

IN THE MATTER of the Gambling Act 2003
AND on an appeal by **PHOENIX
CHARITABLE TRUST LIMITED**

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
R D Bell
A K Foote

Date of Decision: 14 March 2014

Date of Notification
of Decision: 1 April 2014

DECISION ON AN APPEAL BY PHOENIX CHARITABLE TRUST LIMITED

Introduction

1. The Phoenix Charitable Trust Limited ("**Phoenix**" or "**Appellant**") has appealed to the Gambling Commission pursuant to section 61(1)(a) of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to refuse its application for a class 4 operators licence. The Secretary refused to grant the licence because he was not satisfied of certain grounds under section 52.

Decision under appeal

2. The Secretary ultimately issued two letters refusing to grant a class 4 operator's licence. The second expanded on the grounds relied upon in the first. As the parties' submissions deal with the issues raised in both letters, both letters are summarised by way of introduction.
3. In a letter dated 23 November 2012, the Secretary informed the Appellant that he had refused to grant it a licence on the grounds that he was:
 - (a) not satisfied that Phoenix would maximise net proceeds from the class 4 gambling and minimise the operating costs of that gambling (section 52(1)(d)); and
 - (b) not satisfied that Phoenix was able to comply with applicable regulatory requirements (section 52(1)(f)).
4. The Secretary's concern arose from the apparent lack of experience of the directors. He considered that they had limited knowledge of the requirements for the operation of a class 4 gambling trust, and that the Appellant had not undertaken sufficient preparation to

commence a satisfactory class 4 operation. In particular, there was a lack of written policies and procedures on matters such as venue compliance and grant audit processes.

5. Phoenix filed a notice of appeal, but the parties delayed progressing the appeal in order for Phoenix to provide the Secretary with further information, presumably so that the Secretary could reconsider his decision. This course was adopted despite the fact that the matter was then within the jurisdiction of the Commission on appeal (*Bluegrass Holdings Limited*, decision GC17/13).
6. The further information, provided on 8 February 2013, included copies of a venue operations manual and society operations manual. The Appellant addressed the directors' skills and experience, and acknowledged that Ray McIntyre had provided advice in relation to setting up the Appellant. The Appellant stated that Mr McIntyre had indicated that he would be willing to assist it on a casual consultancy basis, if it required assistance.
7. On 10 June 2013, the Secretary wrote to the Appellant, confirming his refusal to grant a licence. The Secretary expanded his grounds for refusal to include a failure to be satisfied that Phoenix was suitable to hold a class 4 operator's licence (section 52(1)(h)) for the following reasons:
 - (a) The named key persons lacked experience.
 - (b) Mr McIntyre was a key person but unsuitable based on his profile of past compliance with the Act. The Secretary's concerns about suitability arose from Mr McIntyre's involvement as a key person of Eureka Trust, whose class 4 operator's licence the Secretary proposed to refuse to renew (although the Secretary did not make a final decision to refuse to renew the licence, because Eureka withdrew its application to renew following his proposal).
 - (c) Phoenix failed to disclose Mr McIntyre's significant involvement in its application, and therefore failed to provide all material information at the time of making the application.
 - (d) Mr McIntyre would play a significant and influential role in both Sideline Bar (the Appellant's only proposed venue) and the Appellant.
 - (e) There were conflicts of interest (although the letter does not identify them expressly).
8. The Secretary acknowledged that the second letter contained additional grounds, and therefore gave the Appellant 15 working days to respond. The Secretary's decisions on applications for a grant of licence are final, unlike decisions to refuse to renew licences, where there is a requirement to notify a proposal to refuse to renew and to provide an

opportunity to comment. The Secretary may have confused the decision to refuse the licence application with a refusal to renew a licence.

9. On appeal the Commission may confirm, vary, reverse or refer back for reconsideration the Secretary's decision (section 61(4)). In doing so, the Commission has regard to all of the material before it, whether or not it was available to the Secretary (section 61(3)).
10. The decision under appeal is one made under section 52, the material parts of which provide as follows:
 - (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—
 - (a) the gambling to which the application relates is class 4 gambling; and
 - (b) the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and
 - (c) the applicant's proposed gambling operation is financially viable; and
 - (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
 - (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and
 - (f) the applicant is able to comply with applicable regulatory requirements; and
 - (g) the applicant will minimise the risks of problem gambling; and
 - (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and
 - (i) there are no factors that are likely to detract from achieving the purpose of this Act; and
 - (j) a key person is not a key person in relation to a class 4 venue licence held, or applied for, by the applicant (except in the case of a club that intends to operate gambling equipment on its own non-commercial premises, the New Zealand Racing Board, or a racing club).
 - ...
 - (4) In determining whether an applicant is suitable for a class 4 operator's licence, the Secretary may investigate and take into account the following things:
 - (a) whether the applicant or a key person has, within the last 10 years,—
 - (i) been convicted of a relevant offence;
 - (ii) held, or been a key person in relation to a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused;
 - (iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt; and
 - (b) the financial position of the applicant and the credit history of the applicant and each key person; and
 - (c) the profile of past compliance by the applicant and each key person with—
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
 - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and
 - (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.
11. Section 4 defines key persons in relation to venues differently to key persons in relation to class 4 operators:

key person means,—

- (a) in relation to class 4 operator's licence, a person who-
 - (i) is a trustee or other officer of a corporate society that is an applicant for, or holder of, a class 4 operator's licence;
 - (ii) is the chief executive (or performs that function) of a corporate society that is an applicant for, or holder of, a class 4 operator's licence;
 - (iii) exercises significant influence in the management of a corporate society that is an applicant for, or holder of, a class 4 operator's licence; and
- (b) in relation to a class 4 venue licence,—

...

- (iv) any other person whom the Secretary reasonably believes to have a significant interest in the management, ownership, or operation of a venue operator [except for certain exceptions, not relevant in this case].

...

- (v) a person contracted to service gambling equipment at a class 4 venue

12. It will be seen from the submissions summarised below that the ambit of the appeal became wider than the specific grounds relied upon by the Secretary. The initial grounds for refusal were dissatisfaction with section 52(1)(d) and (f), but the second letter also relied upon section 52(1)(h), the suitability of the Appellant and its key persons. Although some of the matters raised by the Secretary in that regard fall outside section 52(1)(h), as limited by section 52(4), there is an inherent degree of overlap between many of the section 52 grounds and some of the Secretary's expressed concerns with suitability have potential impact on section 52(1)(d) and (f), which the Secretary also expressly invoked, but also clearly on section 52(1)(j) and potentially on others such as section 52(1)(c) and (g).

Appellant's submissions

13. The Appellant submitted that the grounds set out in the initial refusal had all since been addressed and were now met, and that the Secretary's concerns regarding Mr McIntyre are unfounded, as he was not a key person and, in any case, there was no basis not to be satisfied with his suitability. In the alternative, the Appellant submitted (referring to the affidavit of one of its directors, Mr Gordon) that, if the Commission found that Mr McIntyre was a key person and was not suitable, it will ensure that he is not involved in the Appellant's operation.

Ability to comply with applicable regulatory requirements – section 52(1)(f)

14. The Appellant submitted that inexperience alone was not a ground for refusal and that, if all other section 52 requirements were met, a licence should be granted to a society regardless of the directors' level of experience. In any event, the directors had relevant transferable skills, as a former compliance officer, a former venue operator and a business owner. In addition, the directors had gained a much deeper understanding of

the class 4 regulatory framework through the appeal process. The fact that they each had full-time jobs was not relevant, as many organisations rely on volunteers with full-time jobs.

15. The Appellant addressed the Secretary's other specific concerns regarding preparation as follows:
 - (a) The Appellant provided all the information requested in the application form.
 - (b) Although policies and procedures had not been fully developed at the time of the application, they had all been completed by the expected commencement date of the licence (19 November 2012).

Maximising net proceeds and minimising operating costs – section 52(1)(d)

16. The Appellant submitted that its directors would manage the day-to-day running of the Appellant, but would seek advice if something out of the ordinary arose and that its budget for professional advice is modest. Although legal fees of \$26,500 were forecast for the financial year to 30 June 2013, all but \$1,500 of these related to establishment of the Appellant. Phoenix submitted that, aside from professional fees, it has demonstrated financial viability which should have satisfied the Secretary, referring to a Departmental report dated 12 October 2012, which concluded the Appellant was financially viable. Finally, the Appellant submitted that, in any case, any concern that it intends to rely heavily on professional advice was "overridden" by the Appellant's indication that it will seek assistance from an outside consultant (either Mr McIntyre or a company called Gaming Industries Limited).

Ray McIntyre's role

17. The Appellant argued that Mr McIntyre is not a key person, submitting that he was not intended to be one and that, if he were not unsuitable, then there should be no issue with it applying to amend its licence later if it considered in the future that he was likely to become a key person. However, the Appellant's submissions were also heavily focused on whether Mr McIntyre is suitable.
18. In relation to Mr McIntyre's suitability, Phoenix submitted:
 - (a) Mr McIntyre had always disputed that he was a key person of Eureka. In any event a mere proposal to refuse to renew is not expressly included within section 52(4)(a)(ii). Accordingly only Mr McIntyre's conduct, and not Eureka's, could be considered. The Secretary had not identified any breaches of the Act by Mr McIntyre in relation to Eureka or otherwise.
 - (b) The limitation period for bringing a prosecution for Eureka offences (prescribed by section 355) had passed. The Secretary could not now seek to punish

Mr McIntyre for any historic breach through the regulatory process – in this regard the Appellant submitted that a finding of unsuitability would be a punishment, as he would have to find an alternative career after 18 years in the industry.

- (c) Even serious historic convictions (more than 10 years old) were not relevant to the suitability inquiry, and the relevant period will be reduced to seven years if the Gambling Amendment Bill (No 2) is passed. The events in relation to Eureka occurred in 2006 and 2007. Even if Mr McIntyre had a conviction from that time, its current relevance would be questionable in light of the pending amendment.
 - (d) The material disclosed by Mr McIntyre's estranged wife, Mrs Katy McIntyre, should be treated with care. Mrs McIntyre was "clearly hostile" to Mr McIntyre, but the confidential material she provided did not reveal any grounds to justify a finding of unsuitability. However, in any case, she confirmed Mr McIntyre's integrity.
 - (e) Mr McIntyre should be allowed to address the Secretary's concerns. In that regard, although it did not submit an affidavit from him, the Appellant included a letter from Mr McIntyre addressing his suitability, as an exhibit to another affidavit.
19. The Appellant submitted that the information obtained from Mrs McIntyre was obtained improperly and unlawfully and that the manner in which the information was obtained is relevant to the Commission's consideration of it. Further, much of what Mrs McIntyre said in her interview may be based on privileged information, to which she had access. Phoenix also submitted that the Department of Internal Affairs had acted inappropriately by actively seeking privileged information from Mrs McIntyre.
20. Finally, the Appellant submitted that, if Mr McIntyre was found to be unsuitable, the Appellant would not enter into a contract with him. The Appellant had approached an alternative service provider, Gaming Industries Limited, which had confirmed (via a letter dated 13 December 2013, attached to the Appellant's submissions) that it would be prepared to undertake machine maintenance and auditing services for the Appellant.

Secretary's submissions

21. The Secretary's case was that the Appellant was established at the instigation of Mr McIntyre as a vehicle for his ongoing involvement in the gambling sector. Mr McIntyre was unsuitable to be a key person in a class 4 gambling operation, and assurances by the Appellant that he would not be involved in the future could not provide the necessary satisfaction.

Directors' experience and preparation – ability to comply with applicable regulatory requirements – section 52(1)(f)

22. The Secretary submitted that interviews with the Appellant's directors indicated a "distinct lack of preparation". The Secretary was particularly concerned that requirements in relation to venue compliance and grant audit processes would not be met, as there had been an "obvious lack of consideration of such matters". The Secretary dismissed the Appellant's submission that it had since made up for any deficiencies in preparation and experience saying that, although it was commendable that the Appellant had now developed policies and procedures, "the timing of their submission indicates that they were prepared in response to the Secretary's decision". The Secretary urged the Commission to place more reliance on the statements made by the directors in their interview, than on information provided at a later stage, submitting:

The Secretary also considers that the statements of the directors during interview are far more relevant than the considered response of the Appellant's lawyer on 8 February 2013. The directors' proposed reliance on external professional support was itself one of the Secretary's concerns.

Maximising net proceeds and minimising operating costs – section 52(1)(d)

23. The Secretary submitted that the amounts that the Appellant had budgeted for professional costs were unrealistic in light of the "directors' own statements" (presumably referring to statements made by the directors in interviews about the extent to which they intended to rely on professional advisors). The Secretary pointed in particular to the proposed servicing and audit contracts with Total Gaming Solutions (Mr McIntyre's company), submitting that, because of the initial short (six month) terms, based on past experience, he believed that the contracts would be replaced with long-term ones if a licence were granted. The Secretary also submitted that the hourly rate of \$110 provided for in the contracts required justification, because it equated to a full time salary of \$220,000.

Ray McIntyre

24. The Secretary considered that Mr McIntyre was a key person of Phoenix, because there was evidence to show that Mr McIntyre:
- (a) organised the establishment of the Appellant;
 - (b) organised the surrender of the venue licence held by Bluegrass Holdings Limited (for Sideline Bar);
 - (c) organised the Appellant's problem gambling policy with material obtained from Bluegrass; and
 - (d) stated to Mr O'Brien (a person connected to Bluegrass) that "Sideline bar/331 was agreed as just a 'hold' for me until a Licence came through", indicating that he had

secured the venue for the Appellant, which he regarded as his entity, and he had organised Bluegrass to hold it for him temporarily.

25. The Secretary submitted that Mr McIntyre is not a suitable key person on the basis of his history of non-compliance with the Act, namely:
- (a) Mr McIntyre's involvement in the Eureka Trust, whose licence the Secretary proposed to refuse to renew in 2009, and in respect of which the Secretary alleges Mr McIntyre breached sections 113 and 118 of the Act; and
 - (b) Mr McIntyre's more recent conduct in relation to Bluegrass and Sideline Bar, as revealed by the emails between Mr McIntyre and Mike O'Brien, and between Mr McIntyre and Sonya McIntyre (the venue manager at Sideline Bar and Mr McIntyre's sister in law)).
26. The Secretary acknowledged the (indirect) impact on Mr McIntyre of a finding of unsuitability, but submitted that the key concern must be to ensure that participants in the sector are willing and able to comply with their regulatory responsibilities.
27. Finally, the Secretary submitted that the Commission should be sceptical of the assurance that Mr McIntyre would not be involved in the Appellant's future operations if the Commission found that he was unsuitable. The Secretary referred to two emails from Mr McIntyre to a lawyer, in which he asked the lawyer to ensure that Mr McIntyre's name did not appear on documentation relating to Sideline Bar (apparently relating to the acquisition of the venue by Bluegrass in May 2012).

Other factors that are likely to detract from achieving the purposes of the Act – section 52(1)(i)

28. This ground was not specifically relied upon in the Secretary's initial letter or second letter, although the latter referred to unspecified "conflicts of interest" which the Secretary included under this ground in his submissions. The Secretary submitted that Mr McIntyre had a conflict of interest because he helped his sister-in-law to buy Sideline Bar and his company would be contracted to service its machines. The Secretary argued that, in the light of Mr McIntyre's involvement "at every level of the gambling operation", it was impossible to ignore the prospect of sections 113 and 118 being breached. The Secretary considered that these factors were likely to detract from the purposes of limiting opportunities for crime or dishonesty associated with gambling (section 3(f)) and to ensure that money from gambling benefits the community (section 3(g)).

A key person may not be a venue key person section 52(1)(j)

29. This ground was also not expressly relied upon in either refusal letter, although the second letter stated that the Secretary considered that Mr McIntyre played a significant

and influential role in both Sideline Bar and Phoenix. The Secretary submitted that Mr McIntyre was a key person of Sideline Bar by virtue of his role as a person contracted by Bluegrass to service gambling equipment at Sideline Bar (see definition of a key person in relation to a venue licence in section 4(b)(v)).

Information obtained from Katy McIntyre

30. The Secretary denied any wrongdoing on the part of the Department in relation to the information acquired from Katy McIntyre and submitted that, in any case, under section 226(3), if the Commission considered the material to be relevant, it could receive the evidence, regardless of whether or not it would be admissible in court. The Secretary said that all privileged material has been redacted, and, in response to the Appellant's claim that the material is confidential, that it is well-established "that there is no confidence in an iniquity".

Appellant's submissions in reply

31. The Appellant made the following points in reply:
 - (a) The Secretary's submissions in relation to the Appellant's experience and preparation were directed at defending his original decision, rather than considering whether the grounds for satisfaction had been met, in keeping with the *de novo* nature of the appeal. The Secretary did not explain why the Commission should not be satisfied with the policies and procedures the Appellant had since put in place.
 - (b) The Commission could rely on the Appellant's assurance that Mr McIntyre would not be involved if he was found to be unsuitable. The Secretary had not offered grounds for his submission that the assurance should be treated with scepticism. It amounted to an assertion that Mr Gordon's sworn evidence is unreliable.
 - (c) The Secretary did not offer any evidence to support his assertion that the budgeted amounts for professional advisors was unreliable. Further, the submission was at odds with the financial viability form prepared by the Department, dated 12 October 2012, which concluded that the forecasts did not make any substantial "under statements" of costs.
 - (d) The suggestion that the cost of obtaining outside support through a contracted service provider was equivalent to a full time salary of \$220,000 was misconceived. There had been no suggestion that the consulting arrangement would be for 40 hours a week, 50 weeks a year. \$110 an hour was reasonable for a consulting arrangement, and comparable to the rates indicated by Gaming Industries Limited. Consultants were paid on the basis that they did not have guaranteed hours, and must meet all of their own expenses.

- (e) Much of the Secretary's material in relation to Mr McIntyre was in relation to Bluegrass, in respect of which Mr McIntyre is not a key person. Therefore the section 118 allegation was irrelevant. Mr McIntyre's role with Bluegrass was as a service provider. The emails with Mr O'Brien simply reflect him requesting additional work from Bluegrass within that arrangement.
- (f) The reference to instructing Sonya McIntyre to lie was taken out of context; it was simply a light-hearted joke between her and her brother-in-law.
- (g) The Secretary had not put forward any grounds to support his belief that the short-term service contracts will be replaced by long-term service contracts. The Eureka service agreements are irrelevant. In any case, in a recent High Court decision (*The Secretary for Internal Affairs v Administration Management Services Limited & Ors* [2013] NZHC 3498, 19 December 2013), the Court held that a long-term service contract entered into in 2003 was commercially reasonable and not contrary to the Act.
- (h) The Secretary did not address the "significant amount of information" in Mr McIntyre's letter, attached to Mr Gordon's affidavit. Mr McIntyre confirmed in his letter that he was willing to give evidence before the Commission or to provide a sworn affidavit if required.
- (i) In relation to Eureka, neither the proposal letter (proposing to refuse to renew Eureka's licence), nor Ms Despard's affidavit identified any specific breaches. The Secretary's evidence relied on a letter written by someone else (Peter Webb, a director/shareholder of GMAIS (2006) Ltd and GMAIS (Servicing) Ltd), and an interview transcript, in which an employee of a Eureka venue stated that Mr McIntyre was present at a meeting at which Mr Webb stated that he and Mr McIntyre were the founders of Eureka, but now were contracted to it.
- (j) The Secretary was asking the Commission to his accept his allegations and to conclude that Mr McIntyre committed breaches of section 118 and section 113 in 2008. However, those allegations had never been properly tested and had been consistently denied. The relevant events were so long ago that it was unlikely that any evidence was still available and, if it was, it was unlikely that it could be properly tested.
- (k) It was not the role of the Commission to trawl through several hundred pages of documents regarding Eureka in an attempt to bolster the Secretary's bare allegations, and it would be unfair to Mr McIntyre and the Appellant to do so.

- (l) There was no “half way house”. Either Mr McIntyre breached the Act or he did not. There was no evidence to prove that he did, therefore the allegations regarding Eureka are irrelevant to the appeal and to Mr McIntyre’s suitability.
- (m) The question of Mr McIntyre’s suitability must be viewed in the context of his long involvement in the gambling industry, in which he had never been properly confronted with these allegations, and in which he had complied with all requirements over many years.
- (n) The “other factors” relied upon by the Secretary (section 52(1)(i)) were little more than an assertion that Mr McIntyre’s involvement makes it likely that offences will be committed.
- (o) The Appellant was aware that, if Mr McIntyre was or becomes a key person of the Appellant, he would need to cease providing services to the venue. Mr McIntyre had indicated that he would do so if necessary. This should address any concern in relation to section 52(1)(j).
- (p) The Appellant did not accept that it could be required to place privileged information before the Commission. Section 4C(4) of the Commissions of Inquiry Act 1908 provides that every person has the same privilege in relation to the giving of information to the Commission as witnesses have in courts of law.

Analysis – evidence and onus of proof affecting section 52 grounds

32. The submissions received from the parties did not address the relationship between the test set out in section 52 and the factual evidence either generally or with regard to section 52(1)(h) (and section 52(4) to which it refers). However, the submissions described above contain implicit assumptions regarding the relationship:
- (a) The Appellant treated as critical that Mr McIntyre disputes that he was a key person of Eureka and that the statutory limitation period has expired, meaning that no charges can now be laid. It suggested that regulatory decisions regarding unsuitability amount to punishment for past breaches and that the source of certain evidence should affect how it is used.
 - (b) In its reply submissions, the Appellant argued that its assurances should be accepted, in effect suggesting that not doing so would amount to rejecting the sworn evidence of its deponent and implying that the Secretary must establish the contrary. The Secretary’s evidence is criticised for failing to establish specific breaches and much is made of the fact that evidence regarding past non-compliance is untested. The Appellant implied that matters must be strictly proved before they can be taken into account in assessing suitability.

33. These submissions suggest that section 52(1)(h) and (4) should be approached as if they are penal provisions. The implication is that there is something akin to a presumption of satisfaction with suitability which must be displaced by compelling evidence to the contrary.
34. Section 52 is a licensing provision, not a penal one. It is intended to ensure that licences are only granted to applicants who satisfy the Secretary (or, on appeal, the Commission) that the section 52 grounds are or will be met. There is no starting presumption of satisfaction to be displaced. As the decision-maker must be satisfied of each of the grounds, any aspect that could result in dissatisfaction is, practically speaking, something for the applicant to deal with in such a way that satisfaction is achieved. If new material does result in satisfaction, it does not matter that it was not initially provided. However, as the grounds are largely forward-looking, assessment of satisfaction about a future state of affairs does not exclude an examination of past or current circumstances which might indicate what may occur in the future. The key point is that section 52 requires that, in the end, doubts about satisfaction must be resolved against the application by its refusal.
35. Both the identity and the suitability of key persons emerged as central issues in the appeal. For that reason, the Commission has considered carefully the correct approach to section 52(1)(h) and (4).
36. In *Caversham Foundation Limited* (decision GC06/10), the Commission considered whether to interpret section 68, the equivalent venue provision to section 52(4), restrictively, by strictly confining consideration of material affecting suitability to the matters listed in that provision, or more liberally, by treating section 68 as identifying relevant matters to which regard must be had without necessarily precluding other matters from being considered in the assessment. It concluded that the more liberal interpretation best fitted the overall scheme of the Act as it enabled the Secretary (or the Commission) to have regard to information which the Act required to be supplied in applications, such as information on the history, character and qualifications of venue managers, despite those not being expressly listed as factors relevant to suitability under section 68.
37. Notwithstanding the lack of submissions on the point, the Commission took the opportunity to re-consider carefully its earlier decision in *Caversham*. Having done so, it has reached a different conclusion. The Commission now considers that it is not necessary to interpret section 52(4) in a non-restrictive manner in order to use all information which the Act requires to be supplied in applications. The reason is that the section 52 grounds are not discrete but often contain a large degree of overlap with other grounds. For example, matters affecting financial viability (section 52(1)(c)), maximising net proceeds and minimising operating costs (section 52(1)(d)), application or distribution

of net proceeds for authorised purposes (section 52(1)(e)), and ability to comply with applicable regulatory requirements, which include controls on expenses and distributions (section 52(1)(f)), are often highly interrelated. For that reason, matters such as lack of experience or a record of incompetent or non-compliant management would not necessarily fall to be considered either under section 52(1)(h) or not at all. Such matters could give rise to lack of satisfaction about financial viability, ability to achieve regulatory compliance, maximisation of proceeds, minimisation of costs and minimisation of problem gambling risks.

38. As a result, the Commission considers that it should limit its consideration of suitability under section 52(1)(h) to those matters listed in section 52(4). To the extent that there are matters that might otherwise affect suitability in a more generalised sense, they should be considered under other section 52 grounds. For that reason, it does not follow that the result in *Caversham* would necessarily have been different if a similar interpretation had been adopted.
39. A further matter then arises for consideration; namely the proper approach to identifying and taking into account the matters listed in section 52(4). The Appellant's submission suggests that it is for the Secretary to establish those matters factually before the assessment is undertaken. By way of example, there is an issue in this appeal whether Mr McIntyre is a key person of the Appellant: the Secretary considers that he is a key person but the Appellant disputes that and says that he is not a key person. In applying section 52, should the Commission proceed on the basis that it is for the Secretary to establish that he is a key person, or for the Appellant to establish that he is not?
40. In the Commission's view, the answer lies in the opening words of section 52; namely that the licence application must be refused unless the Secretary is satisfied, in this case, about the suitability of the Appellant or "any key person". Satisfaction under section 52(1)(h) requires satisfaction about both the identity of all key persons and the suitability "in terms of subsection (4)" of each of them. It is not sufficient for an applicant to assert that someone is not a key person or is suitable and argue that its assertion must be accepted unless the contrary is proven. That is not an appropriate approach to the test of satisfaction. Satisfaction means that there is nothing that might arise under section 52 which results in something other than satisfaction. If there are doubts they are to be resolved by refusing the application.
41. Finally, there is the issue of privilege. The Commission understands that Mrs Katy McIntyre provided the Secretary with copies of numerous emails. Subsequently counsel for the parties conferred, a number of the emails were identified as privileged and agreement was reached as to which documents (and which parts of documents) could be used. As a consequence, all of the documents before the Commission were either not

privileged or, if they were privileged, have been the subject of waiver. At paragraph 62 of its submissions in reply, the Appellant stated that, although it did not accept that the information obtained from Mrs McIntyre was properly obtained or admissible, in the interests of progressing the appeal, it had raised no objection to the information placed before the Commission. The Commission does not need to rule on whether its power under section 226(3) to receive material which would not be admissible in a court extends to receiving privileged material, nor whether its powers under section 61(3) or under the Commissions of Inquiry Act 1908 extend to requiring privileged material to be provided to it. Neither situation arises in this case.

Analysis – approach to the issues

Ray McIntyre

42. Having regard to the issues arising from the material placed before it, including the submissions of the parties, the Commission starts its analysis by considering the position of Mr McIntyre, both as to his roles and, if relevant, his suitability. It will then proceed to consider the remaining issues in the light of its determinations regarding Mr McIntyre.
43. The issues for the Commission in relation to Mr McIntyre are as follows:
- (a) Is it satisfied that he is not a key person of the Appellant?
 - (b) Is it satisfied either that he is not a key person of the Sideline Bar or that, if found to be suitable to be a key person of the Applicant, that he will cease to be a key person of Sideline Bar, a venue contracted to the Appellant?
 - (c) Is it satisfied that he is suitable to be a key person of the Appellant, having regard to his profile of past compliance?
 - (d) Is it satisfied that, if not suitable to be a key person of the Appellant, he will in fact cease to be a key person of the Appellant?

Is Ray McIntyre a key person of the Appellant?

44. Ray McIntyre is not named as a key person on the application form. However, he is a key person if he exercises significant influence in the management of Phoenix (section 4). The following matters lead the Commission not to be satisfied that he is not a key person:
- (a) On 20 July 2012, Mr McIntyre emailed Mike O'Brien, stating:

Hey when you/roebyna do the Tax Invoice etc for the threethirtyone equipment It would be really appreciated if you can make it all add to a maximum \$180k this is so it matches the finance application to BNZ and forecasted statements from the accountants and will save any queries from DIA. If it works out to be any more \$, then you can invoice that to Phoenix later, if that makes sense? This would really help me out.

Oh, and the release/tax invoice address etc will be to Phoenix Charitable Trust c/-25 Papatua Street, Ch-Ch attention Matt Gordon.

This email suggests that Mr McIntyre was heavily involved in obtaining the ThreeThirtyOne/Sideline Bar for Phoenix, that he was involved in seeking a bank loan for Phoenix from BNZ and that he was responsible for (or had a stake in) the fate of the application to the Department.

- (b) In 12 November 2012, Mr McIntyre wrote to Mike O'Brien:

Just reiterating that sideline bar/331 was agreed as just a "hold" for me until a Licence came through – hence the venue agreement for 1 year. I'd love to have left it with you longer, but I had no idea how long a licence might take. Belfast was only going to be 1 year max as well – pending the Licence, although a 3 year term was signed just for your bank finance purposes.

This email suggests that Mr McIntyre played a key role in obtaining the Appellant's sole venue. It further suggests that he was involved in the establishment of Phoenix at an early stage, as he made alternative arrangements for the venue that Phoenix would take over in advance of the licence application. The email does not refer to Phoenix by name but, in the context of the evidence, including the preceding email, the Commission infers that he is referring to the licence for Phoenix.

- (c) An email to Mr O'Brien dated 13 July 2012, in which Mr McIntyre asked for a copy of Bluegrass's policy on minimising costs and maximising net proceeds, suggests that Mr McIntyre may have had a hand in drafting Phoenix's policies.
- (d) Mr McIntyre's email of 2 April 2012, seeking a copy of Bluegrass's problem gambling policy (to save Mr McIntyre "re-inventing" one), supports an inference that Mr McIntyre was responsible for creating Appellant's problem gambling policy with material obtained from Bluegrass.
- (e) Mr McIntyre took steps to organise the surrender of the licence for Sideline Bar (in an email to Mike O'Brien dated 13 July 2012, he asked Mr O'Brien how the release was going). The context of the emails between Mr McIntyre and Mr O'Brien, as well as the proximity of the date to the application by Phoenix (which was received by the Department in August 2012, but which the directors signed in May 2012) suggest that he sought the release from Bluegrass in order for the venue to be transferred to Phoenix.
- (f) In her interview with the Department, Katy McIntyre said that Mr McIntyre had set up Phoenix, but was pretending he was not involved in it, with the aim of Phoenix signing a long-term contract for Mr McIntyre's company to service the machines, in the same way as was done in relation to Eureka. Mrs McIntyre's statement

appears to be based on Mr McIntyre having told her at an earlier stage that he was setting up a new trust called Phoenix.

45. The foregoing matters leave the Commission in the position that it is not satisfied that Mr McIntyre is not a key person of the Appellant. The matters advanced by the Appellant do not cause the Commission to be satisfied.

Will Mr McIntyre cease to be a key person of Sideline Bar?

46. Section 52(1)(j) provides that the Secretary (or Commission on appeal) must refuse to grant a licence unless satisfied that a key person is not a key person in relation to a class 4 venue licence applied for by the applicant. Sideline Bar is the sole intended venue for Phoenix on grant of the licence.
47. Mr McIntyre's company, Total Gaming Solutions ("**TGS**"), is currently contracted (via Bluegrass) to service the gambling equipment at Sideline Bar. The Appellant proposes to have TGS provide venue services if Phoenix is granted a licence. TGS is 100% owned by Terry McIntyre (Ray McIntyre's brother), who is also the sole director. However, it appears to be common ground that Ray McIntyre in fact provides the services. The Commission considers that, "a person contracted to service gambling equipment" includes the person who in fact performs the contracted services.
48. Although non-satisfaction with section 52(1)(j) was not notified as a ground for the Secretary's refusal, the Secretary relied upon it in his submissions and the Appellant responded to the issues in its reply submissions. The Appellant submitted that Mr McIntyre was "well aware" that, if he were, or became, a key person of the Appellant, he would "need to cease his involvement with servicing at the venue". Put in those terms, the issue is not whether he is a key person of Sideline Bar but rather whether his involvement in servicing equipment is the sole basis on which he is a key person of the venue and whether the Commission is satisfied that he will cease to be a key person of Sideline if he is a key person of the Appellant.
49. The Commission is not satisfied his servicing work is the sole basis on which he is a key person and that, if a key person of the Appellant, he would cease to be a key person of Sideline Bar. The following matters cause it not to be satisfied:
- (a) Mr McIntyre's emails to Mr O'Brien, in which he negotiated first for Sideline to be taken on by Bluegrass, and secondly for it to be released by Bluegrass to Phoenix.
 - (b) Mr McIntyre's email to Sonya McIntyre, dated 7 March 2012, in which he instructed Sonya McIntyre how to conduct her meeting with the Department,

including to remove signs regarding opening hours, and what to say when asked why she has decided to sign with Bluegrass.

- (c) Mr McIntyre's email to Mr O'Brien, dated 17 November 2011, in which he asked Mr O'Brien if there was anything he wanted Sonya McIntyre to say when asked why she was signing with Bluegrass.
- (d) The statement by Katy McIntyre that Mr McIntyre lent money for the purchase of Sideline Bar to Sonya and Terry McIntyre.

The foregoing indicate the reasonable possibility that Mr McIntyre's relationship to Sideline Bar is not limited to machine servicing but is far more entrenched through family relationships, operational advice and financial support. Cessation of such a relationship is difficult to achieve and to police. The Commission is not satisfied that it would occur, despite the assurances given.

Is Mr McIntyre suitable as a key person of the Appellant?

- 50. The Secretary submitted that Mr McIntyre was not suitable as a key person on the basis of his past involvement in the Eureka Trust, as well as his more recent involvement in Bluegrass and in relation to the Sideline Bar. The Secretary considered that, when a key person of Eureka, Mr McIntyre breached sections 113 and 118 of the Act and further that Mr McIntyre's association with Eureka rendered him unsuitable as a key person, in light of other conduct by Eureka. The Secretary also referred to information provided by Katy McIntyre, suggesting that Mr McIntyre set up Eureka in such a way as to conceal his involvement in the trust, so that he could provide services to its venues via his companies.
- 51. The Secretary further submitted that, more recently, emails between Mr McIntyre and Mr O'Brien in relation to Bluegrass venues showed a breach of section 118(3) and that, in an email exchange with Sonya McIntyre (the venue manager for Sideline Bar), he instructed Sonya McIntyre to lie to gambling inspectors about the source of the business's funding and to disguise the actual hours of operation (so that they matched those claimed in the venue schedule).
- 52. The Appellant submitted that it had always been disputed that Mr McIntyre was a key person of Eureka and that, even if he had been a key person, this would only be relevant if there had been a final decision to refuse to renew the licence (in which case it would be relevant under section 52(4)(a)(ii)). The Appellant submitted that, therefore, the only adverse finding the Commission could make in respect of the Appellant's involvement in Eureka was if he had breached either section 113 or section 118. The Appellant submitted that it would be improper for the Commission to make such a finding in the circumstances, because of the historic nature of the allegations, including the effect of the

two year limitation period for the bringing of criminal proceedings for section 113 and section 118 breaches (section 355).

53. In response to the Secretary's submissions relating to Bluegrass and Sideline Bar, the Appellant submitted that Mr McIntyre was not a key person in relation to Bluegrass and that much of the correspondence between him and Mr O'Brien was simply a function of his role as a contracted service provider for some Bluegrass venues. The Appellant submitted that the Secretary's concerns regarding the email to Sonya McIntyre arose from the Secretary's misinterpretation of Mrs McIntyre's response ("Anything else !!!!!!!!!!! I don't mind lying, but the lovely brother in law bit?"), which was an innocuous, light-hearted joke between family members.
54. The Appellant submitted that Mr McIntyre had had a long involvement in the industry and that he had been compliant throughout. The Appellant also referred to a letter from Mr McIntyre in which he stated, amongst other things, that he could not have a compliance history, because his compliance obligations have always been limited to the contracts that he has had with various societies, and he has not been subject to any direct regulatory obligations.
55. The Commission considered that Mr McIntyre's history of involvement in the gambling industry was relevant. It accepted the Appellant's submission that subsection (4)(a)(ii) of section 52 did not apply (because the Secretary did not ultimately decide to refuse to review Eureka's licence). However, it considered that Mr McIntyre's past involvement in Eureka was relevant to an assessment of whether it was satisfied of his suitability. It did not accept that events involving Eureka were irrelevant based on when they occurred. Section 52(4)(c) does not place a time limit on the composition of a person's profile of past compliance. The concept of a profile of past compliance entails events and actions over a period of time.
56. Nor did the Commission accept the Appellant's submission that Eureka was relevant only if there was sufficient evidence for the Commission to make a positive finding that Mr McIntyre breached section 113 or 118 during his involvement with Eureka. The question is whether the information available leaves the Commission not satisfied about Mr McIntyre's suitability. If the information about past compliance raises concerns in this regard, the Appellant's evidence must address these concerns sufficiently to provide the required satisfaction.

Assessment of Mr McIntyre's suitability

57. The Commission is not satisfied on the material before it about the suitability of Mr McIntyre to be a key person of the Appellant. It considers that the material gives rise to the reasonable possibility at least that Mr McIntyre has been party to breaches by

others and has endeavoured to maintain the appearance of compliance by concealing his involvement in societies such as Eureka and the Appellant. In particular, the Commission was concerned by the following:

- (a) Emails between Mr McIntyre and Mr O'Brien, in which Mr McIntyre sought an assurance from Mr O'Brien that payments would be made to a particular Bluegrass venue operator. Although Mr McIntyre was not a key person of Bluegrass, the emails suggested an arrangement with the venue regarding venue expenses, indicating that Mr McIntyre was prepared to facilitate a breach of section 118.
- (b) The implication, from emails between Mr McIntyre and Mr O'Brien, that Mr O'Brien was a key person in relation to Sideline Bar and also influenced the grants made from net proceeds at that venue. Section 113 provides that a key person in relation to a venue (other than a club) must not be involved in decisions about, or in managing, the application or distribution of net proceeds from gambling conducted at that venue.
- (c) The apparent instruction to Sonya McIntyre to lie. This is not a breach of a particular section of the Act but the implication of an instruction to lie is that the prevailing practice does not conform to statutory or regulatory requirements. While the Appellant submitted that the email is not evidence of an instruction to lie, and that Mrs McIntyre's comment that she didn't "mind lying" was a joke, even without Sonya McIntyre's reference to lying, it is difficult to construe the following instruction from Mr McIntyre as other than advice to mislead the Department:

Remember that you do a significant amount of the pokie room hours to match the venue cost schedule – AND REMEMBER THAT YOU OPEN AT 7.30am SO IF YOU HAVE THE BAR HOURS PLASTERED ANYWHERE PLEASE REMOVE THEM
- (d) Emails from Mr McIntyre to a lawyer, asking for his name to be kept off financial statements regarding the Sideline Bar venue.

58. The Commission considered that these matters, together with Mr McIntyre's earlier involvement in Eureka, raised issues over his suitability as a key person of a class 4 gambling operator. Mr McIntyre's profile of past compliance suggests a history of concealment of his activities, and an apparent willingness to facilitate improper payments. In the Commission's view, this raises serious doubts about his suitability as a key person, in circumstances where the grant of a licence requires positive satisfaction of suitability. The evidence put forward by the Appellant disputed the Department's views about suitability, but did not provide positive evidence of Mr McIntyre's suitability and did not resolve to the satisfaction of the Commission the doubts about Mr McIntyre's suitability raised by the Secretary's investigations.

59. For similar reasons, the Commission is not satisfied that, following its decision that it is not satisfied about Mr McIntyre's suitability, he would cease to have any further involvement in the Appellant. In this regard, indications that a person has taken steps in the past to cover up his involvement in societies create difficulties for satisfaction about future conduct. In addition, in this case, it seems probable that Mr McIntyre had an essential (but covert) role in the founding of the Appellant. Those factors mean that the Commission is not satisfied that the Appellant would operate in the future without the covert influence of Mr McIntyre.

Ability to comply with regulatory requirements

60. The Commission next considered whether it was satisfied that the Appellant was able to comply with the regulatory requirements which would apply to it as a licensed class 4 operator. The assessment assumed that, notwithstanding the foregoing findings, Mr McIntyre would have no involvement in its operations.
61. The Secretary's initial refusal was based on his assessment that the directors so lacked knowledge of their obligation that they had failed to appreciate the need for written policies to cover the following essential areas of operation:
- (a) Employment matters and work requirements for directors and staff.
 - (b) An *operational procedures* manual, including information relating to the society's internal auditing processes, procurement and EMS procedure and associated password security, website maintenance etc.
 - (c) A *Net Proceeds/Grant Distribution* policy, relating to the distribution of net proceeds, frequency of net proceeds meetings, tracking the return to authorised purposes, accountability checks of spent grant money, publication of approved and declined grant applications.
 - (d) A comprehensive *Guide* ensuring venue compliance is properly monitored, including the banking of GMP, record keeping, and compliance with game rules.
 - (e) A conflict of interest register.
 - (f) An expenses policy.
 - (g) A *Service Provider Manual* outlining the duties and scope of all society service providers.
62. The Appellant subsequently provided a *Venue Operations Manual* and *Society Operations Manual*, which cover audit processes, procurement, EMS procedure and password security, venue compliance, and conflicts of interest. The Secretary made no adverse submission on their adequacy. His submission was limited to saying that,

although the preparation of the manuals were a “commendable step”, the timing of their submission indicated that they were prepared in response to the Secretary’s decision. The Secretary dismissed other information provided subsequently as a “considered response” of far less relevance than the statements of the directors in their interviews.

63. The Commission was puzzled by the Secretary’s dismissal of the provided information, in part because he agreed to a stay in order for such information to be provided, but also because it was not clear why such material, if providing satisfaction, should be disregarded. Similarly, the Secretary did not support his submission that the fact the directors work full-time would preclude them from devoting sufficient attention to Phoenix by setting out the likely time requirements.
64. On the other hand, the Appellant’s submissions were also disappointing. It provided the society and venue operations manual, and referred to (but did not produce) an intended expenses policy. The Appellant’s submissions and affidavit referred to the increased appreciation for operational and compliance matters that the directors had gained through the appeal process, but did not elaborate on what had been learned or explain why it had not been appreciated previously. The Appellant gave no estimates of the time it anticipated would be required, and for which it had “budgeted”.
65. The summarised transcripts of the directors’ interviews give rise to some concern that the directors had not given enough consideration to their obligations. For example, the summary for Mr Gordon, the director intended to look after the day-to-day running of the operation, stated:

I’m still trying to ascertain how much time will be involved with running the entire operation but keeping in mind I have no preconceptions. I’m not sure whether it will be a 4 hour a week job or a 40 [hour a] week job. I’m taking it week by week, step by step, to establish how the venue is being run at the moment.

...

But I am unsure on what is involved with the day to day running at governance, management and venue levels. I am hoping that we can keep whatever systems they have got to run it now, that would be my starting point, but I do not know the details of all that.

We have not decided which one of us will be involved with the venue compliance as all this is an emerging process with us.

66. The Commission’s concern is whether the Appellant has demonstrated that those who would be responsible for its operation have sufficient knowledge not merely to lodge an application for a licence, but to conduct a compliant class 4 operation. In that regard, the Commission does not share the Secretary’s concern with the lack of “written policies”. It must be satisfied that compliance can be achieved, not that it be achieved by some particular means. That does not necessarily require the production of documents (and producing documents will not necessarily result in satisfaction).

67. The Commission is concerned that those responsible for the operation of the Appellant appear to have little idea of the complexity of the operation requirements which apply to class 4 operations or of reliable means of achieving compliance. The Commission suspects that the Appellant has relied on the unattributed services and guidance of Mr McIntyre and is not satisfied that the Appellant would be able to comply with its regulatory obligations.

Minimisation of costs and maximisation of net proceeds

68. The Secretary considered that the Appellant intended to rely too heavily on professional advisors, particularly lawyers and accountants, and that this would preclude it from minimising costs. The Secretary did not apparently form this view on the basis of the budget presented. Rather, his lack of satisfaction arose from his doubts that the budget was realistic in light of the directors' own lack of certainty, as revealed in their interviews:

I don't know how much we will use the accountant – whether it will be on a day to day basis or just for the end of year financials. Once again, it's more of trying to establish how much we need to use them and I want to make sure we are doing things absolutely right given the high level of compliance (Summarised transcript for Matthew Gordon 10 September 2012).

I don't really know who the Trust's accountant will be – I have an email somewhere with their name on it but I didn't take any notice. Apart from the projections they have already provided, we will obviously be using them for advice and if there are any curly questions or policy or regulations we are unsure about then we will ask them for advice. We will not be using them for any day to day stuff because Matt will be doing the day to day stuff – Matt is the man. (Summarised transcript of discussion with Brett Wells 7 September 2012).

69. The Commission has had to consider whether these statements displace satisfaction which would otherwise have arisen from the forecasts, which the Department's own investigating accountant appears to have found reasonable. While the Appellant's forecasts were provided on the basis of professional accounting advice and appear to be thorough, it is not clear how the apparent operational uncertainty of the directors is consistent with robust forecasting.
70. The Secretary also expressed concern about the draft service and auditing agreements. The draft agreements were for six month terms, but the Secretary believes, "based on Mr McIntyre's previous conduct", that they would be replaced with long-term contracts if a licence were granted. The Secretary suggested that the proposed hourly rate of \$110 is excessive, on the basis that it is equivalent to a full time salary of \$220,000.
71. The Commission agrees with the Appellant that the extrapolation of an hourly contracting payment to a salary is misconceived because it depends on the contracted service provider's hours, which, in turn, depend on who controls those hours. Uncertainty about that, and other aspects of the contractual relationship, arise from the short duration of the draft contract. As no-one currently knows what the replacement contract will provide, it is difficult to be satisfied about it.

72. The Commission considers that there is currently insufficient certainty about the proposed operation, including the extent of expenditure on professional advisors and the cost of contracted service providers, to be satisfied that the Appellant would minimise operational costs and maximise net proceeds.

Decision

73. For the reasons set out above, the Commission is not satisfied, in relation to the Appellant's application for a licence, about the grounds in sections 52(1)(d), (f), (h) and (j). It confirms the decision of the Secretary to refuse to grant a class 4 operator's licence to the Appellant.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

11 April 2014



**GAMBLING
COMMISSION**