

IN THE MATTER of the Gambling Act 2003

AND on appeals by Sand Bar &
Restaurant Limited and Robyn
Legge-Hunt

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
K M Ford
M M Lythe

Date of Appeals: 10 July 2007

Date of Decision: 14 December 2007

Date of Notification of Decision: **21** December 2007

DECISION ON APPEALS

BY SAND BAR & RESTAURANT LIMITED AND ROBYN LEGGE-HUNT

Appeals

1. Sand Bar & Restaurant Limited ("**Sand Bar**") and Robyn Legge-Hunt (together referred to as the "**Appellants**") appealed under section 77 of the Gambling Act 2003 (the "**Act**"), against a decision of the Secretary for Internal Affairs (the "**Secretary**") to cancel the class 4 venue licence for the venue known as "Sand Bar" (the "**venue**") in Christchurch.

The Gambling Act 2003 and Regulations

2. The key sections of the Act relevant to this appeal 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
 - (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any key person,
 - (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

- (s) any other requirement 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:
 - (b) the financial position and the credit history of the key person;
 - (c) the profile of past compliance by the key person with-
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and

72. Renewal of class 4 venue licence

- (4) Sections 66 and 67 apply to an application for renewal as if it were an application for a class 4 venue licence.
- (5) The Secretary must refuse to renew a class 4 venue licence if-
 - (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.

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;

75. Procedure for suspending, cancelling or refusing to amend or renew class 4 venue licence

- (5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager of, –
 - (a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or ...

76. Consequences of suspension, cancellation, or refusal to amend or renew class 4 venue licence

- (5) Subject to section 78 a licence that is suspended or cancelled or refused to be renewed or amended remains in force or unchanged (as the case may be) until the period for making an appeal expires.

77. Appeal to Gambling Commission regarding class 4 venue licence

- (1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to –
 - (e) suspend or cancel a class 4 venue licence held by the corporate society;
- (2) An appeal must be in writing and must be made within –
 - (a) 15 working days after the date of the notice of the Secretary's decision; or
 - (b) any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in paragraph (a).

78. Consequences of appeal regarding class 4 venue licence

- (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 –

- (ii) appeals a decision to suspend or cancel the licence under section 77(1)(e).

104. Gaming machine profits must be banked

- (1) A venue manager must bank all gaming machine profits from class 4 gambling into a dedicated account at a registered bank in the name of the holder of the class 4 operator's licence
- (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

3. Regulation 4 of the Gambling (Class 4 Banking) Regulations 2006, provides as follows:

4. Banking of machine profits

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

Background

4. Sand Bar signed a site agreement with the Lion Foundation ("**Lion**") on 5 April 2002. Ms Legge-Hunt and Patricia McCartin signed the agreement as Sand Bar's directors and were noted as contact people for the venue.
5. By letter dated 19 April 2004, the Secretary issued a warning letter to Sand Bar stating that it had "late banked" gaming machine profits ("**GMP**"), on eight occasions between 1 January 2004 and 31 March 2004.
6. By letter dated 20 May 2005, the Secretary wrote to Lion stating that Sand Bar had late banked GMP on 15 occasions between 1 April 2004 and 17 May 2005. The letter proposed to suspend Sand Bar's class 4 venue licence for one month. The proposal to suspend the licence was subsequently withdrawn.
7. By letter dated 26 April 2006, the Secretary issued a warning letter to Lion and Sand Bar stating that Sand Bar had late banked GMP on 11 occasions between 2 December 2005 and 31 March 2006.
8. The Secretary identified 13 late bankings of GMP between 14 April 2006 and 27 August 2006. On 14 September 2006, the Secretary issued an infringement notice to Caroline Turnball, who was listed as Sand Bar's venue manager, in the sum of \$2,500. The suspension notice was subsequently withdrawn because of the difficulties in identifying the appropriate recipient of the notice. (Five people had been identified as the venue manager, in contravention of the Act which requires the venue manager to be an identified individual.)

The Secretary identified 13 late bankings of GMP between 3 September 2006 and 26 February 2007. By letter dated 22 March 2007, the Secretary wrote to Sand Bar

proposing to cancel its class 4 venue licence because of repeated late banking of GMP and because he was not satisfied with the suitability of the venue's key people.

10. Sand Bar's solicitors responded by letter dated 11 May 2007, stating that GMP had not been banked late, but accepted that Sand Bar "had been under cashflow stress".
11. By letter dated 19 June 2007, the Secretary wrote to the Appellants and Lion cancelling the class 4 venue licence for the venue. The Appellants appealed the cancellation to the Commission.

Submissions on behalf of the Appellants

12. In summary, the Appellants submitted as follows:
 - (a) The notice of cancellation dated 19 June 2007 is invalid, as it incorrectly stated that the cancellation of the licence would take effect on 8 July 2007 when it would actually take effect (if no appeal were lodged or no extension of time in which to appeal was granted) on 10 July 2007.
 - (b) Although conceding that the venue manager did not satisfy the requirements of Regulation 4 of the Gambling (Class 4 Banking) Regulations 2006, the Appellants did not accept the Secretary's contention that the Regulations will not be met in the future can be a valid ground to cancel the licence, as it is not possible to ascertain future conduct.
 - (c) The Secretary provided no evidence that Sand Bar misused GMP or that GMP was used to address cashflow difficulties.
 - (d) The Secretary relied upon four grounds in reaching his decision to cancel the licence, sections 67(1)(s), 67(1)(c), 67(1)(d), and section 67(1)(r), but provided no evidence in support, despite a request to do so under the Official Information Act 1982.
 - (e) Rather than cancelling the licence, the Secretary should have given greater consideration to suspending the licence.
13. The Appellants filed no evidence in support of their submissions.

Submissions on behalf of the Secretary

14. In summary, the Secretary submitted as follows:

- (a) He cancelled the licence under section 74(1)(a) of the Act, but as an application has now been made to renew Sand Bar's class 4 venue licence, the

Commission could, taking a *de novo* approach, also determine whether to cancel the licence under section 72(5) of the Act.

- (b) The Commission cannot be satisfied that the section 67 requirements are met as there have been over 70 notified instances of late banking, over 30 instances of cheques being dishonoured, and numerous threats by Lion to disconnect gaming machines at the venue since January 2004.
- (c) In the time between the Secretary's proposal to cancel the licence and his decision to cancel, when the Appellants should be strictly adhering to their banking requirements, there were three further instances of late banking. There have been two further instances of late banking during the appeal process.
- (d) The Commission cannot be satisfied as to Ms Legge-Hunt's suitability as a venue manager under section 67(1)(c) of the Act. Ms Legge-Hunt was a founding signatory to the site agreement with Lion, one of five nominated venue managers in September 2004, and the sole nominated venue manager since 2007. Irrespective of the inferences that can be drawn from her role at Sand Bar leading up to her being the sole venue manager, from January 2007 to March 2007 there were four instances of late banking for which she was responsible. Since April 2007, there have been five further instances of late banking.
- (e) The Commission cannot be satisfied as to Ms McCartin's suitability as a key person under section 67(1)(d) of the Act. Ms McCartin was a founding signatory to the site agreement with Lion, one of five nominated venue managers in September 2004 and the sole nominated venue manager for a brief period over the 2005/2006 New Year. She signed a schedule to the venue agreement as being responsible for GMP banking, and in undertaking this role, she was responsible for all late GMP banking from September 2004 to January 2007.
- (f) The Commission cannot be satisfied as to Sand Bar's suitability as a key person under section 67(1)(d) of the Act, as it is Sand Bar's financial position that is the underlying cause of many of the late bankings. Given the habitual failure to bank GMP on time and the numerous dishonoured cheques, Sand Bar must have relied upon GMP to conduct its business.
- (g) Under section 333 of the Act, his staff obtained information from Sand Bar's bank, and from Lion, which showed that during the appeal process, there were two non-notified instances of late banking following dishonoured cheques, seven dishonoured cheques to creditors between 3 and 17 September 2007, and an instance of venue expense payments being used to offset GMP owed.

- (h) Given the Appellants' history of late banking, the Commission cannot be satisfied that there are no other factors likely to detract from achieving the purpose of the Act, or that any other requirement set out in Regulations or the licence conditions is, or will be met. In particular, the Commission cannot be satisfied that Regulation 4 of the Gambling (Class 4 Banking) Regulations 2006 will be met.
 - (i) The Appellants' challenge to the validity of the cancellation notice is irrelevant. Under section 78(2) of the Act, a class 4 venue licence remains in force until the expiry of the period for appeal (which the Appellants calculated correctly) or the outcome of that appeal, should it be lodged. Whatever point in time the Secretary mistakenly stipulates is the point at which the cancellation takes effect has no bearing on this right.
 - (j) Cancellation is the appropriate sanction, as there can be no confidence in future compliance. Given the opportunities that have been afforded to the Appellants to date and the breaches during the appeal process, a suspension of the licence would serve no purpose and be of no remedial value.
15. The Secretary supported his submissions with an affidavit from John Henneby, a Senior Gambling Inspector at the Department of Internal Affairs.

Submissions in reply

16. In reply, the Appellants submitted (in summary) as follows:
- (a) The notice of cancellation is invalid and the Secretary should be required to issue a valid notice.
 - (b) Their banking history is not contested.
 - (c) They have reformed their behaviour and are committed to ensuring that they continue to bank on time.
 - (d) For the Commission to cancel the licence, when other remedies are available, would result in a punishment that would outweigh the seriousness of the mischief, given that the mischief has been remedied. Some form of sanction may be required, but suspension, rather than cancellation, is more appropriate.
 - (e) Gaming is an integral part of the Sand Bar business and if the licence were cancelled, it would significantly reduce the value of the business, compromise

the livelihood of Sand Bar's shareholders, punish its staff, Lion, and the community at large.

17. After filing their submissions in reply, the Appellants' solicitors also filed a letter stating that their clients had been fully compliant in the period from 26 November 2007 to 7 December 2007. In response, the Secretary stated that he did not have enough time before the Commission heard the appeal to investigate whether this information was correct.

Analysis

18. The Commission considered that the following key issues arose for determination in this appeal:
- (a) Did the statement of the incorrect date by which cancellation takes effect invalidate the notice of cancellation?
 - (b) Is the Commission able to treat this appeal as an appeal against a refusal to renew the licence under section 72 of the Act?
 - (c) Is there jurisdiction to cancel the licence?
 - (d) If so, what sanction (if any) is appropriate?

Validity of cancellation notice

19. One of the Appellants' main submissions was that the notice of cancellation was invalid as it incorrectly stated the date by which the cancellation would take effect.
20. As a preliminary observation, the Commission observes that the Appellants' technical objection to the notice ignores the *de novo* nature of the Commission's function on appeal. Deficiencies in the Secretary's process are rarely relevant to the outcome of a *de novo* appeal in which the Commission itself re-considers all matters afresh. The nature of this assessment means that most technical objections, such as those advanced by the Appellants, are remedied in the appeal reconsideration.
21. If the Appellants are seeking a declaration as to the validity of the Secretary's notice, the Commission doubts that it has separate jurisdiction to declare whether or not the notice is valid.
22. The Commission needs only to consider whether a notice with the correct date on which the cancellation takes effect is needed in order for there to be a cancellation (and hence also a right of appeal).

23. Sections 74-78 of the Act sets out a mandatory procedure which the Secretary must follow if he intends to suspend or cancel a class 4 venue licence. The procedure requires that the affected parties receive written notice of the Secretary's allegations, and provides them with an opportunity to respond.
24. If the Secretary decides to cancel the licence, section 75 provides that he must comply with certain notification requirements, including the date on which the cancellation takes effect, the reason for the cancellation, the right to appeal the Secretary's decision, and the process to be followed for an appeal under section 77.
25. The Secretary acknowledged that the notice of cancellation specified an incorrect date on which the cancellation takes effect – the notice stated that the cancellation would have effect from midnight on 8 July 2007, whereas 15 working days after the date of the notice (19 June 2007), would result in the cancellation taking effect from midnight on 10 July 2007, in the event that no extension of time to appeal were sought or no appeal were filed. The Commission observes that the date on which a cancellation actually takes effect depends on whether an application for extension to appeal is granted as well as if an appeal is filed. The actual date will not be known at the time of cancellation.
26. After considering the statutory provisions, the Commission determined that a notice specifying the correct date on which the cancellation takes effect is not needed for there to be a cancellation which can be the subject of an appeal. The purpose of the requirement is to inform the Licence Holder (and certain other affected parties) of the cancellation of the licence, rather than being a matter which is necessary in order for the cancellation to be valid. The error here was an irregularity that did not affect the validity of the cancellation.
27. The notice of cancellation also triggers the appeal period and, as noted in the Secretary's submissions, whatever date the Secretary mistakenly states cannot affect the Appellants' statutory right to appeal. In the present case, the notice of cancellation correctly stated that an appeal had to be lodged within 15 working days of the notice of cancellation (or such longer period applicable if an extension is granted).
28. In its deliberations on this matter, the Commission's attention was drawn to the case of *Harts Contributory Mortgages Nominee Co Limited v Bryers* (HC Auckland, CP403–IM00, 19 December 2003). In that case, Justice Fisher rejected an argument that stating the wrong year in a notice under the Property Law Act 1952 rendered the notice invalid. He stated:

[28] While Mr Keene presented this whole argument with skill and ingenuity, I would be sorry to see a party to litigation succeed on an unmeritorious technicality of

this nature. The law is not an inward-looking game to be played for its own sake like Monopoly or Ludo. It is there to enable people to govern their relationships in the real world. No-one at any point suggested that the slip made in preparing this piece of paper had the slightest impact on anyone.

Similarly in this appeal, there was clearly no reliance on the 8 July date as the appeal was filed on 10 July 2007, the last date of the appeal period.

29. The Commission considers that:
- (a) the notice of cancellation should have specified that the cancellation takes effect on the later of 10 July 2007, or the date that the Gambling Commission extends the time for appealing to (if the application for an extension is made before 10 July 2007), or the date on which the outcome of any appeal is determined;
 - (b) the error did not affect the validity of the notice in this case; and
 - (c) no considerations of justice arising from the error are material to its *de novo* reconsideration of the Secretary's decision.

Can the appeal be treated as an appeal against a refusal to renew?

30. The Secretary submitted that the Commission can treat the appeal as an appeal against a refusal to renew the licence as the licence has fallen for renewal since the time that the appeal was filed.
31. The Commission declined to do so. This appeal is an appeal against a cancellation of Sand Bar's class 4 venue licence. The *de novo* function of the Commission on appeal simply means that the Commission steps into the shoes of the Secretary and itself decides, on the evidence before it, whether the licence should be cancelled, without being bound by the Secretary's decision. It does not mean that the Commission can decide another matter (albeit related) which would have subsequently arisen for decision if the cancellation had not been effected.
32. Further, no evidence was directed at whether the licence should be renewed, and the Secretary made only minimal submissions on the issue.

Is there jurisdiction to cancel the licence?

33. Section 74(1)(a) provides that the Secretary (or the Commission on appeal) may suspend for up to six months, or cancel a class 4 venue licence if satisfied that any of the grounds in section 67 are no longer met. The Commission considers that "satisfied" in this context refers to the civil standard of proof (balance of probabilities), rather than the criminal

standard (beyond reasonable doubt) and simply means that the Commission must consider the relevant evidence and make up its mind on the issue.

34. The grounds in section 67 that are of relevance to this appeal are:
- (a) section 67(1)(s) – whether any other requirement set out in regulations or licence conditions will be met;
 - (b) sections 67(1)(c) and 67(1)(d) – key person suitability; and
 - (c) section 67(1)(r) – whether there are other factors that are likely to detract from achieving the purpose of the Act.
35. The Secretary filed an affidavit from John Hennebry, a Senior Gambling Inspector at the Department of Internal Affairs. This affidavit annexed a number of documents setting out 77 incidents of non-compliance by the Appellants, including dishonoured cheques, banking of insufficient GMP and late banking of GMP. The incidents date back to January 2004, and on many occasions, the Secretary warned the Appellants that the outstanding money must be banked immediately otherwise the gaming machines would be disabled.
36. In contrast, the Appellants did not file any evidence, sworn or otherwise. The Commission would have expected the Appellants to have challenged the Secretary's allegations if they were not true. The Appellants did not do this, and in fact their submissions in reply expressly acknowledged that there had been late bankings in the past, and impliedly, at least, that all of the above grounds in section 67 are no longer met.
37. The Commission considered the recent letter from the Appellants' solicitors. Even assuming that all the contents of the letter are correct, it merely shows that the Appellants complied with their obligations for a two week period. That is of little significance in the wider scheme of things.
38. Given the Secretary's evidence, the lack of contrary evidence by the Appellants and the Appellants' accepted history of non-compliance, the Commission is satisfied that sections 67(1)(s), 67(1)(c), 67(1)(d) and 67(1)(r) are no longer met.

If so, what sanction (if any) is appropriate?


39. As the Commission is satisfied that a number of the grounds in section 67 are no longer met, the Commission proceeded to consider whether to exercise its discretion to suspend or cancel Sand Bar's class 4 venue licence. Section 74(2) provides that in deciding

whether to suspend or cancel the class 4 venue licence, the Secretary, and Commission on appeal, must take into account matters in section 67.

40. The Appellants accepted that some form of sanction may be appropriate, but urged the Commission to consider suspending Sand Bar's venue licence, rather than cancelling it. The Secretary, on the other hand, submitted that in the circumstances of this appeal, a cancellation of licence was the appropriate sanction and that suspension would be of no remedial value, given the Appellants' repeated non-compliance. The Commission concurs with the Secretary's assessment.
41. The Appellants' submission that cancellation is inappropriate is premised on there being no breaches in the future, but several of the grounds upheld are prospective in nature and involve consideration of what is likely to occur in the future. In finding that the requirements are no longer met, the Commission has held that the required prospective compliance is unlikely to occur. On all the evidence before the Commission, there is no reason to think that anything will change. There is no proposal to change the unsuitable key persons. The Appellants have been afforded every opportunity to comply with their banking requirements, but have failed consistently to do so. The fact that there were further breaches during the appeal process illustrates how unlikely any change is.
42. In the circumstances, the nature of the breaches and the lack of evidence to support a conclusion that a suspension would have a remedial effect, the Commission is driven to the conclusion that cancellation is the appropriate remedy.

Decision

43. 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 2007