

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

- Complainant:** Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)
- Respondent:** Tocoan Pty Ltd
(represented by Mr Ashley Wilson of Frichot and Frichot Lawyers)
- Commission:** Mr Jim Freemantle (Chairman)
Ms Helen Cogan
Dr Eric Isaachsen
- Premises:** Zelda's Nightclub, 2 Kent Street, Rockingham
- Matter:** Complaint pursuant to Section 95 for disciplinary action pursuant to Section 96 of the *Liquor Control Act 1988*
- Date of Hearing:** 17 August 2011
- Date of Determination:** 9 November 2011
- Determination:**
- 1 Pursuant to Section 96(1)(m) of the *Liquor Control Act 1988* the Licensee shall pay a monetary penalty of \$15,000. The Licensee shall lodge with the Commission within 28 days of the publication of this determination evidence of payment of the penalty;
 - 2 a video surveillance system compliant with the minimum requirements identified in the Director's "Minimum Standards Closed Circuit Television (CCTV) Security System" Policy or with requirements otherwise approved by the licensing authority must be in place and operational within 30 days of the date of this determination.

Introduction

- 1 On 2 July 2010 the Commissioner of Police lodged a complaint pursuant to Section 95 of the Act against the respondent, the licensee of the premises known as Zelda's Night Club of 2 Kent Street, Rockingham (Licence No. 6070021).
- 2 The complaint alleged that pursuant to Section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:
 - 2.1 The business under the licence is not properly conducted in accordance with the licence [Section 95(4)(a)]
 - 2.2 The licensed premises are not properly managed in accordance with the Act [Section 95(4)(b)]
 - 2.3 The licensee has contravened a requirement of the Act or a term or condition of the licence [Section 95(4)(e)(i)]
 - 2.4 The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee [Section 95(4)(k)]
- 3 The remedies sought by the Commissioner of Police were, after oral amendment at the hearing;
 - 3.1 Imposition of a monetary penalty on the licensee of \$20,000 or as the Commission sees fit [Section 96(1)(m) *Liquor Control Act 1988*]
 - 3.2 Cancellation of liquor licence 6070021493, Zelda's Night Club [Section 96(1)(e) *Liquor Control Act 1988*]
 - 3.3 Prohibit Mr Kevin Mann (a director and approved manager of the licensee) from being approved as a licensee, manager or in a position of authority for any licensed premises for 5 years [Section 96(1)(n) *Liquor Control Act 1988*]
- 4 Orders were made by the Commission on 18 February 2011 permitting cross examination of witnesses but limiting the scope of cross examination to that set out in the orders.
- 5 The complaint was supported by various documents contained in the attachments to the complaint. The Commission notes that the attachments were voluminous and comprised 2 almost full lever arch files of documents (including statements, IMS Reports and CAD data), photographs and DVD recordings.
- 6 Statements filed by the Commissioner of Police from the following persons

were before the Commission:

- 6.1 C Hortchan dated 1 November 2006 [see Book 1, Attachment 7]
 - 6.2 R Grundy dated 12 November 2006 [see Book 1, Attachment 7]
 - 6.3 Scott Sebastian Stephens dated 20 May 2010
 - 6.4 Andrew Victor Dueman dated 15 April 2010.
 - 6.5 Jonathon Peter D'Souza dated 30 April 2010, 3 June 2010 and 12 August 2009
 - 6.6 Trevor Ewan Atkins dated 30 April 2010, 5 June 2010 and 12 August 2009
 - 6.7 Clinton Lee Vredenburg dated 18 May 2010, 19 May 2010, 4 June 2010 (re attendance 27 May 2010), 4 June 2010 (re attendance 29 May 2010) and 23 September 2010 (2)
 - 6.8 Gregory Martin McDougall dated 5 May 2010 and 19 May 2010
 - 6.9 Peter George Smith dated 5 May 2010
 - 6.10 Tadeusz Antonio Wrona dated 19 May 2010
 - 6.11 Paul Joseph Bermudo dated 14 June 2010 and 12 August 2009
 - 6.12 Dwaine Rosworthy dated 12 March 2008
 - 6.13 Howard Leslie Kelly dated 18 August 2009
 - 6.14 Gavin Malcolm Beadle dated 18 August 2009 and 30 June 2009
- 7 Statements filed by the respondent from the following persons were before the Commission:
- 7.1 Daniel Patrick Scully dated 8 October 2010 and 8 August 2011
 - 7.2 Gary Michael Stanich dated September 2009 and 8 August 2011
 - 7.3 Michelle Armstrong dated 27 July 2011
 - 7.4 Kevin Mann dated 8 August 2011, 23 September 2010, 14 June 2011 and 25 July 2011 (Licensee's Response to Police S95 Complaint) and Statement of Facts, Issues and Contentions.
 - 7.5 Brendon Christopher Smith dated 8 October 2010
 - 7.6 Cassia Sue Overton dated 25 July 2011
- 8 At the hearing the following persons were examined by Ms Atkins and cross examined by Mr Wilson:
- 8.1 Senior Constable Beadle
 - 8.2 Senior Constable Kelly
 - 8.3 Senior Constable Bermudo
 - 8.4 First Class Constable Vredenburg

8.5 Sergeant Atkins

- 9 Mr Mann was examined by Mr Wilson and cross examined by Ms Atkins.
- 10 The Commissioner of Police conceded that the evidence referred to in the complaint under paragraph 4.12 (Grounds 2 and 4), paragraph 6 (Ground 2) and paragraph 3 (Grounds 1,2,3,4 – “historical matters” referred to in Attachment 7 of the complaint) would not be relied upon and could be disregarded.
- 11 It was not disputed by the parties that notwithstanding there is only one night club licence issued to the licensee for Zelda’s Night Club which is located on the ground floor of 2 Kent Street, Rockingham a second venue is operated from the licensed premises called Vibe Night Club, access to which is gained via a separate entrance from Zelda’s entrance and that separate entrance is located at Railway Terrace, Rockingham. Whilst part of the same building, there is no direct internal access between the venues which appear to trade as separate businesses.
- 12 A hearing of the matter was held on 17 August 2011.

Submissions by the complainant (save as conceded in paragraph 10 above)

13 In respect of Grounds 1, 2 and 4:

- (i) The WA Police Incident Management Systems shows that between January 2009 and June 2010 there were 31 reports of incidents, of which 27 were alleged assaults, occurring in or around the premises, two of which involved the use of a bottle as a weapon, one alleges indecent conduct by a naked employee towards a plain clothes police officer and eight reports refer specifically to intoxicated victims and assaults.
- 14 CAD data indicates there were 41 calls for police assistance at the premises predominantly between midnight and 5:00am and in respect of antisocial behaviour and assaults.
- 15 The CCTV cameras at various times were inoperative or did not meet the requirements of the Director of Licensing (“the Director”) stipulated in the licence.
- 16 Pornographic video material playing in the premises was visible from the street.
- 17 Officers attending the premises observed patrons whose behaviour led them to believe they were drunk.
- 18 Incident and training registers were deficient and not kept properly in terms of the Act.
- 19 The approved manager hindered police in their attempt to make an arrest by denying them access to the premises.

20 The Act was breached in respect of the failure to comply with Section 116 (3) relating to apparently conducting two separate businesses under the names Zelda's and Vibe.

Ground 3:

21 The following requirements of the Act and conditions of the license have been contravened:

- (i) intoxicated persons allowed to remain on licensed premises and been in possession of drinks,
- (ii) failure to comply with the conditions of the licence in respect of CCTV requirements,
- (iii) failure to complete the incident register in accordance with the *Liquor Control Regulations 1989* ("the Regulations").

22 Since the complaint was lodged, a series of antisocial incidents and assaults have been recorded by the police in the immediate vicinity of the premises.

Submissions by the Respondent:

23 Tocoan Pty Ltd became the licensee on 11 August 2004 therefore the Commission should not have regard to any material relating to the period before that date. (Conceded by the Commissioner of Police – see para 10 supra)

24 The 31 incidents cited by the police (see paragraph 7 above) do not demonstrate a failure of management of the premises in accordance with the Act.

25 The licensee's analysis of police incident reports shows that over the period the total number of alcohol related incidents is overstated and some of the incidents are incorrectly attributed to the licensed premises.

26 The police evidence does not indicate lax management standards in respect of excessive drinking or patron behaviour.

27 The nexus between incidents and the management of the premises has not been established.

28 The level of police attendance is not excessive and largely results from the vigilance of staff in refusing entry to intoxicated people.

29 The general area in which the premises are situated attracts crowds of people who are not patrons of Zelda's and antisocial behaviour in the area cannot necessarily be attributed to patrons of Zelda's.

- 30 The licensee denies trading outside of prescribed hours and having any knowledge of a juvenile on the premises.
- 31 It is denied that there was any failure to produce CCTV footage of the 10 January 2009 incident and claims that if police had approached management it would have been made available and the word of an unidentified security controller that there was no footage should be rejected.
- 32 The alleged behaviour in the context of a strip club involving a naked employee and a police officer did not amount to indecent behaviour in contravention of section 115(i)(a)(ii). Further, there is no evidence that the behaviour was condoned or permitted or corroborative of what was said by the female stripper.
- 33 There is no evidence that the licensee's staff observed intoxicated persons and did not take appropriate action.
- 34 The licensee contends the CCTV system was compliant with the Regulations and in any event a new digital system has been installed.
- 35 Any deficiencies in the incident register are technical.
- 36 Events occurring off the premises are not required to be reported under Regulation 18EB.
- 37 Mr Mann denies he hindered police requests to enter the premises and witness statements of officers Smith and Wrona do not allude to a refusal by Mann to allow police entry to the premises.
- 38 It is denied that video screens within the premises showing 'adult' videos were visible from the street.
- 39 Security personnel have no authority off licensed premises.
- 40 The physical configuration of the premises was approved in 1994 by the Licensing Court and under current policy a licensee is permitted to identify different parts of licensed premises by different names provided appropriate signage compliant with section 116(5) is displayed.
- 41 Recent serious incidents submitted by the Commissioner of Police were dealt with appropriately and in the case of an alleged assault with a glass implement the Magistrate found the patron charged not guilty. Furthermore, it is denied that another of these incidents occurred on the premises.

Determination:

- 42 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action. Section 96 of the Act provides that the Commission shall hear and determine the matter to which the complaint, or complaints, relate and, if it is satisfied, on the balance of probabilities, that the ground upon which the complaint was, or complaints were, made has been made out so that a proper cause for disciplinary action exists, the Commission may then exercise its discretion as set out in section 96(1)(a) to (n).
- 43 The Commissioner of Police submits that 31 incidents in the 17 months between 1 January 2009 and 2 June 2010 of which 29 involved violence directly linked to the premises demonstrate a danger to health welfare and safety of patrons. The licensee disagrees that the number of incidents is excessive pointing to the nature of the neighbourhood in which the premises are situated.
- 44 The Commission accepts that attendance at the premises and calls for police assistance due to anti social behaviour to which alcohol is a major contributor is unacceptably high and patron safety and welfare is at risk. The Commission accepts on the balance of probabilities that there is a sufficient link between alcohol related anti social and violent behaviour and failure of management to properly conduct and manage the premises. Therefore the Commission finds grounds 1, 2 and 4 of the complaint are made out.
- 45 In accordance with the condition placed on the licence, the licensee is required to ensure compliance with the Director's "Minimum Standards Closed Circuit Television (CCTV) Security System" policy at all times. However, statements by police officers (Vredembregt and Stephens) state that on different occasions they requested CCTV footage of incidents and were advised it was not available. On one occasion a crowd controller (unnamed) advised them the CCTV camera at the entrance had not worked for a while. Mr Daniel Scully also informed police that there was no CCTV inside the club recording internal access and egress from the club.

Evidence was tendered that CCTV footage produced on more than one occasion was grainy and virtually undecipherable.

- 46 Notwithstanding that the licensee denies that CCTV was not operative and submitted and that had he been asked he could have produced what the police officers required, the Commission is concerned about the possible non compliance of this condition on the licence.

Whilst accepting the licensee's contention that an uncorroborated statement of an unnamed crowd controller should not be relied on, Mr Scully's statement as an approved manager was given some weight by the Commission.

There was an amount of contradictory and confused evidence concerning the CCTV and provision of acceptable quality footage. On balance the Commission formed the view that there were real inadequacies in the CCTV

system and the ability to produce acceptable quality footage. The licensee conceded there were shortcomings in the maintenance of the incident register.

The Commission therefore considers Ground 3 has been sufficiently made out.

47 In addressing the appropriate penalty, the Commission considered the seriousness of the incidents which were the subject of statements by police officers. They can be summarised as follows:

- (i) The incident, the subject of statements by officers D'Souza and Atkins that they were approached by a stripper who was naked at the time and who according to the officers made lewd remarks and behaved in an indecent manner;

The licensee denies that the incident was lewd or indecent and claims there was no interaction between the stripper (Michelle Armstrong) and the officer, that the police entered into the banter and treated it all as good fun. The licensee makes a counter accusation that a Constable Phil (unidentified) had behaved inappropriately towards Armstrong bordering on harassment at some other time(s).

It is relevant that the licensee was not present on the evening and his response appears to be based largely on Armstrong's statement.

The Commission generally preferred the evidence of the police officers and accepts that the behaviour was inappropriate and deserving of some sanction however in assessing the penalty imposed, the Commission did not regard the incident in the context of adult entertainment in a nightclub setting as at the high end of offences.

- (ii) The allegation that pornographic material was visible from outside the premises i.e. from the street was denied by the licensee. The record of the allegation is covered by the statement of police officer Vredenbregt. The licensee accused officer Vredenbregt of fabricating the evidence and claimed it was impossible to see the video screen from the street. He further alleges he saw officer Vredenbregt standing on a milk crate to take photos. The licensee introduced photos which he claimed demonstrated it was not possible for a person of Vredenbregt's height to see the screen. The photos showed the licensee holding a tape measure against the wall to show the window treatments came to a level considerably higher than officer Vredenbregt's eye level.

This in the view of the Commission was disingenuous as it took no account of sight lines from eye level to the elevated screen inside the premises. Furthermore the window treatments had quite apparently been changed since the photos originally taken by officer Vredenbregt.

The Commission preferred the evidence of the police officers and found that the screens were visible at least to some extent from the street.

- (iii) Constables Smith and Wrona allege that the licensee refused them entry to the premises thus obstructing them from carrying out their duty, in this instance to interview a person identified as Cara. This is denied by the licensee who counter claims he was threatened by the police officers.

The Commission was persuaded on the balance of probabilities that there was some deliberate obstruction impeding them from carrying out their duties.

The Commission regards impeding police in the conduct of their duties as a serious matter.

- (iv) Incidents relating to alleged drunkenness and the permitting of drunkenness by management were the subject of statements by police officers Kelly, Bermudo, Beadle and Vredembregt.

The Commission accepted the evidence of these police officers that the patrons were drunk (within the meaning of the Act).

The point of contention was whether the approved manager in each instance knew or should have been aware that these patrons were in the premises and had taken no action until the police officers advised him of the situation. The Commission formed the view that these patrons were drunk and that the approved manager should have been aware of it and taken prior action.

- 48 In arriving at its conclusion in respect of the police evidence tendered, the Commission observed that there was no material inconsistency or contradiction elicited by counsel for the respondent (licensee). All of the police evidence under cross examination was consistent with their statements and all of the officers proved to be credible witnesses.

Evidence of Mr Mann:

- 49 Mr Mann provided detailed written statements and gave further evidence at the hearing and was cross examined by Ms Atkins.

His evidence consistently denied the allegations made in respect of the matters the subject of police evidence other than that he accepted the number of callouts and attendances by police but denied the number was excessive.


- 50 Mr Mann readily admitted to a lack of respect bordering on contempt for certain individual officers but denied a lack of respect for police generally. The breakdown of the relationship between the police and the licensee is a cause of concern for the Commission and it urges Mr Mann to work with police to develop a more constructive working relationship.

51 Pursuant to section 96 of the Act, the Commission is satisfied that the grounds of the complaint have been established and there is proper cause for disciplinary action.

52 The Commission is of the view that the seriousness of the breaches will be adequately reflected in the penalty imposed in the following orders pursuant to section 96(1) of the Act:

1 that the licensee pays a monetary penalty of \$15,000. The licensee shall lodge with the Commission within 28 days of the publication of this determination evidence of payment of the penalty; and

2 a video surveillance system compliant with the minimum requirements identified in the Director's "Minimum Standards Closed Circuit Television (CCTV) Security System" Policy or with requirements otherwise approved by the licensing authority must be in place and operational within 30 days of the date of this determination.



JIM FREEMANTLE
CHAIRPERSON