

Decision No. 61 - 62/98

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by TERRY RONALD WILLIGERS for an on-licence pursuant to s.7 of the Act in respect of premises situated at 31 Albert Street, Whitianga, Thames Coromandel District, known as "Hooker Bistro & Bar"

AND

IN THE MATTER

of an application by TERRY RONALD WILLIGERS pursuant to s.118 of the Act for a General Manager's Certificate

BEFORE THE LIQUOR LICENSING AUTHORITY

Quorum:

Chairman: District Court Judge J P Gatley

Member: Mr R J S Munro

HEARING at THAMES on 8 December 1997

APPEARANCES

Mr W Dollimore - for the applicant

Sergeant P L French - NZ Police - in opposition

Mr S Blair - Thames-Coromandel District Licensing Agency Inspector - to assist

Mr M Sandilands - Thames-Coromandel District Licensing Agency Inspector - to assist

Mr R G Henderson - on behalf of Medical Officer of Health - in opposition

Mrs E J Gaskell - Chairperson, Mercury Bay Community Board - in opposition

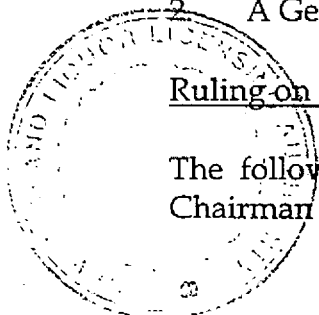
DECISION

We have before us applications by Terry Ronald Willigers for:-

1. An on-licence pursuant to s.7 of the Act in respect of premises situated at 31 Albert Street, Whitianga, known as "Hooker Bistro & Bar"; and
2. A General Manager's Certificate.

Ruling on Application for an Adjournment

The following is a minute of a ruling of the Authority delivered orally by the Chairman on 8 December 1997:-



"The application for an on-licence is opposed by the Police and reports from a District Licensing Agency Inspector and the Medical Officer of Health expressed concerns about the manner of operation of the premises pursuant to temporary authorities. An objection to the grant of the licence has been lodged by the Mercury Bay Community Board and four other objectors.

The applicant has been trading since 27 March 1997 pursuant to temporary authorities issued by the Thames-Coromandel District Licensing Agency.

A notice of hearing issued on 6 November 1997 setting the matter down for hearing on 8 December 1997.

By facsimile dated 3 December 1997, Mr P T Hall, as Solicitor for the applicant, informed the Police:-

'We refer to your facsimile of today with attached details of the Police objections and advice in view of the matters raised therein we will be seeking an adjournment when the application is called on 8th December.

There are a number of matters raised in the objections which will need to be investigated and witnesses briefed.

We note details of the Police objection were requested on 12th November and it is only today these have been received, some two working days prior to the hearing.'

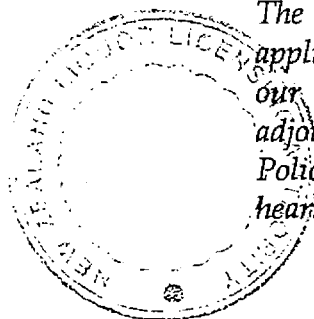
An information copy of that facsimile was received by our Secretary on 4 December 1997.

When the matter was called Mr Dollimore appeared as counsel for the applicant and sought an adjournment basically on the grounds set out in Mr Hall's letter. Mr Hall was not present at the hearing.

Mr Dollimore advises that five minutes before the hearing he received a copy of an adverse report from Mr R G Henderson for the Medical Officer of Health. Counsel submits that the late receipt of that report only adds to the applicant's embarrassment at not having had time to investigate and brief witnesses.

The Authority itself has concerns regarding this application from matters disclosed on the complete file forwarded by the Agency. In seeking answers to the Authority's queries, it would be have been helpful if the Solicitor for the applicant had been present.

The Authority has travelled from Wellington today solely to hear the present application and three related applications for Manager's Certificates. Although our Secretary was given notice that the applicant would be seeking an adjournment, that was only by way of an information copy of the facsimile to the Police quoted above. No formal application was made to our Secretary for the hearing to be postponed.



The Authority is aware of past concerns regarding the sale of liquor over the December/January holiday periods in the Coromandel. It is inappropriate for an applicant whose suitability is opposed to carry on trading pursuant to a temporary authority over the January/December period without the challenge to his suitability being heard by the Authority.

If matters are raised where we consider the applicant to be unfairly prejudiced by short notice of opposition they can be remedied by subsequent affidavits and written submissions mailed to our Secretary in Wellington.

The application for an adjournment is refused. We draw counsel's attention to the judgment of Tompkins J in Chef and Brewer Bar and Cafe Limited v The Police (HC Auckland 24 June 1994 CP. 294/94) where His Honour held at page 5 - 'it is my conclusion that in the circumstances of this case the decision of the Authority to refuse the application (for an adjournment) does not involve the exercise of a statutory power of decision and is, therefore, not reviewable.' - Tompkins J then said that if he was wrong in that respect it would be appropriate for him to express his views on the merits of the application and at page 7 said:-

'Ms McCarthy advises that if the applicant's application is refused the applicant would be unrepresented. That, of course, is its choice. But it is obvious from the sequence of events to which I have referred that it did not need to be unrepresented. Indeed, even now (ie on a Friday) I am unable to see any reason why competent counsel should (not) become seized of the matters relating to the applications in time adequately to represent the applicant next Monday.'

Hearing of the Substantive Application

The base licence under which Mr Willigers (the applicant) has been trading pursuant to a temporary authority, on-licence 011/ON/12/95 authorises the sale and supply of liquor on the subject premises to:-

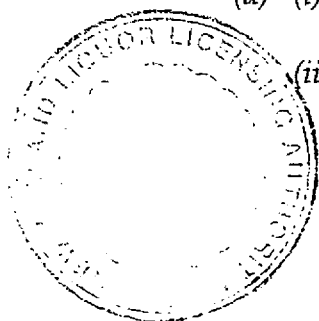
- (a) any person who is present on the premises for the purpose of dining; and
- (b) any person who is present on the premises for the purposes of attending any function or entertainment (whether live or not).

Trading hours authorised are Monday to Sunday 7.00 am to 1.00 am the following day.

The designation condition of the licence provides:-

- "(d) (i) *When the premises are being operated as a nightclub or entertainment venue the whole of the premises is designated as a supervised area.*
- (ii) *During such times that the premises are being operated as a venue for social functions:*
promoted by any person or association of persons other than the holder of the licence

OR



*at which liquor is not being sold or supplied
the whole of the premises is undesignated."*

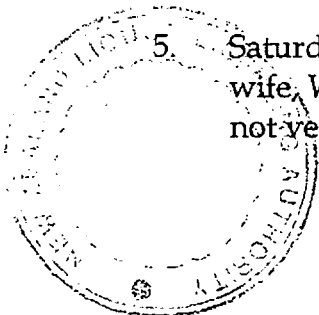
At the hearing it was agreed with Mr Dollimore, as counsel for the applicant, that it would be appropriate for evidence from parties opposing the application to be heard first, so that counsel and the applicant would be fully aware of the case to be answered.

Police Evidence

Evidence was given by Constable M K Skeen, stationed at Whitianga, that in the eight months since the applicant commenced trading on Easter weekend 1997 the Police have received numerous complaints regarding the operation of Hooker Bistro & Bar. At the opening night function on Easter Sunday a number of patched Outcast members from Hamilton were observed on the premises. Complaints received by the Police involved underage drinking, trading after hours, cannabis smoking on the premises, grossly intoxicated patrons and no certified manager being on duty.

A summary of the Constable's evidence follows:

1. Visit 10.30 pm Saturday 26/4/97. No certified manager on duty. 17 year old girl served. Applicant questioned and responded that he had suspected underagers sign a piece of paper that they were over 20 years of age but he never asked for proof of age. Applicant warned to obtain verification of age. There was no food or entertainment. 25/30 patrons present, none of whom were eating and there was no sign of any food being prepared. The only "entertainment" was a stereo playing background music. Two 17 year old girls consuming alcohol were spoken to.
2. Sunday 4/5/97. Police received information that people were drinking in the bar at 2.30 am. At 3.15 am persons were seen to leave the bar and be taken away in a van.
3. 11.30 am Friday 9/5/97. Police visit - intoxicated patron at top of stairway; grossly intoxicated male had to be supported on a bar stool. Duty manager said it was better that intoxicated patrons were watched rather than being put out on the street. Thirty patrons - none eating meals. No entertainment apart from stereo.
4. 2.00 am Saturday 31/5/97 - Police called to an incident outside Hookers between highly intoxicated male and female. Police informed that just prior to the arrival patrons left carrying cartons of beer from the premises.
5. Saturday 1/6/97 - Police called to an incident between the applicant and his wife, Wendy Dye. Both had blood on them. W Dye was highly intoxicated and not very coherent. Both unco-operative with attending Police Officer.



6. On 20/6/97 Constable Skeen spoke to Mr Willigers about why the Police were opposing his application for a General Manager's Certificate. The Constable said the following incidents were discussed with Mr Willigers:

- intoxicated patrons
- minors drinking in the bar
- patrons seen leaving with boxes of beer
- noise complaints
- general disorder of patrons leaving the premises after closing
- reports of fighting inside the bar and out on the street
- responsibilities of licensees/manager.

The applicant was warned that his performance to date was substandard and that until his performance improved, the Police would object to his application.

7. 3/7/97 Police informed of Hooker's beer being taken to a party in Whitianga. Hooker's beer is not available at any other outlet in Whitianga.
8. 2.00 am 25/9/97. Eight to ten persons drinking in the bar - applicant subsequently charged with three offences under the Sale of Liquor Act; the charges are currently before the Court.

Constable Skeen said that on other visits to Hookers over the past twelve months there had been no entertainment other than a stereo and no meals of any description being eaten or prepared. The Police have received numerous noise complaints which have been referred to the Thames-Coromandel Noise Control Officer. More recently the Police have received reports that a weekly raffle is being run at Hookers, known locally as the "meat raffle", where the prize is a prostitute for the night. On some occasions vehicles registered to the Outcast Gang address of 110 Norton Road, Hamilton, have been seen parked outside Hookers. On 29/11/97 a number of Outcast Gang members' motorcycles arrived in Whitianga and the riders were seen to go into Hookers bar.

The applicant had stated in his application for an on-licence that the sale of liquor would not be the principal purpose of the business but *"for the majority of the time, currently, there is no dining or entertainment at Hookers and it is widely regarded locally as a place to go solely for the purpose of sale of liquor."*

At the hearing the applicant, M J Coster and R W O'Connor all sought a General Manager's Certificate. Constable Skeen said that R W O'Connor is a Past President of the Outcast Gang. The Constable produced combined criminal and traffic histories for all three applicants for Manager's Certificates. The applications by M J Coster and R W O'Connor will be the subject of separate decisions.



Constable Skéen concluded his evidence:-

"Willigers has had a long connection with the Outcast Motorcycle Gang in Hamilton and the association continues with Hookers as one of the persons assisting in the running of Hookers is Ricky O'Connor, a Past-President of the Outcast Gang.

Willigers and others were instrumental in organising a 3-day Gang Party in the centre of Whitianga residential/business area from 31 January to 3 February 1997.

There were approximately 40 - 50 patched members of the outcast Gang and Satan Slaves Gang from Wellington, plus other Gangs and their numerous associates.

Persons attending were from all over the North Island.

Police received information of hard drug use and Prostitution.

During the 3 days and nights of partying, Police received numerous complaints of disorderly behaviour, intimidation, driving complaints, wilful damage, theft and noise complaints.

Finally, the information received by the Police regarding the incidents at Hookers has been given in confidence.

The witnesses/complainants did not want to give evidence in person, in fact, they do not want to be identified at all as they fear intimidation by the applicant and his associates and fear for their personal safety should they be identified."

Objection by Mercury Bay Community Board

Mrs Eleanor Joan Gaskell appeared as Chairperson and gave evidence that:-

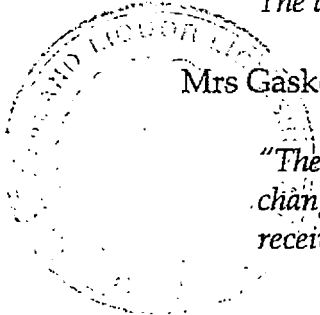
"The Board resolved at a meeting held on 8 July 1997 to lodge an objection to the application for liquor license by Hooker Bistro & Bar due to:

- *The reported undesirable activities in the main thoroughfare of the town centre.*
- *The known gang affiliation and possible intimidation of the public.*
- *The display of management deficiencies under the current management.*

The decision was not unanimous - one Board Member registered a contrary vote."

Mrs Gaskell's report continued:-

"These premises were previously used as a family restaurant/nightclub; the change in operation is undesirable in a main street. Complaints have been received, both verbal and written, all by persons who do not wish to be named for



fear of intimidation. They speak of strong urine smells and mess (vomit) outside the building on the pavement after late night functions, excessive noise, intoxicated patrons being carried from the premises.

The gang affiliation is of great concern to the people of Whitianga, the possible flow on effects on young people attending the premises, the possible encouragement to the consumption of alcohol, possible use of drugs. The town relies to some extent on tourism to assist the economy - known gang activities could have a detrimental effect."

Medical Officer of Health

At the hearing an updated report from Dr Dell Hood, Medical Officer of Health, was tabled by Mr R G Henderson. Dr Hood said:-

"I feel I must record multiple reports that have been drawn to my attention, of the services of a prostitute being raffled on a regular basis, in the above premises. I believe that this information should be submitted, given the provisions of Section 109 of the Sale of Liquor Act 1989.

Because of concerns about these reports, Health Waikato's Health Protection Advisor visited the premises at 0020 hours on Sunday 26 October. During the time he was on the premises, he was told of the above raffle by four different people. Each gave an independent account, and these were all consistent, both in relation to the raffle process, and the description of the prize.

Patrons present told our staff member that the raffle had already taken place earlier on the night of the visit, and that the winner had "taken his prize immediately".

It was reported that raffle tickets are sold for \$5 in the general bar area, and that this process is a regular occurrence known to patrons as "the meat raffle".

I consider that any suggestion of such activity occurring on licensed premises, must raise serious doubts about the suitability of the applicant to hold any license to sell liquor.

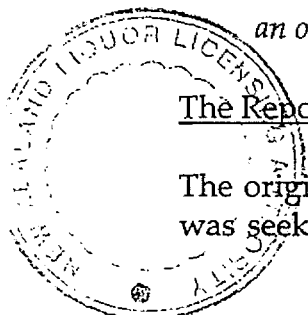
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At the time of the Advisor's visit, food, non alcoholic and low alcohol beverages were available. The applicant had earlier undertaken to provide these items.

In view of my concerns about these premises, I cannot support this application for an on licence."

The Report of the District Licensing Agency Inspector

The original report of Mr B S Blair, Agency Inspector, mentioned that Mr Willigers was seeking a licence authorising the sale of liquor to casual drinkers (s.7(1)(d)) in



addition to the base licence authorisation of the sale of liquor to persons present for the purposes of dining, or attending entertainment. Mr Blair said that Mr Willigers had "pre-empted" the outcome of the application in respect of the sale of liquor to casual drinkers. The report concluded "suitability of the applicant - opinion reserved."

At the hearing another Agency Inspector, Mr M Sandilands tabled a supplementary report based on two inspections:-

"1. Inspection 25 July 1997

At 4.10 pm an inspection was carried out. The licence holder, Mr Willigers, was not present and while the Inspector waited some 20 minutes for his arrival it was noted that:

- (a) the kitchen was not operating*
- (b) there were no signs regarding the availability of food*
- (c) there was no entertainment evident*
- (d) the 9 patrons on the premises were casually drinking*
- (e) there was a Temporary Manager present*

2. Inspection 30 October 1997

At 1230 hrs a spot inspection was carried out. Mr Willigers was present. It was noted that the kitchen was not operating. There were no patrons there at the time.

- 3. I understand that there is a pending Police prosecution on matters relating to alleged "after hours trading" on 26 September 1997.*

RECOMMENDATION

Mr Willigers has displayed a rather cavalier attitude towards the Sale of Liquor Act especially regarding the supply of food to his patrons. The "teething" problems that he has had in establishing this business may well have contributed to this attitude.

However it still causes concern that he has not complied fully with the terms of his Temporary Authority.

Whilst my own observations do not give me sufficient grounds to object to this application this report together with the Police report may persuade the Authority to have reservations in the granting of the licence applied for."

When Mr Blair was asked by the Authority what his final recommendation was as to the applicant's suitability, he replied that he did not believe the applicant was totally suitable to hold an on-licence.

Applicant's Response

Mr Willigers did not have any prepared brief of evidence notwithstanding that the Notice of Hearing indicated the following:

"The applicant, objectors and all other interested parties SHOULD IN THE NORMAL COURSE PROVIDE FOUR COPIES OF A TYPEWRITTEN STATEMENT OF THE EVIDENCE AND/OR SUBMISSIONS TO BE TENDERED AT THE HEARING for the exclusive use of the Authority. Additional copies are to be available for other parties."

In response to questions from his counsel, the other parties and the Authority, Mr Willigers' approach was one of a general denial of the wrongdoing alleged in the evidence of Constable Skeen and the reports from the Inspectors, the Medical Officer of Health and the Chairperson of the Community Board.

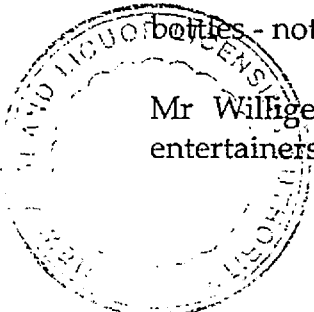
In particular Mr Willigers denied that prostitutes had ever been prizes in raffles conducted on the subject premises during the time he has been trading pursuant to temporary authorities. He said confusion must have arisen from patrons talking about the meat raffles held on Friday nights when "half a beast" was raffled by a social club, not by Hooker's management. The applicant said he could not say that prostitutes do not attend Hooker's. When asked if the club raffles of half a beast would have a Department of Internal Affairs permit to conduct the raffle, Mr Willigers said that he "wouldn't have a clue."

In examination in chief by Mr Dollimore, the applicant said he would not allow underage drinkers on the premises, the premises would close at 1.00 am every morning and cannabis was not allowed to be smoked at Hooker's. In relation to the absence of certified managers on duty Mr Willigers said he employed temporary managers being people who had applied for Manager's Certificates. On the subject of patrons being sold liquor who were not present for the purpose of dining, Mr Willigers responded that pizzas were "available". He also said that he employed two chefs and a "kitchen girl".

On the question of entertainment, Mr Willigers said that he has a jukebox and he changes the music "the same as any disc jockey would do." Since September last he had provided a big screen and videos. A band night was held regularly, every second weekend.

The applicant said that he purchases "Hooker's" beer from the West Coast of the South Island. He denied that any sales of Hooker's for consumption off the premises were ever made. The witness stressed that Hooker's comes in packs of six stubby bottles - not cartons or boxes.

Mr Willigers said that by 1.30 am all patrons would have left but staff and entertainers might not have left the premises until 2.30 am or 3.00 am.



The applicant did not deny that he has friends in the Outcast Gang who have been coming up to Whitianga for the last fifteen years *"but my bar is nothing to do with the Outcast Gang."*

The applicant said that the three day gang party did take place but *"there were no problems"*. Mr Willigers agreed that there might have been the odd scuffle at Hooker's but never *"a brawl"*.

When asked to explain the difference between temporary managers and acting managers, Mr Willigers said that he did not understand the question.

In response to questions from Sergeant French, Mr Willigers said his past experience in the liquor industry was *"nil"*; what patrons do after they leave the premises is a Police problem. When asked his attitude to patrons driving on the footpath, Mr Willigers replied *"what can I do?"* On being asked about underage drinkers, Mr Willigers said *"I can't personally check everyone - I rely on my bar manager"*.

Closing Submission of Counsel for the Applicant

Mr Dollimore submitted that much of the material before us had third party origins with suggestions that informants would not want to come forward. This placed the applicant in a difficult position as he could not challenge the accuracy of information given to the Police.

Counsel submitted that much of the evidence given by Constable Skeen comprised third party allegations that could not be challenged in cross-examination. Counsel cautioned the Authority on the weight to be afforded to the report of Dr Dell Hood and the submission in opposition on behalf of the Community Board.

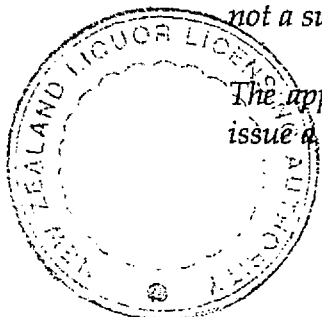
Minute of Oral Decision

The following is a minute of the decision of the Authority in respect of the application for an on-licence, delivered orally by the Chairman at the conclusion of the hearing on 8 December 1997:-

"At the hearing the application was opposed by the Police, the Medical Officer of Health, the Mercury Bay Community Board and in closing submissions, a District Licensing Inspector said he did not believe the applicant was totally suitable to hold an on-licence.

Much of the evidence presented was hearsay, third party and anecdotal but after making due allowance for that, the Authority is unanimous that the applicant is not a suitable person to hold an on-licence.

The application by Terry Ronald Willigers for an on-licence is refused. We will issue a written decision in due course giving reasons for our conclusion."



Authority's Reasons and Conclusion

It is unusual for the Authority to give a preliminary oral decision that an applicant is not a suitable person to hold a liquor licence; we had no hesitation in promptly reaching that unanimous conclusion following the hearing on 8 December last. Having had the opportunity of seeing and assessing Mr Willigers, we did not find him to be a credible witness.

In our oral decision we acknowledged that much of the evidence presented was hearsay, third party and anecdotal and that point was understandably emphasised by counsel for the applicant. Despite the number of reports reaching both the Police and the staff of the Medical Officer of Health, that raffles were conducted at "Hooker's" with a prostitute as the prize, we record that that allegation was not proved on the balance of probabilities. It follows that we put that allegation to one side. Against that we did not find Mr Willigers' response to an enquiry as to whether persons conducting the meat raffles on his premises had an Internal Affairs permit - ie "wouldn't have a clue" - as being the reply one might expect from a responsible licensee.

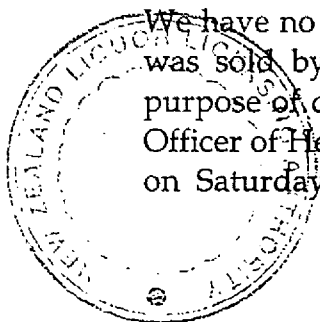
The applicant was trading for eight months under a temporary authority pursuant to a base licence authorising the sale of liquor to patrons present for the purpose of dining, or attending entertainment. The acknowledged authority on whether patrons are present for the purpose of dining is the observation of Blanchard J in Chef and Brewer Bar and Cafe Limited v The Police [1995] NZAR 158 at 169 where His Honour said:-

"However, as has been pointed out, the holding of a licence of this kind is a privilege. It is incumbent on the licensee to see to it, other than in an exceptional situation, no patron drinks without dining. If it is not possible to control the situation when large numbers of people are present, a licensee in these circumstances has to accept that it may be operating in breach of its licence. In other words, it must introduce sit down dining with waiter service or adopt some other method whereby it can ensure that those present do not drink without having a meal.

...

Patrons may have a drink for a short period before dining and may drink for a similar short period after finishing their meal. Such a drinking can be seen as directly connected with the process of dining."

We have no hesitation on the evidence adduced at the hearing in finding that liquor was sold by Mr Willigers and his staff to patrons who were not present for the purpose of dining. We have noted that in the supplementary report of the Medical Officer of Health it was written that at the time of Mr Henderson's visit at 0020 hours on Saturday 26 October last "... food, non alcoholic and low alcohol beverages were



available." Mr Willigers' evidence was of food being available if requested - that does not meet the dining purpose in terms of s.7(1)(b).

Similarly uncontested evidence was that entertainment comprised a stereo or jukebox with bands perhaps once every two weeks. Such entertainment does not meet the well established criteria of what constitutes selling liquor seven days a week to persons present on the premises for the purpose of attending entertainment, whether or not live, in terms of s.7(1)(c).

On those two counts alone, Mr Willigers has traded for some eight months without complying with the requirements of the Act or the conditions of the base licence.

Constable Skeen's evidence of visiting the premises on 4/5/97 and 20/6/97 and warning the applicant of breaches and the need to improve was not contradicted. We have no reason not to believe the Constable's evidence that on visiting the premises on the afternoon of 1 June last, the Police found both the applicant and his wife to be unco-operative.

We accept the Police evidence that Hooker's traded without a certified manager on duty in breach of s.115 of the Act. The breach was compounded by Mr Willigers' suggestion that he always had "temporary" managers on duty but then being unable to understand a question as to the difference between "temporary" and "acting" managers.

We also accept the Police evidence of liquor being sold to and consumed by minors who were not on the premises for purpose of dining or attending entertainment. On the question of suitability to hold a liquor licence or a General Manager's Certificate, two High Court decisions are frequently cited to the Authority. In Hayford v Christchurch District Licensing Agency (HC Christchurch 3 December 1993. AP 201/92) Holland J said at page 9:-

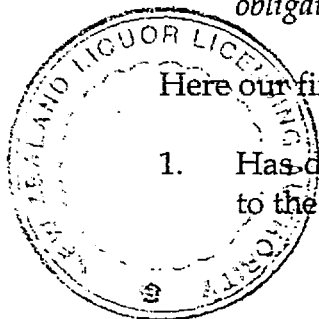
"A holder of a liquor licence under the Sale of Liquor Act 1989 is granted as a privilege. It permits him to sell liquor when others are not permitted to do so. Deliberate failure to carry out conditions attached to the licence or the terms of the licence must be a strong factor justifying a conclusion that the holder of the licence is not a suitable person to hold the licence."

In An Appeal by Sheard [1996] NZAR 61 at 66 Holland J said:-

"Obviously the applicant's past conduct will be very relevant to the consideration of suitability. The real issue is whether the evidence of that past conduct will indicate a lack of confidence that the applicant will properly carry out the obligations of a licensee."

Here our finding on the evidence adduced at the hearing is that the applicant:-

1. Has deliberately failed to follow the authorisation and the conditions attached to the base licence under which he was trading; and

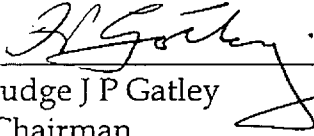


2. Does not give the Authority any confidence that he will carry out the obligations of a licensee in future.

For the sake of completeness we record that it was not proven to our satisfaction that sales of liquor for consumption off the premises had taken place during the period of operation of Hookers by Mr Willigers.

For the reasons set out above we have concluded that Mr Terry Ronald Willigers is not a suitable person to hold an on-licence or a General Manager's Certificate. Both applications are refused.

DATED at WELLINGTON this 21st day of January 1998


Judge J P Gatley
Chairman



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