

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicants:** Andrew Koh Nominees Pty Ltd
(represented by Mr Ashley Wilson of Frichot & Frichot)
- Great Victoria Corporation Pty Ltd
(represented by Mr Gavin Crocket of Gavin Crocket & Co)
- Respondents:** Great Victoria Corporation Pty Ltd
(represented by Mr Gavin Crocket of Gavin Crocket & Co)
- Andrew Koh Nominees Pty Ltd
(represented by Mr Ashley Wilson of Frichot & Frichot)
- Commission:** Ms Helen Cogan (Acting Chairperson)
Mr Eddie Watling (Member)
Mr Greg Joyce (Member)
- Counsel Assisting Commission:** Mr Sam Nunn of State Solicitor's Office
- Date of Hearing:** 23 August 2010
- Date of Determination:** 25 October 2010
- Premises:** Sandringham Cellars
- Matter:** Applications by:
- 1 Andrew Koh Nominees Pty Ltd for costs;
 - 2 Great Victoria Corporation Pty Ltd for costs;
 - 3 Great Victoria Corporation Pty Ltd for a strike out in relation to matter 1 above
- Determination:** The Application by Andrew Koh Nominees for costs is dismissed;
- The application by Great Victoria Corporation Pty Ltd for costs is dismissed; and
- The Application by Great Victoria Corporation Pty Ltd for a strike out in relation to matter 1 above is dismissed.

Authorities considered in determination (by reference to submissions of counsel assisting)

- *Austie Nominees Pty Ltd v Berbar Nominees Pty Ltd & Ors (Liquor Licensing Court No 06/98, 28 October 1998, Greaves, J)*
- *Australian Securities Commission v Aust-Home Investments Ltd (1993) 44 FCR 194*
- *Gribbles v Health Insurance Commission (1997) 80 FCR 284*
- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *McClure v The Mayor and Councillors of the City of Stirling [No 3] [2009] WASC 247*
- *Northern Territory v Lane (unreported, FCA, O'Loughlin J, 14 June 1996, No DG 6001 of 1994)*
- *O'Neill v Mann [2000] FCA 1680*
- *One Tel Ltd v Deputy Commissioner of Taxation (2000) 171 ALR 227*
- *Captam Pty Ltd t/as Waterfront at Mindarie v Ocean Keys Tavern Pty Ltd [2005] WALLC 8*
- *City Provisions; Dinh Holdings Pty Ltd v Liquorland (Australia) Pty Ltd & Anor [2004] WALLC 5 at [1]*
- *Crab & Anchor Brasserie; Cape Bouvard Investments Pty Ltd v Brighton Hotel; Holdings Pty Ltd v Inspirations (WA) Pty Ltd [2003] WALLC 8;*
- *Hudson Gallery; Apthorp v Goldbay Corporation Pty Ltd [2006] WALLC 1*
- *Liquorland Palmyra; Always Holdings Pty Ltd v Liquorland (Australia) Pty Ltd [2005] WALLC 13*
- *Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622*
- *The Good, the Bad and the Ugly Mexican Restaurant; Mad Dog Mexican Company Pty Ltd [200] WALLC 22*

Introduction and Background

1. These applications before the Liquor Commission arise from an application (LLC 12/2006) before the Liquor Licensing Court prior to the extinguishment of that court (in 2007) in which the respondent Great Victoria Corporation Pty Ltd was the applicant and the applicant Andrew Koh Nominees Pty Ltd was an objector.
2. On 3 May 2007, the Liquor Licensing Court before its extinguishment and without having determined the merits of the matter before it reserved the question of costs in the matter before it.
3. Both the Applicants and Respondents acknowledge that the merits of the matter before the Licensing Court (which was the matter of an application for alteration and re-definition of the licensed premises) no longer stand to be resolved.
4. In the submissions made by each of the parties before the Commission the chronology of events which took place before the Liquor Licensing Court was dealt with at length and covered the period between 1 June 2006 when the application was made to the court (by referral from the Director of Liquor Licensing under section 25 of the *Liquor Control Act 1988*) and 3 May 2007 when the Court adjourned the applications before it to a date to be fixed and reserved the question of costs
5. On 7 December 2009, the Commission determined inter alia that :
 - pursuant to the provisions of Section 5(4) schedule 1A of the *Liquor Control Act 1988* the Commission had jurisdiction to hear the Application; and
 - the documents to be considered and any submissions shall be confined to the issue of costs only and not the merits of the original application before the Liquor Licensing Court
6. On 23 April 2010, the Commission determined as follows:
 1. *the application made by Mr Gavin Crocket relating to the jurisdiction of the Liquor Commission (" the Commission") to hear the above matter is dismissed in light of the determination made by the Commission on 7 December 2009 (LC 26/2009);*
 2. *the hearing of each of the applications for costs and the strike out application will be set down for a date to be determined but to be not before 31 May 2010.The*

parties shall provide their available dates for next 3 months by no later than close of business Friday, 7 May 2010;

3. *the parties shall have liberty to lodge further written submissions as to why they are entitled to costs and a strike out by not later than 28 days before the date set for hearing;*
4. *the parties shall in their submissions quantify the costs they seek; and*
5. *The parties may lodge responsive submissions by not later than 10 days before the date set for hearing.*

Hearing

7. On 23 August 2010, a hearing was held before the Commission.

Submissions on behalf of Andrew Koh Nominees Pty Ltd

8. On 29 June 2009, 1 September 2009 and 21 November 2009, Andrew Koh Nominees Pty Ltd made written submissions and on 23 August 2010 made oral submissions at the hearing before the Commission.
9. The written and oral submissions were lengthy and detailed, but consisted largely of matters relating to the merits of the application before the Liquor Licensing Court and the chronology of events which took place before that court and included a submission that Great Victoria Corporation Pty Ltd had abused the court process.

Submissions on behalf of Great Victoria Corporation Pty Ltd

10. On 7 August 2009, 4 November 2009 and 1 February 2010 Great Victoria Corporation Pty Ltd made written submissions and on 23 August 2010 made oral submissions at the hearing before the Commission. These submissions included statements to the effect that the application by Andrew Koh Nominees Pty Ltd was both frivolous and vexatious and as in the case of the submissions by Andrew Koh Nominees Pty Ltd, consisted largely of matters relating to the merits of the application before the Liquor Licensing Court and the chronology of events which took place before that court.

Submissions by Counsel assisting the Commission on the law relevant to the exercise of the Commissions discretion as to costs

11. The written submissions by counsel assisting the Commission filed on 15 July 2010 were made available to the Applicants and Respondents and on 23 August 2010, counsel assisting made oral submissions at the hearing before the Commission.

Quantifications of costs by Applicants and Respondents

12. Both the Applicants and the Respondents quantified the costs sought by the them as required by the Commission.

Determination

13. The Commission considered the submissions made on behalf of the Applicants and Respondents and Counsel Assisting and also considered the considerable amount of documentation before the Commission which was also before the Applicants and the Respondents.
14. Essentially the relevant submissions made on behalf of the Applicants and Respondents respectively can be reduced to "allegations" by each of them that the other of them unnecessarily delayed or obstructed the process before the Liquor Licensing Court with the result that costs were thrown away or incurred unnecessarily.
15. The Commission is of the view that although, no doubt, the process before the Liquor Licensing Court was perhaps inordinately long, that process was not flawed.
16. Great Victoria Corporation Pty Ltd as applicant before the Court was entitled to present its case with all relevant material, notwithstanding that material took time to gather.
17. Andrew Koh Nominees Pty Ltd was entitled to develop its case as an objector before the Court as it saw fit.
18. The Commission finds there is no evidence that either one of the Applicants or Respondents acted frivolously or vexatiously or in any way inappropriately in the conduct of the matter before the Court.
19. It was not contended by either the Applicants or the Respondents that the Liquor Licensing Court and the Commission had and has a broad discretion to award costs including to an objector.
20. As submitted by counsel assisting, 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.

21. The Commission finds that there is no evidence that either of the parties to the Court proceedings had a case which was not arguable or without merit. In any event the Court made no finding on the merits of the application before it.

22. The Commission is of the view that as submitted by Counsel Assisting (and supported by the authorities referred to in those submissions):

- the Commission may have regard to the previous practice of the Court;
- the Commission is not bound by the previous practice of the Court and the policies to be adopted by the Commission in respect of the exercise of the discretion as to costs are matters for the Commission;
- in formulating its policy as to costs the Commission may have regard to Section 21(5)g 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;
- if the Commission is minded to exercise its discretion regarding costs against any party then that party must be put on notice of the prospect of any order being made and given the opportunity to put submissions on the questions of whether an order should be made;
- the discretionary nature of costs does not easily permit the formulation of any concrete rules as to the exercise of that discretion where the merits of the substantive matter are not argued and the issues become moot, except for the issues of costs itself;
- where the Court has such a broad discretion as to costs the conduct of the parties to the proceedings and the reasons for the discontinuance can bear heavily on the exercise of the discretion as to costs;
- although there is no merit in trying a hypothetical case or one that has otherwise been resolved it may be that one of the parties has acted so unreasonably that the other party should obtain the costs of the action;
- in determining the reasonableness of the actions of either party it may be relevant to consider the operation of the rules of the Commission, the parties' compliance with them and the motivation behind any application to discontinue proceedings;
- if it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile the proper exercise of the costs discretion will usually mean that the court will make no order as to the costs of the proceedings;

- it may be that, despite both parties having acted reasonably, one party was almost certain to succeed if the matter had proceeded and
- these principles can only be applied on a case by case basis within the context of the broad discretion to award costs granted by section 21 of the Act.

23. As stated above (Paras 16, 17 and 18) the Commission, being of the view that -

- Great Victoria Corporation was entitled to present its case with all relevant material;
- Andrew Koh Nominees Pty Ltd was entitled to develop its case as an objector as it saw fit; and
- there was no evidence that one of the Applicants or Respondents acted frivolously or vexatiously or in any way inappropriately in the conduct of the matter before the Liquor Licensing Court and subsequently the Commission;

and on the evidence before it and having considered the submissions made by the Applicants and the Respondents and by counsel assisting makes the following determination:

1. the Application by Andrew Koh Nominees for costs is dismissed;
2. the application by Great Victoria Corporation Pty Ltd for costs is dismissed; and
3. the Application by Great Victoria Corporation Pty Ltd for a strike out in relation to matter 1 above is dismissed.

24. There are no other orders as to costs.



HELEN COGAN