proof upon the objectors discharged. It followed that the objections having been established there was no alternative but to refuse the application.

APPLICATION FOR RENEWAL OF LICENCE

R McK Utting, for the applicant.

G Crockett, for the objectors.

Cur adv vult

9 July 1987

JUDGE SHARKEY. This was an application by Murray Stephen McHenry for the renewal of the licence of the Nedlands Park Hotel, situated at 171 Broadway, Nedlands, and also the renewal of an entertainment permit in relation to those premises.

The application was objected to by a number of persons, including Ms Merryl Alexander, also the Town Clerk and Chief Health Surveyor of the Municipality of the City of Subiaco, and the Town Clerk and Senior Health Surveyor of the City of Nedlands.

There were 14 other objectors whose names appear in a schedule which is annexure "A" to an objection dated 24 March 1987, and lodged by Messrs Keall Brinsden, solicitors.

There was also an objection to the renewal of the entertainment permit by Mrs Janina Roper. However, the application for renewal of the licence was withdrawn, so that Mrs Roper was no longer a party to the proceedings.

No other objector pursued his/her objection before me.

The officers of the City of Nedlands and the City of Subiaco were struck out as objectors for reasons which appear sufficiently from the transcript in these proceedings.

Since this is an application for a renewal and not for a grant, s 54 of the *Liquor Act* 1970 (WA) (as amended) does not apply.

The grounds of objection were as follows:

(a) That the accommodation and services provided by the applicant are inadequate to meet the needs of the public in the area, or for the type of licence sought.

(b) That the quiet of the immediate vicinity of the premises to which the application relates would be unduly disturbed.

(c) That the applicant is not a suitable person to be the holder, or responsible as licensee of the licence sought.

(d) That the premises to which the application relates are not adequate or suitable for the purpose for which they are to be used or do not comply with the bylaws made under or standards prescribed by or under any other Act.

Evidence

Character

Exhibit 2 sets out the applicant's criminal record.

10 March 1981 — overcrowding on licensed premises — fined $50.

18 September 1981 — being found on the premises of a common gaming house — fined $10.

14 September 1982 — conviction for assault — good behaviour bond in the

sum of $100 for 12 months — compensation ordered to be paid in the sum of $180.

16 November 1982 — conviction for assault — good behaviour bond for 12 months.

20 November 1985 — trading contrary to a permit (overcrowding) — fined $300.

30 May 1986 — permitting persons to remain in the bar — fined $100.

30 May 1986 — refusing to show register — fined $50.

30 May 1986 — possession of slot machine — forfeited to the Crown — fined $50.

(All of these convictions were in the Court of Petty Sessions at Perth.)

Previous decisions

There were proceedings in 1980 relating to these premises to which I will refer later.

In addition, in 1985, there was an objection to the renewal of the hotel licence and entertainment permit, which had been applied for by Mr McHenry. A decision was handed down by the Licensing Court of Western Australia on 12 April 1985. Objection was taken on the ground that the immediate vicinity of the premises would be unduly disturbed. The finding of the Court, which has not been challenged was, (see p 2), as follows:

> "It is clear that some residents are inconvenienced by the noise in disturbing behaviour of people in the streets close to the hotel. A greater part of the disturbance occurs after the hotel closes. A particularly troublesome period is after midnight on Thursdays, when the hotel closes after the exercise of the entertainment permit."

(See application by M S McHenry, 12 April 1985.)

The Court, by implication, found that Mr McHenry was responsible because it purported to impose conditions by way of "a compromise".

The licence was renewed and the permit issued subject to a condition that the permit be exercised only on Thursday, Friday and Saturday of each week from 12 April 1985 to 31 August 1985, and on Friday and Saturday only in each week from 1 September 1985 to 31 March 1986.

The Court also found that the complaints "are real ones".

On appeal, Kennedy J said — (see *McHenry v City of Nedlands* (unreported, No 92 of 1985, Supreme Court of WA): "It may readily be accepted in this case that the appellant was a good publican who took every reasonable precaution to ensure that his business was properly conducted."

His Honour also said that the critical question, in terms of s 58B(2)(a), is simply; if the application were granted, would the quiet of the immediate vicinity of the premises be unduly disturbed?

Further evidence

The complaints then made appear to be very similar, if not identical to those which are currently before me.

Mrs Sheen, a witness in these proceedings, has referred to Mr McHenry as being a person for whom she has affection. Nonetheless, she was impelled to criticise the role of the premises, in regard to its vicinity.

The Town Clerk of Nedlands, Mr N G Leach, spoke of Mr McHenry's involvement in voluntary work.

Sergeant Mervyn Lockhart, a police officer, said that on the occasions when he was on the premises, he would regard the hotel as a well run hotel. He also said that he did not regard the place as excessively noisy, comparative to other premises, when he went there.

The premises

I was invited by counsel for the applicant to make an inspection of the premises and the surrounding area. This was consented to by counsel for the objectors, and I made such an inspection in the company of counsel and of several of the parties, at the end of the evidence and prior to final addresses.

The hotel is an old building, originally used, as I was told, to serve a residential area. It is close to a service station and a small shopping area. The area is, however, generally speaking, in its hinterland particularly, a residential area with flats and houses. In front of the hotel is the river and for 200 or so metres, from the river to the hotel, there is a rugby ground. On it is a rugby club pavilion, but these are fairly small premises, although it was obvious when we went there that drinking occurs on the premises. There is a reserve next to No 168 Broadway, which is a block of units opposite the car park of the hotel, in The Avenue.

Two of the beer gardens contain built-in bars. The building is a two storey building. Upstairs is a restaurant and toilets, also accommodation, ie, bedrooms, bathrooms etc. The upstairs toilets would not be obvious unless someone downstairs were directed to them. Indeed, the toilets upstairs would seem to be an integral part of the restaurant area. There is little provided by way of accommodation in the narrow sense.

The licensed area includes the drive-in and the three beer gardens, but not the parking area, I was told. However, the lack of an up-to-date plan depicting what precisely are the licensed premises creates some difficulty. None was produced to me, although this is usual. Indeed, divorced of its substantial beer gardens, the premises are not that large. They appear to be generally well maintained and cared for, and there is a substantial bottle department.

Disturbance

I heard a substantial number of witnesses who gave evidence as to disturbance in the area, including noise. I also heard evidence from municipal officials and witnesses expert in the area of noise.

Some of the witnesses who gave evidence as to disturbance were objectors and some were local residents who were not objectors. Some were police officers.

Mr Utting objected to the evidence of local residents who were not objectors, saying that unless a municipality were an objector, the only persons who could give evidence on the question of disturbance were the objectors themselves. He cited the judgment of Kennedy J in *McHenry v City of Nedlands* (unreported, No 92 of 1985, Supreme Court of WA). I do not see anything in that judgment which precludes persons other than objectors giving evidence in these circumstances. Indeed, if that argument were taken to its logical conclusion, no experts or officials could be called in these circumstances.

Thus, there was evidence from the residents who lived in the block of units at 168 Broadway, and there was evidence also from persons who resided in

the vicinity, but at other addresses. Some of them had been objectors in the past.

It is necessary to refer in some detail, to the evidence under this head.

Mrs Margaret Sheen, a long time resident of the area, lives at No 40 The Avenue, and is the owner of four flats at No 42 The Avenue. She is not an objector on this occasion, although she was previously.

Mrs Sheen lives about five x ¼-acre blocks from the hotel. She complained of noise she had heard at No 40 The Avenue, and experienced disturbance.

In her own house, Mrs Sheen complained of disturbance, because her bedroom and lounge were at the front of the property. She complained of noise from after 10 o'clock, which became worse, and then from 12 to 1 am. She attributed the noise to people going and coming from the hotel. The noise consists of people in the beer garden, ie, crowd noise and also the music which is played.

In addition, Mrs Sheen complained of the following:

(a) Yahooing.
(b) Booing.
(c) Baaing.
(d) Barking.
(e) Women screaming in apparent distress.
(f) Filthy and abusive language.
(g) Public urinating.
(h) Public defecating and fornicating.
(i) Unlawful and intrusive parking.
(j) The breaking of glass.
(k) Car horns sounding, car doors slamming, car stereos blaring, people doing "wheelies" etc.
(l) Fighting and aggression.
(m) Vomiting.

Mrs Sheen said that Thursdays and Sundays, when Sunday trading occurred, were always the worst but there was a growing patronage which increases these problems on Wednesdays, Fridays and Saturdays, as well.

During the period of the America's Cup licence, when premises closed at 2 am, of course, the disturbances occurred later, in the early hours of the morning.

The evidence is that witnesses who work are kept from their sleep and interrupted in their work, or woken up.

Mrs Sheen went to one place opposite the hotel on one occasion, and considered the noise there to be incredible.

In addition, persons from the hotel, uninvited, have attended parties in the vicinity.

Mrs Sheen's major complaint was expressed thus: ". . . that the whole hotel penetrates my house and my everyday life."

I heard similar evidence from all witnesses.

There was evidence from Mrs Muriel Alexander (formerly Fox), and from a number of residents of the block of units at 168 Broadway, which is, as I have said, opposite the car park at the licensed premises. These witnesses included Ms Kaye Kannis of Unit 8; Mr James Weinbren of Unit 7; Mr Michael David Firth ofUnit 4; David McNeil of Unit 15; Mr John Summers, on behalf of himself and his wife, at Unit 1; Mrs Agnes Arnold, an

elderly lady from Unit 5. There was also evidence from Ms Joan Wardrop of Unit 14.

I do not propose to canvass all of the evidence in detail because some of it is repetitive, but a full picture of it is necessary. All of the witnesses substantially agreed on the sort of things that disturbed them. Suffice it to say that all of the resident witnesses have been substantially disturbed and they have suffered inconvenience and disturbance, as is very adequately demonstrated hereunder.

Ms Wardrop had problems with persons repairing from the hotel to the reserve and to the garden of No 168, where they continued socialising. There was also evidence that these persons break plants in the garden and urinate there from time to time.

In cross-examination, Ms Wardrop said that the problems on the streets could be stopped if people did not drink until they were paralytic.

Some attention should be given to those witnesses from premises other than No 168 Broadway.

Mr Mark William Falvey resides at 40 The Avenue, and is a tenant of Mrs Sheen. He confirmed the complaints of other witnesses, and made reference to the amount of litter around and the disturbances which occurred, mainly on Thursdays and Sundays.

Mr Roger Richard Jones resides at 144 Broadway, which is situated about 150 m from the licensed premises and certainly, as a matter of fact, within the immediate vicinity of the licensed premises. He gave evidence. Even if I am wrong in that, his evidence provides corroboration of the other witnesses. He experienced disturbances generally in the form of bad language, obscene language on frequent occasions.

Mr Jones referred to this noise as permeating his building. He said that the worst nights were Thursday nights and Saturday nights, also late on Sunday evening. Between Thursdays and Sundays he is also disturbed once a week.

Ms Kannis, who has lived in her unit for six years, said that since 1983 she had noticed that the noise was much worse. Sometimes she had experienced disturbances as late as 3 am. She is a shift worker and found that her ability to work had been affected because of the disturbance to her night's rest.

In the warmer months, all the witnesses were clear that the situation was worse. It was also suggested to witnesses that the noise emanated from the rugby club or Jo Jo's, which is a restaurant quite some distance away down on the river. This notion was rejected by witnesses, particularly Mr Sullivan and Mr McKenzie. There was only one occasion when Jo Jo's restaurant was the source of noise, I was told, and generally the clientele were described as people of various age groups.

Mr Sullivan and Mr McKenzie had kept the premises under surveillance for some time, on behalf of their employer, the City of Subiaco. Some of the witnesses had complained to the police, with little result, and also to a representative of Mr McHenry, as to noise, on various occasions, and nothing was done.

There was evidence from Mrs Dale Patricia Jones, who was not an objector. She is the mother of three daughters, the eldest of whom is 13. The premises in which she and her husband have resided at 33 The Avenue, is across the road from the Nedlands Park Hotel and some 27 m away, measured from the front window of the house. The Jones family has resided

at that address since 1977. When they first bought the premises, Mrs Jones said that the hotel was a quiet residential hotel. When Sunday trading started there was a lot of disturbance about 7.30 pm to 8 pm. There was then a change in the hotel over the next few years, up until 1980, and after that there are matters of which she complains. Her husband had given evidence on the last hearing.

Wooden structures have been built on the grass verge outside her residence to prevent persons parking there. These were built in 1985. They have taken other steps to prevent disturbance from the hotel.

The Joneses also built a 6 ft wall around the property, with iron gates. (See exhibit 5.) They renovated their premises so that they moved their living areas to the back of the property, at substantial expense. Their eldest daughter, who sleeps at the front is woken regularly by noise from the hotel. They are currently disturbed most on Thursday nights and Sunday nights. They are also affected on Friday and Saturday nights. Wednesday night is also a problem.

Mrs Jones said that during the course of the America's Cup legislation, the noise appeared to commence in earnest about 10 pm. There was a noise of talking, laughing, fighting, singing. On Thursday nights their sleeping pattern, at home, is disturbed up until 1 am. Patrons sing, laugh and talk loudly, they use obscene language and there is the noise of glass breaking. There is a great difference between summer conditions and winter conditions. During the winter patrons leave the area a little faster. It was quiet for about two months after the last Court hearing in 1985. Then the situation complained about continued.

Mr David Leslie Emery, aged 65, of Unit 17, 25 The Avenue, Nedlands, gave evidence that he resides about 40 to 50 m from the hotel. He produced photographs, exhibits 7 and 8, to demonstrate where he lived and part of the vicinity. There were also photos of the hotel. He had been an objector on the occasion of the 1985 application. He referred to the difference between winter and summer. He did however point out that in order to sleep he uses ear plugs on Thursdays, Fridays and Saturdays, and also Sunday, until the hours were restricted to 8 pm. In addition, he takes a medically prescribed sedative to assist him to avoid the noise. He was of opinion that if the numbers at the hotel were restricted to 400, that might remedy the problem with noise.

Mr Emery said that a lesser crowd on the premises would reduce excessive noise and rowdyism.

I heard substantial evidence from Ms Merryl Jane Alexander, who resides at Unit 16, 168 Broadway. She has resided there since September 1985. Before she made her purchase, she enquired of the agent as to the noise situation and was given to understand that the late trading, except for Thursday evenings, had been stopped. In September 1985, she found that the noise was occurring and that it was noiser than she had ever experienced before, although it was not intolerable. Her unit faces the hotel across Broadway. The reserve which has been mentioned is alongside the units. She said that her unit was situated in such a position that there was no way to "escape from the hotel" except to go into the bathroom, when there was noise. I have inspected the units with counsel and witnesses and they are small premises.

From the middle of October 1986, she kept an accurate calendar of the noise levels. She also made complaints to various people in authority, including the Hon the Minister for Racing and Gaming. There was a sudden and dramatic increase in the noise during October 1986, which I would point out was subsequent to the first set of proceedings in this matter. That noise occurred on Wednesday, Thursday, Friday, Saturday and Sunday nights. She complained three times by telephone of this noise to persons at the hotel, but nothing was done.

Ms Alexander kept a detailed diary from 16 October 1986, which is exhibit 11, and which lists the noise and the music and its occurrence. The days of the week appear to be mainly Thursdays, Fridays and Saturdays, but these are not exclusively the days. The notes include references to whether music is not too loud or loud, or noisy or very noisy. There is also reference to the police coming on 22 December 1986, for example. Smashing of glasses and abominable language is referred to on 18 and 19 January 1987, for example. There is also reference to the rolling out of barrels in the early morning, on occasion, presumably by staff and not by Flanagan and Allen. There is also reference to shouting, screaming and cars. This pattern continues on the calendar through each month into March, April, and indeed, May, of 1987. That is for a period of eight months. I note that the 1986 marking for the early months on the calendar has been deleted and 1987 substituted. However, I accept that the notes were made on the dates on which they are said to be made.

Ms Alexander was one of a party which counted cars parked in the area on various nights. She did not think that she had a heightened susceptibility to the noise involved. If the noise was less and stopped at 10 pm, it would not annoy her. At p 301 of the transcript she objected to the renewal of the licence and reiterated that that was her objection.

There was evidence from Mr Neil George Leach, the Town Clerk of the City of Nedlands, that the hotel was a perennial problem as far as parking was concerned, and also general behaviour. I should say though that that evidence is as to complaint, not as to fact and I pay little attention to it. On today's standards the requirements for parking at the hotel would amount to 849.

The one occasion on which no noise came from the hotel, was noted. Tawarri Lodge is a couple of kilometres from the area.

Mr Terry Brian Sullivan, a ranger with the City of Nedlands, also gave evidence. From time to time his night duty work involves patrolling the area of the Nedlands Park Hotel. These nights are Thursday, Friday or Sunday, and in the course of his patrolling he has noticed people leaving the hotel. He has noticed people coming out with jugs and glasses of beer and going to the rugby park area and partying on. These people scream, swear and are generally "being a nuisance". He has noticed people urinating on lamp posts and people's fences and throwing rubbish. The traffic in the area is extremely congested on Thursday and Friday nights and on Sundays. Indeed, he described the traffic at certain times of the night as very dangerous. There are a number of other establishments in the area which attract people and traffic. He did not encounter noise at Jo Jo's, except for one occasion.

There was also evidence from Mr Peter Francis McKenzie, the Chief Health Surveyor for the City of Subiaco, who handed in exhibit 20, a report,

and there was a similar report from Mr John Cameron Mitchell, a health surveyor employed by the same city, whose report was tendered as exhibit 19.

These gentleman had conducted noise readings at various units at 168 Broadway, and at other units in the vicinity of the hotel.

On 3 December 1986, Mr McKenzie had a telephone conversation with Mr McKenzie (see pp 5 and 6 of the report). The Manager, Mr Peter Gilchrist, said that he would try and move people inside after 10 pm. There were readings done in December and January of 1986 and 1987 respectively. On occasions Mr McKenzie noticed a steady stream of people in the car park area creating undue noise by swearing, revving car engines etc. There was also band noise. There was noise clearly audible in Unit 16, 168 Broadway.

On 31 January 1987, Mr McKenzie advised the Manager, Mr Gilchrist, at 1.05 am of the results and possible action under the *Noise Abatement Act* 1972 (WA).

On 5 April 1987, at Unit 16, there was crowd noise, band noise, vehicle noise etc. From time to time, he also noticed clearly audible foul language in the vicinity.

Noise was recorded at the following addresses — Unit 14, 168 Broadway; 44, 40, 33 The Avenue; 35, 39, 41 and 45 The Esplanade, and 166 and 168 Broadway, as well as 28 The Avenue, on the corner of Broadway. There were observations of screaming, yelling, whistling, horns blowing and persons urinating in the front garden of 168 Broadway, and on the reserve nearby. This continued until 12.40 pm on 23 April 1987. At no time did staff encourage people to leave quickly or quietly from bar areas or car parks. At no time did Mr McKenzie observe hotel staff counting people entering or leaving premises to satisfy themselves that the premises were not over-crowded.

The crowd within the hotel prevented comfortable access for entry to the premises, with the verandah packed with people and the saloon bar packed shoulder to shoulder.

Mr Mitchell's evidence was not dissimilar.

Exhibit 21 was a report from Mr E G Shurven, Senior Health Surveyor for the City of Nedlands, dated 7 May 1987. He said there was difficulty in counting people, although from appearances the premises were overcrowded.

Constable Alwyn Wright's evidence is of consequence. He attended on 8 February 1987 with other members of the Liquor and Gaming Squad at about 10.30 pm, and he made a report of incidents that night. He made a rough count of person in the beer garden facing Broadway where there were approximately 400 people; 380 in the beer garden facing the river reserve; 80 people in the saloon bar area; 20 in the public bar. There was a steady flow of patrons, over three-quarters of an hour, carrying liquor in glasses leaving the premises and walking along Broadway.

There were two outside bars in the beer gardens. Towards closing time, persons, appearing to be staff, emerged to tell the crowd not to take their glasses out etc. The noise of the crowd could be heard on the north side of The Avenue.

Constable Wright's evidence as to the time he was there, he corrected, but his evidence as to occurrence was quite clear.

Mr McNeil's evidence (ie, p 335) adverted to the size of the crowds and

said he had never seen a crowd like the Sunday crowds. In February, he counted a total of 1,500 people on the premises.

Mr Greg Nicholas, a supervisor employed by the Liquor Licensing Division, gave evidence that on 15 September 1986, he gave instructions for Mr McHenry to apply for two permanent bar counters, located in the two beer gardens. There had been permission to use temporary bars in the beer gardens (see exhibit 10), but no permission from the Court to trade from these structures.

On 24 February 1987, he revisited the premises. Conclusions as to toilet facilities and their inadequacy are set out on p 389 et seq of the transcript.

Licensing and permits

On 11 November 1985, the Court had advised that it was prepared to extend the operation of the entertainment permit to include Thursdays, 11 pm to midnight. The operation was restricted to the areas marked as Garden Lounge, Winter Lounge and Dining area, on a plan supplied on 11 November 1985. A limit of 330 persons was imposed (see exhibit 22).

Exhibit 22 is a copy of the licence granted on 4 April 1986, to be current from 1 April 1986 until 31 March 1987. It sets out trading hours and prescribes a limit of 120 persons in the saloon bar at any one time, and 180 in the lounge bar. There is an entertainment permit of similar currency in respect of the Club Bar for Fridays and Saturdays. A condition is that not more than 140 persons be present in the entertainment area at the one time. The level of sound shall not at any time exceed the levels to be prescribed and adjusted in accordance with the *Noise Abatement Act* and its amendments, and in any event the sound shall be controlled so that it does not cause undue disturbance to house guests of the hotel.

There is an entertainment permit similar in currency issued for the Thursday, Friday and Saturday night of each week in respect of the hotel. (See licence No 2325 with similar conditions.) It prescribes the same conditions but limits the number of persons in the winter lounge to 320.

I am somewhat inhibited in that there is no contemporary plan of the licensed premises as approved.

The situation is that no entertainment permit will now obtain. However, by an order issued over the signature of Mr R J Chapman, the Executive Director of the Office of Racing and Gaming, and dated 31 March 1987, hotel premises may trade from 6 am to 12 midnight, on Monday to Saturday, and 11 am to 8 pm on Sundays, provided they notify to the Licensing Division, the hours when they propose to trade. However, at 12.55 am on 23 April 1987, on the evidence of Mr McKenzie, a band was playing, so that the premises were open as at that time on that occasion, although I am not aware of the hours the hotel is proposing to trade.

Noise

The *Environmental Protection Act* 1986 (WA), which was assented to on 10 December 1986, now deals with noise abatement (see s 81). That Act was proclaimed on 20 February 1987. "Noise" is defined to include "vibration of any frequency whether transmitted through air or any other physical medium".

The *Noise Abatement (Neighbourhood Annoyance) Regulations* 1979 (WA) provides that where (see reg 9) although by measurement or calculation

a noise does not exceed the level prescribed by the regulations, in the circumstances of the case, the noise nevertheless constitutes a nuisance, the local authority may accept that opinion as sufficient grounds for the issue of an abatement notice. Table 1 of the amended regulations of 1982 reveal for premises such as these, which it would seem to me to be classified under B.1 or 2 of the table as outdoor neighbourhood noise levels, those noise levels would be permissible as dB(A) 50 or 55 between 7 am and 7 pm, and 45 and 50 between 7 pm and 10 pm, Monday to Friday, and 40 and 45 from 10 pm and 7 am. Measurements were taken by Mr McKenzie, an authorised person under s 87(1) of the *Environmental Protection Act*, with apparatus used and approved under the *Noise Abatement Act*.

The reports of Mr Mitchell, who also took measurements in the same way, and Mr McKenzie, were assessed for the objector by Dr N P Norton. He disagreed with the addition of tonal penalties. He said that the noise levels associated with the hotel are not unduly excessive in relation to the general environment in that region. He also said that 8 per cent of the population will be highly annoyed when exposed to continuous day/night noise levels. He commented that the noise abatement regulations were excessively restrictive. He also said that findings such as by Dr Schultz in the United States could not be expected to be valid in relation to this country.

It was said, particularly, that those surveys would not be valid as applied to a small area here, instead of metropolitan spreads in the United States.

I am presented with a number of readings taken in accordance with the *Noise Abatement Act* provisions and contained in the exhibits to which I have referred.

Exhibit 26 purports to be a letter from the Town Clerk, City of Subiaco, dated 29 January 1987. The letter requests the licensee to forthwith abate the noise nuisance issuing from the subject hotel.

There is also a suggestion that it would be in the licensee's interest to ensure that patrons leaving the hotel do so quickly and in an orderly manner. *There is no evidence of any response to this letter.*

Exhibit 17 is a plan of the premises, which designates that entertainment permit area in blue, as at 24 February 1987.

I have adverted to the evidence of Dr Norton, Dr Spickett and Mr Overton.

I have adverted to the practice of a health surveyor making a subjective assessment and adding a penalty to the reading, a practice criticised by Dr Norton. I must say that I have had difficulty in reaching a decision put to me on the conflict between a person of academic eminence and another person applying practices against a statutory background in the field. I find difficulty in this case in reading a judgment on methodology, and its validity.

Of course, I am conscious that a condition imposed upon the licence granted on 4 April 1986 was that noise on the premises does not exceed the levels to be prescribed and adjusted in accordance with the *Noise Abatement Act*, now the *Environmental Protection Act*. Thus, since that Act and the regulations exist to protect the community, I would accept, although not bound to, the criteria for noise measurement which it applies. I accept those readings taken by Mr McKenzie and others, of the noise emanating from the premises and the other complained of noise in the vicinity measured by them.

I would say that I do not think, having observed the witnesses in the

witness box, and having heard the sort of noise described, that they were persons who were over-sensitive to noise, particularly since their complaints did not relate to the daytime (except for loud speakers for ordering food), or for some of the hours during which the hotel is open.

Previous decision — 1980

There was, in 1980, objection to the renewal of the licence of the same premises. Upon application by the same licensee, which was heard by the Licensing Court of Western Australia.

The Court found that it was clear that the occupiers of some premises near the hotel were suffering inconvenience and hardship. *The Court then explained that it had not imposed limits on the number of persons in the beer gardens, because, having regard to the open nature of the area, limits in numbers would be impossible to control.* (My italics.)

The objector sought a limitation on the total number of patrons in the hotel and a requirement that the licensee provide parking areas for his patrons' vehicles.

The Court said that there was no evidence as to the manner in which the licence was conducted and no direct evidence as to the persons complained of being patrons of the hotel, although the Court drew that inference.

Car count

The car count (exhibit 28) reveals that, within the area designated in red and yellow on the map, exhibit 12, between 10.30 to 11 pm approximately, on week nights, and 7 to 7.30 pm approximately, on Sundays, there were car counts ranging from 700 or 800 on Sunday nights and Thursday nights mainly, to about 142, for example, on a Tuesday night within the area. It is clear, of course, that all motor vehicles would not necessarily be those of persons attending the hotel.

The law

This application is made pursuant to s 76, which provides for applications for renewal of licences to be made at certain times and in the prescribed form.

The licence had expired on 31 March 1987, by virtue of the regulations, but consideration of its continuing pending the outcome of the hearing is a matter for the Director, pursuant to s 81(3), and that aspect was not mentioned to me by counsel, no doubt because it is not my concern.

The objectors involved are those entitled to apply if the application were for the granting of a licence (see s 79), or for the granting of a permit, as the case might be. Thus, once the application to renew the entertainment permit was withdrawn, s 56 and s 58(1) and (2) no longer apply (see s 79(2)). However, s 55(2) and (3) are deemed to apply with such adaptations as may be necessary to these objections. In addition, s 80(1) provides:

> "The objections that may be made to the renewal of a licence or permit are such of the objections that may be made to the granting of a licence or the issue of a permit as the licensing authority considers applicable, in the circumstances of the case."

In this case, no issue was taken by the applicant with the objections filed, and indeed particulars were sought of them by the applicant, and I ordered these to be provided. Further, as I said during the course of the hearing, the objections taken were and are applicable in the circumstances of this case.

Section 81 governs procedure generally.

Section 81(2) gives the Court the power in granting the renewal of a licence etc, to notify the licensee or permit holder of any matter relating to the operation of the licence or permit, the condition of the licensed premises or premises in which the permit operates or such other matter as, in the opinion of the licensing authority, requires to be rectified and may by the notice attach, subject to subs (2a), conditions to the operation of the licence or permit or grant a renewal for such lesser period than that sought, as the licensing authority thinks fit.

Section 82 provides:

> "Where an objection to the renewal of a licence is based on any inadequacy or unsuitability of the licensed premises or of the furniture, fittings, accommodation, services or amenities on those premises, the licensing authority may, after giving the applicant for the renewal an opportunity of being heard, exercise any of the powers conferred on the licensing authority by this Act to require a variation of the licensed premises and may suspend the licence pending compliance with any such requirement or may grant the renewal for such period and subject to such terms and conditions as the licensing authority thinks fit."

That section, of course, qualifies what might occur in relation to an objection taken under s 57(2)(a)(ii). The objections which obviously apply here are, of course, those relating to a hotel, and enumerated in the notice of objection, with the exception of objection (d).

By virtue of s 61(1), the burden of establishing the validity of any objection lies on the objectors. That burden is to be discharged in accordance with the civil standard of proof (see *Briginshaw v Briginshaw* (1938) 60 CLR 336).

What must be understood is this — once the validity of an objection is established to the satisfaction of the Court, it has no alternative but to refuse the application, with the possible exception of matters to which s 81(2) apply.

Proceedings relating to the granting of licences are not inter partes in the ordinary sense of there being an applicant and respondent or respondents, but legislature contemplated that proceedings would be adversary in nature in the manner of normal proceedings before a court (see per Olney J in *Re Dunsborough Districts Country Club Inc* [1982] WAR 321 at 324).

The scheme of the Act is to specify with considerable particularity the rights duties and powers of the three participants in an application before the Court, ie, the applicant and the objectors, and the Court. (See also per Wickham J in *Re Tiaki Pty Ltd* (unreported, appeal Nos 90 of 1980 and 106 of 1980.) Indeed, the Court is required not to be doctrinaire. Thus, consistent with the sort of important issues which are being decided in a matter such as this, the rigid controls exercised in a criminal trial do not necessarily apply.

Section 17 requires the Court to act without undue formality and to be not bound by the rules of evidence. In this matter, I permitted amendment to the particulars filed consistent with those injunctions. I also doubt, as I said in these proceedings, that a "no case" submission is a warrantable procedure. If it were used, it would of course require the consideration of the question of whether the objector should elect to give evidence or not.

Some attention must be paid not only to the words of the prescribed objections, but to the meaning to be given those words at law.

Objection (a): I have in recent decisions, namely "The Moorings" and

"Joshua's Family Bistro", with reference to the words "accommodation and services" held that that phrase encompasses the services offered in premises and the accommodation provided; the "accommodation" being more than "accommodation" in any narrow sense.

"Accommodation" means more than a providing of a room, in this context. In fact, as I have held following the approach adopted in *Ex parte Foote* [1933] SASR 142, "accommodation" is not limited to additional bed and sitting rooms but includes anything that supplies the necessities or ministers to the public. In my opinion, that includes, in this day and age, in relation to a hotel, parking space.

"Inadequate to meet the needs of the public in the area", is also an important phrase, in the objection.

"Need of the public" was considered in *Toohey v Taylor* [1983] 1 NSWLR 743 at 745. That case related to the NSW equivalent of our provision as to "reasonable requirements" (see s 57(2)(a)(i)). Nonetheless, it assists in pointing out an approach to deciding whether the accommodation and services provided by the applicant are inadequate to meet the needs of the public in the area, having regard to what those needs are or the type of licence, namely, a hotel licence. This is a value judgment.

Thus, I am required to decide whether the accommodation, including parking and services provided are inadequate to meet the needs of the public in the area, ie, the affected area. That includes a consideration of what the public needs are in terms of accommodation and of services. Alternatively, and secondly, one must enquire whether the accommodation and services are inadequate for the type of licence sought. No licence is being sought here, so seemingly that consideration would not apply, except by adaptation under s 80.

Section 73 does not apply as a measure of standards because this is not a grant and the section applies to grants of licences and objections thereto.

The two matters which arise in this context are parking and toilet facilities. Clearly, on the evidence, the parking spaces (109), could not accommodate all patrons. Indeed, it could not be expected, in this day and age, that all would park on the property. Of course, not all of the parked cars counted in the area would be conveying persons to the hotel premises. However, on the evidence, the crowds, are larger on Sunday and Thursday nights. The car counts for those nights are increased over other nights, generally speaking, and the only crowds on the evidence, of any size which congregate in that vicinity attend the hotel.

To some significant extent, the vicinity of the hotel is its car park.

Thus, because of the lack of car parking compared to numbers attending, the accommodation of the hotel is inadequate to meet the needs of the public in the area. If the numbers attending were less, that would not be so. There is no evidence before me that it is inadequate for the type of licence sought.

The next matter which relates to pure accommodation is that of toilet facilities.

On Mr Nicholas' evidence, there are clearly insufficient toilets for 1,500 people, or indeed for large numbers, for example. Even if he is wrong on a formula approach to that aspect, then the toilet facilities are distributed as his evidence reveals so that they cannot cater for the persons in the beer garden. Indeed, the toilet facilities upstairs could not, in my opinion, be easily located

by people downstairs (where the crowds are). Further, the toilets upstairs clearly are connected with the restaurant up there.

Thus, in that respect also, accommodation is inadequate.

Without any demonstrated ability to control the crowd numbers outside in the beer garden, there is no possibility of the facilities (ie) two sets of toilets as shown on exhibit 10, being adequate in accommodation or location. Mr McKenzie's evidence of patrons packed in, shoulder to shoulder, confirms this inadequacy. Thus, the facility, even without evidence of comparison, is inadequate.

Objection (b): The next objection is that the quiet of the immediate vicinity of the premises to which the application relates would be unduly disturbed if a licence were granted. For "granted", substitute "renewed" in the context of this matter.

One must ascertain what "quiet" means. For example, does "quiet" mean "quiet" in the sense of noise, or does it mean "quiet" in a broader sense.

In NSW the objection is couched pursuant to s 45 of the NSW Act in terms of "disturbance of the quiet and good order of the neighbourhood".

In its broad sense "quiet" would be the equivalent of "quiet enjoyment", ie, thus, the enjoyment of the neighbourhood by its inhabitants would be said to be disturbed.

The Victorian provisions provide that an objection may be made on the basis that the quiet of the place in which such premises are situate will be disturbed if the licence is granted. There is no Victorian precedent for the consideration of "quiet". "Quiet" in my opinion means the undisturbed peace of the neighbourhood. The noun associated with "disturbed" is "disturbance" and "disturbance" implies something that is taking place against the will of the person who is disturbed and involves interruption of tranquility, agitation, tumult, uproar, according to the Concise Oxford Dictionary.

This question was also considered in the context of the word "unduly" by the Supreme Court of South Australia (in Banco) in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207 at 212, where the remarks of the judge at first instance were approved ". . . by disturbance I mean the interruption of a person's peace in the usual regular and lawful enjoyment of his property". With any necessary grammatical adaptation, I would adopt that notion to the words "quiet" and "disturbed" in the objection which recites s 57(2)(a)(iv).

The question of what "immediate vicinity" means has also to be considered.

In *McHenry v City of Nedlands* (unreported, No 92 of 1985, Supreme Court of WA), Kennedy J considered the meaning of the words "immediate vicinity". In that case, the words used were "the quiet of the immediate vicinity of the premises" as applied in s 58B(2). His Honour first held that he was unable to restrict the scope of s 58B(2)(a), only to events which were likely to occur on the licensed premises themselves, on the basis that the relevant paragraph was not so restricted in its terms and the "quiet of the immediate vicinity" can be disturbed just as much if not more by the conduct off the premises of the persons resorting to those premises as by their conduct on the premises. I respectfully adopt that view. His Honour also adverted to the expression "immediate vicinity", and the different approaches adopted in NSW and Victoria. The Victorian approach has been followed in New

Zealand. His Honour referred to *Ex parte Paton* (1929) 30 SR (NSW) 67, *Dean v Lewitz* (1958) 76 WN (NSW) 349, *Ex parte Godkin; Re Fitzmaurice* (1969) 90 WN (Pt 1) (NSW) 159, *Mullens v Norton* [1938] VLR 292, *MacPherson v Invercargill Licensing Trust* [1944] NZLR 692.

The Victorian view is that the words mean simply "very near" and thus, the question is one of fact in every case.

The NSW approach is, as his Honour said, in that it does not necessarily regard premises as being in the immediate vicinity to another if, ie, notwithstanding their being in close vicinity to one another, they are out of sight or hearing. However, his Honour was not called upon to determine that question.

In *Villanova Nominees Pty Ltd v Westwood* (unreported, No 258 of 1984, Supreme Court of WA, per Rowland J), an objection was taken to the renewal of a hotel licence and an entertainment permit on the basis that the quiet of the immediate vicinity of the premises would be unduly disturbed if a licence or permit were granted.

That was also a case in which the objectors alleged the quiet of the vicinity was ruined by noisy and rowdy patrons leaving the hotel, fighting, urinating, collecting vehicles, driving off and causing a commotion etc. Rowland J said that his initial reaction to the submission that the Licensing Court is not entitled, as a matter of law, to look at what is occurring in the streets and public parks which are in the vicinity of the hotel is that it is wrong, *and that in the context of an application to establish a liquor outlet the immediate vicinity would include any part of the area that is directly affected by what is to happen within the licensed area, and what is likely to happen in the nearby area as a result of the licence or permit being granted or permitted where it is.* However, those remarks were obiter. *Nonetheless, I would apply them in this matter.* (My italics.)

However, having regard to the dicta in both *Villanova* and *McHenry*, I must say that the Victorian approach (and followed by New Zealand), appeals to me.

The legislation contemplates the position that if a licence were granted, the quiet of the immediate vicinity should be unduly disturbed, ie, it is objectionable to allow in an area a licensed premises which would unduly disturb its quiet. However, that objection is limited in scope. It is only a particular vicinity which is referred to, ie, "immediate". What is "immediate" must depend on the facts in any case and the area which is likely to be disturbed would seem to me to be within the immediate vicinity.

In *R v Minister of Health; Ex parte Tilly's Pty Ltd* [1967] WAR 60 (FC), the meaning of "immediate vicinity" albeit that it was considered in the context of the *Pharmacy Act* 1964 (WA) was said to be a matter of fact in all the circumstances (see per Nevile J at 60).

Of course, the objection cannot be made out unless the quiet will be "unduly" disturbed. In other words, it is not enough merely that the immediate vicinity will be disturbed.

This question was decided by the Supreme Court of South Australia (in Banco) in *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207, in the context of whether persons who resided "in the vicinity of licensed premises" were "unduly disturbed or inconvenienced".

Wells J with whom Zelling and Bollen JJ agreed, quoted with approval the

reasons of the learned acting judge at first instance (see 212). His Honour, the acting judge, at first instance said:

> "The accepted meaning of the word 'undue' is 'not appropriate or suitable', 'going beyond what is appropriate warranted or natural', 'excessive' and so on. In other words, in terms of this legislation, has it been shown that the type of disturbance (by disturbance I mean the interruption of a person's peace in the usual, regular enjoyment of his property) limited in its extent and regularity as I have found, is sufficient to be classed as undue. Of course, residents living nearby a hotel must expect a certain amount of noise and disturbance which naturally occurs. Any resident who lives nearby a hotel must expect a certain amount of necessary or unusual noise from people either arriving at, or more likely, departing from, the premises. From time to time, one or more of the patrons might be expected to be noisier than others — calling out, even yelling and screaming might occur. In extreme cases, a fight or two. These are, in my experience, the types of disorder and inconvenience that might be expected by nearby residents."

Those dicta, with respect, dealing with the meaning of "unduly", I adopt. Of course, it also seems to me that the word "unduly" must be qualified by the nature of the neighbourhood. In a very quiet neighbourhood, disturbance would be undue, which would not be undue in a more noisy neighbourhood. For example, in an industrial area during the day or even at night, since it would be deserted by residents or passersby, or on a busy road or highway.

The facts in that case are not irrelevant.

In that case, as the learned Acting Judge said, the licensee had gone to considerable lengths to alleviate the situation; he found there, as a probability,

> "from time to time, perhaps once or twice a month, some residents are disturbed by either persons going to or leaving the hotel premises. This disturbance is generally the sound of loud voices, sometimes screaming, sometimes foul language and like behaviour. The question that must be asked is — is this disturbance undue?"

The Acting Judge expressed himself as in no doubt that disturbance between the hours of 1 am and 3 am, occurring as it did perhaps once or twice a month was undue in the circumstances of the case.

In *McHenry's* case (op cit), Kennedy J said (see 5): "In my opinion, the Licensing Court was justified in having regard to the past and therefore to the probable future conduct of the patrons off the premises."

The question of what the word "would" means in s 57(2)(a)(iv) must be considered. "Would" is the subjunctive mood of "will".

Therefore, "would" in that context means "will", not "might".

The question to be asked is: "On the balance of probabilities, will the immediate vicinity of the premises be unduly disturbed if the licence is renewed?"

Objection (c): I now turn to the objection made by virtue of s 57(1)(a)(i) which alleges that the applicant is not a suitable person to be the holder, or responsible as licensee, of the licence sought. For "sought" in that section one should now read "sought to be renewed".

The objection is made out, if it is proven that the applicant is not of good

character or repute, or is not a suitable person to be the holder of the licence sought.

If a grave criminal offence is proven against an applicant, then he/she must be regarded as having lost his/her good character; consequently, that person is not a suitable person (see *R v Licensing Authority & Mount Morgan; Ex parte Foley* [1906] St R Qd 221).

Of course, where an applicant bears an excellent character and is otherwise qualified, the mere fact that at a date 20 years previously he/she was convicted of a comparatively insignificant offence, is not of itself sufficient to justify the Liquor Licensing Court disapproving him. (See *Jenkins v Licensing Court* (1947) ALR 526.)

That the applicant is not a fit and proper person to be licensed does not necessarily impute any moral blameworthiness to the applicant. (See *Thomas v Wilkinson* [1932] SASR 448.) I apprehend "fit and proper" to be almost synonymous with "suitable".

In one case, where an applicant for a renewal of a licence gave an undertaking in open court to remove a public drinking bar which had opened and to conduct his premises for the future as an hotel and failed for 12 months to do so, it was held that such conduct was evidence to sustain the decision of the licensing authority that the applicant was not of good character. (See *R v Dublin JJ* (1903) 2 IR 429.) It would also be evidence of unsuitability under the *Liquor Act* (1970) (as amended).

Other matters

It should be said that, by virtue of s 61(1), the burden of establishing the validity of any objection lies on the objector, but by s 61(2) it is clearly provided that where the validity of an objection is established to the satisfaction of the licensing authority, it shall refuse the application to which the application relates.

Thus, once the objector discharges the burden, the Court is left with no alternative but to refuse the application.

The only evidence called in this matter for the objector was that of Dr Norton.

Cross on Evidence (D M Byrne and J D Heydon, 3rd Aust ed, 1986) 1.38 says ". . . that the evidence against a man may be greatly strengthened by his failure to give an explanation or by the inadequacy of the explanation which he does give; these negative facts can therefore be considered".

Thus, the unexplained failure by a party to give evidence, to call witnesses or to tender documents or other evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted that party's case. (See *Jones v Dunkel* (1959) 101 CLR 298 at 308, 311, 320-321.)

By virtue of s 55(2), if this were a new hotel, then a resident of the affected area might object and so can object to an application for renewal.

By virtue of s 57(1)(a), a member of the public may object.

These objectors are, of course, governed by s 61. Its effect I have already dealt with.

Suffice it to repeat that once an objection is established, according to the proper standard of proof and the onus discharged, the licensing authority has no option but to refuse that application. There is no question of compromise.

except by the application of s 82(i), but that is rather a section which might assist after the event if a s 57(2)(a)(ii) objection is made out. (My italics.)

Each objection — (a)(b)(c) — is an objection standing on its own. Therefore, any one of the objections may be established. The fourth objection, objection (d), is no longer appropriate.

Conclusion

The objections in this matter are now three.

Objection (a): The first is that the accommodation and services provided by the applicant are inadequate to meet the needs of the public in the area or for the type of licence. Section 73, as I have said, will not apply.

The evidence in the matter is that there is not sufficient space to accommodate the public. There is not sufficient parking for patrons.

The evidence contained in exhibit 28 and in exhibit 15, as to the number of cars hauled away, as well as the evidence of parking in or about private premises, support that view. It is certainly probable that a large number of the patrons, having regard to the sort of crowds that gather there, park in the area and that some park on private premises. It is noteworthy that the streets close to the hotel are parked over and that the numbers increase on Sunday and Thursday nights etc, ie, nights when witnesses said the attendance at the hotel increased greatly. There is simply insufficient parking — only 109 bays, but that is not the total answer.

I accept the evidence of the police officer, Sergeant Alwyn Wright, who counted 1,500 people on the premises one night and there is no question but that the parking facilities are inadequate. There is also a general impression amongst the witnesses that there is overcrowding. (See Mr Shurven's evidence and the evidence of Mr McKenzie.)

The next question is whether the toilet facilities are adequate, and there was some debate on that question. In practice they are certainly not adequate. The amount of urinating and defecating which occurs outside the premises is some indication of that.

The fact that there are three beer gardens outside, with limited access to toilets, is evidence of that. Upstairs, at the hotel, there are toilets, but these are simply not easily accessible or even visible to people who are downstairs, nor would one know of them unless one were directed to them.

Thus, that aspect of the accommodation is inadequate. It does not meet the needs of the public in the area, on the evidence which I have heard.

I deal with the particulars of that objection, which as amended at 11 May 1987, appear on pp 6-7 of those amended particulars.

3.3.1 The parking facilities clearly are totally inadequate for the number of patrons which repair to the hotel, on busy nights in particular. That evidence is clear. Of course, one takes into account that on licensee could provide at all times, sufficient parking on hotel premises for all patrons, nor is it reasonable to expect that that should occur. However, the patronage should be restricted to reasonable limits by the licensee so that the hotel is patronised, but the immediate vicinity and premises nearby do not just become an extension of the hotel's car park, as clearly, on the evidence in this case, they have become, too often. I find this particular established.

3.2.2 This alleges that the licensed premises in its current structure and form

cannot prevent the noise created on the licensed premises from being emitted and causing a deleterious effect on the neighbourhood amenity and on the immediate residents. The noise permeates the privacy, quiet and enjoyment of the residents in the homes. I do not think that this is a particular of this objection. In my opinion, this objection, as couched in the statute, s 57(2)(ia)(ii) relates to what accommodation and services are provided to meet the needs of the public in the sense of the public needs of licensed premises to repair to. I do not find for that reason that particular appropriate to this objection.

3.3.3 This alleges "inadequate acoustic treatment of the premises", for the same reason, I do not uphold it as an appropriate particular of the objection.

3.3.4 This particular alleges that "the designated licensed premises are unable to cater adequately for the large patronage visiting the hotel". In relation to the provision of toilets, both as to numbers and situation, this is correct and, in addition, in relation to parking, this is correct, and that particular is appropriate and proven. In addition, the fact of the matter is that the hotel used according to its design without grafting on external unauthorised permanent bars in the form of beer gardens, could more adequately cater for its patronage, and the patronage could be more controlled. That particular is proven.

3.3.5 There are insufficient toilet facilities, as I have indicated above. First, on Mr McKenzie's and Mr Nicholas' evidence, they are not adequate. On a consideration of practicalities, the toilets are not sufficient in number and are not properly sited to cater for patrons. There are not sufficient toilets downstairs where people congregate and, on the evidence, there are times when there are too many people downstairs. There are no outdoor toilets to cater properly for the beer gardens. Indeed, some of the problem has arisen because the beer gardens are used as permanent bars and not as places for persons to take their liquor to, and this has been done without authority.

Exhibit 17 reveals that there is a male toilet next to the cool room, which can be entered by leaving one beer garden. There is one female toilet next to it. There are other toilets in the saloon bar. There are no others downstairs.

I find this and the other particulars of this objection proven and the facts which I have outlined above proven on the balance of probabilities.

Objection (b): The next objection is that the quiet of the immediate vicinity of the premises to which the application relates would be unduly disturbed.

The objection contained in s 57(2)(iv) provides that that is the form of the objection. Thus, it would seem to matter not how or why the immediate vicinity of the premises to which the application relates would be unduly disturbed if the Court finds, on the evidence, on the balance of probabilities, that it would be.

One must ask whether, if the licence renewal is allowed, the quiet of the immediate vicinity of the premises will be disturbed on the balance of probabilities.

The word "quiet", in my opinion, means more than "quiet" in the narrow sense, as I have indicated above with reference to the *Hackney* case (op cit). It

means that immediate vicinity is an area which is not to be disturbed and the use of the same by its residents is not to be disrupted (ie) unduly. That disturbance may occur through noise, however created, trespass, congestion, unruly behaviour, loud music, obscene behaviour, damage to property, littering etc. The list cannot be complete.

The "immediate vicinity", applying the authorities to which I have referred above, is a matter of fact in the circumstances. In this case, it is not necessary to strictly declare it except to say that the immediate vicinity encompasses the areas where resided all the witnesses who gave evidence. In that most of the witnesses resided very close to the hotel, there is no difficulty, in any event.

Even the evidence of Mr Rodger Richard Jones, who resided 150 m away, if it were not accepted on its own account, is corroboration of the evidence given by witnesses who resided closer.

It must be said, following Kennedy J in *McHenry's* case, (op cit) and Rowland J in *Villanova's* case (op cit), that the disturbance is a matter for consideration even if it is committed by patrons of the hotel, off the premises.

In this case, there is no doubt, on the evidence I have referred to above and, indeed, all of the evidence for the applicant, that the quiet of the immediate vicinity of the premises has been disturbed. It has been disturbed by foul language, shouting, fighting, whistling, urinating, trespass, damage, littering, fornicating, defecating, vomiting, breaking glass, crowd noise, music noise, rolling of barrels, using cars noisily and dangerously, slamming of car doors, loud playing of car stereos, by metal barrels being rolled around in the early hours of the morning etc. I must say that having observed the witnesses for the objectors, I was struck by the fact that, generally speaking, they were a group of persons who seemed to understate their difficulties. *Their complaints were not trivial. They were not overstated. There was not an over-sensitivity to noises naturally occurring in the vicinity of the hotel.*

Mrs Alexander's careful documentation of the problems was impressive. Mr Sullivan's and Mr McKenzie's evidence corroborated the residents' evidence. Mr Sullivan was a most impressive witness.

The disturbances have had an effect, in that persons could not sleep; their work suffered through lack of sleep; their enjoyment of their premises was disturbed by people urinating, damaging plants etc. There was a necessary remodelling of the Jones' house to try and obviate the problems etc. As Mrs Sheen said, the hotel intruded into her whole life; and that really has been the problem for the objectors.

The scientific evidence was a matter of dispute between witnesses Dr Norton and Mr Overton. Notwithstanding what is the scientific measure, I find that the repetitive nature and all pervading nature of the noise, together with the offensiveness of much of the behaviour and the inevitable noise of a band and a large crowd are sufficient to prove that the immediate vicinity, at least from October 1986 to May 1987 was seriously and certainly disturbed. Those disturbances occurred mainly on Thursday and Sunday evenings, but also on Friday, Saturday and Wednesdays to some extent and indeed even on other evenings during the week.

As far back as 1980, the previous Court found that residents were suffering inconvenience and hardship from this hotel, but declined to attribute this to the manner of running the hotel.

In 1985, the complaints of residents of similar behaviour at this hotel were found sufficient for the Licensing Court to take action by imposing restrictive conditions. Why these conditions were altered, later, is not at all clear.

Some question might arise as to whether the matters complained of arose from this hotel. It is clear from the evidence of all the witnesses, including Mr McKenzie and Mr Sullivan, notwithstanding cross-examination by Mr Utting, that the hotel is the cause of the problems of which I have heard, and I so find.

On the evidence, it is the largest establishment in the area near to the residents, and they have observed it over a long period. Police have visited the premises, municipal officers have kept it under surveillance.

Mrs Jones said that, from 1980, things became worse. After the 1985 decision, there was a hiatus in the disturbance pattern, which did not last for many months. It was also clear that the winter months are relatively free from disturbance, but from October 1986 to May 1987 there has been disturbance.

The question is whether the immediate vicinity would be unduly disturbed by the renewal. The answer is that it clearly would be if the current situation continued.

First, the premises themselves are situated in basically a residential area with services which support the area. They are not in an industrial area. They are not on a busy highway. They are not miles from anywhere. They are on a reasonably busy road.

The premises at first, as Mrs Jones said, were run as a hotel in a residential area. They have been converted to something they are not by grafting on to them beer gardens, where it is impossible to control the crowd numbers. (See the observation in the previous court.) From my own inspection, I would agree with that.

Something was made in his address by Mr Utting of the fact that some residents said in cross-examination that if the hours of opening were restricted or numbers of patrons were restricted, then the hotel could continue. However, Mrs Alexander, for one, maintained that her objection was to the renewal of the licence.

I should say that before me are objections which the objectors have set out to prove. If they do so, certain consequences follow. There is no evidence as to what steps, if any, might be taken by the applicant willingly or otherwise to solve any problems. Up until 23 April 1987, for example, the premises were still open till late and there were difficulties in May 1987. Conditions which might be imposed are relevant if a renewal is allowed or under s 81(2) which relates to objection (a). However, in relation to objections (b) and (c), there is no modification of s 61(2).

The premises properly can accommodate a few hundred people, not 1,500. Whilst they are conducted in this manner, the area will have in part to become the hotel's car park with all the disturbance that ensues. I should make it quite clear that I am not suggesting that a licensee is required to provide parking for all his/her patrons. That is not my view. However, a licensee cannot expect to provide a small amount of parking and then attract patrons in such large numbers that the neighbourhood is used as a large scale parking lot, and persons' enjoyment of their premises is disturbed.

By attracting large crowds, particularly if they are young people, there will be inevitable noise and it will be impossible to control them in their drinking

and irresponsible behaviour will occur. This behaviour has occurred for some years. It might be said that only a few persons have objected, but the question is whether the immediate vicinity is unduly disturbed.

The objectors consisted of people of different ages, sexes and occupations. They did not strike me as persons who were of the 8 per cent who might be highly annoyed even if that finding scientifically is valid. They did not complain of what occurred during the day to any extent. Of course, a person who lives near a hotel must expect some disturbance, some whistling, singing, loud talk, the occasional fight even, as the *Hackney* case (op cit) has observed. Indeed, what is complained of here is more serious than the complaints in the *Hackney* case.

It was submitted to me that Sergeant Lockhart had referred to the hotel being run in an orderly manner on the occasions when he attended there. I must say that he did not say when that was or what hour or hours, and in particular whether it was in the evenings when a band was playing, so that evidence is not convincing as compared to that of the other witnesses.

The former Court fixed as a condition of the licence and entertainments permits that the *Noise Abatement Act* levels be not exceeded. In fact, contrary to that condition, they have been.

After the proceedings in 1985, the disturbance pattern stopped.

Kennedy J, of course, said in *McHenry's* case (op cit), that the Licensing Court was justified in having regard to the past and therefore to the probable future behaviour of patrons of the premises. The same observation could be made in relation to the way the premises have been conducted. I do not have regard to the past conduct of patrons and to the evidence of the manner in which the licensed premises have been conducted.

I must say that it is not valid to say that if the area is policed it will change. The evidence is that it is not policed to the extent that the problems presented and there is no evidence that it will be. In any event, it does not answer the objection to say that if policing occurred then there would be no disturbance. Some policing, in fact, does occur, ie, through occasional visits by police officers and through the City of Subiaco rangers and others to police parking. There is no evidence of any response by the applicant or anyone else on his behalf to requests from any objector to turn down the noise, or indeed to the letter, exhibit 26, from the City of Subiaco, written on 29 January 1987, which constituted a formal notice to abate noise. It is not the role of the police or any other authority to substitute themselves for the licensee who has a responsibility to conduct the premises so that they do not disturb unduly the quiet of the immediate vicinity.

(1) On the evidence, since at least 1980, these premises have caused, quite consistently, disturbance to residents.

(2) The premises continued to do so even after court proceedings on two occasions.

(3) The licensee has not changed in that time. The problems have not changed.

(4) The disturbances referred to in this case were occasioned to some residents only, but they reside in the immediate vicinity, and the sort of disturbance which has occurred in the past is far more severe than that referred to in the *Hackney* case (op cit), where the disturbance was found to be undue.

(5) Although the winter months are less problematical, the disturbance has occurred at late hours and at earlier hours on Sundays, from October 1986 to May 1987, which constitutes nine months out of twelve. That on its own constitutes very substantial evidence of past undue disturbance of the immediate vicinity of the premises, having regard to what residents in the immediate vicinity of a hotel should be required to tolerate and to the nature of the area in the immediate vicinity.

(6) The disturbance is not limited to noise, but includes all the other sorts of conduct and intrusion which I have mentioned and which go beyond what a person residing close to a hotel should be required to tolerate.

(6A) The complaints were not trivial or overstated. There was not an over-sensitivity to noises occurring in the vicinity of the hotel. The noise apparatus measurements corroborate the residents, if that were necessary.

(7) There is no evidence of any real attempt on the part of the licensee to improve the situation. There was an improvement after the 1985 proceedings, but I am not aware of the reason for the same, and indeed it was temporary only.

(8) The evidence of witnesses was that the quiet of the "immediate vicinity" is being disturbed, sleep patterns, enjoyment of their properties etc, by conduct, noise, parking etc, and this is clearly the case.

(9) It is clear that the hotel, which is a smaller type hotel in a mainly residential, or at least reasonably quiet area, is being conducted like a large hotel in a different sort of area. As long as that occurs it will disturb the immediate vicinity, as it clearly does now. That it is being so used is inferrable from the consistent manner of conduct of the premises, the evidence of overcrowding, noise etc. I have no reason to believe that the hotel will in future be used in the manner I have described above.

(10) That it does so is also due to the failure of the licensee so far as the evidence reveals to conduct it any other way. After the 1985 proceedings or even the 1980 proceedings, one would have expected there to have been a permanent change. (In 1985 there was a temporary change.)

(11) No evidence has been given that indicates anything will be done to alter the situation, either by controlling patrons, limiting numbers, or any other means. There is no evidence that the premises will be open during those hours only when a disturbance might not arise.

(12) If I am permitted, as Kennedy J said, to look at the past behaviour of the patrons, I also am permitted to look at the account of the past modus operandi of the premises. The fact is that residents have been disturbed, at least since 1980, by noise and activities on and emanating from the hotel, (of which the outside beer gardens are a large contributing factor), with some frequency, though probably excluding winter months to a large extent. A too large patronage which is not controlled intrudes on the immediate vicinity.

It must be said that the manner in which the premises are being conducted means that it is almost inevitable that they will unduly disturb the quiet of the immediate vicinity. The manner of their conduct is one which permits noise and which attracts an overlarge

patronage, who are permitted to wander off the premises with alcohol in their hands, inter alia; in addition, there is a band noise, crowd noise etc.

I therefore find on the balance of probabilities that if the licence is renewed, then the immediate vicinity of the premises known as the Nedlands Park Hotel will be disturbed.

Thus, the particulars 4.3.1 to 4.3.7 inclusive, are proven, with the exception of 4.2.7. (ie, on p 9).

4.5.2; 4.6.1 and 4.6.2, as well as 4.(2)A are made out. 4.5.3. is not made out (ie, on p 10).

4.3.1 and 4.4.1 (ie, on p 11) are also made out.

Objection (c): This alleges that the applicant is not a suitable person to be the holder or responsible as licensee of the licence sought.

This section must be seen, as indeed must all sections, against the background of the Act. The full title of the Act "it is an Act to revise, consolidate and amend the law relating to the sale, supply and consumption of liquor and the services to be rendered in conjunction with the sale and supply of liquor and for incidental and other purposes".

It is an Act which gives the community a direct interest in its administration. Members of the public may object to a licence being granted or renewed, and may do so, inter alia, on the ground of the unsuitability of the licensee.

The objection as expressed in this case, does not impugn the character or repute of the applicant. It does impugn his suitability to be the holder of the licence sought. It does dispute that he is a suitable person to be responsible as the licensee of the licence sought. What therefore do the words "suitable or responsible" mean.

I have already adverted to *Re Poole* (1888) 14 VLR 519, where it was held that if a grave criminal offence is clearly proven against the applicant, he must be regarded as having lost his good character and consequently is not a suitable person and may rightly be refused a licence. That would appear to me to be a valid comment.

Legislation in other jurisdictions has been concerned with the use of the words "fit", "unfit", "not a fit and proper person". (See, for example, *Thomas v Wilkinson* (op cit), *Jenkins v Licensing Court* (op cit), and *Re Watson* [1949] VLR 342.) Also *De Young v Eldridge* [1951] SASR 112.

In *Ainsworth Nominees Pty Ltd v Superintendent of Licences* (unreported, No 89 of 1986 Supreme Court of NSW), Yeldham J held: "that the question of whether a person was fit and proper to hold a licence looked at against the background of the object of the inquiry is a question of degree."

The object of the inquiry and its background are, I think, set out below.

I was surprised to hear from Sergeant Lockhart that there are licences held by persons with far worse records, although that would be possible if a person having a record which was quite some years old had become suitable in all respects to hold a licence subsequently.

The holder of a licence is a person responsible as licensee in a semi public position. He/she is responsible for running the premises according to law. He/she is responsible for running the premises so that it does not disturb the quiet of the neighbourhood *unduly*. (My italics.) He/she must, upon application, be regarded as of good character and must produce references to

that effect. He/she must therefore maintain that good character and suitability or an objection can be made which can be upheld. Plainly, a person need not be of bad character to be not suitable. However, a person of bad character may well be unsuitable.

The law should be upheld by a licensee and he/she/it should not breach it. A licensee should run premises in an orderly manner. A licensee conducts a premises which dispenses liquor. Such a premises is often the focal part of the social life of the neighbourhood and the person who is the licensee must be a person capable of carrying out and indeed concerned with carrying out a licensee's statutory and community obligations. If the licensee does not, the community in various forms, can object. In this case, between 1980 when this licensee took over the premises and as at today, the applicant has been convicted eight times for criminal offences.

The applicant has been guilty of permitting overcrowding on two occasions. He has been guilty of violence on two occasions. He has demonstrated an inability to comply with the law and in particular the law relating to licensed premises. Three offences occurred on 30 May 1986, and each was a separate offence against the provisions of the *Liquor Act*. These offences occurred in part after he came under scrutiny by the Court upon objection in 1985. Indeed, he was convicted in 1985 of permitting overcrowding after the first set of objections had been dealt with by the Court. In addition, notwithstanding the proceedings in 1985, nothing has altered as far as the complaints which have been made and the applicant has ignored the formal letter from the City of Nedlands in relation to the question of noise, exhibit 26. He did not respond to suggestions to his manager by Mr McKenzie, for improved conduct of the premises.

It was submitted that Sergeant Lockhart had said that Mr McHenry was of good character, but that is not the question, although it may be part of it.

Sergeant Lockhart told Mr Utting that Mr McHenry's record was "pretty good" — "considering it is a popular hotel". He said that of the records of licensees in the metropolitan area there were a few worse than that — significantly worse.

Thus there is an applicant with a criminal record in comparison with which there are few licensees in the metropolitan area with worse records, but those who have such records have significantly worse ones.

It was also submitted that in 1985, Kennedy J, in *McHenry's* case (op cit) had referred to its being accepted that the premises were well run. I do not know what evidence his Honour was referring to, but I must say that since then there is no evidence of any attempt to control crowds or any significant attempt or to come to terms with the problems created for residents.

In addition, his criminal record has increased since 1985.

Indeed, if one looks at the evidence of Constable Cooper, who had attended the hotel in 1981, 1984 and 1985 on various occasions, he said — "On most occasions I was there, we arrested at least 15 persons for misconduct, disorderly behaviour etc, patrons coming out of the premises (ie, for their behaviour on leaving the premises)". This is corroborative of the evidence of the residents. This is further evidence of the problems I advert to under this objection and objection (b).

I accept that Mr McHenry has assisted in voluntary activities in the area, but that does not militate against the evidence which I have heard.

I am of opinion that Mr McHenry's criminal record reveals that he is not a suitable person to hold or be responsible as licensee. The record reveals a disregard for the law and particularly for the licensing laws.

If that were not enough, then Mr McHenry has failed to respond to complaints to his staff, to the 1985 proceedings and to the formal notice sent by a municipality in relation to noise abatement. That is inconsistent with the sort of responsibility which a licensee of a hotel ought to demonstrate.

The licensee has, (according to unobjected to evidence) set up unauthorised permanent outside bars. Thus the beer gardens have become permanent bar areas in an area where crowd control and facilities are inadequate, and thereby created de facto permanent bars where noise is generated.

That evidence is material to particulars 5.2.2 and 5.2.3, although, as I have demonstrated, there is sufficient evidence to support those particulars in any event.

The applicant has failed to respond to legitimate complaints by the residents which were first made in 1985. He fails to maintain effective control over his patrons. He has permitted the quiet of the vicinity to be disturbed in that he has failed to take reasonable steps to prevent it, by regulating his premises, the intake of patrons or by controlling their manner of egress from it, inter alia, when it has been in his power to do so. (See *Berton v Alliance Economic Investment Co* [1922] 1 KB 742.) He has been guilty of the criminal offences which I have referred to above.

Particulars 5.2.1; 5.2.2; 5.2.3 and 5.2.4 are made out.

I have set out in detail above the principles of law which have directed me.

I therefore find that each objection has been established to my satisfaction in its validity and that the onus on the objectors to prove these matters on the balance of probabilities has been discharged by each of them, now remaining, as objectors, severally and jointly.

The application will be refused.

[Note: Certain particulars contained in the original reasons have been omitted.]