and the general manager was implementing them to meet the obligations under the Act. From the evidence provided we find it likely that either the systems and process were not actually in place, despite the existence of an AMP submitted with the 2016 and 2019 renewal applications, or even if they were in place, the record of breaches suggests they were not being communicated to, or followed by, staff and management. This is a failure on the part of the licensee.

[124] Under Mr Murdoch's watch as the sole director of the company we are not satisfied that the Carlton has operated in a manner that accords with the object of the Act. The way an excessive amount of alcohol was sold to the deceased in May 2018 was unacceptable and resulted (either directly or indirectly) in the most serious of alcohol related harm.



[125] Looking forward we have concluded on the evidence before us that Mr Murdoch wishes to distance himself from the day to day management of the business and has brought Mr Bull into the business as a director and shareholder, along with his father Mr Ross Murdoch. His evidence is that that Mr Bull will have full responsibility for the operation of the business. He maintains a level of oversight but given his past performance we are not at all confident that he is sufficiently attentive to fulfil his responsibilities as a licensee.

[126] While it is not unusual for directors of a company that operates a licensed premises to simply hold governance responsibilities and not be actively engaged in the business, Mr Murdoch is much more than that. His history with the Carlton, his role as sole director and shareholder until very recently and his regular presence at the Carlton makes him a visible and identifiable figurehead of the applicant. In his role as the sole director and shareholder of Papanui Road Limited he failed to meet the required standard during the last licence period on three occasions and in the one prior to that.

[127] We do not consider Mr James Murdoch to have maintained the high standard necessary to have the privilege of holding an alcohol licence in relation to the Carlton.

*Mr Gareth Bull*

[128] Mr Bull has been the general manager during the incidents that occurred in December 2016 and May 2018. He was not present at the time of these incidents. Mr Bull is well qualified and experienced. We are concerned that in the time he has held the position of a general manager he has not made significant progress in improving systems and processes, despite assurances the company gave to ARLA in 2017.<sup>44</sup> He had justified this on the basis that there were improvements, but they had not been well communicated. He has sought to collaborate with the Agencies and address their concerns but was frustrated that no one could provide him with a template. We agree with Ms Barbour in her evidence that a licensee should demonstrate their own knowledge when making an application rather than relying on the agencies. We would have expected more progress from Mr Bull given his experience and the seriousness of the incidents, however, with the engagement of ACG, he seems now to be more on track.

[129] Mr Bull's evidence contained extensive documentation of new and improved systems and processes and he gave assurances to the Committee that he would have the authority and resources to implement them and that he welcomed a condition to that effect.

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<sup>44</sup> [2017] NZARLA PH 414-415.

[130] We found Mr Bull to be a well-prepared witness who was able to demonstrate a good understanding of the materials he presented, despite their recent production. His recent acquisition of an interest in the business and directorship gives us greater confidence that he is now equipped to meet the requirements of the Act.

[131] We are concerned, however, at the lack of evidence of any real or significant change in the management of the premises following the May 2018 incident (or indeed following the December 2016 incidents) when Mr Bull was the General Manager. The applicant did not explain why communication was so poor given the significance of the incidents and risks to the licensee of another breach. As Mr Cook said in his closing submissions, there were also communication issues with the tri agencies following lodgment of the renewal application that appear to be resolved by their newly appointed consultants ACG. Good communication would appear to be fundamental to management of a multi-faceted premises such as the Carlton. This does raise questions in our mind as to whether Mr Bull is actually capable of managing the implementation of the new policies and procedures as opposed to saying that he is. However, on balance we do not find him to be personally unsuitable having only recently assumed the role as director. We have had regard to the lack of incidents since May 2018 under his management.

#### *Mr Ross Murdoch*

[132] Mr Ross Murdoch is James Murdoch's father. He became a director of Papanui Road Limited on 4 February 2020. There is no issue raised as to his suitability to hold an alcohol licence, but we did not gain the impression that he was actively involved and appears to be a silent director.

#### *Papanui Road Limited*

[133] On balance given Mr Murdoch's failure's as a licensee in the last renewal period and our reservations regarding the management practices of the Carlton we have concluded on the evidence before us that the applicant is not suitable to hold an alcohol licence.

#### *Systems, staff and training*

[134] The systems, staffing and training requirements were well canvassed in the evidence. Despite the deficiencies in the paperwork and the lack of demonstrated change that existed up until the ARLA hearing in November 2019 it was accepted by the Agencies that the systems and processes were now in order and provided a good platform to move forward. The issue

is now whether the applicant can “walk the walk”. On that issue we are not confident in the ability of Mr Murdoch to lead that change, but he has said that he is no longer hands on in the business and has deferred to Mr Bull.

[135] As explained above, while we had reservations about Mr Bull’s ability to deliver change given the lack of action in the period July 2016 to the May 2018 incident we were encouraged by his commitment to the business and investment in advice and help to prepare appropriate documentation.

#### *Agency Reports*

[136] These have been discussed above. The Medical Officer of Health remains opposed to the renewal. The Police and Inspector, having heard the evidence are more confident in the ability of the applicant to meet the requirements of the Act. It is fair to say they accept that the tools are in place, however the real test will be whether the applicant can “walk the walk”. The Inspector supports the application for renewal for a two-year term from the date of expiry as a “probationary” or truncated renewal period and seeks a condition regarding the prohibition of Mr Murdoch from drinking on the premises. The Police do not take a position on the conditions suggested by the Inspector.

#### *Other criteria*

[137] There is no local alcohol policy. There are no matters of concern with regard to the days and hours during which alcohol is sold nor any concern with the design and layout of the premises. There are no concerns regarding other goods and services. There are no issues with regard to amenity and good order of the locality.

#### *The manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol*

[138] We have already discussed the evidence and our significant concerns regarding the manner in which the applicant has sold and supplied alcohol during the last renewal period which led to suspensions of the licence on two occasions. We have serious concerns about the way alcohol was sold and supplied during the May 2018 incident.

### *Object of the Act*

[139] Our conclusions on the suitability of Mr Murdoch and initial concerns about Mr Bull's performance are illustrative of our lack of absolute confidence or faith in the ability of Papanui Road Limited to meet the dual objects of the Act.

[140] The Object of the Act is 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 should be minimised. We find that during the last renewal period the licensee failed to meet the requirements of the objects of Act. The May 2018 incident is evidence of the ultimate failure on the part of a licensee.

[141] Since the expiry of the licence on 13 December 2019 the applicant has been enabled by law to continue to operate until this hearing and has used that time to work on getting its systems and processes in order to demonstrate that it has addressed the problems of the past and to restructure the business. Mr Bull has been brought into the business and now assumes a significant, if not the main, role in the operation of the business as general manager, director and shareholder.

[142] Standing back and looking forward we have asked ourselves whether we are satisfied that the applicant will meet the dual objects of the Act. Based on the evidence of the operation of the licence during the last renewal period and the slow response to the seriousness of the incidents that occurred, particularly the May 2018 incident, we are not satisfied that the object of the Act will be met.

[143] The question then becomes: should the applicant be given yet another chance to demonstrate that it can now meet the object of the Act with the new management plans and policies in place?

[144] In *Lyger Investments Limited* [2018] NZARLA 299-300 at [99], the Authority said:

The Authority does not consider that it is open for a DLC to consider where the object of the Act is not met by an application that a licence can be granted subject to conditions intended to 'ensure compliance with the Act'. To do so is contrary to the test articulated in *Venus*. It is also contrary to the very risk assessment that the DLC is charged to undertake. The licence is not in its initial 'probationary' period. If the application did not meet the object of the Act, which the Authority agrees it does not, the application should be declined rather than granted subject to the applicant demonstrating over the next ensuing period whether it will "sink or swim". By finding that the application is not capable of meeting the object of the Act, the applicant has already sunk.

[145] In *Karikari Charitable Trust Inc v ER Bellas Limited* [2020] NZARLA 106 at [160], the Authority reiterated its earlier findings in *Lyger* and said:

If the Authority does not consider that the application meets the object of the Act, then as we said in *Lyger Investments Ltd v Young*, the application should be declined rather than granted subject to the conditions which effectively seek to cure the deficiencies in the application, or by asking the applicant to demonstrate over a subsequent period, that it can embed robust management practices which were lacking during the first ‘probationary’ term of the licence.

[146] We were told a number of times by Mr Bull and in submissions from Mr Cook that the events of May 2018 were a “wake up call”. That was also the case in 2016. Mr Bull was asked by the licensee to address the deficiencies that lead to the breaches in June 2016 but there is no direct evidence that the changes were put into effect, or if they were, that they were effective. In fact, within six months two further breaches occurred and then the May 2018 incident. The extensive management plan documentation presented at this hearing was prepared in August of this year. We acknowledge that there have been issues with getting input from the Agencies as a consequence of COVID-19, however, it is the responsibility of the applicant to put in place systems and processes to achieve the object of the Act, they should not have to wait on the input from the agencies. They are experienced operators. It is not good enough in our view to place the responsibility back on the Agencies to ‘collaborate’ and tell them what is required.

[147] Good relationships between a licensee and the Agencies is important, however the Act only obliges the Agencies to collaborate.<sup>45</sup> The Police and the Inspector have enforcement roles under the Act and it’s not their role to hand-hold a licensee through compliance with the Act. We recognise the good will and offers of help from the Inspector and additional Police resourcing. In our view the applicant has taken a long time to “wake up”. Too long. Mr Spang has suggested that we give the applicant time to “walk the walk” now that they have improved their systems and processes and he has suggested the development of a more detailed monitoring regime to keep them accountable. Mr Cook, in cross examination of all the Agencies sought their support for providing the applicant with another probationary period, and a more detailed monitoring regime to keep the applicant accountable, to look over their shoulder.

[148] This is a licensed premises that has been operated by persons who have extensive experience in the hospitality industry over many years and yet they have received two holdings in the last renewal term for this premises. While it may be accepted practice in the first year of

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<sup>45</sup> SSA Act, s295.

a new licence to view it as a probationary period, particularly for an inexperienced operator, this is not such a case. The applicant has been given warnings, probationary (or close monitoring) opportunities for improvement in the past and further breaches occurred, with the most serious of consequences in May 2018. Holding an alcohol licence is a privilege and we are of the view that Papanui Road Limited has lost that privilege due to the manner the licence was operated in the last renewal period.

[149] For completeness we have considered Mr Spang's suggestion that we impose a condition requiring Mr Murdoch not to consume alcohol on the premises. Such a condition, even if lawful, does not resolve our fundamental concerns about the suitability of the licensee and their ability to actually achieve the dual objects of the Act going forward and for that reason the application is not cured through the imposition of such a condition.

### **Decision**

[150] For the reasons above, having had regard to the requirements of s131 of the Act we decline the application by Papanui Road Limited for the renewal of an on-licence for the Carlton Bar and Eatery, located at 1 Papanui Road, Christchurch.

[151] The licence expires on 18 December 2020.

**DATED** at Christchurch this 23<sup>rd</sup> day of November 2020



Cindy E. Robinson  
Chairperson of the Christchurch District Licensing Committee