

**IN THE ALCOHOL REGULATORY AND LICENSING AUTHORITY  
TE MANA WAETURE TAKE WAIPIRO**

[2024] NZARLA 19-22

IN THE MATTER of ss 280 and 285 of the Sale and Supply  
of Alcohol Act 2012

AND

IN THE MATTER applications for the cancellation of an  
on-licence and the cancellation or  
suspension of manager's certificates

BETWEEN GENEVIEVE MARY BROWNLEE  
CRADDOCK  
(NZ Police)  
Applicant

AND MACKENZIE HOLDINGS 2021  
LIMITED  
First Respondent

AND GARRETH RODERIQUE MACKENZIE  
Second Respondent

AND LYNETTE MICHELLE MACKENZIE  
Third Respondent

AND HAMISH MARK JONES  
Fourth Respondent

**BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY**

Deputy Chairperson: District Court Judge A S Menzies  
Members: Ms J D Moorhead  
Mr R Amohau

**HEARING** 28–29 November 2023 at Christchurch

**APPEARANCES**

Senior Constable G Craddock  
Mr N Laing and Ms M Brownlee (for the respondents)

## DECISION OF THE AUTHORITY

### **Introduction**

[1] The first respondent MacKenzie Holdings 2021 Limited holds on-licence 058/ON/00004/2022 in relation to the premises trading as the Platform Bar Restaurant and Cafe situation at 468 Mandeville Road, Mandeville (the premises).

[2] The second and third respondents Garreth MacKenzie and Lynette MacKenzie are directors of the first respondent company and, together with the fourth respondent, hold manager's certificates.

[3] The applicant seeks the cancellation of the first respondent's on-licence together with the cancellation or suspension of the manager's certificates of the second, third and fourth respondents.

[4] Those applications follow events that occurred on 13 August 2022. Late in the evening of Saturday 13 August 2022, a male (referred to in this decision as Mr X) died as the result of a single motor vehicle accident.<sup>1</sup> Mr X had been drinking at the premises earlier that evening. The applicant alleges that the respondents were responsible for Mr X becoming intoxicated on the premises, being supplied with alcohol on the premises and, while intoxicated, remaining on the premises.

### **Statutory provisions**

[5] Because the application involves allegations of intoxication it is relevant to note the definition of intoxication in s 5 of the Act:

[6] Intoxicated means observably affected by alcohol, other drugs, or substances (or a combination of 2 or all of those things) to such a degree that 2 or more of the following are evident:

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<sup>1</sup> Refer paragraph [84].

- (a) appearance is affected:
- (b) behaviour is impaired:
- (c) co-ordination is impaired:
- (d) speech is slurred.

[7] The relevant enforcement provisions of the Act relating to these applications are contained in ss 280 and 285.

[8] Section 280 provides:

**280 Variation, suspension, or cancellation of licences other than special licences**

- (1) Any constable or any inspector may at any time apply to the licensing authority for an order—
  - (a) varying or revoking any condition of a licence, other than a special licence, imposed by the licensing authority or a licensing committee, or imposing any new condition (relating to any matters specified in section 110(1), 116(1), or 117(1)); or
  - (b) suspending the licence; or
  - (c) cancelling the licence.
- (2) Every application for an order must—
  - (a) be in a form approved by the chief executive after consultation with the chairperson of the licensing authority and be made in the prescribed manner; and
  - (b) contain the prescribed particulars; and
  - (c) be made to the licensing authority.
- (3) The grounds on which an application for an order may be made are as follows:
  - (a) that the licensed premises have been conducted in breach of any of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner:

- (b) that the conduct of the licensee is such as to show that he or she is not a suitable person to hold the licence;
  - (c) that the licensed premises are being used in a disorderly manner so as to be obnoxious to neighbouring residents or to the public.
- (4) The secretary must—
- (a) send a copy of the application to the licensee; and
  - (b) fix the earliest practicable date for a public hearing of the application; and
  - (c) give at least 10 working days' notice of the date, time, and place of the hearing to the applicant and the licensee.
- (5) If the licensing authority is satisfied that any of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—
- (a) vary or revoke any condition of the licence imposed by the licensing authority or a licensing committee; or
  - (b) impose any new condition (relating to any matter specified in section 110(1), 116(1), or 117(1)); or
  - (c) suspend the licence for such period not exceeding 6 months as the licensing authority thinks fit; or
  - (d) cancel the licence.
- (6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to give the licensee an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

[9] Section 285 provides:

**285 Suspension or cancellation of managers' certificates**

- (1) Any constable or any inspector may at any time apply in accordance with this section for an order by the licensing authority—
  - (a) suspending a manager's certificate; or
  - (b) cancelling a manager's certificate.
- (2) Every application for an order under this section must—

- (a) be in a form approved by the chief executive after consultation with the chairperson of the licensing authority and be made in the prescribed manner; and
  - (b) contain the prescribed particulars; and
  - (c) be made to the licensing authority.
- (3) The grounds on which an application for an order under this section may be made are as follows:
- (a) that the manager has failed to conduct any licensed premises in a proper manner;
  - (b) that the conduct of the manager is such as to show that he or she is not a suitable person to hold the certificate.
- (4) The secretary of the licensing authority must—
- (a) send a copy of the application to the manager and to the licensee of any licensed premises to which any allegations against the manager relate; and
  - (b) fix the earliest practicable date for a public hearing of the application; and
  - (c) give at least 10 working days' notice of the public hearing to the applicant and the manager.
- (5) If the licensing authority is satisfied that any of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—
- (a) suspend the certificate for such period not exceeding 6 months as the licensing authority thinks fit; or
  - (b) cancel the certificate.
- (6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to give the manager an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

### **Grounds of applications**

[10] The grounds upon which the application against the first respondent is based are:

- (a) That the premises have been conducted in breach of the following provisions of the Act:

- (i) Section 249 - allowing a person to become intoxicated;
  - (ii) Section 248 – sale or supply of alcohol to an intoxicated person;
  - (iii) Section 252 – allowing an intoxicated person to remain on licensed premises.
- (b) The conduct of the licensee is such as to show that it is not suitable to hold the licence.

[11] The applications in respect of the manager’s certificates held by the second, third and fourth respondents are advanced upon the grounds that their conduct is such as to show they are not suitable persons to hold their manager’s certificates based on the same allegations.

#### **Applicant’s case**

[12] The applicant called in support of the applications the following witnesses:

- (a) Kelly Marie Cross
- (b) Senior Constable Craddock gave evidence herself.

[13] Ms Cross was a patron at the premises on the night of 13 August 2022 attending with her partner Mr Dean Johnstone. They were at a leaner in the bar with another local patron Ms Anna Cox when Mr X arrived and joined them. They remained at the same leaner talking amongst themselves for approximately an hour and a three quarters before Mr X left.

[14] Ms Cross explained that she had some background in the hospitality industry. She owned licensed premises in Christchurch and held a manager’s certificate in relation to those premises. The operation of that business was comparatively brief, being less than two years.

[15] Because of that background, Ms Cross considered that she had greater awareness than the public generally in relation to signs of intoxication. Her evidence was that virtually from the time that she observed Mr X’s arrival when he came to join Ms Cross and others at the leaner, he showed signs of intoxication and, in her view, should not have been served alcohol

at that stage. She described other aspects of his behaviour throughout the course of the shared time at the premises which reinforced her view that Mr X was intoxicated and should not have been served. She referred to observing his face as being flushed and his eyes bloodshot upon arrival. She described the ongoing consumption of various drinks and described his conduct at certain times involving for example:

- (a) Being unsteady on his feet
- (b) Being unduly preoccupied with and amorous towards Ms Cox;
- (c) Slurred speech.

[16] Ms Cross maintained that she spoke on different occasions to personnel within the bar including the duty manager Mr Jones. She maintained that by both direct discussion and gestures, she registered her concern to those personnel about Mr X's state of intoxication and the fact that he was receiving ongoing alcohol. Ms Cross maintained that none of the staff did anything about Mr X's condition, continued to serve him and essentially responded about Mr X that is the way he is, everyone knows what he is like, or similar.

[17] Senior Constable Craddock gave evidence of her later involvement in the inquiry that was initially focussed upon the fatal motor accident. Police inquiries indicated that Mr X had been drinking at the premises before the accident and as a consequence the police requested CCTV footage from the premises for the night in question. Senior Constable Craddock confirmed that other police personnel viewed the footage, although not in full (the total coverage provided being about two hours), and Senior Constable Craddock herself "skimmed" the CCTV footage. On the basis of that initial inquiry which Senior Constable Craddock described as part of a graduated response, she formed the initial conclusion there was nothing untoward about the behaviour of the respondents but nonetheless wanted to meet with them as part of an education process. A meeting followed, for which some brief notes were taken. That meeting involved all four respondents with Senior Constable Craddock and the District Licensing Inspector who took the brief notes of the meeting.

[18] No steps were taken, or at that stage, contemplated, against the respondents in relation to the events leading to Mr X's accident. However, the position changed following an approach to the police by Ms Cross some four months after the accident in which she recorded her concern with the police about the circumstances of that evening. Prompted by that approach, Senior Constable Craddock viewed the entire CCTV footage and determined that on the basis of the complaint from Ms Cross combined with the full CCTV footage, there were concerns, in the police view, about the conduct of the respondents and the present applications were commenced accordingly.

[19] The CCTV footage itself is, in total, approximately two hours and covers the entire time that Mr X was on the premises. It was provided in its entirety to the Authority and formed part of the applicant's case. It was viewed by the Authority prior to the hearing and the parties thereafter referred to specific extracts during the hearing to reinforce their respective cases. The footage available comes from three different cameras. One covers the entrance to the premises. The second is directly over the leaner where the parties described spent the evening and the third covers the bar area near the leaner. It is the police case that the CCTV footage shows examples of Mr X's conduct consistent with intoxication and consistent with some of the description of events by Ms Cross. The CCTV footage is visual only – there is no audio record.

[20] The police attached to the applications a considerable volume of documentary material which was primarily material gathered for the purposes of the coronial inquiry. It was offered to the Authority on the basis that the police considered it might be helpful and the police looked to rely upon that material to support the applications.

[21] Because of a contest to the admissibility of that material, the Authority issued a ruling in the course of the hearing and much of that material was excluded. The Authority did however exercise its discretion under s 207 to allow a report from the Institute of Environmental Science and Research (ESR) dated 13 September 2022 which purported to be a toxicology report analysing the blood of Mr X. The police submissions attached (as Appendix A) medical studies which discussed the analysis of blood alcohol levels. That is because the ESR report refers to three different results:

Blood (Iliac) – 158 milligrams per 100 millilitres



Urine – 217 milligrams per 100 millilitres

Vitreous humor – 202 milligrams per 100 millilitres

[22] It is appropriate to deal with that appendix at this point. While it may have been provided with the intention of assisting the Authority, it is clearly further evidence on a technical matter. The Authority is not prepared to allow the admission of further evidence through closing submissions and has not had regard to the appendix or related submissions accordingly. The Authority has considered the ESR report on the basis of what it presents and is discussed further later.

[23] The police submissions refer to the Authority decision in *Faass and Lawn v The Rock Pub and Cafe*<sup>2</sup> in which the Authority held:

[20] It is not sufficient simply to rely on the ALAC guidelines to determine if a person is intoxicated. In this instance the fact that the two men had been in the premises drinking for four hours should have constituted a strong signal for earlier intervention by management.

Knowing that the two men had drunk a lot of beer, management should have been checking them on a very regular basis for signs of intoxication.

Had this been done, it is almost certain that management would have noticed early signs of intoxication such as glazed eyes, the slurring of words, and an inability to coordinate functions adequately. Thus, the various signs of intoxication referred to in the ALAC literature would have been observed.

[24] The police case argues that the respondents failed to assess the issue of intoxication in relation to Mr X and that the available evidence clearly establishes that Mr X was intoxicated. In support of that submission, the police have referred to the Authority's decision in *Robertson v Papanui Road Limited – Carlton Bar and Restaurant*<sup>3</sup> in which the Authority noted:

[53] A breach of s 248, in particular, is one of the most serious offences under the Act and for that reason it attracts a holding as set out in s 288(1)(k). Otherwise, a breach of these provisions strikes at the very heart of the object of the Act, namely the harm which parliament seeks to minimise.

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<sup>2</sup> *Faass and Lawn v The Rock Pub and Cafe* [2010] NZLLA 1134 (14 October 2010).

<sup>3</sup> *Robertson v Papanui Road Limited – Carlton Bar and Restaurant* [2019] NZARLA 262 (11 December 2019).

[25] The police argue that the evidence is such that the Authority should find it desirable to make an order for cancellation or suspension.

### **Respondents' case**

[26] The essence of the respondents' case is that they deny the allegations inherent in the applications and deny in particular that Mr X was intoxicated. The respondents argue that there is no basis for the Authority to be satisfied of the grounds alleged and the applications should be dismissed accordingly. As a secondary argument, the respondents maintain that if the grounds are made out, it would not be desirable to grant the remedies sought.

[27] The respondents called a total of four witnesses being the three respondents themselves and Ms Olivia Schupbach who is employed by the first respondent and on the night in question was responsible for managing the restaurant area of the premises.

[28] The fourth respondent Mr Jones was the duty manager on the evening in question and spent much of his time working behind the bar. Accordingly, he had numerous interactions with Mr X including serving him a number of the drinks that he purchased and consumed.

[29] Mr Jones' evidence was that he knew Mr X and observed him arrive. He served him drinks throughout the course of the time Mr X was present and had a number of discussions with him as a consequence. Mr Jones' evidence was that he had no concerns about the sobriety of Mr X until the very latter stages of his time in the premises. It was only then that Mr Jones noticed that Mr X was starting to slur his words and he indicated to Mr X that service of the requested drinks would be the last. Mr Jones' evidence was that the response from Mr X was to the effect that he would be leaving shortly in any event and there was no problem about no further alcohol.

[30] Mr Jones described the general practices within the premises including the availability of water at the bar, offering food from the restaurant and the policy of maintaining a regular check on patrons for signs of intoxication.

[31] Mr Jones rejected totally the picture that had been presented by the evidence of Ms Cross suggesting signs of intoxication on the part of Mr X from the time he arrived. He also rejected that he had been approached by Ms Cross at any stage that evening raising concerns about Mr X.

[32] The only concession to any suggestion of intoxication by Mr Jones was the indication that Mr X was slurring his words prompting Mr Jones to indicate there would be no further service after the last drinks provided. Mr Jones did, however, indicate that in accordance with what he said was his normal practice, he had been serving the spirits ordered as singles rather than the normal doubles. Accordingly, while he accepted the number of drinks sold to Mr X as alleged by the police, he maintained that the last two or three spirits would have been half strength.

[33] The evidence of Mr and Mrs MacKenzie was more limited in terms of the events of the evening in question. Both hold manager's certificates for the premises but were not on duty. However, they were called back to the premises because there had been an unrelated altercation with other patrons. They were accordingly at the premises for the latter part of the period during which Mr X was present. They also confirmed that from their more limited observations that there was nothing untoward about Mr X's behaviour and that he was not intoxicated. They also confirmed the normal practices for the premises in terms of host responsibility including the provision of water and the availability of food.

[34] Ms Schupbach gave evidence that her responsibilities on that evening were primarily in relation to the restaurant. Nonetheless, she offered the menu and the availability of food to Mr X and the others with whom he was drinking. She also noticed nothing untoward about Mr X's behaviour and saw no signs of intoxication.

[35] Ms Schupbach also gave evidence of an unrelated incident sometime in September 2022. She described an incident involving Ms Cross and her partner at the time, relating to the purchase of a bottle of wine. Ms Schupbach considered that Ms Cross was at that time intoxicated and behaved towards Ms Schupbach in an aggressive manner.

[36] The submissions for the respondents criticised the applicant's case in a number of respects. Many of the criticisms relate to steps not taken by the police including:

- (a) Failing to take adequate notes of the meeting between Senior Constable Craddock and the respondents following the night in question. Accordingly, it is submitted, there was no record of Mr Jones having advised at that meeting that Mr X had been refused service, offered food, and offered a safe transport option home.
- (b) None of the other patrons present at the premises were interviewed by the police including Ms Cross's partner and the fourth person at the leaner with Mr X, Ms Cox.
- (c) The police investigation file containing a crash report, autopsy report and other relevant documents which were not disclosed.
- (d) Any evidence of Mr X's movements after he left the premises.
- (e) A statement taken from Mr X's wife.

[37] The respondents also strongly criticise the evidence of Ms Cross and argue her evidence was neither reliable nor credible. A number of reasons were advanced for that submission:

- (a) Ms Cross has two convictions for excess breath alcohol in 2014 and 2022. The respondents accuse Ms Cross of failing to disclose those convictions both in relation to her application for a manager's certificate and in relation to her employment as a real estate agent. It is submitted that having lied about those matters, Ms Cross has shown herself to be dishonest and not trustworthy and her evidence should not therefore be accepted.
- (b) It was submitted that Ms Cross when shown the CCTV footage, which she had not previously seen, embellished her oral evidence in order to reconcile what she had previously said with pictures apparent from the CCTV.
- (c) The incident in September indicated a motive on the part of Ms Cross to manufacture or embellish her evidence because of a grievance against the respondents. The delay in reporting matters to the police is identified as support for that argument by the respondents.

[38] The respondents argue that the Authority should not attach any weight to the ESR report. Given that the author of the report was not called, there was no context for the conclusions in the report and given no opportunity to test the evidence, no weight should be placed on the report.

[39] The respondents criticised the fact that the allegations against all the respondents are identical with the consequence that there is not sufficient particularity for each respondent to identify the cases against them. Similarly, the respondents argue that the police have been unable to identify the precise time/s at which, and by reference to which observable indicators, they allege that Mr X was intoxicated.

### **Decision and Reasons**

[40] The required approach with such applications has been the subject of earlier Authority decisions. A convenient summary of the relevant approach is set out in *Nekita* at paragraphs [230] – [236]:<sup>4</sup>

[230] The tests for cancellation or suspension under both ss 280 and 285 involve two stages. The first stage requires the Authority to be satisfied of the grounds specified in s 280(3) and s 285(3) respectively. As Ms South correctly submits, the Applicants need only prove one of the grounds under s 280(3)(a) or (b).

[231] The second limb then requires the Authority to be satisfied that it is desirable to make an order (per s 280 (5) and s 285(5)).

[232] The Authority agrees with the Applicants that notwithstanding that the application is to be assessed as at the date of the hearing, the focus of s 280(3)(a) (improper conduct), is on the past operation of licensed premises. That is clear from the plain language of s 280(3)(a).

[233] Whether it is desirable to make an order, however, is wider in scope and includes the considerations of past behaviour as well as consideration of changes made since the conduct giving rise to the applications. In this regard, desirability reflects both the penal nature of the grounds but also the prospective risk of alcohol-related harm should the licensee or managers continue to hold the licences and managers' certificates.

[234] Independently, the Authority may also adjourn the applications, for any period that the Authority thinks fit, to give the licensee and managers time to remedy any matters that the Authority may require to be remedied (per s 280(6) and s 285(6)). This too involves consideration of risk. Adjourning an application, however, is not to be equated with giving a licensee or manager a 'second chance' or the opportunity to prove itself akin to a probationary period. In the absence of some matter capable of being remedied, adjournment is not an available option and, in any event, is unlikely to be countenanced

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<sup>4</sup> *Christchurch City Council Alcohol Licensing Inspector and the New Zealand Police v Nekita Enterprises Limited, Singh and Singh* [2021] NZARLA 139 – 145.

except in circumstances where the risk of alcohol-related harm is low, or the nature of the circumstances are not otherwise egregious in nature.

*Burden and standard of proof*

[235] As the Authority has previously said in *Rapira-Davies v Gogo Bar Ltd*, and in subsequent enforcement applications, the applicant has the burden of proving the grounds of the applications. The standard of proof is that described in *Triveni Puri*, namely 'on the balance of probabilities' but in accordance with decisions of *Spring v King*, and *Z v Dental Complaints Assessment Committee*, the standard of proof is at the higher end of that standard. This was recently reinforced by the High Court in *TS & RK Bhullar Ltd v Commissioner of Police* where Lang J said:

As in any civil proceeding, the standard of proof is on the balance of probabilities. The consequences of a finding against the appellants in the present case are significant, however, because the appellants stand to lose financially if the orders are permitted to remain in force.

An application for the suspension of a liquor licence or manager's licence is undoubtedly penal in nature. Stronger evidence is therefore required before proof to the required standard is achieved. This led Woolford J to observe in *General Distributors Ltd v De 'Ath* that the standard of proof in such cases must be very close to that of a criminal prosecution.

[236] The Authority agrees with the Applicants that notwithstanding the need for stronger evidence these proceedings remain civil proceedings, and proof of criminal offending is not a prerequisite to establishing the grounds of the application. Conversely, a finding by the Authority does not amount to proof of criminal offending.

[41] There is further guidance available in relation to this case from the High Court decision referred to above of *TS & RK Bhullar Limited v Commissioner of Police*<sup>5</sup>. There are some parallels with the current case although that case was a successful appeal to the High Court against a DLC decision suspending the licensee and manager of an off-licence premises. A bottle of rum was sold to a customer, alleged to be intoxicated, who was later stopped for drink driving. The police case was supported by CCTV footage of the sale transaction together with evidence of a subsequent breath alcohol analysis. Because the transaction involved was an off-licence purchase, there was more focus on the point of sale than in the current case where the customer involved was on the premises for a sustained period. Nonetheless some of the comments of Lang J in the *Bhullar* case are helpful:

- (a) ... the results obtained from an evidential breath or blood test may assist in proving that observable symptoms of intoxication were caused by alcohol rather than by some other factors as such as physical or mental infirmity [26].

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<sup>5</sup> *TS & RK Bhullar Limited v Commissioner of Police* [2019] NZHC 3397.

(b) It is not necessary for symptoms of intoxication to be evident at the exact moment at which the liquor is sold. That is evident from the following extract at paragraph [36]:

[36] I do not consider it necessary for the symptoms to be evident at the exact moment at which the liquor is sold. Moore J rejected such an argument in the following passage in *General Distributors Limited v Police*:

[55] To limit proof to two or more signs of intoxication evident at the point (and moment) of sale cannot be the correct approach to proof under s 248. Enforcement of the provision must be both realistic and practical. The object of the Act is to minimise the excessive consumption of alcohol. Section 248 is one means by which that object may be achieved. The introduction into the Act of the four observable indicia of intoxication was no doubt designed to remove the complexity, clumsiness and uncertainty of the previous means by which intoxication was determined.

[56] The cases make it plain that the assessment of whether a person is intoxicated at the time of sale may be drawn from a variety of sources and assessments made at different times including both before and after the actual sale. This evidence constitutes the “pool of evidence” available to the Authority.

[42] Guided by those approaches, the key issue for determination is whether or not Mr X was intoxicated as defined by the Act. Was he observably affected by alcohol to such a degree that two or more of the identified criteria were evident:

- (a) Appearance is affected;
- (b) Behaviour is impaired;
- (c) Coordination is impaired;
- (d) Speech is impaired.

[43] Each of those criteria involve commonly used expressions which have no specialised definition beyond normal usage. It is however helpful to expand on the type of issues to be considered under each criterion as indicators of intoxication:

- (a) Appearance – how does the person look? Indicators of intoxication could include bloodshot eyes, flushed face or dishevelled clothing.
- (b) Behaviour - what is the person doing? Examples of intoxication might include being unduly loud, aggressive, amorous, crude or garrulous.

- (c) Coordination – how are the person’s motor skills? Examples of intoxication could include unsteady walking, bumping into people or objects, unsteady hands, dropping objects or spilling glasses of liquid.
- (d) Speech slurred – is the person articulating clearly? Indicators of intoxication could include mumbling, running words together or becoming difficult for others to understand.

[44] The most relevant evidence relating to the issue of intoxication was provided by Ms Cross, Mr Jones, to a lesser extent Mr and Mrs MacKenzie and the CCTV footage.

[45] Ms Cross asserted that on her assessment Mr X showed signs of intoxication from the moment he arrived. She referred to his eyes being bloodshot, speech slurred and being unsteady on his feet. Ms Cross was far from an expert in this context but she had greater familiarity with the issues than the public generally having been involved with licensed premises some years earlier for a brief period of time. She obtained a manager’s certificate which would have required some knowledge of the Act’s requirements. She was sufficiently concerned about what occurred on the premises that night to contact the police some months later.

[46] Conversely, the evidence from Mr Jones and Mr and Mrs MacKenzie was to the effect that there was nothing of concern apparent in relation to Mr X that would suggest intoxication at all, or at least to the extent that warranted managing the service of alcohol to him or his continued presence in the premises. That was until the very end of the time he was there when he was told by Mr Jones there would be no more service.

[47] These two accounts are diametrically opposed. We are not persuaded by the arguments that Ms Cross was motivated by some ulterior motive whether relating to the later incident with Ms Schupbach or otherwise. Nor are we persuaded that either Ms Cross’ past convictions for excess breath alcohol or any failure to disclose them rendered her an incredible witness.

[48] The issue of behaviour involves matters of degree and we were concerned that the evidence of Ms Cross did suggest some embellishment when confronted with the CCTV footage she was shown during the course of the hearing. We consider there may have been



some exaggeration in terms of degree in the assessment by Ms Cross of Mr X's level of sobriety during his time in the premises.

[49] We do not accept, however, the assertions from Mr Jones and to a lesser extent from Mr and Mrs MacKenzie that there was absolutely nothing untoward about Mr X's level of sobriety. The reality is that the true position is somewhere between the descriptions provided by Ms Cross on the one hand and the respondents on the other.

[50] We are reinforced in that view by our own assessment of the CCTV footage. Before discussing the CCTV footage in detail, we note that the submission by the respondents that the police have not attempted to identify a time or times of intoxication is correct. That in our assessment is not fatal to the applications. Nor is it surprising. Obviously, intoxication is a state or condition which grows over a period of time depending on a range of factors such as the nature of alcohol consumed and the pace and regularity at which it is consumed. In the context of these applications, the police need to show that while at the respondents' premises, Mr X became intoxicated as defined by the Act.

[51] As previously noted, there is CCTV footage of the entire period Mr X was in the premises. There is no audio but there is a visual record of his entire time in the premises. We were therefore able to observe for ourselves Mr X's behaviour as captured by the CCTV footage.

[52] We consider that Mr X became, and was, observably affected by alcohol while on the premises. We consider that three of the identified criteria are met being impaired behaviour, impaired coordination, and impaired speech.

[53] In relation to impaired speech, that determination is based on the acknowledgement from Mr Jones that towards the end of the time at the premises, Mr X's speech was slurred leading to Mr Jones' indication that there would be no more service after the drinks being served. We accept that slurred speech occurred late and prompted Mr Jones to react. Accordingly, we place less weight on that feature beyond noting that Mr X's speech was slurred but he was still served alcohol.

[54] We place more weight on the other two features being impaired behaviour and impaired coordination. There are examples of both throughout the CCTV footage particularly as time went on in the total period of one hour and 46 minutes. However, we place the greatest weight on an extract that is from Channel 7 with reference 2022-08-13-21.30 to 35.48 which was a culmination of developing behaviour. During this period of some six minutes Mr X revealed the following conduct:

- (a) He appeared to be very preoccupied with Ms Cox who was seated at the leaner with him, Ms Cross and her partner Mr Johnstone. Mr X was standing over Ms Cox, constantly leaning in very close to her in a manner apparently oblivious to the others at the leaner.
- (b) At one point he leaves the leaner to walk to the bar to order drinks. While leaning against the bar, in full view of everyone, he has turned round with his back to the bar to face back towards the leaner, put his hands down his pants, poked out his tongue, thereby making obscene gestures.
- (c) Ms Cox joined Mr X at the bar to help him with the drinks that had been poured for him at the bar. Standing behind her he physically manhandles her including fondling her breast – again in full view of everyone present.
- (d) Ms Cox then pushes his hand away and walks away. As she does so Mr X staggers and then walks unsteadily from the bar back to the leaner apparently using another leaner for support.

[55] We consider that those instances illustrate both impaired behaviour and impaired coordination and corroborate a number of aspects of Ms Cross' evidence such as Mr X's overtly amorous attention to Ms Cox and unsteadiness on his feet. All of the behaviour described was captured on the CCTV footage and would have been observable by anyone in the vicinity including Mr Jones who was behind the bar serving the drinks, although Mr Jones may not have been able to see Mr X putting his hands down his pants as he had then turned his back to the bar.

[56] We are reinforced in that view by further features. The first is the volume of alcohol that Mr X consumed on the premises. The police evidence was that Mr X consumed the following:

- 3 x 500ml pints Speights beer (4% ABV)
- 3 x 30 ml shots of Midori Liquor 21% ABV) with Baileys (17% ABV)
- 2 x 60ml shots with Coke – likely Stolen Rum (37% ABV)

[57] That consumption was acknowledged by the respondents with the exception of the strength of the Stolen Rum. Mr Jones' evidence was that he operated his own system that involved short-serving spirits later in the evening. He therefore maintained that the rum shots would have been 30mls rather 60mls. Mr Jones described that practice as being his own method of managing alcohol consumption. There are several features about this practice. The first is that it is imprecise as to how and when Mr Jones applied it. There was no evidence as to what precisely would prompt Mr Jones to apply this practice and whether it was across the board to all patrons or only those whose intoxication was of concern to Mr Jones. There is a further ethical consideration that patrons were apparently being charged for 60mls while being served 30mls but that is not a matter that in itself helps our determination. We are not prepared to accept that there is sufficiently precise evidence available to establish that the consumption was at the 30 or 60ml volume and we therefore apply the latter. Whether at 30 or 60mls for the two shots, the volume of alcohol consumed while on the premises provides support for the finding that Mr X's behaviour was attributable to alcohol and not other factors.

[58] There is support for our conclusion in the evidence of Mr Jones. In the notes of evidence at pages 137 and 138, Mr Jones described measures aimed at managing Mr X's intake of alcohol. The first was the short pouring of spirits which Mr Jones suggested was his generalised practice as the evening progressed. More specific to Mr X was Mr Jones indication that he was serving the drinks to Mr X slowly. This appears to have been Mr Jones' response to monitor and manage the pace of alcohol consumed by Mr X. Further, in his brief of evidence Mr Jones describes the circumstances of the last drinks. His evidence was that he agreed to serve the requested shots but indicated they would be the last to be provided. Evidently Mr X had no issue with that indication as he was about to leave in any event. Mr Jones then records the following at paragraph [65] of his brief:

I made the choice to serve the drink then cut him off to make sure he left without any fuss. In my experience sometimes it is easier when you know someone is going to be annoying when you cut them off, you give them a little "win" while you tell them the bad news (that they are

cut off from service). It saves aggressive behaviour by patrons who have been refused service and then becoming a problem and disruptive to entire bar, a lot easier than having to deal with aftermath and a confrontation.

[59] The inference we draw from that evidence is that the “win” referred to means service to Mr X when he should not have been served. The decision Mr Jones made was to prompt the cooperation of Mr X to leave soon by supplying him with further drinks. Those drinks were shots comprising a mix of two liqueurs Midori and Baileys for consumption at the bar. Those liqueurs have relatively high alcohol content. Whatever the motivation, it is our determination that Mr Jones made the decision to serve Mr X, who was clearly exhibiting signs of intoxication, with alcoholic shots. That was not a responsible decision particularly as Mr Jones’ evidence did not disclose anything about Mr X that would suggest he would become unduly aggressive or difficult in response to service being cut off. In any event, that would not be a justifiable reason to continue serving an intoxicated person.

[60] Our conclusion is further reinforced by the ESR report. We accepted the admission of that report under s 207. We also accept that it was not the subject of any particular scrutiny and we are not prepared to analyse the various different results that are outlined depending on the nature of the testing described. What we do accept was that there was a blood alcohol level of at least 158 milligrams per 100 millilitres found in Mr X’s blood subsequent to the motor accident which in turn was reasonably proximate to his time at the premises. Again therefore, there is evidence to establish that at the relevant time, Mr X had consumed alcohol and there is accordingly that basis as well for the inference that his behaviour captured in the CCTV footage was attributable to alcohol consumption.

[61] For those reasons we consider that while at the premises Mr X became intoxicated, was served alcohol while intoxicated and obviously allowed to remain on the premises to consume those last drinks. There is no suggestion he was taken to a place of safety on the premises which could have engaged the potential for a defence under s252(3). Clearly Mr X was not grossly intoxicated but that does not need to be established and intoxication will always involve levels of degree. However, we consider that the police have established to the required standard that Mr X was observably affected by alcohol in the manner described.

[62] We then turn to the impact of that determination upon the position of the four respondents.

[63] All of the enforcement applications are based upon the same allegations involving breaches of sections 248, 249 and 252. Having determined that such allegations are established, we repeat the comments of the Authority relating to s 248 in particular in *Robertson v Papanui Road Limited – Carlton Bar and Restaurant*<sup>6</sup>:

[53] A breach of s 248, in particular, is one of the most serious offences under the Act and for that reason it attracts a holding as set out in s 288(1)(k). Otherwise, a breach of these provisions strikes at the very heart or object of the Act, namely the harm which Parliament seeks to minimise.

[64] We have no difficulty in determining that the conduct of Mr Jones as the duty manager on the night was such as to show that he is not a suitable person to hold the licence. A suspension or cancellation should therefore follow unless the Authority is satisfied it is not desirable to make an order of suspension or cancellation. We are satisfied that it is desirable to make an order. Simply put, the issue of intoxication in relation to Mr X was observable and should have been picked up and acted upon by Mr Jones earlier than occurred. Further, Mr Jones' decision to serve further alcohol to Mr X – particularly strong shots – when it should have been obvious to Mr Jones that Mr X was intoxicated, was not responsible. Mr Jones had been in and out of the relevant bar area for virtually the entire period that Mr X was there and indeed was the person serving most of the drinks including the last shots. He should have recognised a problem with Mr X sooner and acted sooner.

[65] We also consider that there were shortcomings in Mr Jones' broader host responsibilities. While we accept there was evidence of the availability of water at the bar and food in the restaurant area, we consider that the circumstances warranted either or both of water being taken to the leaner where Mr X was established together with snacks or some other food offerings.

[66] The application itself seeks suspension or cancellation in the alternative. In terms of the order to be made under s 285, we are conscious that Mr Jones has no previous relevant record after some time in the industry. Accordingly, cancellation would not be warranted. Rather, we consider the degree of culpability warrants the suspension of Mr Jones' manager's certificate which we set at 28 days.

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<sup>6</sup> *Robertson v Papanui Road Limited – Carlton Bar and Restaurant* [2019] NZARLA 262 (11 December 2019).

[67] The second and third respondents Mr and Mrs MacKenzie are involved in two different capacities. Firstly, they hold managers certificates and the police seek the suspension or cancellation of those certificates. Secondly, Mr and Mrs MacKenzie are the directors of the licensee company and their actions are imputed to the company. We consider first the position in relation to the manager's certificates.

[68] At the time of the relevant events, both Mr and Mrs MacKenzie were away from the premises with Mr Jones as the duty manager. However, Mr and Mrs MacKenzie were called to the premises as the result of an unrelated event with other patrons and arrived between 8.45 and 9.00pm. The CCTV footage shows that Mrs MacKenzie was behind the bar at the time Mr X was served the last drinks by Mr Jones. Mr MacKenzie's involvement in the area was less again.

[69] Both Mr and Mrs MacKenzie gave evidence that upon their return to the premises and the unrelated incident aside, they observed nothing untoward in relation to Mr X or otherwise. Having determined that Mr X was intoxicated, the issue is the extent to which Mr and Mrs MacKenzie could or should have known of the level of intoxication and the extent to which they should be responsible for the circumstances relating to Mr X. Mrs MacKenzie was more directly involved having been behind the bar at the time that Mr X was served his last drinks. Although Mr Jones was formally the duty manager, it is clear that both Mr and Mrs MacKenzie involved themselves in the activities on the premises when returning as described. They assumed responsibility by dealing with the unrelated issue the subject of the request to them to return. Mrs MacKenzie also mentioned in her evidence that she did not see any signs of Mr X being intoxicated in any way. She also acknowledged being behind the bar when Mr X was served with his last drinks. Her evidence was that if Mr X had appeared intoxicated at the bar she would certainly have said something to Mr Jones as the duty manager. Therefore, by their presence and involvement in activities within the premises, Mr and Mrs MacKenzie assumed their responsibilities under their manager certificates. They were both in the premises following their arrival until Mr X's departure apart from a brief period when Mrs MacKenzie drove another patron a short distance home. Mrs MacKenzie also acknowledged that Mr X was not in a safe shape to travel home. While Mr MacKenzie's evidence was that his interactions with other patrons was limited, he nonetheless made inquiries of Mr Jones with the complaint and Mr MacKenzie also gave evidence of his general observations about activities within the premises.

[70] Mr Jones took the position that Mr X was not intoxicated. We have found to the contrary. Mr and Mrs MacKenzie were at the premises in a formal capacity for sufficient time to assess the position with Mr X and we therefore determine that both Mr and Mrs MacKenzie had sufficient opportunity to observe the situation with Mr X. They, like Mr Jones, formed the view there was no problem which is contrary to the determination we have made. We therefore consider that both Mr and Mrs MacKenzie are not suitable to hold manager's certificates.

[71] The second consideration is then whether it is desirable for there to be any consequence under s 285. Is it desirable that any order be made either suspending or cancelling their manager's certificates?

[72] We accept that the level of involvement of Mr and Mrs MacKenzie was less than Mr Jones. We also accept that they both have no prior issues in terms of their manager's certificates. We consider that suspensions are desirable but for a lesser period than Mr Jones. We therefore direct the suspension of Mr and Mrs MacKenzie's manager's certificates for a period of 14 days.

[73] The remaining respondent to consider is the company MacKenzie Holdings 2021 Limited which is the first respondent and the holder of the on-licence. The police application seeks the cancellation of that licence without specifying in the application suspension as an alternative. The police accept that we nonetheless have the ability to consider suspension if the grounds of the application are established.

[74] The application relies on both s 280(3)(a) and (b). Those provisions cover circumstances where licensed premises have been conducted in breach of provisions of the Act and that the conduct of the licensee is such as to show that it is not a suitable person to hold a licence. For the reasons already described, we have determined that the factual circumstances establish breaches of s 248, 49 and 252.

[75] The position of the company needs to be considered differently in relation to s 248 as opposed to sections 249 and 252. Section 248 creates an offence of strict liability.<sup>7</sup> Although in the context of s 239, the High Court discussed strict liability in *Stird Potential Limited v*

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<sup>7</sup> *General Distributors Limited v De'Ath* [2014] NZHC 3378 at [32] – [33].

*Roycroft*.<sup>8</sup> Following analysis of earlier authorities, the Court confirmed that the standard of “all reasonable care” is the threshold for the purposes of assessing culpability in such situations. Liability might therefore be avoided if all reasonable steps had been taken. That argument would usually arise where a licensee might outline a series of precautionary measures and policies in place but that some offence has occurred despite those measures. The situation in this case is slightly different. The relevant parties by way of Mr Jones and Mr and Mrs MacKenzie positively assert that Mr X was not intoxicated. He was therefore sold alcohol and allowed to remain on the premises. Having found as a matter of fact that Mr X was intoxicated, it is not now open to argue a total absence of fault. The company is therefore strictly liable in relation to the sale of alcohol to Mr X which we have determined was a breach of s 248.

[76] The remaining two relevant sections 249 and 252 clearly have mental elements as they involve allowing people to become intoxicated and to remain on licensed premises. The position of a licensee in such circumstances is affected by s 275 which confirms that a licensee of any licensed premises is not responsible for any offence against the Act committed by any manager of those premises except where the licensee is a party to the offence.

[77] The Authority considered the question of being a party in *Taylor v Crosby*.<sup>9</sup> In that decision the Authority held at [11]:

To establish “party” status mere presence is insufficient to attract culpability under statutory provisions such as s 66(1) of the Crimes Act 1961 ...

In the present application, there is insufficient specific evidence of the type outlined in *Lynch v DPP for Northern Ireland* [1975] AC 653 at 698 (per Lord Symond) to persuade us that Mr Crosby’s action or inaction on the night .... makes the licensee a “party” to a possible offence by the manager ...

[78] Mr and Mrs MacKenzie returned to the premises in the circumstances that have already been discussed. They became actively involved in the manner described previously in paragraph [67]. They were obviously there in the dual capacities of managers and directors of the company. Their circumstances suggested more than mere presence and we are satisfied that the company should properly be regarded as a party to the breaches under s 249 and 252.

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<sup>8</sup> *Stird Potential Limited v Roycroft* [2019] NZHC 429.

<sup>9</sup> *Taylor v Crosby* LLA 2003/96, 25 October 1996.



[79] It is therefore our view that the police case establishes that the premises have been conducted in breaches of sections 248, 249 and 252 with the consequence that the company is not suitable to hold the licence.

[80] We accept that the first respondent has no prior blemishes under the Act and we also accept that the premises appear to have been run in a responsible manner apart from the issues arising in relation to these applications. Nonetheless, breaches of the provisions in question strike at the core principles of the Act and we consider that while cancellation of the licence would not be warranted, a suspension would be.

[81] In the Authority decision previously discussed with some parallels in that the fatality of a customer was involved, the Authority suspended the on-licence for eight days.<sup>10</sup> In that case, there had been some prior difficulties but the licensee acknowledged the problems and offered a range of remedial measures. In this case the licensee has no prior issues but all parties involved have not acknowledged any fault in relation to the allegations which we have found to be established. We consider that a suspension of seven days is appropriate.

### **Summary of Orders**

[82] The following orders are therefore made:

- (a) On-licence 058/ON/00004/2022 in relation to the premises trading as Platform Bar Restaurant and Café situated at Mandeville Road, Mandeville is suspended for a period of seven days from 8am 1 March 2023 to midnight 7 March 2024 (both dates inclusive).
- (b) The second respondent's manager's certificate is suspended for a period of 14 days from 1 March 2024 until 14 March 2024 (both dates inclusive).
- (c) The third respondent's manager's certificate is suspended for a period of 14 days from 15 March 2024 until 28 March 2024 (both dates inclusive).

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<sup>10</sup> *Robertson v Papanui Road Limited – Carlton Bar and Restaurant* [2019] NZARLA 262 (11 December 2019).

- (d) The fourth respondent's manager's certificate is suspended for a period of 28 days from 1 March 2024 to 28 March 2024 (both dates inclusive).

[83] These orders attract holdings for the purposes of s 288(1)(k) and sections 289 and 290 of the Act. If the licence or manager's certificates have not already been cancelled, three holdings within a period of three years will result in an application for the cancellation of the licence or manager's certificates or both.

[84] The last issue to consider relates to interim suppression orders made during the hearing and the subject of a minute at the time. The parties were invited to address that issue in closing submissions. The Police have made no comment from which we infer no final orders are sought. The respondents have noted that position and indicated opposition to any final orders other than anonymising Mr X's name. We agree that is an appropriate course in the interests of his family and therefore direct that this decision should only refer to Mr X. His identity, and any other details leading to his identity, are suppressed. Otherwise, there is no basis for any other suppression order.

~~DATED~~ at WELLINGTON this 31<sup>st</sup> day of January 2024



District Court Judge A S Menzies  
Deputy Chairperson  
Alcohol Regulatory and Licensing Authority