

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of an application by **SKYLINE ENTERPRISES LIMITED** pursuant to ss.35 and 99 of the Act for an off-licence to sell alcohol produced in New Zealand for consumption off the premises in respect of premises situated at Bob's Peak, Brecon Street, Queenstown and known as "Skyline Gondola, Luge and Restaurant".

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 1 December 2016

APPEARANCES:

Mr L R Thomas – representing the Applicant
Sergeant T D Haggart – NZ Police – in opposition
Dr D W Bell – Medical Officer of Health – to assist
Ms J Mitchell – Licensing Inspector – to assist

RESERVED DECISION OF THE COMMITTEE

Introduction.

- [1] Before the Committee is an opposed application for an off-licence. The applicant is Skyline Enterprises Limited (hereafter called the company). The company wishes to sell New Zealand made alcohol as part of its business as a tourist function centre, but more particularly from its retail souvenir shop situated within the company's Gondola and Restaurant building located at the top of Bob's Peak, and accessed by gondola and a walking track. The application is brought under s.35 of the Act. In other words the company contends that the sale of alcohol produced in New Zealand would be an appropriate complement to the kind of goods sold in the retail shop. There is no issue about the company's suitability to hold a licence.
- [2] As stated, above, the premises are situated at the top of Bob's Peak and are accessed mainly from a gondola which departs from a terminal located at the

top of Brecon Street. There is also an access road which provides walking access as well as limited vehicle access. The Skyline function centre is highly popular with visitors to Queenstown, and currently more than 787,000 people use the gondola each year. These visitors are mainly overseas tourists. There is a large licensed restaurant in the premises which has 650 seats, and can also cater for functions such as conferences and the like. There is a luge outside providing tourist entertainment. There are no other licensed premises on the mountain.

- [3] The main revenue streams are from the sale of tickets for the gondola (35%), and food and beverages (35%). The souvenir shop accounts for 5% of sales as does a nearby Mountain Biking park. The luge produces 17% of revenue and there are smaller contributions from photography and stargazing. 85% of the items sold in the shop are not food and consist mainly of clothing, jewellery and souvenirs. The company anticipates that the additional sale of New Zealand alcohol will account for 1% of total sales.
- [4] The company requested trading hours from 9.00 am to 11.00 pm from Monday to Sunday inclusive, being the maximum national default trading hours to protect its future operational requirements.. Although the shop currently closes at 8.00pm, the food and beverages manager stated that the company often receives requests from patrons to purchase a particular item that they enjoyed during their meal. He contended that the retail shop caters for a high end market. It is clear that the potential effects of the off-licence on the amenity and good order of the surrounding area will be less than minor.
- [5] There was no public opposition to the proposal. The NZ Police opposed the application mainly on the grounds that the proposal did not comply with the Act. As well they questioned the hours of operation , the potential harm from exposure of alcohol to young people in the shop, and the precedent setting nature of the application. Because this was a 'greenfield' application for Queenstown, the application was sent to a public hearing.

The Application.

- [6] Mr Pierre Poyet is the company's food and beverage manager and was the applicant's only witness. He advised that the company had recently reviewed its souvenir product range, and has shifted the focus to celebrating 'New Zealand made' with greater emphasis on local products and uniquely NZ higher value items. Among the items that will be displayed if the application is granted is a 'Skyline' branded Central Otago pinot noir, as well as a dedicated craft beer.
- [7] Mr Poyet produced figures of the percentage of food items that are sold in the shop. Only 2% of total sales consists of food items which is packaged chocolates, biscuits/cookies, savoury herb rubs and New Zealand honey. The company does not anticipate any increased floor area growth for this category. In terms of precedent setting, the company asked that its application be treated on its own merits, its main point of difference being that the souvenir shop is a department within a holistic tourism based complex.
- [8] Mr Poyet produced figures to show that the under 18 age group represents 5.9% of actual visitors, of whom only a fraction visit the souvenir shop. He

also pointed out that the company has a large team of managers and supervisors as well as Duty Managers, and has an exemplary record in respect of its on-licence. He was made aware that it will be necessary to have a qualified manager on site at all time that alcohol is being sold or displayed.

NZ Police.

- [9] We acknowledge the research conducted by Sergeant Haggart, the Alcohol Harm Reduction Officer for Queenstown. She confirmed that there were no reported issues with the way the company operated its on-licence. The Sergeant referred to Weslaw's commentary on s.35 of the Act in which it was stated that retail souvenir shops were unlikely to qualify for an off-licence, on the basis that alcohol would not be an appropriate complement to goods of the kind sold therein. On the other hand she accepted that there was some case law taking a contrary view.
- [10] The Sergeant questioned whether it was necessary for the closing time to be 11.00pm given that the shop currently closed at 8,00pm. Her other concern related to the presence of children in the shop, and the need to minimise their potential exposure to the alcohol. It is noted that the company has a policy that children in the shop must be accompanied by an adult. Finally the Sergeant raised the issue of precedent arguing that there are 10 souvenir shops in the Queenstown CBD which might wish to apply for a licence if the current application is granted.

The Medical Officer of Health.

- [11] Dr D W Bell gave an oral submission in which he suggested that the issue of precedent was important and needed to be considered carefully. He expressed concern about the possibility of alcohol being treated as an ordinary commodity, and argued against the view that alcohol was complementary to the kinds of items sold in a souvenir shop

The District Licensing Inspector.

- [12] Ms J Mitchell expanded on her very full report. She acknowledged that case law tended to support the view that alcohol can be considered as complementary to items normally found in a souvenir shop. She noted that in many souvenir shops in Queenstown, NZ honey is a major sales driver. However she accepted that the company did not focus on that product, and was therefore eligible for a licence under s.35 of the Act.

The Committee's Conclusion and Reasons.

- [13] S. 35 of the Act seeks to describe an exception to the kinds of premises for which an off-licence may be granted. The exception is for certain complementary sales. The wording reads:

The licensing authority or licensing committee concerned may direct that an off-licence should be issued for premises not of a kind described in section 32(1) if it is satisfied that -

- (a) the premises are a shop, but not a shop where the principal business carried on is the sale of food (whether food of a particular kind or kinds, or a range of food); and
- (b) alcohol would be an appropriate complement to goods of the kind sold (or to be sold) in the shop.

Subsection (1) overrides section 32(1) but is overridden by section 36.

- [14] Section 36 sets out the kinds of premises for which no off-licence should be issued. These include petrol stations, certain garages, dairies, convenience stores, conveyances or shops within shops.
- [15] The principal business of the shop in question is not the sale of food. The question therefore is whether New Zealand made alcohol, be it wine or spirits or beer is an appropriate complement to the kinds of good sold in the 'Skyline' souvenir shop. As has already been pointed out, the wording in the new Act is substantially the same as appeared in the Sale of Liquor Act 1989. Accordingly we derive assistance from a number of decisions including the following comments made by Tompkins J in *The Wine and Spirit Merchants of v New Zealand Inc v James Gilmour and Co Limited* [1997] NZAR 134:

“Subsection 2(b) is not an easy section to apply. Neither in the section nor elsewhere in the Act is the expression “an appropriate complement” defined. In any application in reliance on that subsection there will need to be detailed evidence of the kind of goods sold on the premises. The Authority will need to decide, having regard to the meaning of that phrase, interpreted in the context of the section and the Act and in accordance with the purpose of the provision, whether, in the particular circumstances of the case, the sale of liquor was an appropriate complement to the kind of goods sold. Each case will need to be decided having regard to its own facts. This the Authority did not do.”

- [16] That alcohol (particularly New Zealand made) can be an appropriate complement in a souvenir shop has already been established. See *Chol Nam Chon and Hoa Ju Chon LLA PH 877/2002*. Although the application was declined for other reasons, the Authority stated at paragraph [16]

The Authority visited the shop and viewed the goods displayed. There is no doubt that the business is aimed at the tourist trade. While there is a mixture of goods for sale it was apparent that the preponderance of those goods were products that would fall within the definition of “food”. We agree that the sale of New Zealand wine and beer would be very complementary to the style of goods for sale.”

- [17] In *Gan Limited LLA PH 791/2003*, the applicant was described as a sophisticated, specialised innovative gift business. The application was opposed on the ground that the primary business of the shop was the sale of food. The Authority granted the application and had this to say:

It is quite unrealistic to suggest that people access the premises of “My Goodness” to purchase food for consumption. It is too expensive for such a purpose, especially after being gift wrapped, and included with other goods. Any food is purchased to give away. In our clear view,

members of the public access “My Goodness” to buy gifts. The presence of gourmet foods and confectionery in the gift is part of the gifting process. The business provides a service to members of the public who do not wish to go through the inconvenience of obtaining a card, selecting a gift, wrapping it and delivering it. The business is fundamentally and principally a gift business.

- [18] In *James Richardson (NZ) Limited 49C/2016/NZDLCWN/102* the Wellington Licensing Committee renewed an off-licence for a shop at the Wellington airport which sold a large range of 'high end' souvenirs and Kiwiana together with NZ wines for customers not travelling internationally. Alcohol sales were less than 5%. The application was granted 'on the papers'.
- [19] Finally in *Charming Land NZ Limited 60A [2015] 2798* the Christchurch Licensing Committee granted a s.35 licence to a shop trading in Riccarton Road as a gift/souvenir business for the sale of New Zealand made wines and craft beer.
- [20] Assessing goods that the sale of liquor would complement should not be an exercise in imagination. We note the decision of *GLG (NZ) Limited LLA 1101/97* in which it was determined that 'coincidence of consumption' was not the correct test. The connection should be instant and realistic. The product that alcohol most closely complements, is food. Yet perversely, stores whose principal business is the sale of food or groceries, (such as delicatessens), are prevented from holding such a licence.
- [21] There is a difference between 'complementing' and 'supplementing'. Provided the sale of NZ alcohol is a low key adjunct to an already established souvenir business then we believe that an off-licence can be granted. It is important to recognise that the issue of such a licence is very much a matter of the committee's discretion. In this case we are satisfied that the alcohol will be displayed in a limited manner so that there is no need for a designation.
- [22] As a nation we can be justifiably proud of the wine, craft beer and even spirits that are produced in this country. For many, such products exemplify what is a relatively fresh, clean and natural environment. If other souvenir shops in the Queenstown CBD believe they can provide a limited opportunity for tourists to purchase alcohol made in New Zealand as a form of memento of the occasion of their visit, then we do not believe that the Act's objects will be compromised in any way.
- [23] What we are expecting is that the alcohol will be tastefully and professionally packaged and marketed. The display will complement the souvenir style of the business. If sales are made to supplement the business then the rules will change. It is important for the licensee to appreciate that once the line is crossed where the sale of alcohol products becomes a significant item in its own right, then it may no longer retain the right to sell alcohol as an appropriate complement to the kinds of goods being sold in the shop. The alcohol must always be a fitting or suitable complement to the souvenirs in the shop.
- [24] That is why we are adopting a precautionary approach and reducing the hours of trade. We would not expect the shop to be opened or even to stay

open just to service customers who may wish to purchase a bottle of the alcohol that they might have recently tasted. If the company's initiative is successful and it is intended to open the shop at a later time, then it can apply for an extension of the closing time on renewal. We suggest that it would be appropriate for the company on renewal to produce figures showing the percentage of alcohol sales to total sales in the shop as well as in relation to total sales of the business.

[25] Based on the evidence, we are satisfied that the company has answered the concerns raised by the Police and it is entitled to an off-licence under s.35 of the Act. The hours of operation will be 9.00am to 8.00pm seven days a week. The premises will be undesignated. The licence will be issued subject to the statutory conditions plus three discretionary conditions as follows:

The type of alcohol that may be sold pursuant to the licence may only be wine, beer or spirits manufactured or produced in New Zealand.

The alcohol may only be sold and supplied in and from the area known as the souvenir shop.

A duty manager must be present in the souvenir shop at all times the shop is open and alcohol is available for sale

DATED at QUEENSTOWN this 12th day of December 2016



Mr E W Unwin
Chairperson