

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

Applicant: City of Rockingham
(represented by Mr Gavin Crocket of GD Crocket & Co)

Respondent: Tocoan Pty Ltd t/a Zelda's Nightclub
(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)

Commission: Mr Seamus Rafferty (Deputy Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)

Matter: Complaint for disciplinary action pursuant to section 95 of the *Liquor Control Act 1988*

Premises: Zelda's Nightclub, situated at 2 Kent Street, Rockingham

Date of Hearing: 24 February 2012

Date of Determination: 24 February 2012

Date of reasons published: 6 June 2012

Determination: The complaint is dismissed.

Authorities referred to in the determination:

- *Water Conservation and Irrigation Commission (NSW) v Browning* [(1947) 74 CLR 492
- *O'Sullivan v Farrer* (1989) 168 CLR 210

Background

- 1 By way of a complaint dated 1 October 2010, the City of Rockingham (“The applicant”) outlines eight grounds of complaint in respect to the operation of Zelda’s Nightclub (“Zelda’s”). The applicant seeks that the Liquor Commission (“the Commission”) exercise the power conferred by section 96(1)(e) of the *Liquor Control Act 1988* (“The Act”) to cancel or alternately suspend the licence pursuant to section 96(1)(d) of the Act until the four pre-conditions specified in schedule 2 annexed to the complaint have been complied with.
- 2 Pursuant to section 96(1) of the Act before any disciplinary action can be taken pursuant to a complaint of this nature, an applicant must satisfy the Commission on the balance of probabilities that the ground upon which the complaint has been made, has been made out so that a proper cause for disciplinary action exists.
- 3 The applicant contends that a proper cause for disciplinary action exists in this instance based on the following matters identified in section 95(4) of the Act, namely:
 - a) The business conducted under the licence is not properly conducted in accordance with the licence.
 - b) The licensed premises are not properly managed in accordance with the Act;
 - c) The licensed premises –
 - i) have fallen into disrepair;
 - ii) are otherwise in an unsatisfactory condition;
 - iii) have been altered without the prior approval of the Director or;
 - iv) contravene the requirements of a written law as to planning, building, health or safety.
 - e) The licensee has -
 - i) contravened a requirement of the Act or a term or condition of the licence;
 - ii) sold or supplied liquor otherwise than in accordance with the authorization conferred by the licence; or

- iii) failed to comply with a summons, direction or order under the Act.
 - fa) The licensee has been given an infringement notice.
 - g) The licensee otherwise is, or becomes, an unsuitable person to hold a licence under the Act.
 - j) The continuation of the licence is not in the public interest or the licence has not been exercised in the public interest.
 - k) The safety, health or welfare of the persons who resort to the licensed premises is endangered by an act or neglect of the licensee.
- 4 The applicant relies on every ground of complaint outlined in section 95(4) of the Act with the exceptions of those grounds which a local government of a district is precluded from alleging by virtue of the operation of section 95(5)(c) of the Act.
- 5 A number of interlocutory matters were dealt with by the Commission prior to the hearing of the complaint and need not be referred to in these reasons.
- 6 The hearing of the complaint was conducted on 24 February 2012. At the conclusion of the evidence adduced by the applicant, the Commission invited submissions from the parties as to the procedure that should be adopted if the Commission were at that time not satisfied to the requisite standard that the complaint had been made out.
- 7 Counsel for the applicant submitted that the hearing should proceed and evidence be adduced by the respondent on the basis that the respondent bore an evidentiary onus of proof. Such submission was rejected by the Commission in its entirety. Had the legislature intended that a respondent bear any onus in a hearing of this type, such position would be specifically referred to in the legislation. The terms of section 96(1) of the Act are clear and unambiguous:
- a) The applicant bears the onus of proof;
 - b) The standard to which the Commission must be satisfied that the complaint has been made out is on the balance of probabilities.
- 8 In submitting that the respondent bore an evidentiary onus, counsel for the applicant also referred the Commission to section 95(3) of the Act and submitted that this section was relevant to the issue of whether the respondent bore the onus referred to. That submission cannot be accepted. Section 95(3) of the Act refers to the Commission's ability to require the parties to attend a preliminary conference

for the purposes referred to in the section. The hearing of the complaint was not a preliminary conference and the section has no bearing on the issue of whether a respondent bears an evidentiary onus.

- 9 Counsel for the respondent submitted that in the event that at the conclusion of the evidence adduced by the applicant the Commission was not satisfied to the requisite standard that the ground of complaint had been made out, his client should not be called upon to adduce evidence as the respondent bore no onus of proof.
- 10 Given the clear wording of section 96(1) of the Act and the absence of any specific section which prescribed a reversal of the onus of proof, the Commission determined at the conclusion of the evidence adduced on behalf of the applicant that it would not call upon the respondent as the applicant had not at that time discharged its onus to the Commission's satisfaction and that the complaint would be dismissed. The Commission considered that this was an appropriate way in which to deal with this matter as section 16(1)(d) of the Act prescribes that the Commission may consider and dismiss applications as it thinks fit.

Evidence submitted on behalf of the applicant

- 11 The evidence relied on by the applicant appears at pp. 1 – 224, pp. 281 – 425 and pp. 428 – 435 of the written materials before the Commission. The evidence was comprised of:
 - previous residents complaints outside the scope of the survey conducted by the applicant;
 - unlawful and unorthodox activities at Zelda's between 1992 and 2008;
 - results of historic inspections of the nightclub;
 - the sale of adulterated liquor;
 - breaches of the *Tobacco Products Control Act*;
 - summary of health notices served on Zelda's;
 - the opposition to Zelda's application for an extended trading permit;
 - complaints relating to Zelda's ;
 - police statistics;

- waste services report;
- physical damage to public facility;
- additional trade conditions imposed on Zelda's between March and May 2012;
- inspections of Zelda's made by the applicant of Zelda's;
- FESA inspection report;
- CCTV incidents that purport to relate to Zelda's ;
- residents survey conducted in 2011;
- evidence of Erica Jenkin, Co-ordinator Health Services at the City of Rockingham;
- evidence of Paul Arthur Ellis.

12 In reaching its decision, the Commission has considered the totality of the evidence adduced by the applicant. The rules of evidence do not bind the Commission (section 16(7)(a) of the Act) and it can take into account any material tendered by a party.

Basis for the complaint

13 In his opening address, counsel for the applicant advised that the complaint was predicated on the following bases which on their own and collectively amounted to proper causes for disciplinary action pursuant to section 95(4) of the Act. The four specific bases were:

- a) poor management of Zelda's;
- b) disrepair of the premises;
- c) delinquency in the area proximate to Zelda's;
- d) the effect the existence of Zelda's has on residents who live near Zelda's.

14 Based on evidence before the Commission, it was apparent that there was a broader purpose behind the complaint. Included in the witness statement of Ms Erica Jenkin, Co-ordinator of the Health Services Department at the City of Rockingham is an outline of the council's Rockingham Beach Waterfront Village

Policy (“the policy”). Zelda’s operates within the precinct to which the policy relates. Ms Jenkin stated at paragraph 3.6 that, *“Zelda’s operation is totally out of sink [sic] with the Rockingham Beach Waterfront Village Policy.”* The basis for contending that the operation of Zelda’s is contrary to the policy is that there is a lengthy history of anti-social, bad and unacceptable behaviour in the area around Zelda’s. That behaviour is inconsistent with the objective of the policy which is to *‘revitalise the CBD of the City and the Waterfront Precinct, creating an “urban village” style development for this area, which caters for the ever-growing City’s tourist sector. In short, the area operates so that resident, business and tourist uses are in harmony with each other.’*

- 15 In relation to the implementation of the policy, Ms Jenkin concluded that, *‘the operation of Zelda’s, and the general anti-social behaviour of its patrons is a substantial negative component to the required intention of the City’s vision for the Waterfront Village area. The anti-social behaviour has continued for a large number of years. The City and its community are now demanding action be taken so that the Rockingham Beach Waterfront Village Policy is able to be implemented without the adverse and deleterious impact being caused by Zelda’s.’*
- 16 In her oral evidence at the hearing, Ms Jenkin stated that Zelda’s was operating under a current planning approval. It is apparent that the planning approval was granted prior to the development and implementation of the policy.
- 17 In essence, the Commission concludes from the evidence adduced from Ms Jenkin that the council is using the complaint provision of the Act in an attempt to close down Zelda’s. The Act allows for complaints to be made and for the ultimate sanction to be imposed pursuant to section 96(1)(e) of the Act, that being the cancellation of the licence. The basis for reaching the conclusion referred to is that there is evidence that the council has developed a policy for the area in which the licensed premises operates and that the council considers that the continuation of the respondent’s licence is inconsistent with the goals of the policy. Ms Jenkin conceded as much when questioned by Commissioner Joyce. There is no evidence before the Commission that the council has attempted to utilise the relevant provisions of the *Planning and Development Act 2005* to achieve its aim of closing down Zelda’s.
- 18 Nothing that the Commission has stated in respect to the objective of the council in making a complaint pursuant to section 95 of the Act should be construed as an express or implied criticism of the applicant. However, there was an alternative approach pursuant to the relevant planning legislation that could have been followed by the applicant that it has chosen, for whatever reason, not to adopt. This applicant can only be considered in the context of the matters outlined in section 95 of the Act and whilst sympathetic to the council’s objectives, they are not relevant to our determination of this complaint.

Evidence tendered at the hearing on behalf of the applicant

19 The exhibits tendered during the hearing which have been considered by the Commission were:

- Ex. 1 - DVD footage;
- Ex. 2 - Minutes of meeting of City of Rockingham on 24/11/2009 : pp.58 – 61;
- Ex. 3 - Minutes of meeting of City of Rockingham on 23/02/2010 : pp.31 – 37;
- Ex. 4 - Minutes of meeting of City of Rockingham on 28/09/2010 : p.48;
- Ex. 5 - Tabulated Results in Annexure “EJS (5)” for Question 3 in City Questionnaire;
- Ex. 6 - FESA Public Building Inspection Form for inspection conducted on 10/04/2010.

Consideration of each ground of complaint

20 The Commission’s findings with respect to each ground of complaint are as follows:

Section 95(4)(a) - The business conducted under the licence is not properly conducted in accordance with the licence.

21 A copy of licence no. 6070021493 relating to Zelda’s Night Club was before the Commission. The licence sets out the terms and conditions of the licence. None of the evidence before the Commission established on the balance of probabilities that the business conducted under the licence was not properly conducted in accordance with the licence to the extent that a proper cause for disciplinary action existed.

Section 95(4)(b) The licensed premises are not properly managed in accordance with the Act.

22 The respondent was sent a letter from Mr Daniel Pearce of the licensing authority on 5 July 2010. The letter referred to a previous inspection conducted by the applicant and stated that the inspection revealed matters that may also be considered to constitute a breach of section 99 of the Act.

- 23 It is clear from photographs taken by the applicant that at a time prior to the making of the complaint in 2010, part of the licensed premises had fallen into disrepair. However, a letter dated 4 August 2010 from Mr Rod Fielding, Manager Health Services at the City of Rockingham to Mr Daniel Pearce at the licensing authority reveals that all of the matters that the respondent was required to attend to, had been complied with.
- 24 Given the respondent attended to each of the matters that required rectifying in a timely and satisfactory manner, the Commission is not satisfied that the allowing of the premises to fall into disrepair is such that a proper cause for disciplinary action exists.
- 25 Reliance was also placed by the applicant on the events shown in the DVD to suggest that the licensed premises were not properly managed in accordance with the Act. For reasons that will subsequently be explained, the DVD footage does not establish the conclusion suggested by the applicant.
- 26 No other evidence relied upon by the applicant established to the Commission's satisfaction that the ground of complaint had been made out.

Section 95(4)(c) - The licensed premises:

- i) have fallen into disrepair;**
- ii) are otherwise in an unsatisfactory condition;**
- iii) have been altered without the prior approval of the Director;**
- iv) contravene the requirements of a written law as to planning, building, health or safety.**

27 The wording of this section suggests that the ground must exist at the time of the making of the complaint. The use of the word "has" in section 95(4)(e) of the Act supports such a construction as in the context of that ground of complaint, it refers to matters that have previously occurred.

28 The letter from the applicant to the licensing authority dated 4 August 2010 establishes that all of the defects with the licensed premises had been rectified by the date of the letter. As such, there is no evidence that as at the date of the complaint any of the matters referred to in section 95(4)(c) of the Act existed. Accordingly, this ground has not been made out.

Section 95(4)(e) - The licensee has:

- i) contravened a requirement of this Act or a term or condition of the licence;**
- ii) sold or supplied liquor otherwise than in accordance with the authorization conferred by the licence; or**

iii) **failed to comply with a summons, direction or order under this Act.**

29 None of the evidence adduced by the applicant establishes this ground to the Commission's satisfaction for reasons that have already been referred to.

Section 95(fa) - The licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section.

30 The applicant alleges that the respondent has been given an infringement notice. It does not specify that the alleged infringement notice was pursuant to section 167 of the Act as required by section 95 (4)(fa) of the Act. Accordingly, this ground has not been made out.

Section 95(g) - The licensee otherwise is, or becomes, an unsuitable person to hold a licence under this Act.

31 This ground of complaint focuses on Mr Kevin Mann, he being a person who holds a position of authority in the body corporate that controls the licence. He was referred to during the hearing as the 'moving hand behind this corporate entity.' (Refer transcript at page 22).

32 There is a fundamental flaw with this ground of complaint in that the local government of a district in which the licensed premises are situated is prohibited from alleging a ground of complaint pursuant to section 95(h) of the Act by virtue of section 95(5)(c) of the Act. Section 95(h) of the Act prescribes that there shall be proper cause for disciplinary action if *'a person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or the profits or the proceeds of the business, is or becomes not a fit and proper person to hold that position or to be so interested.'*

33 Given that the evidence in support of the ground of complaint focused on the individual who held a position of authority in the body corporate and not the body corporate that actually holds the licence, the complaint in respect to Tocoan Pty Ltd has not been made out.

Section 95(4)(j) - The continuation of the licence is not in the public interest or the licence has not been exercised in the public interest.

34 It was submitted in opening that this ground of complaint was the pivot of the applicant's case (Refer transcript at page 17). Much of the evidence adduced by the applicant was directed to this ground of complaint.

35 The term "public interest" is not defined in the Act for the purposes of a section 95 complaint. Where the term "in the public interest" is used in a statute, it 'classically

imports a discretionary value judgment to be made to undefined factual matters, confined only *'in so far as the subject matter and the scope and the purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature have had in view'*: *Water Conservation and Irrigation Commission (NSW) v Browning* [(1947) 74 CLR 492 at p 505], per Dixon J." Refer *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ at 216

- 36 In considering this ground of complaint, it must be remembered that the hearing of a complaint pursuant to section 95 of the Act is a disciplinary matter. It was submitted by counsel for the applicant that for the licence to continue, *'there needs to be a requirement and the survey says there isn't a requirement any longer to have this [licensed premises] at this precinct.'* (Refer transcript at page 107). That statement confuses the purpose of a section 95 complaint which involves the imposition of varying types of sanctions where it can be established that a licensee has done something that requires disciplinary action. In respect to a complaint alleging a ground pursuant to section 95(4)(j) of the Act, an applicant must establish that a licensee has done something which of itself makes the continuation of the licence not in the public interest or that the licence has not been exercised in the public interest and that is deserving of some form of sanction. The fact that residents may not want the premises to continue or that the existence of the licensed premises runs contrary to current planning policies is not sufficient to invoke this ground of complaint.
- 37 In support of this ground of complaint, reliance was placed on a residents survey conducted by the applicant. The Commission has placed little weight on this survey. That is not to suggest that the Commission is not sympathetic to concerns raised by residents. The difficulty is with the manner in which these concerns were adduced as evidence in support of the grounds of complaint.
- 38 The Commission has placed little weight on the responses to the questionnaire, not because it is ignorant of the concerns of residents, but because it considers that the results of a questionnaire have shortcomings as evidence in support of a complaint which seeks that the Commission impose the ultimate sanction of cancelling a licence. The lack of cogency and probative value is reflected by the following factors, namely:
- a) the respondent did not have the ability to cross-examine those residents who made adverse comments in respect of the operation of Zelda's. That denied the respondent the ability to test the basis for the opinions expressed and the Commission the ability to determine the veracity of the opinions given or observations made;

- b) out of 1200 residents who were sent the questionnaire, 254 responded, that being only 21% of residents in the relevant precinct;
 - c) some of the responses of those surveyed related to isolated incidents or matters of a subjective nature, such as music being too loud;
 - d) the absence of any nexus between what residents observed and the management practices of Zelda's.
- 39 Reliance was also placed on the compilation of CCTV footage showing incidents in and around Zelda's nightclub. In the context of evidence on which the Commission could place weight on, there were a number of inherent difficulties with this evidence as reflected by the following factors, namely:
- a) the first incident showed a male person at the entrance of Zelda's who was subsequently involved in a violent altercation. There was no other evidence that was capable of establishing that the male person was a patron at Zelda's and that his behaviour was in any way linked to the management practices of the nightclub. For all the Commission knew, the male person may have been refused entry to the premises. There was simply insufficient material for the Commission to draw any adverse inference against the respondent;
 - b) a young man was shown standing at the rear of a vehicle in a car park consuming what appeared to be a bottle of alcohol. There was nothing to suggest any nexus between his behaviour and the operation of Zelda's;
 - c) people were shown to be drinking in the street. Again, there was nothing that was capable of establishing a nexus between the behaviour of the people shown and the operation of Zelda's;
 - d) a fight occurring on 20 August 2007 within approximately 80-100 metres of Zelda's. There is nothing which establishes any nexus between the participants in the fight and the operation of Zelda's. Had the applicant attempted to show that the participants had been patrons at Zelda's prior to the fight, then its argument as to the poor management practices may have had some validity. In the absence of such evidence, there is nothing to which to base upon an inference adverse to the respondent.
- 40 These reasons do not refer to every piece of evidence relied upon by the applicant in respect to this and other grounds of complaint. Where evidence has not been referred to, it is on the basis that the evidence has been considered to be so lacking in cogency and probative value that no weight has been given to it in determining the complaint.

- 41 The evidence adduced by the applicant in respect of this ground of complaint is so lacking in cogency and probative value that the Commission simply cannot be satisfied that the continuation of the licence is not in the public interest or that the licence has not been exercised in the public interest. Further, the ground of complaint has been misunderstood by the applicant and much of the evidence is irrelevant based on this fundamental misunderstanding.

Section 95(4)(k) – The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee.

- 42 There was no evidence that satisfied the Commission that this ground had been made out.

Determination

- 43 The Commission is not so naive as to determine that there are no issues with the operation of Zelda's. This determination should not in any way be construed as a validation of the manner in which the nightclub is operated. However, for the purposes of this complaint the Commission can only determine the matter based on the evidence adduced by the applicant. In this regard, the evidence was deficient in many respects and required the Commission to draw inferences that were simply incapable of being drawn.
- 44 Accordingly, the complaint of the City of Rockingham is dismissed.



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