

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **FIRST SOVEREIGN TRUST** and **TAURANGA HOTELS LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Appeal: 2 June 2005 (amended 22 August 2005)

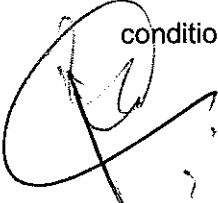
Date of Decision: 10 March 2006

Date of Notification of Decision: 27 March 2006

DECISION
ON AN APPLICATION FOR COSTS BY FIRST SOVEREIGN TRUST AND
TAURANGA HOTELS LIMITED

Appeal

1. On 2 June 2005, First Sovereign Trust and Tauranga Hotels 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**") to impose a further condition on the First Appellant's class 4 venue licence. The Appellants requested that no steps be taken on the appeal, as the issue under dispute was capable of resolution by negotiation between the Appellants and a third party.
2. Negotiations took place between the Appellants and the third party, and the Appellants and the Secretary until August 2005. On 9 August 2005, the Appellants informed the Commission that they would proceed with the Appeal.
3. On 18 August 2005, the Commission wrote to the Secretary requesting copies of documentation relevant to this appeal.
4. On 22 August 2005 the Appellants filed an amended notice of appeal, appealing against the Secretary's decision to impose special condition 1(b)(viii) on the First Appellant's class 4 venue licence. In the alternative, the Appellants sought an amendment to special condition 1(b)(viii), or the deletion of special condition 2(a).



5. The Appellants filed their submissions, evidence and an agreed statement of facts on 3 October 2005.
6. By letter dated 8 November 2005, the Secretary wrote to the Appellants' solicitors stating that special condition 1(b)(viii) could be deleted from the First Appellant's venue licence.
7. The Secretary's removal of special condition 1(b)(viii) concluded the substantive issue under appeal.
8. By letter dated 10 November 2005, the Appellants' solicitors wrote to the Commission seeking costs against the Secretary for the preparation and lodging of the appeal. The Commission sought submissions on costs from the parties.

Submissions by the Appellants

9. The Appellants submitted that the Commission has the power to award costs under section 225 of the Act, and section 11 of the Commissions of Inquiry Act 1908 ("**section 11**"). The Appellants submitted that, although no "inquiry" was completed in terms of section 11, this was only because the Secretary withdrew special condition 1(b)(viii) after they had filed their submissions and evidence.
10. The Appellants submitted that the Secretary repeatedly refused to remove special condition 1(b)(viii) from the venue licence, despite numerous requests to do so. The Appellants were, therefore, put to great effort and expense to run the appeal.
11. The Appellants sought two thirds of their solicitor and client costs.

Submissions by the Secretary

12. The Secretary submitted that costs were not payable by him for four reasons. First, special condition 1(b)(viii) was added at the Appellants' suggestion and removed by him once the Appellants made it clear that they no longer wanted this condition in the licence.
13. Secondly, for public policy reasons, costs should not be awarded against him when he takes steps to conclude an appeal prior to hearing because, if he were susceptible to costs awards in such circumstances, he would be better served to continue with the appeal.
14. Thirdly, and alternatively, the Appellants' costs were overstated and excessive.
15. Fourthly, and alternatively, the Gambling Commission had no jurisdiction to award costs in this particular case, as it had not conducted a hearing of an inquiry in terms of section 11.

Key issues

16. The key issues identified by the Commission are:
- (a) When does the Commission have the ability to award costs in class 4 appeals?
and
 - (b) Should the Commission award costs in this case?

When does the Commission have the ability to award costs?

The Law

17. 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.
18. 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.
19. 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.
20. The Secretary referred to three decisions in his submissions which offer guidance on the application of section 11.
21. In *Pilkington v Platts* [1925] NZLR 864, the Court of Appeal held that, as no witnesses had been called and no arguments had been put forward, there had not been a "hearing of an inquiry" by the Commission of Inquiry. Costs were, therefore, not payable.
22. The Licensing Control Commission followed this decision in *Re Appeals by Lion Breweries Limited & Anor* [1982] 3 NZAR 340, holding that, as the Appellant had asked for its application to be withdrawn on the day of hearing but prior to the start of the hearing, there was no jurisdiction to award costs.
23. The High Court decision of *Commissioner of Inland Revenue v G* [1995] 19 TRNZ 724, while not addressing whether an inquiry has taken place in terms of section 11, provides useful comment on what constitutes a hearing. In that case, the High Court held that section 43(7) of the Inland Revenue Department Act 1974 should be read purposively,

and that any occasion of judicial consideration, such as a judicial conference, would be sufficient to constitute the commencement of the hearing of an appeal. At page 10 of his decision, Barker J stated:

Such anomalies can be overcome by a purposive reading of s.43(7). I hold that the "hearing" of the appeal does not mean the commencement of a hearing on the merits but can mean any occasion on which the appeal is judicially considered by a Judge of this Court such as at the conferences held before Anderson J and myself.

24. It is clear that section 11 limits the Commission's jurisdiction to award costs, and that costs may only be awarded "upon the hearing of an inquiry" or its functional equivalent. To decide whether it has jurisdiction to award costs, the Commission must first determine whether it has commenced the hearing. This, in the Commission's view, is a matter of fact and dependent upon the Commission's appeal procedure.

The Commission's Appeal Procedure

25. The Commission's appeal procedure is clear. The appeal is commenced by an Appellant filing a notice of appeal within the statutory timeframe. Upon receipt of the notice of appeal, the Commission requests two copies of documentation relevant to the appeal from the Secretary – one copy for its own consideration, and one copy for the Appellant.
26. The Commission considers this information, determines whether any preliminary issues arise, and whether there is any reason why the appeal should not be heard on the papers, which is the Commission's usual procedure.
27. Both parties then file evidence and submissions, with the Appellant afforded the opportunity to file evidence and submissions strictly in reply.
28. The Commission considers the written evidence and submissions received and produces its decision.
29. The Commission considers that the appeal hearing could conceivably be considered to commence at three different points during this procedure. First, when the Commission receives and considers the information requested from the Secretary. Secondly, when the Commission receives the Appellant's evidence and submissions. Thirdly, when the Commission meets to deliberate and decide the outcome of the appeal.
30. The Commission is of the view that the appeal hearing commences when it first receives and considers substantive information from one of the parties. This will generally be when the Commission receives and considers the information provided by the Secretary.
31. This receipt and consideration of information is an important part of the Commission's appeal hearing process. The Commission considers in a preliminary way the Secretary's

decision, his reasons for that decision, and the basis for the Appellant's opposition. From its initial assessment of the nature of the issues under appeal, the Commission forms a view on whether the appeal should proceed by way of an oral hearing, or whether the Commission's usual procedure should be followed and the appeal heard on the papers, and directs accordingly.

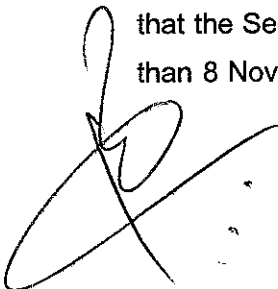
32. Although the Commission's consideration of the issues at this stage is preliminary only, the Commission nonetheless turns its mind to the appeal in a substantive manner for the purpose of deciding the appropriate process. The Commission considers that, in the context of its appeal jurisdiction and its established processes, this approach best approximates the intent of section 11.
33. In this appeal, the Commission not only received and considered the information requested from the Secretary, it also received the Appellant's evidence and submissions. On this basis, the Commission does have the power to award costs.

Should the Commission award costs in this case?

34. 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.
35. The Commission's Practice Notes 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.

36. The Appellants' main submission was that the Secretary could have removed special condition 1(b)(viii) before he did on 8 November 2005. The Secretary's response was that the Appellants' filing of the amended notice of appeal was the first indication from them that they no longer wanted the condition in the venue licence, and he reconsidered his position following this.

37. The material before the Commission indicates that both parties negotiated in good faith from before the filing of the first notice of appeal to the filing of the second notice of appeal. Up until this point, the parties were considering a rewording of the further condition, rather than a complete removal. The most that can be said is that it is possible that the Secretary might have been in a position to withdraw the special condition earlier than 8 November 2005. However, in the Commission's view there is nothing to indicate



that the Secretary 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.

38. The Commission does not approach the question of costs on the basis that, for "public policy reasons", the Secretary enjoys some special immunity. In appropriate circumstances, an award of costs against the Secretary could be made. However, there is nothing before the Commission to indicate that the Secretary acted inappropriately in terms of paragraph 39 of the Commission's Practice Notes.

Decision of the Commission

39. In summary, the Commission holds as follows:

- (a) the Commission's class 4 appeal hearing commences when the Commission received and considers substantive information from at least one of the parties to the appeal;
- (b) once the hearing process has commenced, the Commission can award costs pursuant to section 225 of the Gambling Act 2003 and section 11 of the Commission of Inquiry Act 1908;
- (c) in this appeal, the hearing commenced when the Commission received and considered the information provided to it by the Secretary;
- (d) in this appeal, the Commission declines to award costs against the Secretary as it does not regard his conduct as justifying a departure from its usual rule of not awarding costs.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

27 March 2006