LC 07/2013

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

Applicant:	Tocoan Pty Ltd *(represented by Mr Ashley Wilson of Frichot and Frichot Lawyers)*
Respondent:	City of Rockingham (*represented by Mr Gavin Crocket of Cullen Babington MacLeod Lawyers formerly GD Crocket & Co)*
Commission:	Mr Seamus Rafferty (Deputy Chairperson)
Matter:	Application for costs pursuant to section 21(4) and (5) of the *Liquor Control Act 1988*, and rule 11(1) of the *Liquor Commission Rules 2007*
Date of Hearing:	8 October 2012
Date of Determination:	27 February 2013

Determination:

1. The application for costs is granted in part as per the following orders:

    a) the application for costs in respect to the section 95 complaint is refused;
    b) the application for costs in respect to the section 117 complaint is refused;
    c) the application for costs in respect to the applications filed by the council on 7, 20 and 23 February 2012 is allowed;
    d) the application for costs in respect to the appeal filed on 28 February 2012 and heard on 29 February 2012 is allowed.

2. The applicant has 14 days from the publication of these reasons to file a schedule of costs that sets out the amount sought. If the respondent

does not consent to the amount sought by the applicant, it has fourteen days from the date of the filing of the applicant's schedule of costs to file responsive submissions as to what the appropriate amount of costs that should be awarded to the applicant.

Authorities Considered in the Determination:

- *Woolworths Ltd v Tintoc Pty Ltd* (LC 35/2011)
- *Attorney General v Wentworth* (1988) 14 NSWLR 481
- *Big Bomber Liquors* (06/98) (Liquor Licensing Court)

Background

1 By way of an application dated 5 July 2012, Tocoan Pty Ltd ("Tocoan") seeks an order for costs against the City of Rockingham ("the Council"). The application relates to the following matters that have previously been determined by the Liquor Commission ("the Commission"), namely:

a) a complaint pursuant to section 95 of the *Liquor Control Act 1988* ("the Act") filed on 1 October 2010 (LC 20/2012);

b) a complaint pursuant to section 117 of the Act filed on 1 October 2010 (LC 22/2012);

c) three interlocutory applications filed on 7 February 2012, 20 February 2012 and 23 February 2012;

d) an appeal pursuant to section 28 of the Act filed on 29 February 2012.

2 The Commission has the power to award costs in all proceedings before it pursuant to section 21 of the Act. That power can be exercised if in the opinion of the Commission, proceedings have been brought frivolously or vexatiously (section 21(5) of the Act).

3 The principles applicable to an application for costs were previously considered by the Commission in *Woolworths Ltd v Tintoc Pty Ltd* (LC 35/2011). Those principles are:

- the general practice of the Liquor Licensing Court was not to award costs in favour of successful applicants or objectors and that parties should bear their own costs save that costs may be awarded against a party whose case was not arguable and was without merit;

- the Commission is not bound by the previous practice of the Court and the policies to be adopted by the Commission in respect of the exercise of the discretion as to costs are matters for the Commission;

- in formulating its policy as to costs the Commission may have regard to section 21(5) of the Act, which expressly provides that costs may be awarded against a party where proceedings have been brought frivolously or vexatiously. Such an approach would be consistent with the characterisation of the functions of the Commission as administrative rather than judicial;

- the discretionary nature of costs does not easily permit the formulation of any concrete rules as to the exercise of that discretion;

- these principles can only be applied on a case by case basis within the

context of the broad discretion to award costs granted by section 21 of the Act.

4 It is contended by Tocoan that the complaints brought by the council pursuant to sections 95 and 117 of the Act were brought vexatiously. Tocoan conceded in its written submissions that the proceedings brought by the council were not frivolous. I agree with that concession and proceed on the basis of determining whether I am satisfied that the proceedings in respect to both applications were brought vexatiously.

5 The term "vexatious" is not defined in the Act. In *Attorney General v Wentworth* (1988) 14 NSWLR 481 it was held that, '*proceedings are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise and are properly regarded as vexatious if irrespective of the motive of the litigants, they are so obviously untenable or manifestly groundless as to be utterly hopeless.'*

6 Having regard to this definition, I consider that there are two discrete considerations in assessing the issue of whether these proceedings were brought vexatiously, namely:

a) were the proceedings brought for some other purpose other than to adjudicate on the issues to which they gave rise; and

b) putting aside the issue of motive, were the proceedings so obviously untenable or manifestly groundless as to be utterly hopeless.

Section 95 Complaint

7 The council alleged that there were proper grounds for disciplinary action against Tocoan pursuant to the grounds set out in section 95(4)(a), (b), (c), (e), (g), (j) and (k) of the Act. The council alleged every ground of complaint that was open to it pursuant to the Act.

8 The purpose of the application is to be understood in the context of the penalties sought by the council, namely that the licence be cancelled or in the alternative, suspended until certain preconditions were satisfied. The submissions made at the hearing of the complaint and the evidence adduced made it abundantly clear that the council wanted Zelda's closed down or in the alternative, strict conditions be attached to the licence.

9 I consider that the City of Rockingham brought the complaint with the specific purpose of closing down Zelda's or in the alternative, that strict conditions be attached to the licence and that the Commission was called upon to adjudicate on those specific issues. Whilst the evidence in respect to certain grounds of complaint was lacking and in respect to the ground alleged pursuant to section 95(4)(j) of the Act, there was a fundamental misunderstanding of the proper basis for the making of such a ground of complaint, I do not consider that the

majority of the grounds were so obviously untenable or manifestly groundless as to be utterly hopeless.

10 Counsel for Tocoan referred to the decision of the Liquor Licensing Court in *Big Bombers Liquor* (06/98) (Liquor Licensing Court) in which His Honour Judge Greaves stated,

> *'it seems to me that the approach which the court has traditionally taken under the Act prior to its amendment is the approach which it should continue to take. In many cases over a number of years, the court has made no order for costs in favour of a successful party. On occasion, it has awarded costs in favour of a successful party where the application or objection is found to have no arguable merit. That approach has come to be accepted in this jurisdiction where parties appear voluntarily, except in disciplinary proceedings. In my opinion, nothing in section 21 of the Act requires the court to apply the principles which apply in civil proceedings generally and it should not do so.'*

11 Based on the words 'except in disciplinary proceedings' it is contended that the decision of Judge Greaves is authority for the proposition that different principles should apply to the consideration of costs in disciplinary proceedings before the Commission, as the respondent is not a voluntary party to the proceedings. It is submitted that the principles applicable to a consideration of costs in civil proceedings before a Court should apply to the consideration of costs in disciplinary proceedings before the Commission. I do not accept that submission. To apply the principles applicable to a consideration of costs in civil litigation to the issue of costs in matters before the Commission, would require the Commission to apply different principles to the issue of costs depending on the nature of the proceedings before it. There is nothing in the wording of section 21 of the Act that suggests that different principles should be applied depending on the nature of the proceeding.

12 In any event, the Commission is not bound by previous decisions of the Liquor Licensing Court and there is nothing in the decision of the Court in the *Big Bombers Liquor* case that assists in the consideration of whether costs should be awarded to Tocoan in this particular instance.

13 Accordingly, I am not satisfied that the section 95 complaint was brought vexatiously and applying the general principles applicable to an application for costs in this jurisdiction, the application for costs in respect to the section 95 proceeding is refused.

Section 117 Complaint

14 The section 117 complaint was heard by the Commission on 29 February 2012. In dismissing the complaint, it was noted at paragraph 40 of the Commission's decision that, *'[A]lthough the Commission accepts that the general area in which the respondent's premises are located is a troublesome*

area with high levels of antisocial behaviour, graffiti and littering, it is of the view that the complainant has failed to sufficiently establish any nexus between activity at the licensed premises or on the premises by persons who have resorted to the premises as is required to do pursuant to section 117 of the Act.'

15 As with the section 95 matter, the Commission dismissed the complaint on the basis that there was insufficient evidence supporting the complaint. Despite that assessment of the cogency of the evidence, the evidence led in support of the complaint required the Commission to consider the matters referred to in section 117 of the Act. There is nothing before me, nor is it submitted, that the complaint was made for some collateral purpose. Further, I do not consider that the grounds of complaint were so obviously untenable or manifestly groundless as to be utterly hopeless.

16 Accordingly, I am not satisfied that the section 117 complaint was brought vexatiously. The decision of the Commission to dismiss the complaint was on the basis that there was insufficient evidence to establish the grounds for the complaint. This is different to a conclusion that there were no arguable grounds for complaint. Accordingly, the application for costs in respect to the section 117 complaint is refused.

Applications and Appeal

17 A directions hearing was held on 5 July 2011, 9 months after the section 95 and section 117 complaints were filed with the Commission. At the conclusion of the hearing, various orders were made, including order 4, that being an order that, *'no further evidence will be taken and submissions from the parties must be received 14 days prior to the hearing dates.'* [LC 26/2011]

18 On 29 December 2011, the Commission varied order 4 with the consent of the parties to admit a short DVD into evidence. Otherwise, it was ordered that, *'subject to order 6, no further evidence will be taken and submissions from the parties must be received 14 days prior to the hearing dates'.* [LC 60/2011]

19 Despite the specific orders made by the Commission and over 15 months after the filing of the sections 95 & 117 complaints, the council made application on three separate occasions in February 2012 to adduce further evidence. There had been ample opportunity for the council and its solicitors to obtain evidence prior to the making of the complaints and then within the nine month period between the filing of the complaints and the directions hearing on 5 July 2011 after which an order was made prohibiting the introduction of further evidence.

20 I consider that the three applications filed on 7 February 2012, 20 February 2012 and 23 February 2012 were foredoomed to fail having regard to the specific orders made on 5 July 2011 and 29 December 2011 that no further evidence would be taken in respect to both complaints and the nature of the material that was sought to be adduced. I find that these applications were

vexatious in the sense that there was no merit to the applications and that they were unarguable.

21 I have considered the grounds for the appeal heard on 29 February 2012. They are set out in *City of Rockingham v Tocoan Pty Ltd t/as Zelda's Nightclub* [LC 21/2012]. I consider that each of the twelve grounds of appeal were unarguable and lacking in merit. In coming to that determination, it is important to consider the chronology of events in February 2012.

22 The section 95 complaint was determined by the Commission on 24 February 2012. The Commission made it clear in dismissing the complaint that there was a lack of evidence to establish the complaint to the requisite standard. On 28 February 2012, the day before the hearing of the section 117 complaint, the council filed an appeal against the decisions of the Commission on 7, 20 and 23 February 2012 precluding the council from adducing further evidence on the hearing of the sections 95 & 117 complaints. It is self-evident from the fact that there was no appeal prior to the section 95 hearing, that the council realised after the hearing of the section 95 complaint that there were evidentiary deficiencies in respect to the section 117 complaint, as the evidence relied upon in respect to that complaint was the same as for the section 95 complaint which had already been determined. Given the timing of the filing of the appeal notice, this is the only rational inference that can be drawn.

23 In the context referred to, the appeal was nothing more than a desperate attempt by the council to bolster a complaint that it realised after the hearing of the section 95 complaint was lacking in evidence in support of the complaint. As such, I am of the opinion that the appeal proceeding was brought vexatiously and that costs should be awarded to Tocoan in respect to this proceeding.

24 I accept that Tocoan was put to unnecessary expense as a result of the filing of the three applications in February 2012 and the appeal and as such, in the exercise of the discretion conferred by section 21 of the Act, I grant the application for costs in respect to the applications and appeal.

25 I make the following orders:

a) The application for costs in respect to the section 95 complaint is refused;

b) The application for costs in respect to the section 117 complaint is refused;

c) The application for costs in respect to the applications filed by the council on 7, 20 and 23 February 2012 is allowed;

d) The application for costs in respect to the appeal filed on 28 February 2012 and heard on 29 February 2012 is allowed.

26 The applicant has 14 days from the publication of these reasons to file a schedule of costs that sets out the amount sought. If the respondent does not consent to the amount sought by the applicant, it has fourteen days from the date of the filing of the applicant's schedule of costs to file responsive submissions as to what the appropriate amount of costs that should be awarded to the applicant.

SEAMUS RAFFERTY
DEPUTY CHAIRPERSON