

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **BADGER
BARS LIMITED** pursuant to S127
of the Act for renewal of an on-
licence in respect of premises
situated at 12b Church Street,
Queenstown, known as “Vinyl
Underground”

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

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

HEARING at QUEENSTOWN on 9 March 2015

APPEARANCES

Mr B C Calder – representing the applicant
Ms J Mitchell – Queenstown Lakes Licensing Inspector – to assist
Sergeant L K Stevens – N Z Police – in opposition
Ms L M Grace – Medical Officer of Health – in opposition
Ms T J Surrey – for Spire Hotel Management Limited – objector

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] This decision involves an application by Badger Bars Limited (hereafter called the company) for the renewal of its on-licence in respect of premises situated at 12b Church Street in Queenstown. It is the company’s first application for renewal and follows what is often called its ‘probationary’ year. The first renewal can often be significant, because it represents the first occasion for the licensee’s initial proposals to be measured against reality. The company trades as a tavern although its emphasis is on the provision of musical entertainment.
- [2] The bar is located on the basement level of a building which also hosts two other licensed premises called “Monty’s Bar and Restaurant” and “The Club”, both of which are situated on the ground floor. There are offices on the first floor. The premises used to trade as “Subculture” but that business closed, and the premises lay vacant for about eight months. The company signed a lease of the premises on 29 July 2013 and started trading as “Vinyl Underground” a month later. It became apparent during the hearing, that any

due diligence preceding the lease did not include knowledge or understanding of the resource consent number RM030009.

[3] This consent was granted in 2003, and enabled the sale of liquor from the premises. The conditions of consent included maximum noise limits, a maximum of 190 persons on the premises, the requirement to provide a Noise Management Plan, confirmation from an Acoustic Consultant of a proper survey and audit to confirm compliance with noise limits, plus written confirmation within 4 weeks of every annual anniversary of the consent, of a similar survey and compliance audit, such report to include a summary of all noise complaints and any mitigation measures adopted. In effect, any licensee of the basement premises faces comprehensive and expensive accountability.

[4] The licence was issued by the former District Licensing Agency on 28 August 2014. It contained the following standard provision concerning food:

Food must be available for consumption on the premises as follows: A range of food choices must be readily available at all times that the premises are authorised to be open for the sale of liquor. Menus must be visible and food should be actively promoted. A minimum of three types of food should be available. The range or style of food will be as shown on any menu submitted. Alternatively the range of food should include such items as paninis, pizzas, lasagne, toasted or fresh sandwiches, wedges, pies, filled rolls and/or salads.

[5] Access to the premises is down a set of stairs from Church Street. There are two pool tables and a raised stage area by the dance floor with speakers on either side. The interior is dimly lit. There is limited bar seating, and consequently drinking is primarily vertical. The company has two shareholders and directors. They are Benjamin Calder and Anthony Waldock. Neither can be said to be a 'hands on' licensee. Mr Calder expressed confidence in the company's managers as well as its security company. Mr Calder has his own business called "Big Night Out" which hosts groups of tourists on paid Queenstown bar tours. Mr Waldock is the proprietor of "Fat Badgers Pizza Bar".

[6] The application for renewal was made on 26 August 2014. The company sought reduced trading hours from 12.00pm midday to 4.00am the following day. However due to error the public notices showed proposed times from 7.00pm to 4.00am the following day. In our view there are unlikely to be intoxication, noise or other community concerns between Midday and 7.00pm. In the circumstances we are prepared to allow the commencement of trading to be extended to midday and waive any further requirement to advertise. Under the 'Amenity and Good Order' section of the application, the company was asked what additional sound proofing had been undertaken. The answer was that no work had been carried out. The tavern's current licence trades has the default national trading hours of 8.00 am to 4.00 am the following day. It was accepted by Mr Ben Calder that the premises is "high risk" as the sale of alcohol ceases at 4.00am. Furthermore, he acknowledged some customers arrived after 2.00am, with the potential of having been drinking beforehand.

- [7] Both the Police and the Medical Officer of Health opposed the renewal application. The Police opposed the renewal on the grounds of the object of the Act, and whether the company had appropriate systems, staff and training in place to comply with the law, as well as the lack of any reasonable range of food at reasonable prices.(S105 (a) and (j) and S53 of the Act). The Police also raised the issue of suitability with concerns expressed about intoxication on the premises. The Medical Officer of Health opposed the application on the grounds that the company was trading in breach of S53 of the Act. Concerns were expressed about the choice of food as well as its price and availability.
- [8] Public notification attracted a letter of objection from Spire Hotel Management Limited a recent owner of “The Spire Hotel” (the objector/Spire) situated in Church Street virtually opposite the rear fire exit doors of “Vinyl Underground.” The objector is described as a five star luxury hotel which is part of the Imperium Collection of Hotels along with “Eichardt’s Hotel.” The letter raised the issue of suitability based on the regular escape of noise from the applicant’s premises, resulting in complaints being received from the hotel’s guests. The objector alleged the noise was contrary to current noise control regulations.
- [9] In her report dated 22 October 2014, the Licensing Inspector referred to a meeting held with the company on 6 October 2014, when the company (through Mr Waldock) acknowledged their food supplier of choice closed earlier than 4.00am. He stated this was an oversight and an immediate effort would be made to ensure that the company complied with the law. Mr Waldock also confirmed they were in contact with the Council planner concerning the noise management plan. He advised a report from an acoustic consultant (as required by the Resource Management Consent) would be available in November. The Inspector reported that in her view, the amenity and good order of the area had been affected by more than a minor amount in the previous twelve months.
- [10] The application was initially set down for hearing on 10 November 2014, but this date was changed by the Committee (resourcing issues) to 19 January 2015. Prior to the later hearing, the company requested an adjournment because it stated that it had insufficient time to arrange legal representation or obtain an acoustic report. Thus the case was set down for 9 March 2015.

The Application

- [11] As stated above, Mr Ben Calder is a director and shareholder of the applicant company. He candidly acknowledged that the first nine months had been difficult financially with unexpected building issues and low numbers of customers. He said they had “naturally” adopted a minimalist attitude to get by, although he argued they had always traded within the law. It seems that over the last twelve months the company has been successful in attracting a customer base as it is now claimed that up to 11,000 patrons pass through the doors each month. Mr Calder stated that initially they did not have a freezer on site, and given that food was perishable, and there was little demand for it, they ordered minimal amounts of food, and threw out what they did not sell.
- [12] At the hearing, Mr Calder produced a new menu with three types of toasties, a curry, and a sausage roll, as well as items that could be ordered from “Fat

Badgers Pizza Bar”, which now has trading hours similar to the company. He gave evidence to show the company was now promoting food with appropriate signage and quality, and “Fat Badgers” staff were coming to the bar at 2.00am offering pizzas for sale. He argued the company had always had food available on the premises, and it had now gone over and above standard compliance, and now had food and a menu to be proud of. The downside was that all this activity had taken place in the days leading up to the hearing, rather than five months previously, when the matters were first brought to the company’s attention.

- [13] Mr Calder argued that the company was always strict on intoxication and had joined the Queenstown Alcohol Accord. He disputed the Police evidence about instances of intoxication and his evidence and counter arguments are set out under the Police section of this decision. Mr Calder produced a new and very recently compiled 'Alcohol Management Plan'. He gave evidence that the company had purchased a 'bar safe radio' that keeps the bar connected with other licensed premises, so they are made aware of patrons who have already been removed from other bars. The company is now spending up to \$3,800.00 a week for security and this payment was one of their highest overheads.
- [14] As to the issue of noise, Mr Calder confirmed that when the objector took over the “Spire Hotel” in 6 June 2014, the company received its first noise complaint. In late October 2014, it received a letter from Mr J J Cavanagh Group General Manager of the “Spire” requesting a meeting to discuss noise levels, and to try and reach some agreement about reducing noise levels particularly in the early hours of the morning. Mr Calder produced an email sent by Mr Waldock in which he stated among other things (a) the company had a strict noise management plan that it adhered to, and if the company was within the parameters of this plan then it was doing everything it needed to, and (b) 80% of all call outs showed that the company was compliant, and the other 20% were when the back fire exits had been left open by the band, and (c) the company was taking many mitigating courses of action to make sure that the noise nuisances did not happen again. Reference was made to the installation of sound bats under the speakers, and limiting devices to prevent bands changing the EQS without management knowledge.
- [15] Included in the email were comments such as: *‘Vinyl Underground is built on Music and we will not be turning our levels down to a detriment to the bars trade or custom.’* and *“We will not affect our own trade by turning music levels down to prevent the enjoyment of our customers. We have worked very hard to build our business.’* Mr Waldock had suggested a short meeting to make sure the parties could live and trade together positively. Mr Calder noted that the company had not received a reply to its email, but Mr Cavanagh considered there was nothing he could do further as the company showed little intention of changing the nature of its business.
- [16] Mr Calder attempted to undermine the effect of the various noise complaints that had been made over the previous nine months. He stated that on Monday 29 December last at about 12.45am he was having a conversation with an employee of “Eichardt's Hotel”, and told her of the trouble he was having with the “Spire”. The employee, whose name and phone number was available if required, was reported to have said that “Vinyl Underground” was one of her favourite bars and he shouldn't blame the night managers because they had

been told by the managers to call noise control if they heard anything at all, and to make sure it was frequent.

- [17] Mr Calder also introduced a statement signed by a Stuart Mountain an employee of Cougar Security Group New Zealand. That is the company employed by the Queenstown Lakes District Council (the Council) to monitor noise issues. He stated "Vinyl Underground" operated well within the noise level laws set out by the Council, and this had been confirmed by its duty managers. He stated that the majority of times he has been called out and taken noise measurements in front of the bar and the front door of the "Spire", the noise has been at a satisfactory level, and that on one occasion the noise had been coming from "The Club" next door. Mr Calder concluded his evidence by producing photographic images of the business, as well as testimonials and references from patrons.
- [18] Mr Calder also produced a recently prepared 'Noise Management Plan'. This document followed receipt of the noise assessment from Marshall Day Acoustics arising from a survey conducted on Thursday 26 February 2015, between 10.00pm and 1.00am the following day. This report sets out the noise levels allowed by the resource consent. Noise levels were taken when the bar was unoccupied. The results of the survey were that when measured with no patrons and maximum music volume, noise from the bar did not comply with the limits set out by the resource consent. However the consultants believe that it was possible for the noise to be controlled such that it achieved compliance.
- [19] The report states the fire doors are the one weak point in the building, and 'minor' modifications are required to the doors 'or the activity' in order to reduce noise emissions. The simple solution is to limit internal music noise levels so the low frequency component of the music is reduced by 3 to 5 dB, and the overall internal noise level is not to exceed 90 dB L_{aeq} . The report suggests that in the longer term changes can be made to the rear doors, as well as a possible sound lock, (as had been installed at the front door). This proposal for the rear of the premises had been suggested by the original acoustic assessment back in 2003.
- [20] The report concluded by recommending a further monitoring assessment when modifications or upgrades had been undertaken. Mr Calder advised there was a system in place where a grill had been screwed to the front of the DBX drive rack to prevent the dB limiters from exceeding 90 dB. The only concern was when band brought its own sound equipment in which case there was no automatic system.
- [21] Mr Calder was naturally asked how the company intended to respond to the acoustic report given that it was operating in breach of the resource consent. He initially replied that any modifications to sound systems, or the building, or indeed monitoring by consultants, would have to be looked at in the light of the company's budget, and he expected any remedial work to take about six months. No immediate mitigation matters were suggested apart from the grill that had been installed. However, by the end of the hearing, both he and Mr Waldock were offering to get onto the problem forthwith.

- [22] Mr A M Waldock gave evidence. He described himself as the company's Managing Director. He stated that on 23 November last he was drinking and playing pool with friends. At about 1.00am the manager (Mr Bennell) informed him there had been a noise complaint. He said he was perplexed because there was no band and only background music. He walked outside and noticed loud music coming from "The Club" next door. He said that every time the front doors opened, then loud bass heavy music was pumped out into the street. He then spoke with the night manager of the "Spire" who agreed that the wrong business had been nominated as the cause of concern.
- [23] Mr Matthew Bennell also gave evidence. He is the company's general manager, and is one of two managers, the other being Mr Jake Channer. He seemed to be unaware of the amenity and good order provisions in the new Act. He referred to two noise complaints that had been made on 6 November 2014, one at 1.45am, and the other at 3.15am. He sent an email to the directors to say that in respect of the first complaint, the band had decided to chock the back door open to remove their gear while he was dealing with two aggressive and abusive males who had been refused admission. One was subsequently arrested for spitting on the doorman.
- [24] Mr Bennell advised that on the second occasion even though he had pulled the bass back even more than was legally permissible, a complaint had been made. He gave his email address to the noise control officers and suggested that the night manager from the "Spire" contact him. He confirmed that Stuart (Mr Mountain) had advised that yet again there were no issues with the noise level. Mr Bennell also stated that on another two occasions on 23 November and 27 November, the noise control officer had been called out but had advised that the noise was not excessive.

NZ Police

- [25] Sergeant L K Stevens is the Alcohol Harm Prevention Officer for the Queenstown Lakes area. She noted when the company's original licence application was filed; the Host Responsibility Policy included the following wording under the heading of food: '*Signage is displayed advising the range and nature of food available. Staff will actively promote and encourage the consumption of food to slow the onset of intoxication.*' The Sergeant also produced a copy of a menu that included no less than 14 different types of pizza. The Sergeant gave evidence Mr Waldock had sent an email dated July 2013 indicating the menu would include Pizza Nachos starting from \$10.00, Badger Chicken Wings at \$8.00 or \$15.00 for a kilo, and oven baked wedges for \$8.00. She stated that this information was one of the reasons that the application was not opposed.
- [26] On 3 August last at 1.55am, Sergeant Stevens conducted a routine check of "Vinyl Underground" with other members of the Police. She asked the duty manager Mr M Bennell what food was available. The result was one tin of pasta, one packet of noodles, half a loaf of bread, and six frankfurters. No menus were on display, and no attempt was being made to promote food. When she asked for a menu she was handed one from "Devil Burger". Sergeant Stevens duly wrote to the company setting out her concerns and delivering a written warning. A few days later she had a meeting with Mr Calder. He argued that the company was compliant with the Act so far as food

was concerned. However after a lengthy discussion he stated that a “Fat Badgers” menu would be available by the end of the week, and a chiller was to be installed.

- [27] Sergeant Stevens referred to the company's application for renewal submitted in August 2014, and completed by Mr Calder. Under the heading ‘*General – What provision does the applicant intend to make for the sale and supply of food intended to be available for purchase (or free) (please describe **type and range**),*’ Mr Calder had stated ‘*Patrons are advised of the availability of a range of food at all times liquor is available, by means of clear & well positioned signage.*’
- [28] On 20 September 2014, along with Ms Mitchell, Licensing Inspector, the Sergeant made a routine compliance check. There were eight pies available. On the bar was a hand written sign saying Steak Pie \$8, Mince Pie \$8 and Garlic Pizza \$12. Also available were “Devil Burger” and “Fat Badgers” menus. They subsequently discovered that “Devil Burger” closed at midnight on Monday, Tuesday and Sunday nights.
- [29] On 25 October 2014 at 1.45am, Sergeant Stevens made a further compliance check. On this occasion a menu showed that a variety of pies, toppers, and pizza slices were available. A check of the freezer showed the company was holding five McCains pies, three mince and cheese toppers, one lasagne topper, one steak pie and one mince pie.
- [30] Sergeant Stevens was advised of a compliance check that had been carried out by Sergeant Pirovano and Inspector O K Jensen on 14 December 2014. Evidence was given by Inspector Jensen that at about 3.45 am he entered “Vinyl Underground”. He noticed broken glass on the floor near the door into the bar. He considered there had been an attempt to clean it up, but there was still glass present as well as liquid. He thought the crowd was tense with moderate to high levels of intoxication. He had to weave his way through the crowd to get to the pool table room. He found more broken glass at this door way.
- [31] Inspector Jensen spoke with the manager outside rather than try and combat the noise. They then returned to where the broken glass was. The crowd had thinned out, and in a chair near the bar was a large Pacific Island male holding a half drunk handle of beer. He was obviously asleep. He and Sergeant Pirovano watched the person for about 30 seconds, and it was clear to them that the patron was asleep. The duty manager then came over and they woke the patron. He was taken outside where he was spoken to by Sergeant Pirovano. Upon leaving, the man walked into the back of a motor vehicle parked correctly, and as he continued his walk he weaved across the footpath.
- [32] Sergeant Stevens and Ms Mitchell then held a meeting with Messrs Waldock and Calder on 22 December where these matters were discussed. In the meantime another incident had taken place on 19 December 2014, when at about 3.20am, an obviously intoxicated patron was removed from the premises. Sergeant Stevens spoke with Mr Calder again, and on 29 December 2104 she interviewed the person who was duty manager on both occasions.

- [33] Mr Jake Channer recalled the first visit and thought the Police had been there about 15 minutes before they had spoken with him. They had then returned back to the pool room area when the person (according to Mr Channer) sat down on a couch and dropped his head. He thought the man was a bit confused when he woke up, but considered he was just tired. He disputed any suggestion that the person was intoxicated.
- [34] In his statement, Mr Channer thought he may have arrived at the same time as the Police or alternatively that the patron was on the dance floor when they arrived. He said he was behind the bar checking on the barmaids when the Police arrived, although he accepted that he was a little distracted as he was concentrating on talking with the Police. He recalled seeing the patron on the dance floor but he was just standing there, showing no signs of intoxication. He said he saw the patron walk off but did not see him walk into the parked car or criss-cross the pavement. He thought he might have had a swagger.
- [35] Mr Calder produced a statement signed by a Mr Edward Stott who was having a drink after work with some of his employees, at the time of the first incident. Mr Stott's company works as security for "Vinyl Underground". He thought there were 50 to 60 people present. At 3.45am when he became aware the Police were on their way inside, he did a sweep of the premises to see if there were any signs of intoxication. He wanted to ensure that his employees were doing their job. Later he recalled the Police pointing out a patron who appeared to have fallen asleep on a couch. His statement said that he remembered seeing the person earlier sitting on a chair using his cell phone. He did not think that the person had appeared intoxicated minutes prior to the Police arrival.
- [36] As to the second incident, Mr Channer was not sure why the person had been let into the bar. He thought the person must have snuck past security, but was then removed by a doorman. He had not seen the person enter the bar.
- [37] At 2.15am on Sunday 8 March, Sergeant T D Haggart visited the premises where she saw a number of people sitting on a fence and standing outside "Vinyl Underground". There was a barrier set up to make it easier to contain the queue as security was checking patrons. As she was observing the crowd, she saw a female walk up the stairs and leave the bar. This person gave the impression of being intoxicated with a glazed look. The patron then walked up the street unable to walk in a straight line and with her feet crossing one another. She walked up Church Street and then put her bag down and leant against a bench seat.
- [38] The Sergeant walked up to her and could immediately smell the alcohol on her, as well as the glazed look. The patron said she had not had anything to drink at the bar. She said that she had been drinking at home and had been at "Vinyl Underground" since 10.00pm. Her speech was slurred and she was assessed as being intoxicated. The Sergeant then spoke with Mr Channer as duty manager. He stated that he had known the patron for about two years. He thought she had entered the bar at around 2.00am but did not have any drinks as he had put her on water. He had seen her dancing without any problem although he accepted that she was unable to stand or walk properly when outside. He had put her on water because she was not intoxicated enough to be asked to leave.

[39] Mr Calder produced two statements. One was from Mr Channer who remembered the patron being in the crowd when he went on duty at midnight. At that time he considered she was showing no signs of intoxication. He stated that she returned at 1.45am and was allowed to enter by security. When she approached the bar he gave her water as she appeared to be impaired. Approximately ten minutes later she left the bar. To some extent his statement was supported by another statement from a Mr D Healy who described himself as head of security at "Vinyl Underground". He recalled the person arriving and then leaving and then returning showing minimal signs of the effect of alcohol for which she was placed on water. He said he didn't think it necessary to call for a taxi because she said she was looking for friends.

Medical Officer of Health

[40] Ann Margaret Fowler is a Health Promotion Advisor employed by Southern District Health Board. She made a compliance visit to "Vinyl Underground" on 17 September 2014. She met and spoke with Mr Bennell. She was shown the hand written menu that sat at the end of the bar along with menus from "Devil Burger" and "Fat Badgers". At the time of the visit she was aware "Fat Badgers" closed at 2.30am and "Devil Burger" closed at 2.00am.

[41] Ms Fowler drew attention to the poor lighting saying it would be difficult for patrons to see any of the menus. The handwritten note was for steak and mince pies and garlic pizza. Mr Bennell said the items were purchased from a night and day store for \$4.00 and charged out at \$8.00. He said the company purchased these items on a regular basis as they were awaiting a new refrigerator. He also said they were trying to encourage patrons to order off the "Fat Badgers" menu as this business was part of the same company. Mr Bennell assured her the pizzas were delivered within 15 minutes.

The Licensing Inspector

[42] Ms J J Mitchell has been working for the Council as an Inspector for two years. She produced the noise complaint forms received by the Council. Although there was a claim of 33 such documents having been lodged, we were able to view 29. The details of each complaint and comments from the noise officers are as follows:

19.6.14 2.30am Noise coming from Vinyl Underground – asked them to keep door closed
4.8.14 2.13am Bass extremely loud & extremely loud at Spire. Reduced to half bass level. Situation required serving an E.N.D. but unable to locate book.
25.8.14 2.35am Excessive Noise Direction issued. Bass far too high
24.10.14 2.11am Spoke with bar manager who closed open doors. & turned down volume and bass right down.
26.10.14 2.35am Bar closed on my arrival (3.20) doors locked all quiet
1.11.14 2.12am Music was quite loud. Manager turned down volume and closed open doors
2.11.14 2.42am Spoke with DM. Agreed to close door to keep noise to minimum. No further action needed
5.11.14 2.11am Spoke to the DM and agreed to keep doors closed
6.11.14 1.40am Spoke to DM Back was open as band was carrying out equipment
6.11.14 2.57am Verbal warning issued due to 2nd call
9.11.14 1.15am Turned out to be The Club
10.11.14 2.24am Music very low & acceptable. Spire had to ring as guest had complained
8.11.14 3.40am Bar had already closed by my arrival (4.10am)
15.11.14 3.02am Noise only excessive when door open. Spoke to manager who will make sure door shut
19.11.14 2.59am Sound originating because of door opening and closing for patrons. Noise within legal limits
23.11.14 0.35am Noise not excessive while door is closed. To be kept closed for remainder of night.
24.11.14 3.00am Bass a little excessive. Noise within sound levels

27.11.14 1.23am Band all packed up and no noise.
 29.11.14 2.30am Went to an empty room with DM at the spire and he agreed noise acceptable.
 28.11.14 2.37am Arrived at location (3.00am) and noise level acceptable
 4.12.14 2.56am Followed DM of Spire to the room of complaint and sound level was acceptable.
 10.12.14 10.29pm No noise heard. Complaint withdrawn.
 14.12.14 2.55am Music from both bars not loud so no action taken
 3.1.15 040am Called manager of Spire to locate room. Room 8 but not prepared to let me in. No action.
 31.1.15 2.05am Turned down the music and bass
 14.2.15 2.36am No action taken/needed
 19.2.15 3.55am Bar was closed (arrived 4.15am)
 21.2.15 2.45am Music excessive only when clients are entering/exiting bar – Manager agreed to turn bass down and doors closed when possible
 22.2.15 3.05am Music was loud when patrons entered and exited bar. Manager agreed to turn bass down

[43] An analysis of these complaints shows that 16 of the complaints lodged between June 2014 and March 2015 were not without cause. In two of those cases END notices were warranted. In four cases the noise control officers arrived some time after the complaint, so it is not possible to ascertain whether the call outs were without merit. In one case “The Club” was responsible for the noise. And in eight cases, there was no apparent reason for the complaint.

[44] Ms Mitchell made a compliance visit to “Vinyl Underground” at 3.12am on 17 August 2014 with members of the Police. She asked to see what food was on offer and was shown half a loaf of bread and a packet of six hotdogs. She asked to see the low alcohol beverages and was shown two bottles of Amstel Light. She made a similar visit on 30 September 2014 with similar results as outlined by Sergeant Stevens.

[45] On 1 October 2014 Ms Mitchell sent Messrs Waldock and Calder a copy of the resource consent suggesting to them that the question of whether the conditions were being met would be likely to be raised at the hearing. She later sent them the original noise management plan. On 21 October 2014, Mr Richard Kemp, planner for the council, wrote to Messrs Waldock and Calder advising them of conditions 11 and 14 of the consent and requesting a copy of their current noise management plan as well as a compliance report from an acoustical consultant.

[46] On 22 October Mr Waldock wrote to the Inspector advising that they now had three types of gourmet sandwiches that were to be cooked on site to order, as well as curry and rice, sausage rolls, pies and pizza slices. On 8 November at 12.55am, Ms Mitchell visited the premises with Police for monitoring purposes. She noted that one of the front doors at the bottom of the steps was open but the next set of doors was closed. She asked to see the food that was available. There was one steak pie, one mince pie, one lasagne topper, three mince and cheese toppers and three ham and cheese pizzas. She was advised by Mr Channer that they were still waiting for the sandwiches. She also noted that the menus were not visible to patrons, although on top of the bar was the usual handwritten sign advising the availability of the \$8 pies and the \$12 pizza.

[47] On 18 December 2014, Ms Mitchell received advice from Mr Kemp the council planner that “Vinyl Underground” was currently operating in breach of the resource consent. On 20 December at 1.32am Ms Mitchell made a further monitoring visit. On this occasion there were ten frozen sandwiches, as well as a topper and a pie. There was also a typed menu and the price of the pies was now \$5.

[48] On 27 February 2015 Ms Mitchell received from Mr Waldock a copy of the new menu that was presented at the hearing. Accordingly she made a further monitoring visit the following day at 1.27am. In the freezer she found a variety of eight toasting sandwiches and eight curries. There were five A5 sized menus on the leaners. Ms Mitchell produced two photographs of the people gathering outside the premises, some of whom were queuing to get in. In answer to a question from Ms Surrey, Ms Mitchell stated that her general impression was that the licensee through its directors and managers did not have a very good understanding of the new Act, and hadn't appreciated the gravity of the Act's amenity and good order provisions.

The Evidence on behalf of the Objector

[49] As stated above, Mr James John Cavanagh is the Group Manager for the "Spire", since it took over the hotel in June 2014. He is the holder of a Manager's Certificate. He advised that "The Spire Hotel" and "Eichardt's Private Hotel" pride themselves on their ability to give guests a luxurious and uninterrupted stay. He stated that since August 2014 the hotel has called the after-hour noise control service on 33 occasions to report unacceptable noise levels. He produced the hotel's log recording the complaints made, and referred to another call made by a neighbour on 23 June 2014 at 2.30am.

[50] Mr Cavanagh gave an account of the various guests who had stayed at the hotel, and subsequently complained either to the hotel or reviewed their stay on a web site known as Trip Advisor. At the request of counsel an order was made under S203 of the Act prohibiting the publication of the names of the guests. Mr Cavanagh produced some of the pages on the Trip Advisor web site and it is very clear the damage that can be done with a bad review. For example a guest wrote in February 2015. *"It is 2.30 in the morning the music from outside the hotel is so loud we cannot sleep.....Do not take a room in the front. Wonderful view but street music so loud one cannot sleep"*. Mr Cavanagh stated that this complaint resulted in compensation for the guest of \$900.00. He confirmed that once a review is posted it cannot be removed unless it is found to be in breach of guidelines.

[51] In August 2014 Mr Cavanagh offered two free nights' accommodation to a guest and refunded him the sum of \$1000.00. He confirmed he had written to the licensee in October 2014 in an attempt to meet with them and discuss noise issues and try and reach some agreement, but their reply had stated that overall volumes would not be reduced.

[52] Mr Cavanagh referred to a letter written by a guest to the Council. (See Appendix to Ms Mitchell's brief). This concerned a visit for two nights in November 2014. Included in the letter was: *"Very disappointingly, the 2-night stay turned into a sleepless torture due to the noise of the nightclub directly next to the hotel."* He was given a discount on his rate as his stay had been materially affected.

[53] Mr Cavanagh confirmed that on the morning of 21 February 2015, the duty manager had called at "Vinyl Underground" twice at 2.45am and again at 2.55am asking that the noise be reduced as the hotel had received guest complaints. The Police had also been called after 3.00am to monitor

disturbances in the area. Guests had asked to be moved out of the hotel and they were accommodated elsewhere at a cost to the hotel of \$700.00.

- [54] Mr Cavanagh argued the licensee did not seem capable of managing the noise issues on its premises and a simple thing such as keeping the fire exit doors closed after 10.00pm (as required by the Resource Consent) seemed to be beyond the management. He was adamant that the staff were only to ring noise control if the noise or bass levels were sufficiently loud or strong to cause a nuisance.
- [55] Mr Rahul Sharma is the "Spire's" night auditor, and had worked in that capacity since June 2014. He studied hotel management at the Queenstown Resort College prior to his employment. He personally made the majority of the noise complaints that were listed in the hotel's noise disturbance log (Exhibit A). At least three of the calls were specifically directed at noise from "The Club". He spoke of his own experience in listening to the noise as well as the vibration sensation when the bass was high. He has heard the effects of the noise from the reception area as well as guest bedrooms. Mr Sharma advised that his colleague called noise control on 6 March 2015 because of loud music. The report has yet to be received by the Council in respect of this incident. Mr Sharma confirmed he only called noise control if he heard loud music, and he went outside to confirm where the music was coming from.

The Committee's Decision and Reasons

- [56] Pursuant to S105 and S131 of the Act we are required to have regard to the following matters when considering the application:
- (a) the object of this Act;
 - (b) the suitability of the applicant;
 - (c) any relevant local alcohol policy;
 - (d) the days on which and the hours during which the applicant proposes to sell alcohol;
 - (e) the design and layout of any proposed premises;
 - (f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods;
 - (g) whether the applicant is engaged in, or proposes to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services;
 - (h) whether the applicant has appropriate systems, staff, and training to comply with the law;
 - (i) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence;
 - (j) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129;
 - (k) the manner in which the applicant has sold (or as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.

- [57] Section 106(2) of the Act reads:

In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence, the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality):

- (a) current and possible future, noise levels;
- (b) current and possible future, levels of nuisance and vandalism.

[58] On the renewal of a licence the applicant has the onus of establishing to a probable standard the matters listed above. The question is whether the company has established its suitability to continue to hold the licence in its present form. In making its decision the Committee's duty is to review the evidence including the way the company has operated the premises over the past eighteen months, and apply the facts against the various criteria listed above. The impact of the evidence produced by the objector combined with the evidence from the Inspector, the Police and the Medical Officer of Health, was considerable. The portrait was painted of a business that was either unaware of its responsibilities under the Act (particularly regarding noise, food and intoxication issues), or knew of its responsibilities, but in the interests of building its business, did not take them seriously.

[59] The company appeared to anticipate an entitlement to a renewal of the licence on the same terms because of the activities and adjustments carried out once the reports and objections were filed. It has been reactive and not proactive. Although the following case was decided in respect of the previous Act, the sentiments expressed continue to provide valuable advice. In *Buzz & Bear Limited v Woodroffe* [1996] NZAR 404, McGechan J commented as follows:

"There is no doubt that upon renewal the Authority, which is obliged to consider conditions and reports, and to confirm on same or altered conditions (or to refuse renewal), can consider whether existing hours are appropriate and alter those hours. The restraint, and safeguard against ill-informed tinkering, is that such can occur only in response to inspectors' or Police reports, or at the request of the licensee itself.

Times change. Communities and environments change. Social habits and levels of tolerance change. Obviously it would have been seen by the legislature to be wise to keep conditions imposed under review in light of potential social change. The licensee's submissions would have licence conditions frozen in some time warp while the world marches on; not, even in the arcane world of liquor licensing, a likely legislative intention. Section 4 interpretation directives align with common sense to point towards allowing the Authority to engage in a wider perspective. It can keep its eye on wider trends and needs in a specialist area where it has unique and uniquely current, expertise. Any licensee takes a licence under risk that conditions may change, and a report may recommend adjustment. There is no asset protected for all time whatever may happen outside."

[60] Because of the company's location close to "The Spire", and because it has become a very popular destination, there has developed a fundamental tension between the venue and a five-star luxury hotel. There are also issues with the Police who are partly responsible for the safety and well-being of the patrons as well as the passers-by. The company acknowledged that it is a high risk business in terms of intoxication, and yet the directors appear to have handed the ownership of the problems to the managers. Although the directors have some experience with the operation of licensed premises, they seemed to us to have little knowledge of the Act.

[61] It used to be the considered wisdom under the former Act that the inability to control the escape of noise reflected on the suitability of the licensee to hold an on-licence. Under the new Act the issue has been given statutory blessing and it is a key consideration. The amenity and good order of a locality is defined in S5 of the Act as:

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

[62] Given that some customers arrive at the venue after 2.00am and given that people queue to get in, and given the evidence about intoxication, as well as the number of noise call outs, and given that the company is currently trading in breach of the original resource consent, it is hard to find an argument supporting the proposition that the locality would only be slightly more pleasant and agreeable if the renewal application was refused.

[63] Ms Surrey referred to the decision of *Paihia Saltwater (2001) Limited* LLA PH391/2001. In that decision under the former Act, the Authority made a number of comments about the issue of noise as follows:

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 to 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.

Noise is not just a resource management issue. The escape of noise (particularly music) is an example of bad management. The Authority takes the view that if no attempt is made to prevent the escape of, or reduce noise, then it is the Authority's duty to monitor the hours of opening, if not the existence of the licence.

We have already heard from licence holders who have either installed air conditioning so they can keep doors and windows closed, or have employed security people to monitor outside noise, or they have installed automatic sound control systems. We will always give full credit to those holders who acknowledge any existing noise problem and try and do something about it. In our view the term 'host responsibility' does not exclude the people who live nearby.

Many licensed premises have shown that they can operate in harmony with their residential neighbours. It is no coincidence that the managers and owners of such premises also show a commitment to the reduction of liquor abuse".

[64] This case is really about the company's suitability to operate a late night licence in an underground music venue in the centre of Queenstown. In our view the company has failed to establish these criteria. Its first failure was its lack of diligence in discovering that there was a complicated and potentially expensive resource consent that had been issued to enable alcohol to be sold

in the underground bunker. As a direct consequence, the sleep of guests in a luxury 5 star hotel was disturbed. It is accepted that the company has taken steps since the discovery of the consent terms but it is too little too late.

- [65] The next failed test was when the company applied for its on-licence over a year ago. It enclosed a menu showing a variety of food and stated in its Host Responsibility Policy that signage would display the range and nature of food and that staff would actively promote and encourage the consumption of food. Not only did such information potentially prevent opposition to the licence, it was immediately ignored. Thus the object of the Act to undertake the sale and supply of alcohol safely and responsibly was also ignored. We heard evidence that recently menus have been produced and food is being promoted. After eighteen months its good news but it's too late. How can we ever be sure that the company will revert to the original atmosphere that it decided to create?
- [66] The company started to receive visits from noise control officers. The issue of an excessive noise direction on 25 August 2014 resulted in no complaints in September. But in October the noise started again. Mr Cavanagh wrote his letter requesting a meeting and discussion about the noise. Rather than checking out the situation Mr Waldock wrote "*Vinyl Underground is built on Music and we will not be turning our levels down to a detriment to the bars trade or custom.*" So that sums up the situation. The business is music and it needs to be loud, or the bar will suffer. A lack of empathy reflects a lack of suitability as does a lack of understanding of the new Act.
- [67] As for the nuisance caused by the noise, the company made an attempt at suggesting that the objector had given instructions that noise control should be rung even though there was no noise. It did this by the use of statements and hearsay evidence as against the sworn evidence of two witnesses. It failed in its endeavour. Given the company's attitude to its neighbour and given our findings about suitability, there is no guarantee that current or future noise levels will decrease permanently. As a consequence there is no guarantee the current or future levels of nuisance will decrease either. The company would have to commit itself to doing whatever it was told to do by its acoustic consultants and we are not satisfied that the directors have that level of commitment in the business,
- [68] Eventually the business started to do well although increased crowds brought their own problems. Problems with groups of people queuing to get in. According to the fans (Appendix 16 Mr Calder) there are no cover charges but the drinks are expensive. Problems with people pre-loading. Problems with lack of food. Problems with vertical drinking. Three intoxicated patrons were found on the premises or leaving the premises on 14 and 19 December 2014 and on 8 March 2015. The Committee received evidence on oath on two of these matters and the third was admitted. One of the witnesses was a Police Inspector with a wealth of experience. The company made an attempt to dispute or confuse the evidence with the use of statements from witnesses who were not present. We have no hesitation in accepting the evidence brought by the Police, noting a further breach of the Act's object that the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

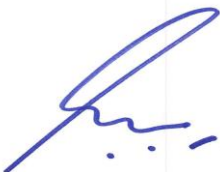
[69] It should be reasonably clear from what we have said that there are grounds in this case to refuse to renew the licence. The company has been unable to establish an entitlement to a renewed licence on the same terms in respect of the vast majority of the criteria set out in paragraph [56] above]. Its 'probationary year' may have been profitable but any profit has been achieved at the expense of breaches of the Act and the licence. It may be that the company can count itself as fortunate that neither the objector nor the agencies were seeking a refusal of the application. On the other hand the company needs time to decide whether to continue with the licence and try to trade without breaching its resource consent and face what may well be a continuous monitoring of the escape of noise. And there needs to be time to see whether our proposals about the trading hours work.

[70] Section 135 of the Act allows us to renew the licence for a further period of not more than 3 years on the conditions presently attaching to it, or any different conditions relating to any matter that the Committee thinks fit. The regulation of the hours of trading has always been recognised as a useful tool in controlling liquor abuse issues as well as anti-social behaviour. See *My Noodle Limited and others v Queenstown-Lakes District Council and another* CA 340/2009 NZCA 564 in which the Court of Appeal stated:

In our view, the Authority is not required to be sure that particular conditions will reduce liquor abuse. It is entitled to apply the equivalent of the precautionary principle in environmental law. If there is a possibility of meeting the statutory objective (as the Authority found there was in this case), then it is entitled to test whether that possibility is a reality. In this case, it clearly intended to test its hypothesis and keep the matter under review: see above at [37].

[71] For the reasons given the on-licence issued to Badger Bars Limited will be renewed for nineteen months to 28 March 2016. The trading hours will be 12.00pm midday to 2.00am the following day.

DATED at Queenstown this 2nd day of April 2015



Mr E W Unwin
Commissioner