

Liquor Commission of Western Australia
(Liquor Control Act 1988)

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

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

Commission: Mr Jim Freemantle (Chairperson)
Dr Eric Isaachsen (Member)
Mr Alistair Bryant (Member)

Date of Hearing: 29 February 2012

Date of Determination: 29 June 2012

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

Matter: Complaint about noise and behaviour related to licensed premises, Zelda's Nightclub; pursuant to section 117 of the *Liquor Control Act 1988*

Determination: The complaint is dismissed

Authorities Referred to in the Determination:

- *City of Rockingham v Tocoan Pty Ltd* (LC 26/2011)
- *OSB Operations Pty Ltd v Jansen and Anor* [2006] WASCA 270
- *Re McHenry* (1987) 4 SRWA 31
- *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207
- *Vandeleur v Delbra Pty Ltd and the Liquor Licensing Commissioner* (1988) 48 SASR 156
- *Arnotts Ltd v Trade Practices Commission* (1990) 97 ALR 555

Background

- 1 On 1 October 2010, the City of Rockingham lodged a complaint pursuant to section 117 of the *Liquor Control Act 1988* ("the Act"), with the Director of Liquor Licensing ("the Director") against licence number 6070021493 in the name of the licensee, Tocoan Pty Ltd., trading as Zelda's Nightclub, situated at 2 Kent Street, Rockingham.
- 2 Various attempts to settle the matter by conciliation or negotiation failed.
- 3 On 7 February 2011 the Director referred the matter to the Liquor Commission ("the Commission") pursuant to section 24 of the Act.
- 4 At a preliminary hearing on 5 July 2011, direction orders were made by the Commission (refer *City of Rockingham v Tocoan Pty Ltd (LC 26/2011)*).
- 5 Previous section 117 complaints, A32115 (1 October 1999), A39292 (18 January 2000) and A61237 (13 July 2001), were determined by the Director Licensing and these determinations formed part of the evidence submitted by the complainant.
- 6 In each of the determinations, orders were made to alleviate the undue noise and disruption emanating from the premises.

Preliminary matter

- 7 Notwithstanding the orders of the directions hearing of 5 July 2011 (*LC 26/2011 supra*), the complainant lodged an appeal on the eve (28 February 2012) of the section 117 hearing seeking to have further evidence admitted, which was opposed by the respondent.
- 8 The appeal was heard by the Commission at a separate hearing on 29 February 2012, immediately prior to the section 117 hearing conducted on the same day.
- 9 As the introduction of further material contravened the orders of the Commission made at the directions hearing of 5 July 2011 (*refer LC 26/2011 supra*), the appeal was dismissed. However, some of the material was accepted into evidence by consent.

Submissions on behalf of the complainant

- 10 The complaint is made pursuant to section 117(1)(a) and (b) and 117(2) of the Act.
- 11 The complainant alleges that: "*There is a large body of evidence to support the particulars which is in the form of written complaints, survey questionnaires, telephone notes, CCTV footage, police data and documentation, Local Authority's reports, Liquor Licensing Division Reports, other statutory authorities' reports, all of which related to the poor state of the licensed premises, unacceptable patron behaviour, the adverse impact Zelda's has on the amenity of the area and the criminal activity in the area.*"
- 12 Further the complainant alleges "*The licensee of these licensed premises has failed to manage Zelda's Nightclub on a sound and proper business basis as prescribed under the provisions of the Act. In addition, on a frequent basis, the licensee allows poor behaviour of patrons which results in disorderly conduct of its patrons, all of which causes undue offence, annoyance, disturbance and inconvenience to persons living in*

the vicinity of the nightclub, persons who work in the vicinity of the nightclub and persons who make their way through the Kent Street precinct.”

- 13 Section 117 relates to the premises not the licensee.
- 14 Neighbourhood should be given its ordinary meaning as contained within the Oxford Dictionary as per Steytler J in *OSB Operations Pty Ltd v Jansen and Anor [2006] WASCA 270*.
- 15 In assessing whether the disturbance was undue one must take into account the nature of the neighbourhood see *Hackney Tavern Nominees Pty Ltd v MacLeod (1983) 34 SASR 207* adopted by Sharkey J in *re McHenry (1987) 4 SRWA 31*.
- 16 The evidence of the City of Rockingham Waste Management Co-ordinator establishes the loss of amenity of the neighbourhood as does the City of Rockingham’s security contractor’s records.
- 17 The City of Rockingham survey whilst not accepted into evidence is subject of comment by the respondent and was in itself sufficient evidence to substantiate the complainant’s complaint.
- 18 The CCTV footage evidences the disturbance of the quiet and good order of the neighbourhood.
- 19 The respondent’s evidence at least in part supports the City’s allegations.
- 20 Some of the evidence refers to a time prior to the current licensee taking over the premises.
- 21 The evidence supporting the complaint must refer to the terms of the respondent licensee.

Submission on behalf of the respondent

- 22 When referring the complaint to the Commission under section 24 of the Act, the Director noted that since the lodgement of the complaint inspections by departmental officers in October and November 2010 had revealed no significant issues in respect of noise or behaviour related to the premises.
- 23 The area in which the licensed premises, the subject of this complaint, is located attracts larger groups of young people, some of whom are difficult to control. Further, the area includes a mix of residential, commercial and tourist related activities including three sets of licensed premises.
- 24 Section 117 of the Act uses the words “at”, “on”, “from” and “to” in respect of the licensed premises thus demonstrating the requirement to prove a direct relationship between the premises and the behaviour complained of.
- 25 On the evidence submitted it is not possible to establish that relationship.
- 26 The neighbourhood is not a quiet neighbourhood by virtue of its demographics and the noise and disturbance cannot be classed as undue. No objective evidence has been led that shows this to be the case.

- 27 The complaint ignores other factors contributing to issues in the neighbourhood particularly the fact that the area attracts people as it is a beach front location. The existence of graffiti, litter, broken bottles, vandalism and antisocial behaviour generally is not disputed but there is no satisfactory evidence that the disturbance is undue or that it can be attributed to the respondent's premises.
- 28 If the survey conducted by the City is not admitted into evidence, then nor should a summary of results, however if the summary is to be admitted, then it should be given little weight as it lacks objectivity particularly where it involves respondents with a vested interest in the outcome. See *Arnotts Ltd v Trade Practices Commission (1990) 97 ALR 555 at 605*.
- 29 The Police data is not premises specific nor does it always indicate the time of day offences took place. Similarly, the hospital data is neither area nor vicinity specific.
- 30 The CCTV evidence, rather than support the complaint actually evidences persons apparently under the influence of alcohol being turned away from Zelda's Nightclub. Much of the footage relates to incidents which cannot be connected to the licensed premises.

Determination

- 31 Section 117 of the Act provides that a complaint may be lodged with the Director alleging that the amenity or good order of the neighbourhood of licensed premises is frequently unduly disturbed by any activity at or in the vicinity of the licensed premises by persons who have resorted to the premises or by noise generated from the premises.
- 32 Such a complaint may be lodged, inter alia, by the local government authority of the district in question pursuant to section 117(2)(b) which is the case in this complaint.
- 33 In considering the complaint the Commission must be satisfied that there is a nexus between the alleged detriment to the amenity, quiet or good order of the neighbourhood and the activity occurring at the licensed premises or the behaviour of those resorting to such premises has caused undue offence, annoyance, disturbance, or inconvenience.
- 34 The Commission having had the matter referred to it by the Director pursuant to section 24(1) of the Act is required to determine the complaint on the balance of probabilities pursuant to section 16 of the Act.
- 35 The respondent premises are located in what is generally known as the "waterfront village" characterised by the presence of a number of licensed premises, food outlets and other entertainment venues. Hence it is reasonable to expect a higher but not undue level of noise and disturbance and unruly behaviour.
- 36 King CJ in *Vandeleur v Delbra Pty Ltd and the Liquor Licensing Commission (1988) 48 SASR 156* following Wells J in *Hackney Tavern Nominees Pty Ltd v MacLeod (1983) 34 SASR 217* stated... "*the test of what is undue therefore is concerned with excess over what will naturally result from the conduct of licensed premises... Whether such annoyance and disturbance or inconvenience can be regarded as undue is a matter of degree and will depend on the circumstances.*" These cases were determined in South Australia however the principle is equally applicable to section 117 of the Western Australian Act.

- 37 In re *McHenry 4 SRWA (1987)* Sharkey J stated *"in order to determine whether the quiet has been unduly disturbed it required the words to be given their ordinary and natural meaning... the words must be qualified by the neighbourhood. Thus in quiet neighbourhoods, disturbance might be undue which is not so in a more noisy neighbourhood."*
- 38 Whilst the respondent did not go as far as to accept that the noise disturbance and antisocial behaviour fell within the definition of undue, it does not dispute that the area generally has a significant level of antisocial behaviour; however it submits that the complainant deliberately ignores the contribution of patrons of other licensed premises and others generally frequenting the area; thereby simply ignoring the other factors impacting on the situation.
- 39 The pivot of this application is the residents summary lodged with the complaint. Commission treated the residents summary with caution as it accepts the respondent's submission that the methodology adopted to obtain the survey was flawed and therefore little weight has been given to it.
- 40 Although 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.
- 41 The CCTV footage tendered could, in the opinion of the Commission, be classed as inconclusive at best. However, at this stage it is relevant to note the Commissions observation in *City of Rockingham v Tocoan Pty Ltd (LC 20/2012)* at paragraph 43 *"the Commission is not so naive as to determine that there are no issues with the operation of Zelda's The Commission can only determine the matter based on the evidence adduced by the applicant."*
- 42 Accordingly, the complaint is dismissed.
- 43 Lastly, as referred in para 7 above, counsel for the complainant complained that he was precluded from introducing important evidence by virtue of orders made earlier by the Commission. This matter was dealt with in appeal proceedings before the Commission prior to the hearing, such appeal being dismissed. Reasons for the decision have been provided and the Commission in respect of this matter simply notes that the complainant had more than ample time to seek a variation of the orders (issued by consent) which it did not do.



JIM FREEMANTLE
CHAIRPERSON