Gallery on Waymouth No 3 **[2014] SALC 48**

LICENSING COURT OF SOUTH AUSTRALIA

GALLERY ON WAYMOUTH

JURISDICTION: Taxation on Costs

FILE NO: 2036 of 2014

HEARING DATES: Submission received on 15 and 22 August 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 18 September 2014

Gallery on Waymouth [2104] SALC 30
Stanley v Phillips [1966] HCA 24; 115 CLR 420
EMI Records v Ian Wallace [1983] 1 CH 59

REPRESENTATION:

Counsel:
Applicant: Mr M Roder SC with Mr P Kelly
Respondent: Mr J Firth with Mr C McEwen
Solicitors:
Applicant: Norman Waterhouse
Respondent: Wallmans

1 In this matter following the applicant's undertaking to pay the objectors' reasonable costs on a party/party basis I was persuaded to grant the applicant the relief that it sought.

2 What remains to be determined is the quantum of those costs. The parties have been unable to reach agreement and have asked the Court to determine what an appropriate amount is.

3 Pursuant to r 4(3) of the *Licensing Court Rules 2012,* in determining the issue of costs I am permitted to apply the practice of the Supreme Court in its civil jurisdiction. Pursuant to r 6.264(5)(c) of the *Supreme Court Rules 2006* that Court may award costs as a lump sum. I propose adopting that procedure.

4 The objectors seek an amount of $55,000. They assert that the objectors actual solicitor costs are of the order of $50,000. They seek two thirds of that amount plus counsel fees of $21,500. They contend that two thirds is a general rule of thumb that reflects the difference between party/party costs and indemnity costs.

5 In support of the application the objectors' solicitors have submitted a detailed account and a copy of counsel's account.

6 The legal principles applicable to the assessment of party/party costs are uncontroversial.

7 The overriding factor is what is fair and reasonable. In determining the amount of costs allowable, the Court must be careful to identify those costs that were incurred in respect of the litigation itself, as opposed to more general advice. It must recognise that what is allowable is limited to that which is reasonable having regard to the complexities and implications of the case. It must be alert to the possibility that a well-resourced litigant might incur fees that looked at through the prism of providence might be regarded as extravagant. Finally, this being an assessment of costs in respect of litigation conducted in a State Court, regard must be had to the scale of fees for solicitors and counsel published by the Supreme Court of South Australia.

8 An examination of the various items contained in the objectors' solicitors account reveals that a number of entries concern matters beyond those concerning the objectors' participation in these proceedings. They include, for example, attendances concerning an overall strategy, attendances on SAPOL with a view to inviting SAPOL to take disciplinary action against the applicant and a conference relating to defamation. They also include numerous entries in relation to the

conciliation phase.[1] None of these should form part of the assessment of costs.

9 As to the question of complexity and the implications of the case, there are matters pointing in opposite directions. On the one hand, this case concerned an important point of principle. Indeed it was that very point of principle that led to my seeking the undertaking as to costs.

10 But that aside, the case ultimately concerned whether or not it was reasonable to maintain a condition in a special circumstances licence that patrons must be seated at all times whilst consuming liquor. Factually it was a relatively simple case. There was only one witness. Apart from tendering some film, photographs and documents the objectors called no evidence. Whilst an adverse outcome might be expected to have some adverse consequences for the objectors, to allow patrons at the applicant's premises to stand whilst drinking liquor is unlikely to have catastrophic consequences for anyone.

11 On the issue of frugality, at all times during the hearing the objectors were represented by two counsel, one from the independent bar, the other from the lawyers acting for the objectors. Both are very experienced practitioners in this jurisdiction. It might have been decided nearly fifty years ago, but what was said in the judgments of the majority in *Stanley v Phillips*[2] remains as valid now as it did then. To adopt the words of Taylor, Owen and Menzies JJ used in that case, if this were a case for the employment of two counsel - then there could hardly be a contested case in the civil jurisdiction of this Court where it could be said that a reasonable and prudent litigant would not, if the litigant could afford it, engage two counsel. This is not a proposition to which I am prepared to subscribe to. The rules of the Supreme Court reflect an expectation that there will be cases conducted in that Court for the proper conduct of which it would be over-cautious to employ two counsel. And so it is in the Court. This was such a case. Either one of the two junior counsel engaged by the objectors would have been capable of ably conducting this hearing on their behalf. The use of two counsel was an extravagance that the applicant should not be expected to pay for.

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[1] Had this matter been resolved at conciliation there would have been no entitlement to costs. As was noted in the earlier reasons [2104] SALC 30 at para 54: "Had he raised this issue at conciliation there is a reasonable possibility that the parties could have reached a mutually acceptable agreement. By taking the path that it did, it more or less invited Denma to object. Denma was perfectly justified in seeking the applicant to be held to its agreement. Although Waydale did not participate in the conciliation, it too was justified in objecting. There is to my mind a sense of unfairness that they have had **to incur legal fees in participating in these proceedings** which might have been avoided had the applicant outlined its concerns about the condition in question and had attempted to continue with negotiations." (emphasis added)

[2] [1966] HCA 24; 115 CLR 420

12 The Supreme Court scale provides for an attendance rate for solicitors at about $300 per hour where the nature of the work requires the exercise of special skill or legal knowledge and about $185 per hour where the work done does not require such skills or knowledge, but where it is nonetheless proper that a solicitor should personally attend. There is a lower rate if the work could appropriately be undertaken by a clerk.

13 Counsel fees are not subject to a scale but are subject to an indicative scale which is not binding. I am mindful that it has not been increased since 1 July 2007. It does, however, provide some guidance. It provides a daily trial fee of between $1,180 and $2,800 for junior counsel. It provides for a general hourly rate of between $200 and $300.

14 Some allowance must be made of the fact that the Licensing Court exercises a specialist jurisdiction. The provision of legal services in connection with the participation in proceedings in this Court will often require a level of expertise beyond that of what I might describe as general practice.

15 In this case the solicitors acting for the objectors have charged by the hour at rates, depending upon the seniority of the individual practitioner, of between $275 to $490 per hour with the bulk of the work done by a practitioner charging at the rate of between $350 and $385 per hour. These rates where applied to all items. There is no differentiation between attendances requiring the exercise of special skill or legal knowledge and attendances which do not. It is difficult to envisage that in this case routine emails and telephone attendances required the exercise of special skill or legal knowledge.

16 Independent counsel, who is a junior counsel, albeit one who is very experienced, has charged at the rate of $600 per hour. I do not doubt the submission that this rate and the rates charged by the objectors' solicitors reflect the current market rates. But that is not especially relevant. Party/party costs reflect what the Court determines is appropriate to award, not what the market will bear. It is well established that an assessment of party/party costs will generally be more parsimonious than indemnity costs.[3]

17 Taking into account the fact that this is a specialist jurisdiction and the fact that the indicative scale for counsel fees is somewhat dated I would allow on a party/party basis a daily trial fee for junior counsel of up to $4,000 a day and a general hourly rate of up to $400 per hour.

18 In summary, the submitted accounts include a significant number of items that concern matters beyond those concerning the objectors' participation in these proceedings. Although the hearing concerned an

[3] See, for example *EMI Records v Ian Wallace* [1983] 1 CH 59 at 63-5 per Sir Robert Megary VC

important point of principle it was not a complex case. It was factually straightforward. The outcome did not entail profound consequences. The objectors' use of two counsel was an extravagance that the applicant should not be expected to pay for. The rate charged by the objectors' solicitors was in excess of the Supreme Court scale and made no differentiation for whether or not particular work required special skill or legal knowledge. The rate charged by the objectors' independent counsel was in excess of what this Court would allow on a party/party basis.

19 With these matters in mind I fix a lump sum of $28,000 for party/party costs inclusive of counsel fees. Upon payment of that amount that applicant will have discharged the undertaking that it gave to the Court.