LC 44/2013

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Matter 1:	Appeal by City of Rockingham pursuant to section 28(4a) of the *Liquor Control Act 1988* of determination no. LC 07/2013 of a single member of the Liquor Commission dated 27 February 2013.
Applicant:	City of Rockingham *(represented by Mr Gavin Crocket of Cullen Babington Macleod Lawyers)*
Respondent:	Tocoan Pty Ltd *(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)*
Matter 2:	Appeal by Tocoan Pty Ltd pursuant to section 28(4a) of the *Liquor Control Act 1988* of determination no. LC 07/2013 of a single member of the Liquor Commission dated 27 February 2013.
Applicant:	Tocoan Pty Ltd *(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)*
Respondent:	City of Rockingham *(represented by Mr Gavin Crocket of Cullen Babington Macleod Lawyers)*
Commission:	Mr Jim Freemantle (Chairperson) Mr Evan Shackleton (Member) Ms Belinda Lonsdale (Member)
Date of Hearing:	11 July 2013
Date of Determination:	5 December 2013

Determination:

1 The appeal by City of Rockingham is dismissed.

2 The cross-appeal by Tocoan Pty Ltd is allowed.

3 City of Rockingham pay costs of Tocoan Pty Ltd in respect of the applications filed on 7, 20 and 23 February 2012.

4 The City of Rockingham pay costs of Tocoan Pty Ltd in respect of the appeal heard on 29 February 2012.

5 The City of Rockingham pay costs of this appeal.

List of Authorities

- *City of Rockingham v Tocoan Pty Ltd LC 20/2012*
- *Attorney-General v Wentworth (1988) 14 NSWLR 481*
- *Commissioner of Police of Western Australia v AM [2010] WASCA 163*
- *Woolworths Ltd v Tintoc Pty Ltd (LC 35/2011)*
- *Wood v Public Trustee (WA) (1995) 14 WAR 251*
- *City of Rockingham v Tocoan Pty Ltd LC 60/2011*
- *City of Rockingham v Tocoan Pty Ltd LC 21/2012*

Introduction

1 These appeals concern a dispute between the parties as to the liability for the payment of costs arising out of proceedings commenced by the City of Rockingham ("the City") under sections 95 and 117 of the *Liquor Control Act* ("the Act") against Tocoan Pty Ltd (t/as Zelda's Nightclub) ("Tocoan") and associated interlocutory and appeal proceedings.

2 The section 95 complaint was heard before a 3 member panel of the Liquor Commission ("the Commission") on 24 February 2012. The section 117 complaint was heard 5 days later on 29 February 2012. The two proceedings sought different remedies but there was a considerable overlap of the issues.

3 The Commission dismissed the section 95 complaint and its reasons are published in *City of Rockingham v Tocoan Pty Ltd* LC 20/2012. In dismissing the complaint, the Commission noted that the City had a "broader purpose" in bringing the complaint, namely to close down Zelda's in order to further the City's town planning policy [paras 14 – 17]. The Commission found that the evidence adduced in support of the complaint "*was deficient in many respects and required the Commission to draw inferences that were simply incapable of being drawn."*

4 The main item of evidence sought to be relied on at the section 95 hearing by the City was a residents' survey. The Commission found that the survey lacked cogency and probative value for a variety or reasons, not least that there was a lack of any nexus between what it was said the residents had observed and Zelda's itself [para 38 of LC 20/2012].

5 At the hearing of the section 117 complaint on 29 February 2012 the City sought to rely on substantially the same evidence as at the section 95 hearing, being evidence which amounted to evidence of complaints of, inter alia, anti-social behaviour and noise in the general vicinity of Zelda's nightclub. The only evidence in the section 95 proceedings, which did not form part of the evidence in the section 117 proceedings, was the residents' survey. The relevance of that to the question of whether costs ought to be payable by the City on the section 117 proceedings will shortly be elucidated.

6 Following the dismissal of the complaints, Tocoan applied for costs in respect of both of those proceedings and the associated interlocutory and appeal proceedings.

7 Tocoan's application for costs was heard by Deputy Chairperson Rafferty on 8 October 2012. On 27 February 2013, he made orders that the City pay for the costs of the interlocutory and appeal proceedings. In short, Deputy Chairperson Rafferty found that these proceedings were vexatious because they amounted to an attempt to bolster cases which had no prospect of success.

8 Deputy Chairperson Rafferty declined to award costs against the City in the section 95 and 117 proceedings, holding that he was not satisfied that those proceedings were so totally devoid of merit as to be unarguable and were therefore not vexatious.

9 In these appeals, the City challenges the award of costs made against it and Tocoan submits that there should be an award of costs made in relation to the section 117 proceedings.

The City's Notice of Appeal

10 Distilling as best we can the essential contentions in the City's grounds, they are:

1. Deputy Chairperson Rafferty made errors of law in construing the "true meaning" of sections 21(4) and (5) of the Act (ground 1) and erred in his interpretation of the meaning of "vexatiously" without reference to the "nature and scope of the Act" (ground 2).

2. The various applications, including the section 117 application did have merit, were arguable and were not therefore vexatious (ground 3).

3. As Deputy Chairperson Rafferty had determined the original section 95 complaint and was the principal decision maker in the appeal, he ought not to have been the person to hear the costs order (ground 4).

Tocoan's Cross Appeal

11 A cross-appeal filed by Tocoan Pty Ltd contends that Deputy Chairperson Rafferty erred by failing to make an award of costs in respect of the section 117 proceedings. There are some 23 grounds of appeal but in reality they amount to particulars of one substantive ground- namely that the Commission erred in not awarding costs in the section 117 proceeding, those proceedings being properly characterised as "vexatious".

City of Rockingham - Grounds 1 and 2

12 Section 21(4) relates to proceedings in which there is an "objection". The nature of the proceedings in question concern matters of a disciplinary nature (section 95) and complaints about noise or behaviour relating to licensed premises. The reference, therefore to section 21(4) in the appellant's notice of appeal is misconceived.

13 Section 21(5) of the Act is the relevant section in so far as the questions of costs are concerned. That section provides that the Commission may award costs where, inter alia, a person has "brought proceedings" frivolously or vexatiously.

14 In the case of *Attorney-General v Wentworth* (1988) 14 NSWLR 481 which was cited with approval by the Court of Appeal in The *Commissioner of Police of Western Australia v AM* [2010] WASCA 163, Roden J expressed the test for vexatiousness thus:

> "*Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;*
>
> *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;*
>
> *They are also 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*."

15 The discretion to award costs need to be considered having regard to the nature of the Liquor Licensing Commission's jurisdiction. This was considered in the case of *Woolworths Ltd v Tintoc Pty Ltd* (LC 35/2011) which referred to a number of principles

to be applied for the awarding of costs including the general principal that the parties should bear their own costs.

16 Deputy Chairperson Rafferty referred to the correct test for vexatiousness and the need to consider the principles applicable to this jurisdiction.

17 In our view, grounds 1 and 2 fail to identify any error by Deputy Chairperson Rafferty and have no merit.

City of Rockingham - Ground 4

18 The propositions in ground 4 have no merit. It is almost invariably the case that a judicial officer or Commission member hearing a case will be the one to make a decision in respect of an application for an order for costs.

19 In any event, the City did not take objection to Deputy Chairperson Rafferty sitting on the appeal at the time of hearing and so cannot now take that point.

20 The Commission notes that the City did not appeal the decision of the 3-member panel on 24 February 2012 [LC 20/2012] *supra* and so has concluded that ground 4 contains an impermissible collateral challenge to that decision. (See *Wood v Public Trustee (WA)* (1995) 14 WAR 251*)*

21 Ground 4 of the appeal is therefore dismissed.

Ground 3 and the Cross-Appeal

22 Ground 3 of the City's Appeal and Tocoan's cross appeal contain the central issue in contention, namely whether the relevant proceedings are properly characterised as "vexatious" and therefore justify of the awarding of costs. The proceedings in contention can be put into sub-categories, namely:

1. the interlocutory proceedings in February 2012 and related appeal; and

2. the section 117 proceedings filed on 1 October 2011 and heard on 29 February 2012.

23 It is convenient to deal with the parties' contentions together.

24 Tocoan does not contend that the City's applications were "frivolous" but rather "vexatious".

25 The central argument put by Tocoan is that, in each case the proceedings were doomed to fail and thus fell within the third category for vexatiousness identified by Roden J in *Wentworth*, supra.

26 In order to properly understand these issues, it is necessary to consider the chronology of the proceedings as a whole.

27 On 1 October 2010, the City filed complaints against Tocoan pursuant to sections 95 and 117 of the Act. The applications were made separately but the City sought to rely on the same kind of evidence.

28 Following the City lodging the complaints, some 9 months passed and on 5 July 2011 there was a directions hearing before the Commission in which various orders were made, including an order that "*no further evidence will be taken and submissions from the parties must be received 14 days prior to the hearing dates*".

29 On 9 December 2011, just over one year after the original application was filed, the City lodged the CCTV footage in relation to the applications.

30 On 29 December 2011, the Commission varied order 4 with the consent of the parties to admit the CCTV footage referred to at paragraph 29 into evidence. Otherwise, the orders stated, inter alia, that "*no further evidence will be taken and submissions from the parties must be received 14 days prior to the hearing dates*" (*City of Rockingham v Tocoan Pty Ltd* LC 60/2011).

31 On 7, 20 and 23 February 2012 (14 months or so after the original applications were filed) the applicant filed three applications seeking orders that the City be permitted to adduce further evidence in the section 95 and 117 proceedings.

32 Each of these applications were refused on the basis that the Commission had made it clear on two occasions, namely 5 July 2011 and 29 December 2011, that any further evidence to be relied on must be received 14 days prior to the hearing dates. In refusing the third of these applications, Chairperson Freemantle made the following observation in a letter dated 23 February 2012:

> "*I refer to the copious correspondence addressed to me and the Executive Officer of the Commission since 21 February 2012. I am very disappointed by the continued practice of disregarding deadlines and orders issued by the Commission. This shows a disturbing lack of consideration and respect to the Commission and other parties to the proceedings.*"

33 By letter dated 17 February 2012, the City asked the Commission to adjourn the section 117 proceedings but that application was refused by the Commission in a letter dated 20 February 2012.

34 The section 95 complaint was heard before the Commission on 24 February 2012. In dismissing the complaint, the Commission made it plain that it considered that there was a lack of evidence to support the complaint. [LC 20/2012, supra at para 3].

35 The fact that there was such a lack of evidence is reflected in the fact that in the weeks prior to the commencement of the hearing, the applicant had sought to adduce further evidence, in the knowledge that the Commission had made very clear orders in July and December 2012 that any evidence must be filed 14 days prior to the hearing date. It can be inferred from the timing of the applications to adduce further evidence that the applicant well knew prior to the commencement of the hearing that the evidence was deficient.

36 On 28 February 2012, the day before the hearing of the section 117 complaint, the City filed an appeal against the three decisions of the Commission to refuse the admission of further evidence (being the applications made on 7, 20 and 23 February 2013) in the section 117 hearing.

37 The appeal against the refusal of the Commission to admit further evidence was heard on 29 February 2013 (*City of Rockingham v Tocoan Pty Ltd LC 21/2012*). The City's applications were refused and the hearing of the section 117 complaint proceeded.

38 The section 117 complaint was dismissed, the Commission finding that there was a failure to establish any nexus between the complaints referred to in the residents' summary and that the CCTV footage was "inconclusive at best" [LC 22/2012].

Were the Section 117 Proceedings Vexatious?

39 Deputy Chairperson Rafferty was not persuaded that the sections 95 and 117 applications were frivolous or vexatious. Whilst he found that the evidence in respect of both applications was lacking he was not satisfied that it was "*so obviously untenable or manifestly groundless*".

40 The main plank of Tocoan's argument that the section 117 proceedings were frivolous and vexatious is that, once the City was alerted to the fact that the section 95 proceedings were without merit, then it follows, as a matter of logic, that the section 117 proceedings were also without merit. This is so, it is said, because the evidence relied on in the section 117 proceedings was essentially the same as the evidence relied on in the section 95 proceedings, save that the residents' survey was not in evidence in the section 117 proceedings. Tocoan argues that, if anything, there was less evidence to support the section 117 complaint.

41 The City contends that, at the section 95 hearing on 24 February 2012, the Commission did not properly consider the evidence of 256 pages of residents' complaints which was the "source material" forming the basis of the survey material tendered in the hearing.

42 Mr Crocket (representing the City) argued that the Commission had not properly considered the "survey evidence" at the section 95 hearing and that, had it done so, it would have disclosed an arguable case. The relevance of his challenge to the Commissions's approach to that evidence at the section 95 hearing in these proceedings appears to be as follows: had the Commission admitted the evidence *and* considered it properly in the section 117 proceedings then it would have disclosed, at least, an arguable case.

43 There has been no appeal as to the correctness of the section 95 proceedings and so any assertion that the Commission failed to properly consider that evidence is an impermissible collateral attack to a previous ruling by the Commission.

44 We would make a similar comment in relation to his complaint that the Commission erred by "precluding" him from referring to matters which were not in evidence.

45 His submissions in that regard have no merit.

46 For what it is worth, the Commission doubts that the "source documentation" referred to would have advanced their contentions at either the section 95 or 117 hearings. It was clear that, as the Commission found at the section 95 hearing, whilst there was evidence of anti-social behaviour in the area of the licensed premises, none of that behaviour could be directly attributable to Tocoan.

47 In this regard, we note that sections 117(1) (b)(i) and (ii) specifically refer to the need to prove the relevant conduct as being "on" or "from" the premises. On no view of the evidence, whether it was evidence in fact adduced or sought to be adduced by the City, could it be said that the conduct relied upon by the City had that necessary nexus.

48 Even if all of the source documentation for the survey had been in evidence then this would not change the Commission's view that the section 117 proceedings were vexatious in the sense of being unarguable and having no reasonable prospects of success.

49 The Commission cannot see how, in light of what transpired at the section 95 hearing, the City could have failed to realise that the section 117 proceedings were doomed to fail. This was no doubt the reason why the City had appealed the decision by the Commission refusing to admit further evidence and had applied for for an adjournment of the section 117 proceedings on the day of the hearing.

50 It was of course open to the City to withdraw the complaint (and there would be nothing preventing them instigating a fresh complaint in the future once the evidence was to hand). However, for reasons which remain a mystery to this Commission, the City chose to plough on with the section 117 application with an argument which was plainly untenable.

51 It may well be that in October 2010, at the time the proceedings were instituted, the City had a genuine belief that the evidence, once it was to hand in its final form, would support the complaint. For that reason, the Commission does not consider that the complaint was vexatious from the outset.

52 However, following the hearing of the section 95 complaint, the situation had changed. The City well knew that the section 117 application was in trouble. Indeed, in an exchange with Deputy Chairperson Rafferty at the hearing for the application for costs on 8 October 2012, Mr Crockett made a clear admission that he had realised the writing had been on the wall. He complained that because the City had been refused the opportunity to adduce further evidence in the section 117 proceedings, "*I put the worst case because I was struggling to find the evidence because it had all been precluded*". In our view, that amounts to a clear admission by Mr Crockett that he well knew that the section 117 application was bound to fail.

53 Mr Crockett submitted at the present hearing that there was "a large volume" of evidence which "would have" made the City's claim arguable. In support of his contention he referred to witness statements (which he had sought to adduce in evidence but had been refused) and "source documentation" forming the basis of the residents' survey.

54 The problem with Mr Crocket's argument (apart from the Commission doubting that the putative evidence was cogent and had probative value) is that these documents were not in evidence at the time of the hearing.

55 In his submissions, Mr Crocket seeks to have this Commission re-litigate the merits of the applications to adduce further evidence. To that extent his submissions amount to an impermissible collateral challenge to a previous ruling of this Commission. In any event, regardless of the correctness of the Commission's ruling, the only inference to be drawn was that, at the time of the section 117 hearing, Mr Crockett must have realised that the application was now bound to fail.

56 That is not to say that but for the rulings, section 117 application would have had any better prospects of success. It seems to us that, based on the decision of this Commission on 24 February 2012 in respect of the section 95 proceeding that the evidence sought to be admitted lacked any cogency or probative value in terms of

establishing the necessary nexus between the problems complained of and the premises in question.

57 The Commission accepts Tocaon's submission that it is not necessary for the Commission to find that the proceedings brought by the City were vexatious from the outset. The Oxford dictionary definition of "to bring" includes the meaning "to cause (something) to move in a particular direction" which, in our view, could encompass conduct which occurs at various points along a continuum leading to the events in question. To that extent, 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.

The Order for Costs for the Applications to Adduce Further Evidence

58 In granting Tocoan's application for costs in respect of the City's applications to adduce further evidence, Deputy Chairperson Rafferty gave the following reasons:

> "*Despite the specific orders made by the commission and over 15 months after the filing of the sections 95 and 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 9 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*.
> *I consider that the three applications……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 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*".

59 Distilling, as best we can from the voluminous arguments put by Mr Crocket in written submissions and in oral argument, it appears that the City contends in essence that the Commission unreasonably declined the City an opportunity to adduce this evidence.

60 In our view, this argument has no merit. Any deficiencies in the City's case and any delays in the filing of evidence were not adequately explained by counsel for the City. The application was first filed in October 2010 and so the City had had nearly 15 months to gather evidence. It is now apparent that, at the time the City filed its original applications, it in fact did not have any evidence, which begs the question why it did not wait until it had the necessary evidence before commencing proceedings.

61 Mr Crockett contended in January 2012 he had become "confused" by whether the evidence filed in respect of the section 95 hearing had also been filed in respect of the section 117 hearing because in July 2012, the two hearings had been "separated out". He had apparently assumed erroneously that the residents' survey had been filed with the section 117 proceedings.

62 In response to the above, Chairperson Freemantle in a letter to Mr Crockett dated 23 February 2012, referred to the fact that the survey had been filed under cover of letter dated 16 November 2010 and entitled "Section 95 Complaint – City of Rockingham". As pointed out by Chairperson Fremantle, the letter also clearly stated that the evidence was filed in support of that application.

63 We would make the observation that it is not for this Commission to ensure that the parties have their house in order or to attempt to buttress any deficiencies in the evidence or the way the parties chose to run their case.

64 Mr Crocket submitted that he attempted to advise the Commission of the problem but we find that the correspondence does not bear this out and Mr Crocket's submission in that regard to be disingenuous.

The Appeal Against the Interlocutory Orders

65 The appeal against the Commission's refusal to allow the City's three applications was filed following the section 95 hearing also had no merit.

66 In his reasons for Deputy Chairperson Rafferty stated at [22] of his judgement that

> "*it is self-evident from the fact that there was no appeal prior to 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. Giving the timing of the filing of the appeal notice this is the only rational inference that can be drawn.....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*".

67 The Commission agrees with the conclusions reached by Deputy Chairperson Rafferty Rafferty and we would dismiss ground 3.

Orders

68 The Commission makes the following orders:

1. The appeal by City of Rockingham is dismissed.
2. The cross-appeal by Tocoan Pty Ltd is allowed.
3. City of Rockingham pay costs of Tocoan Pty Ltd in respect of the applications filed on 7, 20 and 23 February 2012.
4. The City of Rockingham pay costs of Tocoan Pty Ltd in respect of the appeal heard on 29 February 2012.
5. The City of Rockingham pay costs of this appeal.

69 The Commission will hear the parties as to the making of further orders in relation to proceedings for the taxation of costs.

70 The parties are required to lodge their submissions by close of business Friday, 31 January 2014.

MR JIM FREEMANTLE
CHAIRPERSON