

Decision No. QLDLC 0009/16

IN THE MATTER of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER of an application by
FEDERAL DINER LIMITED pursuant to
Section 99 of the Act for a new Off Licence
In respect of premises situated at 47
Helwick Street Wanaka and known as
“Fedeli”.

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

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

HEARING at WANAKA on 5th May 2016

APPEARANCES

Mr P M Hewitt – representing the applicant
Ms S H Swinney – Queenstown Lakes District Licensing Inspector – to assist
Sergeant TD Haggart – NZ Police – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction

[1] Before the committee is an application pursuant to Section 99 of the Sale and Supply of Alcohol Act 2012 by Federal Diner Limited (the applicant) for an Off Licence for premises located at 47 Helwick Street Wanaka. The application was filed with the Queenstown Lakes District Council (QLDC) Licensing Agency on the 20th January 2016.

[2] The applicant has recently opened a delicatessen type operation to compliment an existing licensed restaurant style business located on the same site and trading as the “Federal Diner”. The new business operates under the name of “Fedeli” The applicant intends to offer boutique and craft beers from local breweries and local wines along with picnic hampers as a supplement to the main focus of “Fedeli” being a takeaway delicatessen food and coffee facility.

The Application

[3] The applicant is a registered company with four directors as shown below.

- Peter McLeod Hewitt
- Kirsty Jane Hewitt
- Brona Parsons
- Sian Elizabeth Watts

In addition to those named above, there are two further shareholders of the applicant

company, being Ms Emilie Brosnahan and Mr Michael George Cantrick Stephens. The application was filed by Mr Peter McLeod Hewitt who appeared at the hearing on behalf of the applicant. Public notification incorrectly showed the applicant's name as Kirsty Jane Hewitt but given the lack of any public objection a waiver under s. 208 of the Act is granted.

[4] The premises have been recently constructed to replace an old cottage. This new building along with the 'Federal Diner' is owned by Mr and Mrs Hewitt. Both buildings are situated in the Wanaka Town Centre Zone. Surrounding them are retail stores, restaurants, a tavern, and a supermarket.

[5] Access to the premises is gained from a decked corridor which is shared with the Federal Diner opposite. Fedeli itself has no internal seating available to customers as the operation is primarily a takeaway business selling fresh and frozen prepared food items, packaged preserves and delicatessen style products along with hot and cold drinks, smoothies and juices. The focus of the activities of Fedeli is to provide a healthy, inexpensive and fast takeaway option for those customers who are in a rush, or want something for later or simply don't want to cook their dinner

[6] Both the QLDC Planning Department and the QLDC Building Department have confirmed that the application meets the requirements of the Resource Management Act 1991 and the building code as set out in section 100(f) of the Act. The hours applied for are Monday to Sunday, 8.00am to 10.00pm. These hours comply with the Maximum National Default Hours as set by the Act for off licensed premises.

[7] As stated above, the application did not generate any public objection; however it did draw a report in opposition from the Police. In that report, the Police submitted that the applicant had failed to meet the criteria as set out in Section 32 of the Act, and that therefore an off-licence was unable to be granted. The Inspector in her report also drew our attention to the various requirements under the Act and in particular, the kinds of premises for which an off-licence could be granted.

The Applicant

[8] Mr P M Hewitt was the only person to give evidence. The applicant had already lodged a comprehensive business plan in which it was stated that the Federal Diner's culture was "great hospitality, coffee and food delivered in a timely manner." Mr Hewitt advised that the aim was to build on the diner's venue and reputation that had been already established, and to anticipate the inevitable demand for healthy take away food options brought about by Wanaka's growth rate as a tourist attraction.

[9] Mr Hewitt spoke about the applicant's current staff training and procedures and argued that there should be no concern about the safe and responsible sale and supply of alcohol. He asked the question whether the business was a grocery store and acknowledged that it was "probably not". He pointed out that the new business was closer in concept to "Oliver's" in Clyde which, according to him, runs a licensed restaurant as well as a Deli style operation, and that alcohol can be taken away, although he had no evidence to support his assertion. He advised that the applicant offered a wide range of good food which included a breakfast to dinner menu, albeit on a take away basis.

[10] From his evidence it seems that no legal advice was taken prior to lodging the

application and Mr Hewitt was willing to place the outcome in the hands of the Committee. It is fair to say that the applicant's request for a licence was based more on hope than anticipation. Mr Hewitt informed the Committee that he was appearing to clarify and respond to any issues that had been raised by the Inspector.

The Police Submissions.

[11] Sergeant Tracy Haggart from Queenstown appeared for the Police in opposition to the application. She submitted that the application did not appear to meet any of the descriptions for premises for which an off licence may be issued as set out in Section 32 of the Act as follows:

S32 Kinds of premises for which off-licences may be issued.

(1) An off-licence may be issued only -

(a) to the holder of an on-licence issued for a hotel or tavern, for the premises or part of the premises) for which the on-licence is held; or

(b) for retail premises where (in the opinion of the licensing authority or licensing committee concerned) at least 85% of the annual sales revenue is expected to be earned from the sale of alcohol for consumption somewhere else; or

(c) if (i) the premises for which it is to be issued are not retail premises; and

(ii) at least 85% of the annual income of the person to whom it is to be issued is (in the opinion of the licensing authority or licensing committee concerned) expected to be earned from the remote sale of alcohol; or

(d) for premises where (in the opinion of the licensing authority or licensing committee concerned) the principal business carried on is the manufacturer of alcohol; or

(e) for premises that (in the opinion of the licensing authority or licensing committee) are a supermarket with a floor area of at least 1000m² (including any separate departments set aside for such foodstuffs as fresh meat, fresh fruit and vegetables, and delicatessen items); or

(f) for premises that (in the opinion of the licensing authority or licensing committee concerned) are a grocery store

[12] The Sergeant submitted that the delicatessen would most closely fall into the category of a grocery but given that a grocery required a range of products and other household items, and given that food products does not include ready to eat prepared food or snack food, (see s.33 of the Act), the current premises did not qualify.

The Licensing Inspector

[13] The Inspector had provided a full and detailed report in which she drew our attention to the restrictions on the issue of off licenses within Sections 32 to 36 of the Act.

The Committee's Decision and Reasons

[14] The committee felt that this application is quite straight forward. As stated in paragraph [11] above, an applicant for an off-licence must establish that the premises for which an off-licence is sought is either a tavern or a hotel or a bottle store, or a winery or a brewery, or a supermarket or a grocery. Fideli's 'causa est' is as a takeaway delicatessen, something it achieves particularly well. Mr Hewitt, in his evidence arrived at the conclusion that they were "probably not" a grocery store, more a 'foodie' takeaway. Under s.33 (1) of the Act a grocery store means a shop that has the characteristics normally associated with shops of the kind commonly thought of as grocery shops. "Fedeli" has no such characteristics.

[15] In considering this application, the committee must consider the kinds of premises for which off licenses may be issued under the Act. It is up to an applicant to satisfy us that there is compliance. Pursuant to s.34 of the Act an off-licence may be granted to another sort of premises if the establishment of a bottle store or a supermarket or a grocery store would be uneconomic because of the isolated area in which the premises are situated. Clearly this exception does not apply.

[16] Section 35 allows the Committee to grant an off-licence to any other sort of premises provided that alcohol was an appropriate complement to goods that are sold from the premises. However such premises cannot be a shop where the principal business is the sale of food. In **Michael John Lopdell v DeliHoldings Limited AP 97/01 High Court Auckland** the Judge made these comments at paragraph [29] when discussing a similar section in the Sale of Liquor Act 1989:

The matter is by no means free of difficulty. However, on balance I have concluded that the appellants' contention is correct. I accept Mr Pilditch's submission that the reference to 'any other premises' is not to be read down in the way contended by the respondent. If it had been intended to restrict off-licences simply to premises similar to supermarkets or grocery stores, then the legislature could easily have said so. Indeed, it has chosen to use open language which restricts the grant of off-licences under s.36 (2) (b) to any other premises on which the principal business is the sale of food or groceries.

[17] Accordingly, after consideration of the matters recorded above, and for the reasons we have set out, the application by Federal Diner Limited for an off licence for the premises known as Fedeli is refused.

DATED at Queenstown this 17th May 2016



J.M. Mann
Commissioner
Queenstown Lakes District Licensing Committee