

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Tocoan Pty Ltd
(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)

Respondent: City of Rockingham
(represented by Mr Peter Doherty of Francis Burt Chambers and Mr John Woodhouse of the City of Rockingham)

Commission: Mr Seamus Rafferty (Deputy Chairperson)

Matter: Application pursuant to section 21 of the *Liquor Control Act 1988* for costs

Date of Hearing: 6 March 2014

Date of Determination: 6 March 2014

Determination: Costs awarded to Tocoan Pty Ltd in the sum of \$15,840.00

Authorities referred to in Determination:

- *Withnell v The Liquor Commission* [2013] WASC 201

BACKGROUND

1. The City of Rockingham (“the City”) made complaints against Tocoan Pty Ltd trading as Zelda’s Nightclub (“Tocoan”) pursuant to section 95 and section 117 of the *Liquor Control Act 1988* (“the Act”). The complaints were heard separately by the Commission on 24 and 29 February 2012.
2. The Commission dismissed both complaints on the basis that there was insufficient evidence in support of both matters.
3. Tocoan made an application for costs in respect to the section 95 hearing, the section 117 hearing and the interlocutory applications and appeal that required determination prior to the hearings.
4. I came to the conclusion that the applications and appeal were vexatious in the sense that the applications were foredoomed to fail based on previous orders made by the Commission. I declined to award costs in respect to the section 95 and section 117 hearings. (LC07/2013)
5. The City appealed the decision to award costs to Tocoan. There was a cross-appeal in respect to the decision refusing costs in respect to the section 117 hearing. The appeals were heard by the Commission constituted by three members.
6. In decision LC 44/2013, the Commission dismissed the City’s appeal and upheld Tocoan’s cross-appeal. The issue of the quantum of costs in respect to the applications, the appeal and the section 117 hearing have been re-mitted to me for determination. The Commission also made orders in respect to costs relating to the 5 December 2013 appeal hearing.
7. The question of costs relating to the 5 December 2013 appeal hearing is not to be determined by me. I was not a member of the quorum constituting the Commission in that matter and it is inappropriate for me to determine the quantum of costs in respect to the appeal hearing in which I was not involved.
8. The parties were provided with the opportunity to provide submissions by 31 January 2014. By way of written submissions dated 31 January 2014, solicitors for Tocoan

have set out the manner in which this matter should proceed and a schedule of costs. Solicitors then acting for the City also filed submissions on the same date.

9. For reasons which will be obvious, the City was granted leave to file supplementary submissions, which were filed on 17 February 2014.

SUBMISSIONS ON BEHALF OF TOCOAN

10. In determining the quantum of costs to be awarded, it was submitted that the Commission should apply the hourly rate for legal practitioners approved in the *Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2010*. A schedule of costs outlining work completed by the solicitors for Tocoan was attached to the written submissions.

ORIGINAL SUBMISSIONS ON BEHALF OF THE CITY

11. Cullen Babington McLeod Lawyers, filed submission on behalf of the City on 31 January 2014. Those submissions were signed by Counsel who appeared on behalf of the City at the various hearings, Mr Gavin Crocket. Those submissions are extremely discourteous and trespass beyond the bounds of legitimate advocacy. Further, factual assertions made in the submissions are blatantly incorrect.
12. The submissions include the following assertions, namely:
 - (a) 'The remark made at paragraph 63 of the Decision [LC 44/2013] distorts the true history of the City's endeavours to present its case. The City was precluded from the inception in presenting its case, in both complaints.'
 - (b) 'The approach (allowing all evidence to be admitted) was abandoned in this matter and an aggressive uncompromising approach was taken by the Commission by throwing up barriers for the City in presenting its case, in refusing to allow it to adduce what evidence it deemed appropriate to support the complaints and in particular, disallowing evidence which had come into its possession in the last 6 months prior to the hearing, which was cogent and relevant.'

(c) 'The City can have little optimism that the provisions of Section 7(b) will fall in its favour in the presentation of these submissions for to date the Commission has been obstructive in preventing the Local Authority in establishing its complaints. The City has been punished with an order for costs.'

(d) 'This party can draw no comfort that the legal principles about indemnity costs, for self represented litigants, will be administered accordingly to the provisions of the Act.'

13 I do not propose to defend the Commission in respect to the matters raised in the original submissions. However it is important to recognise that those counsel who appear before the Commission are bound by the *Legal Profession Conduct Rules 2010*. Any legal practitioner who appears before the Commission is expected to do so in a courteous and professional manner. The original submissions filed on behalf of the City fall well short of the level of conduct expected by the Commission and appear to be a petulant expression of counsel's frustration.

SUBSEQUENT SUBMISSIONS ON BEHALF OF THE CITY

14. In written submissions dated 17 February 2014, counsel who had been subsequently engaged by the City made the following submission:

'1.1 The City of Rockingham (City) refers to the Submissions dated 31 January 2014, filed by its then solicitors, Messrs Cullen Babbington Macleod (Submissions).

1.2 The City did not have the opportunity to review the Submissions before they were filed and unreservedly withdraws (and apologises for) the various disparaging remarks in relation to the Commission which are contained therein.'

15. It is to the credit of the City and counsel for the City, Mr Peter Doherty that the original submissions were withdrawn. Accordingly, the Commission will ignore the original submissions and focus on the matters raised in the written submissions dated 17 February 2014.

16. It is submitted that the Commission should adopt the scale prescribed in the *Legal Practitioners (State Administrative Tribunal) Determination 2010* in which the maximum allowable rates for a senior practitioner were \$352 per hour. That was the determination in existence at the time of each relevant application, appeal or hearing.
17. Adopting the relevant scaled rates, it is submitted that an appropriate award of costs to Tocoan for the matters that I am considering is \$14,700.00.

DETERMINATION

18. As was noted by His Honour McKechnie J in *Withnell v The Liquor Commission* [2013] WASC 201, the Liquor Commission is not a Court. Accordingly, I do not consider that it is appropriate for the Commission to adopt scales of rates allowable for legal costs in the District or Supreme Courts.
19. There is no provision in the *Liquor Control Act 1988*, *Liquor Control Regulations 1989* or *Liquor Commission Rules 2007* as to the maximum allowable rate allowable for a senior practitioner. The functions of the Commission are administrative and not judicial in nature. Accordingly, I have adopted the submissions of the City and will determine the issue of quantum applying the *Legal Practitioners (State Administrative Tribunal) Determination 2010*. I consider that I am entitled to adopt such an approach having regard to the relevant matters set out in section 16 of the *Liquor Control Act 1988* which include that the Commission:
 - (a) shall act without undue formality;
 - (b) may consider and dismiss or determine applications, and receive submissions and representations in relation to any application before it, as it thinks fit.
20. Applying the relevant determinations, being aware of the documentation referred to in the schedule of costs submitted on behalf of Tocoan and having considered the submissions of both parties, I allow costs as follows:

(a) 7 February 2012 Application

4.5 hours at \$352.00 per hour \$1,584.00

(b) 20 February 2012 Application

6.5 hours at \$352.00 per hour \$2,288.00

(c) 23 February 2012 Application

13 hours at \$352.00 per hour \$4,576.00

(d) 29 February 2012 Appeal

11 hours at \$352.00 per hour \$3,872.00

(e) section 117 hearing

10 hours at \$352.00 per hour \$3,520.00

21. The total amount awarded to Tocoan in costs is \$15,840.00.
22. In determining the quantum of costs, I have:
- (a) With the exception of the section 117 hearing, accepted the times outlined in Tocoan's submissions as to how long it took to deal with each matter;
 - (b) In respect to the section 117 hearing, I have allowed a total amount of 10 hours.
23. In granting costs for 10 hours work for the section 117 hearing, I am mindful of the Commission's decision in LC44/2013 in which it was stated that, '...the Commission is of the view that Deputy Chairperson Rafferty erred in that he ought to have found that the continuation of the section 117 proceedings following the section 95 hearing was vexatious. *We would make orders for the payment of costs by the City from the time following the section 95 hearing.* [emphasis added]'
24. Having regard to that decision, I consider that an allowance for 10 hours work properly reflects the time counsel would have required for preparation after the section 95 hearing and the time for the hearing of the section 117 complaint.



**SEAMUS RAFFERTY
DEPUTY CHAIRPERSON**