

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 Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)

Matter: Appeals pursuant to section 28 of the *Liquor Control Act 1988* against the following determinations:

1. determination made by Deputy Chairperson Eddie Watling on 7 February 2012;
2. determination made by Chairperson Jim Freemantle on 20 February 2012; and
3. determination made by Chairperson Jim Freemantle on 23 February 2012.

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

Date of Hearing: 29 February 2012

Date of Determination: 29 February 2012

Determination: Each of the appeals is dismissed

Date of Reasons Published: 29 June 2012

Background

- 1 On 2 July 2010 and 1 August 2010 the Commissioner of Police ("the Police") and the City of Rockingham ("the City"), respectively lodged a complaint pursuant to section 95 of the *Liquor Control Act 1988* ("the Act") against the licensee of premises known as Zelda's Nightclub situated at 2 Kent Street, Rockingham.
- 2 On 7 February 2011, pursuant to section 24 of the Act, the Director of Liquor Licensing ("the Director") referred a section 117 complaint lodged by the City against Zelda's Nightclub to the Liquor Commission ("the Commission") for determination.
- 3 On 5 July 2011, at a directions hearing the Commission made the following determination (LC 26/2011) in respect of all the above three matters lodged with the Commission against Zelda's Nightclub:

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3. *Orders 1 and 2 made by Commissioner Watling on 26 October 2010 are quashed and the three outstanding matters being, a section 95 complaint lodged by the Commissioner of Police, and a section 95 complaint lodged by the City of Rockingham and the section 117 complaint lodged by City of Rockingham will be heard separately and in the following sequences:*
 - *section 95 – Commissioner of Police;*
 - *section 95 – City of Rockingham; and*
 - *section 117 -City of Rockingham*
 4. *No further evidence will be taken and submissions from the parties must be received 14 days prior to hearing dates.*
 5. *Parties to these proceedings are required to provide their available dates by close of business Friday, 15 July 2011.*
 6. *On the basis that the Applicant's solicitor has advised that he is unable to provide a copy of all the relevant CCTV footage to the Respondent and the Commission and with the agreement of parties to this proceeding, CCTV footage will not form part of the evidence in respect of the City of Rockingham section 95 and section 117 complaints.*
- 4 On 5 December 2011, the parties to the proceeding were advised that the applicant's section 117 complaint was set down for a hearing on 29 February 2012.
 - 5 On 29 December 2011, at the request of the applicant and the respondent, the Liquor Commission amended its determination of LC 26/2011 made on 5 July 2011 by varying Order 4 of that determination as follows:
 4. *Subject to Order 6, no further evidence will be taken and submissions from the parties must be received 14 days prior to hearing dates*

and substituting the following order in place of order 6.

6. *The short DVD film comprising of 23 minutes created by Glare Productions summarising the "incident" of interest referred to in the letter from GD Crocket & Co to Frichot & Frichot dated 9 December 2011 together with annexure 2 to that letter shall form part of the evidence.*

All other orders of the Commission determined on 5 July 2011 remain unchanged.

- 6 As a matter of procedural fairness, as a consequence of the amendment made to the Orders on 29 December 2011 (LC 60/2011), the licensee was permitted to lodge a responsive statement as a comment on the DVD footage.
- 7 In the month of February 2012 in copious correspondence lodged by the City with the Commission, City's Counsel requested additional evidence to be allowed to be lodged or alternatively for the hearing to be adjourned to a later date.
- 8 On the basis that the Orders made in December 2011 by consent (emphasis added) afforded sufficient time to the parties to lodge their submissions the Commission refused to grant the request at such a late stage by correspondence dated 7, 20 and 23 February 2012.
- 9 In the afternoon of 28 February 2012, a day prior to the hearing, the applicant lodged an appeal against the above three decisions of the Commission dated 7, 20 and 23 February 2012 respectively ("the appeal"). The applicant defined the three decisions as "prohibition orders".
- 10 The grounds of appeal were as follows:
 - (a) *By the Commission's issuing orders dated 7, 20 and 23 February 2012 whereby the applicant has been denied the opportunity to lead any evidence to support the section 117 complaint.*
 - (b) *Section 117(4) of the Act requires the complainant be given "a reasonable opportunity to be heard". This opportunity is denied to the applicant for its evidence to support the section 117 complaint has been before the Commission since 17 October 2010 (**the evidence**) yet it is denied the right to rely on the evidence.*
 - (c) *By refusing the applicant the right to produce the evidence to support its section 117 complaint yet permitting the respondent the right to lodge evidence (**the respondent's evidence**) constitutes the denial of natural justice.*
 - (d) *Parties to the proceedings have clearly identified the issues as set out in the applicant's written complaint dated 1 October 2010 (**the complaint**). All parties to the proceedings have lodged evidence in support and against the complaint being the evidence and the respondent's evidence.*
 - (e) *The Commission's order allowing the respondent's evidence to stand in the complaint, without the evidence and the source material of the evidence being introduced into*

evidence, constitutes a denial of natural justice and breaches the provisions of section 117(4) of the Act.

- (f) The Commission acted beyond power in making orders prohibiting the applicant the right to introduce the evidence to support its complaint.*
- (g) The Commission acted beyond power by preparing a Book of Papers which excludes the applicant's primary source of evidence (**the evidence**).*
- (h) The 5 July 2011 orders (Order 4), in refusing the parties the right to introduce evidence, contravenes section 16 and 117(4) of the Act.*
- (i) The Commission failed to correct its own error by allowing the order made on 31 March 2011 (in suspending the lodging of evidence by the parties) to stand.*
- (j) The Commission has acted outside its power by prescribing to the applicant what evidence it may or may not adduce to support its complaint.*
- (k) The Commission has acted outside its power by preparing a Book of Papers, which procedure then determines what evidence is permitted to establish a complaint.*
- (l) The provisions of the Act allow the applicant the right to elect what the scope and the nature of the evidence is to be and what evidence it will adduce to establish a complaint. This legal right is denied to the applicant in this complaint.*

10 An expedited hearing with a newly constituted panel of Commissioners heard the appeal immediately prior to the hearing of the section 117 complaint.

Submissions on behalf of the applicant

11 On the morning of 29 February 2012, the day of the hearing, the applicant handed written submissions to the Commission and made oral submissions at the hearing of the appeal.

12 The applicant's submissions may be summarised as follows:

12.1 The applicant conceded that the appeal was out of time.

12.2 The applicant defined the correspondences by the Commission in respect of both the section 95 and section 117 complaints on 26 October 2010, 16 March 2011, 30 March 2011, 8 April 2011, 5 July 2011, 29 December 2011 and 9 February 2012 respectively as "the orders" and defined the orders made on 7, 20 and 23 February 2012 (those against which the appeal was lodged) as "the prohibition orders".

12.3 The "Prohibition orders" denied the applicant the opportunity to lead any evidence to support the section 117 complaint.

- 12.4 The applicant considered that in view of the determination of 5 July 2011 as amended (see paragraphs 3 and 5 above) the evidence which was available in the section 95 complaint would be available in the section 117 complaint.
- 12.5 The three decisions constitute a prohibition on the introduction of the 'source material' which the applicant states is 254 surveys together with the Scott and Ellis documentation which is all identified in the "Mann Evidence" (as defined by the applicant) dated 29 April 2011.
- 12.6 What the applicant is seeking to do is to introduce exactly the evidence that is identified in the minute of proposed orders submitted with the notice of appeal it has the material available (at the hearing) and the respondent has had it since 17 November 2010. The respondent has also had the survey material since 5 November 2010. Therefore there would be no prejudice to or surprise for the respondent through the acceptance of this material.
- 12.7 It is not the case that the appeal has been lodged as a delaying tactic. The applicant's ability to present its complaint has been curtailed by the "prohibition orders" when in fact if the prohibition orders had determined that the Scott, Ellis and all the source material, principally the survey documentation and the statutory authority personnel reports be admitted, this matter could have proceeded expeditiously.
- 12.8 The "orders" of 31 March 2011 read with the "prohibition order" of 5 July 2011 are contradictory. The applicant (and Mr Mann) saw the evidence in the section 95 complaint as being the evidence in the section 117 complaint.
- 12.9 The 'Mann evidence' was lodged on 29 April 2011 but there was no order for this material to be lodged because the relevant orders of 31 March 2011 had been suspended, the outcome being that each party to these proceedings has suffered some confusion.
- 12.10 Something that contravenes the Act by the "prohibition order" of 5 July 2011 cannot be remedied unless a proper order is made varying that order – the order of 31 March 2011 was suspended. The order of 5 July 2011 said "no more evidence" – that is in non-compliance with the substantive provisions of the Act, (sections 117, 16 and 33) which means the applicant is unable to present its complaint. Curing this situation is very simple – the source documentation is handed to both parties and the complaint is proceeded with the complaint (both parties have all the documentation listed in the index of documents). The appeal is to allow the Scott, Ellis and the survey material into evidence in association with the Mann evidence which will provide proper evidence in this hearing.

Submissions on behalf of the respondent

- 13 On the morning of 29 February 2012, the respondent handed written submissions to the Commission and made oral submissions at the hearing of the appeal.

- 14 The respondents submissions may be summarised as follows:
- 14.1 Each of the decisions (7, 20 and 23 February) arises out of order 4 of the orders of the Commission made on 5 July 2011 and varied (by consent) by the order of 29 December 2011. The decisions in effect dealt with an application to vary the orders of 5 July 2011 and the appeal constitutes a collateral attack on that order.
- 14.2 The decisions arise from the application of the order dated 5 July 2011 and any appeal against that order should have been instituted within 1 month of 5 July 2011 as required by rule 6(1) of the *Liquor Commission Rules 2011* and accordingly the appeal against the decisions is out of time and if it is not, the Commission, duly constituted in accordance with section 25 (4a) may:
- affirm, vary or quash the decision appealed against; or
 - make a decision that the Commission could have made instead of the decision appealed against and in any case may make any ancillary or incidental order the Commission considers appropriate.
- 14.3 The applicant was given a reasonable opportunity to be heard in relation to each of the decisions. Indeed the decision made on 29 December 2011 was made with the consent of the applicant.
- 14.4 The late application to introduce new evidence was dealt with properly by the Commission.
- 14.5 The procedure of the licensing authority shall be determined by the Commission however there is a public interest in the efficient management of the business of the Commission.
- 14.6 Case management principles include the objects of disposing efficiently of the business of the Commission, maximising the efficient use of available administrative resources and facilitating the timely disposal of business at a cost affordable to the parties and proportionate to the importance and complexity of the subject matter. Bearing in mind the restrictions on awarding costs in this jurisdiction and in this connection, there is a significant cost prejudice to the respondent if the section 117 proceedings are adjourned effectively allowing the applicant to introduce significant additional evidence. Even an order for costs may not always undo the prejudice a party suffers by late amendment or late adjournment to allow additional evidence and the Commission is entitled to weigh in the balance the strain the litigation imposes upon litigants.
- 14.7 Right up until late December 2011, the applicant had opportunity to apply to expand or extend or enlarge the evidence on record. However it did not do so.
- 14.8 In fact and in substance the appeal is against the order made by consent on 5 July 2011 and varied by an order made by consent on 29 December 2011.

14.9 The applicant has now realised that it did not file evidence in the section 117 proceedings and the argument that the applicant interpreted the order of 5 July 2011 as meaning there was some commonality in the evidence filed in the section 95 proceedings and the section 117 proceedings deserves to be howled down and is untenable – the language of the orders make it untenable.

Determination

Grounds (a) and (b) (e) and (h)

- (a) By the Commission issuing order dated 7, 20 and 23 February 2011 whereby the applicant has been denied the opportunity to lead any evidence to support the section 117 complaint
- (b) Section 117(4) of the Act requires the complaint be given “a reasonable opportunity to be heard”. This opportunity is denied to the applicant for its evidence to support the section 117 complaint has been before the Commission since 17 October 2010 (the evidence) yet it is denied the right to rely on the evidence.
- (e) The Commission's order allowing the respondent's evidence to stand in the complaint, without the evidence and the source material of the evidence being introduced into evidence, constitutes a denial of natural justice and breaches the provisions of section 117(4) of the Act.
- (h) The 5 July 2011 orders (Order 4), in refusing the parties the right to introduce evidence, contravenes sections 16 and 117(4) of the Act.

The Commission does not accept the assertion that its orders dated 7, 20 and 23 February 2012 denied the applicant an opportunity to lead any evidence or rely on the evidence lodged to support section 117 complaint. The applicant had every reasonable opportunity to be heard in relation to evidence to support the section 117 complaint contrary to the assertions made in the grounds above.

Each of the orders as per ground (a) above arose out of order 4 of the Orders of the Commission made on 5 July 2011 and as varied (at the request of the applicant and agreed by the respondent) by the Order of 29 December 2011. These Orders provided time lines for any evidence to be relied upon, submissions and responsive submissions to be lodged by the parties to the proceeding.

The applicant was given a reasonable opportunity to be heard in relation to each of these orders. In fact the Order was further varied at the request of the applicant to include the DVD evidence and the matter of any further inclusion of evidence should and could have been addressed at that time.

There was thus no denial of natural justice by reason of the Commission refusing the applicant the right to produce evidence to support the section 117 complaint at a very late stage. It is not clear from ground 'e' of the appeal what the applicant means by its assertion that the respondent was permitted to lodge evidence. If what is referred to is the granting of leave for lodgement of Mann statement dated 5 February 2012; this 'evidence' was permitted to be lodged as a matter of

procedural fairness, to enable Mr Mann to comment on the DVD footage the subject of the order varied by the Commission on 29 December 2011 at the request of the applicant.

Ground (c)

- (c) By refusing the applicant the right to produce the evidence to support its section 117 complaint yet permitting the respondent the right to lodge evidence (the respondent's evidence) constitutes the denial of natural justice.

The order of December 2011 was varied at the request of the applicant (emphasis added) to include the CCTV footage. As a matter of procedural fairness, the respondent was provided with a right to lodge rebuttal evidence. It did not envisage a series of rebuttals to be lodged over an extended period of time. Such a situation is untenable as it does not provide the parties to the proceeding as well as the Commission an opportunity to consider the evidence in detail so that a fair outcome is reached in the matter.

This ground is therefore rejected.

Ground (d)

- (d) Parties to the proceedings have clearly identified the issues as set out in the applicant's written complaint dated 1 October 2010 (the complaint). All parties to the proceedings have lodged evidence in support and against the complaint being the evidence and the respondent's evidence.

The Commission is unable to address this ground of appeal which is only a statement of an alleged fact.

Grounds (f), (g), (j), (k), (l)

- (f) The Commission acted beyond power in making orders prohibiting the applicant the right to introduce the evidence to support its complaint.
- (g) The Commission acted beyond power by preparing a Book of Papers which excludes the applicant's primary source of evidence (the evidence).
- (j) The Commission has acted outside its power by prescribing to the applicant what evidence it may or may not adduce to support its complaint.
- (k) The Commission has acted outside of power by preparing a Book of Papers, which procedure then determines what evidence is permitted to establish a complaint.
- (l) The provisions of the Act allows the applicant the right to elect what the scope and the nature of the evidence is to be and what evidence it will adduce to establish a complaint. This legal right is denied to the applicant in this complaint.

As part of its usual administrative process the Commission prepared an index of documents and circulated it to the parties to the proceeding on 17 January 2012 with a request to advise the Commission of any necessary amendments to be made in the index by close of business 1 February 2012. Whilst the index was amended and recirculated to the parties to the proceeding again on 17 February 2012 to include some documents requested to be included by the Counsel for the respondent. However, no such request was received by the City's Counsel. The Commission is entitled to put time limits on parties for administrative purposes. No content restraints were imposed. The index of documents is for administrative and procedural purposes only and does not in any way purport to determine what evidence is permitted to establish a complaint.

The Commission therefore rejects the ground which alleges that the Commission acted outside its powers by preparing an index of documents and thereby prevented the parties to the proceeding to determine what evidence is permitted to establish a complaint.

Ground (i)

- (i) The Commission failed to correct its own error by allowing the order made on March 31 2011 (in suspending the lodging of evidence by the parties) to stand.

The email advice of the Acting Executive Officer dated 30 March 2011 confirmed that the current timelines did not apply and new submission timelines would be advised in due course to the parties to the proceeding. The orders of 5 July 2011 issued by the Commission after (emphasis added) the advice of 30 March 2011 provided for the new timelines to lodge evidence, submissions and responsive submissions. The Commission therefore rejects the ground that the Commission failed to correct its own error by allowing the order made on 31 March 2011 to stand.

- 15 Accordingly, none of the grounds of appeal can be upheld and each of the appeals is dismissed.



**MR JIM FREEMANTLE
CHAIRPERSON**