

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Beachfront Hotel
Licensee:	Trojanmede Pty Ltd
Licence Number:	80315200
Nominee:	Mr Adam Netherwood
Proceeding:	Complaint pursuant to Section 48(2) of the <i>Liquor Act</i>
Complainant:	Mr Paul Kiely
Heard Before:	Mr John Withnall (Chairman) Ms Annette Smith Mr Craig Spencer
Date of Hearing:	5 August 2004
Date of Decision:	17 November 2004
Appearances:	Complaint in person Ms Jodi Truman for the Licensee

Background

1. The Beachfront Hotel has TAB facilities on the premises and television monitors displaying various race meetings being broadcast.
2. At about 4pm on Thursday 26 February 2004 the complainant ("Kiely") attended the Trophy Bar of the Beachfront Hotel to have a few beers and place some bets on the Moonee Valley trots, which he intended to watch at the hotel. He intended to stay until about 9 pm.
3. The first incident of which Kiely complains occurred at 5.30 pm, when he placed a bet on the TAB but realised after putting the bet card in the machine that he did not have sufficient funds to make payment for the bet. Kiely's version is that as he then walked away towards an automatic teller machine that was some four to eight metres away he informed staff member Lisa Palmer that he needed to withdraw some money to pay for the bet. He obtained cash and returned to pay for the bet previously placed.
4. Lisa Palmer's version is that Kiely just walked off in the direction of the ATM without a word, and that she called out to him three times but was ignored. In any event, the incident was observed by staff member Scott Featherstone, who accosted Kiely as to bets having to be paid for at the time of placement. Whilst there are variations between the versions of Palmer and Kiely as to the scene that ensued, Kiely freely admits to having called Featherstone "anally retentive". Ms Palmer says that Kiely was becoming so loud and angry that she rang for the Duty Manager, Mr Robert Reid.
5. Featherstone refused to serve Kiely a drink or to accept any further bets from him, and Kiely sat at a table to watch the race on which he had placed the bet, which is where he was when Mr Reid arrived and approached him some ten minutes later.
6. It is common ground that Reid told Kiely that he was required to leave the premises, and that Kiely refused. Reid grabbed hold of Kiely and hauled him upright. Kiely grabbed Reid. In the struggle, Kiely says, he broke free, picked up his spilled betting tickets and resumed

his seat, determined not to be evicted. Ms Palmer's version is that Kiely crossed his legs and "went to ground".

7. In any event, it is common ground that for approximately the next three (3) hours Kiely remained on the premises, avoiding staff who were refusing to allow him to be served with drinks at the bar by going to the bottle department where he purchased one beer at a time, which he took back into the Trophy Bar for consumption. During that time Reid returned with a female staff member who asked Kiely again to leave, but Kiely again refused. They threatened to call the police, to which Kiely says his response was to say "good". No police arrived.
8. Shortly before 9 pm Kiely attempted to place a bet on the TAB. The staff member on duty at this point was Reid, who cancelled the ticket and refused the bet. (Kiely has issues relating to the technicalities involved in the cancellation, but we can make no finding in that regard within the parameters of this proceeding).
9. Upon Reid cancelling the bet, Kiely became quite vocal towards Reid. It was at this time that Security Officer Christopher Wheat approached him. What then ensued constitutes the second incident. Wheat's version of what was occurring was that Kiely was aggressive and abusive. Kiely admits to being vocally angry, and admits threatening the establishment with lawyers.
10. The allegation by Kiely is that Wheat grabbed hold of him and while he was being held he was headbutted by Wheat. As a consequence of the headbutt, he lost balance and Wheat grabbed his finger and forcibly led him out of the building. Wheat's version differs, but he does admit to the headbutt.
11. It is common ground that there is no allegation that Kiely was intoxicated, or that he resisted the first attempt (by Reid) to remove him from the premises with any violence.
12. The Licensee did not call Featherstone or Reid as part of its case. However, Mr Doug Sallis the Managing Director of the corporate licensee gave evidence that both Featherstone and Reid were no longer in the Licensee's employ, and in that circumstance the Commission is not prepared to assume that their evidence would not have assisted the Licensee's position (*Jones -v- Dunkel (1959) 101 CLR 298*).
13. Kiely complains that his exclusion from the licensed premises was unlawful, and that the Licensee should be held responsible for the use of excessive force in his removal.

Section 121

14. We reproduce the key elements of s.121 of the *Liquor Act* that relate to this matter:
 - (1) *A licensee or employee of the licensee shall, or an inspector may, exclude or remove a person, not being a bona fide resident of the licensee's licensed premises, from the licensed premises if the person is intoxicated, violent, quarrelsome, disorderly or incapable of controlling his behaviour.*
 - (1A) *A licensee, an employee of the licensee or an inspector may exclude or remove from the licensee's licensed premises –*
 - (b) *subject to any other law in force in the Territory, any person (including a bona fide resident), if the presence or continued presence of the person on or at the premises would or might –*
 - (ii) *in his opinion, disrupt the business of the licensee or unreasonably interfere with the wellbeing of other persons lawfully on the premises...*
 - (2) *A person to whom subsection (1) or (1A) is applicable shall immediately leave licensed premises on being requested to do so by the licensee, an employee of the licensee, an inspector or a member of the Police Force...*

(4) *A licensee, employee of a licensee, inspector or a member of the Police Force exercising a power under this section may use such force as is reasonably necessary for the purpose.*

15. It is to be noted that subsection (1) is mandatory for a Licensee, whereas subsection (1A) allows the exercise of a discretion in relation to the criteria under that subsection.

Licensee's perspective

16. Ms Truman indicated that the Licensee wished to argue as its first line of response to the complaint that it acted under subsection (1) of s.121, as Kiely's behaviour was quarrelsome and/or disorderly.

17. As an alternative to subsection (1), the Licensee said it would argue that Kiely's behaviour came within the criteria of subsection (1A) (b) (ii), although this was not its preferred option.

Issues Arising

18. Several issues immediately arise for the Commission from the Licensee's preferred position:

- Was Kiely able to have been reasonably considered quarrelsome and/or disorderly by the Licensee immediately before the 5.45 pm request to leave the premises? If so, then the request would appear to have been lawfully made in terms of s.121(2), and the use of force by Reid under subsection (1) to have been reasonable upon Kiely's admitted refusal.
- However, the situation is surely compromised for the Licensee by the removal being unsuccessful and Kiely being allowed to continue to refuse to leave for the next three hours. If Kiely was sufficiently quarrelsome or disorderly as to warrant the application of force, why was his continuing refusal not further pursued or actioned by the Licensee? If the application of force was justified under s.121(1), which is the Licensee's position, then the obligation that constituted that justification was not fulfilled. The subsection is mandatory; it does not permit the Licensee to forgive a patron offending under s.121(1).
- To avoid being held in breach of s.121(1) over some three ensuing hours, the Licensee would need to persuade the Commission that Kiely had *not* been quarrelsome and/or disorderly at 5.45, which of course would render the use of force to remove him at that time unlawful.
- Did the Licensee by allowing Kiely to remain on the premises, consuming drinks, playing the poker machines and successfully placing some bets, tacitly acknowledge that Kiely's ongoing presence on the premises was permitted under those conditions and that there was no requirement for him to leave the premises? As indicated, this puts the Licensee in a difficult position in relation to justifying the earlier application of force.
- Given that Kiely had been permitted to remain on the premises for so long, is the second application of force shortly before 9pm to be regarded as a belated reinforcement of the three-hour-long obligation to remove him or as a separate or severable incident needing to be discretely justified in terms of s.121(1)?
- Even allowing the second removal attempt to have been quite regular, was a headbutt of Kiely by Wheat within parameters of reasonable force in the circumstances?

Remaining on the premises

19. The Licensee in addressing these issues drew the Commission's attention to a previous decision of the Commission in the matter of the Corroboree Park Tavern in 2003, where the Commission had said in paragraph 7 of the published decision in that matter:

“A licensee is entitled (and indeed, expected) to take measures to prevent disturbance as he or she apprehends it. It is not a case of how fair or unfair that may be in the case of a particular individual. The licence is not a roadside inn; statutory discrimination issues apart, the licensee has no legislative imperative, social obligation or community covenant to permit access to the tavern to all who demand it.”

20. The Licensee pointed out that irrespective of how hard done by Kiely may have felt about his service on the premises on that day, the Licensee was at liberty to decide who it wishes to have on its premises.
21. This is true enough in terms of the Licensee making assessments under s.121(1A), but where (as here) the justification for forcible exclusion is that a patron was quarrelsome or disorderly in terms of s.121(1), then (a) that circumstance must be demonstrated, and (b) exclusion becomes mandatory rather than discretionary.
22. On the evidence, we agree with the Licensee that Kiely became sufficiently quarrelsome, if not disorderly, in relation to the first confrontation over the bet that was interrupted by Kiely’s visit to the ATM as to trigger the need for his exclusion or removal from the premises. Where Kiely’s evidence may be in conflict with that of Lisa Palmer, we prefer the evidence of Palmer, for reasons mentioned hereunder. Given Kiely’s refusal to leave, it follows that not only was it lawful for Robert Reid to attempt a removal by force, but that such removal became mandatory on the Licensee at that point.
23. Ms Truman suggested that the term “exclude” in s.121(1) is something different from “remove”, such that an exclusion from services rather than physical exclusion from the premises can be a compliance with the statutory requirements of the section. We do not accept this submission. The Northern Territory Court of Appeal in *Northern Territory Liquor Commission et. ors. -v- Rhonwood Pty Ltd (1997) 117 NTR 1* in addressing the meaning of s.121(1) uses the expression “exclude from the premises”, and the Commission will continue to apply the exclusion requirement in that sense.
24. In the Commission’s view the Licensee, by allowing Kiely to remain on the premises for hours after an attempted forcible eviction, has treated s.121(1) as reading “may” rather than the mandatory “shall” that it is. In doing so, the Licensee has breached s.121(1). This breach would seem to be a key contributing factor in the occurrence of the second incident.
25. As part of its case, the Licensee did concede that there was some mismanagement in the handling of the events involving Kiely, that “things could have been handled better”. As a result, Director Mr Doug Sallis gave evidence of the institution of a range of management measures to better deal with future events of this nature.

Second eviction

26. We now focus on the second incident, the second application of force to Kiely, the incident that is the core of his complaint of unnecessary force.
27. The Commission heard evidence that Wheat commenced duty at 2000 hours and was briefed on the events of that day by Reid, the person who had unsuccessfully earlier attempted to remove Kiely from the premises. The briefing included issues related to Kiely. Wheat was asked to monitor Kiely’s behaviour.
28. Wheat on his own evidence had at no time spoken to or otherwise dealt with Kiely until the incident where Kiely had his attempted bets on the TAB cancelled by Reid shortly before 9pm and again became heated over his treatment.
29. Wheat says that he demanded that Kiely leave the premises, but was told to “fuck off”. Kiely initially denied being given the opportunity by Wheat to leave the premises, but under cross-examination conceded that Wheat had in fact spoken to him before grabbing him but that he “could not remember the exact words”.

30. We find that on the occasion of his being approached by Wheat, Kiely was again being sufficiently quarrelsome and disorderly to trigger the application of s.121(1). Wheat was therefore not only justified but duty bound to evict Kiely.
31. Where the evidence of Wheat conflicts with that of Kiely, on the balance of probabilities we prefer the evidence of Wheat. We do so because in the context of the comparative credibility of the witnesses it is considered that there are several unsatisfactory self-contradictions in Keily's presentation over-all.
32. We do not detail those perceived contradictions because our major concern arising out of the eviction is sustained by Wheat's own evidence, and further, the evidence of both Wheat and Kiely supports the Commission's major factual finding that when the headbutt was administered Kiely's right hand and Wheat's left hand were in contact with each other and Kiely's left hand /wrist and Wheat's right hand were in contact with each other.
33. The issue of who bent whose finger and in what sequence at what stage is one that both Kiely and Wheat consider important to their version of events, so important that they have both sought to corroborate their versions with other evidence such as a medical report and incident register respectively. Both seem to believe that they were the victim of the other. On Kiely's version, his finger was bent back after the headbutting occurred and he was being taken out of the premises. Wheat's version is that Kiely grabbed his fingers immediately before the headbutt and his motivating reason for administering what he describes as a minimal headbutt to Kiely was to release the finger that was being bent back.
34. In Wheat's view he had no alternative but to headbutt Kiely (with "minimal force" however!) in order to have Kiely release his hold on Wheat's fingers.
35. Even taking Wheat's evidence at face value, the Commission has serious concerns with a professional security provider of eight year's experience headbutting a patron so early into the sort of positional manoeuvring that is surely to be normally expected in a forcible eviction situation. It appears to the Commission that the headbutt was too simple and easy an option available to Wheat, and by no means the only available option to a professional of his experience.
36. The assessment of the reasonability of the particular application of force needs to carefully take into account the context stated by Wheat, that the reason he needed to apply a headbutt was to have his fingers released by Kiely, a patron who had offered no violence up to the point of reacting to Wheat's first physical manoeuvre. Indeed, Kiely seems to have done an impressive job of keeping very much to himself in a fraught situation for some three hours before that. We find that the sequence was that Wheat came up to Kiely and said that he had to leave; Kiely refused; Wheat reached out with an arm (to "shepherd" the recalcitrant patron); Kiely reacted and Wheat and Kiely went into a clinch that was mutually painful; Wheat promptly headbutted Kiely while they were standing hands to hands.
37. In the Commission's view the action of Wheat in headbutting Kiely so quickly, so early in the type of physical confrontation in which the patron's reaction was surely not unexpected, was not reasonable - at least not without endeavouring to take other measures that did not involve the application of such potentially traumatic force. It is surprising to the Commission that Wheat did not at least explore or apparently even consider a range of other options in which he has doubtless been trained. We do not see him as being without reasonable alternatives at that point.
38. This is not to say that we do not appreciate that physical confrontations of this nature are reactive and difficult occasions for a participant to have an internal debate with himself as to his options and the state of the law, but Wheat was the trained professional initiating a situation that was basic bread and butter for him. On all the evidence, we are of the view that the sudden headbutt was out of order, an application of force that was excessive in the circumstances.

Meaning of removal from the premises

39. According to the plan of the licensed premises for the Beachfront Hotel (see the definition of the licensed premises at clause 9(d) of the liquor licence), the car park area is within the boundary of the licensed premises. S.121(1) requires that a person shall be removed from the licensed premises. Ergo, it would appear from the evidence of Wheat and Kiely that Kiely was not removed from the licensed premises by Wheat but only from the building that comprises the service and consumption areas.
40. In that event, considering the second eviction as a separate event as we do, s.121(1) was technically not complied with on this second occasion either. Strictly speaking, at no time was Kiely excluded or removed from the licensed premises that night.

The findings

The Commission summarises its findings on the issues as follows:

41. Robert Reid's attempt to remove Keily from the premises was lawful.
42. The Licensee failed in its statutory duty to remove and exclude Kiely at that time. Such breach continued for some three hours thereafter.
43. Such breach led to the equivocal situation needing to be dealt with by Christopher Wheat. The two attempted removals are to be regarded as discrete incidents, with the Wheat removal to be assessed on its separate dynamics.
44. Christopher Wheat was nevertheless entitled (and therefore required) under s.121(1) to forcibly remove Kiely from the premises at the time he did so.
45. Christopher Wheat applied a headbutt to Kiely which constituted a force which was excessive at the time and in the circumstances of its application.
46. Christopher Wheat did not remove Kiely from the licensed premises as defined in the liquor licence, such that compliance with s.121(1) did not occur even on the occasion of the actual eviction of Kiely from the bar.

The outcome

47. What should be the outcome of our findings in this matter? After all, Kiely admitted to have been acting like a "prat", and on our findings he himself was in breach of s.121(2) of the *Liquor Act* (failure to quit). There are those no doubt who would propose that he was largely the author of his own misfortune. However, Kiely's behaving like a prat simply constituted the justification, and hence the obligation, to remove him. The grounds for the execution of a statutory duty should not be confused with the duty itself. The duty of the Licensee was in no way lessened or leavened by the behaviour giving rise to the existence of the duty, nor does a prat abandon his right not to be the victim of an unjustified headbutt by a professional private security licensee.
48. The outcome of the hearing at this stage will be twofold:
 - (1) We will refer the evidence and our findings in relation to Mr Wheat to the corporate Licensing Commission for consideration and possible action by the Commission as the licensing authority under the *Private Security Act*. Mr Wheat can be assured that no action will be taken under that *Act* without him being afforded an opportunity to show cause against it.
 - (2) As to the consequences for the Beachfront itself, we will accept written "submissions on penalty" from both the Licensee and from Mr Kiely within 28 days from the date of this decision. That is to say, we will accept from both parties written submissions as to what action the Commission should or should not take under s.49(4) and/or s.66(1)(b)

of the *Liquor Act* as a result of our findings in this matter. The submissions will need to address the Commission's main finding that not only was the Licensee entitled to forcibly remove or exclude Mr Kiely from the time of Mr Reid's attempt at doing so, but that the Licensee was and remained in breach of s.121(1) of the *Liquor Act* as from Reid's abandonment of that attempt. (The parties will find many decisions on breaches of s.121(1) on the Commission's website, although most of them are concerned with the obligation of a Licensee to exclude patrons who are intoxicated, a situation which as a general rule the Commission would see as more culpable than the situation presented by Mr Kiely).

49. We expect any submissions on penalty to have regard to the evidence of Mr Sallis as to his erstwhile preference for conciliatory process in relation to a problematic patron, and the changes he has now implemented to staff training and customer management as a result of the situation that gave rise to the hearing.
50. The Commission is unable to deal with Mr Kiely's claim for compensation, as we have no jurisdiction to entertain it. Such a claim must remain a matter for the civil courts.

John Withnall
Chairman

17 November 2004