

Decision No. QLDLC 0015/14

IN THE MATTER

of the Sale and Supply of Alcohol

Act 2012

AND

IN THE MATTER

of an application by **WHITEHAWK
DOWN LIMITED** pursuant to s.137 of
the Act for a Special Licence in respect
of premises situated at 93 Ardmore
Street, Wanaka, and known as "Speights
Ale House"

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

Mr G H Lawrie – representing the Applicant Company

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

Sergeant L K Stevens – N Z Police – in opposition

Dr D W Bell – Medical Officer of Health - in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction.

[1] This is an application by Whitehawk Down Limited (hereafter called the company), for a special licence to trade on Good Friday 18 April 2014, and Easter Sunday 20 April 2014. The company trades as a tavern with permitted trading hours between 11.00am and 2.30am the following day seven days a week. The style of business is a well known and renowned franchise in the South

Island being a family orientated bar and restaurant. Although licensed until 2.30am, the bar is seldom open after midnight.

[2] The application was accompanied by a letter from Mr G H Lawrie one of the company's directors. The letter was as follows:

"We are applying for a special licence to allow our Bar/Restaurant to be open on Good Friday and Easter Sunday in accordance with our everyday liquor licensing conditions. "Warbirds over Wanaka" is only one of many events bringing a large influx of people into the area, we would like the opportunity to fully cater for their requirements. Last year our staff faced continuous abuse (some very ugly) from customers as they adhered to the Easter Trading law. The public simply do not understand nor do we why we are still abiding by these laws.

[3] The application was to sell alcohol to members of the public on Good Friday and Easter Sunday from 11.00am to 11.00pm on each day – (in other words for 12 hours each day). The event was described as "Warbirds over Wanaka/Rodeo/Car Racing", and no answer was given to the requirement to state the principal purpose of the event.

[4] The background to the application is the bi-annual 'Warbirds over Wanaka' major event due to take place in Wanaka at Easter. This event is held at the Wanaka Airport, 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, the company is one of seven on-licensed premises that have applied for special licences to sell alcohol in Wanaka itself.

The Application.

[5] Mr Lawrie described the application as a gathering of visitors to the region. He said the special licence would enable his company to provide hospitality and support for the various events such as Warbirds and the Jet Sprints. He said that the previous year was not a pleasant one for customers or staff. In his words customers faced a constant hassle from his staff to eat up and drink up and leave as per the Easter trading laws. As a consequence he said that staff were faced with verbal abuse from customers who were unaware or unaccepting of the Easter Trading laws. He contended that members of staff were not looking forward to the coming Easter because of the abuse they were expecting.

[6] Mr Lawrie acknowledged that the company was looking to make a profit from being open over Easter, but submitted that the quid pro quo was that it was providing a service to the community. He argued that if all premises were closed over Good Friday and Easter Sunday there would be a negative impact on Wanaka. He asked what the difference was between those two sacrosanct days and Easter Saturday? He concluded with these comments: *"You the board have the opportunity to see that common sense prevails here over an out of date Easter trading law."*

The Inspector.

[7] The Inspector is required by S.137 of the Act to inquire into and file a report on the application. Her report noted that there was no suggestion in the application that there would be any entertainment. She accurately submitted that it appeared that the company was asking to trade on its current tavern licence conditions over the two sacrosanct days, because of the events taking place in Wanaka over the weekend.

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 noted that the proposed event or gathering was not ticketed, and not only had no stated purpose, but no activity was planned. Further the proposed event was not aimed at any group of people in particular. She also advised that the car racing was being held at Cromwell about 53 kilometres from Wanaka. In particular she pointed out that there was no known connection between the company and the various events. In short the gathering was simply 'business as usual'.

[9] Sergeant Stevens referred to the decision of *K A Pirovano [2006] NZLLA 727* in which the Authority made these comments:

“In summary, the sacrosanct days are not events or occasions within the meaning of s.73 of the Act. The “Warbirds over Wanaka” and the “Race to the Sky” clearly fall into such a category, but there was no attempt to link the timing of the events or occasions with the proposed hours of trading. At any event, we have already held in The Loaded Hog Group LLA PH 323-334/2001 that “attending” an occasion or event was akin to being present at that occasion or event. For an event or occasion to qualify for a special licence there must be at the least an attempt to comply with the spirit and intent of the Act.

[10] 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 argued that the legislation was clear that on certain days there are restricted trading rights. Therefore it was important that any attempt to trade on those days should be scrutinised carefully to ensure that the criteria were met. He submitted that the Object of the Act was that the harm from excessive or inappropriate consumption of alcohol should be minimised. He suggested that the issue of a special licence would not assist to minimise such harm. He pointed out that in this particular case the company had the right to sell alcohol to members of the public who were on the premises to dine. Finally he argued that clear and decisive use of the legislation would ensure equity across the hospitality industry.

The Committees Decision and Reasons.

[11] At the conclusion of the hearing and in the interests of commercial reality, the committee gave an interim decision declining the application. However it reserved the right to give this fuller and more considered reserved decision.

[12] 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 premises 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.

[13] 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.

[14] 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.”

[15] 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.”

[16] 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.

[17] 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.

[18] 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.”

[19] 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 to be imposed, there could well be difficulty with enforcement, absent a ticket only approach.

- (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.

[20] The criteria to which we must have regard in deciding whether to issue a special licence are set out in S142 of the Act. We do not accept that the issue of a special licence would contravene the Object of the Act as submitted by Dr Bell. The object refers to the need to minimise the harm caused by the excessive or inappropriate consumption of alcohol. There was no evidence that patrons attending the "Speights Ale House" on Good Friday or Easter Sunday would drink excessively or inappropriately. The relevant conditions in this case are:

- (i) the nature of the particular event for which the licence is sought and
- (ii) the days on which and the hours during which the applicant proposes to sell alcohol. There are no issues about the applicant's suitability to hold a special licence.

[21] As with some of the other applicants, Mr Lawrie argued that the law was outdated. In his letter sent with the application he stated that neither he nor the public understood why they were still abiding by such laws. Yet these provisions were considered by Parliament in 2012 and approved. How could a law become outdated within 18 months of it being passed? We note that none of the applicants made submissions on the new Act, or indeed on the Law Commission's publication "Alcohol in our lives. Curbing the harm" which was presented to Parliament on 27 April 2010. This major report provided the framework on which the new Act was based. In 2009 the Law Commission produced an issues paper entitled "Alcohol in our Lives". In Chapter 9 the prohibited days were discussed. The commission wrote:

"Undoubtedly, the prohibited days adversely affect the business of licensed premises. The tourism and travel industry would likely be assisted by their elimination. For many people, rules around the prohibited days are outdated and inconvenient.

On the other hand, many would argue that the remaining sacrosanct days should continue to be respected, and that the three and a half days are the only days on which workers are guaranteed time off to spend with their families. However, these arguments are not so apt for bars that are only open in the evening and early hours of the morning. Although New Zealand is a largely secular society, in the 2006 census, just over two million people affiliated with a Christian religion. Recent attempts to change the general Easter shop trading hours have failed in Parliament."

[22] The Issues Paper was the subject of 50 public meetings and a record 2939 written submissions were received. The submissions were duly analysed and considered and the final report was duly prepared. In that report the Commission felt that the 3 ½ sacrosanct days should be the same as the general law affecting retailing in New Zealand. It stated:

“We think the licence conditions regarding the prohibited days should reflect the general law relating to business in New Zealand. Currently, the Shop Trading Hours Act Repeal Act 1990 requires almost all shops to be closed on these three-and-a-half days. We do not think the new sale of alcohol legislation should apply different rules relating to trading days than applies to other types of stores.

We acknowledge the prohibited days do adversely affect the business of licensed premises. The tourism and travel industry would likely be assisted by their elimination. Many submitters, particularly from the retail and hospitality industries, were in favour of the prohibited days being removed for the reason that this law is no longer necessary or relevant. For a significant number of people, the rules around the prohibited days are outdated and inconvenient.

However, many other submitters argued the prohibited days should be retained. It was considered these days provide a further limit on the availability of alcohol. They allow many people who work in the hospitality industry to have a day off to spend with their families. It was felt that three-and-a-half days per year is not a large limitation on the commercial right to sell alcohol. Many also argued the sacrosanct nature of these days should be respected for historical or religious reasons. As mentioned in our Issues Paper although New Zealand is a largely secular society, a significant proportion of New Zealanders affiliate with the Christian religion and recent attempts to change the general Easter shop trading hours have failed in Parliament”.

[23] 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 3½ 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.

[24] 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 general members of the public are not legally able to be present on club premises 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 simply to allow members of the public a form of unrestricted and normal access to alcohol.

[25] 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. 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 on the basis that to do so is common sense or that issuing a licence would in some way provide a better working environment for the company's staff. 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. In case we are wrong in our understanding of the new Act we point out that the company has the right within ten working days of the date of this decision to appeal to the licensing authority if it is dissatisfied with the way the Act has been interpreted. (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. For example, 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] 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 [18] above, the applicant failed to prove an entitlement on any of them. There were to be no ticket sales. There would be no commonality of interest. Patrons would not be attending an event at all. Mr Lawrie said he was hosting a gathering. This was to be a gathering of drinkers. Twelve hours drinking on Good Friday and Easter Sunday could not be said to be a gentle intrusion into the prohibited hours. And finally, 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.

[28] 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 "Speights Ale House" is an established destination in Wanaka. But that is not a reason to allow the company the right to sell alcohol on Good Friday and Easter Sunday. Nor are the alleged problems said to be faced by customers and staff alike a reason to ignore the law. Put shortly, the company 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 day of May 2014



E W Unwin

Chairman