

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of four applications by **CARGO
BREWING COMPANY LIMITED**
pursuant to ss.16, 32, 40, and 99,
of the Act for an on-licence, a
caterer's endorsement to the on-
licence, an off-licence, and an off-
licence with remote sellers
endorsement in respect of
premises situated at 170 Arthurs
Point Road, Arthurs Point,
Queenstown to be known as
"Cargo Brewery and Kitchen."

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

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

HEARING at QUEENSTOWN on 21 July 2016

APPEARANCES

Mr M A W Blakey – representing the applicant
Ms S H Swinney – Queenstown Lakes Licensing Inspector – to assist
Sergeant T D Haggart – N Z Police – to assist
Dr D W Bell – Medical Officer of Health – to assist

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] We have effectively four applications for determination. Cargo Brewing Company Limited (here after called the company) is a private company owned and operated by Mr M A W Blakey. The company was incorporated in August 2015 and its 'vision' is to become Queenstown's first craft brewery. According to Mr Blakey there are no breweries presently operating in Queenstown. The company currently produces a limited quantity of craft beer which is brewed out of town and supplied under the brand "Cargo".
- [2] When he gave evidence Mr Blakey acknowledged that his applications were "unusual". That comment could best be described as an understatement. One day in the future Mr Blakey has plans to build and establish a brewery business. In the process of researching where to build his brewery, Mr Blakey

found a semi-vacant site at 170 Arthurs Point Road. This is a block of land owned by Koia Investments Limited containing 7054 square meters.

- [3] The property could be described as a prime site on the tourist route between Queenstown and Arrowtown, and in a good position to target the après ski market located as it is between Queenstown and the Coronet Ski Field. Actually, it currently looks more like a neglected and 'down at heel' gathering place. On the other hand it is conceded that the artistic impression of what the finished site might look like conveys a very different picture. In this application the question could be asked in its proverbial form "Can a silk purse be made out of a sow's ear?" A more useful question might be "In the history of alcohol licensing, has any applicant ever been granted an on-licence for a truck, a container and a port-a-loo?"
- [4] At the back of the site an historical villa has been relocated, and is apparently used for office purposes. The rest of the property is untidy if not unsightly, and contains two used shipping containers, a truck, a van selling tacos, a canopy, a few seats and a port-a-loo. At least the port-a-loo cannot be seen from the road. The company has a lease of the property for an unspecified term, at an unspecified rent and for an unspecified part of the land. There is a limited amount of commercial activity going on in the form of food services such as burgers, doughnuts, tacos and pizza.
- [5] What Mr Blakey wants to do is licence the so-called 'temporary' premises including the truck and the container. He seeks an on-licence so that passersby and customers can purchase and consume his craft beer from the side of the truck. There are to be five different types of beer on offer, plus two types of cider, soft drinks and food such as burgers, empanadas and soup of the day. Mr Blakey advised that he would have containers or kegs of his craft beer stored in the container next to the truck. Pipes would run from the kegs through the side of the container, and into the back of the truck. It was anticipated that the side of the truck would open up to display a bar over which customers could purchase and consume the craft beer.
- [6] In addition Mr Blakey is seeking a catering endorsement to attach to the on-licence. He advised that he was receiving enquiries from customers who wished to have his food and beer truck at their outdoor events during the coming months, although the enquiries were mainly for weddings. His plan was to drive the truck off the site for catering purposes, which means that during this time there would be no sales of beer or food. Finally, Mr Blakey is seeking an off-licence to sell his company's craft beer from the container for take-away purposes. In addition he seeks an off-licence with a remote seller's licence enabling him to sell and deliver or courier the craft beer via the internet. On-line sales would be for a 12 pack of 'Cargo' bottles valued at \$50.00 plus the cost of delivery. The plan is that the computer to control the internet sales would also be based in the container.

The Application.

- [7] There was a pre-lodgement meeting between Mr Blakey, his licensing agent Mr Nik Horn, and Ms S H Swinney the Alcohol Licensing Team Leader at Queenstown Lakes District Council. At the meeting it was stated that the application was stage one of two. Under stage two Mr Blakey and the land owner were planning to place four shipping containers on the site.

These would be used for the new brewery operation although it is not clear if or when stage two will come to fruition. Following the meeting a resource consent application was lodged “to establish and operate a commercial complex consisting of relocated containers and food trucks including the sale of alcohol for an 18 month period.”

- [8] Resource consent was granted with reduced trading hours between 8.00am and 8.00pm seven days a week for a period of 18 months with all structures to be removed before 24th December 2017. This was surprising to us given that there was to be the one port-a-loo to be used by male and female customers and staff. We were advised that the port-a-loo is presently provided by QT Hire and is emptied and thoroughly cleaned weekly although extra cleans can be arranged. The disabled toilet access was to be in the villa at the rear of the property some 25 meters away. There was even a suggestion that patrons might be able to use the toilets at the restaurant next door. The consent itself stated that adverse visual effects were considered to be no more than minor because of the limited nature and scale of the activity, its proposed limited duration and the proposed layout. There is room to park nine cars.
- [9] In terms of suitability, Mr Blakey appears to be well qualified. He has held a Manager's Certificate since 2005. He has worked in the hospitality and events industry for the past 12 years and owns another business called “QT Event Management” which specializes in corporate events such as conferences and team building. He has been involved in such events as the Arrowtown Long Lunch, The NZ Open, the Audi Quattro Winter Games and Concerts in Wanaka and Queenstown utilising special licence's where necessary. The details of his actual involvement in these events were not given. As stated above, Mr Blakey's long term aim is to open Queenstown's first craft brewery.
- [10] It seemed to us that Mr Blakey was taking the opportunity of obtaining an alcohol licence to test the market. His emphasis was on the short term nature of the proposal prior to making a decision whether to establish the main brewery. He said:

“Opening a temporary premises where customers can experience the beer at that site and be able to take it away with them will give us valuable insight into whether we have the right location for this business. It will also give us important feedback on the beer itself and hopefully give us a loyal following of customers to help in the early stages of opening the main brewery.”

Submissions from the Medical Officer of Health.

- [11] Dr Bell has been the designated Medical Officer of Health for the Otago and Southland Health Districts since 1998. In his initial report he stated that he had no matters in opposition but made the following comments which he suggested should be considered by the Committee.

“I have some reservations about the physical nature of the premises. A service truck, a shed, shipping containers and outside seating are unusual physical characteristics for a permanent licensed premises. Temporary structures might not be appropriate for this particular use.”

NZ Police.

- [12] Sergeant T D Haggart is the Alcohol Protection Officer for the area. She gave evidence of a fatal accident that had occurred nearby the proposed premises when a tourist was walking along the road at 10.43pm on 29th October 2013 and was struck by a vehicle the driver of which did not see the pedestrian.

The Licensing Inspector's Evidence and Submissions.

- [13] In addition to her very full report, Ms S H Swinney gave evidence and made submissions. In her evidence she referred to the legal issue whether the container was a building that required a building consent and whether it was possible for Mr Blakey to obtain a compliance certificate as required by the Act. She advised the Committee that she had received a phone call from a brewery owner who was awaiting the outcome of the application as he had similar ideas that he wished to pursue.
- [14] In her final submissions Ms Swinney referred to s.105 (1) (e) of the Act. In coming to a decision about whether to issue a licence the Committee must have regard to the design and layout of the proposed premises. She said that this was important because the proposal was for the bar to be located in a food truck. There was some argument about whether a truck could be considered to be a building. There were also concerns because occasionally the truck would be leaving the site. In addition she submitted that we should take into account the life of any proposed grant given that all structures had to be removed by December 2017. On the other hand there was potential for the resource consent to be extended, allowing the current use to be permanent.

The Committee's Decision and Reasons.

- [15] Pursuant to s.105 of the Act we must have regard to a number of criteria when considering whether to issue all or any of the licences applied for. We believe that the relevant issues are the object of the Act, the design and layout of the proposed premises, and the reports from the Inspector, and the Medical Officer of Health. There are other questions such as whether it is possible for the applicant to be granted a compliance certificate, whether there are premises that can be legally licensed, and whether the applicant legally qualifies for the licences that have been sought.
- [16] The most important issue in our view is the object of the Act which is set out in s.4 (1) of the Act and which reads as follows:

The object of the Act is that -

- (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and***
- (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.***

- [17] We believe that in this case the applicant is not only seeking a temporary solution but a cheap one. The company is not prepared or not able to spend

money on permanent premises in case the proposal becomes uneconomic. Two consequences follow. (a) Standards have been ignored, and (b) We are unable to issue temporary licences in this case. (See s.74 of the Act). It is unbelievable to us that up to 30 or 40 males and females are expected to share a port-a-loo as part of their experience in being able to purchase and consume craft beer at this site. Such activity might have been acceptable for a special licence although even in that case we would have expected higher standards than those proposed. Not only do we have to treat this application as something that could be a permanent enterprise, but its novelty will set the bench mark for all other applications.

[18] And that is the reason why this application for an on-licence must be declined. It would set a dangerous precedent. It would drop standards of what may be expected in licensed premises. In our view it would inevitably result in the unsafe and irresponsible sale and consumption of alcohol. If this Committee declined to take the licensing process seriously, why should it expect licensees to respect the Act's purpose and objects?

[19] We also note that the purpose of the Act as set out in s.3 (1) of the Act is for the benefit of the community as a whole to implement a new system of control over the sale and supply of alcohol. We do not think that the licensing of a truck and container in these circumstances would benefit the community as a whole. We cannot think of any argument that would encourage us to issue a permanent licence for a container or a truck that did not even provide decent bathroom facilities, having said that we accept that a container can be renovated and restored to compare favorably with a brand new building. It is the combination of a truck, container and a port-a-loo that causes the concern, particularly as the truck is not a premises and is not a conveyance.

[20] There are examples from the past where other tribunals have tried to 'hold the line'. In ***Universal Liquor Limited and anor* [2003] NZLLA 806** the Liquor Licensing 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] And as was stated in ***The Warehouse Limited* [2008] NZLLA 1673**:

"The danger of reducing liquor to the level of an, any-day/any-time/any-place commodity should not be underestimated."

[22] In the decision of ***West Cafe Limited* TA 59/01 – 2014** the Selwyn District Licensing Committee had to deal with an application to licence a vehicle that had been used for events. The wheels were to be removed. The decision to refuse the application included these comments:

The objectors quite rightly, in our opinion, described the proposed premise as "an eyesore" in its present state.

Mr Sharplin's comments in relating to the temporary nature of the premises are relevant. He stated that he thought that the premises could be used in situations where a building had to be demolished after the earthquakes and as a temporary measure the bar could be brought in to compensate. This is exactly what did occur after the demolition of the Carlton Hotel when the Christchurch earthquakes meant the Hotel's demolition was necessary. In that situation these specific premises operated as a tavern and were suitably dressed up with planter boxes and the like. The current proposal is very different.

- [23] In relation to the funding of the venture the decision of ARLA in **B L Group 2013 Limited (Cotton Club)** NZARLA PH 1192/2013 is relevant:

It is not the role of the Authority to determine if a business will be viable. However, if there is no evidence or merely vague evidence of funding matters (as here) and as there is evidence that a company associated with the Samson family (who apparently, are supplying some of the funding) is in receivership (Casino Bar No 3 Limited), then it is reasonable for there to be some concern. This is particularly so given that the formula proposed for the business is untried. The evidence is that if the business plan fails, the business would be sold; but that may not happen with alacrity. If there is inadequate capital to sustain the proposed formula until the business becomes viable or is sold, then there could be a temptation to go down market and trade more like "Club 22". Whilst this would certainly attract enforcement action, the harm that could occur pending resolution of that action would be unacceptable. The lack of clarity of funding is relevant to the suitability of the applicant. In addition it has s.4 of the Act ramifications."

- [24] Finally, we refer to the decision of Moore J in **Auckland Medical Officer of Health v Birthcare Auckland Limited** [2015 NZHC 2689 and in particular to the comments at paragraph [50] as follows:

"There is no reason in principle why the "causal nexus" approach adopted under the 1989 Act and approved in decisions of this Court, should not continue to be relevant and applicable under the new Act. Indeed, it was not suggested in argument that a different legal test should be adopted. Under both Acts the relevant enquiry is the same; the Authority is required to have regard to the s.105 criteria (or in the case of a renewal the s.105 criteria as modified by s.131) and then step back and consider whether there is any evidence to suggest that granting the application will be contrary to the object of the Act contained in s.4(1). Namely that the sale supply and consumption of alcohol should be undertaken safely and responsibly and the harm caused by excessive or inappropriate consumption of alcohol should be minimised."

- [25] We considered the criteria in s.105 of the Act as well as the evidence and submissions of the company. We also considered the evidence from the Licensing Inspector and her submissions. We considered the evidence from the Police and the submissions of the Medical Officer of Health. The company is suitable and is aware of the company's responsibility to ensure that alcohol is supplied in a safe and responsible manner. We then stood back and considered whether there was any evidence to suggest that granting the application in its present form would be contrary to the object of the Act in

s. 4 (1). It was our view that there was a considerable amount of evidence that was unhelpful to the applicant's cause. Because of the proposed design and layout we believe that granting the application for temporary purposes involving a container and a truck with very limited bathroom facilities would seriously undermine the Act's objectives. The application for an on-licence is accordingly refused.

[26] The refusal of the on-licence has consequences for two of the other applications. Without an on-licence it is not possible to issue an endorsement for caterers. Therefore this application is also refused. However we should point out that even if an on-licence had been granted an endorsement would have been refused. Pursuant to s.38 (1) we must be satisfied that the company **carries on the business of a caterer** (our emphasis). The Concise Oxford Dictionary defines a caterer as a person or company providing food and drink at a social event or other gathering. Mr Blakey and his company has the onus of satisfying us that this is what the company does. There was some evidence about Mr Blakey's involvement with hospitality for events over the years, but nothing to indicate that the company is regularly called upon to provide food and drink at social events, and is regarded as a catering business, or has a reputation for this type of enterprise.

[27] Section 32 of the Act sets out the kinds of premises for which off-licences may be issued. The company is not a supermarket or a grocery store. Nor are its premises used for the manufacture of alcohol. There is no suggestion that the premises will be a bottle store. The only way in which an off-licence could have been issued is under s.32 (1) (a) of the Act is if it holds an on-licence issued for a tavern for the premises for which the on-licence is held. Accordingly the application for an off-licence is also refused.

[28] That leaves the application for an endorsed off-licence allowing the remote sales of alcohol. Under s. 32 (1) (c) of the Act, if the container is not retail premises and at least 85% of the company's annual income is expected to be earned from the remote sales of alcohol, then an off-licence may be issued. If the company wishes to take up a remote sellers off-licence and pay the annual fees we see no reason why an off-licence should not issue provided the company can establish its right to a certificate that the proposed use of the container meets the requirements of the building code. As the Inspector pointed out the fact that there will be someone working in the container may result in the company being unable to claim an exemption for the container from the Building Act. The issues are not without difficulty but if the company wishes to proceed and is able to obtain a building code certificate and satisfy the agency's requirements, then we will be happy to issue a remote sales off-licence.

DATED at Queenstown this 25th day of August 2016



Mr E W Unwin
Commissioner