

Decision No. QLDLC 0019/14

**IN THE MATTER**

of the Sale and Supply of Alcohol

Act 2012

**AND**

**IN THE MATTER**

of an application by **BARRA PISTA LIMITED** pursuant to s.136 of the Act for a Temporary Authority in respect of premises situated at the corner of Searle Lane and Eureka Arcade, Queenstown, known as "The Powder Room"

**BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE**

Chairman: Mr E W Unwin

Members: Ms M W Rose

Mr J M Mann

**HEARING** at QUEENSTOWN on 9 June 2014

**APPEARANCES**

Ms T J Surrey – for the Applicant Company

Ms J J Mitchell – Queenstown Lakes District Licensing Inspector – to assist

Sergeant L K Stevens – N Z Police – to assist

Dr D W Bell – Medical Officer of Health – to assist

**RESERVED DECISION OF THE COMMITTEE**

**Introduction.**

[1] This case involves an application by Barra Pista Limited (hereafter called the company), for a temporary authority to carry on the sale and supply of alcohol for a period not exceeding three months or until its application for a new on-licence has been determined, which-ever happens first. The business operates as a tavern. The premises are located in the Queenstown Central Business

District and have been licensed since 2005. There are eleven licensed premises within a 50 metre radius. "The Powder Room" is small (about 23.5 square metres). There is one single door entry/exit and two window seats. The majority of the premises can only accommodate vertical drinking. Capacity is below 50 people and there is no kitchen. Trading hours are from 12.00 midday to 4.00am the following day. There is a small area outside for smokers which is licensed to 10.00pm, but the company has accepted that there will be no consumption of alcohol outside the premises while it trades under a temporary authority. The business has a focus on emerging music, and various national and international musicians perform in the premises.

[2] The business used to be known as "Mini Bar" and was owned and operated by the 'Good Group Limited'. On 20 August 2013, the Queenstown Lakes District Council (QLDC) received an application for a temporary authority to operate the business following a contract for its sale. The applicant was a company called Taiaroa Group Limited. At that time Taiaroa Group Limited was operating a business called "Skybar". In its first 'probationary' year there had been a number of incidents at "Skybar", and applications were being considered for the suspension of "Skybar's" licence, as well as the Managers Certificate of Mr Daniel Taiaroa (one of the directors). At a meeting with the directors of Taiaroa Group Limited the agencies suggested that the application for a Temporary Authority would be opposed.

[3] On 27 August 2013, Mr Rajesh Patel filed a second application for a temporary authority in the name of Barra Pista Limited. He advised that Mr Daniel Taiaroa and Mr Ricki Taiaroa had elected to leave the business partnership. Indeed the New Zealand Companies office website showed that the day beforehand the Taiaroa brothers as well as a Mr Mark Laurence had ceased to be directors, and that Ms Charlotte McCubbine had been appointed as a director of the company. A temporary authority was issued to the company on 3 September 2013 and it has been trading on temporary authorities ever since. The current authority expires on 30 June next.

[4] On 4 November 2013 the substantive application for an on-licence was filed. Mr Rajesh Patel was shown as owning 85% of the company's shares. There were three directors. Mr Patel, Mr Simon Child and Ms McCubbine. No objections were received from either the Police or the Medical Officer of Health. In a report dated 31 January 2014, the Inspector pointed out a number of incidents that were alleged to have taken place since the company had started trading. As a consequence the Licensing Committee directed that the on-licence application should be determined at a public hearing to be held on 12 May 2014. At the hearing the company argued that because the application had been filed prior to 18 December 2013, the appropriate tribunal was the Alcohol Regulatory and Licensing Authority (ARLA). The committee accepted the argument and the application has been duly forwarded to Wellington and is awaiting a hearing. The present application for a Temporary Authority was filed on 16 May last and the committee directed a public hearing pursuant to s.136(3) of the Act..

#### **The Incidents that have occurred since 3 September 2013.**

[5] At the applicant's request the reporting agencies gave their evidence first. The first incident occurred on 23 November 2013 at 2.15am. According to the evidence a 25 year old man had been drinking and was moderately intoxicated. While he was dancing on the dance floor another male bumped into him. This second male had removed his clothing and was naked. The first male took exception to this and punched the naked man. A confrontation ensued resulting in three men being removed from the bar. The first male was charged with disorderly behaviour. He pleaded guilty and received diversion. The second male left the scene and has not been located. The third male who joined in after the initial assault received a warning.

[6] The second incident occurred on 10 December 2013 and involved a temporary duty manager who had been drinking. She was spoken to by Sergeant K A Pirovano. Sergeant Pirovano could not be present at the hearing. As Ms Surrey has pointed out, there was no possibility of her being cross-examined even though her brief was admitted. However Sergeant L K Stevens who is the Alcohol

Harm Prevention Officer was advised of the incident and followed it through. Sergeant Stevens spoke first with Charlotte McCubbine a director of the company as well as its manager. Ms McCubbine was aware of the incident. The phone call was made on 27 December 2013. The Sergeant referred to the incident and explained that intoxication could have consequences for the licensee – the person who owned the place. Ms McCubbine appeared to think she was referring to Mark and Daniel Taiaroa. The Sergeant followed up on the mention of Daniel Taiaroa's name given that he was the subject of enforcement proceedings. Ms McCubbine then recanted and asked whether the Sergeant wanted to contact Mark Laurence.

[7] Eventually the Sergeant spoke with the temporary manager who acknowledged that she had drunk three glasses of wine but was unsure over what period. She confirmed that she had been asked to step in as the manager had been unwell. She added that she had been working at the establishment for about two months. She had not applied to become a manager or to complete any of the requirements. The Sergeant advised that the person had since left her employment with the company.

[8] Ms J J Mitchell is a Licensing Inspector employed by the Queenstown Lakes District Council. She has held this position since January 2013. On 27 January 2014 she became aware of a promotion being run by the company which had started on 19 December 2013.. The promotion offered a free bungy jump that could be won every Thursday for ten consecutive weeks by buying a drink to enter the draw. This type of promotion is in breach of s.237(1)(e) of the Act. She wrote to Mr Patel advising him of the breach. He later explained that he had advised staff that the promotion would need to be cancelled although he was too late to stop the final advertisement. Ms Surrey pointed out that this was a new type of illegal promotion that had only become law on 18 December 2013. However, the reality is that the Act received its Royal assent on 18 December 2012. The various players in the hospitality industry had effectively 12 months notice of the Act's contents.

[9] Ms Mitchell referred to the fact that the business has a '100 Shot Wall'. It is a main feature of the bar's decor. A recent advertisement in the local free newspaper states "Check out our '100 Shot Wall.' QT's biggest and best selection of shots! Can't decide? Roll the dice." When he gave evidence Mr Patel confirmed that dice were available to be rolled by a customer and the outcome determined the shot that was to be consumed. Although not necessarily illegal Mr Patel acknowledged that the promotion may well be sending out the wrong message.

[10] The Committee was shown CCTV footage of a DJ and a barman "snorting" a substance behind the bar. This incident occurred on 23 March at about 2.51am. Ms Tarryn Turner was the duty manager as Ms McCubbine was in Christchurch. The footage was quite graphic and showed the barman preparing the substance on a clip board on the floor behind the bar. He then appeared to "snort" it and was followed by the DJ. The Duty Manager was also behind the bar serving. She took action afterwards and told the two men to leave. The barman had been employed on a trial basis and his employment was subsequently terminated by Ms McCubbine. The DJ has not been invited back to the premises.

[11] A further incident was reported by Sergeant Pirovano and this was acknowledged by the applicant. On 6 April 2014 at about 2.46am Ms McCubbine was asked about food. She stated that they had paninis and samosas that could be heated. However when requested to show the food Ms McCubbine was unable to find anything, and recalled that she had thrown it out the day before as it was stale. On 15<sup>th</sup> April Sergeant Stevens spoke with Ms McCubbine who advised that the food was replaced the next day. She said that she had thrown out the bread and the paninis but not the fillings. It is unclear whether she was referring to 'toasties' that are on the menu or 'Panini's' that are not mentioned.

[12] The evidence was that Ms McCubbine is in Queenstown on a working holiday from England. She arrived in New Zealand on 9 November 2013 and holds a Manager's Certificate. She was

granted a work visa that was due to expire on 26 April 2014. She submitted a request for an extension to her visa on 29 April 2014. She was considered to be unlawfully in the country as from 29 April 2014 to 21 May 2014 when she was granted a visa valid to 21 May 2015 allowing her to work "as Managing Director for Barra Pista." On 8 May last Ms McCubbine sent a notice of management change in respect of another employee. She signed the document as a director. Because of potential and actual concerns about her suitability, Ms McCubbine was removed as a director of the company on 30 May 2014. Since she is no longer a director or the manager, it seems to us that the status of her visa should be clarified.

### **The Applicant Company.**

[13] Mr Rajesh Patel resides in Sydney and is employed in private practice as a lawyer in banking, finance and property. He explained that the company had evolved as a commercial venture between friends who had known each other over 15 years. Originally the company had consisted of five shareholders. However after the new business had been purchased, the decision was made to remove Ricki and Daniel Taiaroa from the company. He stated that Mark Laurence was initially the operations manager but he has now relocated to Auckland and remains a shareholder. The other director is Simon Child but essentially he is a silent partner. Mr Patel advised that given concerns about Ms McCubbine's ability to manage the business, the company had taken on a more experienced general manager.

[14] He advised that Mr Jonathon Dykes has had significant experience of being a general manager for over 10 years at a number of reputable licensed premises including his most recent appointment as manager of the "Matakana Village Pub". He confirmed that Mr Dykes had accepted responsibility to ensure the company's compliance with the Act, and that staff would now report to Mr Dykes. He gave evidence that the company employed four people including Ms McCubbine and Mr Dykes, and that the company considered that this was an adequate resource to operate the business. In addition the company had engaged the services of a security company that had similar arrangements with a number of bars in Queenstown. He stated that while the major economic and commercial decisions were his, the general manager was given a large amount of autonomy. He said that he received a daily account of the business.

[15] Mr Patel confirmed that staff were aware of their responsibilities under the Act and were encouraged to take the LCQ test after three months employment to show their potential to obtain their manager's certificates. He produced what he described as a comprehensive host responsibility policy. Mr Patel explained that the incident with the patron who removed his clothing had happened very quickly and staff were unable to react in time. He advised that the temporary manager who had been drinking had had her employment terminated, and that the lack of food was an oversight. He confirmed that the company had a zero tolerance to illegal substances as evidenced by the dismissal of the two people involved.

[16] Ms Surrey acknowledged that some of the issues raised by the agencies were not ideal but that they were in the past and previous temporary authorities had been issued against the background described above. She asked the committee to take into account the co-operation shown by the company in offering to have the outside area removed from the definition of licensed premises, as well as the appointment of a new experienced manager. She argued that the last incident had occurred in April – two months previously

### **The Committees Decision and Reasons.**

[17] Section 136 (1) of the Act reads:

*A licensing committee may, on the application of a person who appears to the committee to have any right, title, estate or interest in any premises, or any business conducted in any*

*premises, for which an on-licence or off-licence is in force, make an order authorising the applicant (or some suitable person nominated by the applicant) to carry on the sale and supply of alcohol for a period, not exceeding 3 months, stated in the order.*

[18] On making an order the committee must impose any conditions that the Act requires an on or off-licence to be issued subject to. The committee may impose any conditions that the Act enables an on or off-licence to be issued subject to. And the committee may also impose any other reasonable conditions it thinks fit. In exercising our discretion we have few guidelines. In this case the company has already established its entitlement and interest in the premises. Given that the on-licence application has been filed and is to be dealt with in another forum it is not appropriate in our view to consider the general criteria listed in s.105 of the Act. On the other hand the suitability of the applicant is a relevant matter for consideration.

[19] An applicant's suitability was discussed by the Liquor Licensing Authority recently in *Nishchay's Enterprises Limited* [2013] NZARLA PH 837.

[20] At paragraph [53] of that decision the Authority stated:

*"[New Zealand Police v Casino Bar No 3 Ltd (CIV 2012-485-1491; [2013] NZHC 44) a recent High Court judgement which discussed "suitability" in some detail] did not specifically refer to the test for suitability contained in Sheard [1996] 1NZLR 751 where Holland J said at 758:*

*"The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence".*

*However the judgment inferred that the test applied when the learned Judge referred with approval to Holland J's statement in Re Sheard:*

*"Suitability is a relatively broad concept and, in the context of an assessment of an application under section 13 of the Act, it relates to the suitability of the applicant to be granted the privilege of an on-licence to dispense liquor".*

*Traditionally that test has been interpreted as meaning whether or not an applicant will comply with the penal provisions of the Act. In fact, the test is much wider. To carry out the responsibilities that go with the holding of a licence includes whether or not liquor abuse issues are likely to arise. Thus, it includes the object of the Act as set out in section 4. The Sheard test is not simply about how a business is likely to operate in the future. It is dependent on an assessment of the more generalised factors referred to in the previous paragraph. It includes how a licensee will deal with liquor abuse issues that may arise from the establishment of the business. The usefulness of the Sheard test is that it gives a focus to the wider exercise contemplated in the Casino Bar No. 3 Limited decision by reminding one of the reason for the exercise."*

[21] Although Ms Surrey stressed that overseas licensees are not uncommon in Queenstown, an absentee licensee will be required to give the manager almost complete autonomy which means that the manager must be more than competent. In such circumstances a licensee will need to have tight business systems in place. The business under discussion is high risk in that the premises are designed for vertical drinking, there is encouragement of drinking shots, the company has a focus on music and dancing, and there is precious little attention to food. Mr Patel seemed to have little knowledge of the details of the business he has taken over. For example he was unaware that the company's address for service was a former residential address of one of the Tairaroa brothers in Wellington. He had little idea of the way that the food is prepared or promoted.

[22] The menu itself is inadequate in that people are offered either a ham and tomato toastie or a chicken and cheese toastie or 2 vegetable samosas. It has always been the case that two or three

types of the same food does not satisfy a requirement that a range of food is available. Although there is a suggestion that food can be obtained from the “Devil Burger” round the corner, we were made aware that this establishment closes at midnight during the week. Furthermore we thought it either unlikely or risky that staff would be able to leave the premises to pick up an order. Given these handicaps the Committee would be unlikely to consider “Devil Burger” as a realistic or viable option when considering the provision of food. The ‘comprehensive’ host responsibility policy refers to the Sale of Liquor Act 1989. The document advises that no promotions encouraging the rapid consumption of alcohol or an excessive volume of alcohol will be either initiated or conducted on these premises. And yet the company actively encourages patrons to drink shots in the usual way with a pair of dice deciding the nature of the shot.

[23] The onus is on the company to prove on the balance of probabilities that it is a suitable entity to hold a temporary authority. It must establish an entitlement. Given its history set out above we certainly had concerns about this issue. Mr Patel did concede that there would have been times when the business was not being adequately controlled. We accept that there have been no incidents for two months but it has been a quieter time between seasons with less pressure. What has persuaded us to grant the application is the presence of a clearly competent manager. We have confidence that with his guidance and direction the object of the Act will be more likely to be achieved. The issue is for us how long will the manager stay?

[24] There is another reason why we have decided to give the company an opportunity to prove its worth. The issue is whether a refusal of the application would be considered unreasonable. This is a new Act. Section 3 of the Act sets out its purpose. It is to put in place a new system of control over the sale and supply of alcohol; and to reform the law generally relating to the sale and supply and consumption of alcohol. The characteristics of this new system are that:

- (a) *It is reasonable; and*
- (b) *Its administration helps to achieve the object of this Act.*

[25] Section 4 sets out the Act’s object. Section 4(1) reads:

- (1) *The object of this 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.*
- (2) *For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes –*
  - (a) *Any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and*
  - (b) *Any harm to society generally or the community, directly or indirectly caused, or directly and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).*

[26] Given the object of the Act and the type of business that is being licensed, and the company’s management and trading history to date, we think that it is necessary to reduce the trading hours. In our view this will be likely to reduce the risk of alcohol related harm and ensure that alcohol is more likely to be sold and supplied safely and responsibly. Further, the earlier closing will give the Police and Inspector more opportunity to monitor the premises to ensure that the provisions of the Act are

respected. We considered the imposition of a one way door policy and this was not discussed at the hearing.

[27] For the reasons we have set out we make an order authorising the company to carry on the sale and supply of alcohol from 1 July 2014 to 1 September 2014 or until the application for an on-licence has been determined whichever is the first in time. During the currency of this temporary authority we expect the company will ensure that Ms McCubbine has the correct visa to enable her to continue working. Furthermore we expect that the company will review and clarify the provision of food. The company is reminded that the failure to have a reasonable range of food available for consumption is not only a breach of the Act (s.53) but also a breach of the condition of the licence. A fine of \$5,000.00 may be imposed for the offence of failing to comply with the section 53 of the Act, (see s.259(1)(a)), and the licence can be suspended or cancelled. (see s.280(3)(a)).

[28] We anticipate that the company may wish to review its promotion of shots. We have reduced the period of time for the Temporary Authority to give the parties the right to review the conditions, and for us to see whether our expectations have been realised. In the event that the company does match or exceed expectations it may be that another temporary authority can be granted without the necessity of a hearing.

[29] The following conditions are imposed.

- (a) The trading hours will be 12.00 midday to 3.00am the following day.
- (b) During the currency of this temporary authority no alcohol sold or supplied by the company will be consumed outside the premises

**DATED** at QUEENSTOWN this 16<sup>th</sup> day of June 2014



E W Unwin

Chairman