

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

Applicant: Woolworths Limited
(represented by Mr Gavin Crocket of GD Crocket & Co)

Respondent: Tintoc Pty Ltd (In Liquidation)
(represented by Mr Neville Gale)

Commission: Mr Jim Freemantle (Chairman)
Mr Greg Joyce (Member)
Mr Seamus Rafferty (Member)

Date of Hearing: 14 November 2011

Date of Determination: 3 January 2012

Matter: Appeal under section 28 of the *Liquor Control Act 1988* “the Act” pursuant to decision LC 35/2011 of a single Commissioner for an application for costs against the respondent pursuant to section 21 of the Act

Premises: Woolworths Liquor, Warnbro Fair Shopping Centre,
Corner Warnbro Sound Avenue and Palm Springs
Boulevard, Warnbro

Determination: The appeal is dismissed

Authorities referred to in Determination

- *The Commissioner of Police of Western Australia v AM* [2010] WASCA 163 (S)
- *Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* (LC 37/2010)
- *Attorney-General v Wentworth* (1988) 14 NSWLR 481

Background

- 1 On 18 April 2011 in decision LC 13/2011 the Liquor Commission “the Commission” approved an application for a conditional grant of a liquor store licence lodged by the applicant for the subject premises on referral from the Director of Liquor Licensing “the Director” under section 24 of the Act.
- 2 The respondent was the licensee of the Warnbro Fair liquor store which is in the same shopping centre as the proposed premises of the successful application.
- 3 The respondent had lodged an objection to this original application on 18 October 2009, five months prior to the application being lodged on 18 March 2010. This objection was in the form of a letter and a petition containing 1443 signatures against the applicant being granted a liquor store licence, it was not in the form required by the Director of Liquor Licensing nor was it in conformity with the time frame of the Act. This objection was withdrawn on 3 December 2010 as the respondent had sold its interest in the Warnbro Fair liquor store to Liquorland (Australia) Pty Ltd. The respondent took no part in the substantive hearing.
- 4 Prior to the withdrawal the respondent participated in a directions hearing conducted by the Commission on 15 November 2010.
- 5 From the evidence the respondent had been in negotiation with the applicant and Liquorland (Australia) Pty Ltd for the sale of three liquor store premises it owned in the area during 2010. In addition, in the past, the applicant had purchased liquor stores from the respondent.
- 6 The applicant lodged an application with the Commission on 21 April 2011 pursuant to Rule 11(1) of the *Liquor Commission Rules 2007* for an order for the respondent to pay the wasted costs of the applicant fixed in the sum of \$6,000.
- 7 The application for costs was determined on papers on 31 August 2011 by a single Commissioner and in decision LC 35/2011 it was refused.
- 8 On 12 September 2011 the applicant lodged an appeal of decision L35/2011 with the Commission under section 28(4a) of the Act.

- 9 A hearing of the Commission constituted under section 28(4a) of the Act was conducted on 14 November 2011.
- 10 At the end of the hearing the respondent advised the Commission that it had gone into voluntary liquidation. As a consequence of this on 15 December 2011 the Commission wrote to the liquidator, DMA Chartered Accountant. On 16 December 2011 that firm advised the Commission that the respondent had gone into voluntary liquidation on 10 July 2011 and that it would not be making a submission in relation to the subject matter. On 20 December 2011 the applicant advised the Commission of its concern about the process and queried why the liquidator had been approached.

Submissions on behalf of the applicant

- 11 The respondent has not been frank. It objected to the application on the basis it was not in the public interest and then sold its liquor store to Liquorland (Australia) Pty Ltd. The objection was vexatious and frivolous given the respondent was not serious about the duopoly issue.
- 12 The petition provided by the respondent consisting of 1443 signatures against the granting of the liquor licence to the applicant was flawed for the following reasons:
- the respondent failed to advise the signatories that it was in the process of negotiating a sale of its liquor store to the applicant and Liquorland (Australia) Pty Ltd;
 - the respondent failed to disclose to the signatories that it had a serious conflict of interest. It had a financial interest in the outcome of the application.
 - there were no valid public interest matters; and
 - the wording of the petition was not fair and was constructed to ensure a favourable outcome for the respondent.
- 13 The applicant questioned the status of the respondent as an objector. Given the objection was lodged 5 months before the lodging of the application, it was not in the form required by section 73 of the Act, its contents were erroneous and the objection was therefore a nullity. The applicant, in correspondence dated 14 November 2011

and after the hearing, advised the Commission that it withdrew its statement that the objection was therefore a nullity and accepted its status.

- 14 The respondent caused the hearing of the application to be delayed by one year because the applicant was required to carry out a full market survey, compile a public interest assessment and prepare the case.
- 15 The respondent was aware at the directions hearing itself that its interest in the liquor store had been sold but did not advise the Commission of the sale until after the directions hearing.
- 16 Andrew Pollard, Property Manager, Woolworths Ltd, in a signed statement said *"In late September 2010 I telephoned Neville Gale to discuss the Woolworth proposals. He advised me he had sold the Warnbro Liquor Store to Liquorland (Australia) Pty Ltd and negotiations with Woolworths could not continue. I advised him I was disappointed at his lack of courtesy in failing to get back to me, on Woolworth's proposal"*.
- 17 The determination of the Commission to conditionally grant the liquor store licence is an endorsement of the merits of the application and it follows that the respondent's objection had no merit.

Submissions on behalf of the respondent

- 18 The objection was bona fide and was only withdrawn as a consequence of the sale of its interest in the liquor store and after discussion with the Chairman of the Commission at the directions hearing, and the staff of the Department of Racing, Gaming and Liquor.
- 19 The objection included a number of good reasons why the licence should not be granted such as the area is currently well served with liquor stores, the Rockingham community has significant and serious existing alcohol related problems, and the sale of cheap liquor by the applicant will exacerbate the situation.
- 20 Irrespective of the outcome of the objection, the respondent had made its mind up to sell its liquor stores and the objection was made in the genuine belief, for the reasons given, the application should not be approved.

- 21 The real intention of the applicant was to obtain the subject licence and convert it into Dan Murphy's Store which would have been substantially larger.

Determination

- 22 This is an appeal of a single member of the Commission pursuant to section 28 of the Act and was heard by the Commission duly constituted under section 28(4a) of the Act. Four grounds of appeal were provided by the applicant in correspondence dated 12 September 2011 and can be summarised as follows:

The Commissioner erred in law in finding:

- (i) A licensee objector is entitled to lodge a statutory objection to an application before an application for a licence is lodged. The grounds of appeal state the objection was lodged 6 weeks before the application, whereas the applicant's submission dated 1 November 2011 states the period as 5 months.
 - (ii) It is open to a licensee objector lodging an objection on the grounds that it is not in the public interest to issue a licence to the applicant and that the applicant and Liquorland (Australia) Pty Ltd have a duopoly.
 - (iii) It is permissible for a licensee to mislead the general public into signing a petition claiming it is against the public interest to grant the applicant a liquor licence when the information provided in the petition to the community is untrue, and when the licensee was at the time negotiating the sale of its licence and this was not disclosed to the public.
 - (iv) In finding the licensee's conduct was not frivolous, vexatious and without merit when the objection delayed the application; the objection was not bona fide but lodged to advance the business interests of the licensee and the licensee knew it was to sell the business to either the applicant or Liquorland (Australia) Pty Ltd.
- 23 Section 21(1) of the Act empowers the Commission, subject to the Act, with a wide discretion to award costs. Section 21(4) specifically provides for the award of costs in respect of an objection. Section 21(5) provides the Commission with power to award costs where proceedings have been brought or objection made that in the opinion of

the Commission is frivolous or vexatious. It is the Commission's view that these subsections should be read together.

24 The scheme of the Act provides a general right of objection for any person on the grounds permitted by the Act and is found at section 73(2), and the grounds of objection are found at section 74(1). These include the public interest, harm or ill-health to people, undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity; and the reduction of the amenity quiet or good order of the locality.

25 The Commission takes note of the principles established in the various case laws and in particular the following:

- 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. (*Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd (LC 37/2010)*, at 20).
- In formulating the 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. (*Andrew Koh Nominees Pty Ltd, supra*, at 22).
- The test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. (*The Commissioner of Police of Western Australia v AM [2010] WASCA 163 (s)* at 27).
- The ordinary meaning of 'frivolous' in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. It is apparent from the

ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'. (*AM, supra*, at 29).

- It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe the test may be expressed in the following terms (*Attorney General v Wentworth (1988) 14 NSWLR 481*, at 491):
 - (i) Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
 - (ii) They 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.
 - (iii) They are properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

26 The first ground of appeal concerns the issue of the objection of the respondent not having complied with the requirements of section 74 of the Act both in form and timing. It is clear the Department has treated the letter and the petition of 18 October 2009 as an objection and the respondent should have been made to comply with the requirements as to form. The issue of timing is unusual since the time frame in the Act for an objection is concerned with the objection being within time whereas, in this case, it was before time commenced. Whilst these may be issues that go to establishing the validity of the objection under section 74(10) of the Act at a substantive hearing of the licence application and the burden is on the respondent, it is not for determination in this application. The fact is the respondent lodged a letter and a petition and it was treated as a *prima facie* objection during the interlocutory process by the Department, the Commission and the applicant. Its validity has never been determined. In any event invalidity does not necessarily incur costs. Suffice it to say this is an informal jurisdiction and the Department and the Commission tend to look indulgently at issues that go to form and timing.

27 The second ground of appeal concerns whether the respondent has correctly raised the public interest test. In the Commission's view it is not right for the applicant to

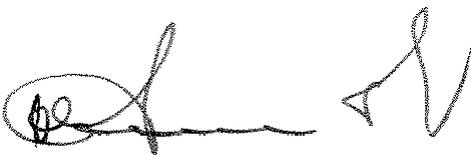
argue that because the Commission subsequently approved the application for a licence therefore the objection was invalid because this anticipates the determination. Valid objections can be raised but in the weighing and balancing exercise an application can still be approved.

- 28 The concept of the public interest is extensive. Section 38(4) of the Act provides an inclusive definition and the case laws and the Second Reading Speech of 2 September 2006 provide useful guidance. In the petition and in the letter of 16 April 2010, the respondent identifies issues that raise public interest matters. Specifically the letter raises the issue of juvenile drinkers, threats of violence, crime and antisocial behaviour. It raises issues that go to the objects of the Act including harm or ill-health and the proper development of the liquor industry. Both the petition and the letter indirectly raise the proliferation issue identified in the Second Reading Speech. The commercial impact on existing liquor stores is also raised and the Commission is well aware that these matters are no longer valid objections. Objectors raise many issues in the course of an application and in the weighing and balancing exercise that the Commission carries out the crucial question is what weight the particular matter carries.
- 29 The third ground of appeal concerns the circumstances and intent of the petition. There can be no doubt that the respondent had an underlying commercial motive in arranging the petition and lodging the objection. However the Act provides that any person can object (section 73(2)) providing that person establishes the grounds set out in section 74(1) and the burden of proving this lies with the objector (section 74(10)). In the weighing and balancing exercise that the Commission carries out in the assessment of an application it will take into account the circumstances of a petition and decide what weight it carries.
- 30 The fourth ground of appeal raises the issue of whether the objection was frivolous or vexatious. Applying the principles set out in paragraph 29 above the Commission finds that the respondent objected primarily because its commercial interests were threatened by the establishment of another liquor store in the shopping centre that would impact on its trade and it wanted the application to be refused. However the respondent was exercising its rights under section 73(2) of the Act and the objections raised were prima facie arguable and had merit. Whether they were valid or invalid or what weight would be given to them by the Commission was never decided. They were

not 'obviously untenable' or 'manifestly groundless'. There is no evidence that the respondent objected with the intention of 'annoying or embarrassing' the applicant.

31 The Commission has also considered whether there was a 'collateral purpose' to the objection including that of strengthening the respondent's hand in its negotiations with the applicant or Liquorland (Australia) Pty Ltd. The Commission was not advised of the date when the contract of sale with Liquorland (Australia) became unconditional. The respondent told the hearing it occurred 'in the middle of November'. Whereas the applicant argued it was before the directions hearing of 15 November 2010 and the respondent should have advised all parties at that time and withdrawn its objection. The respondent advised at the hearing that the price being offered by the applicant for its liquor store was too low and below the price it had paid for it. Nevertheless there was no compelling evidence found by either the single Commissioner or at the hearing of this application to suggest the respondent was using the objection as a tool for another purpose.

32 In summary all four grounds of the Appeal are dismissed. This was a commercial contest between experienced parties utilising their best means available under the Act. There were two interveners and another objector to the original application and hence the matter had to be thoroughly prepared and argued by the applicant in any event. Both parties were seeking the best outcome for themselves and they should bear their own costs.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a smaller, more complex flourish.

JIM FREEMANTLE
CHAIRMAN