

Decision Number 60C [2014] 1549

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

AND

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

BEFORE THE CHRISTCHURCH DISTRICT LICENCING COMMITTEE

Chairman Mr R.J.Wilson JP

Members Mr A.J.Lawn
Mr D.L.Blackwell oSM

HEARING at Christchurch on 3 July 2014

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

DECISION OF THE CHRISTCHURCH DISTRICT LICENSING COMMITTEE

(1)We are dealing with an application by Wunderbar (2006) Ltd for renewal of its On Licence for premises known as Wunderbar situated at 17 London Street Lyttelton. The renewal is opposed by Mr Mark Fitzgerald a local resident who objects to disturbance by noise from the bar. Mr Paul Spang, Alcohol Licensing Inspector opposes the renewal for the full period of three years. He supports a one year renewal so that the applicant may address noise issues.

(2)Prior to the hearing the Committee made a site visit to Lyttelton mainly to gain an appreciation of the location of the Wunderbar and its relationship to the principal complainant's address in Foster Terrace.

(3)At the outset the Chairman confirmed with the Inspector that the only issue before the Committee was that of noise from the bar. No question of suitability on the part of the licensee arises. On that understanding the Chairman invited those giving evidence to restrict themselves to the noise issue. They should address the requirement of the Committee to have regard to s105(1) of the Act *“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 the issue of the licence”* and s106 (1)(a) where we are required to take account of *“the following matters (as they relate to the locality) : (i) current, and possible future, noise levels.”*

EVIDENCE OF APPLICANT

(4)Mr Bishop told the Committee that there had been huge problems with the business arising from the earthquakes. It had closed and reopened on three occasions in that time including one period of nine months closed. Major work had been done on the building and this was still not complete. He had assurances from the building owner that it would be finished last year but this had not happened. Everything seemed to take longer than first thought. A number of pieces of work that are pending should make a significant difference to the amount of noise escaping from the bar. In the meantime he had been proactive in the matter of noise control. There was no such thing as a 3 am closure any more, times having been brought in considerably to no later than 1 am on a Friday or Saturday night and around 11 pm otherwise. He acknowledged that there had been a total of 107 complaints since April 2012 but said 103 of these were from the one complainant, Mr Fitzgerald. Only 13 of these had resulted in a noise direction being issued. Mr Bishop said bands had been given instructions to contain the noise particularly the bass sounds but there had been instances of band members turning up the sound. He said both he and Duty Managers were alert to this. Partly the problem is because some bands bring their own sound systems and sound levels are thus difficult to control. To address this problem he had spent \$16,000 on a new PA system the intention being that visiting bands would use this equipment which they would not be able to tamper with. Mr Bishop pointed out that the last excessive noise direction had been given in November 2013 and the previous one was 11 months before that.

CROSS EXAMINATION

(5)Mr Spang asked how Wunderbars’s business had been affected by the earthquakes given that most of the buildings around Wunderbar had been demolished including a number of bars. Mr Bishop said the three periods of closure he had mentioned earlier had a serious effect but his bar had a loyal clientele many of whom come from outside Lyttelton. Bands were an integral part of the business. He said he had lived in Lyttelton for 8 years and knew the community well. Asked what he had done specifically to address noise issues since the last substantiated complaint in November Mr Bishop responded that he had purchased the sound system as already mentioned. He conceded however that he had not obtained an acoustic report from a qualified person as recommended to him earlier because he had been told this would be

pointless until the building work was completed. He was prepared to give an undertaking that he would obtain a report from a sound engineer and carry out any recommendations once the overall work to the building was completed. He felt the latter was in the hands of the landlord and there was not much he could do in the meantime. He was prepared to accept a cessation of music at 1 am as a condition of his licence.

(6) To the Committee Mr Bishop confirmed that he had accompanied Mr Spang, the Inspector up to Foster Terrace in the vicinity of Mr Fitzgerald's property. He accepted that he could hear the band noise emanating from Wunderbar but thought the overriding noise was from port operations. He said he had only one person come and identify herself to him and to complain about the noise. He said he had personally shown this person what had been done and what was planned and she appeared satisfied. Mr Bishop would welcome the opportunity to do the same with any other complainants. He repeated that he was a part of the community and wanted to be a good member of it. He said bands are told on arrival to keep the noise levels down and to respect both patrons and the community but it was in the nature of bands to tweak things louder. He said he was there himself most of the time but it was not easy to control the sound particularly if the band was in the middle of a set. He said he and his managers could only do their best.

EVIDENCE OF INSPECTOR

(7) Mr Spang presented a written brief of evidence and answered questions from the Committee. He said Mr Bishop had received a copy of his report and would have been aware of his recommendations, particularly that he should obtain an acoustic report, for the past two months. He said that when he visited Foster Terrace with Mr Bishop the noise from the bar was louder than he had expected. He had the impression that it was louder than Mr Bishop had expected too. Mr Spang said that he was used to dealing with noise issues in Lyttelton. He was aware that noise can be amplified going up the hills. He also thought the situation may have been aggravated by the demolition of a number of buildings which may have blocked sound. Mr Spang said he had several conversations with Mr Bishop about the noise issue and thought he could have been a bit more proactive in obtaining an acoustic report from a sound engineer. He acknowledged that Mr Bishop was to some extent in the hands of his landlord. Mr Spang presented two alternative courses of action for the Committee to consider. The first was that the licence could be renewed for twelve months subject to the condition that the applicant engage a suitably qualified acoustic consultant to report on options to further mitigate noise and that the applicant implement the recommendations of the consultant in a timely manner. The alternative suggestion was that the Committee might consider adjourning the application for six months for these suggested actions to be completed and reported back to the Committee. In answer to the Committee Mr Spang said he preferred the first option as he thought the work identified might be quite expensive and he was not sure whether it could be completed in a six month time frame. Whichever it was his intention to try to get a definite time frame adopted for noise mitigation work to be completed.

(8)Mr Spang confirmed that the distance from the Wunderbar to Mr Fitzgerald's residence was about 415 metres and even further from the port. On the night of his visit to Foster Terrace it had been a quiet night at the port. He thought that if the port was busy noise from its operations might be louder than that from the bar. When questioned as to whether it was unusual to have only one public objector to the renewal of the licence he responded that he had expected more. He was not aware that there had been 15 different complainants between April 2012 and April 2014.

EVIDENCE OF MR JOHN ALPS

(9)Mr Alps is an Environmental Officer employed by the Christchurch City Council and was called to give evidence by Mr Spang. Mr Alps said it is his responsibility to investigate complaints about noise and manage the work of security officers employed by Armourguard a security company retained by the Council to respond to after hours complaints. He presented a complaint history with respect to the Wunderbar noting that two further complaints had been received since he had compiled it. Of the total of 109 complaints 90 were made by Mr Fitzgerald and 19 from a total of four other people. Excessive noise directions were issued in respect of 13 complaints. Mr Alps told the Committee that on three occasions in February and March Mr Fitzgerald had given an address in Winchester Street which turned out to be false. He also believed Mr Fitzgerald was the person in a van who had allegedly been following an investigating security officer around such that he feared for his safety. Mr Alps said that monitoring had been carried out on several occasions from near Mr Fitzgerald's residence and in the main the noise mostly emanated from the port. He conceded that two recent complaints had not been assessed properly because the officer sent was not familiar with Lyttelton, his electronic equipment had malfunctioned and he had become concerned about apparently being followed. Mr Alps said he had spoken to a number of residents of Foster Terrace who had not experienced similar problems to Mr Fitzgerald.

(10)Asked by the Committee as to what steps he thought the applicant should take he said the best outcome was no complaints and he had recommended suitable acoustic firms to Mr Bishop so he could obtain advice. It was a principal of one of these firms who had advised Mr Bishop that there it would be difficult to make useful recommendations until building work had been completed. Mr Alps was of the view that Mr Fitzgerald's actions in making complaints ostensibly from an address he did not live at and in following the security officers cast a shadow on his evidence. He acknowledged that noise travels around the hills but knew of no reason why noise from Wunderbar should be especially audible in Foster Terrace. It is possible that some buildings now demolished may have blocked sound in the past. Wunderbar is elevated and it is possible sound is coming through the roof.

QUESTIONS FROM THE COMPLAINANT

(11)Mr Fitzgerald put it to Mr Alps that there had been complaints from other residents of Foster Terrace but he had not spoken to them. He asked about the weather on the night Mr Alps had visited Foster Terrace and met with him. Mr Alps responded that there was a clear sky

with a mild westerly wind which was just starting to get gusty. Mr Fitzgerald put it to him that the wind was actually 37.9 knots as confirmed by Port records and the bass noise from Wunderbar could be heard above the wind. Mr Alps that he had identified noise from six different sources that night, the port being relatively quiet, and only a slight bass noise was audible from the bar. When asked to clarify his location at the time Mr Alps said he was in the cemetery immediately below Mr Fitzgerald's house. Mr Fitzgerald expressed surprise that this could be so as the cemetery was posted with danger signs warning against entry on account of earthquake damage. Mr Fitzgerald then said that on that night he could hear the bass sound inside his house. He then raised with Mr Alps that he had not been given a full list of complaints when he had asked for one. Mr Alps agreed that initially this was so and it was because of a filing error at the Council. He had discussed the matter previously with Mr Fitzgerald and he knew he now had the full list. Mr Fitzgerald would have disputed the matter further but was reminded by the Chairman that he should confine himself to questions at this point and that he would have his opportunity to give evidence later in the hearing.

(12) In response to questions from the Committee Mr Alps responded that noise complaints in Lyttelton usually came from closer to the port. He said that there was a certain amount of acceptance of noise as the port by its nature was a noisy operation. He said there had been complaints about other bars but in the main these had resolved with better selection of bands. He was of the view that noise monitoring by Wunderbar had improved and the applicant was resolving the issue. Certainly the noise is audible at times but he did not believe it was excessive. The cost of employing a noise consultant to produce a report might run to \$2000 to \$3000. The cost of carrying out the recommendations would obviously depend on what had to be done. Bass sounds are difficult to mitigate and the best way is to increase the density of the materials through which the noise must pass. It may be simple or it could be a more complex structural matter. In answer to a question as to what would be a reasonable time frame for getting the problem fixed Mr Alps hoped that six months would be sufficient but it would depend on what needed to be done, what building consents were necessary and the availability of trades people. When further questioned on this point he said that in previous dealings about noise complaints about bars, the operators had got an acoustic report and carried out the recommended work thus resolving the problems. This had taken about 3 months pre earthquakes so 6 months now should be sufficient to sort it out.

EVIDENCE OF MR MARK FITZGERALD

(13) Before starting his evidence the Chairman asked Mr Fitzgerald to respond to the accusations that he had made complaints as though from an address not his own and had followed the security officers around while they responded to noise complaints. Mr Fitzgerald said that he had been advised that Winchester Street was even more likely to suffer the effects of noise than Foster Terrace. His intention in giving a Winchester Street address was simply to have noise investigations conducted from there. He did not intend to deceive. He denied following the security officers around but admitted to parking his vehicle so he could watch their activities. The Chairman pointed out to Mr Fitzgerald that this was inappropriate behaviour and he should not repeat it. However in his opinion it did not impinge on the issue

the Committee had to consider which was whether the amenity of the Foster Terrace location would be reduced, to more than a minor extent, by the renewal of the Wunderbar's licence. Mr Fitzgerald was invited to address that matter.

(14) Mr Fitzgerald said he had watched the security officers' activities because on several occasions after making a complaint he had waited at the top of his driveway and seen Armourguard vehicles drive in and out of Lyttelton without going near the Wunderbar or recording noise from his boundary. He said that ever since the Wunderbar reopened after the earthquakes he had regularly heard music from inside his house particularly the base sounds. Before 6 September 2013 the music was regularly played on Wednesday, Thursday, Friday and Saturday sometimes to 3 am. He started ringing Noise Control about this and when the noise continued would ring again to see whether anyone had been sent out. He said he was then told the noise was not excessive although the officers had not come to his boundary to listen. On 28 June 2012 he rang to complain but no one showed up. It took three calls to get them to come to his boundary. The officer then found the noise was excessive and instructed Wunderbar to reduce it. Since then they had found it excessive on two more occasions. Because of the number of complaints the Armourguard manager himself had come out to monitor the noise. However he parked in Norwich Quay where he would mainly pick up noise from the port and when he came up to Foster Terrace did not get out of his vehicle. When Mr Fitzgerald phoned Mr Alps to complain that Armourguard was not doing its job he was told that his complaints were "put on log only". He thought this was "funny". Also his neighbor had told him that he had complained too but there was no record of this. He brought this up with Mr Alps at a Community Board meeting that both attended. He also saw Ruth Dyson the local MP and learnt from her that Armourguard staff had been going to London Street, Richmond in Christchurch not London Street, Lyttelton. Armourguard denied this but admitted that on Christmas Eve 2012 they had gone to Richmond. He believed this was not the only time. After he saw Ms Dyson Armourguard got more active and on 3 March 2013 as a result of his complaint found the noise excessive and told Wunderbar to reduce it. After Wunderbar had received three such directions he rang Mr Alps who told him he would take action. He said Mr Alps had told him he was the only complainant but in fact two other persons had complained. There have been 13 excessive noise directions the last one being on 15 November 2013 at 2.30 am. He had made two complaints since then when Armourguard found the noise not excessive but he did not believe the officers had gone to his boundary on those occasions. He has double glazing on his house which keeps the port noise out but the bass noise from Wunderbar still gets through. On several occasions Armourguard had come out some time after the complaint had been made by which time the noise had stopped or the bar had closed. He said the noise had started up again on some occasions after the officer had driven away. Armourguard also took measurements from the end of his street where noise from the port was more evident. They did not come to his boundary. This is why he has complained so many times. His neighbour and others had complained also but these complaints appear to have "dropped off the record". He also does not understand why the record shows no complaints on Thursdays when he has made some on that day. So far as soundproofing in his house is concerned he believes that it has more than the Wunderbar. He can see batts in the roof vent at Wunderbar from the road but batts are not effective on bass sounds. He understands that noise can be very directional. He cannot hear

Wunderbar from behind his house but he can hear it inside and in front. It wakes him and he has sleepless nights. He cannot understand why the officers are saying there is no problem. He has lived in Lyttelton for nine years and before the earthquakes could only hear the bar noise from his deck not inside the house.

CROSS EXAMINATION BY MR SPANG

(15) In response to the Inspector Mr Fitzgerald confirmed that his property was 415 metres away from Wunderbar and looked directly down on it. The bar cannot be seen from the ground floor only from the second level. He could also see it before the earthquakes to the right of the Harbourlight building now demolished. He believed what had made it worse since the earthquakes was the removal of the concrete block cladding on the Wunderbar building and its replacement by corrugated iron. He does hear port noise and on occasions is bothered by it but he tolerates it because Lyttelton is a port town. Asked why he thought he was the only public objector Mr Fitzgerald said he could not speak for anyone else. He just wanted not to hear the Wunderbar from inside his house, he could tolerate it when he is outside. He is usually in bed by 10 pm and the worst thing is not knowing when the noise is going to stop.

CROSS EXAMINATION BY MR BISHOP

(16) Mr Bishop first explained to the Committee that the cladding of the Wunderbar used to be concrete blocks but after the earthquakes this had been replaced by long run iron. Inside it is solid wood and carpet lining. He asked Mr Fitzgerald who had given him advice to make complaints from a false address in Winchester Street. The response was that it was a friend. Mr Bishop then asked Mr Fitzgerald whether he had tried to start a petition against Wunderbar and had gone knocking on doors seeking signatures. He put it to Mr Fitzgerald that 99.9% of the population supported Wunderbar and refused to sign. He also told Mr Fitzgerald that he could not stop a band when it was in the middle of a set. He did not know when complaints were made or when Armourguard is going to arrive. Mr Fitzgerald was asked why he had not complained about noise from other bars and responded it was because he does not hear them. Mr Bishop put it to Mr Fitzgerald that he was conducting a vendetta against Wunderbar but Mr Fitzgerald denied this. Mr Bishop told the Committee that he could not understand complaints which were made on days when there was just a singer without a microphone or when there was no bass. Mr Fitzgerald was asked about the state of his house given Mr Bishop's understanding that Foster Terrace had been hammered in the earthquakes. Mr Fitzgerald responded that his property had sustained damaged but it all been repaired.

SUBMISSION OF THE LICENCING INSPECTOR

(17) Mr Spang submitted that were no issues with the applicant's suitability but the Committee were required to consider whether the amenity and good order of the locality would be reduced to more than a minor extent by the renewal of the licence. This is further defined by reference in s106 directing the Committee to have regard to current and possible future noise

levels. He said that noise complaints about bars were not rare and the usual action was for the licensee to employ an acoustic engineer and address the problem. Usually this had led to a satisfactory outcome. He believed Mr Bishop could have done more in this regard.

SUBMISSION OF THE APPLICANT

(18) Mr Bishop said he would engage a qualified man once the building repairs were completed. He hoped this would be in two or three months time. He will then be happy to implement any recommendations.

DISCUSSION

(18) The Committee accepts that this is a difficult situation for both the applicant and the complainant. Mr Bishop has had a very difficult time with his business since the earthquakes and we acknowledge that he has taken a number of steps to try to deal with the noise problem. On the other hand we find Mr Fitzgerald's complaints credible. There is no doubt that at times the noise from Wunderbar is excessive. Mr Fitzgerald may have behaved unwisely at times but he is entitled to the enjoyment of his property without undue noise intrusion from the bar.

(19) We are mindful of a decision of the Liquor Licensing Authority re *Paihia Saltwater (2001) Ltd 4 September 2001* where the Authority said:

" (27) It is our view that no-one should have to put up with persistent interference with their sleep patterns. We do not think it is sufficient to submit that a true test is the number of calls to the licensed premises or the Noise Abatement Officer. We have heard enough evidence to suggest that making such calls in the early hours of the morning is unpleasant and often unrewarding.

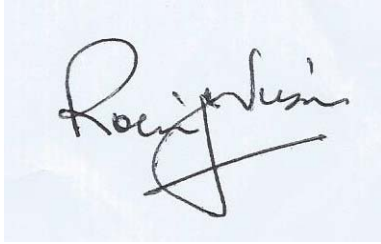
(28) Noise is not just a resource management issue. The escape of noise (particularly music) is an example of bad management...."

(20) In this case we are not going so far as to suggest that Mr Bishop is a bad manager. There is evidence to the contrary. However we are concerned that the matter has been allowed to drift for this long. There have been too many complaints over too long a period. We appreciate that Mr Bishop is in part in the hands of his landlord but the Committee believes he needs to be more proactive. He needs to speak to the landlord about completing the building work without delay. He also needs to engage an acoustic engineer so as to obtain a report with recommendations for action. He then needs to carry out any work required as a result in a timely manner. The Committee's preference is to adjourn this hearing for a period of six months so that Mr Bishop can undertake these tasks. The adjournment should have the effect of getting some action. At the end of the period of six months a further report will be required of the Inspector. If sufficient progress has been made and no further excessive noise complaints have been substantiated then the Committee will likely determine the matter on the papers without the need for a further public hearing. The outcome at that time is likely to be a renewal of the licence with conditions. However if the required action is not taken and further noise

complaints ensue then a public hearing will be reconvened and the Committee will consider its options.

DECISION

The hearing of the application by Wunderbar (2006) Ltd for a renewal of its On Licence is adjourned for six months. In that time the applicant is to obtain the services of an acoustic engineer and carry out any recommendations made as a result.

A handwritten signature in black ink, appearing to read 'R.J. Wilson', is centered on a light blue rectangular background.

R.J. Wilson
Chairman
Christchurch District Licensing Committee