GC03/21

IN THE MATTER	of the Gambling Act 2003
AND	an appeal by **PUB CHARITY LIMITED** against a decision of the Secretary for Internal Affairs regarding Class 4 venue licence conditions for **MATATA HOTEL**

BEFORE THE GAMBLING COMMISSION

Members:	L M Hansen (Chief Gambling Commissioner) D C Matahaere-Atariki W N Harvey S C L Pearson
Date of Appeal:	14 August 2020
Dates of Decision:	6 November 2020, 11 December 2020, 5 March 2021
Date of Notification of Decision:	8 April 2021

DECISION ON AN APPEAL BY PUB CHARITY REGARDING VENUE LICENCE CONDITION FIXING MAXIMUM PERMITTED NUMBER OF GAMING MACHINES AT MATATA HOTEL

1. INTRODUCTION

1.1 Pub Charity Limited ("**Pub Charity**") appealed a decision of the Secretary for Internal Affairs to issue a Class 4 venue licence for the venue at 47 Arawa Street, Matata ("**Matata Hotel**") with a commencement date of 14 August 2020 and a condition that no more than 9 gaming machines may be operated. The previous venue licence for Matata Hotel had permitted up to 14 machines, although only 5 machines had been operated in practice.

1.2 The Secretary's decision was made on the basis that:

(a) the venue did not hold a class 4 gambling licence between 11 December 2019 (the effective date on which the prior licence was surrendered) and 14 August 2020 (the commencement date of the new licence issued);

(b) as a consequence, the venue did not have a class 4 gambling licence for a period of more than 6 months (after 17 October 2001) and had accordingly lost any statutory entitlement arising under s 92 of the Gambling Act 2003 to a licence for more than 9 gaming machines at the venue; and

(c) in all the circumstances, the licence should not be backdated in order to preserve the former statutory entitlement.

1.3 Pub Charity argued on appeal that the Secretary had erred by making the decision on the basis both that the six month period commenced on 11 December 2019 and that discretion should not have been exercised to backdate the new venue licence for the Matata Hotel to the date of application in order to preserve "grandfathered" rights under s 92 of the Act, the effect of which would be to permit the operation of up to 14 gaming machines at the venue.

1.4 The Commission received extensive written submissions for the Appellant, accompanied by affidavits of Martin Cheer (the Chief Executive of Pub Charity), Allan Unsworth (the sole director of the owner of the Matata Hotel, the venue) and Simon Sorapure (a Senior Licensing and Purchasing Officer employed by Pub Charity), similarly extensive written submissions on behalf of the Secretary, accompanied by an affidavit of Charlotte Stanley (the Deputy Director Gambling, Regulatory Services) and reply submissions on behalf of Pub Charity.

1.5 As commenced, the appeal raised the following key issues for determination:

(a) What is the date on which the prior venue licence ceased to have effect? The issues in this regard relate to both the timing of the processing of a surrender form received on 12 December 2019 and the creation of a new venue licence form for the Matata Hotel dated 17 January 2020 in the course of that processing.

(b) Whether the licence issued should be backdated to one day before the lapse of six months after the prior venue licence expired.

1.6 After considering the submissions from the parties on the foregoing issues, the Commission raised with the parties another issue, which had not been addressed in the submissions already received, and the parties filed detailed further submissions on that issue.

2. BACKGROUND

2.1 The Southern Trust, the previous holder of the venue licence, held a venue licence for the Matata Hotel, which expressly permitted the operation of up to 14 gaming machines pursuant to rights arising under section 92. On 12 December 2019, it filed with the Department of Internal Affairs ("**DIA**") a form notifying the surrender of the licence with effect from 11 December 2019.

2.2 The appeal was not brought on the basis of an agreed summary of facts. Notwithstanding that, there appeared to be little disagreement in substance over the events which occurred

between 12 December 2019 and 14 August 2020. The parties principally differed in the events which they emphasised in their respective submissions and, more particularly, in respect of the effect or relevance of those events.

2.3 The affidavit of Mr Sorapure contained an extensive timeline, in excess of six pages in length (which was reproduced in the Appellant's submissions). The affidavit of Ms Stanley similarly set out a detailed chronology account of events from the perspective of DIA.

2.4 The following is a summarised statement of the key events as they appeared from the affidavits:

12/12/19	The prior licence holder, The Southern Trust, notifies DIA of the surrender of its venue licence for Matata Hotel with effect from 11 December 2019. The notice advises that the reason for surrender is the gambling operation was not viable.
17/01/20	A venue licence form for Matata Hotel, in favour of The Southern Trust, with a commencement date of 17 January 2020, is created in the DIA IGP system. The creation occurred in the course of recording the termination by surrender of The Southern Trust licence in the DIA IGP system
29/01/20	The DIA publishes on its website a quarterly report which showed that, as at 31 December 2019, The Southern Trust held a venue licence for the Matata Hotel which was listed as having 5 gaming machines.
07/02/20	Gambling Regulator, Brent Addison, advises Pub Charity by email "Max no. of gm's allowed is 14".
28/02/20	Unsworth Investments Limited enters into conditional agreement to purchase the Matata Hotel, with a settlement date of 31 March 2020.
02/03/20	Mr Addison's email is forwarded to Unsworth Investments Limited by Pub Charity.
09/03/20	Unsworth Investments Limited enters into a venue agreement with Pub Charity and the venue key person, Allan Unsworth, completes and signs a personal information form.
21/03/20	New Zealand goes to Covid-19 Alert Level 2 (from 21 March 2020 to 23 March 2020).
23/03/20	New Zealand enters Alert Level 3 nationwide lockdown (from 23 March 2020 to 25 March 2020).
25/03/20	New Zealand enters Alert Level 4 nationwide lockdown (from 25 March 2020 to 27 April 2020).
31/03/20	The original intended settlement date as provided in the agreement for sale and purchase of the venue. Settlement and possession is postponed by agreement owing to the lockdown.

27/04/20	New Zealand enters Level 3 nationwide lockdown (from 27 April 2020 to 12 May 2020).
13/05/20	New Zealand moves to Level 2 (from 13 May 2020 to 8 June 2020). Bars and pubs are not permitted to open until 21 May 2020.
14/05/20	Lease negotiations are finalised and a deed of assignment of lease signed.
15/05/20	The Matata Hotel purchase is settled.
22/05/20	Mr Unsworth completes a second personal information form (because personal information forms signed more than one month before submission are not accepted by DIA).
29/05/20	The venue licence application is lodged with DIA. The application omitted to attach the venue agreement in error and noted that it did not include machine serial numbers which would be provided within 2 weeks.
02/06/20	The venue licence application is entered into the DIA IGP system.
12/06/20	DIA requests the missing venue agreement be provided within 10 working days.
12/06/20	The missing venue agreement, dated 9 March 2020, is provided.
16/6/20	Details of 14 gambling machines, including serial numbers, are received by DIA.
23/06/20	A substantially amended floor plan and two videos (showing the path required to enter the relocated gaming room from two of the venue's entrances) are provided. The new floor plan shows 14 gaming machines located in an different part of the venue from where the earlier 5 gaming machines were located.
29/06/20	Gaming room relocation work commenced.
01/07/20	Police checks are completed (no suitability issues reported).
01/07/20	DIA requests a current liquor licence (the temporary liquor authority provided earlier having expired).
02/07/20	An updated temporary liquor licence is provided.
03/07/20	An updated floor plan is submitted to DIA with the outdoor garden bar included.
03/07/20	DIA staff member signs off the amended floor plan, saying "I will sign it off no concerns apparent, subject to physical check when we are in the area next".
15/07/20	DIA enquires whether the renovations are completed and when the venue will open.

16/07/20	DIA is advised by telephone that the renovations would be completed within 1-2 weeks. Simon Sorapure (Senior Licensing & Purchasing Officer, Pub Charity) advises that the new gaming room has been built, but still requires carpeting and painting. DIA indicates that the licence is ready to be processed but the licence will not be issued until the room is ready.
21/7/20	Mr Sorapure asks DIA whether it would be possible to amend the details for the 14 machines in the application and advises that the gambling operation is to commence on 10 August 2020.
21/07/20	DIA advises: "If you can just provide me the updated gaming machine list. I can do the change the week of 10 August".
04/08/20	Final gaming room renovation work completed (painting and carpeting of the gaming room).
05/08/20	Amended machine details for 12 machines are provided to DIA. DIA is advised that the number of machines operated will reduce from 14 to 12 owing to limited space.
07/08/20	DIA advises Mr Sorapure, first by telephone and then by email, that the licence would not be backdated and only a 9 machine licence would be issued. The application of section 92 had not been raised previously by any party.
07/08/20	Martin Cheer (Pub Charity CEO) asks for the licence to be backdated to 29 May 2020 (the date of application) and says the delay was due to Covid-19 and that backdating had been previously indicated.
13/08/20	The Secretary issues a venue licence (with a commencement date of 13 August 2020) erroneously containing a condition that the venue may operate no more than 14 gaming machines.
13/08/20	Pub Charity queries an apparent error (the commencement date) in respect of the licence issued on 13 August 2020.
14/08/20	The Secretary issues a replacement venue licence with a commencement date of 14 August 2020 and a condition that the venue may operate no more than 9 gaming machines.
14/08/20	Appeal filed.

3. RELEVANT LEGISLATION

3.1 The purpose of the Act is set out in section 3, the material parts of which are:

> **3 Purpose**
> The purpose of this Act is to—
> (a) control the growth of gambling; and
> (b) prevent and minimise harm from gambling, including problem gambling; and
> (c) authorise some gambling and prohibit the rest; and
> (d) facilitate responsible gambling; and
> ...

(g) ensure that money from gambling benefits the community; and
(h) facilitate community involvement in decision s about the provision of gambling.

[…]

3.2 Sections 89, 92 and 94 of the Act relevantly govern the maximum number of machines that may be operated at a class 4 venue as follows:

89 Notification required

(1) A society that operates gaming machines on the commencement of this section must notify the Secretary, in the manner that the Secretary reasonably requests, within 1 month after the commencement of this section of -
(a) the class 4 venues where the gaming machines were lawfully operated (on the day 3 days after the commencement of this section); and
(b) **the number of gaming machines lawfully operated** at each class 4 venue (on the day 3 days after the commencement of this section); and
(c) **the serial number and model of each gaming machine** at each class 4 venue (on the day 3 days after the commencement of this section).

92 Limit on number of gaming machines for which class 4 venue licence held on 17 October 2001

(1) This section applies to a class 4 venue for which—
(a) a class 4 venue licence was held on 17 October 2001; and
(b) there has not been a period of 6 months or more since 17 October 2001 when no class 4 venue licence was held.
(2) A corporate society must not operate **more than 18 gaming machines** at a class 4 venue.
(3) **The number of gaming machines notified to the Secretary under section 89(1), and the models and serial numbers of the gaming machines**, must be treated as a **condition** of the class 4 venue licence and the corporate society **must not change the gaming machines**, or operate more than that number of gaming machines at the venue, unless—
(a) **a new class 4 venue licence is obtained that allows the change; or**
(b) **the licence is amended to allow the change**.
(4) The limit in subsection (2) and the condition as to number imposed under subsection (3) may be overridden under section 95 or reduced by regulations made under section 314(1)(a).

94 Limit on number of gaming machines for venue with venue licence granted after commencement

(1) This section applies to a class 4 venue—
(a) to which section 92 does not apply; and
(b) for which a class 4 venue licence is granted after the commencement of this section.
(2) A corporate society must not operate at a class 4 venue **more than the greater of—**
(a) 9 gaming machines; or
(b) the number of gaming machines approved by the Minister under section 96.
(3) The limits in subsection (2) may be reduced by regulations made under section 314(1)(a).

3.3 In addition to the requirements of section 92(3), section 70(1) applies to all venue licences as follows:

70 Content and conditions of class 4 venue licence

(1) **A class 4 venue licence must include the following information and conditions**:
(a) the name of the corporate society that holds the licence; and

(b) the commencement date and expiry date of the licence; and
(c) the authorised purpose of the corporate society; and
(ca) the name of the class 4 venue; and
(d) the name of the venue operator; and
(e) the name of the venue manager; and
(f) a description of the class 4 venue and its location; and
(g) **conditions about the class 4 gambling that may be conducted at the venue, including the number of gaming machines that may be operated**; and
(h) **details of the gambling equipment that may be operated at the venue**; and
(i) conditions to prevent class 4 gambling being conducted at the venue unless the primary activity of the venue is offered and available at that time; and
(j) any other conditions added by the Secretary.

3.4 Section 71(1)(g) requires the licensed corporate society to notify the Secretary if the society has not conducted gambling at the venue for more than 4 weeks. It provides, parenthetically, in such cases, that the licence must be surrendered unless the Secretary has agreed that the venue may remain inactive.

71 Significant changes in relation to class 4 venue licence must be notified

(1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur:
[…]
(g) the corporate society has not conducted class 4 gambling at the venue for a period of more than 4 weeks (in which case the class 4 venue licence must be surrendered, under section 79(1)(a), unless the Secretary agrees that the venue may remain inactive for a further specified period).
(2) Notification must be made before, or as soon as practicable after, an event listed in subsection (1) occurs.
[…]
(4) The Secretary may require the corporate society to apply for an amendment under section 73, or may invoke the suspension or cancellation provisions under sections 74 and 75, as a result of the notification.

3.5 Section 79 of the Act confirms the requirement for corporate societies to surrender class 4 licences if a venue has been inactive for more than 4 weeks without approval from the Secretary.

79 Surrender of class 4 venue licence

(1) A corporate society—
(a) must surrender a class 4 venue licence to the Secretary in the circumstances described in section 71(1)(g):
(b) may surrender a class 4 venue licence to the Secretary at any other time.
(2) The surrender of a class 4 venue licence does not affect—
(a) the obligation of the corporate society to apply or distribute the net proceeds from the gambling in accordance with this Act and the licence; and
(b) any condition relating to records that must be maintained and reporting requirements.

3.6 Sections 65 and 67 of the Act set out the requirements for an application for a class 4 venue licence and the grounds for granting a class 4 venue licence respectively, the material parts of which are set out below:

65 Application for class 4 venue licence

(1) A corporate society may apply to the Secretary for a class 4 venue licence.

(2) An application must be on the relevant standard form and be accompanied by—

(a) a description of the venue and its location; and

(b) a territorial authority consent if required under section 98; and

(c) a copy of a class 4 venue agreement if required under subsection (3); and

(d) a statement by the applicant of how it proposes to minimise the risk of problem gambling and underage gambling at the class 4 venue; and

(e) a profile of the venue manager and the venue operator, including details of their experience in conducting class 4 gambling, character, and qualifications; and

(f) details of gambling equipment that the applicant intends to operate at the venue and evidence that it meets relevant minimum standards; and

(g) if the application relates to a venue that is licensed to another corporate society, notice from the other corporate society that it is surrendering its venue licence for the venue; and

(h) if relevant, evidence that on issue of the licence the applicant will own any gambling equipment (except for electronic monitoring systems) that it proposes to operate; and

(i) evidence that any gambling equipment that the applicant proposes to operate under the licence is not and will not be financed by the manufacturer, distributor, or vendor of the equipment; and

(j) evidence that the class 4 venue is not to be used mainly for operating gaming machines; and

(k) if the application relates to a venue for which a class 4 venue licence was not held at the time of commencement of this section, evidence that the class 4 venue is not to be part of a place at which another class 4 venue or a casino is located; and

(l) evidence that the venue is suitable in all other respects to be a class 4 venue.

(3) The application must also be accompanied by a class 4 venue agreement unless the Secretary is satisfied that the applicant is a club that intends to operate gambling equipment at a non-commercial class 4 venue that—

(a) it owns or leases; and

(b) is mainly for the use of club members.

(4) Despite subsection (3), an application by TAB NZ or a racing club is not required to be accompanied by a venue agreement.

(5) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.

(6) The Secretary may request from the applicant any further information that the Secretary considers necessary to consider the application properly.

67 Grounds for granting class 4 venue licence 4

(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 minimised; and

[…]

(e) if the application relates to a class 4 venue that is licensed to another corporate society, the other corporate society has surrendered its class 4 venue licence for the venue; and

(f) the territorial authority has provide a consent (if required under section 98; and

(g) on issue of the licence, the applicant will own any gambling equipment (except for electronic monitoring systems) that it proposes to operate; and

(h) on issue of the licence, the applicant will not operate any gambling equipment that is financed by the manufacturer, distributor, or vendor of the equipment; and

(i) all gambling equipment to be operated at the venue meets relevant minimum standards; and

(j) the class 4 venue agreement (if required)—

(i) enables the class 4 gambling conducted at the class 4 venue to comply with this Act and the proposed class 4 venue licence; and

(ii) includes the information specified in section 69; 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 this Act; and

(s) the applicant is able to comply with all other applicable regulatory requirements.

3.7 The right of appeal against conditions in venue licences is conferred in the following terms:

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-

...

(b) amend or revoke a condition of the licence, or add a new condition to it; or ....

(1A) To avoid doubt, the specification of an expiry date under section 70(1A) is not a decision that may be appealed to the Gambling Commission.

(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).

(3) The Gambling Commission-

(a) may request any information from the corporate society or the parties to the agreement or the venue manager or the Secretary; and

(b) is not bound to follow any formal procedure; and

(c) does not need to hold a hearing; and

(d) must consider any information provided by the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

(4) The Gambling Commission may-

(a) confirm, vary, or reverse the decision of the Secretary; or

(b) refer the matter back to the Secretary with directions to reconsider the decision.

(5) The Gambling Commission must give notice of-

(a) its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary; and

(b) the date on which its decision takes effect (which may be a date that is later than the date on which it makes the decision).

3.8 The requirement for territorial authority consent in the context of class 4 venue applications is set out in the following provisions:

98 When territorial authority consent required

A territorial authority consent is required in the following circumstances:

(a) if a corporate society proposes to **increase the number of gaming machines that may be operated at a class 4 venue (whether by way of an application for, or amendment to, a class 4 venue licence**, and whether or not in association with an application for ministerial discretion under section 95 or 96):

(b) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any corporate society for the venue within the last 6 months:

4. PUB CHARITY'S SUBMISSIONS

4.1 Pub Charity lodged an appeal against the Secretary's decision on 14 August 2020 and filed submissions on 11 September 2020. The appeal challenged the Secretary's conclusion that the six month period under section 92 commenced on 11 December 2019 and argued that the Secretary should have backdated the licence in order to preserve the venue's section 92 entitlements.

4.2 As to the date on which a venue licence was last held for Matata Hotel, it was submitted for Pub Charity as follows:

(a) The period without a venue licence at Matata Hotel did not commence on 11 December 2019 (so the section 92 period did not expire on 11 June 2020). The surrender notice was not received until 12 December 2020 and was not effective until entered into the DIA's IGP system (which, on the Secretary's evidence, was 17 January 2020).

(b) A licence created in the IGP system on 17 January 2020 was the last licence issued for Matata Hotel prior to the licences issued to Pub Charity on 13 and 14 August 2020.

(c) As the 17 January licence was never surrendered or cancelled, it was still in force when the 14 August licence was issued (so there was no lapse of time under section 92).

(d) In the alternative, if the 17 January licence were validly cancelled immediately by the Secretary (although the Secretary lacks power to do so), it had the effect of restarting the section 92 period (so the section 92 period ended on 18 July 2020).

(e) If the latter is correct, DIA had a completed application on 16 June 2020, a month before the section 92 period ended and the resulting backdating period would only be one month.

4.3 On the question of backdating, Pub Charity made the following submissions on the law:

(a) It is well established that the Secretary has a discretion to backdate new venue licences in appropriate cases to preserve section 92 entitlements and appropriate cases can include unwarranted delay by the Secretary and events outside the applicant's control (*Appeal by Air Rescue Services (re Robbies Bar & Bistro)*, (decision GC26/10).

(b) The decisions in *Appeal by Grassroots Trust Limited re Lucky's Barcade and Social* (decision GC09/20) and *Appeal by Youthtown Inc re Kina's Sports Bar*

(decision GC10/20) established that appropriate cases are not limited to the reasons suggested in earlier decisions, such as unwarranted delays by the Secretary, and could be extended to other processes. The decisions also established that it was appropriate to backdate licences in order to keep faith with assurances about backdating given to applicants, when such assurances had been relied upon.

(c) The Act's statutory purpose may be relevant to the exercise of the discretion to backdate.

(d) Steps taken to preserve section 92 entitlements are not inherently improper or wrong and there is no presumption that such entitlements should have come to an end by now.

4.4 On the application of the law to the present facts, it was submitted for Pub Charity as follows:

(a) It is common ground that DIA had a complete application on 16 June 2020, more than a month before the section 92 period expired (assuming an 18 January 2020 termination).

(b) In fact, it is arguable that DIA had a complete application as early as 12 June 2020. There is no need for serial numbers to be provided because licences can be amended to remove the initially listed machines[1].

(c) DIA should have notified the applicant of the omission of the venue agreement earlier than 14 days after receipt of the application.

(d) It has been common to extend statutory time periods as a result of the Covid-19 Alert Level restrictions. There are numerous examples including motor vehicle Warrants of Fitness, liquor licensing obligations and many gambling regulation obligations. The Secretary failed to consider whether the Alert Level restrictions justified backdating. The period of the relevant Alert Levels 4 and 3 was from 25 March until 13 May 2020, a period of 6.5 weeks.

(e) Settlement of the purchase of the venue was postponed from 31 March 2020 until 15 May 2020. Application for a new venue licence could not be made until the purchase became unconditional, until new lease terms were finalised on 14 May 2020 and until settlement had taken place because no application could be made before the intended venue operator was in possession.

[1] No other support was offered for this submission and it was made without reference to section 65(2)(f).

(f) The speed of the renovation work was affected by the Alert Level restrictions, including subsequent work backlogs of contractors once they were lifted.

(g) The renovations included relocation of the gaming room in order to improve supervision of access (as the original gaming room was a thoroughfare). The renovations were in furtherance of the statutory purpose.

(h) The renovation plans were signed off on 3 July 2020 and construction work, except cosmetic paint and carpeting, was completed by 16 July 2020. The licence could have been issued then but was held back for the cosmetic work to be finished.

(i) The case for backdating is stronger than in decision 26/10.

(j) The application was not made only at the end of the section 92 period, there was no prior delay in surrender and no cynical appeal to extend the prior licence. No significant changes were made to the application after it was filed.

(k) There was an implied assurance that the licence would be backdated, arising from:

(i) advice on 7 February 2020 that the maximum number of gaming machines at the venue was 14;

(ii) the receipt of an application for more than 9 gaming machines once 14 serial numbers were provided on 16 June 2020; and

(iii) agreement to accept amended serial numbers on 21 July 2020 without raising section 92.

(a) However, no issue with section 92 was raised until 7 August 2020, the day before the operation was due to open and after a room to house 12 machines had been constructed, bases and wiring for 12 machines had been permanently installed and 12 machines had been delivered and installed.

4.5 The Appellant concluded by asking the Commission to backdate the licence to the day before the expiry of the six month section 92 period (whatever that was held to be).

4.6 The Appellant also signalled an intention to seek costs if successful and sought an opportunity to make submissions on costs in that event.

5. SECRETARY'S SUBMISSIONS

5.1 In the Secretary's view, the facts were largely not in dispute. The exception was the allegation that the Secretary had refused to issue the license until painting and carpeting

was completed. The Secretary's evidence was that the issue of the licence was held up only pending advice from the applicant of the intended commencement date, because of concern about the effect of section 71(1)(g), and that the completion of painting and carpeting had not caused any delay in its issue.

5.2 The Secretary submitted that the date on which the section 92 period started was 11 December 2019 (so the six month period ended on 11 June 2020) for the following reasons:

(a) A notice of surrender was received on 12 December 2019 stating that the licence was surrendered with effect from 11 December 2020.

(b) Recording termination of a licence in the DIA's IGP system requires 3 steps which were completed only on 17 January 2020. However, the licence had been surrendered with effect from 11 December 2019 and no gambling could be lawfully conducted from that date, irrespective of what was recorded in the IGP system.

(c) That surrender depends on a communication from the licence holder (to be interpreted in the surrounding context), and not on the IGP records, is clear from the *Youthtown* appeal decision (GC10/20). No particular form of surrender notice is required by the Act. The Act contains no reference to venue licence "terminations".

(d) Section 65 requires an application for a venue licensed to another society to be accompanied by a surrender notice from that society.

(e) There is no such thing as a "request" to surrender a class 4 venue licence; a surrender is a voluntary action by a licence holder which the Secretary cannot decline. It is effective in its terms once given.

(f) None of the statutory processes, even including cancellation (which requires steps to be taken by the Secretary), refer to DIA records or to entries in an electronic system. A licence is brought to an end by notice of its surrender, not by subsequent processing of the surrender in the IGP system.

(g) In this case, the surrender document was clear, unambiguous and unconditional. It brought the prior licence to an end in accordance with its terms (and without the need for an IGP entry), namely on 11 December 2019. The date of its subsequent processing in the IGP system is irrelevant.

(h) Holding that the period for which licences are held depends on entries in IGP would create considerable complexity and uncertainty about licence holder obligations.

(i) The creation of a licence form in the IGP system during the process of recording the termination of The Southern Trust venue license by surrender is not the issue of a licence. Ms Stanley's affidavit explained how and why the document was created. It was not a licence, merely an electronic record of a step taken in the IGP system. It was not issued to anyone and had no legal effect.

(j) A "licence" is not a mere document, but an authorisation or permission. In ordinary usage, it extends to the document certifying or recording the authorisation but, absent an effective authorisation, no document constitutes a licence.

(k) Section 92 refers to a licence being held. The High Court, in *Air Rescue Services v Secretary for Internal Affairs*[2], said that "held" meant that a licence "is in existence". It is clear on the evidence that the creation of a record as part of the termination process in the IGP system was not an effective authorisation to conduct gambling.

(l) A class 4 venue licence is defined as a licence granted under section 67. No decision to grant a licence under section 67 was made on 17 January 2020 and none of the requirements for such a decision, including receipt of an application under s 65, had been met. Nothing was issued to anyone as a licence holder.

(m) If Pub Charity were correct and a licence were held on 17 January 2020, the Secretary had no power to issue a valid licence on 14 August 2020. As the licence holder was unaware of its existence, it was not surrendered, and the Secretary took no steps to cancel it. If it were ever in force, it would remain in force and preclude the issue of a valid licence to Pub Charity with potentially adverse consequences for all concerned, including Pub Charity, the 17 January "licence holder" (who believed that it had surrendered its venue licence in December 2019) and even the patrons.

(n) No one placed any reliance on the "licence" document. Neither The Southern Trust nor Pub Charity were even aware of its existence. The Secretary did not consider that it had any legal effect.

5.3 On the issue of whether the new venue licence should be backdated, the Secretary submitted as follows:

[2] *Air Rescue Services v Secretary for Internal Affairs*, HC Wellington, CIV-2010-485-1919, 3 May 2011, at [12].

(a) It is accepted that the Secretary, and the Commission on appeal, may backdate venue licences to allow the section 92(1)(b) condition to be satisfied in order to preserve machine number entitlements.

(b) The Commission initially set out principles for the exercise of the discretion to backdate in decision GC26/10. It observed that the position preserved by section 92 was aberrant, not reflecting the general rule, and there was no indication of an intention that entitlements should be preserved at all costs. However, it also saw no discernible intention that entitlements should be lost casually, especially by delay by the Secretary.

(c) Subsequent decisions broadened the ambit of appropriate cases from delay by the Secretary to unexpected external processing delays, such as with building consents and alcohol licensing.

(d) The application was filed on 29 May 2020, near the end of the section 92 period which ended on 11 June 2020. It was incomplete on filing and the Secretary did not have a complete application until 16 June 2019. The Commission indicated, in decision GC09/20 (at [37](a)), that it is a negative consideration if an application were filed so late in the period that there was no real prospect of it being granted within the period.

(e) In this case, there was no realistic prospect of the application being granted in the remaining 8 days, even if it had been complete. There are 19 requirements of which the Secretary must be satisfied after making inquiry and 13 accompanying pieces of information to be considered. Provision is made for credit and Police checks which usually take several weeks to complete.

(f) There is nothing to suggest that last minute applicants should expect licences to be backdated. The result in decision GC26/10 was expressly exceptional and did not constitute a precedent or legitimate expectation. The present circumstances are similar to those in decision GC09/20 where the Commission indicated that the timing of the application meant that there was no prospect of a grant within the period. The Secretary has refused to backdate other applications which have been made similarly late.

(g) In the present case, the application was incomplete until 5 August 2020 when the updated gaming machine list was provided. The required venue agreement was received on 12 June 2020. After the initial machine list had been received on 16 June 2020, on 18 June 2020, the Appellant advised that the layout of the venue would be altered, and the gaming room relocated. From that point, satisfaction concerning section 67(1)(b) was not possible until the new layout

was provided and assessed. An amended plan was provided on 23 June 2020, with a further amended plan provided on 3 July 2020. A new temporary alcohol licence was provided on 1 July 2020. DIA asked when the venue would commence operation and was advised, only on 21 July 2020, that it would be 10 August 2020. On 5 August 2020, the final machine details were provided.

(h) The application was processed in accordance with the usual DIA procedures and timings. The delay in issue was not for cosmetic work to be completed but in order to ensure that the Appellant could comply with all regulatory requirements, including section 71(1)(g). If the licence had been issued on 18 June 2020, the Appellant would have breached s 71(1)(g) by not operating the venue for more than 4 weeks.

(i) It is the applicant's obligation to provide a complete application. It is not reasonable to expect DIA staff to remind applicants of their obligations or to detect shortcomings in applications within 48 hours (as suggested in Pub Charity's submissions).

(j) The renovations involved a major departure from the original plan provided with the application, namely the complete relocation of the gaming room. The renovations removed any prospect of an early grant. An applicant who wished to preserve section 92 continuity was not entitled to assume that the Secretary would backdate the licence without seeking an assurance to that effect.

(k) The renovations were not required for harm minimisation (the existing layout had previously been approved without the Secretary raising any harm concerns) and the applicant's motivation for undertaking renovations is irrelevant.

(l) However, harm considerations are a negative factor in the exercise of the discretion to backdate for the following reasons:

(i) Although The Southern Trust held a 14 machine licence, it only operated 5 machines. The Appellant now intended to operate 12 machines.

(ii) Because The Southern Trust only operated 5 machines, the Appellant was not entitled to reply on the permitted maximum[3].

(iii) The size of the Matata community and the increase in the number of machines in practice created harm concerns. The resulting density of gaming machines would more than double the national average.

[3] No supporting argument was advanced for this submission.

(m) The Covid-19 restrictions are a relevant consideration and were in fact considered. However, adding 6 weeks to allow for the impact of the restrictions would not have resulted in the grant of a licence by 23 July 2020.

(n) Decision GC 09/20 was decided on the basis of an unambiguous assurance by a DIA staff member that a backdated licence would be issued. A similar assurance is recorded as having been given in decision GC10/20. No such assurance was given in this case.

(o) The matters relied on to constitute an implied assurance do not justify the claimed inference. The Addison email simply recorded the correct position in February 2020 and implied nothing about the future. There was no reasonable basis to infer an assurance about backdating from the quarterly statistics spreadsheet published by the Secretary, especially when no specific advice had been requested.

(p) There is similarly no entitlement to assume that a backdated licence would be granted when there had been no prior discussion about backdating. Pub Charity was aware of the previous Commission decisions on backdating but chose not to raise the issue nor to seek any assurance. It was only apparent that more than 9 machines were sought when the initial details were provided on 16 June 2020.

(q) Treating the provision of constructive assistance (requesting information rather than returning applications as incomplete) and unchecked assumptions as having the same effect as an express assurance is unjustified and, if upheld, would likely to lead to a stricter approach to handling of applications to the detriment of efficiency.

6. REPLY SUBMISSIONS

6.1 Submissions in reply were filed on behalf of Pub Charity. On the question of when the licence held by The Southern Trust was surrendered, the following submissions were made:

(a) As the notice was not received until 12 December 2019, it could not have taken effect until that day. If so, the first day on which a licence was not held was 13 December 2019. The omitted venue agreement was provided on 12 June 2020.

(b) The licence does not come to an end merely by giving notice of surrender; it must also be extinguished in the DIA electronic system. On that basis, a society could withdraw a notice after it is given, so long as it had not been processed in

the DIA electronic system before withdrawal. The DIA public electronic records should be regarded as authoritative on the issue of whether a licence is "held".

(c) A valid licence can be issued without the section 67 criteria being met. That is what occurred as a result of the *First Sovereign Trust* decision[4], when the grant of a licence for one day was ordered by the High Court. If a licence is granted but the decision is set aside on judicial review, the venue is not regarded as not having held a licence in the period between the grant and the judicial review decision.

(d) The PDF document produced by the IGP system on 17 January 2020 was a licence because that is what the form said.

(e) The issues of complexity and accidental non-compliance created by treating such a document as a licence, despite no application for a licence and no notice to the party noted as holding the licence, are avoidable.

6.2 On the question of the exercise of the backdating discretion, the following submissions in reply were made:

(a) That an application is made too late for a grant to be made in the remaining section 92 period is not fatal. That was the outcome in decision GC26/10.

(b) In fact, it would have been possible to have granted a licence on 12 June 2020. The venue operator had previously been vetted and there is no requirement to provide gambling machine details if the society does not intend to operate any immediately. If it had been, it could have been subsequently amended to include gambling machine details and an application made for approval for the venue to remain inactive for a period.

(c) The Secretary was wrong to be concerned about a breach of section 71(1)(g). Pub Charity could have surrendered the licence and re-applied or sought approval to remain inactive from the Secretary. The normal delays arising from renovations are an established justification for delay (decision GC26/10).

(d) Even if not necessary, the renovations had a positive effect on harm minimisation.

(e) There is no evidence that increasing the number of gaming machines in Matata from the usual maximum of 9 to 12 would increase harm. The study referred to

[4] *First Sovereign Trust & Anor v The Secretary for Internal Affairs,* HC Wellington, CIV-2005-485-512, 22 March 2005

does not support the submission adequately. Other studies indicate that changing machine numbers have had little impact on problem gambling.

(f) The impact of Covid-19 justifies use of the discretion. The caution shown by Pub Charity which resulted in delay was commercially justified. Even on the Secretary's calculation, if allowance were made for the impact of the alert levels, the licence was granted only 8 days after the expiry of the extended period.

(g) The error in issuing the wrong licence on 13 August 2020 justifies exercise of the discretion to backdate.

7. PRIOR COMMISSION DECISIONS

7.1 The appeal raises issues relating to surrender of class 4 licences and the exercise of the discretion to backdate class 4 licences from the date of issue in order to allow the applicant to take the benefit of the grandparenting provision in section 92.

7.2 The question of what is required for the surrender of a licence was considered, both for the first time and most recently, in *Appeal by Youthtown Inc re Kina's Sports Bar* (decision GC10/20). The Commission was required to determine whether the communications from the prior licence holder in December 2018 constituted surrender of the licence, in circumstances where the Secretary had proceeded to treat the communications as a surrender. In that decision, the Commission held as follows:

(a) Class 4 licences do not terminate automatically on the liquidation of the licence holder nor on the expiry of a period of four weeks of inactivity without approval (44).

(b) Licences continue in force until they expire (without renewal application), are surrendered or cancelled. A failure to surrender a licence after four weeks of inactivity is a ground for cancellation, but the cancellation process is required to bring the licence to an end (47).

(c) No particular form or process for notifying surrender is specified by the Act and use of the Secretary's preferred form is not required (49).

(d) Surrender requires a clear, unambiguous, and unqualified communication. No particular form of communication or of words is required (including the use of the word "surrender") (51).

(e) Whether a surrender occurred is a factual determination requiring objective assessment of the communication in question in the context of the surrounding circumstances (55).

In the result, despite the Secretary having understood the communications as constituting a surrender, by a majority, the Commission held that they were insufficiently clear and unequivocal to have that effect.

7.3 Shortly before issuing the decision in decision GC10/20, the Commission had set out the principles that apply to the exercise of the discretion to backdate the issue of a licence for the purposes of section 92 in *Appeal by Grassroots Trust Limited* (decision GC09/20). Those principles were a development of those first set out in *Appeal by Air Rescue Services (re Robbies Bar and Bistro)* (decision GC26/10) and were repeated in decision GC10/20 as well.

7.4 The key aspects of the guidance offered by those decisions are as follows:

(a) Section 92 allows venues which held an existing right to more than 9 gaming machines (which no new licence can have) to continue to enjoy that right, providing a continuity condition is met. The continuity period requires a gap of no more than 6 months in a venue licence being **held** – the required continuity is not preserved by a mere application.

(b) Section 92 permits an aberrant state of affairs, on satisfaction of that condition. Its application should be approached neutrally, without an assumption that the position should be preserved at all costs or that the rights should be casually lost, especially by delay or error on the part of the Secretary. Preservation will not necessarily be appropriate in all cases.

(c) Grounds for exercise of the discretion are not restricted to delay or error by the Secretary but extend to unexpected procedural delays outside the applicant's control. They can extend to processes outside gambling regulation, including building regulation and alcohol licensing.

(d) The Secretary is not required to consider backdating without a request do so but consideration should generally be given in the case of applications relating to venues which had preserved section 92 rights.

(e) The latter may especially be the case where the delay is the result of the Secretary's insistence upon an issued liquor licence as a prerequisite to a grant of a class 4 venue licence.

(f) The giving of an assurance by the Secretary (in response to an inquiry) that a backdated licence would be issued is highly material. The discretion should generally be exercised in such cases in order to keep faith with promises made on the Secretary's behalf.

8. SURRENDER – ANALYSIS

8.1 The first issue comprises two distinct, but related, sub-issues:

(a) Whether the surrender of the licence took effect on the date specified in the surrender notice (11 December 2019), the day of or day after its receipt by the Secretary (12 or 13 December 2019) or the date on which the resulting termination was entered into the DIA's electronic IGP system (17 January 2020).

(b) Whether the creation (on 17 January 2020) of a form of venue licence in the DIA system, in the course of entering the termination by surrender, was the issue of a new licence which was "held" for the purposes of section 92.

8.2 The Commission rejects the Appellant's submission that surrender of a venue licence depends, not on the terms of a notice given by the venue licence holder, but on the timing of the Secretary's actions following its receipt. Such a submission on the requirements for surrender cannot be reconciled with decision GC10/20, which held that surrender depends on the terms of the licence holder's notice, rather than a belief or subsequent action on the part of the Secretary. In this case, there is no suggestion that the notice was other than clear, unambiguous and unequivocal. It also specified the date on which the surrender would take effect, being 11 December 2019.

8.3 As the notice did not stipulate an effective time however, it left open the question of whether the licence was surrendered at the beginning, during or the end of the date on which it said that it would take effect. The approach taken by the Commission in decision GC10/20 was influenced by the final nature of a surrender, a consequence of the lack of remedy provided under the Act to challenge an action taken by the Secretary in relation to surrender. Appeal rights exist for all other actions which the Secretary might take which are averse to a licence holder's rights.

8.4 Against that background, the Commission not only rejects the argument that the status of a licence depends on the date of its receipt by the Secretary or on the Secretary's subsequent actions, it also adopts a construction of the notice on its face which is the most generous of the licence holder's rights. In this case, it does not construe the notice as bringing to an end the right to gamble at the venue at the very beginning of the nominated date but at the close of the nominated date, being 11 December 2019. As a result, the effect of the notice was that the first day without a licence was 12 December 2019 (neither 11 December 2020 as submitted by the Secretary nor 13 December as submitted by Pub Charity).

8.5 In addition to avoiding the loss of rights by virtue of an unappealable entry in the DIA records, concerns would also arise if a society gave notice of surrender and the entry of the surrender in the DIA records was either delayed (as in this case) or overlooked

entirely. If the surrender depended, not on the licence holders' notice, but on its subsequent processing by DIA, the society's obligations would depend, not on its own actions, but on the actions of DIA within DIA's own records. The result would a highly undesirable state of affairs from a regulatory point of view.

8.6 While section 90 requires the Secretary to maintain a register of places for which a class 4 venue licence was held on 17 October 2001, to amend the register if a new venue is substituted under a relocation policy and to make an entry if there is a period in which no class 4 venue licence is held, the legislation does not provide that the register is authoritative on the issue of section 92 rights. As the required register is limited to section 92 venues, it is not co-extensive with the DIA's IGP system (although there is no reason why the latter could not discharge the obligation).

8.7 The second sub-issue raises similar considerations. The evidence indicates that, in the course of entering the termination of The Southern Trust venue licence in the IGP system, a new licence form in favour of The Southern Trust, was produced by the IGP system on 17 January 2020. The form was not treated as a licence by the Secretary and was not communicated to The Southern Trust. The Appellant learned of its production only when provided with the Secretary's file in the course of the appeal.

8.8 The Commission accepts as correct the Secretary's submissions on the meaning of "licence" and "held" (as the term is used in section 92). A document in the form of a licence only constitutes a licence if it records a legally effective authorisation. In this case, no decision to issue a licence was made by anyone and there was no communication to the "licenceholder". The document created on 17 January 2020 was not a "class 4 venue licence ... held" within the meaning of section 92(1)(b).

8.9 Treating the automated production of a licence form inside the DIA system as the issue of a licence would create a number of undesirable consequences. Because it was not cancelled, a 17 January 2020 licence would be regarded as continuing in force and the issue of the licence to Pub Charity on 14 August 2020 would be in breach of the Secretary's statutory obligations and subject to challenge accordingly. If the licence had been issued (as Pub Charity contends), Pub Charity would have been required to provide a notice from The Southern Trust surrendering the 17 January 2020 licence; it did not do so for obvious reasons, with the result that the Secretary would have issued the licence under appeal without being satisfied of the matter specified in section 67(1)(e).

8.10 While it is the case that a 1 day licence was issued as a result of the direction of the High Court in the *First Sovereign Trust* decision, an application for renewal of the licence had been made in that case. Even if the licence were not issued in the exercise of the Secretary's powers under section 67, there is no question that there was a considered decision to issue a valid and legally effective licence with formal notice to all those

potentially affected by its issue. There is no equivalence between those events and what occurred on 17 January 2020. Pub Charity's submission would place The Southern Trust in the position of unwittingly continuing to hold a licence for the venue, despite having lodged a surrender notice in December 2019, which licence created obligations which it would likely have failed to discharge as a result of ignorance of its existence.

8.11 The submission that a licence was subsequently held as a result of what occurred on 17 January 2020 is rejected. The first day of the applicable section 92 period was 12 December 2019 and the period would have expired if no licence had been issued by the end of 11 June 2020.

9. DISCRETION TO BACKDATE – ANALYSIS

9.1 It follows, from the above analysis, that the licence under appeal dated 14 August 2020 was granted and issued more than 6 months after the effective surrender of The Southern Trust Licence. An entitlement to more than 9 gaming machines, as provided by section 92, would require the exercise of the discretion to backdate the issue of the licence to a date no later than 11 June 2020.

9.2 In decision GC26/10, Commission confirmed that section 92(1)(b) required a licence to be held (not simply applied for) without a break of more than 6 months. It also held that, while the section 92 period was strict and could not be extended, a discretion to backdate the issued licence could be exercised. It addressed the general principles on which the discretion should be exercised in that and several consequent decisions. The submissions received are broadly aligned on the statements of principle which appear in those decisions but differ markedly in relation to their application. As a result, it is apparent that provision of the necessary guidance for future cases requires this decision to address comprehensively all submissions received on the application of the principles.

9.3 A number of the submissions rested on propositions concerning the date on which the Secretary might properly have issued a licence on the material submitted; the inference which the submissions invited to be drawn was that the Secretary was at fault for failing to have done so. None of those submissions are accepted for the following reasons:

(a) The Secretary did not receive a complete application on 29 May 2020. The application was required to be accompanied by a copy of the applicable venue agreement. It was the responsibility of the applicant to have included the venue agreement and the applicant must bear responsibility for the failure to do so. The suggestion that the delay is the fault of DIA for not raising the applicant's omission earlier, or that any errors and omissions in the application must be notified by DIA within 48 hours, is rejected.

(b) The application was also not complete when the missing venue agreement was provided. Section 65(2)(f) requires an application for a venue licence to be accompanied by details of the gambling equipment that the applicant intends to operate at the venue and the venue licence must include "details of the gambling equipment that may be operated at the venue"[5].

(c) While details of 14 gambling machines were provided on 16 June 2020, on 23 June 2020, the applicant lodged an amended floor plan which showed a complete relocation and expansion of the earlier gambling area to enable it to accommodate 14 rather than 5 gaming machines. The final details (for 12 gaming machines) were provided only on 5 August 2020.

(d) The decision to undertake the relocation and expansion of the gambling area precluded any reasonable possibility of the Secretary granting the application until the ramifications of the proposed change had been investigated. That did not occur until 3 July 2020 at the earliest.

(e) The response to the Police check was not received until 1 July 2020 and a current liquor permit was provided only on 2 July 2020.

(f) The query by the Secretary on 15 July 2020 regarding the intended commencement of the gambling operation was answered only on 21 July 2020. The applicant advised that it expected to commence the class 4 gambling operation on 10 August 2020. The same communication also advised that the applicant wished to amend the gaming machine details previously provided. The new details were provided only on 5 August 2020.

9.4 Pub Charity submitted that the Secretary was wrong to have asked about the commencement date before issuing the licence, arguing that the inquiry was unnecessary and the licence should have been issued without making any inquiry. The Commission does not agree. Pursuant to section 67(1)(s), the Secretary is required to refuse to grant a venue licence application unless satisfied that the applicant is able to comply with all other applicable regulatory requirements. Sections 71 and 79 between them create a requirement regarding continuity of the gambling operation at a class 4 venue. It does not appear that the applicant proactively addressed compliance with that requirement (as might be expected if the issue of the licence had been urgent). Although Pub Charity submitted to the Commission that the requirement might have been met by a surrender and new application or obtaining the Secretary's agreement, it did not, in fact, propose either course to the Secretary. The Commission is satisfied that the inquiry was

[5] Section 70(1)(h)

appropriately made and was the result of the applicant failing to address the matter proactively.

9.5 The principles set out in the Commission's earlier decisions indicated that the discretion should be reserved for cases in which an applicant has made a diligent effort to obtain a licence with the strict 6 month statutory period but whose efforts have been thwarted by matters outside its control. The exercise of the discretion would be justified if it had been thwarted by delay or error on the part of the Secretary but could also extend to unexpected delay caused by other circumstances. In particular, if the applicant had raised concerns about expiry of the statutory period and received an assurance that the licence would be backdated, an exercise of the discretion to backdate would be expected.

9.6 It is a striking feature of the present case that the applicant did not raise with the Secretary any concern about the possibility of expiry of the section 92 period before the issue of the licence and did not seek (and therefore did not receive) any assurance that the licence would be backdated. While it should have been apparent to the Secretary from the gaming machine details supplied on 16 June 2020 and from the amended floor plans provided on 23 June 2020 that it was intended to install 14 gaming machines (rather than the 5 machines previously installed), the applicant did not raise the section 92 period with DIA and sought no assurance that a licence would be backdated.

9.7 Pub Charity submitted that it should be treated as if it had the benefit of an implied assurance that the licence would be backdated because of a prior statement about the maximum number of machines made in February 2020 (which was arguably correct at the time and would have remained correct if a new venue licence in appropriate terms had been granted by 11 June 2020), and because of indications in the course of the application that more than 9 gaming machines were sought without any issue being raised by DIA until 7 August 2020.

9.8 The submission reverses where the responsibility for maintaining continuity lies. An applicant who intends to rely on section 92 to preserve an entitlement to more than 9 gaming machines is expected to do everything in its power to ensure that the continuity requirement is met. That would usually include alerting the Secretary to the importance of the time period and seeking an assurance of backdating from the Secretary before embarking on changes to a venue which would likely delay the issue of a venue licence. An applicant under section 92 time pressure would be expected to be diligent in the early submission of a complete application and to address proactively any likely concerns. That is not what the applicant did in this case.

9.9 While the Secretary received indirect notice of an intention to seek a licence for more than 9 gaming machines, the resulting knowledge did not create an effective implied assurance about backdating. In the Commission's view, an applicant is not entitled to assume that

the Secretary will backdate the issued licence unless it receives an express assurance in that regard.

9.10 Neither is positive comparison with the successful appellant in *Appeal by Air Rescue Services (regarding Robbies Bar and Bistro)* (decision GC26/10) nor the absence of the sort of negative circumstances noted in that decision of much relevance and assistance on this appeal. Decision GC26/10 set out, in paragraph 40, a number of special circumstances which tipped the balance, by a small margin, in favour of backdating, when the circumstances otherwise supported a refusal to backdate. None of those circumstances apply to the present appeal. The same paragraph also indicated that future backdating should not necessarily be expected following a decision to undertake major construction at the venue.

9.11 The Commission considers that it is necessary to address directly in this decision the risks which an applicant runs if it decides to undertake venue renovations which may delay the issue of a licence beyond the strict section 92 period. In the foregoing decision, its first decision which addressed section 92 and backdating, the Commission referred to "the sort of difficulties which are inevitably created when a venue undergoes redevelopment"[6] and said that "there is nothing objectionable in principle ... to seek a licence for premises which are undergoing renovation"[7]. Although no subsequent decision of the Commission has indicated that renovations would be treated favourably as a category which should expect the benefit of backdating, and despite the comment in paragraph 40, it appears to the Commission that applicants may have read more into those references than was intended and the position requires clarification accordingly. Pub Charity is recorded as advancing a submission to that effect in paragraph 6.2(c) above.

9.12 Section 92(1)(b) provides an opportunity for certain applicants to preserve an aberrant position which has not otherwise been possible since 2001. The requirements for preservation are strict and not subject to extension of time. The exercise of the power to backdate is intended to allow the Secretary and the Commission to achieve a just outcome in deserving cases, in particular to allow the Commission to provide a fully effective remedy in the event of a successful appeal. Exercise of the discretion is intended to provide relief to diligent applicants who would otherwise lose a statutory entitlement as a result of matters beyond their control. However, an applicant who decides to undertake a major venue renovation elects to run the risk that the renovation will make it unlikely that a licence would be issued within the section 92 period.

9.13 The Commission does not consider that the existence of the discretion to backdate a licence should provide a guaranteed "safe harbour" in such cases. The Commission has

[6] Decision GC26/10, paragraph 37(d)
[7] Decision GC26/10, paragraph 37(f)

previously rejected the proposition that there should be a presumption of protecting section 92 entitlements at all costs. Undertaking a major venue renovation, without securing an express assurance about backdating from the Secretary, is the sort of circumstance that may well result in loss of section 92 entitlements without exercise of the discretion. The terms of section 92 are strict on their face and the exercise of the discretion is not intended to undermine the strict requirements imposed nor to create a "right to renovate" without consequence.

9.14 The Commission also does not accept the suggestion that the renovations were motivated by a desire to improve harm minimisation or that the discretion should be exercised by reference to the statutory purpose set out in section 3. There is no information before the Commission of prior dissatisfaction on the part of the Secretary with the venue in its previously licensed state. The principal reason for the renovations appears likely to have been the desire to increase the number of gaming machine from 5 to 14. However, neither does it accept the Secretary's contrary submission that preservation of section 92 entitlements would be contrary to the statutory purpose by reason of the likelihood of increased harm. The information provided does not justify such a conclusion (for the reasons advanced by Pub Charity in its reply). Reference to the statutory purpose is, on balance, a slightly, but not overwhelmingly, negative consideration when regard is had to section 3(a) ("control the growth of gambling").

9.15 The issue of a licence containing an error on 13 August 2020, and its replacement with a corrected version the following day, has no material bearing on the exercise of the discretion to backdate the licence.

9.16 Neither is it material, as much of Pub Charity's submissions implied, that the applicant might have missed the expiry of the section 92 period by only a short period. The time limit imposed by section 92 is a strict one and use of the backdating discretion should not proceed otherwise, effectively being used to excuse non-compliance if the expiry date was not missed by much.

9.17 It should be apparent that none of the foregoing matters raised by Pub Charity are regarded by the Commission as justifying the exercise of the discretion to backdate the issued licence. If they had been the only factors before it, the Secretary's decision would have been confirmed.

9.18 However, Pub Charity also points, with some justification, to the effect of the Covid-19 Alert Level restrictions. Even the Secretary conceded that their effect on the progress of the application was a material consideration on the exercise of the discretion. Ultimately the Secretary considered that, while the restrictions undoubtedly had an effect, they did not sufficiently explain the entire delay, once the period comprising the imposition of Alert Levels 3 and 4 were added to the expiry of the section 92 period.

9.19 While the Commission has some sympathy with that approach (and an effect which did not explain all of the period after expiry should generally be discounted), it considers that it did not adequately take into consideration the less direct effect of the Alert Levels, including the pressure on accessing third party services immediately following the end of those restrictions. Pub Charity made a good point that the pandemic restrictions had generally resulted in quite generous relief provisions, including in relation to regulation of gambling. While they did not include a statutory exemption from the effect of section 92, they generally support treating the effect of the exceptional pandemic circumstance with a degree of flexibility.

9.20 The Commission has reached a decision to vary the decision of the Secretary in relation to the backdating of the licence, specifically by backdating the licence sufficiently to avoid the loss of section 92 rights by lack of licence continuity in the particular circumstances. It has not reached that decision easily and it is made by a very fine margin. The reasons for its decision are a combination of the last factor and concern that its remarks in decision GC26/10 may have been misconstrued and resulted in an expectation that renovations could be undertaken safely without risk of losing a section 92 entitlement. As this decision is expected to clarify that position for the future, it does not expect that to be a factor in future cases.

10. THE PERMITTED NUMBER OF GAMING MACHINES AND TERRITORIAL AUTHORITY CONSENT

10.1 The foregoing deals with the issues raised directly by the appeal, all of which related to the question of licence period continuity. However, in considering the terms of the licence to be issued, the Commission had cause to consider whether sufficient continuity as to the permitted number of machines had been maintained in order for the Appellant to receive the relief sought.

10.2 The Commission noted that, although the prior licence held by The Southern Trust contained the following condition:

> The holder of this class 4 venue licence is authorised to conduct class 4 gambling by way of gaming machines at the venue specified on this licence by operating no more than 14 gaming machines.

10.3 It also contained the immediately following condition:

> The holder of this class 4 licence is authorised to operate the gambling equipment specified in the schedule attached to this licence.

10.4 The schedule attached to The Southern Trust licence contained the details of 5 gaming machines only.

10.5 The licence under appeal had replaced “14” in the former (maximum number) condition with “9”; the appeal sought the reinstatement of “14”. The licence under appeal had included the

latter (permitted machines) condition and a schedule with the details of 9 machines; the appeal sought the issue of a licence with the same permitted machines condition and a schedule containing the details of only 12 machines.

10.6 In December 2020, the Commission wrote to the parties seeking additional submissions on two related issues:

(a) the effect of sections 92 and 70 on the number of authorised machines at the venue at material times; and

(b) the effect of section 98 on the application, having regard to that number.

10.7 It noted that the licence application dated 29 May 2020 answered the question about the need for territorial consent in the negative and referred to comments made in Decision GC26/10[8]. With reference to section 98, it asked the parties to address the following:

(a) Did the venue licence application seek "to increase the number of gaming machines that may be operated at a class 4 venue (... by way of an application for ...a class 4 venue licence ...)", in terms of section 98(a)?

(b) Is a territorial consent required for an application for a venue licence which authorises more than 5 machines at the venue?

(c) In terms of section 67(1)(f), was the Secretary satisfied that that "the territorial authority has provided a consent (if required under section 98)"?

(d) Can the Commission be so satisfied?

(e) If it cannot, what order should the Commission make pursuant to section 75(4)?

10.8 In response, the Appellant submitted as follows:

(a) While section 92 permits qualifying venues to have up to 18 gaming machines, it fixes the venue maximum as the number of machines notified to the Secretary on 22 September 2003 (the effective section 89(1) notification date) by requiring the notified number to be treated as a condition of the licence. If fewer than 18 gaming machines were notified, the number may be increased only if a new licence is issued allowing the increase, in which event territorial consent is required under section 98.

(b) Matata Hotel had a venue licence on 17 October 2001 and, on the appeal, the Appellant argues that it has maintained the required licence continuity since then.

(c) It is common ground that the venue operated 14 gaming machines on 22 September 2003. Because it is not seeking more than 14 gaming machines (the number notified

[8] Specifically, paragraphs 29, 37(f) and 42.

on 22 September 2003), section 98 has no application and no territorial consent is required.

(d) Section 70 imposes two separate requirements:

(i) Section 70(1)(g) requires a venue licence to include a condition regarding the number of gaming machines that may be operated at the venue, being the number that may be operated without obtaining territorial consent.

(ii) Section 70(1)(h) requires the details of the gaming equipment currently operated to be listed (without reference to the number of gaming machines

(e) The section 70(1)(g) condition should be treated as specifying a number, which was the number notified under section 89(1) on 22 September 2003, any increase in which would trigger a requirement for territorial consent under section 98. The section 70(l)(h) condition is merely descriptive of the gaming machines currently in operation. It follows that the number specified in section 70(l)(g) and the number of machines for which details are provided in section 70(l)(h) do not need to be consistent. The reference in section 98 to an "increase in the number of machines permitted" is a reference to the number of machines specified in the section 70(1)(g) condition (which is the number notified under section 89(1)), not the number of machines for which details are provided in the section 70(1)(h) condition.

(f) The comments made by the Commission at paragraph 37(f) and 42 of decision GC26/10 (to the effect that replacing a licence for 18 machines with a licence for a single machine would have brought section 98 into effect if and when the licenceholder later sought an increase back to 18 machines) are in error and require reconsideration

(g) The comments were outside the critical reasoning required for the decision made and were made without the benefit of submissions on the point. They are contrary to how the Secretary, the industry and the territorial authority have interpreted section 98 (referring to Gambling Fact Sheet #12), and with the machine numbers provided by the Secretary under section 103 to territorial authorities and societies which often show a difference between the number of machines permitted to be operated and the number in operation. The Commission is not bound by its previous decisions.

(h) The key text of section 98(a) and section 70(1)(g) – both contain the phrase "the number of gaming machines that <u>may</u> be operated" – is the same.

(i) In contrast, it was submitted that section 70(1)(h) requires "details of the gaming equipment that <u>is</u> operated at the venue".

(j) The notice required by section 89(1) and the provisions of section 92(3) would be redundant if voluntary reduction in the number of machines actually operated resulted in a need for territorial consent under section 98.

(k) When interpreting the provisions of the Gambling Act, regard must be had to its purpose. One of the purposes is to ensure that money from gambling benefits the community. That would be frustrated if a society had to seek territorial authority approval whenever it wished to change a gaming machine at a venue. When gaming machines are to be changed at a venue, their details are first removed from the licence, emptying the schedule, and new details added to the schedule only after installation.

(l) Gaming machines fees are charged on the basis of the number of machines listed on the schedule. If a venue obtains permission to remove inactive machines, it is normal practice to apply to remove the machine details from the schedule in order to avoid paying fees, thus saving costs and increasing community returns.

(m) Allowing societies to reduce machine numbers for a period and to increase them back to the maximum specified has the effect of encouraging and facilitating venues to operate fewer machines and is thus consistent with the purpose of controlling the growth of gambling.

10.9 The Secretary's submissions were too broadly similar effect, as follows:

(a) The licence conditions that refer to "no more than 14 gaming machines" refer to the number of gaming machines that may be operated in the venue. The schedule of machine details refers to the machines that were in fact being operated legally. The latter condition and schedule do not override the former condition and are separately required by section 92(3).

(b) Section 70 sets out what can and must be included in a class 4 venue licence. It requires two separate licence provisions, a "condition" governing the maximum number of machines that may be operated (section 70(1)(g) and "information" that set out the details of the machines that are currently being operated (section 70(1)(h)).

(c) Under section 70(3), the Secretary may amend or revoke a condition of a class 4 venue licence. There is no reference in section 70 to the need for territorial consent being required for any amendment. The requirement for territorial consent is governed completely by section 98.

(d) The statutory requirements predated the use of electronic licence monitoring technology. The requirement to notify the details of "currently operating" machines under section 92(3) likely reflected an intention that the Secretary closely monitor the machines being used to ensure that they are appropriate and comply with all

regulatory requirements. Technology has made such monitoring easier than in 2003.

(e) A "substance over form" approach would indicate that what is critical is what is permitted rather than what is presently operated.

(f) Section 98 requires territorial authority when the number of machines which may be operated is increased, not when the number of machines actually being operated is increased.

(g) The former is the number of machines specified in the condition required by section 70(1)(g). Section 92 does not describe the details of the machines listed as those that may be operated nor require those details to be treated as a licence condition.

(h) Societies are not required to operate the maximum number of machines specified. They may increase the number that they are operating up to the number that they may operate.

(i) When the Secretary permits venues to cease to operate, operators typically seek to have machines removed from the licence schedule and the Secretary generally approves their removal because section 70(1)(g)[9] requires details of the machines that may be operated. If a venue is approved to be inactive for a period, no machines may be operated[10]. It would be unworkable if territorial authority consent were required when the gaming operator resumed gambling after an approved period of inactivity.

(j) The application did not seek to increase the number of machines that may be operated at the venue, merely the number of machines that were being operating. No territorial consent was therefore required. Neither would territorial consent be required for the 9 machine licence that the Secretary issued.

(k) The Secretary's views on these matters, reached following the Commission's Decision 26/10, are summarised in Gambling Fact Sheet #12.

10.10 Gambling Fact Sheet #12 was provided to the Commission. Materially to the issues, it says as follows:

> Territorial authority consent is required when a society proposes to:
>
> - Increase the number of gaming machines that may be operated at any venue. (Note: 'increase' includes an increase from mandated maximum limits. For example, a Departmental condition or the number of machines a venue notified on 22 September 2003 under Section 89 of the Act, but not an increase after a voluntary reduction in the current number of machines operating ....

[9] Actually section 70(1)(h) requires the machine details; subsection (g) requires the number of machines.

[10] It was not clear whether "may" is used in the sense of possibility or of authorisation. Only the former seems to be the case.

Territorial authority consent is not required when:

- An operator applies for a licence within a period of six months since a Class 4 venue licence was last held.
- A society wishes to return to the statutory or mandated maximums after a voluntary reduction.

10.11 The submissions indicated considerable common ground between the parties, specifically:

(a) The maximum number condition is concerned with the number of machines that may be operated whereas the permitted machine condition is solely concerned with what is in fact in operation, not what may be operated.

(b) As a result, there is no conflict to be resolved between the two conditions and the former is the **only** condition that controls the possible number of machines in operation at any time.

In other respects, the submissions contained a number of uncontroversial observations which, in the Commission's view, were not directly raised by the questions posed.

10.12 The principal difficulty which the Commission identified with the common position advanced by the parties was the lack of congruity with the text of the statutory provisions and with the actual licence conditions imposed.

10.13 It is common ground that, apart from the unlicensed period which is the central subject of the appeal, Matata Hotel is a venue to which section 92(1) applies. Under section 92(3), both the number of gaming machines notified under section 89(1) and the models and serial numbers of the gaming machines must be treated as a venue condition of the class 4 venue licence and the society must neither change the gaming machines (nor operate more than that number of machines) at the venue unless:

(a) a new class 4 venue licence is obtained that allows the change; or

(b) the licence is amended to allow the change.

10.14 Self-evidently, section 92(3) is not concerned solely with the number of machines; nor is it is the case that only the number of machines must be treated as a condition. A condition is also required which specifies "the models and serial numbers of the machines". In that regard, the parties' submissions that the original conditions, as to number and machine details, must be derived from the section 89(1) notice, are accepted as correct.

10.15 The requirements of section 92(3), which are limited in their application to section 92(1) venues, are mirrored in part only in section 70(1) which applies to all class 4 venue licences. The section requires the "following information and conditions" to be included in every class 4 venue licence. The list comprises 11 items:

Item 8 (section 70(1)(g)) is:

conditions about the class 4 gambling that may be conducted at the venue, including the number of gaming machines that may be operated.

Item 9 (section 70(1)(h)) is:

details of the gambling equipment that may be operated at the venue

10.16 Self-evidently, both subsections (g) and (h) refer to what may be operated at the venue, not to what is actually in operation as a matter of fact or election. In the Commission's view, the attempt to draw a distinction between the two provisions, based on one being concerned with what is permitted to be operated and the other with what is in fact being operated, does not withstand scrutiny of the statutory language. Both are concerned with what may be operated; neither is concerned with what is in fact being operated.

10.17 Furthermore, the text of the conditions of the last licence to be held, the licence to The Southern Trust dated 14 February 2019, reflects the statutory language, not the distinction advanced in the parties' submissions. The schedule attached to the licence contained the serial numbers and model descriptions of only 5 gaming machines and they were the only machines that were permitted to be operated.

10.18 In the Commission's view, provisions which require both the number of gaming machines and the details of the equipment that may be operated, would generally be expected to produce consistent information as to what was permitted. If a venue were authorised to operate up to 9 gaming machines, one would expect the details of at least 9 gaming machines to be set out in the licence. That is because, if the operator may operate only machines for which details are set out in the licence schedule, there is no sense in which it may operate more machines than those for which details are set out in the licence schedule. If the schedule contained details of fewer machines than the expressly permitted number, the licence conditions would conflict, and the true permitted number would be the number of machines for which details appeared in the schedule.

10.19 The foregoing analysis draws a clear distinction between what is permitted ("may be operated") and what is in fact operated. The Commission acknowledges that there is no statutory obligation for a society to operate all of the machines which it is permitted to operate at a particular venue. The minimum operational requirement is that set out in section 71(1)(g); it requires the conduct of some form of class 4 gambling at the venue within a 4 week period, with no reference to the number of machines operated. If a single machine were operated, even briefly, at the venue during the period, none of the requirements for notification, approval and surrender would be engaged.

10.20 There is also no statutory requirement to remove, from the schedule setting out the details of the gaming machines which may be operated, the details of machines which are not presently in operation. The provisions do not preclude the schedule containing the details of machines

which are not located at the venue (so long as they are all owned by the society[11]); they do not even preclude the schedule listing the details of more machines than permitted by the number condition[12]. That conclusion is consistent with the submission that the likely reason for the schedule requirement is the need for oversight by the Secretary to ensure that the venue only ever operates machines which meet all regulatory requirements. Listing compliant machines which are not at the venue would allow a venue to change the number of machines actually in operation up to the maximum number without any requirement to amend the licence, so long as it added machines from the schedule to its operation.

10.21 There is similarly no statutory requirement to remove equipment details from the schedule if the venue ceased its gambling operation for a period, including for an approved period of more than 4 weeks, nor to remove from the schedule details of machines as soon as they are removed from the venue and before substituting their details with those of the replacement machines. The principal reason for amending the schedule in such circumstances appears to be purely commercial, arising from the basis on which the Secretary has chosen to charge fees (although the basis for charging fees may be based in the erroneous assumption that the licence requires only the machines actually in use to be listed).

10.22 In response to the detailed submissions of the parties, the Commission makes the following observations:

(a) Section 92(3) requires both the number **and** the specified details of the machines notified under section 89(1) to be treated as conditions of the licence but provides for both to be changed by either a new licence providing otherwise or a licence condition amendment to different effect. It does not provide that the original number or the original details must remain, or should be assumed to be, unchanged.

(b) Section 70(1)(g) requires the licence to state the "conditions about the class 4 gambling that may be conducted ..., including the number of gaming machines that may be operated", not the number permitted on the section 89(1) date or the highest number otherwise permitted at some point in the past.

(c) Section 70(1)(h) requires "details of the gambling equipment that <u>may</u> be operated at the venue", not the equipment currently operated in fact. It would be a breach of the permitted machines licence condition to operate any equipment which was not listed in the schedule.

(d) Consistently with its previously expressed view that grandparenting provisions should be read neutrally, sections 89, 92 and 70 are intended to be construed in

[11] See section 69A(b).

[12] In that event, the maximum number condition would have the effect of limiting the number of machines in operation **at any one time**, with the selection available being drawn from the longer list.

accordance with their terms and context, not primarily by reference to the effect of section 98 (as the Appellant suggested).

(f) While, under section 70(3), the Secretary may amend or revoke a condition of a class 4 venue licence, the power may not be exercised to remove conditions required by section 70(1). In addition, no lawful amendment of conditions could have the effect of removing the obligation created by section 98. As the requirement for territorial consent is governed completely by section 98, it is immaterial that there is no reference in section 70 to the need for territorial consent being required for any amendment. Sections 66 and 67, which contain such references, apply expressly to amendment applications[13].

(e) While sections 98(a) and 70(1)(g) both refer to "the number of gaming machines that may be operated", section 70(1)(h) neither requires nor permits the provision of details of a smaller number of machines than is stated in the condition required by section 70(1)(g). Logically, one would expect the number of machines for which details are specified to be either the same or higher. If they are lower, the number condition would be manifestly wrong.

(f) No issue is taken with the contention that the "increase" in section 98 is an increase in the number specified in the licence **as required by section 70(1)(g)** (that is, the actual number of machines which are currently permitted to be operated, not the number notified under section 89(1) in 2003). Section 98 is neither affected by changes in the detail of the permitted equipment (so long as the list includes details of at least the same number of machines as specified as the permitted number) nor by a society's decision to operate fewer than the number permitted at any time.

(g) Societies do not need to seek territorial authority consent if they change machine details on their licences or operate the permitted machines after a period of not operating all of the machines permitted.

(h) The requirement for territorial authority consent is governed by section 98. It governs the exercise of the Secretary's licencing powers as expressly provided for in the licencing provisions, such as section 67(1)(f), which requires the Secretary to be satisfied that the territorial authority has provided a consent (if required under section 98).

(i) Regard to the statutory purpose is appropriate when construing the provisions of the Gambling Act. The Act provides a single purpose comprising 8 elements[14]. While ensuring that money from gambling benefits the community is one element, so is facilitating community involvement in decisions about the provision of gambling. The

[13] Section 73(4) and (5).
[14] See section 3.

requirement for territorial authority consent is one of the few provisions in the Act which provide for community involvement in decisions about the provision of class 4 gambling. That element of the statutory purpose does not support reading section 98 restrictively. That seems especially the case if the reason for doing so is to reduce fees which societies must otherwise pay to the Secretary, when such fees are set by subordinate legislation[15].

(j) The Commission does not need to reconsider the comments made in GC 26/10 because those comments do not address the present circumstances at all. The comments referred to a hypothetical situation, not even the prevailing situation in that appeal (because the application had been amended). More relevantly, the comments were not directed at a distinction between the number of machines permitted and the details of the permitted items of equipment (as no such distinction had been drawn in the material before the Commission) and certainly not with the number in actual operation. As the comments were expressly directed to a hypothetical situation in which a licence permitting 18 machines was replaced by a licence permitting only 1 machine, the comments were substantively correct (because the section 70(1)(g) condition number refers to the number of machines that may be operated, not the number in actual use or notified in 2003 under section 89(1)) but largely immaterial for the present appeal.

10.23 Strict application of the statutory analysis outlined above would have serious consequences for the outcome of the appeal, rendering the principal appeal issues largely moot in practice. The analysis would result in the venue remaining a section 92 venue (with a theoretical maximum number of 18 machines) but with a current entitlement to operate only 5 machines since the schedule was reduce to 5 machines[16]. If the number of approved machines constituted "the number of gaming machines that may be operated", any increase from 5 machines would trigger the obligation to obtain territorial authority consent under section 98(a), something which may not be possible to obtain. However, it is clear that neither the Appellant nor the Secretary anticipated such an outcome.

10.24 The administration of the Act has been affected by practices adopted or endorsed by the Secretary which, in the Commission's view, were not well-grounded in the Act's provisions. The contents of Gambling Fact Sheet #12 are in fact correct on their face, but they have been given an application in practice inconsistent with the Act. The information sheet is correct in recording that consent is required when an increase in the permitted number of machines is proposed by reference to the "mandated maximum limits", which are those set by licence conditions and that consent is not required when a venue increases the number of machines in operation following a voluntary reduction in its operation. Unfortunately, what has happened

[15] No details of the applicable fee schedule were provided to the Commission.

[16] The information before the Commission indicates that the number of approved machines was reduced from 14 in 2001, to 10 in 2005 and to 5 in 2014.

is that voluntary reductions have been reflected, unnecessarily in the Commission's view, in amendments to the licence conditions which have, in fact, reduced the number of machines that the venue is permitted to operate. Strictly speaking, doing so reduced the "mandated maximum limits" and a later increase would require an increase in the "mandated maximum". What happened in such cases was not simply a voluntary operational reduction within the mandated maximum, although that would have been the case if the licence had not been amended.

10.25 It is of real concern to the Commission that societies will have acted, to their detriment, in accordance with advice from, and a practice encouraged by, the Secretary. It is probable that many societies, in reliance on incorrect advice, have sought and obtained similar changes to the permitted machine schedule, which, if a strict approach were now applied, may be difficult to reverse because of the need to obtain territorial authority consents. The Commission's consistent practice has been to avoid, whenever it can, outcomes which would be unfair in their operation to operators who reasonably relied on an erroneous construction of the Act.

10.26 By way of example, in decision GC26/10, the Commission clarified the position concerning section 92 (holding that the applicable period is 6 months *without a licence* – time does not stop with a mere application) and contrasted it with section 89 (holding that the period is 6 months *without having made an application* – time stops with an application). Having done so, the Commission granted the appellant a form of indulgence in the outcome in order, among other things, to remove the prospect that it had been disadvantaged by holding a view on the construction of the Act which the Commission ultimately rejected. It directed the Secretary to issue a licence, which permitted the use of 14 machines (the details of which would need to be provided by the appellant) and which was backdated to preserve the section 92 rights, in circumstances which would not usually justify that course. The Commission's first recorded reason for doing so was the likelihood that the appellant had been under a misapprehension about the differing requirements (noting that no future appellant could credibly claim to be in the same position now that the position had been clarified).

10.27 While the Commission sees it as its proper role to correct what it sees as erroneous views about the meaning and application of provisions of the Act, it has a strong preference for providing relief to operators who have relied on an erroneous view, especially if that view has been endorsed or encouraged by the Secretary. Such a circumstance clearly arises in this case.

10.28 The Commission considers that the best solution in the present case is to refer the matter back to the Secretary with directions aimed at providing a sufficient opportunity to the Appellant to enable it to recover its position in the light of the guidance provided by this decision. The direction would be to issue a new licence, backdated to 11 June 2020, for a maximum of 14 machines and including the listed details for at least 14 permitted machines. The Appellant would need to provide the Secretary with the details of an additional 2 machines (having advanced the details for only 12 machines in its application). If a licence were issued in those

terms, the Appellant's position under section 92 would have been recovered and the venue would be in a position to maintain those rights in the future if it elects to do so. In order to do so, it will need to maintain a permitted machine schedule with the details of 14 machines (and meet any ongoing associated costs of doing so). In that regard, the Secretary may wish to consider revising the present basis for machine charges, including making provision for the separate recording in venue licences of both permitted machines and operating machines.

10.29 In the Commission's view, adopting such an approach would not be inconsistent with the Act's statutory purpose. The result would reflect what is likely to have been the case if the construction issues outlined above had been identified by industry participants earlier. Societies which hold venue licences for section 92 venues have generally been keen to maintain the grandparented rights, if possible. Their principal focus to date has been on licence continuity, on the assumption that only the maximum number condition was critical to maintain the entitlement. However, the Commission has no reason to think that, if maintenance of the maximum number had been recognised as requiring maintenance of a matching number of permitted machines (whether they were installed and operated or not), operators would have taken steps to do so. If that is the case, the relief granted would not result in territorial authorities losing control rights which either they expected to have or which they would have had, if operators had been alerted to the issue.

10.30 The Commission suggests to the Secretary that other operators in a similar position should be given the opportunity to recover their position in a similar fashion, by providing them with the opportunity to add the necessary machine details to bring the permitted machine condition into alignment with the maximum number condition. Ideally that opportunity would be available at any stage up to and including the next licence renewal. If, after receiving notice of the need to align the maximum number and permitted machine details conditions, class 4 venue licence holders elect not to do so (whether to save fees or otherwise), they can expect to be the subject of the strict application of sections 92 and 98 after the next licence renewal.

11. DECISION

11.1 For the foregoing reasons, pursuant to section 77(4), the Commission refers the decision back to the Secretary with directions to issue a licence backdated to 11 June 2020 and, subject to the Appellant supplying the details of at least an additional 2 machines (so that the permitted machine schedule contains the details of at least 14 machines), increasing the maximum number of gaming machines to 14.

11.2 Pub Charity has asked for the opportunity to file submissions on the making of an award of costs in the event that the appeal was successful. While the Commission was surprised by the request in the light of its previous decisions on the question of costs on appeals, the Appellant may lodge submissions on costs if it wishes. The Commission allows the Appellant a period of 14 days to file and serve a memorandum on the question of costs.

If it does so, the Secretary will have a further 14 days to file a memorandum in response and the Appellant will have a further 7 days to file a memorandum strictly in reply.

Lisa Hansen
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

8 April 2021