

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of an application by **LUANDA
EXPERIENCE LIMITED** pursuant
to S.127 of the Act for the renewal
of an on-licence in respect of a
conveyance situated at Berth #7,
Connelle Wharf, Queenstown,
known as "The Luanda"

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 13 September 2017

APPEARANCES

Mr A W Ruski-Jones – representing the applicant
Ms S H Swinney and Mrs C J Steele – Queenstown Lakes Licensing Inspectors – to assist
Sergeant T D Haggart – N Z Police – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] This is an application by Luanda Experience Limited (hereafter called the company) for the renewal of an on-licence in respect of a conveyance situated at the Queenstown Wharf known as "The Luanda". The boat operates on Lake Wakatipu. It is known as a party boat. It hosts cruises such as BBQ lunch cruises and evening cruises. The business also caters for private charters, which tend to be celebrations, such as stag and hen parties, as well as birthdays.
- [2] As such it could be argued from a Sale of Alcohol perspective that the principal business is to sell and supply alcohol to the public (see definition of a tavern in s.5 of the Act).
- [3] The destination depends on the nature of the trip. The company has resource consent to operate on the Frankton Arm until 8.00pm. Passengers are

normally on board for about two hours. The bar is closed when passengers are embarking and disembarking. This is due to the fact that the barperson is also the skipper's boat crew and assists with ropes etc. The company currently trades with licensed hours from 8.00am to 12.00 midnight (with reduced hours in Frankton Arm as per its resource consent – there is an error in the current licence).

- [4] The public advertising was carried out in the name of Anthony William Ruski-Jones who is the company's director and shareholder rather than the company. We are satisfied that the mistake was not willful with little impact on public perception and a waiver under s.208 of the Act is granted.
- [5] The Luanda is a 15 metre vessel with four levels. This means that the entire public area is not visible from any one vantage point. There is a seating area (snug) on the lower level. The bar faces into the snug. The wheelhouse is on the main deck and there is access to the top roof through the rear of the main deck. The maximum number of passengers and crew is 40. Normally there are two members of the crew – the skipper and a barman/crew person. When there is a large crowd there will generally be an extra crew member. The business has held a licence since 13 December 2012.
- [6] There was no public objection to the application and the Medical Officer of Health had no matters in opposition. The application disclosed that there was only one holder of a Manager's Certificate. This was a Mr B J Round. The Police checked his manager's application and noted that he described himself as a skipper. This brought into question the issues of dual roles of responsibility. Consequently, the Police offered no objection to the renewal, but requested that a condition be added to the renewed licence to the effect that the duty manager must not be the skipper of the boat.
- [7] The request followed a meeting with the company in early December 2016. A further meeting was subsequently held with interested parties to see if the issue could be resolved. However, it appears that the respective opinions became more entrenched. Given the concerns raised by the Police and the number of other licensed boats operating on Lake Wakatipu, the application was set down for a public hearing.

The Application.

- [8] Considering the potential implications of the proposed condition, it was surprising that Mr Ruski-Jones did not consider the issue important enough to retain counsel. On the other hand he had no doubt that appointing the skipper as the duty manager was the common sense and correct procedure. Both he and his skipper aligned their arguments to the safety of the passengers. They both showed concern that appointing the barperson as the manager would somehow diminish the skipper's authority.
- [9] The company's argument was that the skipper had the ultimate responsibility for the safety of the vessel, crew and passengers. That it was the skipper who gave the pre-charter briefing and set the tone around alcohol consumption. That it was the skipper who reminded the customers of the company's obligations under its licence. And it was the skipper who had the most

interaction with customers and was therefore the most appropriate person to be Duty Manager.

- [10] Mr Ruski-Jones advised that he operates the vessel in accordance with Maritime New Zealand Law. He said that since March 2016 the company has operated under a new Maritime Operator Safety System (MOSS) using a Maritime Transport Operator Plan (MTOPlan). It was stated that the plan had been approved by Maritime New Zealand. The plan states that the skipper is highly recommended to “hold their Bar Managers and LCQ”. In other words the recommendation is that the skipper holds the qualification, although it does not follow that he or she will be the duty manager.
- [11] Mr Ruski-Jones provided little detail about the business. About 120 charters are conducted in a year and the average number of patrons is apparently 15. He estimated annual alcohol sales at around \$60,000. Beer wine and spirits are sold but shots can only be drunk at the bar.
- [12] Mr Ruski-Jones was supported by Mr Blake John Round the skipper. He argued that he was in command of the vessel so he gained the respect of the crew and the passengers. He contended that if the barperson was the duty manager then this would create an overlap as to who was in charge. He stated that if there were difficulties such as rough water, docking, retrieving something from the water, mechanical problems or dealing with a problem passenger, then, it was common to close the bar and get the crew member to stay with the skipper to help manage the boat.
- [13] Mr Round also stated that the skipper had a better view of the boat levels from the helm than the barperson. He said he believed that it was the skipper’s duty to oversee the safety of everybody on the vessel including their behaviour and intoxication levels. He acknowledged that there had been an incident where the Police had been called. Members of a party had got out of control, so after warnings had been issued and ignored, the bar had been closed. He returned to shore with the barperson standing with him. During that time members of the group had helped themselves to more alcohol.
- [14] Mr Round acknowledged the rules on the water issued by Maritime New Zealand state that the skipper is legally responsible for the safety of the boat and all the people on board. According to documents issued by Maritime New Zealand, the skipper is also responsible for complying with the “relevant rules and regulations”. The rules on the water (also issued by Maritime New Zealand) require the skipper to keep a good look out at all times. It is a skipper’s responsibility to stay alert for other boats, swimmers, dive boats, kayaks, hazards and obstacles. A skipper must keep focused on the water ahead especially when travelling at speed.
- [15] Mr Round argued that he was able at any time to stop the boat and leave the helm to deal with any issues. He stated that it was perfectly fine for a skipper to delegate somebody to keep watch while he was away from the helm. Mr Round has held a manager’s certificate since 27 October 2016, but he stated that he had years of experience managing bars in Queenstown and contended that the way they were operating the Luanda, they had a higher level of control over their patrons than a lot of bars in Queenstown. Mr Round was resolute in his opinion and firmly declined to see the issue any other way.

The Licensing Inspector.

- [16] Mrs Carolyn Jill Steele is an Alcohol Licensing Inspector at Queenstown Lakes District Council. She had gone to the trouble of interviewing and preparing a brief for the District harbourmaster, Mr M A Black. She advised that there were currently six conveyances with licences operating on Lake Wakatipu with a further application being processed. The majority of these vessels acted on the basis that the skipper was the duty manager.
- [17] Mrs Steele had also been in touch with Mr Graham Carradus the Coordinator of Environmental Health for the Tasman District Council. He is also a former harbourmaster with a current commercial skipper's qualification. He advised that there were a few licensed conveyances in the Tasman District that operated in Tasman and Golden Bay. He added that the service of alcohol was a minor component of the service they provided. The service is typically focused on other slightly energetic activities.
- [18] In email correspondence, Mr Carradus said that almost without exception the skipper was the duty manager and no problems had ever been experienced. Mr Carradus did acknowledge that the "party boat" label did raise the overall risk profile significantly, although he was still of the view that the skipper held the ultimate responsibility and was therefore the appropriate person to be the duty manager.
- [19] Mrs Steele had also been in touch with her counterpart in the Southland District. An email was received about the vessels operating in the Sounds. It was stated that the licensees preferred to have skippers as the duty manager because the skippers were more long term employees as compared with the crew members. No issues had arisen from the dual roles being undertaken by one person.
- [20] Martin Andrew Black is the Harbourmaster for the Queenstown Lakes District. He confirmed that the skipper had the ultimate and enduring responsibility to ensure the safety of all passengers and the crew. He saw no issue with the skipper being the duty manager and added that if the role was split then there could well be conflict, as it is the skipper who has the sole responsibility to make decisions regarding the safety of all parties. It is fair to say that when questioned by members of the Committee, Mr Black took on a more objective or neutral role.
- [21] Mr Black has spoken on the phone with the Regional Compliance Manager (Mr Dominic Venz) for Maritime New Zealand (see para [24] below) and claimed that Mr Venz had clarified his remarks. This hearsay evidence did not assist us in coming to our decision but certainly helped to "muddy the waters". As it happens we are required to make our decision under the Sale and Supply of Alcohol Act 2012 and not the Maritime Transport Act or the Maritime Security Act.

New Zealand Police.

- [22] Sergeant Tracy Diane Haggart is the Police Alcohol Harm Prevention Sergeant based in Queenstown. She discovered that the skipper was taking on the duty

Manager's role and this was confirmed at a meeting with Mr Ruski-Jones and a licensing Inspector. The Sergeant initially gained the impression that the company was going to ensure that the bar staff member became a certificated manager and could therefore take over the role of duty manager. That is why she did not oppose the application but requested a condition on the renewed licence preventing the skipper from being the duty manager.

[23] Following a further meeting with the parties on 14 August 2017 the Sergeant made contact with Maritime New Zealand in Invercargill. She was advised that in the opinion of the representative the skipper could not confidently be in charge of the vessel as well as be in charge of the bar. The representative stated that it was wise for a skipper to hold a manager's certificate to give that person a full understanding of the Act and a manager's obligations under the Act, but not be the duty manager. The representative was unable or unwilling to provide a written opinion.

[24] The Sergeant then made contact with Mr Dominic Venz the Regional Compliance Manager for the Southern Region of New Zealand based in Nelson. She explained that the boat had a skipper and one bar staff/crew member. Mr Venz provided a letter saying that Maritime New Zealand supported the imposition of such a condition. In his email letter he stated

"Our view is that the same person cannot properly undertake both the role of the skipper and a Duty Manager. There will be competing and simultaneous obligations for the person's time. This means that the same person cannot fully undertake both roles. This would raise issues not only under maritime law (and the navigational requirements) but also under health and safety law (and the requirements to watch out for the safety of the fee paying passengers)."

[25] In her final submissions Sergeant Haggart stated that the main concern was the significant importance of the two roles. The skipper was responsible for the water safety of the vessel and the people on it. The duty manager was responsible for alcohol consumption and prevention of harm. She noted that on Lake Wakatipu there are often situations where tourists and locals often inexperienced, go out on the lake in pleasure boats, jet skis, kayaks, home-made rafts, swimming or waterskiing etc., with little consideration of the water safety rules and others around them.

[26] She considered that it was difficult to see how someone who must be focused on the water and safe navigation of their vessel at all times, can therefore also carry out the role of the duty manager effectively and manage the sale and supply of alcohol to all patrons, assessment of them and dealing with difficult patrons, particularly if there is one other staff member on board.

The Committee's Decision and Reasons.

[27] What seems to have escaped the company's attention is that this decision is made pursuant to our statutory function under the Act. (s.187). A licence has always been regarded as a privilege with corresponding responsibilities. The purpose of the new Act is to put in place a new system of control over the sale and supply of alcohol with the characteristics that the new system will be reasonable and its administration will help to achieve the Act's object and the

second purpose is to reform the law relating to the sale, supply and consumption of alcohol so that its effect and administration helps to achieve the Act's object. (s.3)

[28] The new system of control is all about achieving the Act's object. That object is to ensure that the sale, supply and consumption of alcohol should be undertaken safely and responsibly and that the harm caused by the excessive and inappropriate consumption of alcohol should be minimised. (s.4)

[29] The rules that encapsulate the status of a duty manager are set out in the Sale and Supply of Alcohol Act 2012 as follows:

214 Manager to be on duty at all times and responsible for compliance.

- (1) **Except as provided in section 215, a manager must be on duty at all times when alcohol is being sold or supplied to the public on any licensed premises.**
- (2) **A manager on duty on any licensed premises is responsible for –**
 - (a) **the compliance with and enforcement of –**
 - (i) **the provisions of this Act; and**
 - (ii) **the conditions of the licence in force for the premises; and**
 - (b) **the conduct of the premises with the aim of contributing to the reduction of alcohol-related harm.**
- (3) **At all times while a manager is on duty on any licensed premises, the full name of the manager must be prominently displayed inside the premises so as to be easily read by people using the premises; and the person named as manager at any time is to be treated for the purposes of this Act as the manager at that time.**
- (4) **At all times when alcohol is being sold or supplied on licensed premises the licensee must take all reasonable steps to enable the manager to comply with this section.**

[30] Section 214 of the Act has been described by Alan Dormer and Alastair Sherriff in their textbook the "Sale of Alcohol" in these terms:

Thus the section is one of the cornerstones that underpin the licensing system. It lays the foundation for placing much of the responsibility for the control of licensed premises on the shoulders of the holder of the duty manager's certificate. The duty manager's required presence at all times emphasises this. The obligation in relation to compliance and enforcement in sub (2) is further reinforcement of the importance in the licensing system of the duty manager.

Licensees will necessarily make decisions about the role of the duty manager within their own business. The Authority, however has said that if a duty manager is placed away from points of sale then the licensee assumes a risk as a result of that, and if there is a breach of the legislation or the conditions, then the licensee can expect little sympathy from the monitoring authorities. See Campbell v Ngaere Stores Ltd LLA PH576/07, 8 June 2007, and Bryant v The Crossing on Kaiapoi Ltd LLA PH469/09, 6 May 2009 at [22].

[31] Even if the barperson is the duty manager, the skipper continues to have the ultimate responsibility for the safety of the vessel, crew and passengers. The skipper can still give the pre-charter briefing and set the tone around alcohol

consumption. The skipper can remind the customers of the company's obligations under its licence and the skipper can continue to interact with customers. In short, any suggestion about the skipper's possible or potential loss of authority is baseless.

- [32] The over-riding issue in this case is that this is a party boat. It has no other *raison d'être*. During the course of a year, a large amount of alcohol is consumed. There is a world of difference between this vessel and other tourist craft operating not only on Lake Wakatipu but also in Golden Bay, Tasman Bay and the Sounds.
- [33] Given the ultimate responsibility placed on a duty manager for compliance with the Act, we are surprised that the company did not agree to the suggestion that the barperson was suitably trained and certificated. The roles of a skipper and a duty manager are both important and significant and given the type of business conducted on board, both roles should not be confused or compromised.
- [34] As stated above, if the duty manager is placed away from the point of sale then the licensee assumes the risk of a potential loss of licence. There will be some businesses where the risk will be slight and the licensee may make a business decision accordingly. However, in a case such as this, we are in no doubt that the risk to the Act's object is too great.
- [35] We believe that Sergeant Haggart is right. We do not accept that the skipper is in a position to monitor and assess patrons on a regular basis. Nor do we accept that he/she can have face to face interaction with the patrons. What we do accept is that the skipper will continue to have overall control and decision making on the vessel allowing that person the freedom to carry out the core functions of safety and navigation.
- [36] We have considered what action should be taken. We are not inclined to impose a condition on the licence. Such a condition should not be necessary. The majority of all licensees in the Queenstown Lakes area are well aware of the responsibilities associated with the privilege of holding a licence. They do their best to uphold the Act's object. In those circumstances we think it unreasonable to impose a condition when we have made our position in respect of this conveyance perfectly clear.
- [37] Both the company and the Police have appellate rights that they may wish to exercise. If no appeal is lodged against this decision then two options remain. On the one hand the company may accept the decision and ensure that the barperson becomes certificated and assumes the role of duty manager. On that basis we will grant the renewal on the papers. On the other hand if the company takes no action, the application will be set down for a further public hearing to reconsider the application for renewal or the request to impose a condition. We ask that the Inspector reports back to us within the next three months.

DATED at Queenstown this 3rd day of October 2017



Mr E W Unwin
Chairman

