

IN THE MATTER of the Gambling Act 2003
AND of a pre-hearing application
by the **LION**
FOUNDATION to exclude
affidavit evidence and
identified parts of
submissions made by the
Secretary for Internal
Affairs

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
K M Ford
P J Stanley

Date of Application: 3 March 2006

Date of Decision: 7 April 2006

Date of Notification of Decision: 18 April 2006

DECISION

**ON A PRE-HEARING APPLICATION BY THE LION FOUNDATION TO EXCLUDE
AFFIDAVIT EVIDENCE AND IDENTIFIED PARTS OF SUBMISSIONS MADE BY THE
SECRETARY FOR INTERNAL AFFAIRS**

Introduction

1. On 21 November 2005, the Lion Foundation ("Lion") appealed under section 77 of the Gambling Act 2003 (the "Act") against a decision by the Secretary for Internal Affairs (the "Secretary") to impose a further condition on 17 venue licences held by Lion.
2. The Gambling Commission's standard appeal procedure was followed and Lion filed and served its evidence, submissions and an agreed statement of facts. The Secretary, in turn, filed and served his submissions and affidavit evidence.
3. Following receipt of the Secretary's evidence and submissions, Lion, through its solicitors Chapman Tripp, wrote to the Secretary on 24 February 2006 raising concerns in relation to the admissibility of two of the affidavits he filed and parts of his submissions. Chapman Tripp's letter invited the Secretary to withdraw the two affidavits and remove the identified submissions prior to the Commission's hearing of the appeal.

4. By letter dated 1 March 2006, the Secretary replied to Chapman Tripp stating that he did not accept that the two affidavits, or the identified submissions, should be excluded, and suggested that Lion could respond to the material to which it objected in its submissions in reply.
5. On 3 March 2006, Lion filed with the Commission an application to exclude the affidavits of John Stansfield and Dr Phillip Townsend, and for orders that the identified parts of the Secretary's submissions be struck out. On 8 March 2006, the Secretary filed his submissions in opposition.

Submissions by Lion

6. Lion submitted that the affidavits of John Stansfield and Dr Phillip Townsend should be excluded because:
 - (a) Mr Stansfield and Dr Townsend are not experts in the operation of gambling venues, or the supervision of persons in those venues, so their evidence is inadmissible opinion evidence;
 - (b) the affidavits do not satisfy the High Court Rules requirements regarding the form and content of expert evidence;
 - (c) Mr Stansfield's affidavit contains hearsay evidence;
 - (d) the affidavits are irrelevant because they address problem gambling rather than the central issue in the appeal, namely, whether the possibility of persons under 18 years gaining access to class 4 gambling at each of the venues is minimal;
 - (e) as a matter of fairness, the Secretary should not be allowed to raise a new issue (namely whether the Secretary's decision to impose a new condition can be justified on problem gambling grounds) at such a late stage, and as the affidavits related to this new issue, they should be excluded.
7. Lion submitted that it is unfair for the Secretary to refer to alleged facts in his submissions when those alleged facts have not been put before the Commission by its proper process.
8. Lion submitted that there are instances where the Secretary's submissions make unsupported statements about relevant considerations, or the rationale of the Secretary's decision to impose the new licence condition. Lion identified paragraphs 24, 44, 48, 49, 51, 52, 93, 94 and 96 as containing submissions requiring exclusion.
9. Lion also submitted that the Secretary made general statements (unrelated to the Secretary's decision to impose a new licence condition) that are not supported by

evidence. Lion identified paragraphs 60, 64-70, 87 and 88 as containing submissions that require exclusion.

Submissions by the Secretary

10. The Secretary submitted that the Commission hears an appeal *de novo* and is entitled to take whatever evidence it considers relevant to making the decision afresh.
11. The Secretary submitted that it is within the Commission's jurisdiction to find that, while the Secretary imposed the further licence condition on one ground, support for the decision can be taken from another ground. In this instance, the further ground relied upon is problem gambling.
12. The Secretary stated that he would leave the issues of admissibility and relevance of the affidavit evidence for the Commission to determine, but noted that section 226(3)(b) of the Act provides that the Commission may "receive evidence that is not admissible in Court".
13. The Secretary responded to the individual paragraphs identified by Lion as containing objectionable material.

Key Issues

14. The Commission has identified five key issues in relation to the affidavits of Mr Stansfield and Dr Townsend. These key issues are as follows:
 - (a) Are the opinions offered by Mr Stansfield and Dr Townsend solely a matter for experts in the operation of gambling venues or the supervision of persons in those venues? If so, is the Commission precluded from considering their opinions?
 - (b) Do the High Court Rules bind the Commission? Is the Commission able to consider expert evidence tendered that does not strictly comply with the High Court Rules?
 - (c) Does Mr Stansfield's evidence contain hearsay? If so, can the Commission consider it?
 - (d) Is the Commission limited to considering only evidence relating to the express reason given by the Secretary for his decision? That is, is evidence relating to problem gambling irrelevant?
 - (e) Are there any considerations of fairness that would prevent a new reason for the imposition of the condition being raised by the Secretary and considered by the Commission?

Analysis

The Commission's powers

15. The Commission considers that it has broad powers, under both the Act and the Commission of Inquiry Act 1908, to set its own procedure and receive information with no express restriction. The Commission's powers include the following:
- (a) it may receive evidence that is not admissible in Court pursuant to section 226(3)(b) of the Act;
 - (b) it can generally regulate its procedure as it thinks fit pursuant to schedule 3, clause 2(1) of the Act;
 - (c) when considering an appeal regarding a class 4 venue licence, it may request any information from the corporate society or the parties to the venue agreement, the venue manager or the Secretary, pursuant to section 77(3)(a);
 - (d) it is obliged to consider any information provided by the corporate society, the parties to the agreement, the venue manager or the Secretary, pursuant to section 77(3)(d);
 - (e) it is not obliged to follow any formal procedure and does not need to hold a hearing pursuant to sections 77(3)(b) and (c);
 - (f) within the scope of its jurisdiction and subject to the Act, it must be treated as if it were a Commissions of Inquiry. Accordingly, the Commission has the following powers conferred upon it by the Commissions of Inquiry Act 1908:
 - (i) it may inspect or examine any papers, documents, records or things, pursuant to section 4C(1)(a), Commissions of Inquiry Act 1908; and
 - (ii) it may, pursuant to section 4B(1), Commissions of Inquiry Act 1908, receive as evidence, any statement, document, information or matter that it considers may assist the Commission, whether or not it would be admissible in a court of law.

16. Against this background, the Commission considers each key issue.

Are the opinions offered by Mr Stansfield and Dr Townsend solely a matter for experts in the operation of gambling venues or the supervision of persons in those venues? If so, is the Commission precluded from considering their opinions?

17. As noted in paragraph 15, the Commission has the statutory power, under both the Act and the Commissions of Inquiry Act 1908, to receive and consider evidence that would

not be admissible in a court of law. In the Commission's view, this power includes the ability to consider non-expert opinion evidence. The Commission will not, therefore, exclude the affidavits of Mr Stansfield and Dr Townsend on the ground that they contain statements of non-expert opinion.

18. The Commission does note, however, that if it forms the view at the substantive hearing of this appeal that the expressions of opinion of Mr Stansfield and Dr Townsend are not based on appropriate expertise, it may give the opinion evidence little weight. This is, however, a matter for the substantive hearing.
19. As the Commission has determined that it will consider the non-expert opinion evidence of Mr Stansfield and Dr Townsend, it does not need to consider whether their opinions are solely a matter for experts in the operation of gambling venues or the supervision of persons in those venues.

Do the High Court Rules bind the Commission? Is the Commission able to consider expert evidence that does not comply with the High Court Rules?

20. The Commission does not consider that it is bound by the High Court Rules. Nor do the Commission's Practice Notes specify that affidavits must comply with the High Court Rules.
21. The Commission, in exercising its functions, has wide powers to set its own procedure and can consider evidence tendered that is not in strict compliance with the High Court Rules.
22. The Commission will not, therefore, refuse to consider the affidavits of Mr Stansfield and Dr Townsend for non-compliance with the High Court Rules.
23. The Commission notes that any criticism by Lion of the differences between the affidavits in question and the requirements of the High Court Rules can be made in its submissions in reply.

Does Mr Stansfield's evidence contain hearsay? If so, can the Commission consider it?

24. For the same reasons outlined in paragraph 17, the Commission is authorised to receive and consider evidence that would not be admissible in a Court of law. This includes the ability to consider hearsay evidence.
25. The Commission will not exclude the affidavit of Mr Stansfield on the ground that it contains hearsay.
26. Again, the Commission may, if appropriate, reduce the weight which it attaches to parts of Mr Stansfield's evidence on the basis that it is hearsay.

Is the Commission limited to considering only evidence relating to the express reason given by the Secretary for his decision? That is, is evidence relating to problem gambling irrelevant?

27. The Commission is not limited to considering only evidence relating to the express reason given by the Secretary for his decision.
28. The appeal function exercised by the Commission is conducted on a *de novo* basis. Paragraph 27 of the Commission's Practice Note provides:

The Commission will consider and determine appeals from decisions made by the Secretary under section 224(1)(g)-(k) anew, as though it is the decision maker in the first instance.

29. When exercising its appeal functions, the Act provides that the Commission may request information from the parties under section 77(3)(a), and must consider any information provided by the parties under section 77(3)(d). This additional information may include evidence that was not considered by the Secretary when he exercised his decision-making powers. The Commission must consider this information.
30. The Commission also has the power, under section 77(4)(a), to confirm, vary or reverse the Secretary's decision. Again, these powers may be based upon evidence not considered by the Secretary when he made his decision.
31. The Commission is of the view that when it approaches the appeal *de novo*, it must consider whether the condition imposed is justified for any reason under the Act. It must hear any evidence that is relevant to the reasons for which a condition could be imposed, even if the Secretary did not consider that information.
32. The evidence Mr Stansfield and Dr Townsend addresses problem gambling. The Secretary submitted that the further condition he imposed would have the "unintended" benefit of detecting problem gamblers, as well as addressing the central issue under appeal. The Commission considers that evidence relating to problem gambling is relevant in the current context because, in addition to the express ground (s70(2)(b), further grounds for imposing a condition include encouraging responsible gambling at class 4 venues (s70(2)(g) and otherwise promoting or ensuring compliance with the Act (s70(2)(i)).
33. The Commission will not exclude the affidavits of Mr Stansfield and Dr Townsend on the ground that they contain evidence not related to the express reason given by the Commission. Their evidence is relevant.

Are there any considerations of fairness that would prevent a new reason for the imposition of the condition being raised by the Secretary and considered by the Commission?

34. Lion submitted that it would be unfair for the Commission to consider arguments on problem gambling because the Secretary did not consider this matter when he made his original decision.
35. As just noted, the Commission is permitted to consider new matters that support the imposition of the condition under the appeal. Whether that right is restricted on grounds of fairness is, in the Commission's view, dependent on the circumstances of the case. For example, if the Secretary deliberately withheld the problem gambling reasons in order to obtain an unfair advantage at the appeal stage, Lion may have been able to submit that the Commission should not consider the new reasons.
36. However, there is no suggestion that the Secretary acted in bad faith, rather he appears to have reconsidered his decision once challenged by Lion, and discovered a new reason that supports the imposition of the condition.
37. The Commission does not accept that there are any considerations of fairness that would prevent a new reason for the imposition of the condition being raised.
38. The Commission does note, however, that its normal timetable for an appellant to file evidence and submissions in reply is 10 working days. This timetable does not contemplate an Appellant needing to respond to a new reason being raised by the Secretary in his evidence in response. The Commission considers that 10 working days is insufficient time for Lion to provide evidence and submissions in response to the issue of problem gambling. The Commission will allow Lion an additional five working days to file its evidence and submissions in reply.

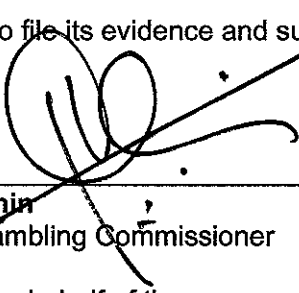
Application for striking out parts of the Secretary's submissions

39. Lion applied to strike out certain parts of the Secretary's submissions on the basis that those submissions contain factual statements that are not supported by evidence, and that it would be unfair to allow the Secretary to refer to alleged facts in the body of his submissions, when he has elected not to put evidence in through proper process.
40. It is the Commission's understanding that a court of record would normally hear arguments on whether or not factual statements are supported by the evidence at the substantive hearing. The Commission does not see any compelling reason why this should not be the case for Commission procedure as well.

41. Accordingly, the Commission will not exclude the submissions identified by Lion. Should it elect to do so, Lion can respond to the Secretary's submissions in its submissions in reply.

Decision of Division

42. For the reasons already provided, the Division unanimously declines Lion's pre-hearing application to exclude the affidavits of John Stansfield and Dr Phillip Townsend, and for orders that identified parts of the Secretary's submissions be struck out.
43. The Division allows Lion 15 working days from the date of receipt of this decision in which to file its evidence and submissions in reply.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

18 April 2006