

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

Applicant: Woolworths Ltd
(represented by Mr Gavin Crocket of G D Crocket & Co)

Respondent: Tintoc Pty Ltd
(represented by Neville Gale, Managing Director)

Commission: Ms Helen Cogan (Member)

Premises: Woolworths Liquor, Warnbro Fair Shopping Centre Corner
Warnbro Sound Avenue and Palm Springs Boulevard,
Warnbro.

Matter: Application for costs against the Respondent pursuant to
Section 21(4) and (5) of the *Liquor Control Act 1988*, and
Rule 11(1) of the *Liquor Commission Rules 2007*

Date of Determination: 31 August 2011 (on papers)

Determination: The application is refused.

Authorities Considered in the Determination:

- *The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S)*

Authorities referred to in the Applicant's Submissions as follows:

- *Liquor Barons Claremont and The Wine Box Nedlands (LC 21/2009)*
- *Fremantle Beverages Pty Ltd and Smithers Jones Pty Ltd and ors (LC15/2010)*
- *Andrew Koh Nominees Pty Ltd and Great Victoria Corporation Pty Ltd (LC37/2010)*
- *Hunter Resources Ltd v Melville 1988 16 CLR 234*

Introduction and Background

- 1 This application before the Liquor Commission arises from an application (in matter LC13/2011) made by the Applicant for a conditional grant of a liquor store licence for the Premises. (“the original application”).
- 2 The Respondent lodged an objection to the original application which objection it subsequently withdrew.
- 3 The original application was approved and a liquor store licence was conditionally granted to the Applicant for the Premises subject to certain conditions, none of which are relevant to the present application for costs.
- 4 This present application was considered and the determination made “on the papers”, i.e. on the basis of written submissions by the parties, without a hearing before the Commission.

Submissions on behalf of the Applicant

- 5 The Applicant made written submissions:
 - 5.1 On 21 April 2011 in the letter from its solicitors G D Crocket & Co, lodged with the present application; and
 - 5.2 On 9 May 2011 in the letter from its solicitors to the Respondent, which was copied to the Liquor Commission
 - 5.3 On 16 June 2011 (“Submissions made in support of the Application for Costs against Tintoc Pty Ltd”)
 - 5.4 On 23 June 2011 (“Responsive Submissions lodged pursuant to the Liquor Commission Order dated 4 May 2011”)
 - 5.5 On 30 June 2011 (“Applicant’s Response to Tintoc Pty Ltd’s submissions received 29 June 2011”)
- 6 The present application is for the following orders:
 - 6.1 The Respondent pay the wasted costs of the Applicant occasioned by the Respondent withdrawing its objection in the original application (no. LC13/2011)

6.2 The costs be fixed in the sum of \$6000.

7 The present application states that the grounds for the award of costs are set out in the Applicant's solicitor's letter dated 21 April 2011 (see paragraph 5.1 above), which states as follows:

7.1 "It follows, there are two substantial grounds upon which our client believes costs should be awarded:

- At its kindest level, Neville Gale was less than frank (and lacked bona fides) in lodging the objection and more particularly later, at the Directions Hearing he denied the sale of the licence to Liquorland by Tintoc; and
- The principal ground of objecting to the grant of the licence by Tintoc was the public interest ground. It was said by Tintoc, it could not be in "the public interest" to allow Woolworths and Liquorland to have an alleged "duopoly" in the packaged liquor industry, particularly in the locality. Tintoc then sold its business to Liquorland which puts into sharp focus the lack of "bona fides" of the Tintoc objection. The objection is a vexatious and frivolous objection given Tintoc could never have been serious about the duopoly issue, for if it had been, it would not have sold its business to Liquorland"

8 The Applicant's submissions generally can be summarised as follows:

8.1 Prior to the Directions Hearing in matter LC13/2011 Mr Neville Gale advised the Applicant's solicitors that the Warnbro Fair Liquor Store (the Licensee of which was the Respondent) had been sold to Liquorland Australia Pty Ltd ("Liquorland") and at the Directions Hearing Mr Neville Gale denied the sale of the business and stated this had not occurred.

8.2 In January 2011 the Respondent (as licensee of the Warnbro Fair Liquor Store) lodged transfer papers for the sale of the store to Liquorland and in the same month withdrew its objection to the original application.

8.3 The principal thrust of the present application is predicated upon the Respondent's vexatious "public interest" ground of objection as articulated in its notice of objection lodged to the original application.

- 8.4 Mr Neville Gale was “less than frank” and “lacked bona fides” in lodging its notice of objection to the original application and when he denied the sale of the Warnbro Fair Liquor Store to Liquorland. The notice of objection is a frivolous and vexatious objection.
- 8.5 The Applicant had to undertake a significant amount of work to address the objection when the Respondent knew full well the Respondent would be selling the Warnbro Fair Liquor Store licence to Liquorland yet persisted with the objection and the supporting evidence lodged with the objection.
- 8.6 The Respondent’s objection was mischievous and significantly added to unnecessary delays in the original application and resulted in an excessive amount of work having to be undertaken by the Applicant.
- 8.7 The objection failed to comply with the provisions of Sections 73 and 74 of the *Liquor Control Act 1988* (“the Act”) and did not support a ground of objection under the Act.
- 8.8 The objection was lodged to delay the hearing of the original application while the Respondent negotiated the sale of its liquor store licence to ‘one of the two large public companies’ which sale was achieved by the Respondent which withdrew its objection without good reason, it was always entitled to pursue the objection at the hearing (of matter LC13/2011).
- 8.9 The Applicant has lodged a statement from Andrew Pollard, the State Property Manager and Authorized Officer for liquor licensing matters for the Applicant in Western Australia, which statement:
- 8.9.1 indicates Mr Gale told Mr Pollard that Mr Gale had sold the business Warnbro Fair Liquor Store to Liquorland in September 2010;
- 8.9.2 affirms that the Applicant had purchased liquor stores from Mr Gale;

8.9.3 indicates that the Warnbro Fair Liquor Store was being “brokered” for sale between “these two public companies”, the Applicant and Liquorland, by Mr Gale.

- 9 The Respondent was not a bona fide objector in opposing the original application.
- 10 The objection was prepared six weeks in advance of the lodging of the original application and the objection was lodged five weeks before the Applicant lodged the original application – the premature lodging of the “purported letter of objection” is unexplained by the Respondent, - the plausible explanation was the Respondent was fully mindful of the pending original application because he was in discussions with the Applicant to sell (his) liquor store licence to the Applicant.
- 11 The credibility of Mr Neville Gale is questionable in that:
 - 11.1 he has failed to explain the premature lodgment of the objection;
 - 11.2 he does not disclose he was in detailed discussions with the Applicant to sell the Warnbro Fair Liquor Store to the Applicant in 2010;
 - 11.3 he failed to disclose to members of the public it was his intention to sell “his liquor licence” either to the Applicant (Woolworths) or Liquorland;
 - 11.4 his comment that he withdrew the objection because it was ruled invalid is untrue. The purported objection was lodged because the licence (Warnbro Fair Liquor Store) had been sold to Liquorland (which fact has never been disclosed);
 - 11.5 At the Directions Hearing in November 2010 he misled the Liquor Commission in categorically denying the licence (Warnbro Fair Liquor Store) had been sold to Liquorland.
 - 11.6 The letter (being the purported notice of objection) is entirely defective and could not constitute a proper objection notice.
- 12 The statement of Andrew Pollard supports the legal submission that the lodging of the purported objection by the Respondent (Tintoc) was vexatious and

frivolous and lodged for the principal purpose of attempting to stop the Applicant entering the Warnbro packaged liquor market.

- 13 The lodging of the purported objection delayed the grant of the licence. This delay assisted and enhanced the Respondent's commercial position in disposing of its licence to Liquorland.
- 14 The lodging of the purported notice of objection by the Respondent was done for a private commercial gain.
- 15 The purported notice of objection fails to comply with the provisions of the Act and the content of the notice, together with the petition submitted by the Respondent, could not have established a bona fide statutory ground of objection.
- 16 Parties who improperly use a statutory regulatory system for their personal commercial gain should be penalised. Effectively in this set of circumstances the Respondent should be ordered to pay for the Applicant's wasted legal costs, in having to deal with an objection which was without merit and lodged solely to protect the commercial interests of the Respondent.
- 17 Mr Andrew Pollard's unsworn statement relevantly states:
 - 17.1 In 2010, detailed negotiations were conducted by myself acting for Applicant and Neville Gale to purchase Neville Gale's business interests in a number of packaged liquor outlets he owned in Warnbro. These negotiations were well advanced. The purchase price for two businesses had been discussed. My understanding of the business arrangements was Neville Gale would consider the Applicant's commercial proposal and get back to me.
 - 17.2 In late September 2010 I telephone Neville Gale to discuss the Applicant's proposals. He advised me he had sold the Warnbro Fair Liquor Store to Liquorland and negotiations with the Applicant could not continue. I advised him I was disappointed at his lack of courtesy in failing to get back to me, on the Applicant's proposal.
 - 17.3 To the best of my knowledge and belief the Warnbro Fair Liquor Store owned by Neville Gale's company was transferred to Liquorland in January 2011.

- 18 No weight is able to be attached to the Respondent's submissions because:
- 18.1 the submissions are not relevant in addressing the question of costs;
 - 18.2 the emotive statements made by Neville Gale on behalf of the Respondent do not amount to legal submissions;
 - 18.3 The Respondent had the ability to give evidence at the hearing of the original application, it chose not to, and is precluded from introducing evidence after the Decision. Its status as a party to proceedings ceased at the time it withdrew its purported objection notice (December 2010).

Submissions on behalf of the Respondent

- 19 In a letter dated 27 April 2011 addressed by the Respondent to the Chairman of the Liquor Commission it was stated that
- 19.1 the Respondent's objection to the original application was only withdrawn after it was determined by "you and the officers of the Commission" that the objection would be invalid if the Respondent's stores were to be sold;
 - 19.2 at the time of the first hearing the Respondent had only received an expression of interest in purchasing the stores and no offer to purchase had been received;
 - 19.3 the withdrawal of the objection occurred only after your explanation to me at the preliminary hearing and subsequent discussion with your officers and following receipt (by the Respondent) of an offer to purchase;
 - 19.4 The Respondent's objection was not frivolous nor designed to frustrate proceedings but a genuine objection to the original application;
 - 19.5 had the objection not been ruled invalid the Respondent would have proceeded with its objection as it still believes in the relevance of the matters raised in the objection.
- 20 On 28 June 2011 the Respondent wrote to the Liquor Commission (and it is apparent from the papers that the letter and its enclosure being a document

headed "Submission made by Tintoc Pty Ltd against the awarding of costs to Woolworths", was copied to the Applicant) in the following terms:

- 20.1 The Respondent lodged the objection because it believed the original application was not in the public interest.
- 20.2 The objection was supported by a petition of several thousand objectors mainly from the affected area of the original application, and the petition was not only a declaration that another liquor licence was unnecessary but also an expression of genuine concern about the growing influence and domination of the liquor industry by Woolworths and Coles in Western Australia.
- 20.3 The objection was also supported by the lodgement of numerous incident reports from the Respondent's Warnbro Fair Liquor Store, with most of the incidents relating to the refusal of service to juveniles as a significant problem in the Rockingham area, as was supported by Police and the Health Department.
- 20.4 At the Directions Hearing on 1 November 2010 in response to a question from Mr Jim Freemantle (the Commissioner presiding at the Directions Hearing) I responded truthfully that no offer to purchase the Respondent's liquor stores in Warnbro, Waikiki and Port Kennedy had been received at that time. The Commissioner went on to explain to me if a sale should occur the objection would cease to be relevant in the hearing of the original application.
- 20.5 At a later date following the Directions Hearing and by then having received a formal offer to purchase the stores I sought further clarification of the status of the objection from officers of the Liquor Division and it was only then based upon comments of the Commissioner and advice of the Division, the Respondent reluctantly withdrew its objection.
- 20.6 The assertion by Mr Crocket in his letter to the Commission dated 21 April 2011 that I had advised his client the Applicant that the Warnbro Fair Liquor Store had been sold to Liquorland. **This was not true** (emphasis added). While discussions had commenced with both Liquorland and Woolworths about a possible future sale no formal offer had been made or accepted at that time.

- 20.7 Mr Crocket asserts that I was less than frank in lodging the objection and denying the sale of the stores at the Directions Hearing. This is clearly not the case as the offer to purchase the stores was made well beyond the Directions Hearing. Furthermore I was not aware of the effect a sale would have on the veracity of the objection.
- 20.8 Mr Crocket's assertion that the objection was vexatious and frivolous because the Respondent and the petitioners dared to object to the power of the duopoly and the flow on effects to the liquor industry as a whole is not correct, the thing is most Australians are extremely concerned about this unlevel playing field.
- 20.9 The Respondent contends that this costs application is a means to eventually achieving the objective of establishing a large liquor store on an adjacent site. The Applicant has been less than frank to the Commission and is unhappy the Respondent did not sell his store to Woolworths.

Determination

- 21 This determination has been made on the papers, by written submissions lodged by the parties without hearing before the Commission.
- 22 The power of the Commission to award costs is contained in Section 21 of the Act which reads as follows:

21. Costs

- (1) Subject to this Act, the costs of and incidental to all proceedings to be determined by the Commission, including any adjournment, shall be in the discretion of the Commission, and the Commission has power to determine by whom, in what manner and to what extent costs are to be paid.
- (2) The costs may be recovered in any manner in which costs payable in respect of proceedings of the District Court may be recovered.
- (3) *[repealed]*

(4) Costs and expenses, to be payable by or to a party to the proceedings, may be awarded by the Commission in respect of an objection whether the application to which the objection relates is granted, refused or withdrawn, except that costs shall not be awarded in relation to an objection made under section 73(1) by a person authorised to intervene under section 69(6), (7) or (11).

(5) Where, in the opinion of the Commission, a person has –

- (a) brought proceedings; or
- (b) exercised a right, or attempted to exercise a purported right, to object to an application,

frivolously or vexatiously, the Commission may award costs against that person.

(6) The Director does not have power to award costs.

[Section 21 amended by No. 73 of 2006 s. 18 and 106.]

23 This application for costs was properly made in accordance with the provisions of Rule 11 of the Liquor Commission Rules 2007.

24 There is no dispute between the parties to this application as to the following matters, save as set out in para 24.2.

24.1 On 18 March 2010 the Applicant lodged the original application for and on 18 April 2011 was conditionally granted a liquor store licence for the Premises.

24.2 The Respondent lodged an objection to the original application, (“the objection”). It is not clear on the papers when the objection was lodged. The Applicant has submitted that the objection was lodged prior to the lodgement of the original application, but having regard to the Applicant’s submissions in relation to this issue and to its submissions in relation to the validity of the objection, the Commission considers that in relation to the matters being considered in this application, there can be no issue as to the fact of an objection having been lodged to the original application.

- 24.3 On 15 November 2010 a Directions Hearing in the matter of the original application was heard before the Liquor Commission with Mr Jim Freemantle (Chairperson) presiding at which both the Applicant and the Respondent were present and heard. The matters the subject of the Determination at the Directions Hearing are not relevant to this application for costs.
- 24.4 On or about 3 December 2010 the Respondent withdrew its objection. There was no objection to withdrawal of the objection and following the withdrawal the Respondent took no further part in relation to the original application. No findings in relation to the objection were made in the Determination of the original application.
- 24.5 At some time in or about January 2011 after the withdrawal of the objection the Respondent sold its business of the Warnbro Fair Liquor Store to Liquorland.
- 25 The following findings of the Liquor Commission in matter no LC 37/2010 which findings were referred to in submissions in this matter are relevant and apposite to this application for costs.
- 25.1 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.
- 25.2 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.
- 25.3 In formulating its policy as to costs the Commission may have regard to Section 21(5) 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.
- 25.4 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. In the connection it is noted that the issue of the objection, it having previously been withdrawn, was not argued at the hearing of the original application

- 25.5 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.
- 26 The grounds for this application for costs are stated by the Applicant in its application by reference to the letter from the Applicant dated 21 April 2011 addressed to the Executive Officer of the Liquor Commission and as referred to in paragraph 5.1 above in relation to the applicant's submissions and are repeated here as follows:
- 26.1 At its kindest level Mr Nelville Gale was less than frank (and lacked bona fides) in lodging the objection and more particularly later at the Directions Hearing he denied the sale of the licence to Liquorland by the Respondent; and
- 26.2 The principal ground of objecting to the grant of the licence by the Respondent was the public interest ground. It was said by the Respondent, it could not be in "the public interest" to allow Woolworths and Liquorland (Coles) to have an alleged "duopoly" in the packaged liquor industry particularly in the Locality. The Respondent then sold its business to Liquorland which puts into sharp focus the lack of "bona fides" of the the Respondent's objection. The objection is a vexatious and frivolous objection given the Respondent could never have been serious about the duopoly issue, for if it had been, it would not have sold its business to Liquorland.
- 27 The Respondent denies that its objection was frivolous or vexatious or designed to frustrate proceedings and further states that it was withdrawn only after it had been "ruled invalid" and following receipt from Liquorland of an offer to purchase its business of Warnbro Fair Liquor Store.
- 28 There is an exchange of correspondence as follows:
- 27 April 2011 – Respondent to Liquor Commission, copied to the Applicant;

- 27 April 2011 - Respondent to Liquor Commission, replacing previous letter of 27 April 2011
- 9 May 2011 – GD Crocket & Co to the Respondent, copied to Liquor Commission;
- 13 May 2011- Respondent to GD Crocket & Co copied to Liquor Commission;
- 28/29 June 2011 - Respondent to Liquor Commission, copied to Applicant’s solicitors

For the purposes of this determination the references in that correspondence to alleged proposals by the Applicant to establish a named Liquor Store are not taken into account as there is no compelling evidence to support the allegations.

- 29 It is noted that there is a dispute of fact as to whether the Respondent sold its business of the Warnbro Fair Liquor Store to Liquorland prior to the Directions Hearing. For the purposes of this Determination it is not necessary to make any finding on this dispute as it is not disputed that the sale took place and the objection was withdrawn before the hearing of the original application.
- 30 The Commission finds that, in view of the submissions made by both the Applicant and the Respondent in relation to this application for costs there is no compelling evidence on the balance of probabilities that the objection was frivolous or vexatious. In any event there was no determination on the status of the objection it having been withdrawn prior to the hearing of the original application.
- 31 In relation to the issue of what constitutes “frivolous or vexatious” in the circumstances it is relevant to consider the following authority; **The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S)** and the remarks made by Pullin J at paras 3 and 4 at page 4 and Buss J at at paras 33 to 38 at pages 11 and 12, and the authorities referred to therein.
- 32 The Commission is not persuaded that particular weight should be given to the Applicant’s submission unsupported by evidence other than inference, that the principal purpose of the objection was to protect its private interest while the Respondent negotiated a deal with either the Applicant or Liquorland to sell its business.

- 33 The Respondent was entitled to lodge its objection and to withdraw its objection prior to the hearing on 1 March 2011 and while the Respondent may have been less than frank in relation to its negotiations for sale of the business with both the Applicant and Liquorland, the Commission:
- 33.1 has a discretion in relation to awarding costs; and
- 33.2 is of the opinion that the Respondent did not exercise its right to object frivolously or vexatiously.
- 34 The Respondent was entitled to pursue its objection or choose not to pursue its objection and should not be penalised for doing so by an award of costs made against it, notwithstanding that it may have been “less than frank” as referred to in paragraph 33 – the Respondent maintaining that the basis for its objection was real regardless of its sale negotiations.
- 35 The Application is refused.


HELEN COGAN
MEMBER