**LC 15/2019**

**Liquor Commission of Western Australia**

**(*Liquor Control Act 1988*)**

**Applicant:** The Hollow Beach Bar & Grill Pty Ltd

*(represented by Mr Henry Jackson, instructed by Ms Susan Nicholson of Cullen Macleod Lawyers)*

**Respondents:** Lavan Lawyers

 (*represented by Mr Dan Mossenson*)

 Mr Chris Garvey

 (*represented by Mr David Garnsworthy*)

 Mr Graham Coatz

**Commission:** Mr Alex Zilkens (Member)

**Matter:** Application for costs pursuant to section 21 of the *Liquor Control Act 1988*

**Premises:** Hungry Hollow Tavern, 135 Ocean Drive, Bunbury

**Date of Hearing:** 6 February 2018 (LC 21/2018)

**Date of Determination:** 31 May 2019

**Determination:** Applicant be paid costs as outlined in Paragraph 35 of this determination.

1. In the Commission’s decision LC21/2018 dated 1 August 2018, the Commission determined that the applicant’s, The Hollow Beach Bar & Grill Pty Ltd, costs be paid as follows:
2. on a standard party/party basis from 2 December 2016 to 3 February 2017;
3. on an indemnity basis, from 3 February 2017 to 12 September 2017;
4. on a joint and several basis by Lavan, Mr Garvey and Mr Coatz, as agreed between them, from 2 December 2016 to 15 May 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid; and
5. on a joint and several basis by Mr Garvey and Mr Coatz, as agreed between them, from 15 May 2017 to 12 September 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid.
6. The combined effect of the costs order by the Commission as set out in paragraph 1 above is that the Commission needs to determine:
7. party/party costs from 2 December 2016 to 3 February 2017; and
8. indemnity costs from 4 February 2017 to 15 May 2017,

which together are payable by Lavan, Mr Garvey and Mr Coatz under paragraph 1(3) above; and

1. indemnity costs from 16 May 2017 to 12 September 2017 which are payable by Mr Garvey and Mr Coatz under paragraph 1(4) above.
2. The parties have failed to agree on the amount of costs to be paid to the applicant.
3. By way of written submissions dated 15 August 2018, solicitors for the applicant have set out the manner in which this matter should proceed, and a bill of costs claimed.
4. On 30 August 2018, the second respondent, Mr Christopher Garvey, filed his submissions in respect of the applicant’s bill of costs.
5. On 11 September 2018, the first respondent, Lavan, filed their responsive submissions in respect of the applicant’s bill of costs.
6. On 29 January 2019, the Commission asked the applicant to provide further information being a copy of the costs agreement between the applicant and its solicitors and an itemised breakdown of the lump sums claimed in Schedules 1 and 2 and anything that is for more than 3 units of time in Schedule 3, claimed in the Bill of Costs.
7. On 4 February 2019, the applicant’s solicitors provided a letter dated 4 February 2019 enclosing the Deed of Retrospective Costs Agreement dated 29 August 2018 (**the Deed**) and making submission in relation to the request for itemised breakdown.
8. On 7 February 2019, Lavan made further submissions in relation to the Deed and the request for an itemised breakdown.
9. On 12 February 2019, in response to Lavan’s submissions on 7 February 2019, the applicant’s solicitors, made submissions regarding the validity of the Deed.
10. On 13 February 2019, in response to applicant’s submissions on 12 February 2019, Lavan alleged that the said submissions amounted to a waiver of legal professional privilege by the applicant.
11. On 12 March 2019, in response to Lavan’s submissions on 7 February 2019 and 13 February 2019, the applicant:
12. made submissions (in a letter) to the Commission regarding the potential waiver of privilege; and
13. filed further written submissions regarding the validity of the Deed.
14. On 9 April 2019, the second respondent, Mr Christopher Garvey, filed his responsive submissions in relation to the validity of the Deed.
15. The third respondent, Mr Graham Coatz, has not filed any submissions.
16. The Commission has accepted to determine the quantum of the costs on the papers.
17. The Commission accepts the applicant’s submissions that the period of costs on a party/party basis includes 3 February 2017 and as such, it follows that the period of costs on an indemnity basis must not include the same date. Order 1(b) in the LC21/2018 decision should read as follows:

“on an indemnity basis, from but not including, 3 February 2017 to 12 September 2017”.

1. The Commission notes that the period of costs payable on a joint and several basis by Lavan, Mr Garvey and Mr Coatz includes 15 May 2017 and as such, it follows that the period of costs payable on a joint and several basis by Mr Garvey and Mr Coatz must not include the same date. Accordingly, order 1(d) in the LC21/2018 decision should read as follows:

“on a joint and several basis by Mr Garvey and Mr Coatz, as agreed between them, from but not including, 15 May 2017 to 12 September 2017 …”.

**Submissions on behalf of Hungry Hollow**

1. In the applicant’s submissions on 15 August 2018, the applicant submits that the Commission should adopt the scale prescribed in thein which the maximum allowable rates for a senior practitioner were $407 per hour. That was the determination in existence at the time of each relevant application or hearing.
2. In relation to the indemnity costs, the applicant submits that costs should be awarded pursuant to the Deed of Retrospective Costs Agreement dated 29 August 2018 (**the Deed**) between the applicant and its solicitors, CM Legal Pty Ltd (Cullen McLeod Lawyers).
3. The applicant submitted a bill of costs dated 15 August 2018 for assessment which claims the sum of $51,790.62 plus GST which is comprised of the following:

|  |  |  |  |
| --- | --- | --- | --- |
| Party/Party Costs (including disbursements) | Schedule 1 and 2 of Bill of Costs | Preparation of applicant’s submissions and preparation of case for hearing | $3,642.08 |
| Indemnity costs | Schedule 3 of Bill of Costs | Itemised bill | $26,530.88 |
| Indemnity costs  | Schedule 4 of Bill of Costs | Counsel fees and parking costs | $19,517.66 |
|  |  | Drawing of Bill of Costs and service | $2,100 |
| **Total** |  |  | **$51,790.62** **(plus GST)** |
| **Total** |  |  | **$56,969.68 (inclusive of GST)** |

1. In the applicant’s written submissions on 12 February 2019, the applicant submits that the Deed is valid and it was prepared based on the advice provided by Mr Fraser Robertson, a barrister and member of the Costs Committee of the Law Society of Western Australia.
2. In the applicant’s letter and written submissions on 12 March 2019, the applicant submits that:
3. the *Legal Profession Act 2008* (WA) does not prohibit the making of a costs agreement retrospectively;
4. retrospective costs agreements provide for valuable executed consideration: *Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Corrs Chambers Westgarth (A Firm) [No 3] [2016]* WASC 366*;*
5. in any case, the question of whether there was valid consideration does not arise as the retrospective costs agreement was executed as a Deed; and
6. the applicant merely referring to Counsels’ advice in relation to retrospective costs agreements in a generic way, with no further reference to the content of the advice, does not constitute the waiver of legal professional privilege.

**Submission of behalf of Mr Christopher Garvey**

1. In Mr Garvey’s submissions on 30 August 2018, Mr Garvey’s submits that:
2. In relation to the party / party costs, the work done to request delay should not be payable by the respondents; settling is part of the cost of the documents – not additional; the letter to lodge and serve documents doesn’t need attention of a senior practitioner; and more of the services could have been performed by a junior lawyer.
3. In relation to the indemnity costs, there are various objections namely that:
4. various costs are outside the scope of the order;
5. that the respondent is not responsible for the specified costs;
6. a junior rate should be applied to various items in the bill; and
7. the applicant is not entitled to claim office overheads.
8. In Mr Garvey’s submissions on 9 April 2019, Mr Garvey submits that the Deed should not be taken into account as there is no evidence that the Deed was intended to act retrospectively.

**Submissions on behalf of Lavan**

1. In Lavan’s submissions on 11 September 2018, Lavan adopts the submission of the second respondent and notes that:

(1) the bill of costs and supporting accounts fail to verify the amount of time i.e. the number of hours, claimed by the applicant; and

(2) all work done in relation to the Supreme and District Court matters are beyond the costs order and in any event not the responsibility of the first respondent.

1. In Lavan’s submissions on 7 February 2019, Lavan contends that:
2. the costs agreement between the applicant and the applicant’s solicitors dated 20 October 2016 does not relate to the proceedings before the Commission and its scope of works is limited to:
3. provide advice and assistance on the application to transfer the Hungry Hollow Tavern liquor licence to The Hollow Beach Bar and Grill Pty Ltd;
4. liaise with the Licensing Authority and other parties; and
5. review, collate and advise on documents require for the application; and
6. the Deed is not valid.
7. In Lavan’s submissions on 13 February 2019, Lavan:
8. alleges that the applicant’s submissions on 12 February 2019 amounted to a waiver of legal professional privilege; and
9. requests that the applicant provide to the Commission and all parties with the applicant’s request for advice and the subsequent advice provided by Barrister Fraser Robertson in relation to retrospective cost agreements.

**Decision**

1. The Commission accepts the applicant’s submissions that a mere reference to the fact that advice was sought from Counsel without the outline of the advice itself does not constitute a waiver of legal professional privilege.
2. As was noted by His Honour McKechnie J in *Withnell v The Liquor Commission* [2013] WASC 201, the Liquor Commission is not a Court. Accordingly, the Commission does not consider that it is appropriate for the Commission to adopt scales of rates allowable for legal costs in the District or Supreme Courts.
3. There is no provision in the *Liquor Control Act 1988*, *Liquor Control Regulations 1989* or *Liquor Commission Rules 2007* as to the maximum allowable rate allowable for a senior practitioner. The functions of the Commission are administrative and not judicial in nature. Accordingly, the Commission has adopted the submissions of the applicant and will determine the issue of quantum applying the *Legal Profession (State Administrative Tribunal) Determination 2016* (WA).

The Commission considers that it is entitled to adopt such an approach having regard to the relevant matters set out in section 16 of the *Liquor Control Act 1988* which include that the Commission:

(1) shall act without undue formality; and

(2) may consider and dismiss or determine applications and receive submissions and representations in relation to any application before it, as it thinks fit.

1. Applying the relevant determinations, being aware of the documentation referred to in the schedule of costs submitted on behalf of the applicant and having considered the submissions of both parties, the Commission allows costs as follows:
2. Costs from 2 December 2016 to 15 May 2017 (inclusive of GST)
3. Party/Party Costs (2 December 2016 to 3 February 2017)

**Schedule 1**

3 hrs at $366.30.00 per hour $1,098.90

**Schedule 2**

* 1. hrs at $366.30.00 per hour $1,648.35
1. Indemnity costs (4 February 2017 to 15 May 2017)

**Schedule 3**

SMN 20 hours at $407 per hour $8,140.00

PJ 0.8 hours at $308 per hour $246.40

DM 3.5 hours at $154 per hour $539.00

**Schedule 4**

Item 1 Counsel Fees $4,578.75

Item 2 Courier Fees $0.00

 **Total: $16,251.40 (inclusive of GST)**

1. Costs from 16 May 2017 to 12 September 2017 (inclusive of GST) on an indemnity basis:

**Schedule 3**

SMN 20 hours at $407 per hour $8,140.00

JMP 3.6 hours at $154 per hour $554.40

**Schedule 4**

Item 3 Parking $0.00

Item 4 Counsel Fees $9.652.50

Item 5 Counsel Fees $7,177.50

Item 6 Parking $0.00

*Drawing Bill of Costs*

4 hours at $407 per hour $1,628.00

*Taxation of Costs*  $0.00

 **Total: $27,152.40**

 **(inclusive of GST)**

1. In determining the quantum of costs, the Commission has:
2. accepted the first and second respondents’ objections regarding:
3. the applicant’s failure to verify the amount of time i.e. the number of hours, claimed by the applicant for party/party costs and for indemnity costs for large fixed costs items and has reduced the same to the reasonable time it should have taken the applicant’s solicitors to complete the work;
4. the inclusion of costs regarding the work done in relation to the Supreme and District Court matters and has deducted the amounts claimed;
5. the work done to request the delay and has deducted the same;
6. settling documents and has included the settling costs into the costs of the preparation of the document/s; and
7. the letters lodging and serving documents and has deducted the same.

accepted the applicant’s submission that the issue of valid consideration does not arise as the retrospective costs agreement was executed as a Deed.

1. notwithstanding that the issue of valid consideration does not arise, rejected the applicant’s submission that the Deed is a valid costs agreement between the applicant and their solicitors, and as a result the applicant’s costs are confined to the applicable scale of costs in relation to the indemnity costs.

Whether the Deed operates retrospectively in relation to the costs claimed is a question of the proper construction of the Deed. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean (*Walter v Buckeridge* *[No 5]* [2012] WASC 495 at [50]).

The Deed should expressly state that it is intended to be an agreement between the parties to have retrospective effect in relation to the work undertaken by Cullen McLeod on behalf of the applicant during the requisite time.

The Deed fails to expressly state that it is intended to have retrospective effect in relation to all work undertaken by Cullen McLeod on behalf of the applicant between say 2 December 2016 to 12 September 2017, inclusive, but rather it states that “*it is entered into to put beyond the Client’s liability to CM for the costs incurred in the Review Retainer and that the terms of the First Costs Agreement apply, and applied, to the Review Retainer*”.

Even if the Deed was accepted, the scope of work must be limited as below and does not include the work undertaken in relation to the matters the subject of the costs order.

*Provide advice and assistance on the Application to Transfer The Hungry Hollow Tavern liquor licence to The Hollow Beach Bar and Grill Pty Ltd (Application).*

*Liaise with the Licensing Authority and other parties on the Application.*

*Review, collate and advise on documents required for the Application.*

1. taken into account the applicant’s submissions that certain costs in Schedule 3 of the bill of costs are the product of a discount that was provided in certain bills to the applicant.
2. considered whether it was reasonable to carry out the items of work to which the claimed costs relate, whether or not the work was carried out in a reasonable manner, and what is a fair and reasonable amount of costs for each item / task.
3. Where costs have been reduced, the Commission divided the costs claimed by the scale hourly rate to determine the hours claimed, and based on the tasks undertaken, determine the reasonable time it should have taken the applicant’s solicitors to complete the tasks claimed.
4. Given that costs were awarded on a joint and several basis, the Commission does not need to deal with apportioning the costs between the respondents.
5. Accordingly, the Commission orders that the total amount awarded to the applicant in costs is $43,403.80 (inclusive of GST) and payable by the respondents as follows:
6. for the period 2 December 2016 to 15 May 2017, payable on a joint and several basis by Lavan, Mr Garvey and Mr Coatz, the amount of $16,251.40(inclusive of GST); and
7. for the period 16 May 2017 to 12 September 2017, payable on a joint and several basis by Mr Garvey and Mr Coatz, the amount of $27,152.40 (inclusive of GST).

\_\_\_\_\_\_\_\_\_\_\_\_\_\_
**ALEX ZILKENS**

**MEMBER**