

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

**BEFORE A DIVISION OF THE GAMBLING COMMISSION**

Members: G L Reeves (Chief Gambling Commissioner)  
L M Hansen  
A K Foote

Date of Application: 12 October 2011

Date of Decision: 9 December 2011

Date of Notification  
of Decision: *18<sup>th</sup>* February 2012

**DECISION**  
**ON AN APPLICATION FOR PARTICULAR DISCOVERY BY FIRST SOVEREIGN TRUST**

**Background**

1. First Sovereign Trust ("**Trust**" or "**FST**") has appealed a decision by the Secretary for Internal Affairs ("**Secretary**") refusing to renew its class 4 operator's licence. Before filing its substantive submissions on the appeal, FST made an application to the Gambling Commission seeking an order for "particular discovery" against the Secretary. The Secretary opposed the application. Following directions by the Chief Gambling Commissioner, the Secretary and First Sovereign filed submissions addressing:
  - (a) the Commission's jurisdiction to make the order sought;
  - (b) the desirability of making the order;
  - (c) the relevance of the information sought; and
  - (d) timetable orders.

**Relevant law**

2. The relevant law is as follows:

**Gambling Act**

**225 Gambling Commission is Commission of Inquiry**

- (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.



- (3) The Gambling Commission has no power to—
- (a) acquire, hold, or alienate property; or
  - (b) employ people.
- (4) Powers conferred on the Gambling Commission by this subpart are additional to powers conferred on the Gambling Commission by the application of the Commissions of Inquiry Act 1908.
- 226 Gambling Commission may engage experts and receive wide evidence**
- (1) The Gambling Commission may appoint experts to assist the Gambling Commission to exercise its functions or powers, or to do any of the things specified in subsection (2).
- (2) A person appointed as an expert—
- (a) may be required to make inquiries, conduct research, facilitate consultation, or provide reports on matters before the Gambling Commission; and
  - (b) is entitled to be paid fees by the Gambling Commission at rates that the Gambling Commission thinks fit; and
  - (c) may be separately reimbursed for expenses reasonably incurred in performing the services.
- (3) The Gambling Commission may—
- (a) reconsider any matter that has been determined by it and issue a fresh determination; and
  - (b) receive evidence that is not admissible in a court.

#### **Commissions of Inquiry Act**

##### **4 Commissioners' powers**

- (1) For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of citing parties . . . and conducting and maintaining order at the inquiry.
- (2) Repealed.

...

##### **4B Evidence**

- (1) The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a court of law.

...

##### **4C Powers of investigation**

- (1) For the purposes of the inquiry the Commission or any person authorised by it in writing to do so may—
- (a) Inspect and examine any papers, documents, records, or things:
  - (b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:

- (c) Require any person to furnish, in a form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records as aforesaid.
- (2) The Commission may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this section shall be verified by statutory declaration or otherwise as the Commission may require.
- (3) For the purposes of the inquiry the Commission may of its own motion, or on application, order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Commission, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy.
- (4) Every person shall have the same privileges in relation to the giving of information to the Commission, the answering of questions put by the Commission, and the production of papers, documents, records, and things to the Commission as witnesses have in Courts of law.

#### **Official Information Act**

#### **6 Conclusive reasons for withholding official information**

Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—

...

- (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; ...

#### **Background**

3. The Secretary refused to renew the Trust's licence because he was not satisfied of a number of matters of which he must be satisfied under section 52(1) Gambling Act 2003 (the "Act"). He was not so satisfied, in large part, because of costs that the Trust had incurred in the purchase of Administration Management Service Limited ("AMS") with which FST had contracted to provide management services to it. The Secretary considered that the purchase price was neither necessary nor reasonable.
4. The Trust's position is that incurring the purchase price was necessary and reasonable and that the question of what is necessary and reasonable cannot be considered in a vacuum; but rather should be considered by reference to costs paid by other class 4 operators in similar circumstances. After filing its notice of appeal, the Trust asked the Secretary to provide it with documents he held relating to the buyout by two named class 4 operators of their contracted service providers as well as all documents in relation to similar transactions by any other class 4 operators. The Trust recorded in its letter requesting the documents, dated 26 September 2011, that it had requested disclosure of the same documents on an earlier occasion (prior to filing the appeal). The Secretary



treated the 26 September 2011 request as one for official information under the Official Information Act 1982 ("OIA") and refused to provide the information under section 6(c) OIA on the grounds that providing the information would prejudice the maintenance of law including the prevention, investigation and detection of offences and the right to a fair trial.

5. On 12 October 2011, the Trust filed an interlocutory application for particular discovery by the Secretary of:
  - (a) all documents held by the Secretary in relation to a management or similar contract between a named corporate society and two named companies, as well as any other service provider(s) or management company or companies;
  - (b) all documents held by the Secretary in relation to the settlement or buyout of a management or similar contract between two further named corporate societies and their service provider(s) and/or management company or companies; and
  - (c) all other documents held by the Secretary in relation to other similar transactions.
6. The Trust sought orders that, among other things, the Secretary provide copies of the above documents to the Commission and the Appellant; the Secretary provide an affidavit verifying that all such documents in the Secretary's possession had been provided and stating, if any such document had been in the Secretary's possession but was no longer, what had become of it; and that Secretary pay the Appellant's costs in preparing and filing the application. The Trust also set out its grounds for believing that the documents sought were, or may have been, in the Secretary's possession.

#### **FST's submissions**

7. FST submitted that the Commission has jurisdiction to make the discovery order under sections 225 and 226 of the Act.
8. FST submitted that, as a general principle and as a matter of natural justice, all information relating to a matter in an appeal should be disclosed. It submitted that the terms of such an order should be made by analogy with the High Court Rules 2008 for the following reasons:
  - (a) The procedure under the High Court Rules had been developed over many years to deal appropriately with the disclosure of information in trials, and in particular where the Court was considering a matter at first instance.



- (b) The Commission's appeal process was similar to an adversarial process, and also to a "first instance" forum, in that it considered appears afresh and could hear fresh evidence.
  - (c) The default terms of a High Court discovery order provide the appropriate test for the Commission to meet its natural justice obligations regarding disclosure. The test for documents that should be discovered is whether they relate to a matter in question in the proceeding (rather than requiring that the documents be "directly relevant").
- 9. FST acknowledged that framing its application as a request for particular discovery created "something" of a difficulty. Under the High Court Rules, an order for particular discovery is designed for situations in which there are grounds for believing that a party has not discovered documents that should have been discovered. FST submitted that it was not arguing that the Department had failed to comply with the terms of the Commission's initial request, but rather that the rule for particular discovery, when read together with the default discovery rule, provided the Commission with a useful process to consider in this situation.
- 10. In response to the Commission's request that the submissions address the relevance of the documents sought, the Trust submitted that there were "significant dangers" in a party other than the party seeking the documents, or even the Commission, evaluating the relevance of documents for the purposes of disclosure, because neither the other party nor the Commission were likely to fully appreciate the arguments that the party seeking the documents might be considering. The Trust submitted that it was clear that the documents requested related to a matter in question in the appeal, namely whether the amount paid to AMS was actual, reasonable and necessary.
- 11. FST submitted that the order should be made for the following reasons:
  - (a) The information sought should related to a matter in question in the proceeding and therefore satisfied the High Court test for discovery.
  - (b) In any case the material sought was directly relevant to the central issue on appeal, namely whether the costs that it incurred in terminating its arrangement with AMS were reasonable or necessary.
  - (c) The concepts of reasonableness and necessity did not exist in a vacuum and should be considered against other conduct in the industry.



- (d) It would also assist the Commission in evaluating competing expert views (the Appellant expected that both it and the Secretary will produce expert valuation evidence).
  - (e) The Secretary was obliged to act consistently. If the documents requested were to reveal that the Secretary had not acted consistently, FST would be entitled to raise this with the Commission.
12. The Secretary's OIA concerns were, in FST's submission, irrelevant. The Commission, as a commission of inquiry, has much broader powers than a "requester" under the OIA.
13. Finally, the Appellant submitted that, if it were successful, it sought costs against the Secretary.

#### **Secretary's submissions**

14. The Secretary accepted that the Commission had the jurisdiction to make the order sought, but submitted that the order should not be made for the following reasons:
- (a) The Department had ongoing investigations in relation to the organisations in respect of which FST sought information. Providing the information would be likely to prejudice those investigations. Further, if those investigations led to a decision or decisions by the Secretary that were then appealed, providing the information now might prejudice the right of both parties to a fair trial. The Secretary noted that this was a ground for refusal to provide information under section 6(c) OIA.
  - (b) The information was not relevant. The question of what is a reasonable or necessary cost requires a case-by-case assessment. Whether another person or entity has incurred similar costs in the past is irrelevant. The Commission's *de novo* approach requires a discrete and fresh assessment of the costs in this case.
15. The Secretary submitted that the parties should meet their own costs.

#### **FST's submissions in reply**

16. In reply FST submitted, in summary, that:
- (a) The OIA was not relevant in the present context.
  - (b) The Secretary had not substantiated his claim that disclosure would prejudice other investigations. His position appeared to be that, because there were ongoing investigations, it followed automatically that prejudice would arise.



- (c) The Secretary's concerns regarding prejudice appeared to be based on the assumption that the information would be released publicly (as would be the case under OIA). FST did not intend to release the information publicly. Indeed, if the orders were made on the basis of normal High Court discovery principles, there would be an implied undertaking that the information could only be used for the purpose of the appeal.
- (d) The Secretary's concern that by seeing the documents sought in relation to this appeal ahead of other appeals the Commission might form a pre-determined view was unfounded.
- (e) The Secretary misunderstood the Commission's *de novo* approach as meaning the Commission considered each appeal in isolation.
- (f) The information was relevant, because it would shed light on the industry's attitude towards transactions of this nature, in particular regarding valuation.

### Analysis

- 17. The Commission first considered whether the application should be considered under the OIA. The Commission was of the view that it should not. Although the Secretary and the Department were correct to treat the initial requests as requests under the OIA, the matter now fell to be considered under the Gambling Act and the COI Act. The powers of inquiry under the COI Act, including the production of information to a commission of inquiry are not limited by reference to the grounds for withholding information in the event of requests under the OIA.
- 18. The Commission considered that (assuming the material was relevant) it had jurisdiction to require the provision to it of the material in question, by virtue of the COI Act and the Gambling Act for the following reasons:
  - (a) Under section 225 of the Act, the Commission is a commission of inquiry under the COI Act, and has the powers of a commission of inquiry under that Act.
  - (b) Under section 4C COI Act, the Commission may require any person to produce for examination "any papers, documents, records, or thing, in that person's possession or under that persons control" and to allow copies to be made (section 4C(1)(b)).
  - (c) The Commission may also require any person to furnish "any information that may be required by it" (section 4C(1)(c)).

- (d) Further, under section 4C(3), the Commission may, of its own motion or on an application, order that any information or document furnished, produced to it be supplied to any person appearing before the Commission and it may impose such conditions as it thinks fit on the supply or use of the information. The latter is in contrast to the OIA where information is provided without restriction on its future use or disclosure.
19. In the Commission's view, the Act and COI Act expressly and adequately provided for the provision to the Commission of the information sought by FST as well as for the protection of sensitive information in the event of its provision to the Appellant. In the Commission's view, it was not necessary for it to have resort to the High Court Rules for discovery. Nor did the Commission consider it desirable to adopt the High Court Rules procedure by analogy. In reaching this conclusion, the Commission took into account the following:
- (a) The Commission's function is not directly analogous with the adversarial process of the High Court. It is a specialist body with powers to investigate and receive information which a court could not receive, and which makes decisions in the public interest rather than adjudicating on private disputes between individuals.
- (b) In *Comalco New Zealand v Broadcasting Standards Authority* (1995) 9 PRNZ 153, the Court of Appeal considered it unnecessary to determine whether the High Court Rules for discovery applied in circumstances in which jurisdiction to order the production of the material in question was provided for under s 4C COI Act.
- (c) The High Court Rules provide for the discovery of documents by the party in possession of the documents directly to the other party or parties. It is then for the parties to decide which documents will be produced to the Court in evidence. The COI Act does not provide for the Commission to order that one party provide another party with documents, without also requiring the material to be provided to the Commission (*Comalco New Zealand v Broadcasting Standards Authority* CA 148/95 4 March 1996). Although in this case FST did not seek for the material to be provided to it without being provided to the Commission as well, this was another factor that told in favour of deciding disclosure issues under the COI Act without overlaying the High Court Rules.
- (d) The Commission understands that the test for documents to be discovered under the High Court Rules has been changed with effect from 1 February 2012.



20. The Commission therefore decided to dismiss the application for discovery in the terms sought by FST, albeit it not for the reasons advanced by the Secretary.
21. The Commission then considered whether or not to require production of the documents sought by FST under s 4C COI Act.
22. Section 4C(1)(b) COI Act empowers the Commission to require the production of “any” documents and section 4C(1)(c) empowers it to require the furnishing of any information or particulars “that may be required by it”. Neither of those sections restricts the information or documents that the Commission might require. However, section 4B provides that the Commission may receive evidence if in the Commission’s opinion it may assist the Commission to deal effectively with the subject of the inquiry. Accordingly, the Commission considered that it should only require the production of information that would potentially assist it in its decision-making.
23. Insufficient information was provided to the Commission for it to make a proper assessment of the relevance of the material sought or of the Secretary’s argument regarding prejudice. In the Commission’s view, the documents requested might well be relevant and of assistance to it. The Commission considered that, if the matters at issue in FST’s appeal had occurred elsewhere in the industry, this might provide relevant context to the Commission. The Commission was also of the view that, if relevant information were available that could assist in its decision-making, it would prefer to see that information. However the mere possibility of relevance does not mean that the information will necessarily be relevant and of assistance. The information before the Commission was insufficient for it to be able to make any conclusive assessment of the potential assistance of the documents sought.
24. The Commission did not agree that its *de novo* approach to appeals rendered the information irrelevant. Although the *de novo* approach means that the Commission is not bound by the approach taken by the Secretary regarding other societies, it does not render contextual evidence regarding other societies irrelevant and of no assistance. The Commission’s statutory power to make its own inquiries and obtain new information is the basis for its *de novo* approach.
25. In order for the Commission to make a proper assessment of the potential relevance and prejudice of the documents sought, the Commission requires further information. The Commission therefore directs the Secretary to provide it with:
  - (a) the identity of the societies, of which he is aware, that have bought the goodwill of their contracted service and/or management providers since the commencement of the Act; and



(b) the circumstances and terms of the sale, including purchase price paid, and how it was made up, and a brief statement of the relevant points of similarity and distinction with the present appeal.

26. The Commission will consider that further information and, if necessary, may seek further clarification or information. Once it has had a chance to consider the potential relevance of that information, the Commission will consider providing it to FST on conditions regarding its future disclosure and use. In relation to FST's submission that it ought to receive all the documents sought in order that it may make its own assessment of relevance, the Commission notes that under the COI Act, the power to require the production of documents is at the Commission's discretion. The fact that one or other of the parties considers documents relevant to its case will in turn be relevant to the Commission's consideration of whether or not the documents might assist it to deal effectively with the subject of the inquiry.

#### **Decision of the Commission**

27. For the reasons above, the division dismisses the application by the Appellant for particular discovery but makes orders, in the terms set out in paragraph 25, under section 4C(1)(c) requiring the Secretary to provide it with the specific information described in paragraph 25.
28. The Commission makes no order as to costs.

  
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**Graeme Reeves**  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

15<sup>th</sup> February 2012

