

IN THE MATTER of the Gambling Act 2003
AND on an appeal by **FIRST SOVEREIGN TRUST** and **WHISKEY JACKS LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
M M Lythe
P J Stanley

Date of Appeal: 28 July 2006

Date of Decision: 15 December 2006

Date of Notification
of Decision: 21 December 2006

DECISION

ON AN APPEAL BY FIRST SOVEREIGN TRUST AND WHISKEY JACKS LIMITED

Appeal

1. First Sovereign Trust and Whiskey Jacks Limited (the "**Appellants**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") refusing to renew the class 4 venue licence for the venue known as "Whiskey Jacks" (the "**Venue**") in Rotorua.

The Gambling Act 2003

2. The key sections of the Act relevant to this appeal are as follows:

72. Renewal of class 4 venue licence

- (5) The Secretary must refuse to renew a class 4 venue licence if—
 - (a)
 - (b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67; or
 - (c) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, licence conditions, game rules, and minimum standards.

67. Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that -
- (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and
 - (k) the class 4 venue is not used mainly for operating gaming machines; and ...
 - (s) any other requirements set out in regulations or licence conditions is, or will be, met.

68. Determining suitability for class 4 venue licence

- (1) In determining whether a key person is a suitable person for the purpose of sections 66 and 67, the Secretary may investigate and take into account the following things:
- (c) the profile of past compliance by the key person with—
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
 - (ii)
 - (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.

Facts

3. By letter dated 28 March 2006, the Secretary wrote to the Appellants proposing to refuse to renew the venue's class 4 venue licence, as he was not satisfied:

- (a) that the Venue is not used mainly for operating gaming machines; and
- (b) that the venue operator, Whiskey Jacks Rotorua Limited, has complied with licence conditions previously imposed; and
- (c) with the past level of compliance by the venue operator, and its sole director Keith Mitchell.

4. The Secretary invited the Appellants to make submissions on his proposal. The Appellants responded by letter dated 2 May 2006, proposing a complete refit of the Venue, and suggesting that six conditions be added to the venue licence to ensure completion of the refit and that the Venue would not be used mainly for operating gaming machines.

5. By letter dated 13 June 2006, the Secretary refused to renew the Venue's class 4 venue licence. The Appellants appealed this decision.

Submissions on behalf of the Appellants

6. The Appellants submitted (in summary) as follows:
- (a) the Venue will not be used mainly for operating gaming machines as it will be refurbished into an upmarket café. The focus of the new Venue will be non-gaming activities;
 - (b) a number of conditions precedent can be added to the venue licence in order to ensure that the refurbishment will be carried out and that the Venue will not be used mainly for operating gaming machines;
 - (c) while accepting that Mr Mitchell had a history of non-compliance, it was submitted that he would have less involvement in the operation of the refurbished Venue than previously;
 - (d) the Secretary did not properly consider a historical audit of the Venue undertaken by BDO Spicers, and incorrectly dismissed the accuracy of projected accounts for the refurbished Venue;
 - (e) the Commission should consider the refit proposal, rather than any past non-compliance;
 - (f) there is no evidence to suggest that the Venue has been used mainly for operating gaming machines.
7. The Appellants filed no evidence in support of their submissions.

Submissions by the Secretary

8. The Secretary submitted (in summary) as follows:
- (a) The Venue is used mainly for operating gaming machines and has been since it opened in 1999. The Secretary noted that:
 - (i) gaming machines have significant prominence at the Venue;
 - (ii) non-gaming facilities are scarce or do not exist;
 - (iii) the only reason most patrons attend the Venue is to play gaming machines;

- (iv) the gaming room is the only room in use;
 - (v) the Venue has no track record of operating without gaming machines;
 - (vi) he could not obtain satisfactory information about the Venue's revenue streams to assist him in his consideration of whether or not the Venue is used mainly for operating gaming machines.
- (b) the Appellants have previously failed to comply with licence conditions, breaching five of the six conditions that were attached to the site approval in December 2003. These conditions related to the development, promotion and reporting of non-gaming activities;
- (c) taking into account past non-compliance, neither Whiskey Jacks Limited or Keith Mitchell are suitable to be key persons of the Venue.
9. The Secretary supported his submissions with evidence from Steven Jewkes and Robert Hunter, both Senior Gambling Inspectors with the Department of Internal Affairs (the "**Department**"); Heath George, an Investigating Accountant with the Department; Christina Clement, a Counsellor and Youth Worker with the Problem Gambling Foundation; Dawn Meertens, a Technical Officer responsible for host responsibility, liquor licensing and smoke-free enforcement employed by Toi Te Ora Public Health; Julie Smale, an Inspector specialising in liquor licensing and hazardous substances with the Rotorua District Council; and Henrietta Donaldson, a Licensing Administrator with the New Zealand Police.
10. The Secretary also filed affidavits from Matthew King, Jennifer Lund and a second affidavit from Robert Hunter, analysing three weeks CCTV footage from the Venue, demonstrating how the Venue is used. Mr King and Ms Lund were contracted by the Department to assist Mr Hunter to analyse the CCTV footage.

Submissions in Reply

11. In reply, the Appellants submitted that the Secretary's evidence and submissions concentrated on whether the Venue has been, and continues to be, used mainly for operating gaming machines, ignoring the refit proposal and the self-policing nature of the conditions proposed by the Appellants.

Visit to the venue

12. A Commissioner visited the Venue in December 2006 as a member of the public, unaccompanied by representatives of either party. The purpose of the visit was to gain

an impression of the Venue's layout and operating practices that had been represented to the Commission in submissions and in evidence.

Analysis

13. This appeal relates to the renewal of a class 4 venue licence. Section 72 of the Act sets out the renewal process. The Secretary refused to renew Whiskey Jacks' class 4 venue licence pursuant to section 72(5)(b) and (c).
14. As it has noted in previous decisions, the appeal function that the Commission exercises under section 77 of the Act is on a *de novo* basis. This means that the Commission considers the matter afresh. The Commission must apply section 72 as if it were the Secretary and so decide whether it must refuse to renew the licence because of the matters in section 72(5).
15. Section 72(5)(b) and (c) provide that the Secretary (and the Commission on appeal) must refuse to renew a licence if the Secretary (or the Commission) is not satisfied about any of the matters specified in section 67 of the Act, or that the Appellants will comply with the Act or licence conditions. In relation to section 72(5)(b), the Secretary submitted that the Commission could not be satisfied in relation to matters specified under subsections 67(1)(d), (k) and (s).
16. The Commission observes that the requirement to refuse to renew the licence is mandatory if the Secretary (and Commission on appeal) is not satisfied in relation to the matters in sections 72(5)(b) or 5(c). The word "satisfied" does not mean satisfied beyond reasonable doubt. Instead, it simply means that the decision-maker makes up its mind.
17. The Commission considered its role to be forward looking in determining whether to renew the licence. The language of subsection 72(5)(c) clearly indicates that its concern is whether the applicant will comply in future with various regulatory requirements. Equally, the Commission has interpreted subsection 5(b) to apply to future compliance with section 67.
18. When assessing whether there will be future compliance, it is, however, logically relevant to consider past compliance and behaviour. Applicants with a history of non-compliance are less likely to comply in the future, while there may be no reason to question future compliance by applicants with an exemplary history.
19. Similarly, any proposed changes to the venue itself or its operation may be relevant to some regulatory requirements (eg access by minors), although not to others (eg key person suitability, unless those persons are changing). The weight to be given to proposed changes will vary from case to case.

20. The manner in which proposals for future change are presented will also be important, a thorough and well-particularised proposal, supported by affidavit evidence, being more persuasive for reasons of certainty, than a vague and unsupported proposal.
21. Section 72(5)(b) is linked to section 67 which in turn refers to section 68, relating to the suitability of key persons. The particular parts of section 67 that are of relevance in this appeal are:
- (a) Section 67(1)(k) – whether the venue is “used mainly” for operating gaming machines. In approaching its analysis, the Commission applied the same test it outlined in decision GC22/06, relating to an appeal by the *Southern Trust*. In summary, the Commission considered that the phrase “used mainly” was best defined as “in the main”. When determining whether or not a venue is used in the main for operating gaming machines, the decision-maker must make an overall assessment of the venue, including the consideration of a number of indicia, such as relative floor areas, prominence of gaming machines, promotion and extent of other activities, revenue streams and ability to participate in the activities. No one matter was considered by the Commission to be individually determinative of whether a venue is “used mainly” for operating gaming machines, this assessment to be made in the round.
 - (b) Section 67(1)(d) – suitability of key persons. In determining key person suitability, the Commission may consider the matters in section 68 or any other matters that are relevant. In this case, the previous failures to comply with agreed licence conditions, breaches of the legislation, and what appears to have been attempts to be obstructive when the Secretary has requested information were considered by the Commission to be relevant. Proposed changes to the physical layout of the Venue were considered not to be relevant to whether a key person is suitable.
 - (c) Section 67(1)(s) – this essentially duplicates the requirements set out in section 72(5)(c).

Section 67(1)(k) - Whether the Venue is used mainly for operating gaming machines

22. The Secretary filed 10 affidavits from a variety of deponents in support of his position that the venue is a gaming shop and that there have been various breaches of licence conditions. In contrast, the Appellants did not file any affidavit evidence at all and so the evidence that the Venue was originally set up as a gaming shop is not contradicted by the Appellants. The Commission also noted that, in *Whiskey Jacks Rotorua Ltd & Anor v Minister of Internal Affairs & Anor* (HC Wellington, CIV 2003-485-1901, 11 September 2003, Wild J), the High Court said in relation to the venue:

[3] Whiskey Jacks opened in June 1999 as a gaming shop. It had poker machines and little else. It was owned and operated by the first plaintiff.

23. The Secretary's position was that the non-gaming activities at the Venue had declined further over recent years. Again, the Appellants did not file any evidence to contradict this. The Appellants' argument was that the licence should have been renewed because the Venue is apparently to undergo a redevelopment which, in the Appellants' submission, would address all of the Secretary's concerns.
24. The Commission had very little information from the Appellants on the refit proposal, with the notice of appeal and submissions being short on detail, and unsupported by affidavit evidence. The document containing the most information on the refit was a letter dated 2 May 2006 from the Appellants' solicitor to the Department in response to its "proposal to refuse" letter. The Commission considered this letter as part of its determination, but deemed the contents to be insufficient to counter the sworn evidence filed by the Secretary.
25. The Commission considered the Appellants' proposal to refit the premises and impose conditions precedent, and determined that it was insufficient for the Commission to be satisfied that, in future, the Venue would not be used mainly for gaming machines.

Sections 67(1)(s) and 72(5)(c) – Compliance with regulatory requirements

26. The Commission noted that the submissions and evidence filed by the Secretary demonstrated serious non-compliance at the Venue over a prolonged period of time. The Appellants failed to file any evidence to explain this non-compliance, or to in any way attempt to satisfy the Commission that they would be compliant in the future.
27. The Commission considered it very relevant that the Appellants have, in the past, proposed to redevelop part of the Venue and have agreed to licence conditions being imposed to reflect their representations, but then failed to comply with those conditions. The Secretary's evidence on this was unchallenged. If the Secretary's position were wrong, the Commission would have expected the Appellants to have filed evidence to correct it. That did not occur.
28. The Commission was not satisfied that the Appellants would comply with regulatory requirements.

Section 67(1)(d) - Suitability of key persons

29. Section 68 outlines a number of matters which the Secretary may investigate in relation to key persons. The Secretary relied upon section 68(1)(c) and a profile of past non-compliance with the Act, previous legislation and licence conditions.


30. Again, the Secretary's evidence was unchallenged, with the Appellants' submissions accepting that there had been non-compliance in the past.

Conclusion

31. Having considered all the evidence, the Commission determined that it could not be satisfied in relation to the matters specified in section 67(1)(k), 67(1)(s), 67(1)(d) or section 72(5)(c). The weight and volume of the Secretary's evidence, and the lack of any countering evidence from the Appellant meant that this was the only conclusion the Commission could have reached. Accordingly, the Secretary was correct in refusing to renew the class 4 venue licence for the Whiskey Jacks Venue.

Decision

32. For the reasons already provided, the Division unanimously declines the appeal.



**GAMBLING
COMMISSION**

Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

21 December 2006