

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of an application by **Donald Cliburn** pursuant to section 219 of the Act for a Manager's Certificate to be used on the premises situated at 31 Poplar Avenue, Raumati South, known as 'Bays' Brasserie'.

BEFORE THE KAPITI COAST DISTRICT LICENSING COMMITTEE

Chair: Cr Fiona Vining
Members: Mr Michael Dodson
Mr Phillip Parkinson

HEARING at Kapiti Coast District Council offices, Paraparaumu, on 25 May 2018.

PROCEDURAL MATTERS

The Chair convened a public hearing of the District Licensing Committee to consider and determine this application. Notice of the hearing was given to the following parties:

- The Applicant
- The Licensing Inspector
- The Police

APPEARANCES

Mr Donald Cliburn – the applicant
Ms Katherine McLellan – Licensing Inspector (Kapiti Coast District Council)
Sgt Christopher Muir – New Zealand Police
Ms Joanne Burt – Licensing Inspector (Wellington City Council) for the Police

RESERVED DECISION OF THE COMMITTEE

Introduction

1. This is an application by Donald Cliburn for a Manager's Certificate to manage the sale and supply of alcohol on licensed premises at Bays Brasserie, 31 Poplar Avenue, Raumati South.

The Application

2. A copy of the application was forwarded to the reporting agencies and the Licensing Inspector, as is required by section 220. The police opposed the application based on concerns about suitability.
3. All those appearing were sworn in.

Applicant's Evidence

4. The applicant Mr Cliburn spoke in support of his application. He stated that he understood that there were two main issues of concern to the Police and Licensing Inspector. These were in relation to his previous convictions and in relation to events that occurred when he was managing the licence for premises in Wellington in August 2017.
5. Mr Cliburn on his application disclosed a conviction for common assault which related to a domestic disturbance around fifteen years ago. He acknowledged that he had not listed his conviction for driving while disqualified nor driving under the influence. He stated that he had not put them on his previous applications for a manager's certificate as he thought that they were traffic offences that he was not required to disclose. In terms of the driving while under the influence offence he stated that this occurred when he moved his car from one part of a car park to another and that he did not drive on a public road while intoxicated. In response to questions, he stated that these offences were a long time ago and that he doesn't even drink socially now.
6. The second issue raised in objection was that Mr Cliburn sold alcohol from his premises at Orpheus Restaurant in Wellington in August 2017 while those premises were unlicensed.
7. In his primary evidence Mr Cliburn stated that he had taken over and was running Orpheus Restaurant, but had not checked the expiry dates on the liquor licence which was due to expire. He stated that Council had sent reminder letters to his former business partner and that Council informed him of the expiry of the licence on the day it was due to expire. He said that he applied to renew the licence on the day but was told that the licence was "dead" and that he had to apply for a new licence.
8. Mr Cliburn stated that the restaurant's turnover was usually \$30,000 a week and that he had to pay rent of \$2300 a week. He said that he didn't sell alcohol for the first few days, but that as a result 80% of the restaurant's customers left. He said that he wasn't in the right frame of mind and made a decision to sell alcohol. He said that he had spoken to friends who ran restaurants who told him that as he had run two previous businesses before with no offences or issues he should just sell alcohol. That night he sold alcohol to a Wellington City Council licensing inspector. He stated that as a result he had to close the business, give up his lease, and eventually gave up the business.
9. He stated that the while the information from Police and inspector said he was unfit to hold a manger's certificate, he did not think that was true. He stated that he had had an impeccable record and this shouldn't be held over him for the rest of his life.

10. Mr Cliburn responded to questions from the Licensing Inspector, Police and the Committee.
11. Mr Cliburn acknowledged that his Manager's Certificate had expired on 9 August 2017. He was asked if he acted as a Duty Manager during that time. He responded that there were two other Duty Managers and that he didn't realise that his certificate had expired as he just did not check. He listed himself as proposed Duty Manager when he sent his application for a liquor licence. At that point, Wellington City Council advised him that his Manager's Certificate was about to expire. He did not reapply for his Manager's Certificate as it wasn't a priority with two Duty Managers already employed.
12. Mr Cliburn stated that his current role is as a hospitality professional and that he works as a chef and at night serving food and alcohol. He works at Hugo's in Wellington and Bays Brasserie in Kapiti. He resides in Wellington. Mr Cliburn was asked why he was applying in Kapiti. He responded that he is sixty two years old and looking at retiring and that he has no obligation to stay in Wellington and apply there.
13. In respect of the circumstances surrounding the sale of alcohol at Orpheus when it was unlicensed Mr Cliburn blamed the Wellington City Council for not notifying him that the Licence was about to expire. He acknowledged that he had effectively taken over the business and had not let Wellington City Council know as required by the Sale and Supply of Alcohol Act 2012. He said he was advised by "unreliable sources" that he did not need to do that as the old owner was still receiving a "cut of sale of alcohol".
14. He made a number of statements asserting that this situation he found himself in was the fault of the Wellington City Council, as they had not ensured that he personally received notification that the licence was about to expire. He acknowledged that he had not updated WCC as to the correct contact details for the business. When asked by Sgt Muir, "is it your obligation as licensee and duty manager to keep this information up to date?", Mr Cliburn responded "I was under the impression that it wasn't an issue."
15. Following his sale of alcohol while unlicensed, police opposed Mr Cliburn's application for a new licence for Orpheus. Mr Cliburn appeared to also take exception to this saying that he had been told that the issue of a new licence would only take four weeks. When the police opposed the licence he was then informed that the process would take longer, so he withdrew his application. He stated that the Police understood he was getting out of hospitality
16. During cross-examination on other matters, Mr Cliburn stated that he was angry with the WCC process, not the staff and he thought there should have been more assistance from WCC. He also stated that WCC did not refund his fee when he withdrew his application for a new licence for Orpheus.
17. Mr Cliburn's evidence was that he has been in the industry for thirty five years, the bulk of which has been as a chef. He has only had a Manager's Certificate when he owned the premises.

18. Mr Cliburn stated that he has always tried to be a law abiding citizen. He has been in the police and in the Army in America. He stated he would uphold the law, and that he only broke the law out of desperation.
19. He insisted that he did not put his own interests first. He stated that his sole concern was payroll for staff and that it was never just for his benefit. He stated that he had never had an incident or complaint and that he was not in the right frame of mind so he took a calculated risk. He stated that he was stupid and that he apologised. He also stated that he had learned a valuable lesson.
20. Mr Cliburn stated that if the same thing [finding himself unlicensed] were to happen again he would not break the law but would close down immediately.
21. Mr Cliburn's evidence was that he became involved in Bay's Brasserie when the previous owner was in trouble and called him in to help. He said that he found that the business was untenable. He said that he has been in many businesses in Wellington to sort them out and that the Police and WCC are aware of what he does.
22. Mr Cliburn didn't know whether he would step in to help another financially struggling hospitality business in future. He stated that the new business was different to Orpheus which had been undercapitalised.
23. Having blamed the financial pressure he was under for his decision to sell alcohol while unlicensed, Mr Cliburn did not seem to have a clear plan in place to avoid a similar situation in future. When asked what he will do differently, he responded that if he could open restaurant that didn't sell alcohol he would be happy as he is all about food. He stated that the public will not go to a restaurant that doesn't serve alcohol. He noted that Bay's Brasserie does not run happy hours or promotions, and that they advertise on radio and Facebook but without promoting alcohol in those advertisements.
24. He did not come up with any practical measure that he has taken or will take. He repeated that he has learned his lesson and that it won't happen again.
25. During his evidence Mr Cliburn made a number of statements that he did not cause any "harm" by selling alcohol while he was unlicensed. He was asked whether he understood that it caused harm to the system when he simply decided to sell alcohol without a licence. He responded he did, but that no patrons were ever harmed and he never had an incident. He has never had to remove anyone nor call the Police.
26. Bay's Brasserie, where Mr Cliburn is currently working, is operating under a temporary authority issued to a company owned by Mr Cliburn's wife, Nola Cuisine Limited ("Nola"). When the company was incorporated Mr Cliburn was one of the directors of Nola but he has since stepped down. He said that was because he has other interests that he wished to achieve and that he is looking at retiring.
27. Mr Cliburn's evidence was that he is making decisions about how Nola is run. He then tried to qualify that statement to say he provides advice and guidance to his wife.

28. When Nola was first issued a temporary authority it included a requirement that a substantive application for a licence be filed within three months or that reasons why this did not occur should be provided. Mr Cliburn stated that the reason that an application for the substantive licence was not filed within three months is because they were not certain that they would continue with the business. The equipment was leased and they needed to buy new equipment. They were not sure if they wanted to make that investment for a restaurant that only makes \$6000 - \$8000 per week.
29. In response to the question as to why this reason was not supplied with the second temporary authority application, Mr Cliburn stated that he did not know as his wife was providing those answers.
30. Mr Cliburn's evidence was that if he was not granted a Manager's Certificate that he would assume that the On-Licence would not be granted, so he would close down and move on.
31. Mr Cliburn stated that the Police recommendation of a stand down of two years was unwarranted as he is not "some twenty-five year old kid" and that he is a responsible person.

The Police

32. The police called Ms Joanne Burt as a witness. Ms Burt is a Licensing Inspector employed at WCC. She has been employed there as an inspector for twenty years.
33. In response to questions from Sgt Muir, Ms Burt stated that WCC grants in excess of 400 licences and Managers' Certificates a year. She stated that although there is no requirement in the Act for councils to remind licensees of upcoming renewals, WCC send three reminder notices and in the last month tried to contact the licensee directly. She stated that it was not until the Health Inspector became aware of a change of owner that the alcohol licensing team became aware of the situation regarding the liquor licence.
34. Her evidence was that the previous owner, Jeremy, advised her that there was a new operator for the business. She stated that as there was no longer a base licence, the new operator would have to apply for a new licence. She said that Mr Cliburn and the licensee company were advised of this and the relevant process and were advised that WCC would try and get the licence through as soon as possible.
35. She stated that she did not believe that alcohol would be sold, as an Environmental Health Officer had been in to the premises and flagged the situation regarding the lack of a base licence but a few days later an inspector was sent down to check. He asked if was able to buy a drink. He was handed a menu and purchased a beer. At this stage the premises were closed down.
36. Sgt Muir asked Ms Burt if it was at that point that the Inspectorate realised that Mr Cliburn did not have a valid Manager's Certificate. Ms Burt responded "yes, we had advised him earlier that it was due to expire".
37. Police were notified the following day.

38. In terms of the police evidence supplied, we accept the evidence of Mr Cliburn's traffic offences. Sgt Muir stated that while Police recognise that they are old, Police wished to highlight that these offences had not been disclosed on the application.
39. Sgt Muir also referred to an article from the "Stuff" website. The article itself is not good evidence. Sgt Muir explained that Police were looking at prosecution of Mr Cliburn through the District Court, but were advised by WCC that Mr Cliburn had withdrawn his licence application. Police decided not to pursue a prosecution, but that any application for a liquor licence or managers certificate by Mr Cliburn would be opposed.
40. Mr Cliburn asked Sgt Muir whether he [Mr Cliburn] has ever denied these charges and Sgt Muir confirmed that he had not. He also asked why Police took three weeks to oppose the application for a new licence. Sgt Muir did not have information available on this point.
41. In response to questions regarding the decision not to prosecute, Sgt Muir indicated that this decision was primarily driven by Mr Cliburn's decision to withdraw the application for a licence. He said that under prosecution standards it is necessary to show that it is in the public interest to take a prosecution which is more difficult to show following withdrawal of the licence application. He advised that it is not a type of prosecution which happens often. Police would not revisit the decision not to prosecute, but rather have opposed Mr Cliburn's application for a Manager's Certificate.

The Inspector

42. Ms McLellan presented her report and read her statement which had been circulated prior to the hearing. She confirmed that the clean slate legislation does apply to Mr Cliburn's offences.

Committee's Decision

43. The matters which a Committee must consider in regard to the application for a Manager's Certificate are contained in section 222 of the Act:
- (a) the applicant's suitability to be a manager:
 - (b) any convictions recorded against the applicant:
 - (c) any experience, in particular recent experience, that the applicant has had in controlling any premises for which a licence was in force:
 - (d) any relevant training, in particular recent training, that the applicant has undertaken and evidence that the applicant holds the prescribed qualification required under section 218:
 - (e) any matters dealt with in any report made under section 220.

Suitability

44. Under the previous legislation, the High Court has stated:

The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that are to go with the holding of a license.¹

45. The Liquor Licensing Authority has noted:

Each application is dealt with on a case by case basis. In determining suitability we assess the likelihood of a potential licensee or manager upholding the law in light of the evidence provided.²

46. There are a number of matters which the Committee have identified as reflecting on Mr Cliburn's suitability. These primarily arise from the sale of alcohol while unlicensed.
47. Mr Cliburn acknowledged his evidence that it was a conscious decision to sell alcohol while unlicensed and that he took a calculated risk. His evidence was that he was not in a good head space and that he was desperate. He said that he acknowledges that he made a mistake and that it will not happen again. The Committee did not find his evidence on this point convincing for a number of reasons.
48. Mr Cliburn gave evidence that going back he would not do the same thing again, but this statement appeared to the Committee to be rather self-serving. The Committee formed the view from Mr Cliburn's statements that while this might be true, this would be because of the current consequences of his actions, rather than any real acknowledgement that those actions were wrong.
49. Throughout his evidence Mr Cliburn did not accept blame for the situation that he found himself in, rather he blamed WCC, the law and the licensing process. This was despite the fact that the reason he was unaware that the liquor license was about to expire was because he had failed in his legal obligation to update the business's details with WCC.
50. We acknowledge Mr Cliburn's evidence that he did not take the steps that he did for any personal pecuniary gain. Mr Cliburn stated that his primary concern was for staff and that he wanted to ensure that they would still be paid. This is not a sufficient justification for his actions.
51. The Committee was also concerned about Mr Cliburn's view that there was no "harm" caused by his actions. While there was not harm to individuals the Committee is of the view that there is harm when a person decides to knowingly breach their obligations under the Act. The Act relies on licensed premises and those holding manager's certificates to comply with their obligations.

¹ *Re Sheard* [1996] 1 NZLR 751 at 758

² *Deejay Enterprises Limited* (LLA Decisions 531/97-532/97)

52. Despite saying that he would not do the same thing again in future, Mr Cliburn was not able to point to any steps he had taken, other than to insist he would make sure it would not happen again. Mr Cliburn's primary explanation for the breaches, both in failing to update the businesses details and the subsequent sale of alcohol while unlicensed, was the amount of stress he was under trying to revive a business that was in a very difficult financial position. Notably, Mr Cliburn indicated that he has taken over struggling licensed premises in the past and would consider doing so again in the future. This showed very little insight to the situation. It is difficult to accept his explanation of events together with his insistence that it would not happen again when combined with a willingness to take the same risks without a plan in place to mitigate those risks.
53. The Committee is aware of a decision by ARLA considering the granting of a Manager's Certificate by the Auckland District Licensing Committee after the applicant sold alcohol while working at premises which were unlicensed at the time³. In our view there are important differences between Mr Agampodi's situation and that of Mr Cliburn. Mr Agampodi was an employee who had relatively little control over the situation that he found himself in. His employer had made the decision not to seek a further temporary authority to sell alcohol. In addition, Mr Agampodi was in New Zealand on a visa linked to his employment. His employer had threatened to terminate his employment if he did not comply. Losing employment would have put him at risk of being required to leave the country. To get away the situation he found himself in, he began looking for another job.
54. Mr Cliburn, on the other hand, has been working in the industry for a substantial period of time. He was in full control of the premises. It is the Committee's view that the situation he found himself in was his own fault and it concerned the Committee greatly that throughout the hearing he continued to blame others for his predicament. Mr Cliburn was obliged to ensure that he complied with the law. It was not the job of WCC to remind him, although they tried to do so three times. Mr Cliburn's failure to receive reminder notices was because he had failed to update the business's details, despite the law requiring him to do so. He did not seem to have even considered how he would avoid a similar situation in future.
55. In summary, Mr Cliburn did not satisfy the Committee that he had any real insight into his actions. The Committee remains concerned that Mr Cliburn would ignore the requirements in the Act if he felt justified in doing so and did not believe he would be caught. As a result, the Committee has serious misgivings about Mr Cliburn's suitability to hold a license.

Convictions

56. We note that Mr Cliburn has three convictions of which he only disclosed one. It is unfortunate, but it appears that many applicants are confused as to whether they are required to disclose driving offences. Given that, we have not taken this issue into account, but Mr Cliburn has now been put on notice to list these offences in future.

³ *Sturzaker v Agampodi* [2017] ARLA 452

57. As Mr Cliburn was not convicted for selling alcohol while unlicensed this matter cannot be addressed as a conviction, but is already adequately considered in relation to his suitability.

Recent experience in the sale and supply of alcohol

58. Mr Cliburn's recent experience has been at Bay's Brasserie which is owned by a company owned by his wife. Mr Cliburn initially acknowledged that he made the decisions in relation the running of this business, but then appeared to try and minimise his involvement stating that he just provided advice to his wife.
59. We were not convinced by this statement and are concerned that he is in fact acting as a director of the company and managing the business, but is attempting to hide this fact by having the company in his wife's name. This is not a conclusive factor in our decision, but it certainly does not support Mr Cliburn's application for a manager's certificate.
60. His previous experience is also not of assistance since it involved the sale of alcohol while unlicensed.

Other matters

61. The matters raised by the Police and Licensing Inspector have been discussed above.

Renewal criteria as a whole

62. The Committee is required to consider all the criteria set out in section 222. This is a balancing act.
63. In these circumstances, the Committee agrees that a stand down period is required. In determining an appropriate time frame, the Committee considered the case law regarding stand down periods for relevant convictions.
64. In *Re Osborne*⁴ the Liquor Licensing Authority said in respect of a manager's certificate, there should be an appropriate stand-down period in respect of serious convictions:

"The same approach, in our view, should apply to Managers' Certificates. Without fettering ourselves in this or other applications, it may be helpful if we indicate that we commonly look for a five year period free of any serious conviction or any conviction relating to or involving the abuse of alcohol, or arising in the course of an applicant's duty on licensed premises.

We regard Mr Osborne's convictions on 25 October 1991 as fitting squarely within this categorisation.

Less serious convictions are also weighed. By way of example is an isolated excess breath/blood alcohol conviction, or a single driving offence disclosing no pattern of offending. Nevertheless all convictions must be weighed as required by s.121(1)(b). In these and similar cases we frequently indicate that a minimum of two years from the date of conviction may result in subsequent favourable consideration – providing

⁴ LLA 2388/95 (13/10/1995)

suitable reports from both the Police and a Licensing Inspector are received. In all situations we usually regard time as running from the date of conviction, rather than the date of offending.

65. The Committee regards Mr Cliburn's actions as prima facie fitting into the first paragraph described, as "arising in the course of an applicant's duty on licensed premises" therefore suggesting a five year stand-down. We note that Mr Cliburn was not convicted of an offence, but accept that the primary reason for this was that after the events he withdrew the application for the on-licence and indicated to Police that he was leaving the industry. There is no evidence to suggest that this was not his intention at the time.
66. While this is a starting point, the Committee is of the view that Mr Cliburn should also be given some credit for the fact that he has had a number of years operating in the industry and that this is the only incident for which Mr Cliburn has come to the attention of authorities. As a result, the Committee has decided that a two year stand down period before applying for a further Manager's Certificate is appropriate.
67. The Committee did consider Mr Cliburn's explanations but remained concerned that Mr Cliburn has not shown himself suitable to hold a Manager's Certificate at this time.

Conclusion

68. Accordingly, the District Licensing Committee, having read the application and the submissions and reports filed by the parties and having listened to the capable submissions which were made by all parties, and having taken particular notice of the objects of the Act set out in Section 4, and having addressed the criteria for the issue of a Manager's Certificate set out in Section 222, **declines** the application by Donald Cliburn for a Manager's Certificate to manage the sale and supply of alcohol on licensed premises at the Bays Brasserie, 31 Poplar Avenue, Raumati South.

DATED at Paraparaumu on this 4th day of September 2018



Cr Fiona Vining

Chair

Kāpiti Coast District Licensing Committee