

Decision No. QLDLC 0014/14

IN THE MATTER

of the Sale and Supply of Alcohol

Act 2012

AND

IN THE MATTER

of an application by **GIN AND RASPBERRY LIMITED** pursuant to s.137 of the Act for a Special Licence

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin

Members: Ms M W Rose

Mr L Cocks

HEARING at QUEENSTOWN on 7 April 2014

APPEARANCES

Mrs F Voza – representing the Applicant

Ms K L Rusher – Queenstown Lakes District Licensing Inspector – to assist

Sergeant L K Stevens – N Z Police – in opposition

Dr D Bell – Medical Officer of Health - in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction.

[1] This is an application by Gin and Raspberry Limited for a special licence for two of the statutory three and a half 'sacrosanct' days. The company trades as a tavern with permitted trading hours between 8.00am to 2.30am the following day. The business opened in September 2013 as a boutique bar designed to offer drinks and surroundings that differ from the Wanaka norm. Mrs Francesca Voza is a director of the company. According to her evidence the business developed a weekly timetable of events which attracted a regular clientele. In addition live music is played during the daily happy hour. This was described as offering local musicians an opportunity to showcase their

talents. Mrs Voza stated that the business was building towards being a venue for live entertainment as well as special events focusing on a high standard of performing artists.

[2] The application is to sell liquor to members of the public on Good Friday and Easter Sunday from 5.00pm to 2.30am the following day. We acknowledge that the business is legitimately able to operate from midnight to 2.30am on Easter Saturday and Easter Monday so that the request is for seven hours trading on each day. The first event was called "Good Friday – Fuzzpunch Live Music" and the principal purpose of the event was described as "Live Music Event". The second event was described as "Easter Sunday – 1920's Speakeasy Jazz Night" and the principal purpose of the evening was described as "Live Jazz Group – Dancing – Themed Dress code – Themed Decorations – Themed Food and Drinks".

[3] The applications should be viewed against a background of the bi-annual 'Warbirds over Wanaka' major event due to take place in Wanaka at Easter. This event is held at the Wanaka Airport some distance out of Wanaka, where approximately 50,000 people are expected to attend on the three days of Good Friday, Saturday and Easter Sunday. The first day is practice day and the remaining two days comprise continuous entertainment finishing at about 4.30pm each day. There will be eight outlets selling alcohol under special licences at the event. Because of the large numbers of people attracted to Wanaka over this Easter weekend, a number of licensed premises have applied for special licences to sell alcohol in Wanaka itself.

The Application.

[4] In her evidence Mrs Voza stated that they hoped to be able to have the doors open for the massive number of tourists descending on Wanaka for the holiday weekend. She added that 'Warbirds over Wanaka' had always fostered an excited and energetic atmosphere in Wanaka. The business hoped to have the chance to showcase some of the incredible talent Wanaka has on offer as well as providing the musicians with an opportunity to perform in front of lots of new faces.

[5] 'Fuzz Punch' is a local Wanaka band. This band has played at the premises before particularly New Year's Eve and Halloween. The plan is to charge \$10.00 for a ticket which may be purchased at the premises prior to the event or at the door if unsold. The estimate of people attending was 150 to 180. On the first evening a local singer would operate for the first four hours and the band would start at 10.00pm and go through to 2.00am. The company would provide its usual snack foods that are normally available, and in addition there was a capacity to order pizzas from a mobile wood fired pizza that the company also operates.

[6] The second proposed event has the same style or format. Tickets would be \$10.00 able to be purchased at the premises prior to the event or at the door if unsold. Bar food and pizzas would be available. The theme was to be 1920's to 1940's. The entertainment would start with a 17 year-old acoustic solo musician. She will play and sing for four hours. At 10.00pm the Les Richardson Quartet would play with several vocalists. Apparently the members of the quartet are playing as individuals during the day. Mrs Voza stated that the evening would be special and they intended to continue the theme and excitement of Warbirds over Wanaka with 1920 to 1940's themed evening with the jazz band music reflecting the era, and patrons encouraged to dress up. Free themed nibbles would be offered during the evening.

The Inspector.

[7] The Inspector is required by S.137 of the Act to inquire into and file a report on the application. A comprehensive report was duly received. She pointed out that the applicant used Facebook to promote the bar and she attached a number of posts on the company's Facebook page which showed that live music featured in the company's normal course of business. She noted the

matters in opposition raised by the other reporting agencies which therefore brought into question whether the applicant had met the criteria set out in s. 142 of the Act.

The Reports from NZ Police and the Medical Officer of Health.

[8] Pursuant to s.141 of the Act the Police must inquire into an application and must file a report if they have any matters in opposition. In this case Sergeant L K Stevens provided very helpful submissions. She noted that on each occasion the main act did not start until 10.00pm some five hours after the door had opened. She pointed out that the events were open to the general public in that tickets would be available at the door. She produced a Facebook entry which indicated that Fuzz Punch would be playing regularly over the winter months. She also produced another entry which advertised Paul Ubana Jones who was playing a week before Easter for which tickets were \$15.00 increasing to \$20.00 at the door. In general she argued that the applicant often has live bands and live entertainment.

[9] Sergeant Stevens referred to the decisions of ***Membrey re [2009] NZLLA 378*** in which the Authority stated:

“It seems to us that the less planning that has taken place, the less likely it is that a serious event is being contemplated. As stated above, it is not as if a live band is that special. In our view the prospect of a band does not make the business of a tavern after midnight, significantly different.”

And ***K A Pirovano [2006] NZLLA 727*** in which the Authority concluded:

“Nevertheless the only practical way to resolve the matter is to have the law changed rather than treat it without respect.”

[11] The Sergeant concluded with the submission that the proposed events had been contrived to enable the company to trade at a time when the legislation otherwise required the premises to be closed. She argued that the entertainment that was anticipated was merely business as usual.

[12] Dr D W Bell has been a registered medical practitioner since 1998. He has been the Medical Officer of Health for Otago and Southland since 1998 under designation. We note that under s.141 of the Act he “may” inquire into an application for a special licence, and “may” report if he has matters in opposition. He submitted that the legislation was clear about restrictions of trade on certain days of the year. Therefore when a special licence was sought on those days it was especially important that the criteria for the issue of the licence were clearly met. He argued that the proposed events did not significantly differ from normal trading, and suggested that it was important for a nationally consistent approach through clear and decisive interpretation of the Act that would ensure equity across the hospitality industry. He also contended that the application contravened the Object of the Act.

The Committees Decision and Reasons.

[13] At the conclusion of the hearing the committee gave an interim decision declining the application but reserving the right to give this fuller and more considered reserved decision.

[14] Section 47 of the Act provides that the holders of an on-licence are unable to sell alcohol on Good Friday, Easter Sunday, Christmas Day or before 1:00pm on Anzac day. There are 3 basic exceptions. The first exception is where a special licence for the premises is granted. The second exception is where persons are on the premise for the purpose of dining. And the third exception is where people are residing or lodging on the premises. Parliament has therefore decreed that the owners of on-licences have the right to apply to sell alcohol by way of a special licence on the 3 ½ sacrosanct days. However there are obstacles to be overcome.

[15] Special Licences are referred to in S.22 of the Act. A special licence enables the licensee to sell or supply alcohol to people **who are attending an event** described in the special licence. (Emphasis ours). It is not to be granted to enable people to attend the premises primarily to drink. An event is defined in s.5 of the Act as including an occasion or a gathering. There is no substantive difference between an event under the new Sale and Supply of Alcohol Act 2012, and the previous act. Therefore we must rely on previous case law to assist with the Act's interpretation. Over the years a number of principles and guidelines have been established as follows.

[16] First there must be a genuine event and not something that has been contrived. **Alan Robert Christie v Invercargill Licensing Trust LLA PH 1225/2000**. This was a case involving events over Easter. The Authority stated:

“The principal issue for determination is whether or not persons attending the series of occasion or events at the 'Sugar Shack' were attending a particular occasion or event in terms of s.79(1)(a) of the Act, or they were attending a contrived series of events or occasions, contrived solely for the purpose of enabling a tavern to trade at a time when the legislation otherwise required the premises to be closed.”

[17] Secondly the application must not be a means for a tavern to obtain extended trading hours. In **Bond Street Inn Limited 1997 NZAR 9** the Authority stated:

“We have a firm view as to what the special licence is not intended to cover. It is not intended to be a means for hotels and taverns to obtain extended trading hours at times when the premises would otherwise be required to be closed.”

[18] Thirdly one of the major changes in the new Act is the dramatic shift in decision making from a national to a territorial level. As a consequence it is likely that a degree of national consistency will be lost. There have been cases where local decisions have been made for local circumstances. In **David Alan Thomson LLA 1287/97** the Authority declined to interfere with a local body decision to allow a tavern to trade through to 1.00am on Christmas Day.

[19] It is therefore possible for local decisions to be made to address local needs. But for every case where the Authority has not interfered with a local decision, there are just as many cases where the local decision has been reversed. One of the most significant of those was **Pirovano [2006] NZLLA 727** where the Queenstown Lakes District Licensing Agency had granted 22 special licences to trade over Easter because of “Warbirds over Wanaka”, and because Queenstown was a significant tourist destination. All 22 decisions were reversed by the Authority.

[20] Fourthly it is likely that any wholesale relaxation of standards will bring the Act into disrepute, and could in the long term, reflect adversely on the Object of the Act. In **Universal Liquor Limited and anor [2003] NZLLA 806** the Authority stated:

“If all taverns (and off-licences) had the right to trade through Easter then in our view the law restraining trading during that time would inevitably be brought into disrepute. Having a law that has no effect may not physically lead to liquor abuse, but could certainly encourage the public to treat the Act with contempt and disrespect. This in turn would in our view undermine any serious attempts to reduce the abuse of liquor.”

[21] To these principles we would add our own. Whether an event is contrived can often be determined by a number of factors. The following examples are not exhaustive;

- (a) The price of entry. The lower the price the more members of the public the applicant appears to be encouraging to attend, and the less the event would merit a licence.

- (b) Whether there is some generic factor with the customers (such as guests at a wedding or people with a special interest in the event) or whether it is anticipated that members of the public will attend. (It will be noted that under s.147(1) (h) of the Act a licensing committee may impose a condition excluding members of the public from the premises). If such a condition were imposed the problem would then be enforcement.
- (c) Whether the intrusion into Good Friday and/or Easter Sunday is significant or restrained. In other words whether the applicant seeks to trade for as many hours as possible.
- (d) Whether a reasonable person attending the event would immediately notice a difference between the ambience of the occasion and any other trading day.
- (e) The extent of the planning that has taken place, and the thought that has been given to the way the event is to be run. The less organised the applicant, the more likely that the event has been thought about after the decision has been made to apply for a special licence. Well organised licensees apply early so that any issues can be discussed with the reporting agencies and hopefully resolved well prior to the day of the event.

[22] The criteria to which we must have regard in deciding whether to issue a special licence are set out in S142 of the Act. The relevant conditions in this case are (a) the object of the Act, (b) the nature of the particular event for which the licence is sought and (f) the days on which and the hours during which the applicant proposes to sell alcohol. There are no issues about the applicants' suitability to hold a special licence.

[23] The Act's object is to be found in s.4 of the Act. It states that the sale, supply and consumption of alcohol should be undertaken safely and responsibly, and the harm caused by the excessive or inappropriate consumption of alcohol should be minimised. Given the steps to be undertaken by the licensee, and the provision of food and entertainment, and the applicant's ability to hold similar gatherings apparently without problems, there is no reason to predict that there will be excessive or inappropriate consumption of alcohol. We think that in this case the Act's object has little relevance.

[24] We would have been keen to try and assist the attempt made by this and other licensees to provide hospitality to the many visitors to the area, to help showcase Wanaka, to support the 'Warbirds over Wanaka' festival, and to provide much needed revenue when the summer tourist season comes to a close. It was argued by many that the law was outdated and that the committee had the capacity to interpret and apply the law in a more flexible manner.

[25] However instead of being asked to bend the law in a reasonable way, the effect of the seven applications, was that we were presented with a full assault on the provisions of the new Act. We were literally asked to ignore the Act's restriction on the sale of alcohol on Good Friday and Easter Sunday. While it is true that S.3(2)(a) of the Act requires that we act in a reasonable way we are unable to break the law to please licensees. To do what we were asked to do would in our view destroy the Act's integrity. It would enable the people of Wanaka to change the law outside Parliament. The applicants have the right within ten working days to appeal to the licensing authority if dissatisfied with this decision. (S.154 of the Act).

[26] There may be ways of enhancing the 'Warbirds over Wanaka' event, and at the same time giving Wanaka an edge. There would need to be consultation and co-operation with the 'Warbirds over Wanaka' management as well as the agencies. What needs to be considered is whether the licensed premises in Wanaka can become part of the festival. Since the event closes at the airport at

4.30pm it may be possible as part of the event, to offer hospitality at taverns in Wanaka for say two hours giving visitors to the town an opportunity to relax before dining. Such an opportunity would have to become part of the Warbirds programme and part of the actual event. In this way there would be no need to dress the hospitality up, since the ability to drink at bars would become an integral part of the festival. Such an idea cannot be judged until it has been thought through and presented. Whether members of the public should be included or not would be one issue to be resolved. We simply flag the proposal as an illustration of the way that the aspirations of licensees could become reality. We suggest that if the applicants are serious then planning should start immediately.

[27] In December 2012 Parliament passed the Act in its present form. It had the opportunity to change the law by allowing a more liberal approach but chose not to do so. In fact the law affecting the 3 ½ days has become even more restrictive as it now affects all on-licences including entertainment and cinema style licences. What the Act does do is specify that persons who are present on premises to dine may drink for an hour before and an hour after their meal.

[28] It is pertinent to ask why Parliament allowed club licences the continued right to trade on Good Friday and Easter Sunday as well as on Christmas Day and Anzac Day. Two logical reasons come to mind. (a) That members of the public are not legally able to be present at a club unless as a guest of a member, and (b) that members of clubs have an obvious commonality of interest. If that is the case then weight is added to the conclusion that special licences granted on the sacrosanct days are not to enable members of the public unrestricted access to alcohol'

[29] The onus is on the applicant to prove on the balance of probabilities that the event is genuine and not contrived. That it is worthy of a special licence. Applying the factors set out in paragraph [21] above, the applicant failed to prove an entitlement on most of them. The price of the ticket was very low. About the price of one drink. It could be argued that all persons attending had an interest in the main bands, but on the other hand, there was nothing to prevent members of the public attending who only wanted an opportunity to drink. Seven hours drinking on Good Friday and Easter Sunday could not be said to be a gentle intrusion into the prohibited hours. There was no reason to have a lead in singer perform for four hours. It seemed clear to us that a reasonable person would not notice any difference between what was happening on each night compared to any other night when bands were playing. And finally, while some planning was evident, the application was filed just in time to allow the reports to be received and a public meeting held, before the event was due to occur.

[30] Our summary may appear critical but criticism is not intended. Put shortly, it was our view that the applicant (along with other licensees) wanted to provide hospitality and entertainment on Good Friday and Easter Sunday for as many visitors and locals as possible, and for as long as could be justified. We accept that the company has established attractive premises with excellent décor complemented by innovative service and entertainment. The application was very well presented. Nevertheless, and for the reasons we have tried to articulate, it has not established to our satisfaction a legitimate right to sell liquor on Good Friday and Easter Sunday. It has failed to prove that there will be an event in terms of the Act warranting the issue of a special licence. The application is accordingly refused.

DATED at QUEENSTOWN this 5th May 2014



E W Unwin

Chairman