GC04/19

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **NEW ZEALAND COMMUNITY TRUST**

BEFORE THE GAMBLING COMMISSION

Members:	G L Reeves (Chief Gambling Commissioner) L M Hansen W N Harvey S C L Pearson
Date of Application:	11 January 2019
Date of Decision:	15 February 2019
Date of Notification of Decision:	26 February 2019

DECISION ON AN APPEAL BY NEW ZEALAND COMMUNITY TRUST

Introduction

1. The New Zealand Community Trust ("**NZCT**") appeals, under section 77(1)(b) of the Gambling Act 2003 ("**Act**"), against a decision by the Secretary for Internal Affairs ("**Secretary**") refusing to amend NZCT's class 4 venue licence to record a change of physical address for the Counties Inn in Pukekohe.

2. The sole substantive issue on appeal is whether territorial authority consent under section 98(c) of the Act is required to change the physical location or address of a class 4 venue in a situation where:

   (a) the relevant territorial authority has a relocation policy (even one that does not permit any movement); and

   (b) the proposed move is minor in scope and meets all four criteria set out in the High Court decision in *ILT Foundation v Secretary for Internal Affairs* ("***Waikiwi***"), namely the new building remaining close to the existing venue, the tavern's name remaining the same, ownership and management staying the same, and patrons and the public regarding the tavern as having retained its venue.[1]

3. In *Waikiwi*, the High Court found that movement of a class 4 venue premises, where those four criteria are met, does not constitute a change of venue, requiring an

[1] *ILT Foundation v The Secretary of Internal Affairs* [2013] NZHC 1330 ***[Waikiwi]*** at [19].

application for a new venue licence and territorial consent under section 98 of the Act. The parties agree that the *Waikiwi* criteria are met in this case.

4. The issue is whether the *Waikiwi* decision continues to apply following the Gambling (Gambling Harm Reduction) Amendment Act 2013 ("**Amendment**"), enacted after *Waikiwi* was decided. The Amendment provided for corporate societies to retain their machine numbers when they relocate (section 97A) with the consent of the territorial authority pursuant to that authority's relocation policy (if there is one) (section 98(c)).

5. In this case, NZCT neither obtained Auckland Council's consent, nor applied to relocate under the Amendment. It merely seeks an amendment to its licence to change the venue's recorded address on the basis that the recorded move is not a change of venue, triggering the application of section 98(c). The Secretary declined the application to amend on the basis that territorial authority consent was required, even if the move falls within the *Waikiwi* framework.

6. NZCT also seeks costs on the basis that the Secretary has adopted an untenable position, contrary to *Waikiwi* and its own prior position, and because of the Secretary's delays in reaching its decision.

Background and relevant law

Application

7. NZCT is a holder of a class 4 operator's licence (NZGM1113). On 23 April 2018, NZCT applied to amend the venue licence for Counties Inn (GMV950) from 17 Paerata Road, Pukekohe to 25 Paerata Road. NZCT operates 18 gambling machines at the Counties Inn. The application for amendment was in accordance with the circumstances outlined in *Waikiwi*.

Legislation prior to the Amendment

8. Prior to the Amendment, there was no provision in the Act entitling venues to move while retaining their existing venue licences, or to acquire a new licence but retain the number of gaming machines that they were entitled to under prior licences.

9. The only applicable provisions were those concerned with applications for new venue licences (sections 65 to 70). Relevantly, section 65 sets out 12 matters that an application must submit to the Secretary to support its application for a venue licence, including "a description of the venue and its location" (section 65(2)(a)) and "a territorial authority consent if required under section 98" (section 65(2)(b)). Section 67(1)(f) provides that the Secretary must refuse to grant a class 4 venue licence unless satisfied that "the territorial authority has provided a consent (if required under section 98)."

10. Prior to the Amendment, section 98 provided:

> **98 When territorial authority consent is required**
>
> A territorial authority consent is required in the following circumstances:
>
> (a) if a society proposes to increase the number of machines that may be operated at a class 4 venue ...
>
> ...
>
> (b) unless paragraph (c) or paragraph (d) applies, the first time there is an application for a class 4 venue licence for a venue for which a class 4 venue licence was not held on 17 October 2001:
>
> (c) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last 6 months:
>
> (d) on the commencement of this section, in accordance with section 93 for a class 4 venue—
>
> (i) to which section 92 does not apply; and
>
> (ii) for which there is a class 4 venue licence granted after 17 October 2001 and before the commencement of this section.

11. Class 4 venue policies governing applications for territorial authority consent were, and are, required by section 101. In adopting a policy, the territorial authority must have regard to the social impact of gambling within the territorial authority district. Section 101(3) and (4) require the class 4 venue policy to specify whether class 4 venues can be established in the district, and allows restrictions on maximum gaming machine numbers, having regard to various factors relating to the characteristics of the district and the nature, scope and effect of gambling in the district.

12. Under section 92, the holder of a continuously held venue licence issued prior to 17 October 2001 is entitled to continue operating 18 gaming machines. However, under section 94, only nine machines can be operated under a new venue licence. In other words, if a movement in venue were contemplated by a venue with 18 machines, a successful application for a new licence would require it to forego nine of those machines.

13. There are also provisions for amending a class 4 venue licence. Section 73(1)(c) provides that a corporate society must apply to amend its licence if it proposes to change any condition of the licence or any procedure that is a condition of the licence. Under section 70, a class 4 venue licence must include a description of the class 4 venue and its location. Under section 73(4), sections 66 and 67 apply to an application as if it were an application for a class 4 venue licence.

Waikiwi decision

14. The *Waikiwi* case involved the proposed construction of a new tavern building separated by one section from the original tavern. The proposal could only proceed if the existing venue licence continued to apply. Otherwise, a new venue licence would be required, and the tavern would lose its entitlement to host 18 gaming machines.

15. In a declaratory judgment, issued on 6 June 2013, the High Court held that not all relocations were a change of venue requiring a new venue licence. In some circumstances, a change in the location of a class 4 venue is so minor that it does not constitute a change of venue for the purposes of the Act and that, in that case, the tavern could be moved under an existing licence with an amendment to that licence under section 73. The following reasons were given for that conclusion:[2]

(a) There is no statutory definition in the Act of "venue", and "class 4 venue" is defined as "a place used to conduct class 4 gambling" (section 4).

(b) "Place" is defined as:

(i) a building, structure, or tent, whether fully or partly constructed;

(ii) a room in a building or structure; and

(iii) a court or a mall; and

(iv) land; and

(v) a vehicle, vessel, or aircraft; and

(vi) a caravan or a trailer or other conveyance.

The definition includes land and buildings but does not specifically include an "address" (section 4), thereby indicating that Parliament did not intend that the term "venue" meant the land or buildings at a specific address.

(c) Accordingly, "venue" has a potentially broad application.

(d) Movement will be within the same venue where:

(i) the new building will be on a site very close to the existing site;

(ii) the name of the tavern will remain the same;

(iii) the ownership and management of the tavern will be the same; and

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2 At [17]-[19].

(iv) for all intents and purposes, patrons and the public will regard the tavern as "having retained its venue" even if the building moved to a nearby site.

16. In reaching this decision, the Court referred to two earlier Gambling Commission decisions:[3]

(a) *Isobar*:[4] The Commission found that moving a bar 75 metres within a mall was not a change of venue where the address stated on the licence was simply the address of the mall, because the address remained the same even after the tavern moved.

(b) *Air Rescue Services Ltd*:[5] The appeal also involved a move within the same mall but the mall had been renovated and the current licence specified a different shop number to that recorded on the licence. The Commission concluded that the movement was not a change of venue requiring a new licence, even though it was to a different shop number than described in the licence.

17. The Court considered its approach to be consistent with the purposes of the Act, particularly controlling the "growth" of gambling (as movements did not increase the number of gambling machines), and the grand-parenting provisions of the Act (sections 92 and 93) which indicated an intention to allow existing licence holders to retain 18 machines. There was no unequivocal statutory language to support an intention that that benefit be easily lost.[6]

18. The Court also drew assistance from section 65(2) of the Act, which differentiates between a description of a 'venue' and its 'location' in the context of applications for venue licence (see also section 70(1)). The distinction suggested that the words are not synonymous. The Court also derived assistance from the change in statutory language from "site" under the Gambling and Lotteries Act 1977 (which means a specific address or location) to the broader "venue" under the Act.[7]

The Amendment

19. In September 2013 (four months after *Waikiwi* was released), the Act was amended to make provision for relocation policies adopted by territorial authorities which apply to changes of class 4 venue. The key provisions, in their current form, [8] are section 97A, and the amended sections 98 and 101:

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3 At [21]-[23].
4 *Decision on an appeal by New Zealand Community Trust* GC 10/05, 26 April 2005 **[*Isobar*]**.
5 *Decisions on an appeal by Air Rescue Services Ltd* GC 35/11, 11 November 2011 **[*Air Rescue Services Ltd*]**.
6 *Waikiwi*, above n 1, at [24]-[28].
7 At [29]-[31].
8 Further immaterial amendments were made to section 98 in 2015.

97A Effect of relocation

(1) This section applies when—

(a) a territorial authority has adopted a relocation policy (as defined in section 101(5)); and

(b) in accordance with that policy, the territorial authority grants consent in respect of a venue (the new venue) to replace an existing venue (the old venue); and

(c) a new class 4 venue licence is granted in respect of the new venue.

(2) When this section applies,—

(a) the Secretary must cancel the class 4 venue licence that relates to the old venue, in which case—

(i) the cancellation takes effect on the date on which the new class 4 venue licence takes effect; and

(ii) there is no right of appeal against the cancellation; and

(b) despite section 100(1)(b)(i), the maximum number of gaming machines permitted to operate at the new venue at the time when the new class 4 venue licence takes effect is the same as the maximum number of gaming machines permitted to operate at the old venue immediately before the licence relating to the old venue is cancelled; and

(c) for the purposes of this Act,—

(i) if the old venue was a venue to which section 92 applied, the new venue must be treated as a venue to which section 92 applies; and

(ii) the old venue must be treated as if no class 4 venue licence had ever been held by any society for that venue (which means that, under section 98, consent will be required for that venue if a class 4 venue licence is subsequently applied for in relation to it).

98 When territorial authority consent required

A territorial authority consent is required in the following circumstances:

...

(c) if a corporate society proposes, in accordance with a relocation policy of the territorial authority, to change the venue to which a class 4 venue licence currently applies.

101 Territorial authority must adopt class 4 venue policy

(1) A territorial authority must, within 6 months after the commencement of this section, adopt a policy on class 4 venues.

...

(3) The policy –

...

(b) may include a relocation policy.

...

(5) A relocation policy is a policy setting out if and when the territorial authority will grant consent in respect of a venue within its district where the venue is intended to replace an existing venue (within the district) to which a class 4 venue licence applies (in which case section 97A applies).

20. The effect of the Amendment is that territorial consent is required pursuant to a territorial authority's relocation policy (if it has one) for a proposed relocation. If consent is given, the old venue licence is replaced by a new venue licence, and the number of machines may be maintained.

21. NZCT has applied to amend its licence under section 73. As discussed, section 67(1)(f) includes a requirement for territorial consent if section 98 applies. Any application to amend must meet all section 66 and 67 criteria. The only criterion in issue is section 67(1)(f) (and the issue is whether it applies).

Secretary's policy and decision

22. On 8 April 2014, the Department of Internal Affairs concluded, consistently with NZCT's submissions, that *Waikiwi* licence amendments remained available following the Amendment. Accordingly, between 2014 and 6 May 2018, the Department amended various venue licences which met the *Waikiwi* standard. However, on 7 May 2018, the Department advised that it had reconsidered its position and now considered that *Waikiwi* was no longer applicable to minor movements if the territorial authority had a relocation policy in place. In such cases, consents would be required.

23. On 6 November 2018, the Secretary declined NZCT's application because no territorial authority consent had been sought or given. He considered that the Amendment created a new express legislative process for all movements of venue, reflecting community-based decision-making. He considered that the statutory context made clear that Parliament intended all movements, including movements which were not changes of venue pursuant to *Waikiwi*, to be treated as relocations which were synonymous with changes of venue. Otherwise, the object of providing community input into relocation decisions would not be achieved. He noted that most relocation policies were drafted to capture all forms of movement. He also emphasised the legislative use of the word "relocation" which "literally means a physical move to a different location".[9]

Submissions

24. NZCT submitted that the Secretary's decision is wrong. It submitted, in summary, as follows:

    (a) Parliament expressly provided at section 98(c) that territorial consent is only required if there the "corporate society proposes…to change the venue", and where the society proposes to do so in accordance with a territorial authority relocation policy. Section 97A refers to a "new venue" and an "old venue". Parliament did not amend the meaning of "class 4 venue" and "place" as

[9] At [57].

considered in *Waikiwi*. A movement under the *Waikiwi* criteria is not, according to the High Court, a change of venue. The Amendment is fully consistent with the continued application of *Waikiwi*. As the *Waikiwi* criteria are met, there is no proposal to change the venue in accordance with Auckland Council's relocation policy and no territorial consent is required.

(b) This approach is consistent with the express purpose of the Amendment, to provide "additional measures" to, inter alia, "facilitate community involvement in decisions about the provision of gambling". It is also consistent with the stated intention of the Amendment during the legislative process: a harm minimisation tool for venues to relocate from high to low deprivation areas.[10] Community involvement is not subverted in cases of minor movements, which are *de minimis* in the town planning context, and incapable of moving a venue from a high to low deprivation area.

(c) The meaning is plain and unambiguous on its face. Even if Parliament had intended to limit the application of *Waikiwi*, it failed to do so in the Amendment (or in a later 2015 amendment). Clear language was required to impose new obligations on societies and take away existing rights to effect minor movements.[11] The Secretary's interpretation would result in 13 post-*Waikiwi* amendments granted between 2014 and 2018 having to be rescinded. No Parliamentary or policy documents mention *Waikiwi* or expressed an intention to create a code for all movements, and territorial authority policies are drafted in a catch-all way on the understanding that they do not affect minor movements.

(d) Consent was not required as Auckland Council's relocation policy was not "adopted" as required by section 97A because it was adopted before section 101(5), which defines "relocation policy", even existed. For relocation policies to apply, they must be adopted after the Amendment came into force after formal consultation under section 93A of the Local Government Act 1998.

(e) The Secretary has changed his position on the effects of the Amendment.

25. The Secretary submitted, in summary, as follows:

(a) The statutory wording and legislative context demonstrate that Parliament intended for all movements to require territorial authority consent under relocation policies. The Amendment therefore created a mechanism to allow community involvement in the location and movement of all class 4 gambling

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10 (4 September 2013) 693 NZPD 13258; Gambling (Gambling Harm Reduction) Amendment Bill 2013 (209-2) (select committee report) at 4.

11 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 537.

venues.[12] Applying *Waikiwi* subverts this goal, and territorial authority policies which prohibit all movements take precedence over *Waikiwi*. Accordingly, section 97A(2) requires the Secretary to issue a new licence when the territorial authority grants consent, but does not authorise a minor *Waikiwi* movement if the policy prohibits relocations.

(b) Parliament considered *Waikiwi* to be incorrect or limited to its facts for three reasons:

(i) The Commerce Committee stated that class 4 licences are "attached to the physical venue", meaning a specific venue at a specific address or place. This contradicts what the Court held in *Waikiwi*.[13]

(ii) *Waikiwi* was released in a context where no mechanism for venue change existed, and the decision created a limited exception within that context which is no longer required in light of the Amendment.

(iii) *Waikiwi* was distinguished by Parliament because it involved the demolition and rebuild of the tavern, and Collins J considered the new venue to be the same "place" because of this factor.

(c) Nothing can be drawn from Parliament's failure to mention *Waikiwi* in the legislative documents relating to Amendment or the 2015 amendment, especially as the Bill for the latter was drafted prior to the Amendment being passed.

(d) The use of the word "venue" reflects the mechanism used under section 97A, not the meaning of "venue" as discussed in *Waikiwi*. The cancellation of one venue licence and its immediate replacement with a new licence is in line with other schemes in the Act. This includes when a venue operator ends a venue agreement with one society and changes to another, or merger applications under section 95.

(e) While he did change his position, he is entitled to do so. He reached his new position after a thorough and principled review.

(f) His interpretation is consistent with the definition of "class 4 venue" in section 4. When a venue relocates to a different address on a different certificate of title, it nearly always changes its "place" as the building is changed, the land is

12 Gambling (Gambling Harm Reduction) Amendment Bill 2013 (209-2) (select committee report) at 4; Gambling (Gambling Harm Reduction) Amendment Bill (209-2) (Report of the Department of Internal Affairs to the Commerce Committee) at 6 and 55.

13 Gambling (Gambling Harm Reduction) Amendment Bill 2013 (209-2) (select committee report) at 4.

changed and so on. By contrast, a "place" is not changed when a venue relocates within a court or mall or within a building. In other words, his interpretation remains consistent with the decisions in *Isobar* and *Air Rescue Services Ltd.*

(g) Allowing minor *Waikiwi* movements outside of relocation policies is contrary to the principles of the Treaty of Waitangi, as it overrides territorial authority policies adopted as a result of meaningful engagement with iwi.

Analysis

26. The key issue is the meaning of "relocation" in the Amendment, and whether that includes all movements of venue premises. It is not expressly defined. However, section 101(5) defines a "relocation policy" as a policy setting out when consent is granted "in respect of a venue within its district where the venue is intended to replace an existing venue (within the district) to which a class 4 venue licence applies". Section 98(c) provides that consent is required, in accordance with the relocation policy, if a corporate society "proposes...to change the venue to which a class 4 venue licence currently applies". Section 97A provides that, where, "in accordance with that [relocation] policy, the territorial grants consent in respect of a venue (the **new venue**) to replace an existing venue (the **old venue**)" then the "new venue" is granted a licence and the licence that relates to the "old venue" is cancelled. The context makes clear that "relocation" in the Amendment means a change of venue or the replacement of an existing venue with a new venue. Territorial consent is only required in those circumstances.

27. The word "venue" under the Act, and what constitutes a change of venue, was considered in *Waikiwi*. The High Court held that not all relocations were changes in venue. "Venue" was held to have a wide meaning, so that it was possible for minor movements of premises to occur within the same venue. Provided the four criteria were met, the Court held that there would be no change of venue, nor replacement of an existing venue with a new one.

28. The effect of the Amendment is that territorial consent is required only where there is a proposed change of "venue". The Amendment made no change to the statutory meaning of "class 4 venue" and "place", which the Court relied upon. The Amendment applies expressly to relocations or movements that constitute changes of "venue", and not to relocations within an existing venue. Accordingly, in the Commission's view, the effect of the Amendment was to change the provisions that apply to a proposed change of venue without altering what a change of venue is. Movements which meet the four *Waikiwi* criteria do not trigger the application of the Amendment and the test in *Waikiwi* continues to apply in those cases.

29. This analysis is clear on the face of the Amendment, and little assistance can be drawn from the parties' submissions on Parliament's subjective intent, whether from the Amendment or from the Parliamentary process. The Commission can only adopt an interpretation that the statutory words can fairly bear, even if the plain wording does not give effect to what may have been the drafter's subjective intention.[14]

30. In any case, the purposive material relied upon by both parties neither reinforces nor undermines the competing interpretations. Undoubtedly, the intent of the Amendment was to facilitate changes in venue if the territorial authority (via community consultation) agreed under its relocation policy. This was against a background of hope that approval would be given if harm benefits were apparent.[15] The Amendment was plainly not to facilitate *Waikiwi* movements but neither is there any basis to infer an intent to forbid what was already permitted, or to bring it within territorial authority control, particularly as the definition of "class 4 venue" and "place" had not changed. Accordingly, the inferences drawn by both parties from specific words and phrases in the Parliamentary process are speculative and ultimately unhelpful.

31. The Commission sees little basis for the Secretary's suggestion that the use of the phrase "physical venue" by the Commerce Committee evidences an intention for the Amendment to cover all movements. All venues are "physical", they are simply wider in scope than an "address", as the Court expressly held in *Waikiwi*. Nor is there any apparent basis for the suggestion that Parliament's use of "venue" was simply a reference to the statutory mechanism of replacement. The Commission sees nothing in the Parliamentary material to support the Secretary's submission that Parliament considered *Waikiwi* to be incorrect or distinguishable. *Waikiwi* is not referred to in the Parliamentary process. Moreover, the decision in *Waikiwi* is plainly of general application to all minor movements that meet the criteria (not only where there is a demolition or rebuild, and not only as an exception to the pre-Amendment legislative framework). Reversing the effect of *Waikiwi* would require amendment of the statutory definition of the terms relied upon, a course which Parliament did not take.

32. The Secretary's submission that its interpretation is consistent with the statutory definitions of "class 4 venue" and "place" is incorrect in light of *Waikiwi*. The criteria in *Waikiwi* cover more possibilities than movements within malls and large certificates of title. In effect, the Secretary's position is that *Isobar* and *Air Rescue Services* were correctly decided (but distinguishable) and *Waikiwi* was wrongly decided. The Commission is, however, bound by *Waikiwi*.

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14 *Union Motors Ltd v Motor Spirits Licensing Authority* [1964] NZLR 146 (SC) at 150; *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] 3 NZLR 289 (PC) at 299; *Multiplex Industries Ltd v Speer* [1966] NZLR 122 (CA) at 150.

15 Indeed, section 102(5A and 5B) requires territorial authorities, when reviewing their class 4 venue policies, to consider whether to include a relocation policy and in doing so consider the social impact of gambling in high-deprivation communities within its district.

33. There is also nothing in the legislation which suggests that its interpretation should be affected by the principles of the Treaty of Waitangi. The subject matter of the Act and the Amendment, notwithstanding the effect of problem gambling on Māori, do not suggest that interpretation consistent with Treaty principles is required.[16] In any case, the Amendment on its face only applies to changes in "venue".

34. The Commission also disagrees with NZCT that support can be drawn from Parliament's failure to expressly override a judicial decision in its 2013 or 2015 amendments. It would be exceptional for Parliament to do so. However, if Parliament had intended to overturn the effect of *Waikiwi*, it would have been necessary to use different statutory language, including amendment to the statutory definition of "class 4 venue" or "place", and it did not do so.

35. In addition, whether or not the Secretary has changed his position is irrelevant to what the legislation objectively means.

36. The Commission has considered the parties' submissions on whether Auckland Council did "adopt" a relocation policy as defined in section 101(5). It doubts whether the Amendment requires relocation policies to be formally adopted after the Amendment came into force. However, in view of the Commission's conclusion on the plain meaning of the legislation, it is unnecessary to determine the point.

Conclusion on Substantive Appeal

37. The Commission agrees with NZCT's primary argument on appeal. A movement that meets the *Waikiwi* criteria is not a change of venue requiring territorial consent. As there is no dispute that the application falls within the *Waikiwi* criteria, the ordinary process for amending a licence applies.

38. Applications for an amendment to a venue licence proceed under section 73, which requires the application to meet the requirements of section 66 and 67. While section 67(1)(f) requires territorial consent if section 98 applies, in the Commission's view, no such consent is required. There is no dispute that the requirements of sections 66 and 67 are otherwise met in this case.

39. The Commission therefore considers that the Secretary erred and that NZCT's application to amend should have been granted. Pursuant to section 77(4) of the Act, the Commission reverses the decision of the Secretary to refuse to amend the licence to record the change of address of the Counties Inn in Pukekohe and directs that the Secretary issue the amended licence sought.

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16 Compare *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC).

Costs

Submissions

40. NZCT sought costs, if successful, because of the Secretary's conduct in making the decision subject to the appeal. In particular, it submitted as follows:

(a) The Secretary failed to follow *Waikiwi*. The decision is clear that, when the criteria are met, there is no change of venue.

(b) The Secretary changed his position to adopt an unreasonable interpretation of the Act, thus ignoring his own precedents and advice he gave to councils that relocations under *Waikiwi* were not changes of venue. It also ignored feedback from councils that *Waikiwi* movements do not result in changes of venue. Many relocations approved by the Secretary under *Waikiwi* would now have to be revisited, unless the appeal succeeds.

(c) The Secretary failed to have due regard to an opinion by David Goddard QC which reflects NZCT's interpretation. The opinion describes the Secretary's position as "plainly wrong" and making "no policy sense".

(d) There was unreasonable delay in reaching the decision. The application was made on 23 April 2018 with a written decision issued on 6 November 2018. Correspondence between NZCT and the Secretary prior to the release of the decision included promises and undertakings from the Secretary to deliver the decision at particular times, which it failed to meet. Similar issues were faced in another application to amend under *Waikiwi*. There is a need for prompt decisions to be made to provide commercial certainty. The Counties Inn had to reopen on 15 December 2018 without gaming machine revenue. The six and a half month timeframe compares unfavourably with other timeframes in the Act (e.g. venue licences are surrendered with more than four weeks' inactivity – section 71(1)(g); territorial authorities are required to consider and determine applications for consent within 30 working days (section100(3)).

41. The Secretary submits that, assuming the appeal is successful, there are no grounds to award costs as there was no bad faith or procedural misconduct in the decision-making process. It submits as follows:

(a) The passage of new legislation is generally a good reason for distinguishing a prior case.

(b) While consistency is desirable, the Secretary is entitled to change his position. He carefully considered his position before changing his approach. His new

position was reasonable and tenable and he acknowledged that both sides' arguments have merit. He will take into account the need to avoid injustice in dealing with any prior relocations decided under his previous approach, and will make his position clear to councils.

(c) He was under no obligation to adopt Mr Goddard QC's position. He did take it into account (but disagreed).

(d) The delays were justified because the Department wanted to consult more widely with industry given the significance of its change of approach, a position originally accepted by NZCT. It sought and received legal advice from Crown Law on 2 August 2018 (but maintains privilege in the advice), the Secretary's proposal letter came three weeks after that, and came to a final decision on 23 October 2018, which was then communicated to NZCT. He does admit that he failed to serve the venue operator and the venue manager as required under the Act until 20 September 2018. He acknowledges that ideally decisions will be made quickly, but that the delay was not excessive given the need for full consideration and legal advice. The Department acknowledges that delays were caused by an internal restructure that took effect in June 2018 and that it is committed to improving efficiency in decision-making.

Should costs be awarded?

42. The Commission has jurisdiction to award costs. The relevant Commission Practice Notes are as follows:

> 33. The Commission will not normally award costs but reserves its right to do so.
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> 34. Factors which will be relevant in considering whether to order payment of costs, and in fixing the amount of an award, include whether any party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct.

43. The leading decision is the *Kilbirnie Tavern* case, where the Commission said:[17]

> [An] award of costs may be appropriate to deter parties from ignoring the Commission's prior decisions and treating them as ineffective. While costs should remain exceptional and will generally involve bad faith or procedural misconduct, the Commission will not restrict itself to considering only conduct during an appeal and, in awarding costs, may take into account conduct which brought about an appeal.

44. The *Kilbirnie Tavern* has some similarities to this appeal. The decision appealed from was the third time the Secretary had imposed, or sought authority to impose, a licence condition preventing simultaneous smoking and class 4 gambling in the open gaming area at the venue. A previous attempt resulted in a successful appeal to the Commission against the Secretary who then brought declaratory proceedings in the High Court which

[17] *In the matter of an appeal by the Lion Foundation Ltd* GC16/11, 15 April 2011 ***[Kilbirnie Tavern]*** at [13].

did not expressly impugn the decision of the Commission.[18] The Secretary then went on to impose a similar condition. This resulted in a successful appeal by The Lion Foundation, including an application for costs.

45. The Commission considered ordering costs against the Secretary but, by a fine margin, the majority decided costs should not be imposed. In favour of costs were the following factors:

(a) The Secretary's submissions were premised on what appeared to be an almost wilful misinterpretation of the High Court decision.

(b) The Secretary put before the Commission voluminous irrelevant evidence – none of which changed the position from the previous appeals.

(c) The Secretary assessed evidence against a High Court decision interpreted in a contrived manner, in an attempt to persuade the Commission that it had erred in its earlier decision. The Commission was left with the impression that the Secretary was prepared to take almost any step to justify his attempt at "legislative" correction by licence condition.

(d) The Secretary did not acknowledge any other errors on his part. Rather, he emphasised the fact that the statutory decision was a matter for his satisfaction (notwithstanding that this was coloured by his preference for his own interpretation over the High Court's).

46. However, there were important factors weighing against costs:

(a) It was unclear that the Secretary had acted in bad faith or that his approach amounted to misconduct. It produced evidence as part of a genuine, albeit misguided, attempt to address evidential deficiencies in his previous Kilbirnie decision.

(b) The misguided approach was not in defiance of the earlier decision, in which the objection to the use of venue-specific conditions to effect what amounted to legislative change was not made explicit.

(c) The Secretary was acting on legal advice from Crown Law Office and external senior counsel. That indicates that its actions were considered and not frivolous or in bad faith.

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[18] *Secretary for Internal Affairs v Kilbirnie Tavern Ltd* HC Wellington CIV-2007-485-1988, 7 May 2008.

(d) The Secretary was not precluded by the substance of the earlier decision from considering the imposition of a similar condition. If there had been better evidence, the Commission indicated that its decision may have been different.

47. There are two other relevant Commission decisions on costs: *First Sovereign* and *Caversham Foundation*.[19] In both cases the Secretary's decision was appealed to the Commission. In each case, after receiving the appellant's submissions and evidence, the Secretary reassessed his previous decision and made a new decision, which removed the need for the appeal. In both cases there was nothing to justify a costs award. In *First Sovereign*, both parties had negotiated in good faith, and in *Caversham Foundation*, the Secretary was commended for reassessing his earlier decision in light of the matters placed before the Commission.

48. The Commission has given serious consideration to whether costs should be awarded on this appeal. In its view, the Secretary's position was premised on a weak and contrived interpretation of the Amendment, and showed a curious reluctance to apply a binding High Court decision. However, on balance, the Commission has decided against an award of costs. It generally approaches costs on the basis that they are a punitive, rather than compensatory, measure. While the argument has been held to be weak, it was not so weak as to cause the Commission to find bad faith or procedural misconduct. The Secretary was entitled to change his position and to test an alternative arguable interpretation before the Commission. While there were delays, these were largely explicable. Further, the Secretary accepted responsibility for some of the delay and none of the delays indicated bad faith or misconduct.

Decision

49. For the reasons set out above, the Commission, pursuant to section 77(4) of the Act, reverses the decision of the Secretary to refuse to award the licence to record the change of address of the Counties Inn in Pukekohe and directs that the Secretary issue the amended licence sought.

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[19] *In the matter of an appeal by First Sovereign Trust* GC03/06, 10 March 2006; *In the matter of an appeal by Caversham Foundation Ltd* GC30/08, 5 December 2008.

50. The Commission declines to award costs against the Secretary.

Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

26 February 2019

GAMBLING COMMISSION