

**IN THE MATTER** of the Gambling Act 2003  
**AND** of an appeal by the  
**SCOTTWOOD TRUST**

**BEFORE A DIVISION OF THE GAMBLING COMMISSION**

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

Date of Appeal: 8 February 2006

Date of Decision: 9 June 2006

**DECISION**  
**ON AN APPEAL BY THE SCOTTWOOD TRUST**

**Appeal**

1. Scottwood Trust (the "**Appellant**") appealed under section 77(1)(e) of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Respondent**" or the "**Secretary**") to cancel the class 4 venue licence held by the Scottwood Trust for the Tenpin Lincoln Road, 199 Lincoln Road, Henderson, Auckland. The Appellant sought reinstatement of the licence.

**Gambling Act 2003 and Gambling (Harm Prevention and Minimisation) Regulations 2004**

2. The Appellant's licence was cancelled pursuant to section 74(1)(a) which provides that:

(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; ...

3. Section 67 of the Act provides (in part):

67(1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that –

(b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimal; and

(q) the proposed venue is suitable in all other respects to be a class 4 venue; and

(r) there are no other factors that are likely to detract from achieving the purpose of the Act; and

- (s) any other requirement set out in regulations or licence conditions is, or will be, met.

4. Regulation 4 of the Gambling (Harm Prevention and Minimisation) Regulations 2004 (the “Regulations”) provides as follows:

**4. Unsuitable class 4 venues**

The following venues are declared unsuitable to be a class 4 venue:

- (a) a venue at which the primary activity is anything other than onsite entertainment, recreation, or leisure focused on persons 18 years and over, including (without limitation) –
  - (i) a dairy, supermarket, or other similar venue:
  - (ii) a fast-food outlet or other similar venue:
  - (iii) an office:
  - (iv) a private residence:
  - (v) a sports stadium:
  - (vi) a circus, fair, amusement parlour, arcade or park, theme park, or other similar venue:
- (b) a venue that is not a fixed permanent structure, including (without limitation) –
  - (i) a tent or marquee:
  - (ii) a vehicle, vessel, aircraft, trailer, or other conveyance:
- (c) a footpath (whether or not undercover):
- (d) a concourse area (whether or not enclosed):
- (e) an internet-café or cyber-café, or any other venue at which the primary activity is electronic media (including games):
- (f) a library, art gallery, museum, theatre, cinema, or other similar venue:
- (g) a place of worship.

**Facts**

- 5. An Agreed Statement of Facts was filed by the parties limited to a description of the circumstances leading up to lodgement of the appeal.
- 6. The Appellant filed affidavit evidence from Mr Penney, the sole director and shareholder of Bowlplex Limited, which owns and operates Tenpin Lincoln Road; Ms Keene, the Chief Executive Officer of Scottwood Trust; and Mr Nevatt, the Chief Executive Officer of Ten Pin Bowling New Zealand Incorporated.
- 7. The Respondent did not file evidence, but set out additional factual matters in its written submissions relating to the inspections undertaken by the Department of Internal Affairs (the “Department”), promotional material collected from the site, and the venue’s website.

8. By letter dated 3 October 2005, the Respondent advised the Appellant that it proposed to cancel the class 4 venue licence for Tenpin Lincoln Road and stated the following reason for the proposed cancellation:

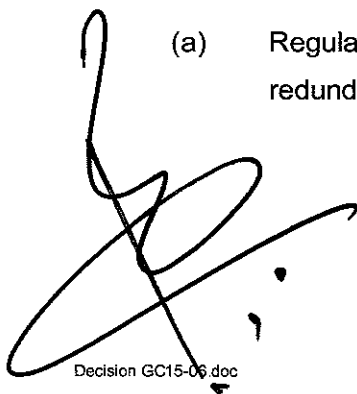
The reason for the proposed cancellation, based on the outcome of its inspections, is that the Department is not satisfied that the Venue's primary activity is on site entertainment, recreation or leisure focused on persons 18 years and over, as required by section 67(1)(s) and Regulation 4. The Venue's primary activity is ten pin bowling, which is focused on persons of all ages, including the very young. This conclusion is supported when the Venue's subsidiary activities, which have a clear youth focus, are also taken into account.

9. The Appellant lodged submissions, opposing the proposed cancellation.
10. By letter dated 30 January 2006 the Department gave notice that it had decided to cancel the licence, with effect from midnight on Friday 24 February 2006.
11. On 9 February 2006, the Appellant lodged an appeal of the Respondent's decision.
12. Class 4 gambling at Tenpin Lincoln Road is conducted in an area located close to and behind the bar, with the gaming area occupying approximately 15% of the venue's public floor space.
13. It was common ground that the primary activity for Tenpin Lincoln Road is ten pin bowling with a range of additional entertainment facilities, including video games and other entertainments.
14. A member of the Division of the Commission hearing the appeal visited the premises on two occasions, on 4 and 8 June 2006, as a member of the public and unaccompanied by a representative of either of the parties. The purpose of the visit was to provide the Division (through one of its members) with an impression in three dimensions of what had already been represented to it by photographs and in evidence.

#### **Submissions on behalf of Appellant**

15. The sole ground of appeal was that Tenpin Lincoln Road was not in breach of Regulation 4 of the Regulations because the primary activity (ten pin bowling) is recreation focused on persons 18 years and over.
16. Regarding the interpretation of Regulation 4, the Appellant submitted:

- (a) Regulation 4(a) should be construed narrowly. To do otherwise would be to make redundant Regulations 4(b) to 4(g).



Decision GC15-06.doc

- (b) It could be presumed from the omission to refer to ten pin bowling venues in Regulation 4(a) that such venues are suitable and prohibited by Regulation 4 only if the primary activity is not focused on persons over 18 years of age.
  - (c) The reference in Regulation 4 to “the focus of the primary activity” contemplates that a venue is not unsuitable merely because some persons under 18 years participate in the primary activity.
  - (d) The Respondent had incorrectly taken into account subsidiary and ancillary activities in making its determination that the venue was unsuitable.
17. On the facts, the Appellant submitted that the Department had insufficient evidence reasonably to conclude that the primary activity was not focused on persons over 18 years. In support of this contention, the Appellant relied on the evidence of Mr Penney and Mr Nevatt that:
- (a) Ten pin bowling is an adult dominated sport.
  - (b) 98% of all league bowlers at Tenpin Lincoln Road are over 18.
  - (c) Over 80% of the venue’s turnover is generated from persons over 18 years.
  - (d) Over 75% of people visiting the venue over the six month period prior to April 2006 were over 18 years of age.
  - (e) Income generated from youth leagues is 3% of the total league income.
  - (f) Over 75% of all non-league income is generated from persons over 18 years of age.
  - (g) External marketing via fax and radio is targeted at business groups, with 98% of the annual advertising expenditure targeted directly at business groups.
  - (h) Adult bowling is more lucrative and for this reason the venue management markets to persons over 18.

#### **Submissions on behalf of the Respondent**

18. The Respondent submitted that:

- (a) The venue has an “all ages” focus, and the primary activity is not focused on onsite entertainment, recreation or leisure focused on persons 18 years or over. It is not necessary to ascribe a percentile or proportional value to the business

generated by youth; it is sufficient that the focus is not limited to persons 18 years and over.

- (b) In addition to section 67(s) and Regulation 4, sections 67(1)(b), (q), and (r) indicate that the Secretary is able to take into account a broad range of factors in determining suitability.
  - (c) There is a legislative presumption first, against granting a licence under section 67(1) and second, that a venue is unsuitable under Regulation 4(a) where the primary activity is anything other than onsite entertainment, recreation or leisure focused on persons 18 years or more.
  - (d) Regulation 4(a) provides a general rule for classifying unsuitable venues, with examples, while Regulations 4(b)-(g) provide a list of venues that are inherently unsuitable for class 4 gambling. The words "without limitation" in 4(a) make it clear that the list in 4(a)(i) to (vi) is not exhaustive.
  - (e) The Secretary was not wrong to consider secondary activities in making his decision that the venue was unsuitable. Secondary activities are relevant as they may indicate that the venue is focused on all ages.
  - (f) Cabinet Papers relating to the Regulations support an interpretation of Regulation 4(a) to the effect that ten pin bowling venues are unsuitable if the focus is not on persons over 18 years.
  - (g) Ten pin bowling venues will not be caught by Regulation 4 in circumstances where such venues have "such a scant youth participation/focus that it would preclude an all ages focus and [would] thereby be analogous to a pub." The focus of the venue on activities for persons 18 years and over must be clear and the participation and presence of minors must be minimal.
19. In submitting that the primary activity had an all ages focus, the Respondent relied on promotional material collected from the venue and the website for Tenpin Lincoln Road, which included promotions for families, children, birthday parties and school groups.
20. The Respondent submitted that the statistics provided by the Appellant relating to income, turnover and numbers of persons over 18 attending the venue were not robust or determinative. It was submitted that league representation was not indicative of broader junior/youth participation at the venue, and that the source of turnover generation is different from the group upon whom the primary activity is focused. The evidence showed, it was submitted, that the venue is concentrating and directing attention to the

family/youth market. In the alternative, the statistics provided by the Appellant, if relevant, supported a view that bowling was not focused on persons over 18 years.

### Submissions in reply

21. Matters raised by the Appellant in reply included the following:

- (a) The Respondent has not filed any evidence. The evidence filed on behalf of the Appellant is sworn, uncontested evidence. Comments in the inspector's report provided to the Commission are hearsay, and accordingly must be given little (if any) weight.
- (b) The Secretary has misconstrued section 67(1)(b). The Secretary is required to be satisfied that the possibility of persons under 18 years accessing class 4 gambling is minimal. The issue is not access generally to the venue.
- (c) Section 67(1)(b), (q) and (r) are not relevant as the Secretary has previously been advised that the only ground for cancellation is section 67(1)(s).
- (d) The Cabinet papers referred to by the Respondent are an inadequate basis for concluding Parliament intended Regulation 4 to apply to ten pin bowling venues.

### Preliminary matters

22. As noted by the Appellant, the Secretary filed written submissions but no affidavit evidence and a limited Agreed Statement of Facts. In its decision relating to an appeal by Perry Foundation (GC14/06), the Commission discussed placement of factual material before the Commission, and its preference for receiving information in the form of sworn evidence. The Commission refers the parties to its earlier decision but, in this particular case, none of the factual information received in unsworn form appears to be contentious.

### Key issues

23. The Commission's jurisdiction on appeal is *de novo*. It reconsiders the Secretary's decision having regard to the information before it and is neither restricted to the information which was before the Secretary nor to the grounds stated by the Secretary for his decision. The Commission considers the primary issue to be the suitability of the venue for class 4 gambling (section 67(1)(q)), including whether that assessment is affected by Regulation 4.

24. The Appellant has argued that Regulation 4(a) must be narrowly construed to avoid making Regulation 4(b) to (g) redundant.

25. The Commission does not agree that the Regulation should be interpreted to avoid any overlap between Regulation 4(a) and 4(b)-(g). Regulation 4(a) is concerned with the **primary activity** of the venue, while Regulation (b)-(g) are concerned with the **type** of venue. Because Regulation 4(a) and (b)-(g) concern different things, there is no requirement to interpret the Regulation to avoid overlap.
26. A venue which falls into Regulation 4(b)-(g) is inherently unsuitable as a class 4 venue, whether or not its primary activity is focused on persons over 18. An adult cinema would be unsuitable on that basis.
27. Equally, the Commission draws little from the omission of Regulation 4(a) to refer specifically to ten pin bowling alleys. It is clear, from the phrase "including (without limitation)", that Regulation 4(a) applies to venues beyond those listed depending on the focus of the primary activity at each such venue. Ten pin bowling alleys will be suitable or otherwise under Regulation 4(a) depending on the focus of the primary activity of each such venue.
28. The concept of a "primary activity" recognises that a venue may have a number of activities present, although it assumes that there will be one primary or dominant activity, the other activities at the venue being incidental or ancillary. Class 4 gambling is never supposed to be the "main use" of the venue (section 67(1)(k)).
29. Determining what the primary activity is in any given case is a question of fact. In the present case, there is no dispute between the parties that the primary activity of the venue is ten pin bowling. Incidental or ancillary activities include video games, sale of food and beverages, and class 4 gambling. The application of Regulation 4(a) is assessed on the focus of the primary activity, not the ancillary activities, although the nature of the ancillary activities may affect the assessment of the focus of the primary activity.
30. The word "focused" in Regulation 4(a) does not carry a particular legal meaning, and the Commission gives it its ordinary meaning of "a centre of interest or activity" or "close or narrow attention; concentration". While the focus of the primary activity must be on persons over 18, exclusive attention to, or participation by, persons over 18 is not required.
31. The Commission considers that the test for suitability proposed by the Respondent was too narrow, in suggesting that the venue had to be "analogous to a pub", in the sense that persons under 18 were excluded from entry. A venue is not rendered unsuitable merely because of the presence of persons under 18 years. Regulation 4(a) requires assessment of the focus of the primary activity, as distinct from the venue itself.

32. Having considered the evidence and information before it (including the impressions gained from the visits to the premises), the Commission was satisfied that Tenpin Lincoln Road is a suitable venue in all respects to be a class 4 venue and, in particular, that the focus of the primary activity (ten pin bowling) was the onsite entertainment, recreation and leisure of persons 18 years and over.

#### **Decision of Division**

33. The Commission decided to allow the appeal and reinstate the Appellant's licence, having determined that the venue met the requirements of section 67(1) and Regulation 4 of the

Regulations.  
**GAMBLING  
COMMISSION**

---

Peter Shin  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

26 June 2006