

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **CAVERSHAM
FOUNDATION LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
G L Reeves
M J Richardson

Date of Appeal: 19 March 2008

Date of Decision: 5 December 2008

Date of Notification
of Decision: 15 December 2008

**DECISION
ON AN APPLICATION FOR COSTS BY CAVERSHAM FOUNDATION LIMITED**

Background

1. On 21 November 2007, the Secretary for Internal Affairs (the "**Secretary**") refused to renew the class 4 operator's licence of Caversham Foundation Limited ("**Caversham**").
2. On 19 March 2008, Caversham appealed, under section 61 of the Gambling Act 2003 (the "**Act**"), against the Secretary's decision.
3. The Commission set out a timetable for Caversham and the Secretary to file their evidence and submissions, which Caversham did in August 2008.
4. On 11 September 2008, the Secretary issued a conditional class 4 operator's licence for six months. The condition required Caversham to provide financial information to the Secretary on a monthly basis.
5. On 2 October 2008, Caversham applied to the Commission for an award of costs against the Secretary. The Commission sought submissions and costs from the parties.

Submissions by Caversham

6. Caversham submitted, in summary, that:

- (a) The Secretary based his November 2007 decision on two grounds, "financial viability" and "compliance issues". The Secretary did not act in good faith, or engaged in procedural misconduct, in deciding that he should not renew Caversham's class 4 operator's licence because of outstanding compliance

issues. This forced Caversham to appeal the Secretary's decision and spend a considerable amount of money on legal fees in preparing its evidence and submissions on the compliance issues.

- (b) In September 2008, the Secretary decided that Caversham was financially viable and issued Caversham's class 4 operator's licence. The Secretary's 2008 decision did not address Caversham's compliance issues.
- (c) The Secretary is under a statutory obligation not to renew a licence unless he is satisfied about all criteria. The Secretary has now issued the licence, and as the evidence and submissions do not differ from the information before him when he made his November 2007 decision, there was no legitimate basis for that decision in November 2007. This constitutes bad faith or procedural misconduct.
- (d) Caversham's solicitors' fees in pursuing this appeal total approximately \$75,000. Approximately half of this cost related to compliance issues, so an award of costs in the amount of \$37,500 is appropriate.

Submissions by the Secretary

7. The Secretary submitted, in summary, that:

- (a) He made his September 2008 decision cognisant of the Commission's *de novo* jurisdiction.
- (b) He has not demonstrated bad faith or procedural misconduct, rather he has made the most reasonable decision in the circumstances.
- (c) Looked at in isolation, the compliance issues on their own would have warranted an application to suspend Caversham's operator's licence, but it would have been nonsensical for him to refuse to renew Caversham's operator's licence in respect of Caversham's financial viability, and at the same time seek to suspend Caversham's operator's licence in respect of the compliance issues. Instead the compliance issues were added to the proposal refusing to renew Caversham's licence.
- (d) The compliance issues were inseparable from the financial viability issues. Once he determined that Caversham was financially viable in September 2008, he considered the compliance issues on their own for the first time. While maintaining the same view on the breaches, he decided not to take enforcement action on them, but rather to issue a conditional licence for six months, and reassess Caversham's position after that time.

Caversham's submissions in reply

8. In reply, Caversham submitted, in summary, that:
- (a) The compliance issues are not inseparable from the financial viability issues, and the evidence supports this.
 - (b) The Secretary made a decision to refuse to renew Caversham's operator's licence without conducting an independent examination on whether the compliance issues supported a finding that he could not be satisfied that the section 52(1)(h) criteria was met. As such, his decision was a nullity and constituted procedural misconduct.
 - (c) When the Secretary did conduct the investigation, he found that the offences did not justify a decision to refuse to renew Caversham's licence.

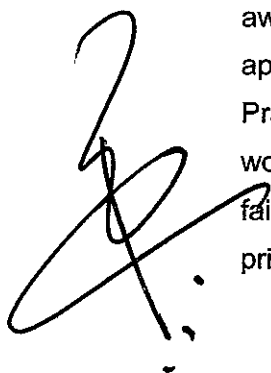
Analysis

The Law

9. The Commission is able to award costs in class 4 appeals pursuant to section 225 of the Gambling Act and section 11 of the Commissions of Inquiry Act.
10. Section 225(1) and (2) of the Act provides:
- (1) Within the scope of its jurisdiction, and subject to this Act, the Gambling Commission, (including any Division) must be treated as if it were a Commission of Inquiry under the Commissions of Inquiry Act 1908.
 - (2) Accordingly, the Commissions of Inquiry Act 1908 applies to the Gambling Commission.
11. Section 11 provides:
- The Commission, upon the hearing of an inquiry, may order that the whole or any portion of the costs of the inquiry or any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held: ...
12. The Commission considered its likely approach to the exercise of its discretion to award costs before it began hearing appeals with the resulting policy set out in the Commission's Practice Note. The Practice Note was issued as a guide to the practice of the Commission generally. The introduction provides that it is not to be seen as a set of inflexible rules, but should be followed unless there is good reason not to.
13. Paragraphs 38 and 39 of the Practice Note relate to costs, and provide as follows:

38. The Commission will not normally award costs but reserves its right to do so.

39. Factors which will be relevant in considering whether to order payment of costs, and fixing the amount of an award, will include whether any party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct.
14. These paragraphs illustrate that the Commission's starting position is that it does not normally award costs, but that it may do so in cases where a party's conduct justifies or requires an award of costs to ensure that the Commission's processes are not abused.
15. This approach was confirmed in a prior decision of the Commission on an application for costs by First Sovereign Trust and Tauranga Hotels Limited (decision GC03/06). In that case, the Commission found that there was "nothing to indicate that the Secretary had conducted himself in such a way as to justify an award of costs against him in circumstances where the Commission's usual approach is not to award costs."
16. The circumstances of the present application do not differ materially from those in decision GC03/06. In each case, the Secretary made a decision which was appealed to the Commission. After receiving the Appellant's submissions and evidence, the Secretary reassessed his previous decision and made a new decision, which removed the need for the appeal.
17. No costs were awarded in decision GC03/06 and, considering the circumstances of the two appeals in the round, the Commission was surprised that Caversham would consider that there was a basis for a different decision in this case.
18. The Commission exercises a *de novo* appellate jurisdiction. As the Secretary is both the original decision-maker, and an active party before it, the Commission expects him to reassess his earlier decision in the light of the matters placed before the Commission. The Secretary's actions in reassessing his earlier decision in the course of the appeal are to be commended, not criticised and punished.
19. In the Commission's view there is nothing to indicate that the Secretary conducted himself before the Commission in a way which would justify an award of costs against him in circumstances where the Commission's usual approach is to not award costs.
20. What Caversham has attempted to do is to advance the application for costs by arguing, on a highly technical basis, that it meets the Commission's stated approach to costs awards. However, this ignores the underlying principles behind the Commission's approach, and is misconceived in several aspects. First, Caversham approaches the Practice Note as if it had statutory effect and the Commission is obliged to apply its own words of guidance strictly, rather than reflecting their underlying principle. The approach fails to acknowledge that the statements are indicative and are provided for guidance in principle only.



21. The Commission is not tied to its current policy, or to the manner of its expression. Bad faith and procedural misconduct are merely examples of the type of behaviour that may result in an award of costs. As decision GC03/06 indicates, the issue is whether a party's conduct before the Commission is so inappropriate that it justifies an award of costs when costs are not normally awarded.

The Commission's primary focus is on protecting its processes to ensure that they are not misused and that parties before it do not think that they can breach directions with impunity.

22. Finally and most crucially, Caversham's submissions focus entirely on the Secretary's decision which is the subject of the appeal, not on the conduct of the appeal by the Secretary. An award of costs by the Commission is concerned with the Commission's own process (the appeal) not the earlier statutory decision of the Secretary. There is no suggestion that the Secretary misconducted himself before the Commission, which is the only proper basis for an award of costs on an appeal. Such an application for costs is misconceived.

Decision of the Commission

23. For reasons above, the division unanimously declines to award costs against the Secretary.



Peter Ch...
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

15 December 2008