

IN THE MATTER of the Gambling Act 2003

AND on an application by **THE SOUTHERN TRUST** for an order for name suppression in respect of its appeal of a decision by the Secretary to suspend its class 4 operator's licence

BEFORE THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)

Date of Application: 4 December 2009

Date of Decision: 22 December 2009

Date of Notification
of Decision: 22 December 2009

**DECISION ON APPLICATION BY THE SOUTHERN TRUST FOR
NAME SUPPRESSION**

Introduction

1. The Southern Trust ("Trust") has applied to the Gambling Commission ("**Commission**") for an order for name suppression or that its name not be published in connection with its appeal to the Commission against a decision by the Secretary for Internal Affairs ("**Secretary**") suspending the Trust's licence for five days.
2. The application was made shortly after the Commission received a request under the Official Information Act 1982 ("**OIA**") by another class 4 operator to provide the name of the class 4 operator that currently has an appeal pending before the Commission. The requester made the OIA request upon learning that the Secretary had agreed with the Trust not to publish the Department's suspension decision pending the appeal.
3. Following the Trust's application, the Commission sought and received submissions from the Secretary.

Trust's application

4. The Trust applied for name suppression on the basis that the Commission has the power to grant name suppression under section 225 Gambling Act 2003 (the "**Act**") and section 4 Commissions of Inquiry Act 1908. The Trust also relied on the Criminal Justice Act 1985, section 140. The Trust's grounds for name suppression were that publication of its name would cause it undue hardship for three reasons:

- (a) There is a risk that it would lose potential new venues as well as existing venues, because other class 4 operators may target its venues armed with the knowledge of the suspension decision and impending appeal.
- (b) If the Department's decision is found to be wrong there will be limited, if any, remedies available to the Trust to mitigate the consequences of the interim damage done by publication of its name before the Commission's decision.
- (c) Owing to "complex issues of law" the Commission has sought additional legal assistance. This will extend the time it takes for the appeal to be decided. The extended period before the decision would create unnecessary uncertainty and hardship for the Trust until a decision is reached.

Submissions by the Secretary

5. The Secretary acknowledged that he had agreed, upon request by the Trust, not to publish his suspension decision until the appeal was decided. The Secretary stated that he does not have a general policy of keeping his decisions or subsequent appeals confidential, however he considers confidentiality may be appropriate in certain circumstances. He described his position regarding publishing decisions as follows:

As a general statement, the Secretary believes he has the power to publish his decisions (whether or not appealed against) and he uses that power on a case by case basis, in good faith. In appropriate cases the Secretary chooses to publicise his decision and each such case will need to be considered on its particular facts and no generalised approach can be mandated. What is appropriate for Southern Trust this time may not necessarily be appropriate for another set of circumstances.

In some cases, the Secretary has strong views on the need to publish his decisions in a timely manner for reasons of general deterrence, public interest and the desire to see an immediate change of behaviour within the sector. In other cases, the Secretary sees no real difference with the timing of the publication and can accommodate requests from Appellants, such as the one lodged by the Southern Trust in this case.

6. The Secretary submitted that this is the first time an appellant has sought an undertaking from the Secretary not to publish a decision pending the outcome of an appeal. The Trust made the request when the two parties were still considering options to avoid the need for an appeal to proceed. The Secretary decided to accept the request as a demonstration of good faith during those negotiations and remained committed to it after those negotiations failed.

Analysis

The Commission considers that it has the power to grant non-publication orders when necessary. Its power arises under section 4 of the Commissions of Inquiry Act 1908, which applies to the Commission by virtue of section 225 of the Act. Section 4 Commissions of Inquiry Act provides:

4 Commissioners' powers

For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of citing parties . . . and conducting and maintaining order at the inquiry.

8. Section 225 of the Act provides that the powers conferred upon the Commission by the Act are additional to the powers conferred on it by the application of the Commissions of Inquiry Act. In addition, the Commission has broad powers under Schedule 3 of the Act to regulate its own procedure as it sees fit. The Criminal Justice Act 1985 does not apply, as the Commissions of Inquiry Act grants only the powers of a District Court in its civil jurisdiction.
9. Non-publication orders should only be granted in exceptional circumstances. The principle of open justice is generally paramount and non-publication orders should only be granted where it is necessary for justice to be done in the particular case. The kinds of circumstances when non-publication orders are appropriate involve things such as where there is a risk that publicity will jeopardise the subject matter of the appeal; adversely affect the Commission's ability to determine the matter before it or to control its proceedings; prevent a party from pursuing its claim; or involve an abuse of process.
10. These reasons are all related to the potential damage to its commercial interest that the Trust faces if its name is published in connection with the Secretary's decision, which it has appealed. The Trust's concern is that the Commission may reverse the Secretary's suspension decision, but, in the meantime, the Trust will have suffered a commercial loss because venues due to renew their venue agreements between the Secretary's decision and the resolution of the appeal may prefer to sign agreements with other class 4 operators to avoid the risk of the consequence of the appeal failing. The Trust argues that it will not be able to remedy such loss if its appeal is successful, because it will not be able to re-sign those venues.
11. The potential commercial prejudice the Trust faces if the decision is published is not an exceptional circumstance requiring non-publication of its name in order for justice to be done. These sorts of concerns would be a feature of most, if not all, class 4 appeals to the Commission. They do not affect the subject matter of the appeal, which is the correctness of the Secretary's decision. Nor will they render pointless the Trust's legal remedy (reversal of the Secretary's decision) if its appeal succeeds. Publication of the Trust's name will not prevent the Commission from performing its task, which is to consider the Secretary's decision, in light of submissions from the Trust and the Secretary, and to decide whether to confirm, vary or reverse the Secretary's decision. The publication will not create a disincentive to pursue the appeal and no considerations of abuse of process arise.
12. Further, in this case the public interest in open justice outweighs the Trust's interest in preventing potential damage to its interim commercial interests. The Trust's argument is

predicated on the relevance of the Secretary's decision to venues with whom the Trust is negotiating. In this respect, the potential prejudice to the Trust from publication can be weighed against the potential prejudice from non-publication to the class 4 venue operators with whom it is negotiating. The risk to the Trust, if its name is published (that its appeal will be upheld, but that it will not be able re-sign venues who in the meantime left because of adverse publicity) is mirrored by the risk to venues if the Trust's name is suppressed (that the appeal will be dismissed but the venues, unaware of the Department's decision or pending appeal, will in the interim have entered into binding agreements with the Trust). Moreover, given that the Secretary's decision, if it is upheld, will take effect after the resolution of the appeal, the Trust is in effect asking the Commission to assist it to hide from venue operators the risk that after signing with the Trust, they may be affected by a five day suspension order, the possibility of which was deliberately obscured during the negotiations.

13. In addition, the public interest is not limited to the interests of venue operators. Grant recipients, the gaming public and the general public have an interest in knowing the results of Departmental decisions and appeals.
14. For the foregoing reasons, the Commission does not consider that making a non-publication order would be in the interests of justice. The considerations advanced by the Trust do not displace the general principle of open justice.

Decision of the Commission

15. The Commission declines the Trust's application for non-publication.
16. The Commission's decision deals only with an application for name suppression. The request made under the Official Information Act 1982, which led to the application, will be dealt with in the usual way, now that the application for name suppression has been dealt with.


Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

22 December 2009