

# NORTHERN TERRITORY LICENSING COMMISSION

## DECISION

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<b>LICENSEE:</b>	<b>Mr Matthew Evans</b>
<b>LICENCE NUMBER:</b>	6712
<b>PROCEEDINGS:</b>	Investigation of Complaints Lodged Pursuant to Section 53A of the <i>Private Security Act</i>
<b>HEARD BEFORE:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Jane Large
<b>DATE OF HEARING:</b>	18 November 2011
<b>APPEARANCES:</b>	Licensing Inspector Mark Wood Mr Ian Rowbottam, Counsel for Crowd Controller Evans

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### BACKGROUND

- 1) Licensing Inspector Jodi Kirstenfeldt on 27 October 2010 lodged a number of complaints under the *Private Security Act* ("the Act") with the Director of Licensing against three Crowd Controllers, including Mr Matthew Evans, arising from alleged incidents at Monsoons on 14 and 15 October 2010.
- 2) Mr Rowbottam, Counsel on behalf of Crowd Controller Evans sought a Directions Hearing of the Commission to raise a number of procedural issues in respect to the lodgement of the complaints, including that laid against his client, Crowd Controller Evans.
- 3) At the commencement of the Directions Hearing held on 25 May 2011 Mr Rowbottam addressed the Commission in respect to what he regarded as deficiencies in the laying of the complaint against Crowd Controller Evans and in bringing the matter before the Commission.
- 4) Following the Directions Hearing the Commission dismissed the contention of Mr Rowbottam that the procedures leading to a Commission Hearing were not in accord with legislative requirements and therefore should be discontinued.

- 5) The Commission Decision at the Directions Hearing was handed down on 7 June 2011 and stated:

*“For the reasons set out above, the Commission determines that there was no disallowing flaw in the process employed by the Director in respect of the bringing of the complaints against Crowd Controller Evans or in the Commission’s earlier determination to conduct an investigation by way of a hearing so as to vitiate the processes adopted by the Director or the Commission.*

*The Commission intends to conduct investigations, pursuant to Section 53C(3) of the Act, in respect of the complaints lodged against Crowd Controller Evans by Inspector Kirstenfeldt. Those investigations will be conducted by way of a hearing to be convened by the Commission at a date to be advised. The Commission directs, pursuant to Section 53C(3)(b) of the Act that Crowd Controller Evans is to attend that hearing. The Commission also intends to hear from the complainant, Inspector Kirstenfeldt, in the course of that hearing and from any witness proposed to be called by either party.”*

- 6) The Commission subsequently informed Mr Rowbottam that Commission investigations into the complaints lodged against Crowd Controller Evans by Inspector Kirstenfeldt would be conducted by way of Hearing on 20 October 2011. Due to non attendance of his client Mr Rowbottam sought an adjournment and subsequently the Commission reconvened the Hearing on 18 November 2011.

## **HEARING**

- 7) At the Hearing Inspector Mark Wood, on behalf of the Director, outlined the two complaints relating to alleged breaches of the Code of Conduct, thereby offending Section 19(2)(c) of the Act, which states:

### **19 Conditions of licence**

*(1) The licensing authority may grant a licence on such conditions as the licensing authority thinks fit and specifies in writing to the licensee.*

*(2) A licence is subject to:*

*(a) such conditions, if any, as are prescribed in relation to such a licence;*

*(b) the conditions, if any, specified in accordance with subsection (1) and amended, if at all, in accordance with section 20; and*

*(c) where a code of practice has been approved under section 48 in relation to such a licence, the condition that the code shall be complied with and not contravened.*

The relevant section of the Northern Territory Private Security Code of Practice for Crowd Controllers is:

### *3. Professional Standards and Conduct*

*Crowd Controllers shall:*

*(8) Not threaten any patron with physical violence.*

*(13) Not use undue force in the course of their duties.*

*(14) Not participate or encourage others to participate in assault.*

*(16) In the course of their duties use mediation, negotiation, communication, and conciliation as the primary methods of dealing with clients.*

- 8) Inspector Wood outlined that there were two complaints against Crowd Controller Evans; one relating to alleged use of force on Mr David Weston in the early hours of 14 October 2010 and the second relating to alleged undue use of force against Mr Niall Atkinson on the morning of 15 October 2010. Both Messrs Weston and Atkinson were informants or complainants who had laid out their respective complaints to Inspector Kirstenfeldt who then, as an appointed Licensing Inspector, formally laid the complaints which were accepted by the Director.
- 9) Inspector Wood said that Messrs Weston and Atkinson have provided statements incorporated in the Hearing Brief but neither were in attendance at the Hearing to enable Mr Rowbottam to cross examine them. Inspector Wood then tabled the Hearing Brief (Exhibit 1). Inspector Wood advised that the complaints would heavily rely on video evidence to be presented during the Hearing.
- 10) Mr Rowbottam objected to the tabling of the full Hearing Brief on the basis that it contained statements from Messrs Weston and Atkinson who were unavailable to give evidence under oath and to be cross examined. Inspector Wood reminded the Commission that Messrs Weston and Atkinson were present and available for cross examination at the initial Hearing date on 12 May 2011, however Mr Rowbottam at that Hearing was unable to continue with his defence of his client as there had been a mix up and Crowd Controller Evans was not present.
- 11) The Commission therefore determined to accept the Hearing Brief into evidence and to accord appropriate weight to the statements contained therein of Messrs Weston and Atkinson.

## Complaint One

- 12) In outlining the complaint in relation to Mr Weston (Complaint One) Inspector Wood provided a summary as follows.
- 13) At 3.30am on 14 October 2010 Crowd Controller Evans failed to comply with a condition of his licence through not conforming to the Code of Practice as approved under Section 48 of the Act. The conduct alleged is contrary to:  
  
*“Not to use undue force in the course of their duties.”*
- 14) Inspector Wood submitted that Crowd Controller Evans, in removing Mr Weston from Monsoons did so in a very forceful manner and assisted by Crowd Controller Storrier, restrained Mr Weston against the footpath balustrade wall at the front of Monsoons. In placing Mr Weston in leg locks with his legs up towards his back and in sitting directly on Mr Weston’s legs until Police arrived, Crowd Controller Evans used excessive force.
- 15) Mr Rowbottam addressed the Commission on the issue of the degree of force used by his client and made preliminary submissions in relation to powers of arrest under which condition the necessary power of restraint can be used. He submitted that the arresting party’s powers under the Criminal Code, Section 441, cannot be fettered and that the application of the *Private Security Act* or related Code of Practice does not apply to these incidents.
- 16) In support of the complaint Inspector Wood provided the Commission with a viewing of relevant CCTV footage on the night in question. The Commission was then assisted by Inspector Wood, Mr Rowbottam and his client, Crowd Controller Evans, in interpreting the actions being shown in the footage of the incidents.
- 17) The footage in relation to Complaint One shows Crowd Controller Evans and fellow Crowd Controller Storrier removing Mr Weston where, due to the momentum under which he is removed, Crowd Controller Evans has caused Mr Weston hit into the balustrade. The Commission was following this able to clearly see evidence that Crowd Controller Evans had his foot on Mr Weston and that Mr Weston was held down for several minutes after which Police are seen to lift him to his feet.
- 18) The Commission was also shown earlier footage which shows Mr Weston inside Monsoons where he seeks to intervene following a woman being hit in the face following which a scuffle ensues. Crowd Controller Evans is then seen to take hold of Mr Weston and remove him from the area.
- 19) Inspector Kirstenfeldt was questioned over her inquiries in relation to the matters raised by Mr Weston. She was questioned on a statement by Mr Weston that he was *“rammed into a pillar”*. Inspector Kirstenfeldt was unable to verify this statement but agreed that this incident probably

happened inside the venue when Crowd Controllers were marching Mr Weston out of the premises.

- 20) In relation to Crowd Controller Evans crossing Mr Weston's legs and sitting on them, the Commission was advised that this was a "*leg lock*", a recognised preventative mechanism to disable and control troublesome people.
- 21) Crowd Controller Evans was then sworn in as a witness and advised that he had held a licensed dual Crowd Controller and Security Officer for three years and that he had undertaken a five day course leading up to his licence, including a two day course on defensive tactics. He explained that he had applied a "*leg lock*" on Mr Weston to keep him on the ground and stop him moving about.
- 22) In response to questions from the Commission, Crowd Controller Evans stated he did not speak to Mr Weston at the commencement of the incident inside Monsoons and did not ask him to leave but, as an altercation had developed, his focus was on immediately ejecting Mr Weston from the premises.
- 23) He also advised he did not ram Mr Weston's head into a pole and further stated that Mr Weston was agitated and threatening himself and other Crowd Controllers.

### **SUMMARY SUBMISSION – Complaint One**

- 24) In summary submission of Complaint One Inspector Wood outlined that Mr Weston was rightly removed from the premises. He advised that he agreed Mr Weston was struggling when initially outside the premises, but once on the ground outside, there was no need to continue with the weight or full force of the body weight to keep Mr Weston grounded when he was in a "*leg lock*".
- 25) Inspector Wood submitted that with Mr Weston's legs crossed over behind him, little weight was required to restrain him and in his submission what the Commission had seen on the CCTV footage displayed excessive use of force. This was added to by the upper body of Mr Weston being restrained by another Crowd Controller.
- 26) In his summary submission Mr Rowbottam referred the Commission to Section 441 of the *Criminal Code*, the NT codification of the former common law power of a citizen's arrest. Under section 441(2) of the *Criminal Code*, any person can arrest another whom he or she finds committing an offence or behaving such that he or she believes on reasonable grounds that the offender has committed an offence and that an arrest is necessary for a range of specified reasons.

- 27) Mr Rowbottam submitted that Section 441 did not in any way limit the degree of force a person may use in executing a "citizen's arrest" so that not only excessive but also deadly force was permissible. In response to a direct question from the Commission Mr Rowbottam contended that even were Mr Evans to have shot Mr Weston during the "citizen's arrest" he would have been protected by section 441. Mr Rowbottam did not refer the Commission to any authority supporting that proposition.
- 28) Mr Rowbottam contended that when Mr Weston was grounded, the force used over time was lessened. The assistance of Crowd Controller Storrier when Mr Weston was on the ground was to control Mr Weston's arms as he appeared to be struggling in an attempt to regain his feet.
- 29) He further submitted that Inspector Wood had not taken exception with the "leg lock" technique, which ensures the person being controlled is incapable of kicking, but it does not control the top half of the body which warranted the assistance of fellow Crowd Controller Storrier. He stated that Crowd Controller Evans "used nothing more than legitimate force".

## **Complaint Two**

- 30) Complaint Two as outlined by Inspector Wood is that on 15 October 2010 Crowd Controller Evans failed to comply with the Code of Conduct in removing Mr Atkinson from the Monsoons licensed premises. Following removal of Mr Atkinson from Monsoons after an altercation in the premises, Crowd Controller Evans is alleged to have restrained Mr Atkinson by locking his arms behind his back and forcing Mr Atkinson to the ground with some force. Crowd Controller Evans then pinned Mr Atkinson's arms to the ground while kneeling on them and sitting astride him until the Police arrived. The complaint alleges that undue force was applied in this restraining action by Crowd Controller Evans
- 31) In relation to this complaint, the use of undue force by Crowd Controller Evans against Mr Atkinson on 15 October 2010, the CCTV footage was presented. Mr Atkinson is seen to be inside Monsoons and commence an altercation with another patron following which Crowd Controllers remove him from the premises. Following Mr Atkinson's removal he is seen to be pinned down on the ground next to the balustrade where Crowd Controller Evans sits on his chest and pins his arms down.
- 32) Mr Rowbottam advised the Commission that this complaint should be dismissed summarily. His interpretation of the footage of the events was that it was patently obvious that Mr Atkinson was violent, had commenced attacking another man inside the premises and for patron and public safety he needed to be heavily restrained following his removal from the premises. He also advised that in sitting on Mr Atkinson's chest to restrain him, the Code of Conduct had not been breached.

- 33) In questioning Crowd Controller Evans over the incident, Commissioner Timney asked whether anything would be done differently if such an incident happened again to which Crowd Controller Evans candidly responded that maybe he would not restrain the person as heavily for such a long time.
- 34) Mr Rowbottam advised the Commission that he disagreed with his client on this point as due to Mr Atkinson's earlier violent behaviour, if less restraining force was used or if he was let go, he could have caused public nuisance or injury.

### **SUMMARY SUBMISSION – Complaint Two**

- 35) In summary submission on Complaint Two Inspector Wood conceded it would be irresponsible if a Licensee just removed an intoxicated or troublesome patron from the premises where he or she could cause trouble and therefore did not disagree with the need to provide ongoing restraint until the Police arrived. He maintained that sitting on a man's chest for a prolonged period of time whilst using excessive force was a breach of the Code of Practice.
- 36) He advised the Commission that he was not persuaded by Mr Rowbottam's submission on Section 441 of the Criminal Code.
- 37) Mr Rowbottam further outlined his contention that the Security Officers were in effect making an arrest and holding that person until Police arrival. Under Section 441 of the Criminal Code the arrest continues until that person is delivered to Police.
- 38) Mr Rowbottam directed the Commission therefore to the conclusion that the complaint against Crowd Controller Evans in relation to his actions in detaining Mr Atkinson should be dismissed.
- 39) Inspector Wood presented that if Mr Rowbottam's argument was taken to its logical conclusion then when a Security Officer or citizen is arresting a person he can "*give him a hiding*". He argued that there needs to be a reasonableness in any action and following this, if an arrest has taken place, it does not allow for undue force to be used.

### **CONSIDERATION OF THE ISSUES - Complaint One**

- 40) Mr Rowbottam has submitted that Section 441 of the Criminal Code should apply as his client was making a citizen's arrest. Further he submitted that Section 441 did not limit the degree of force able to be applied in executing a citizen's arrest. That proposition is wrong at law and not supported by the authorities. The case of *Whitbread & Anor v Rail Corporation NSW & Ors* [2011] NSWCA 130 (24 May 2011) concerned a citizen's arrest by officers

authorised under the *Rail Safety Act* of 2 brothers who were intoxicated and committing offences at a railway station. The NSW Court of Appeal considered the power of arrest permitted pursuant to s 352(1) of the NSW *Crimes Act*." His Honour Whitby JA pronounced:

195. *The issue here is essentially one of fact. I am satisfied that it was open to the trial judge to conclude as he did. He was not satisfied that excessive force had been used. He took into account the fact that the brothers were held on the ground and then "sat upon to stop them thrashing around". He also took into account that handcuffs had been applied to restrain them.*

196. *It is simply not realistic to argue, as did the appellants, that the objective of ensuring compliance with the directions that had been given could have been achieved by simply blocking Sebastian's path to the station, and delivering an oral direction to both brothers to "go away". It is clear that the officers were engaged, at one time, in two pursuits. They were attempting to remove the brothers from railway land for failure to obey valid directions, consequent upon breaches of cl 13 of the Rail Safety (General) Regulation. At the same time, the officers purported to arrest the brothers in respect of that failure to comply, and to restrain them pending the arrival of the police officers. In my view, it was open to the trial judge to find that the arrest was lawful in each case. It was also open to him to find that, in the absence of restraint, and had re-entry been achieved, further breaches of the Regulation were likely to occur, particularly having regard to the intoxicated state and the aggressive and abusive behaviour of each of the brothers. It was open to his Honour to find that the time of restraint was not unduly protracted, and that the method used by the transit officers to restrain them was a reasonable application of force in those circumstances. That question had to be judged by reference to the "pressure of events and the agony of the moment, and not by reference to hindsight". (Woodley v Boyd at [37]; Pringle v Everingham at [67]). (Emphasis added).*

41) In addition, the Honourable Justice Mullighan in the matter of *Police v Hailemariam* No. SCGRG-98-1510 Judgment No. S96 [1999] SASC 96 (12 March 1999), found:

18. *It may be accepted that in effecting an arrest a person, including a citizen, may use all reasonable force: see R v Turner [1962] VicRp 2; [1962] VR 30. It is unnecessary to consider whether the use of weapons such as knives, by carrying or brandishing them, may be regarded as reasonable to effect an arrest as a citizen's arrest situation did not exist in the present circumstances. (Emphasis added).*

42) In the earlier Victorian case of *R v Turner*, cited above, the Full Court of the Supreme Court of Victoria was required to consider the citizen's arrest powers contained in section 459 of the Victorian *Crimes Act*. In that case a

citizen shot and killed a person he suspected of breaking into his vehicle. The Full Court pronounced:

*The words "apprehend" and "take him" and "deliver him" all, in our opinion, connote the right to use force if necessary to effectuate the power conferred.*

*If the section connotes the right to use force, the force which the section connotes is, in our opinion, such force as is reasonably necessary to apprehend and to take and deliver him as provided by the section. This is not only a reasonable interpretation of the section, but it is analogous to the powers of arrest for felony at common law. When a felony is committed in the presence of a member of the public, he may use reasonable force to apprehend the offender or for the prevention of the felony. What is reasonable depends upon two factors. He is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (i.e. the commission of the felony or the escape of the felon).*

*The passage cited in the judgment of Smith, J, in McKay's Case[1957] VicRp 79; , [1957] VR 560, at p. 572-3; [1957] VicRp 79; [1957] ALR 648, from the report of the Criminal Code Bill Commission of 1879 indicates not only that force may be used to apprehend a felon whether or not the felony was committed in the presence of the arrestor, but also that the degree of force which may be used is in both cases measured by the necessity of the occasion and the relation between the force used and the gravity of the occasion. It is worth repeating here the passage so cited:*

*"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used, is not disproportioned to the injury or mischief which it is intended to prevent."*

*Expressions in early authorities which say that "deadly force in the apprehension of offenders" cannot be justified or "he cannot justify the killing of him upon his flight and refusing to submit" were used at a time when the modern concepts of mens rea had not been developed. Translated to modern times, they in general relate, in our opinion, to cases of intentional killing or acts done with intent to do grievous bodily harm. We do not think they are applicable to cases in which the killing was unintentional and no bodily harm was intended, e.g. if a man were killed as a result of being tripped by the arrestor to prevent his escape from lawful custody or arrest. We find, therefore, no authoritative support for the proposition that where there is no duty to arrest, e.g. when the felony is not committed in the presence of the arresting party, that a reasonable*

*degree of force may not be used to effect the arrest. Indeed, we are of the opinion that such authorities as there are lean the other way.*

- 43) Mr Rowbottam's submission that a person engaged in executing a citizen's arrest is not limited in the degree of force used in the arrest cannot be sustained. Even were the Commission to accept that Mr Evans was affecting a citizen's arrest of Mr Weston, it would be faced with the same question as is it is now with the complaint under the *Private Security Act*. Namely: Was the force used by Mr Evans reasonably necessary to apprehend Mr Weston and commensurate with the requirement to hold him until he was handed over to Police.
- 44) If as Mr Rowbottam contends, Mr Evans was carrying out a citizen's arrest of Mr Weston, there is no doubt he was doing so in his capacity as a licensed Crowd Controller. He was on duty on the night in question for the purpose of controlling the behaviour patrons at Monsoons. As a result if Mr Evans used excessive force in "arresting" Mr Weston he has committed a breach of the Code of Conduct for Crowd Controllers. He has also exposed himself to the potential of a civil prosecution for unlawful arrest in that the arrest was carried out with more force than was reasonable in the circumstances. Mr Rowbottam's submission actually exposes Mr Evans to the risk of being sued by Mr Weston.
- 45) Through statements, submissions at Hearing and through viewing of the CCTV footage of the incident it is clearly evident that Crowd Controller Evans has removed Mr Weston from the premises, walked him into the balustrade street boundary with sufficient force to have Mr Weston hit the wall following which Mr Weston is put to the ground and restrained.
- 46) As a background to Mr Weston's removal, the Commission notes that at the time in question Mr Weston was out with his girl friend at a licensed premises when he witnessed a male patron (since identified as a licensed Crowd Controller) hit a woman in the face. This action is clearly visible in the CCTV footage viewed by the Commission.
- 47) Mr Weston then goes to remonstrate with the patron / Crowd Controller who hit his female companion. An altercation ensues following which Mr Weston is removed and the Commission has been advised that the other patron / Crowd Controller was similarly removed through another exit the Nuttal Street doorway.
- 48) To some Mr Weston's actions in remonstrating with a person who has hit a female in the face could be viewed as rightful and even responsible. The fact that an altercation then ensues necessitated the removal of Mr Weston from the premises. Neither party to the Hearing has contradicted the necessity for Mr Weston's removal.

- 49) At issue is the degree of force used by Crowd Controller Evans, particularly when Mr Weston is on the ground face down with his legs forcibly held behind his back and with the weight of Crowd Controller Evan's body on his legs. At the same time Crowd Controller Storrier also has Mr Weston's arms in a restraining lock.
- 50) Following the incident Mr Weston presented to the Emergency Department of the Royal Darwin Hospital where the medical report issued states:
- "He has bruising to the right eye and a laceration to his left forehead (flap with vital well applying, edges thin and non viable). Swollen left fifth finger proximal interphalangeal joint. FROM, no pain on palpation. Some bruising/grazes/abrasions to the right trunkside."*
- 51) This medical evidence adds weight to the likelihood that excessive force was used in the restraint of Mr Weston.
- 52) The culmination of the restraint through Crowd Controller Storrier being positioned on Mr Weston's upper body and Crowd Controller Evans restraint and body weight on Crowd Controller Evans, is in the Commission's view, excessive.
- 53) Even taken individually, the action of Crowd Controller Evans is also considered to be excessive and leaves the Commission to conclude that his actions have breached the Code of Conduct which prescribes that Crowd Controllers *"not use undue force in the course of their duties"*.
- 54) The Commission also expresses concern over the degree of force used in projecting Mr Weston onto the balustrade. During the Hearing when questioned on what would have happened to Mr Evans if there not been a balustrade to arrest his momentum, Crowd Controller Evans stated that if it was not for the balustrade, Mr Weston would have been projected onto the road.

## **CONSIDERATION OF THE ISSUES - Complaint Two**

- 55) Following consideration of all the evidence before the Commission, it is able to conclude that following an altercation within the premises, Mr Atkinson was rightly removed and then restrained outside the premises until the Police arrived.
- 56) Submissions and the CCTV footage viewed by the Commission show Crowd Controller Evans sitting on Mr Atkinson and pinning his arms to the ground with use of his knees. Given that Mr Atkinson had clearly been showing belligerent and aggressive behaviour, the Crowd Controller would naturally be on alert as to potential for violence to ensue, should the patron not be

adequately restrained or controlled. In this circumstance the Commission accepts that some degree of force is likely to be necessary.

- 57)The Commission has not witnessed the entirety of the restraining actions on Mr Atkinson, as during the time Mr Atkinson is restrained, he is removed from the Mitchell Street frontage of Monsoons to Nuttal Street where there is no CCTV coverage.
- 58)Following the incident photographs had been taken of Mr Atkinson which clearly show a black eye which he alleges was the result of punches to his face by a Crowd Controller. The Commission has no evidence as to whether this was a result of Crowd Controller action and, more specifically, the Commission is not able to determine whether Crowd Controller Evans was involved in any action likely to result in a black eye.
- 59)On the evidence presented therefore the Commission is not able to determine that undue force has been used in this instance and the complaint is therefore not made out.

## **DECISION**

### **Complaint One**

- 60)The Commission finds that excessive force has been used in the restraint of Mr Weston following an incident inside a licensed premise. It therefore finds a breach of the conditions of licence issued to Crowd Controller Evans has occurred through a breach of the Code of Practice for Crowd Controllers.
- 61)The Commission is mindful of the testing environment which Crowd Controllers are subject to in their line of work and that sometimes in the heat of the moment a bad judgement call can take place. It considers this matter to be one in this category.
- 62)Under the Act the Commission has the power to issue fines, licence suspension or licence cancellation. In this instance the Commission is inclined to impose a fine under Section 53D(1)(d) of the Act in the amount of \$300.00. It therefore directs that Crowd Controller Evans make payment of \$300.00 within twenty-eight days of this decision.

**Complaint Two**

63)The complaint alleging the use of undue force by Crowd Controller Evans against Mr Atkinson is not made out. Therefore this complaint is dismissed with no further action on the matter required.

Richard O'Sullivan  
CHAIRMAN

4 January 2012