GC04/21

IN THE MATTER	of the Gambling Act 2003
AND	an appeal by **NEW ZEALAND COMMUNITY TRUST** against a refusal by the Secretary for Internal Affairs to agree to cessation of gambling at **FLANNAGAN'S IRISH PUB**

BEFORE THE GAMBLING COMMISSION

Members:	L M Hansen (Chief Gambling Commissioner) D C Matahaere-Atariki W N Harvey S C L Pearson
Date of Appeal:	24 December 2020
Date of Decision:	5 March 2021
Date of Notification of Decision:	8 April 2021

DECISION ON AN APPEAL BY NEW ZEALAND COMMUNITY TRUST AGAINST REFUSAL BY SECRETARY FOR INTERNAL AFFAIRS TO AGREE TO CESSATION OF GAMBLING AT FLANNAGAN'S IRISH PUB

1. INTRODUCTION

1.1 New Zealand Community Trust ("**NZCT**") appealed against a decision by the Secretary for Internal Affairs refusing to agree to the gambling activity at Flannagan's Irish Pub ("**Venue**") ceasing for a period longer than 4 weeks. Following the filing of the appeal on 24 December 2020, the Commission sought a copy of the Secretary's file, as it usually does when an appeal is commenced. By an email of the same date (18 January 2021), counsel for the Secretary questioned the Commission's jurisdiction to receive and hear an appeal against a decision declining to agree to an extended period of cessation of gambling, referring to the Commission's decision GC10/20 (*Appeal by Youthtown Incorporated re Kina's Sports Bar*) ("**Kina decision**"), and suggesting that an appeal right would arise only if and when the Secretary made a subsequent decision, such as to cancel the licence.

1.2 The Commission considered that a question of jurisdiction to hear an appeal arose and directed that it would consider and determine the jurisdiction question initially, and separately from the substantive appeal issues. It sought submissions from the parties on the question of jurisdiction on the basis that, if it decided that a valid appeal had been commenced, it would then proceed to seek submissions on the substantive merits and decide the appeal.

1.3 The parties were directed to file written submissions on jurisdiction only, specifically whether NZCT had a right to appeal the refusal to agree to the Venue remaining inactive for longer than 4 weeks. Memoranda dated 5 February 2020 (accompanied by an affidavit of Anna Reed sworn on 5 February 2021), in the case of the Secretary, and 22 February 2021, in the case of NZCT, were received by the Commission.

2. LEGISLATION

2.1 The underlying issue arises from section 71(1)(g) and section 79, which provide as follows:

> **71 Significant changes in relation to class 4 venue licence must be notified**
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> (1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur:
>
> (a) a key person in relation to the class 4 venue licence is convicted of a relevant offence:
>
> (b) a key person in relation to the class 4 venue licence is placed in receivership, goes into liquidation, or is adjudged bankrupt:
>
> (c) a key person in relation to a class 4 venue licence breaches a rule of racing made under section 37 of the Racing Industry Act 2020:
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> (d) the venue manager ceases to be the venue manager or is incapable of performing the duties of his or her position:
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> (da) the venue manager changes:
>
> (e) the venue operator changes:
>
> (f) the nature of the class 4 venue changes:
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> (g) the corporate society has not conducted class 4 gambling at the venue for a period of more than 4 weeks (in which case the class 4 venue licence must be surrendered, under section 79(1)(a), unless the Secretary agrees that the venue may remain inactive for a further specified period).
>
> (2) Notification must be made before, or as soon as practicable after, an event listed in subsection (1) occurs.
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> (3) The powers and obligations in section 66 apply to a notification as if the notification were an application for a class 4 venue licence.
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> (4) The Secretary may require the corporate society to apply for an amendment under section 73, or may invoke the suspension or cancellation provisions under sections 74 and 75, as a result of the notification.
>
> …
>
> **79 Surrender of class 4 venue licence**
>
> (1) A corporate society—
>
> (a) must surrender a class 4 venue licence to the Secretary in the circumstances described in section 71(1)(g):
>
> (b) may surrender a class 4 venue licence to the Secretary at any other time.

(2) The surrender of a class 4 venue licence does not affect—

(a) the obligation of the corporate society to apply or distribute the net proceeds from the gambling in accordance with this Act and the licence; and

(b) any condition relating to records that must be maintained and reporting requirements.

2.2 The effect of those provisions may be summarised as follows:

(a) Section 71 is a notification provision. It requires the society which holds the class 4 venue licence to notify the secretary if any of 8 separate events occur.

(b) The obligation to report is expressly either before, or as soon as practicable after, the event which must be reported.

(c) Receipt of the notification empowers the Secretary to do any of the things set out in sub-section (4), namely to require the society to apply for an amendment or to invoke the suspension or cancellation provisions in sections 74 and 75.

(d) The last of the listed things requiring a report is the society not conducting class 4 gambling at the venue for a period of more than four weeks.

(e) In addition to the obligation to notify such a period of inactivity, section 71(1)(g) imposes a subsidiary obligation, by means of the words in brackets, namely an obligation to surrender the venue licence unless the Secretary agrees that the venue may remain inactive for a further specified period.

(f) The subsidiary obligation in brackets is confirmed and reinforced by section 79, which provides, not only for voluntary surrender of venue licences, but also an obligation for the surrender by the society of a venue licence in the circumstances described in section 71(1)(g).

2.3 The critical provision regarding jurisdiction to appeal is section 77, which sets out the right to appeal, to the Commission, decisions by the Secretary regarding class 4 venue licences. The material part of section 77 is as follows:

77 Appeal to Gambling Commission regarding class 4 venue licence

(1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—

(a) refuse to grant a class 4 venue licence to the corporate society; or

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

(c) refuse an application by the corporate society for the renewal of a class 4 venue licence; or

(d) refuse to amend a class 4 venue licence held by the corporate society; or

(e) suspend or cancel a class 4 venue licence held by the corporate society.

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

2.4 The Commission's powers of appeal are purely statutory. It may receive and hear appeals which come within the statutory appeal provisions, but not otherwise. Section 77(1) lists 5 different types of decisions which may be appealed and subsection 1A expressly excludes a certain type of decision from appeal.

2.5 The foregoing statutory analysis indicates that the issue for determination is whether the Secretary's decision not to agree to a further extended period of activity (as provided in the bracketed words in section 71(1)(g)), comes within the decisions listed in section 77(1).

3. PREVIOUS DECISIONS

3.1 The extent of appeal rights following refusal by the Secretary to agree to an extended period of inactivity has been considered twice previously by the Commission.

3.2 The jurisdiction question was considered directly in 2010 in the context of an appeal by Air Rescue Services in respect of a venue called The Wheatsheaf. The society lodged an appeal against the Secretary's decision not to agree to extend the period of inactivity; the Secretary raised the issue of jurisdiction. The society argued that seeking the Secretary's agreement amounted to an application to amend the licence, so refusal was a refusal to amend a class 4 venue licence (section 77(1)(d)).

3.3 The issue was considered as a preliminary matter by the then Chief Gambling Commissioner. His view was recorded in an email to counsel for the parties from the Commission's Executive Director dated 24 August 2010 (**Wheatsheaf email**). As no formal decision was ever issued or published by the Commission concerning the appeal, the matter appears to have proceeded no further, despite the favourable email ruling. The Wheatsheaf email was appended to NZCT's notice of appeal.

3.4 The view recorded in the Wheatsheaf email may be summarised as follows:

(a) An appeal under section 77 may be brought only against decisions listed in section 77(1).

(b) Refusing to agree to a further period of inactivity is not amendment, revocation, or addition of a venue licence condition. There is no current licence condition regarding inactivity and the Secretary has not added one. Nor has a decision been made to suspend or cancel a licence.

(c) That leaves only refusal to amend the licence. However, the licence contains no term regarding inactivity and the Secretary's agreement under section 71(1)(g) would not take the form of amendment of the licence.

(d) Nevertheless, the refusal to agree should be treated as a refusal to amend the licence for 2 reasons, the first relating to what would be an anomalous omission of an appeal right and the second relating to the documentation used and treatment of the request for agreement as an application to amend.

(e) The supporting reasoning for the anomalous lack of an appeal rights was as follows:

(i) Generally, the Act provides appeal rights against decisions which adversely affect the rights and interests of a licence holder.

(ii) The Secretary's decision to refuse to agree would be final and would result in "automatic surrender of the licence", an effect similar to cancellation or non-renewal.

(iii) The Secretary's decision under section 71(1) must be made by reference to the factors in section 66. That section also applies to decisions to grant or review a licence, which are expressly appealable. The challenged decision is thus not different in kind to other, expressly appealable, decisions.

(iv) The steps which the Secretary can take in response to notifications under section 71(1)(a) to (f) are all matters which would be appealable. With section 71(1) (g), in contrast, the effect of the Secretary's agreement or otherwise is contained within section 71(1)(g) itself.

(v) If the Secretary declines to agree and then commences the suspension or cancellation process, unless the notification and request for agreement is treated as a request to amend, the cancellation process would have been commenced in respect of a licence that had "already been irrevocably surrendered".

(f) The supporting reasons for the "treatment of the request" ground were as follows:

(i) The Secretary's letter indicated that he required completion of a standard form GC4 and payment of a fee. It is arguable that, by doing so, the Secretary required the society to apply for amendment under section 71(4) by seeking the completion of a form in terms of section 73(2).

(ii) The form's heading referred to "amendment".

(iii) The part of the form dealing with periods of inactivity referred to an application by the society.

(iv) In deciding not to agree, the Secretary applied sections 66 and 67 (as would be required by sections 71(3) and 73(4)) and refused extension because he was not satisfied about one of the matters in section 67(1).

(g) The email concluded by observing that the Act as a whole did not indicate a statutory intention that a decision by the Secretary that resulted "in the effective termination of the licence" would not be subject to a right of appeal.

3.5 In 2020, in the *Kina* decision, the Commission reconsidered aspects of the reasoning set out in the Wheatsheaf email. The appeal was not against a refusal to agree to a further extension under section 71(1)(g) but against a decision to issue a venue licence allowing no more than 9 gaming machines when the previous venue licence had permitted 16 machines. At issue was whether the rights created under section 92 (to operate more than 9 machines) had been lost. Preservation of those rights required the venue to establish that it been the subject of a class 4 venue licence without a gap of more than 6 months. As a result, the appeal required the Commission to determine whether the venue had held a licence without a gap of more than 6 months.

3.6 The society argued that the previous licence had remained in effect until surrendered in December 2019. The Secretary argued that it had come to an end because the licence holder had gone into liquidation, raising issues about key person suitability. More relevantly, he also argued, based on the Wheatsheaf email, that the licence had been automatically surrendered after 4 weeks of inactivity without the Secretary's agreement to a further period of inactivity. The Secretary further argued that the previous licence holder's communications amounted to surrender. In reply, the society argued that section 71(1)(g) did not result in automatic surrender of the venue licence, merely an obligation to do so. If not complied with, it was for the Secretary to commence the cancellation process under section 74(1)(b) (failure to comply with a requirement of the Act).

3.7 The Commission's decision dealt comprehensively with the question of surrender, including the argument that sections 71(1)(g) and 79 resulted in automatic surrender of a licence, the argument which the Secretary had advanced on the basis of the Wheatsheaf email. It rejected the argument. The key passages of the decision are as follows:

> 42. Section 71 creates an obligation to notify the Secretary of certain circumstances, but the notification has no apparent effect on the continuation of the licence. Rather than providing for any automatic consequence, section 71 (4) confirms that, following receipt of notice, the Secretary may require the society to apply for an amendment of its licence or invoke the suspension or cancellation provisions under section 74 and section 75.
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> …
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> 44. As a result, liquidation does not automatically terminate a venue licence. The suggestion on behalf of the Secretary that it does so and that no action was required by the Secretary to bring a licence to an end is unsupported by any statutory reference (or otherwise) as is the suggestion that surrender occurs automatically at the end of a period of four weeks inactivity without approval.
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> …

> 46. The position in paragraph 44 is confirmed by the provisions of section 70(1)(b) and (5), 72(6) and 79. Their effect is that a venue licence continues in force until it expires (without a renewal application), is surrendered, is cancelled or is not renewed. Provisions for extension following expiry arise from a prior renewal application (section 72(6)) and from appeals (section 78).
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> 47. The grounds for suspension or cancellation under section 74 and section 75 include a past or continuing failure to comply with the prevailing regulatory requirements. Such failures include both the obligation to notify under section 71 and the requirement to surrender a licence under section 79. They also include one or more of the suitability requirements in section 67 no longer being met. Sections 74 and 75 thereby provide the means by which the Secretary can bring a licence to an end following the occurrence of a section 71 event.

3.8 Against that background, the Commission has considered certain common issues twice previously, reaching the differing views on each occasion. Although the Wheatsheaf email was not a published decision, it set out the supporting reasoning clearly and it directly addressed the central issue. The Kina decision, a published decision, reached a different conclusion on a matter which appeared to be fundamental to the Wheatsheaf email analysis, namely whether a period of inactivity of more than 4 weeks without the Secretary's agreement to a further period resulted in "automatic suspension" and "effective termination of the licence."

3.9 The Commission is not bound by its previous decisions. Section 226(3)(a) provides that it may "reconsider any matter that has been determined by it and issue a fresh determination". As it may reconsider decisions previously made and issue a substitute decision, it follows that it may reconsider its previous reasoning and depart from it in later decisions. As it is not bound to follow either of its earlier decisions, the Commission considers itself free to reach a fresh conclusion on the appeal issue.

4. SECRETARY'S SUBMISSIONS

4.1 The Secretary's submissions included a statutory analysis including the nature of the obligation in section 71(1), the express steps that the Secretary may take (in section 71(4)), the nature of section 79 (creates an obligation but no internal machinery to enforce it) and the expressly limited appeal rights created by section 77(1).

4.2 The Secretary supported as correct the Commission's reasoning in the Kina decision, namely that section 71(1)(g) creates an obligation but does not bring the licence to an end and that licences come to an end in only limited circumstances which do not include a period of inactivity of more than 4 weeks without the Secretary's agreement.

4.3 The Secretary also submitted that sections 71(1)(g) and 79 create a statutory obligation, not an obligation under a licence condition, and that the Secretary's powers to impose or amend licence conditions do not extend to relieving the licence holder from an obligation created by a statutory provision.

4.4 The Secretary conceded that there had been an amendment to the licence in the form of the removal of all of the gaming machine details from the schedule but said that the amendment had been the result of an application by NZCT for their removal, not an amendment effected by the Secretary in order to reflect refusal to agree to a further period of inactivity.

4.5 The Secretary pointed to undesirable practical consequences of allowing an appeal against refusal to agree under section 71(1)(g) when the outcome would not necessarily determine the status of the licence. If the appeal against refusal were unsuccessful, the Secretary would then need to commence the cancellation process which would be subject to a fresh right of appeal. No injustice would arise from limiting appeal rights to subsequent action by the Secretary which directly affected the licence, such as cancellation of the venue licence for breach of the obligation to surrender. The appeal right on a cancellation decision would include whether the Secretary had been correct to refuse to agree to the extension but would also extend to all other matters bearing on the decision to cancel. The society's rights would not be adversely affected, by section 71(1)(g) and 79, without a right of appeal.

4.6 The Secretary submitted that NZCT's appeal assumed that the Wheatsheaf decision was correct. That decision assumed that section 71(1)(g) alone would result in termination of the licence but the Commission had reconsidered the reasoning in the Kina decision and departed from it.

4.7 The Secretary argued that the analysis in the Kina decision is preferable to that in the Wheatsheaf email, submitting in summary as follows:

(a) The decision to treat something which was not a refusal to amend as a refusal to amend was wrong in principle.

(b) The position was not anomalous for the reason assumed, as the consequences of the decision to refuse were not as had been assumed.

(c) The reference to section 66 was not relevant (for the same reason and because section 66 relates to the Secretary's powers and obligations to investigate the suitability of the key persons, which relates to other aspects of section 71(1), apart from subsection (g)).

(d) Section 71(1)(g) was not different from subsections (a) to (f) (as none of the notified events had a direct effect on the licence but each required further action by the Secretary which could be appealed).

(e) The Secretary's processes in considering requests for agreement to a further period of non-activity do not treat the request as an application for amendment (a submission which drew on the affidavit of Ms Reed).

(f) The Secretary agreed that the statutory intent was not to make refusal to agree under section 71(1)(g) final but submitted that that did not mean that an appeal right against

the refusal was required to avoid such an outcome; the intent was that a refusal would need to be followed by the cancellation process which would result in a right of appeal.

4.8 The Secretary acknowledged that, following the Wheatsheaf email, DIA had created policy and guidance documents which adopted the views set out in the Wheatsheaf email. However, it had later revised its policy and guidance in the light of the *Kina* decision. In addition, neither the concept of legitimate expectation nor the doctrine of estoppel could provide an appeal right outside the provisions of the Act.

5. NZCT SUBMISSIONS

5.1 The submissions for NZCT adopted the reasoning set out in the Wheatsheaf email. It submitted that, where the Wheatsheaf reasoning was inconsistent with the Kina decision, the former should be preferred. Reliance was placed on the fact that the central issue in the Wheatsheaf email was the same as that on the appeal, whereas the Kina decision had addressed a different issue.

5.2 While accepting that a consequence was not automatic surrender as recorded in the Wheatsheaf email, NZCT submitted that a decision which created an obligation, breach of which would be a breach of the Act, was one with serious consequences. It argued that a mandatory statutory obligation is similar to cancellation or non-renewal.

5.3 It submitted that a right of appeal arising from a cancellation decision does not suspend the obligation to surrender created by sections 71(1)(g) and 79 and that an appeal against a cancellation decision based on breach of that obligation would be "pointless".

5.4 It said that the request for agreement to allow a further period of non-activity was referred to as an "application". The request was said to be "akin to an application to amend a venue licence". The invoice for the fee payable referred to "amendment".

5.5 NZCT said that the Secretary's practice is consistent with the application for approval under section 71(1)(g) amounting to an amendment of the licence. Licences include a condition expressly authorising the conduct of class 4 gambling at the venue but, when declining to agree to an inactivity period extension, the Secretary's standard practice is to advise that any future gambling will be illegal and failure to surrender the licence will result in a cancellation proposal. The submissions also annexed an email from counsel for the Secretary confirming the view that resumption of gambling after failing to surrender the licence would amount to illegal gambling.

5.6 NZCT argued that, as the Secretary's statements go beyond the true legal position (as a licence in fact would remain in place), they should be considered to be an amendment to the licence condition that permits gambling or a new condition. In support of that analysis, it referred to the decision in *Appeal by Hardy's Bar (2014) Limited* (GC 22/15) (**Hardy's Bar**

decision) which related to obligations recorded in a letter accompanying the issued licence which were not reflected in the licence itself.

5.7 NZCT advocated for a purposive approach to the construction of section 77(1), arguing that the Secretary's approach was excessively literal.

5.8 It argued that it was insufficient to restrict a challenge to the correctness or justice of a section 71(1)(g) request refusal to an appeal against a consequential step taken by the Secretary. If the Secretary did not proceed to propose cancellation, the decision could not be challenged until a decision was made to refuse to renew the licence. It complained that it would be unfair to require societies to risk their licence in order to challenge the decision to refuse to agree and expressed concern about the danger of informal pressure arising from correspondence.

5.9 NZCT dismissed the Secretary's concerns about re-litigating the same issue. It suggested that, if a society were able to appeal a decision to refuse to agree to an extension of the inactivity period and, if unsuccessful, later appealed a subsequent cancellation decision, the second appeal could be struck out as an abuse of process. It also contended that societies have no history of attempting to re-litigate matters in second appeals.

6. ANALYSIS

6.1 The Commission considers that the issue can be determined shortly by reference to section 77(1), the provision which sets out its appeal jurisdiction. A decision by the Secretary to refuse to agree to a request to extend the period of inactivity under section 71(1)(g) is not a decision for which section 77(1) provides a right of appeal. The refusal to agree is not a refusal to grant a venue licence, an addition to, or amendment or revocation of, the conditions of a venue licence, a refusal to renew a venue licence, a refusal to amend a venue licence or a suspension or cancellation of a venue licence. It is merely a matter on which the Secretary may rely upon in making certain subsequent decisions (cancellation or refusal to renew) which are themselves subject to rights of appeal.

6.2 If, as the Commission held in the Kina decision, the licence is not terminated merely by refusal to agree to an extended period of inactivity but termination would require a further action which can be challenged on appeal, the result would not be so unsatisfactory as to justify construing the Act so as to provide a right of appeal for the refusal alone as well as for the later decision.

6.3 The Commission noted that the key underlying assumption of the Wheatsheaf decision is fundamentally contrary to the Kina decision analysis. On further consideration of the issues, the Commission concluded that the Kina analysis is correct. A period of inactivity of more than 4 weeks, without the Secretary's agreement to a longer period, does not result in "automatic surrender" or "effective termination of the licence" without an effective right of appeal (thus requiring section 77(1) to be read sufficiently widely to allow the refusal decision to be appealed). While the *Kina* decision itself reflects the Commission's view that the Act should be interpreted, if possible, so as to avoid loss of licence rights without an effective appeal, the

decision dealt with that concern by its interpretation of the surrender provisions (whereas the Wheatsheaf approach had been to resolve the concern by expanding the appeal rights). On reconsideration, the Commission re-affirms its analysis in the Kina decision.

6.4 If the assumption that refusal of agreement to a non-activity extension (or the passing of more than 4 weeks of inactivity without such an agreement) is rejected, the central plank of the reasoning in the Wheatsheaf decision disappears. The problem that the Wheatsheaf decision aimed to fix by a broad interpretation of the appeal rights was resolved in the later Kina decision by construing sections 71(1)(g) and 79 as having a strictly limited effect.

6.5 On further reconsideration of the Wheatsheaf decision, the Commission doubts that the reference to section 66 in section 71 provides much support for an appeal right. Section 66 is concerned exclusively with suitability of key persons and has a more obvious connection to other sub-sections of section 71(1) than sub-section (g). In addition, there is force in the Secretary's submission that even an adverse decision, reached after a section 66 inquiry as to the suitability of a key person, does not result directly in any licence consequence and accordingly is similarly not subject to a separate appeal right. Appeal rights arise only if and when the Secretary takes a statutory step following an adverse assessment.

6.6 If the converse position were taken, in accordance with the Wheatsheaf decision, that there is a separate right of appeal against a decision to refuse to agree to a non-activity period extension, the Secretary would be correct in suggesting that the result would be two rights of appeal. The Commission considers that no such intention is apparent on the face of the Act. Such a result would be undesirable and would undermine efficient administration of class 4 gambling regulation.

6.7 The Commission doubts the correctness of the submission for NZCT that an appeal against cancellation following an unsuccessful appeal against a refusal to agree under section 71(1)(g) could be rejected as an abuse of process, in part because the issues on a cancellation appeal would not necessarily be limited to the correctness of the earlier refusal. It is not clear that the Commission would even be entitled to limit the second appeal issues so as to exclude the correctness of the refusal decision (even if the likelihood of success were minimal). While the Commission has once previously dealt with an appeal as an abuse of process1, determining appeals on that basis is not well-established[2]. Determination of the extent of the Commission's powers to determine an appeal by a finding of abuse of process should occur when that is the central issue on an appeal, rather than as a secondary argument, as it would be in this determination.

6.8 The Commission considered that there was more substance in the concerns expressed about the Secretary's communications when refusing to agree to extend the non-activity period,

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[1] Decision on Application by Secretary on an appeal by Infinity Foundation Limited re "The Bar 4 Us" (GC 07/07)
[2] Another appellant might have challenged the decision as inconsistent with section 77(3)(d) (which was not expressly considered). In addition, the abuse was essentially conceded by the appellant who admitted that it had been filed to buy time.

namely advice that recommencing gambling at the venue would be considered to be illegal gambling, a matter which counsel for the Secretary confirmed by email to counsel for NZCT. While NZCT suggested that, while incorrect, there were sound policy reasons for the advice and that it was reasonable for the Secretary to have given it, neither seems to be the case to the Commission for the reasons which NZCT itself gave. Part of the Secretary's advice on refusal is not a correct statement of the legal position – following refusal, unless surrendered voluntarily, the venue licence would remain in place for the reasons advanced in the Kina decision (and in the Secretary's submissions). Advice that resumption of gambling after 4 weeks without the Secretary's agreement would be illegal is inconsistent with the Kina decision (and the rest of the case advanced for the Secretary on the appeal).

6.9 NZCT argued that the communication should be treated as equivalent to the additional obligations added in the accompanying letter, but omitted from the licence conditions, as considered in the Hardy's Bar decision. However, the Commission does not consider the circumstances in each appeal to be sufficiently similar.

6.10 The Hardy's Bar decision concerned express prohibitions set out in a letter accompanied by advice that the Secretary would audit compliance with them. The Secretary had wished to impose the obligations but had doubted that they could be incorporated as conditions because he considered that they did no more than reflect an existing statutory obligation. In its decision, the Commission held that the Secretary's reservations were unfounded, that the additional obligations could, and should, have been incorporated as licence conditions, that they were accordingly conditions in substance and that the Secretary could not avoid an appeal against their imposition by omitting to include them formally in the licence. The obligations were conditions in substance because they did not merely reflect a statutory obligation but rather imposed an express obligation requiring discharge of a statutory obligation in a specific way.

6.11 The current position is not analogous. The exercise by the Secretary of the power to amend, revoke or add new conditions to a licence under section 70(3) is subject to a right of appeal[3]. Although NZCT contends that the communication should be regarded as a condition amendment which removes the authorisation to conduct gambling, application of the Hardy's Bar decision analysis would not result in such a change amounting to a condition. In substance, it would amount to purported cancellation of the licence, without having undertaken the statutory process expressly required by in section 75. A "class 4 venue licence" which lacks authorisation to conduct any class 4 gambling at the venue is not a class 4 venue licence in substance.

6.12 It is clear to the Commission that the Secretary's communication did not purport to exercise a power to amend or revoke a condition of a licence or to add a new condition. If anything, the Secretary's communication assumed the correctness of the automatic surrender argument,

[3] Section 70(4) even expressly requires notice of the right to appeal.

which the Commission expressly rejected in the Kina decision (and which the Secretary's own submissions on this appeal rejected).

6.13 The Commission is very concerned with the practice of giving such advice, following the Kina decision. The advice is incorrect and misleading. If followed, it could lead to operators losing statutory rights without a statutory right of redress. The Commission wishes to make clear that, if an operator seeks the Secretary's agreement to extend the period of inactivity, is refused and wishes to challenge the correctness of refusal decision, **the operator should not surrender the venue licence**. Rather the operator should advise the Secretary that it regards the refusal to be in error and that it intends to challenge any decision which is made in reliance upon it, await the Secretary's subsequent action in response and then lodge an appeal.

6.14 The result is not entirely satisfactory but it represents the Commission's best endeavours to reflect the totality of the statutory language as it appears in the Act. In that regard, it is instructive to have regard to the legislative history of section 71(1)(g) as it may explain how the Act came to create a notification and surrender obligation without a direct enforcement mechanism or appeal right. As initially drafted:

(a) A society would have been required to apply to the Secretary to amend its venue licence in any one of four specified circumstances, including if it proposed to "cease conducting class 4 gambling at the venue"[4]. Refusal of an application for amendment would have given rise to an appeal right (as is the case now under section 77(1)(d)).

(b) Cessation of gambling at the venue would **not** have been one of the operational changes of which notification was required (under what is now section 71(1))[5].

(c) During the Select Committee phase of the Bill, DIA recommended that clause 66 be amended to include both notification and an obligation to surrender the licence in the event that a society proposed to cease conducting class 4 gambling at the venue. The Select Committee accepted the recommendation and added sub-clause (g) to clause 66(1) (with consequent changes to clause 68).

(d) Clause 66(1)(g) was subsequently further amended by way of Supplementary Order Paper at the third reading of the Gambling Bill (as it was then known) replacing "ceases to conduct class 4 gambling at the venue" with "has not conducted class 4 gambling at the venue for a period of more than four weeks (unless the Secretary has agreed that the class 4 venue may remain inactive for a further specified period)". That is the form in which it was enacted as section 71(1)(g).

(e) At the same time, a supporting amendment was made to clause 74(1), which became section 79 of the Act.

[4] Clause 68(1)(c), Responsible Gambling Bill, which became section 73.
[5] Clause 66(1), Responsible Gambling Bill, which became section 71.

6.15 While the Bill's initial draft would not have required notification and surrender of the licence in the event of inactivity, it would have required an application for amendment (which would have been subject to an appeal right), there was a deliberate legislative decision to replace the later with the former. It is possible that, in the course of doing so, the effect on the limited statutory right of appeal was overlooked. But, even if that were the case, the Commission is required to apply the statutory provisions as they currently are. As section 71(4) expressly limits the consequences of notifications, including a notification of inactivity without agreed extension, and section 77 expressly limits the statutory right of appeal, the Commission has reached a conclusion that represents the fair and reasonable application of both provisions.

6.16 Against that background, the Secretary should immediately cease the practice of advising operators that gambling, if conducted after four weeks of non-activity without the Secretary's agreement to extend the period, is illegal (at least in circumstances where a licence continues to remain in place) or that, even if they wish to challenge the refusal to extend the period, they are required to surrender the venue licence.

6.17 The balance of the advice given by the Secretary (that continued conduct of gambling will likely lead to a proposal to cancel the venue licence for breach of section 79(1)(a)) is correct and appropriately given. Only that part of the communication correctly stated the legal position, making it clear that the licence would remain in existence until a cancellation process had been completed. It is then for the Secretary to commence a cancellation process during which the operator will have statutory rights of hearing and a subsequent appeal right.

7. DECISION

7.1 For the foregoing reasons, the Commission has concluded that it lacks jurisdiction to hear the appeal. In the circumstances, no right of appeal has yet arisen under section 77(1). If the Secretary takes steps under the Act in reliance on the refusal to agree, NZCT will then have an appeal right.

Lisa Hansen

Lisa Hansen
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

8 April 2021

GAMBLING COMMISSION