

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

Applicant:	That's Entertainment (WA) Pty Ltd T/A The Clink Nightclub <i>(represented by Mr Ian Curlewis of Lavan Legal)</i>
Respondent:	The Commissioner of Police <i>(represented by Ms Leanne Atkins of WA Police)</i>
Commission:	Mr Jim Freemantle (Chairperson) Ms Helen Cogan (Member) Dr Eric Isaachsen (Member)
Matter:	Complaint for disciplinary action pursuant to section 95 of the <i>Liquor Control Act 1988</i> , in relation to an application for strike out.
Date of Hearing:	10 October 2011
Date of determination:	18 October 2011
Date of reasons published:	3 November 2011

Introduction

- 1 On 12 October 2010 the Commissioner of Police lodged a complaint pursuant to section 95 of the *Liquor Control Act 1988* ("the Act") against the Applicant which is the licensee of premises known as the Clink Night Club located at 14-16 South Terrace Fremantle.
- 2 On 14 December 2010 a preliminary hearing in this matter was held by the Commission at which relevantly, it was determined that the listing of the hearing of the complaint would be deferred pending the outcome of proceedings against the Applicant in the Magistrates Court.
- 3 On 28 June 2011 at a directions hearing in this matter the Commission determined:
 - 3.1 all evidence relied upon by the Commissioner of Police to be served on the Applicant in this matter by close of business Friday, 8 July 2011;
 - 3.2 in accordance with the procedures of the Commission, parties to the proceeding will be required to lodge submissions (14 days prior to the hearing) and responsive submissions (7 days prior to the hearing) prior to the hearing of the complaint;

- 3.3 parties to the proceeding are required to provide their available dates by close of business Friday, 15 July 2011 to hear this matter in the next three months.
- 4 The parties acknowledge that there was an acquittal of the Applicant licensee and its staff in the Magistrates Court regarding the alleged section 115 offence.
- 5 On 15 July 2011 the Applicant's solicitors sought a listing for an interlocutory hearing before the Commission whereby the Applicant will move that the section 115 aspect of the section 95 complaint be struck out on the ground that:
- 5.1 the Commission does not have jurisdiction to hear the complaint;
- 5.2 there is no substantial merit to the ground of complaint; and
- 5.3 it is a vexatious proceeding.
- The Applicant's solicitors further stated that the substantive complaint is not ready for hearing and therefore seeks that no hearing of the complaint take place until the Commission has determined the application to strike out the offensive matter in the complaint.
- 6 On 10 October 2011 the application for a strike out (only) was heard by the Commission and on 17 October 2011 the Commission determined inter alia that the application for a strike out was refused and indicated that the reasons for the determination will be published in due course. Provided below are the reasons of the Commission for refusing the strike out application.

The Hearing

Applicant's Submissions

- 7 The Applicant submitted that:
- The reasons that the strike out application should be granted are that:
 - the Commission does not have jurisdiction to hear the complaint;
 - there is no substantial merit to the ground of complaint; or
 - it is a vexatious proceeding.
 - Section 95 of the *Liquor Control Act 1988* does not permit in its text that disciplinary action may be taken if a licensee has been tried and acquitted of contravening the Act. It only permits disciplinary action where there has been a conviction or contravention.
 - The licensee has not been convicted of an offence under the Act and therefore cannot be disciplined under section 95(4)(f)(i).
 - The licensee relies on the transcript of the proceedings in the Magistrates Court (all parties and the Commission have a copy of the transcript).
 - The contention by the Respondent that a licensee acquitted of an offence by a

Court can be disciplined in the Commission in respect of the same matters for which it has been acquitted in contrary to any notion of justice. If the legislature had been intended for such an outcome to be possible under section 95 it would have expressly provided for it and the section does not so provide.

- It is clear from the evidence before the Commission that the Police did not see the patron in question consume any liquor on the licensed premises and it was not therefore reasonable in the circumstances to believe that the impairment of the female patron resulted from the consumption of liquor.
- Section 3A(1)(a)(b) and (c) of the Act are conjunctive. The Police must satisfy all three components of the section in order to claim a person is drunk for the purposes of the Act. The Polices' failure to witness the patron consume any liquor makes it unreasonable for them to conclude the impairment resulted from the consumption of liquor simply because the patron was on licensed premises.
- The Police's determination that the patron was drunk for the purposes of the Act is therefore fundamentally flawed with the result there is no merit to the complaint altogether.
- It is oppressive for the Police to effectively appeal the decision of the Magistrate to the Commission.
- The Commission is bound to act according to equity and it is inequitable for the Commission to discipline the licensee on the basis of the 3 October 2010 incident because a Court of law has already found that it did not contravene the Act in that instance.
- It is inequitable for the licensee to be tried twice on the same facts regardless of the different levels of proof required by the Court and the Commission respectively.
- Whilst not bound by the Evidence Act it is submitted that the Commission will not be acting in good conscience:
 - If it receives evidence obtained by Police contrary to the requirements of the Criminal Investigation Act 2006 and,
 - if it condones the use of evidence that was not admissible in a Court because its acquisition was obtained contrary to the requirements of the Criminal Investigation Act.
- It is well established that where there is more than one logical inference that can be drawn from the facts an accused is entitled to have the question decided on the basis of the inference that is more favourable to it, in this matter the licensee is analogous to an accused because it has not been convicted of contravening the Act.

- It is clear from the construction of section 95 and the absence of any section authorising the Commission to act otherwise that it was never contemplated by the legislature that the Police would be given a second opportunity to effectively appeal a decision of a Court to the Commission by repeating proceedings previously initiated and unsuccessful and the Commission is not to be used as a secondary forum by the Police when the available avenues through the justice system have been exhausted, *Enever v the King* [1906] 3 CLR 969

Respondent's Submissions

8 The Respondent submitted that:

- The delegate of the Commissioner of Police has instructed that both grounds of the complaint and both incidents are to be pursued before the Commission at the hearing.
- There is nothing in the Act to dictate that the Commission has no jurisdiction to hear the complaint.
- The proceedings before the Magistrates Court and the Liquor Commission are separate and distinct with different standards of proof and different rules as to the admissibility of evidence. Further, the disciplinary proceedings are aimed at the public interest in promoting proper standards in the liquor industry so as to ensure, inter alia, the safety, health and welfare of patrons.
- The Commission is entitled to inform itself as it seems fit. In so doing it is able to have regard to any apparent admissions of knowledge of drunkenness by a bar tender and also to statements by the alleged drunken female as to her consumption of alcohol and her state of drunkenness when inside the licensed premises.
- The Criminal Investigation Act 2006 is relevant to criminal proceedings, not to proceedings before the Commission. That Act and rules against hearsay explain why the statement by the bar tender and the audio of the video recording were properly excluded in the proceedings before the Magistrates Court.
- The relevant provisions of the Act were reviewed, namely:
 - section 5;
 - section 9(1);
 - section 16 (1)(d);
 - section 16(7);
 - section 95 and subsections (1)(2)(3)(4)(5b);
 - section 96(1).
- There is no provision in the Act that prohibits the Commission from hearing a complaint after it's dismissed of criminal charges based on the same facts that

comprise the complaint.

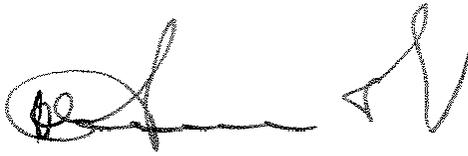
- Disciplinary action under section 95 of the Act is dependent upon a complaint being lodged. The person commencing the prosecution in the Magistrates Court and the person authorised to commence the complaint before the Liquor Commission are not the same.
- Disciplinary proceedings under section 95 of the Act are civil proceedings in which the civil onus applies and even if the factual questions are identical the difference in the onus of proof prevents the issues being the same.
- Disciplinary proceedings consequent upon a conviction in criminal proceedings are not barred by *autrefois convict* or any wider principle of double jeopardy, therefore the converse may also be true.
- The Applicant has been provided with all evidence upon which the Respondent intends to rely and has thereby been accorded procedural fairness in that it is aware of the evidence against it and the nature of the complaint.
- The Commission has not adopted any of the rules, practices or procedures pursuant to the Criminal Investigation Act 2006 which Act is not relevant to proceedings before the Commission.
- The dismissal of the criminal charges arising out of the same facts as the complaint does not prohibit the Commission from hearing and determining the complaint.
- The Complainant (Respondent) is required to satisfy the Commission that the grounds can proceed on the balance of probabilities. The issue is not that a contravention must be established in another forum before a complaint is laid.
- The Commission is entitled to obtain information as it sees fit and to conduct its proceedings as it sees fit. It is therefore not bound to follow a principle applied in criminal proceedings.
- “In paragraphs 22-24 of the Applicant’s submissions the unreported case of *Pizzata v R* (Unreported; WA Court of Appeal; Library number 930596;29 October 1993) regarding inferences is cited together with *Jackson v Dyball* (1993) 74 A Crim R 10. Whilst the principle extracted regarding inferences is sound, both cases involved criminal prosecutions not disciplinary proceedings and can be distinguished. Further the case of *Jackson v Dyball* related to the knowledge to be imputed to a manager where juveniles had entered and remained on premises.”

Reasons for Determination

- 9 The Commission may on a complaint lodged under section 95 of the Act, take disciplinary action.
- 10 Pursuant to section 96 of the Act, if the Commission is satisfied, on the balance of probabilities that the ground upon which the complaint was made has been made out so that a proper cause for disciplinary exists, the Commission may take action as outlined in section 96(1).
- 11 Pursuant to section 16(1)(b)(i) of the Act the Commission may make its determination on the balance of probabilities.
 - 11.1 Pursuant to section 16(7) of the Act:
 - the Evidence Act 1906 does not apply to the Commissions proceedings and the Commission is not bound by the rules of evidence or any practices or procedures applicable to counts of record, except to the extent that (the Commission) adopts those rules, practices or procedures or the regulations make them apply;
 - (the Commission) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- 12 The Commission has carefully considered the written and oral submission made by the Applicant and the Respondent and the references to legislation and authorities made by each of them.
- 13 The Commission has set out a summary of those submissions in some detail in order to make it clear that all the relevant issues have been taken into account.
- 14 The Commission considers that on the balance of probabilities the respondent has not made out a case for the granting of its strike out application and in particular the Commission notes:
 - 14.1 The plain meaning of the Act, in particular section 95 does not prevent the Commission from having jurisdiction to hear the complaint.
 - 14.2 The issue of the substantial merits of the ground of complaint can be addressed at the substantive hearing of the complaint.
 - 14.3 The complaint does not constitute an appeal against the decision of the Magistrates Court nor is the Commission being used as a secondary forum by the Police when the available avenues through the justice system have been exhausted.
 - 14.4 There are clear differences between the jurisdictions of the Magistrates Court (criminal) and the Commission (disciplinary) respectively in particular and proceedings in the one do not necessarily prevent proceedings in the other. Clearly questions of onus of proof and admissibility of evidence in each of the

jurisdictions are different.

- 14.5 The issue of whether the complaint is vexatious can be addressed at the substantive hearing of the complaint.
- 14.6 There is no relevant issue in respect of the parties to the complaint and the parties before the Magistrates Court.
- 14.7 The Commission considers that the principles of autrefois convict or autrefois acquit or double jeopardy or resjudicata are not applicable to this matter.
- 14.8 In relation to the authorities referred to in the parties submissions the Commission is persuaded that where there is a difference of opinion between the parties, the Commission has preferred the view of the Respondent as to the applicability of those authorities.

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a series of loops and a long horizontal stroke.

MR JIM FREEMANTLE
CHAIRPERSON