

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **MBT
HOLDINGS LIMITED** pursuant to
S. 102 of the Act for an on-licence
in respect of premises situated at
12 Church Street, Queenstown,
known as “Vinyl Underground”

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin
Members: Mr L Cocks
Mr J M Mann

HEARING at QUEENSTOWN on 7th and 21st June 2017

APPEARANCES

Mr R E W Mawhinney – for the applicant company
Mr N P Bates – Queenstown Lakes Licensing Inspector – to assist
Sergeant T Haggart – N Z Police – to assist
Ms T J Surrey – for Spire Hotel Management Limited and Eichardt’s Hotel
Management Limited – objectors

RESERVED DECISION OF THE COMMITTEE

Introduction.

- [1] Before the Committee is an application by MBT Holdings Limited (hereafter called the company) for an on-licence in respect of premises situated at 12B Church Street in Queenstown. The application results from the purchase of the business known as “Vinyl Underground” on 1st September 2016. The business is a nightclub which has been operating since 2003. It is located in the basement level of a building which also hosts two other licensed premises called “The World Bar” and “The Club”. The company trades as a tavern although its emphasis is on the provision of musical entertainment.
- [2] There are several restaurants and bars located in the vicinity. Entry to the premises is down a set of stairs from Church Street. At the bottom of the stairwell there is a set of noise suppression doors that lead into a small corridor before arriving at a second set of noise suppression doors that lead into the main room of the premises. There is an emergency exit door that leads into Church Lane. This is an important feature as will become apparent as it is located opposite the entrance to “The Spire” boutique five star Hotel.

- [3] The operation of the night club is governed by a resource consent dated 17th March 2003. This document allows for the sale of liquor between 8.00am and 6.00am the following day. Another condition is that all opening doors are to be closed by 10.00pm each night and remain so (apart from normal timely entry and exiting from the building) until 8.00am the next day.
- [4] This is not the first time that the premises have come before us. In March 2015 we heard an opposed application by Badger Bars Limited for the renewal of its licence. That company had been trading for over twelve months with a closing time of 4.00am. Both the Police and Medical Officer of Health opposed the renewal and there was public opposition as well from Spire Hotel Management Limited. Issues related to the escape of noise, lack of food and bad management. At the public hearing we heard evidence of 33 noise complaints. In our reserved decision we found against the previous owner on issues of suitability. (See, QLDC Licensing Committee 0002/15). The licence was renewed for 19 months to 28th March 2016 with a closing time of 2.00am.
- [5] The previous owner then carried out significant changes to ensure that noise obligations were met. These improvements included two new high rated acoustic fire exit doors for the fire exit that leads out to Church Lane where 'The Spire' is located. A wall that had been identified by a noise consultant as a weak link, was coated with seven layers of sound bats and sound gib and then covered with red brick. Since the changes were made, only one noise complaint was lodged prior to the business being sold to the applicant company.
- [6] The previous owner made application for renewal of the licence with an extension of the closing time from 2.00am to 3.00am. There were no objections or opposition from the public or reporting agencies and the application was granted. The evidence was that Spire Hotel Management Limited would have lodged an objection had it known about the application. On the other hand there were no suggestions that the present company's closing time be put back to 2.00am.
- [7] The applicant company then purchased the business and duly made application for an on-licence. Since September 2016, it has been trading under temporary authorities with trading hours from 8.00am to 3.00am the following day. The company seeks a closing time of 4.00am and it is this aspect of the application that attracted public opposition from Spire Hotel Management Limited (The Spire) and Eichardt's Hotel Management Limited leading to the hearing.
- [8] The Medical Officer of Health reported without any matter in opposition. The Police advised that there was no opposition but expressed concern over the proposed 4.00am closing preferring that the company continue to trade to 3.00am. As stated above, two companies that operate within close proximity to the premises, opposed the grant of a licence based on the following criteria:

The days on which and the hours during which the applicant proposes to sell alcohol'

The amenity and good order of the locality would be likely to be reduced to more than a minor extent by the effects of the issue of the licence.

- [9] It is of interest that there were no issues about suitability or alcohol related harm. Because of the public objections, the application was set down for a public hearing and heard over two discrete days because of the unavailability of the main witness for the two objectors.

The Application

- [10] Mr M J D Burgess is one of the applicant company's directors and gave evidence on its behalf. The company is part of the Republic Hospitality Group of seven hospitality venues in Queenstown. The consortium has been operating in Queenstown since 2001. He stated that following the remedial work carried out by the previous owner he considered that the basement was one of the best designed premises in Queenstown for the purposes of a nightclub. Indeed there was no significant evidence about the escape of music noise. The issue was all about the foot traffic in the area.
- [11] Mr Burgess produced a letter from the World Bar consenting to the application to trade to 4.00am provided that the frontage is not frequented by Vinyl's patrons and the streetscape and beer gardens were left tidy. The letter concluded "Working alongside Republic as operators has been a pleasure thus far and I look forward to a long a positive relationship with you downstairs".
- [12] Mr Burgess spoke about the four significant changes made by the company to alleviate noise issues since taking over. The first relates to the realignment of speakers inside the premises to contain noise inside. We understood that this was as a result of the only 'request for service' issue that has been recorded by the Council about noise levels at the location since the business was taken over. The second initiative was to provide free lollipops to patrons as they depart the premises. This is aimed at keeping down street noise levels from departing revellers and the evidence was that it does indeed keep people quieter.
- [13] The third illustration of good management is a joint enterprise between The Spire, The Club, World Bar and involves the employment of a security guard to patrol Church Lane on Friday and Saturday nights and at any other time when the premises are busy. Details of the arrangement are included separately in this decision but the parties are to be commended for agreeing to be part of such a common sense way of helping to solve any potential problem.
- [14] Finally, an issue arose about the emergency fire door which leads onto Church Lane and is situated opposite the entrance way to the Spire. This door is supposed to be used only for emergency but it became clear at the first hearing that it was being used by patrons just to go outside. In the two weeks period between the hearings, Mr Burgess decided to have a 'mag lock' placed on the fire exit door. This means that the door could no longer be opened indiscriminately but only when a fire alarm was activated.
- [15] Mr Burgess argued that any noise in the area was 'people noise' and was generated mostly from people using Church Lane as a thoroughfare between

the 'Novotel' hotel and central Queenstown, rather than patrons congregating around the bars. In addition people gravitated towards the 'Seven Eleven' as well as the Nomad Backpackers both on Church Street. He stressed that apart from the one request for service, there had been no complaints received since the company had taken over the premises.

The Incident on Sunday morning 11 June 2017.

- [16] In the interim period between hearings, at about 12.45am on Sunday morning 11th July, the emergency door was opened and one or more patrons came outside. The night manager from the 'Spire' became involved as did the security guard employed by the consortium. The night manager subsequently gave the general manager Mr J J Cavanagh his account of what happened, and this was repeated by Mr Cavanagh when he gave evidence on the second day.
- [17] Mr Burgess was advised and he arranged for the security guard to make a statement. There was a considerable conflict between the 'second hand' accounts of the incident. The incident caused no nuisance to any third party, and since it happened well before closing time, it served as a reminder to keep all doors closed as per the resource consent.

The Alcohol Licensing Inspector.

- [18] Mr N P Bates spoke to his report and gave evidence about an incident on 3rd June 2017. In his report he noted that there were several restaurants and bars located within 50 metres of the premises including "Sasso", "Blue Kanu", "Devil Burger", and "No 5 Church Lane" as well as "World Bar" and "The Club". Under the heading of Amenity and Good Order, Mr Bates stated "I believe that potential effect on the amenity and good order of the area are less than minor for the premises."
- [19] He also spoke highly on the applicant's suitability stating "The licensee has a long history of operating bars within Queenstown area and is considered by the licensing inspectors one of the better operators in the area showing an ongoing willingness to co-operate and keep informed the police and inspectors when there are issues or circumstances that they believe should be known."
- [20] Mr Bates advised that on Saturday 3rd June 2017 at 11.50pm he was monitoring licensed premises with Sergeant Haggart and another member of the Police. While speaking with security he noticed one of the company's directors exiting the premises through the open front door. He briefly heard music as patrons were entering and exiting the premises. He checked the front doors and noted that the left door was on a latch. He explained that this was a breach of the resource consent and the door was closed. Mr Burgess acknowledged that this had happened and advised that the staff had been briefed and told that all doors had to be closed at 10.00pm.

Independent Evidence from Security.

- [21] During the first hearing the Committee raised the possibility of hearing from the security guards employed by the four licensed premises to monitor foot traffic in Church Lane on Friday and Saturday nights. It was felt that they

might be able to give an overview of the area based on their experience. There was general agreement with the proposal and the Inspector was asked to interview a guard and prepare a brief of evidence. This was duly done although unfortunately the guard was unable to attend the hearing and the statement has not been tested in that way. Nevertheless the statement provides an excellent account of what happens.

- [22] The joint initiative commenced about six months ago. The proposal is to station a security guard in Church Lane on Friday and Saturday nights starting at 11.00pm and finishing between 3.30am and 4.00am the next day. Mr Jack Dent has worked the shift approximately every third weekend and now provides the briefing for the new security guards who are carrying out the shift for the first time. He is the go to person for questions because of his experience.
- [23] He stated that the shift generally involves talking to people who are moving through the laneway, answering any questions that may have and making sure that they are not making too much noise. He described the amount of foot traffic as sporadic and estimated that 95% of people using the laneway are either coming or going from the Novatel. The Novatel is a reasonably upmarket Accor hotel which has 272 rooms and caters for a variety of guests, including bus tours of tourists. Mr Dent can see the entrance to the hotel. He stated that he asks people to lower their voices about two or three times a night and believes that the majority have not come from one of the premises in Church Lane.
- [24] He has no recollection of ever having to stop anyone who was causing damage, he has never heard music from Vinyl, never seen anyone use the emergency exit, and never received any complaint about noise.. He thought that the free lollipop ideas made a difference.
- [25] Mr Dent considered that there was no increase in noise levels when Vinyl closed as their security did a good job of moving people away from the area. In fact he thought that security at all venues was good because he had never had to intervene or help out. He noted that groups of smokers could start forming at the front of Vinyl but once again security tended to move them down in the direction of "Sasso" and away from the laneway. The same type of management applied with any queues of patrons waiting to get into the premises. If there was any incident such as a fight or property damage then this had to be reported to the Regional Manager of Allied Security. He has yet to make a report.

The Objectors.

- [26] Mr J J Cavanagh is the Group General Manager for the Imperium Group in Queenstown. This includes the Spire as well as "Eichardt's". At the second hearing, Mr Cavanagh advised that the Marine Parade (where "Eichardt's" is located) has not been affected by the operation of Vinyl and accordingly the Eichardt's objection was withdrawn.
- [27] The Spire prides itself on its ability to give its guests a luxurious and uninterrupted stay. It is a boutique five star hotel with ten bedrooms six of which face on to Church Lane. There is also a restaurant and house bar that

can seat up to 55 people. A night manager is employed between 10.30pm and 8.00am and a night auditor is on duty. Mr Cavanagh advised that the company had obtained a report from an acoustic expert in October 2016 but the cost of any remedial work to the side of the building facing Church Lane was considered to be unviable.

- [28] In Mr Cavanagh's view the amenity and good order of the Church Street and Church Lane locations will be affected to a degree that would be more than minor, if there is an extra hour of trading granted by the committee. He submitted that it was obvious that a number of people would congregate on the street lining up to get into the premises. He further argued that given the capacity of the premises was 190, an extension of an hour would mean that the noise would continue. He was referring to people noise.
- [29] Mr Cavanagh asked the committee to note that there were premises that closed at 2.30am such as The World Bar and Winnies that also catered for the 18-25 year old demographic. He pointed out that there were other premises in the centre of town that stopped at 2.30am. He submitted that it was 'highly likely' that if Vinyl could trade to 4.00am then patrons from these premises will migrate to Vinyl.
- [30] Mr Cavanagh produced four 'Trip Advisor' reviews from people who stayed in September 2016, and March, April and May 2017. One five star review stated *"Make sure you get a room facing the church as the other side faces a noisy lane way."* The four star review in March referred to ridiculous street noise and music every night (weekend and weekday). *"Despite manager comments that the noise had been fixed through local government or such, it is still terrible as of March 2017. You could hear club music at 2am and shockingly loud bass music still going past 4am"*.
- [31] The April 2017 report was also four stars and *stated "Our only complaint is noise from the street in the middle of the night. We purposely chose room on the side facing the Church, however there was lots of noise which awakened us at 2am."* Finally, there was a five star review for a stay in May 2017 which added the comment *"Also the alley The Spire is located in, is filled with bars which does get noise."* In cross-examination Mr Cavanagh acknowledged that there were a total of 154 reviews and that 141 of them had given a score of excellent and 8 a score of very good.
- [32] In conclusion Mr Cavanagh acknowledged that the noise issues experienced since the applicant company had taken over the premises had largely been due to issues in Church Lane (where the emergency exit is located). He stated that that the Spire had also objected to the renewal of "The Club" on-licence.
- [33] We also heard from Mr A R Moore the Operations Manager for the Imperium Group. He stated that it was Imperium Group's view that Vinyl should close at 3.00am. He submitted that it was common sense that if Vinyl was open until 4.00am there would be a higher likelihood of noise when patrons came from other licensed premises that had closed.
- [34] He gave evidence that the night manager had reported in the hotel logbook that on 8th November 2016 at around 1.00am to 2.00am a drunk person had

been attempting to get into the back doors of both Vinyl and The World Bar, and that the night manager had at some stage asked this person to move on. Also that on 3rd March 2017 at 11.00pm, the night manager had received a complaint about music coming from Vinyl's back door and he had spoken with the duty manager at Vinyl and the matter had been resolved.

Closing Submissions.

- [35] On behalf of the Police, Sergeant Haggart confirmed that the application was not opposed, and that even though Vinyl was under a strong management team, the Police had concerns with the closing time being extended back to 4.00am, particularly in the light of the previous hearing involving the same premises. She advised that if the further hour was approved there would be close monitoring to see if there were migration issues resulting in congregations of waiting patrons. There was also a concern that if the 4.00am closure was granted then "the World Bar" might be encouraged to follow suit.
- [36] Mr Bates accepted that the concerns raised by the objector were valid but noted that the applicant had shown a willingness to mitigate any possible negative effects on the surrounding environment.
- [37] Ms Surrey confirmed that the key submission was the impact that the extra hour is likely to have on the amenity and good order of the locality. She reiterated that the objector had no issue with a 3.00am closing. She provided helpful legal argument as to how the committee could form an opinion, and in particular whether in its opinion the amenity and good order of the locality would be likely to be reduced by more than a minor extent by the effects of the issue of a licence
- [38] Mr Mawhinney referred to the default national hours as set out in s. 43(1) of the Act, and noted that the company has resource consent to trade till 4.00am. He submitted that there was no evidence to suggest that the extra hour of trading would produce any more than a minor effect on the amenity and good order of the locality. He argued that there were several possible sources of noise in the vicinity of Church Street and Church Lane and it was unfair to blame Vinyl's patrons alone. Mr Mawhinney contended that The Spire would have been aware of the presence of Vinyl and other bars and licensed premises when they commenced business.

The Committee's Decision and Reasons

- [39] Pursuant to s105 of the Act we are required to have regard to a number of matters when considering an application for a licence. The objectors have identified two relevant matters as follows:

The days on which and the hours during which the applicant proposes to sell alcohol and

Whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of issue of the licence;

- [40] Section 106(1) of the Act reads:

In forming for the purposes of section 105 (1) (h) an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of a licence, the licensing authority or a licensing committee must have regard to –

- (a) the following matters (as they relate to the locality):**
 - (i) current and possible future, noise levels;**
 - (ii) current and possible future, levels of nuisance and vandalism;**
 - (iii) the number of premises for which licences of the kind concerned are already held; and**
- (b) the extent to which the following purposes are compatible:**
 - (i) the purposes for which land near the premises concerned is used;**
 - (ii) the purposes for which those premises will be used if the licence is issued.**

[41] Under s.5 of the Act amenity and good order of a locality is defined as:

In relation to an application for or for the renewal of a licence, means the extent to which, and ways in which, the locality in which the premises concerned are situated is pleasant and agreeable.

[42] Ms Surrey referred to the case of *Re Venus NZ Limited* [2015] NZHC 1377 where Heath J examined whether an applicant bore an onus to satisfy the Authority (licensing committee) that in granting an off-licence there would be no likely reduction to the amenity and good order of the locality if the off-licence were granted. His Honour described the role in forming an opinion as essentially inquisitorial where notions of onus of proof may not be helpful or appropriate.

[43] In forming an opinion about the likely reduction to the amenity and good order of the locality, we first had regard to current and future noise levels. At present these are at a low level. There was really no evidence at all about the escape of noise from the basement (which is so different to the previous case). There were minor incidents about people exiting via the fire door but we believe that the issue is now resolved.

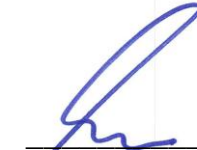
[43] The security guard's report was to the effect that any current noise level from foot traffic is because Church Lane is a busy thoroughfare. The Trip Advisor notes did not really help. The first post referred to a noisy lane way. The second must have been referring to The Club given that Vinyl trades to 3.00am. And neither of the other two posts identified Vinyl. And in this case, the objector has no concern about Vinyl trading to 3.00am. In summary there are currently no noise issues that are more than minor.

[44] As for future noise levels, it is our view that this depends on management skills. The company has a good record and is spoken of highly by the Police and Inspector. Mr Burgess was an impressive witness and seems pro-active in ensuring that the conditions of any licence are being met. If the company can manage the dispersal of patrons at 3.00am why cannot they do so at

4.00am? It seems to us that there is an argument that with “The World” closing at 2.30am and Vinyl at 3.00am, it might be better to separate them further. There might be migration (to be discussed shortly) but the company has shown that it has the ability to manage crowds.

- [45] The second issue to which we must have regard is current and future levels of nuisance and vandalism. There was no evidence of this sort of impact on the amenity of the neighbourhood, and no suggestion that it might happen if the trading is extended by one hour. And there’s another issue. Amenity and good order is defined as being the extent to which, and the ways in which the locality is pleasant and agreeable. This locality is virtually the centre of Queenstown. There are licensed premises everywhere. The lane is a busy thoroughfare leading to and from a large hotel and a park. The degree of pleasantness will likely depend on the age of the person who is there at the time. Anyone seeking peace and tranquillity in this locality at 4.00am is likely to be disappointed.
- [46] There are six licensed premises within 50 metres of Vinyl and at least a further six within 100 metres. Some are entitled to trade to 4.00am. The number of on-licensed premises in the area make it less likely that an hour’s extra trading by this applicant will impact on the amenity and good order of the locality in any meaningful way. As an aside we repeat that if there had been evidence of alcohol related harm then we might have been persuaded to review the issue in greater depth, but this argument is only about the likely impact on the environment.
- [47] Which leads us to the balance of the considerations to which regard must be had. While it is true that some of the land near the premises is used for accommodation, most of it is used for hospitality and entertainment which is the same basis on which the application is founded.
- [48] There are other considerations. When it passed s.43 of the Act concerning national default hours, Parliament gave an indication that trading to 4.00am could be seen as the norm. In Queenstown there are fundamental tensions between those who see Queenstown as a tourist mecca, and those whose primary concern is the health and welfare of the citizens. In other words it may be difficult to establish a community of interest. What is certain is that in this case the company has resource consent to trade to at least 4.00am.
- [49] The final issue is that an on-licence is granted initially for one year. This is often described as a probationary year so that the conditions of any licence may be the subject of review. The applicant company is well aware that its conduct will be the subject of scrutiny.
- [50] In summary we have had regard to the criteria in s.105 of the Act and in particular the issues of amenity and good order. There is no evidence to suggest that granting the application will be contrary to the object of the Act. In our opinion, the effect of the issue of a licence in this case on the amenity and good order of the locality will be minor. The application is therefore granted and the license will be subject to standard conditions. There will be a condition that the Licensee will ensure that fire exit door onto Church Lane will be the subject of a ‘mag lock’, and that there will be suitable signage on the outside of the door to indicate no entry.

DATED at Queenstown this 28th day of June 2017



E. W. Unwin
Chairman