

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: THE VICTORIA HOTEL
Smith Street Mall
Darwin NT 0800

LICENSEE: REVICTION PTY LTD

LICENCE NUMBER: 80300989

NOMINEE: Steven Taylor

PROCEEDINGS: Hearing into a Complaint Pursuant to Section 48(2)
of the *Liquor Act* – Breaches of Section 110
re Failure to Comply with Camera Surveillance Guidelines 2004

HEARD BEFORE: Mr Richard O’Sullivan (Chairman)
Ms Brenda Monaghan (Legal Member)
Mrs Jane Large

DATE OF HEARING: 31 March 2009

APPEARANCES: Mr D Crowe for the Licensee
Mr A Borg for the Director of Licensing

COMMISSION DECISION ON PRELIMINARY ISSUE OF WHETHER OR NOT THERE IS A CASE TO ANSWER

BACKGROUND

- 1) On 31 March 2009, the Commission commenced a hearing to consider a complaint brought by the Director of Licensing against the Victoria Hotel. The complaint alleges that the Licensee breached a condition of its liquor licence by failing to comply with the Camera Surveillance Guidelines 2004. The alleged circumstances of the breach were that the Licensee failed to provide CCTV footage to a Police Officer upon request following an incident on 13 September 2008 at the Hotel.

- 2) At the hearing, a submission was made by Mr Crowe on behalf of the Licensee that there was no case to answer and that the complaint should be dismissed. The hearing was then adjourned to allow the parties the opportunity to provide written submissions with respect to this issue. Submissions have now been received from both parties and the Commission has considered whether or not there is a case to answer with respect to the complaint.

SUBMISSIONS RECEIVED

- 3) The evidence tendered by the Director included the oral evidence of Constable Andrew Hansen and affidavit evidence from a number of persons contained in the hearing brief. While the Commission has not yet heard the evidence of the Licensee regarding the circumstances of the breach, the affidavits sworn by hotel staff and Mr Crowe's letter to the Director of Licensing of 22 January 2009 tend to suggest that there is unlikely to be a challenge to the evidence currently before the Commission.
- 4) In summary, the evidence before the Commission is as follows:
 - a) PC Andrew Hansen made several attempts to get camera surveillance footage by phoning the hotel about four (4) or five (5) times over ten (10) or so days following the alleged incident on 13 September 2008.
 - b) On one occasion on 16 September 2008, PC Hansen rang and spoke to Hotel employee Kristi Barrett, Casual Accounts Manager, who immediately advised the Duty Manager Andrew Case of the request. Mr Case was sitting next to her at the time preparing end of week reports. Mr Case was too busy to immediately attend to the request.
 - c) On 17 September, PC Hansen rang the hotel to see if the CCTV footage was ready for collection and was told it was not.
 - d) On 18 September, PC Hansen again spoke by phone to Kristi Barrett, who recorded a notation in the Hotel's communications diary requesting footage as follows: "*Andrew, Darwin Police require footage from the 13/9. Fight started in upstairs toilet and then man was evicted by the bouncers out the front door. Job # 4142207 Constable Andy Hansen*".
 - e) The words "*approx 2.20am*" were added to Kristi Barrett's entry referred to above by employee Ms Stephanie Martin following a subsequent phone call from PC Hansen later in the day. Nothing was entered in the security footage request logbook.

- f) On 24 September PC Hansen made further enquiries via telephone to the Hotel and was advised the footage was available for collection.
 - g) On 5 October PC Hansen attended at the Hotel to collect the footage but was advised that there was a mixup and the footage was no longer available.
 - h) In an interview on 31 October 2008, Licensing Inspectors Paull and Cookson were advised by Andrew Case, Duty Manager, that he was responsible for checking the communications diary and admitted it was his negligence which resulted in the request for CCTV footage not being copied or supplied.
 - i) In an interview with Licensing Inspectors Cookson, Mikaelian and Paull on 15 October 2008, Nominee Russell Wilkes advised of the procedure that the Hotel had in place for dealing with CCTV footage requests by Police and Inspectors. The process was that the request is entered into a dedicated log and into the Communications Diary which is checked by Duty Managers routinely on a daily basis. In addition the CCTV footage requested is copied to a dedicated folder in their computer records for future reference. The evidence appears to be that either Russell Wilkes, Nominee or Andrew Case, Duty Manager were the ones who were responsible for making copies of the CCTV footage upon request.
- 5) Oral submissions made by Mr Crowe at the hearing on 31 March and later written submissions by Mr Wyvill filed on behalf of the Licensee include the following:
- a) The Nominee and Licensee are jointly liable for licence breaches pursuant to Section 110 of the *Liquor Act* (the Act). The Director has failed to prove the essential elements of the offence because at no time was a request for CCTV footage made to the Nominee, Russell Wilkes by the Police. The requests were all made by phone to Hotel employees other than the Nominee. In fact, at no time did Mr Wilkes know of the request until after the event.
 - b) The employee who took the phone request on 16 September and both communicated the message to the Duty Manager and noted it in the communications diary, was a Casual Accounts Manager and there is no evidence that she was authorised by the Nominee to accept requests for CCTV footage from the police.
 - c) Mr Case, the Duty Manager who was advised of the request was not the Nominee. A request for footage made to an employee is not sufficient in circumstances where a breach can lead to a criminal prosecution or a

suspension of licence.

- d) The Act in particular sections stipulates that both the employee and the Licensee or Nominees are all potentially liable for certain offences. Examples are Section 102 (serving an intoxicated person), Section 103 (sale of adulterated liquor) and Section 106B (minors on licensed premises). If the legislation and Camera Surveillance Guidelines had intended the request for camera surveillance to be able to be made to any employee, then the wording should have indicated that. It did not and instead, the Camera Surveillance Guidelines are silent on this matter and merely state that: *“where requested...a copy of the recording must be provided”*. In these circumstances, where the penalty for a breach of licence is borne by the Licensee and Nominee, then they must be the ones to whom the request is made.
 - e) Alternatively, the employee Kristi Barrett who received the request had not been given actual authority by the Licensee to receive it. Nor did she have ostensible authority by reason of her title or position to be held out by the Licensee or the Nominee as the one who could receive such requests. It cannot be assumed by her position within the organisation that a twenty-two (22) year old Casual Accounts Manager had ostensible authority to validly accept such a request.
- 6) Oral submissions made by Mr Borg and written submissions later made by Mr Bruxner on behalf of the Director of Licensing include the following:
- a) The submissions on behalf of the Licensee concentrate on the offence provisions of the Act when they should be focussing on the fact that the Commission’s interest is in an alleged breach of licence conditions. There is no need for this complaint to be worded in terms of Section 110 of the Act for it to be a valid complaint. The Section 48 complaints process is wider than this and can be used for consideration of a wide range of matters affecting the conduct of the business. In this hearing, the Commission’s attention is focussed on whether or not there has been a breach of the licence conditions that require the Licensee to observe the Camera Surveillance Guidelines 2004.
 - b) The Camera Surveillance Guidelines 2004 at Clause 8(b) provide: *Where requested by a member of the Commission, the Director, an inspector or a member of the Police....a copy of a recording must be provided”* A request cannot be made to anyone but only in a manner such that the Licensee could reasonably be expected to respond. The Licensee’s submission that the method used (ie though an employee to the Duty Manager) was insufficient is not persuasive.

- c) The Camera Surveillance Guidelines assume that others apart from the Licensee or Nominee will be involved in various aspects of the process. On at least two (2) occasions in the Guidelines, there is mention of a Duty Manager assuming responsibility for downloading requested footage and for the effective operation of the system. The Guidelines are silent as to who should receive a request for footage but it is reasonable to assume that the Duty Manager would be one such person.
- d) The Duty Manager in this case was given the message that CCTV footage was required and this is sufficient communication of the request.

CONSIDERATION OF THE ISSUES

- 7) The Commission has considered the evidence tendered in this matter and the submissions made by Counsel for the parties. The Commission makes the following comments:
 - a) The oral submissions made on behalf of the Licensee emphasise the offence provisions of the Act (eg Section 102 and Section 121) as justification for the submission that where the legislators intend persons other than the Licensee (and Nominee) to bear criminal responsibility for their actions, then they are specifically referred to in the Act. The Commission accepts this submission but is not persuaded that it gives guidance as regards a breach of licence conditions and the interpretation of the Camera Surveillance Guidelines 2004 where valid service of the request for footage is concerned.
 - b) The relevant licence condition for camera surveillance states that: *“the Licensee shall comply with such requirements for and in relation to camera surveillance as the Commission shall at any time notify to the Licensee in writing as being thereafter applicable to the licensed premises.”* It is accepted that the relevant document for the Licensee to comply with is titled “Camera Surveillance Requirements at Licensed Premises” (the Camera Surveillance Guideline 2004) included at Folio 28 of the tendered Brief.
 - c) The whole tenor of the Camera Surveillance Guideline 2004 is not to provide a prescriptive code for Licensees to follow to the letter but to give guidance as to what minimum standard of compliance is acceptable. It is then left to Licensees to act responsibly and put in place reasonable internal procedures to ensure they are compliant. The Guidelines cover the following issues:

- d) The types of premises required to have CCTV systems:
- i) The requirements of the system in terms of clarity and accessibility of image, the positioning of cameras, lighting and technical requirements, signage and liability for expenditure;
 - ii) Timing of installation of new or upgraded systems;
 - iii) Integrity of recordings including security and maintenance and performance requirements;
 - iv) Operation requirements and obligations on Nominee and /or Duty Manager;
 - v) Storage requirements of recorded images; and
 - vi) Rules regarding access to CCTV footage.
- 8) The Camera Surveillance Guidelines 2004, do not specify any particular procedure which must be followed by Police or others in requesting CCTV footage from the Hotel. Neither do they require the Police or Director of Licensing to make their request in writing. The Guidelines also make no mention of any particular person or category of person on licensed premises who is able to accept a request for CCTV footage. In these circumstances, an element of reasonableness must prevail and, where a verbal request is made, much will depend on the evidence provided to the Commission at hearing.
- 9) If a person has actual authority from the Licensee or Nominee to accept a request or if he or she has apparent or ostensible authority because of their position or title, then the request will be deemed to be accepted by the Hotel. It is the Commission's view, for example, that a person titled "Duty Manager" who is responsible under the Guidelines for the operation of the system and the downloading the footage would ostensibly have the authority to accept a request for such footage. To argue otherwise would be a nonsense.
- 10) On the assumption that a responsible Licensee will ensure a process is in place to process CCTV requests, a person of lesser status than the Duty Manager may well be able to validly accept a request. It may be, for example, that the internal process of the licensed premise requires the receptionist to accept and log any request on the assumption that it will be actioned by a nominated person such as the Duty Manager or Nominee. There will be limits however. If the only evidence before the Commission is that a request for footage was made to the cleaner, then it would not be reasonable for the Commission to consider this appropriate service of the request. It will often depend on the evidence in such cases.

- 11) In the case before the Commission, it is reasonable to accept that the CCTV footage request was properly made and received. The evidence of the Nominee and hotel staff supports the finding that the Hotel had adopted its own system for dealing with requests. This practice provided that all requests received by staff were to be noted both in the Communications Diary and on a separate register. In accordance with the Camera Surveillance Guidelines, the Nominee or Duty Manager was then responsible for downloading the footage and retaining a file copy for future reference.
- 12) The Casual Accounts Manager, Kristi Barrett clearly knew the system, as did employee Stephanie Martin. In particular, Kristi knew that the Duty Manager was responsible for downloading the CCTV footage and on 16 September 2008, she immediately advised him verbally of the request. She also knew that details of the request must be placed in the Communications Diary. Two (2) days later on 18 September 2008, she wrote a reminder in the Communications Diary for the Duty Manager giving the details of the footage required and by whom. Stephanie Martin added further clarification regarding the time of the alleged incident in the Communications Diary on the same day after receiving this information from PC Hansen. Whether either knew about the need to log the request into a separate register or whether that was someone else's job is unknown.
- 13) The evidence supports a finding that the problem only occurred when the Duty Manager forgot to process the request and download the footage. The evidence from the Nominee, the Duty Manager and the staff member who made a statement all confirm that it is the specific duty of Duty Managers to read the Communications Diary and ensure the requests are actioned as required. The Duty Manager, Andrew Case has acknowledged in evidence that he was negligent in not checking the Communications Diary daily. Had he done so, he would have been reminded of the CCTV request.

DECISION

- 14) The Commission is satisfied in this case that there is a case to answer. The Commission does not accept the submissions put forward by the Hotel that any request for CCTV footage must be made to the Nominee or Licensee. Further, it finds on the evidence that the request for CCTV footage was validly received by the Hotel.
- 15) In circumstances where a verbal request for CCTV footage is made rather than a written one, there is always more room for dispute. The Commission acknowledges that there may well be circumstances where footage is urgently required by Police or the Director of Licensing and, in those circumstances, it would be inappropriate for an authorised person to have to do anything more than attend the premises and make a verbal request.

Where possible however, it would be prudent for requests to be made in writing and for service of the request to be acknowledged by the person receiving it at the Hotel.

- 16) The matter will now be re-listed for the hearing of the complaint to be completed. If the parties consider it appropriate, written submissions only are acceptable to the Commission.

Richard O'Sullivan
CHAIRMAN

25 August 2009