

IN THE MATTER of the Gambling Act 2003
AND of a pre-hearing application
by the Secretary for
Internal Affairs to strike out
the appeal by **INFINITY
FOUNDATION LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Member: P Chin (Chief Gambling Commissioner)
Date of Appeal: 13 April 2007
Date of Application: 17 April 2007
Date of Decision: 8 May 2007
Date of Notification of Decision: 8 May 2007

DECISION

**ON A PRE-HEARING APPLICATION BY THE SECRETARY FOR INTERNAL AFFAIRS TO
STRIKE OUT THE APPEAL BY INFINITY FOUNDATION LIMITED**

Introduction

1. On 13 April 2007, Infinity Foundation Limited ("**Infinity**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to cancel the class 4 venue licence issued to Infinity for "The Bar 4 Us" situated at 342 Heretaunga Street West, Hastings (the "**Venue**").
2. The Secretary cancelled the licence because he determined that the key people at the Venue, and in particular, Mr Bruce Douglas, were no longer suitable because they failed, on 24 occasions, to bank gaming machine profits within the timeframes stipulated by section 104 of the Act and Regulation 4 of the Gambling (Class 4 Banking) Regulations 2006, and because gaming machine profits were applied to deficits in the business's cashflow.
3. Infinity stated that its grounds for appeal were that:
 - (a) A binding agreement for the sale of the Venue had been entered into between Mr Douglas, as vendor, and Mr Wayne Martin, as purchaser.

- (b) Settlement can take place as soon as the Secretary determines an application made by Infinity for a new venue licence, with Mr Martin as the key person.
 - (c) Mr Douglas is no longer actively involved in the Venue's operations.
 - (d) It would be satisfied if the date that the gaming machines are turned off is extended until after the Secretary's decision on the new licence.
4. On 17 April 2007, the Secretary filed with the Commission an application to strike out Infinity's appeal. Infinity filed submissions in opposition on 19 April 2007, with the Secretary filing submissions in reply on 26 April 2007.

Relevant legal provisions

5. The relevant provisions of the Gambling Act 2003 are as follows:

67. Grounds for granting class 4 venue licence

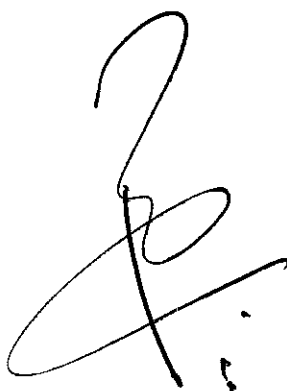
- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that –
 - (c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 68, to supervise:
 - (i) the conduct of class 4 gambling at the venue; and
 - (ii) any personnel; and
 - (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key persons, in terms of section 68; and ...

74. Suspension or cancellation of class 4 venue licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that –
 - (a) any of the grounds in section 67 are no longer met; or ...

78. Consequences of appeal regarding class 4 venue licence

- (1) ...
- (2) A class 4 venue licence remains in force until –
 - (a) the expiry of the period for an appeal under section 77(2); or
 - (b) the outcome of an appeal, if the appellant –
 - (i) appeals a refusal to renew or amend the licence under section 77(1)(c) or (d); or
 - (ii) appeals a decision to suspend or cancel the licence under section 77(1)(e).



104. Gaming machine profits must be banked

- (1) ...
- (2) The gaming machine profits must be banked within the time frame specified in regulations made under section 371 or, if no time frame is specified, as soon as reasonably practicable.

6. The relevant provision of the Gambling (Class 4 Banking) Regulations 2006 is as follows:

(4) Banking of gaming machine profits

For the purpose of section 104 of the Act, a venue manager must bank all gaming machine profits within 5 working days beginning on the day that the profits are, or ought to be, calculated.

Submissions by the Secretary

7. The Secretary submitted, in summary, as follows:

- (a) Infinity did not challenge any of the grounds for the Secretary's decision to cancel the class 4 venue licence.
- (b) Infinity's appeal is an abuse of the Commission's appeal process, and is vexatious.
- (c) He will not grant a new venue licence while the current licence is in force as a venue cannot have more than one valid licence.
- (d) Protecting the saleability of a commercial venue is not a legitimate ground for appeal.
- (e) The strike out application should be dealt with expeditiously.
- (f) He reserved the right to apply for costs.

Submissions by Infinity

8. Infinity submitted, in summary, as follows:

- (a) It wanted to vary the date that the gaming machines are turned off to when the Secretary approved the new licence and the suitability of the new key person, Mr Martin.
- (b) It is supervising the bankings from the machines.
- (c) The electronic monitoring system monitors the turnover from each gaming machine so any illegal practices can be avoided.

Secretary's submissions in reply

9. In reply, the Secretary submitted, in summary, as follows:
- (a) He accepted that the Commission has the power to vary his decision and extend the date for cancellation of the class 4 venue licence, but it would be inappropriate for this appeal.
 - (b) Infinity did not dispute that Mr Douglas is unsuitable as a key person, and allowing him to remain as a key person until a new licence is issued would frustrate the stringent suitability regime and unnecessarily increase the potential for misuse of gaming machine profits.
 - (c) He accepted that the electronic monitoring system monitors the turnover for each gaming machine, but it does not monitor the banking of gaming machine profits, Mr Douglas having failed to bank these on time on 24 previous occasions.
 - (d) The effect of Infinity filing the appeal is to allow Mr Douglas, whose unsuitability as a key person is undisputed and who has misused gaming machine profits, to continue to have direct access to gaming machines proceeds.
 - (e) The sale of the Venue is conditional on a new venue licence being issued. This leads to an impasse as a new licence will not be issued while the current licence is in existence, which it is by virtue of the appeal acting as a stay, but the sale cannot become unconditional until a new venue licence is issued.
 - (f) Striking out the appeal will allow him to process the application for the new venue licence and make a decision on the suitability of the new key person(s) in a considered manner.

Analysis

10. Infinity's appeal, and the Secretary's strike out application, have arisen following the Secretary's decision to cancel the class 4 venue licence issued to Infinity for "The Bar 4 Us" in Hastings. The Secretary cancelled the venue licence because he determined that the key people at the Venue were no longer suitable.

11. Infinity filed a notice of appeal dated 13 April 2007, supplemented by a letter of the same date. Infinity's appeal documentation did not dispute, or in any way attempt to contradict, the Secretary's grounds for cancelling the class 4 licence.

12. In its submissions opposing the strike out application, Infinity made minor amendments to its grounds for appeal, but those amendments did not extend to challenging the basis for

the Secretary's decision to cancel the licence. In particular, each of the notice of appeal, letter, and submissions did not challenge in any way the Secretary's finding that Mr Douglas is not a suitable key person but rather made clear that the appeal was brought in an endeavour to preserve continuity of operation pending a change in key persons.

13. Section 78(2) of the Act effectively provides that a class 4 venue licence remains in force if an appeal is filed, pending the outcome of that appeal. Such a provision can lend itself to abuse if unmeritorious appeals are filed simply to delay the effect of the Secretary's decision. The totality of the material before the Commission indicates that the sole purpose of lodging the appeal was to obtain the benefit of this automatic stay to facilitate the sale of the business to a third party. The Commission does not consider this to be a legitimate use of the appeal process and accordingly strikes the appeal out as constituting an abuse of process.
14. The Commission notes that Infinity has lodged with the Secretary an application for a new venue licence for the Venue, with Mr Martin as a key person. The Commission expects the Secretary to consider this application expeditiously so that Mr Martin has some certainty of his position.

Decision of the division

15. For the reasons already provided, the division allows the Secretary's pre-hearing application to strike out Infinity's appeal.


Peter Shin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

 May 2007