

IN THE MATTER of the Gambling Act 2003
AND on appeal by **CAVERSHAM
FOUNDATION LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Decision: 19 March 2010

Date of Notification of Decision: 30th March 2010

**DECISION
ON APPEAL BY CAVERSHAM FOUNDATION LIMITED**

Appeal

1. Caversham Foundation Limited ("**Caversham**" or "**Appellant**") appealed, under section 77 of the Gambling Act 2003 (the "**Act**"), against a decision by the Secretary for Internal Affairs ("**Secretary**") refusing to renew the Class 4 venue licence for the Crossing on Kaiapoi ("**Crossing**" or "**Venue**").
2. The Secretary refused to renew the licence as he was not satisfied that the criteria in sections 67(c) and 67(d) of the Act were met, because the venue manager, and a key person in relation to the Venue, Stewart Turner, could not be deemed suitable under the criteria of section 68. The Secretary was not satisfied of Mr Turner's suitability because of:
 - a conviction for a relevant offence in August 2008 for providing credit to a gambler; and
 - the history of past non-compliance, namely:
 - (i) a failure to supervise Class 4 gambling at the Venue leading to incidents of after-hours gambling at the Venue;
 - (ii) incidents of late banking;
 - (iii) a failure to issue a self-exclusion order.

Agreed Statement of Facts

3. The Secretary and Caversham agreed upon a statement of facts, which provided as follows:

After-hours gambling

4. Turner is a key person by virtue of being a "venue manager" under the venue agreement with the Crossing and by being a shareholder in the venue operator entity.
5. Between 25 January and 23 February 2009 two key persons at the Venue, Ms Nikki Spicer and Ms Sherrin Solomon participated in and permitted after-hours gambling to take place at the Venue in breach of licence condition 1 of the venue licence.
6. The actions of Spicer and Solomon that led to a breach of the licence took place in the early hours of the morning when the Venue was closed. Turner was not working at the time or present at the Venue.

*Late banking*7. Warning letter February 2007:

- The alleged breaches relate to the first half of 2006. They were identified as part of a general audit of Caversham.
- These were incidents of banking being a few days late in breach of section 104 of the Act. All funds were subsequently banked and the period of non-compliance was one or two days in each instance.

8. Warning Letter August 2008:

- This related to three instances of late banking and one instance of a short banking in mid 2008.
- One incident was approximately one week late and the other two incidents were three to five days late.
- All GMP was subsequently banked.

9. Warning letter February 2009:

- The alleged breach relates to one week's banking being two days late.
- No compliance action against any key person was initiated by the Secretary for the incidents of late banking set out above other than the issuing of warning letters.

Exclusion Order

10. By letter dated 18 February 2008 from the DIA, Turner was warned for not issuing an exclusion order when requested to do so by a problem gambler. This matter arose from a general mail-out by the Problem Gambling Foundation in May 2007 (on behalf of problem gamblers).
11. The DIA's letter acknowledges that Turner had treated the PGF letter as an actual exclusion order, rather than a request for one, and as such had acted in accordance with the intent of harm minimisation regulations. However, the Secretary maintained that there was a breach of the regulations by not issuing an exclusion order in response to the letter.
12. The DIA's letter advised Turner of the required procedure to be adopted for dealing with mailed-in exclusion order requests, and warned him against future breaches of this procedure.

Conviction for providing credit

13. In 2008, Turner was charged with three offences of breaching section 15 of the Act for providing credit to a patron while knowing the credit was to be used for gambling. He pleaded guilty and was convicted of these offences.
14. During sentencing, Counsel for the Secretary advised the Court and Turner that the convictions would not lead to a finding of unsuitability, but that subsequent additional matters were likely to do so and that Turner should see a conviction as a warning that the licence might be cancelled in the future for any breaches of regulatory and compliance obligations.

Submissions on behalf of Caversham

15. Caversham submitted, in summary, as follows:

After-hours gambling

- Between 25 January and 23 February 2009 Spicer and Solomon participated in, and permitted, after-hours gambling at the Venue, but there is no evidence to suggest that Turner participated in or knew about this.
- Turner is a key person because he is a shareholder in the venue operator company. Shareholders are not directly accountable under gambling legislation for the operation of the Venue or compliance with regulations. A breach of gaming regulations by venue personnel does not automatically make all shareholders unsuitable in terms of section 68 unless they have been shown to

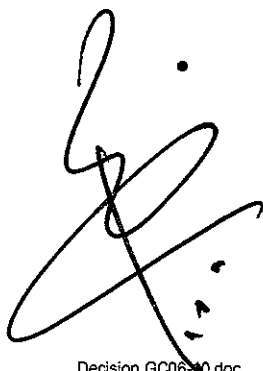
have been directly involved with the breach. Turner cannot be considered unsuitable merely due to his shareholding in the venue operator company.

- Turner is also a key person because he is the venue manager at the Venue. It argues that:
 - (i) The actions of Spicer and Solomon took place when the Venue was closed. Turner was not working at the time and had no knowledge of their actions.
 - (ii) There is no requirement under the Act, Regulations or licence conditions for a venue manager to be present at the Venue at all times.
 - (iii) There is no provision imposing a strict liability on venue managers making them liable for the actions of other personnel outside of the control or knowledge of the venue manager.
 - (iv) The key words in section 68(1)(c) are “the profile of past compliance by the key person” (emphasis added). It is the specific acts or omissions of a key person which are to be assessed. As such, the actions of Spicer and Solomon are not actions by the key person, Turner.
 - (v) The breaches by Spicer and Solomon cannot be held against Turner unless the evidence shows that Turner himself failed to comply with the licence conditions or aided or abetted others to breach. There is no such evidence.
 - (vi) Turner discharged his duties as venue manager by supervising the gambling operation while he was at work, putting in place all reasonable processes to ensure compliance and ensuring all venue personnel knew their duties and responsibilities.
- The Secretary took account of the actions of others in assessing and determining Turner’s suitability. The decision is therefore *ultra vires*, irrespective of the merits of the other factors relied upon.

Late banking

- There were three series of late banking incidents, referred to as February 2007, August 2008 and February 2009. Warning letters were issued to Mr Turner on each occasion.

- The issuing of a warning letter is not evidence that a breach occurred.
- Warning letter February 2007:
 - (i) These were incidents of banking being one or two days late. All funds were banked and no funds were risked.
 - (ii) The reason for most of the incidents was that they were banked into an ANZ Bank account on a Friday, but the electronic transfer to Caversham's National Bank account did not happen until the subsequent Monday night. Turner therefore ensured that all GMP was collected and deposited, but did so in such a way that the funds were not credited to Caversham's account until one working day later.
 - (iii) This is not a case where GMP was banked late because it was being used for an inappropriate purpose, rather it is a case of acting with the right intent but with the wrong administrative practice.
 - (iv) These breaches relate to the first half of 2006 and were identified when the late banking notification requirements were not the same as they are now. At that time, late bankings were regulated on the basis that societies were required to have processes in place to "minimise the risk of late bankings" and recover any overdue funds, rather than strict adherence to the five day rule, as is the case now.
 - (v) It is not appropriate to judge this alleged historical offending by the current regulatory environment.
 - (vi) These alleged breaches are too old to be considered as grounds for this proposal.
- Warning letter August 2008:
 - (i) Initially Caversham could not locate any record of a warning letter from August 2008. A copy has since been provided by the Secretary, but counsel did not receive instructions on the issue.
- Warning letter February 2009:
 - (i) This alleged breach relates to one week's banking being two days late. This was due to Turner using the wrong deposit book for the banking – he mistakenly used a book relating to another venue. As soon as the

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the bottom.

mistake was discovered, he arranged for the funds to be transferred. At no time were any gaming funds at risk.

- (ii) Apart from the mid-2008 incidents, Turner had not missed a weekly banking for 128 weeks.

Exclusion Order

- At the time of PGF's letter, the process for the issuing of an Exclusion Order by mail was not well understood – it was not known if exclusions could be dealt with by mail, or if the problem gambler had to be present to effect the exclusion.
- The Secretary's warning letter acknowledged that Mr Turner treated the PGF letter as an Exclusion Order, and as such he complied with the intent of the harm minimisation regulations, but the Secretary claimed there was a breach by not issuing an actual Exclusion Order.
- It is not appropriate to use the incident as a ground for a punitive sanction when there was confusion about the nature of the obligations and when the evidence shows that the venue operator acted in good faith and complied with the intent of the regulations.

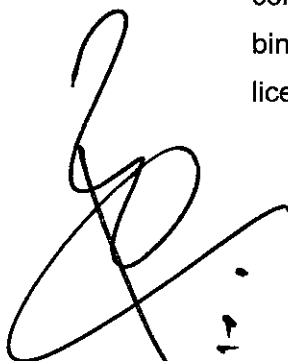
Convictions for providing credit

- A conviction for a relevant offence is not a mandatory consideration; rather under section 68(1)(a)(i) it is a factor that the Secretary may take into account.
- At the District Court sentencing the DIA counsel stated that the conviction itself did not justify Turner being deemed unsuitable. The only conclusion that can be drawn from this is that at that point in time, the Secretary was satisfied that Turner was suitable as a key person despite the conviction.

Secretary's submissions

16. As a preliminary issue, he stated that he received information from a Liquor Licensing Inspector suggesting that the business at the Venue might be in the process of changing hands. He suggested that this could amount to an abuse of the Commission's appeal process as the appeal may have been lodged only to delay the effect of the Secretary's decision. In reply, Caversham submitted that there is no sale, either now or impending. Further, if it became aware that Turner ceased to have an ownership stake in the business, it would immediately withdraw the appeal.

17. His decision to refuse to renew the licence was made under section 72(5)(b) of the Act, which provides that he must refuse to renew the licence if his investigations cause him not to be satisfied about any of the matters listed in section 67. He is concerned about sections 67(1)(c) and 67(1)(d) in that he is not satisfied about Mr Turner's suitability to supervise:
- (a) the conduct of Class 4 gambling at the Venue; and
 - (b) venue personnel.
18. He submitted that:
- (a) His concerns about Turner's ability as a director and shareholder are secondary, and that the Commission need not consider them if the Commission considers that the test under section 67(1)(c), in relation to his role as venue manager, is met.
 - (b) Unless the Commission considers Turner to be suitable as a key person, it has no discretion and must similarly refuse to renew the licence under section 72(5). In this respect, refusal to renew differs from cancellation under section 74(1), under which he (or the Commission on appeal) faces a two-step process, considering first whether a person is unsuitable and secondly, if he or she is unsuitable, whether the sanction of cancellation should be imposed.
 - (c) Under the legislation, it is possible for unsuitable persons to remain in their positions during the licence period, subject to his discretion to cancel under section 74. His assessment of suitability must be reconsidered when the licence holder applies to renew its venue licence. At that point, he can no longer allow an unsuitable key person to remain in the position and must refuse to renew the licence. As a result, a failure to cancel the licence during its term cannot be taken as an indication of satisfaction on renewal.
 - (d) During the licensing period of the previous venue licence, there were several events upon which he could have cancelled the venue licence on grounds of unsuitability. That he decided to allow Turner several opportunities to become compliant should not effect his assessment at licence renewal time, and does not bind the Commission in its *de novo* assessment as to whether or not to renew the licence.

A handwritten signature in black ink, consisting of a large, stylized initial 'G' followed by a series of loops and a final flourish.

- (e) The following timeline sets out how Turner is unsuitable:
- 16 May 2005 – the Venue was first licensed to Caversham with Turner as a venue manager and director/shareholder of the venue operator.
 - During 2006 – Turner breached section 104 (late banking) on 15 occasions, for which he was warned in February 2007.
 - May 2007 – Turner breached section 310 (failing to issue an exclusion order when asked) for which he was warned in February 2008.
 - 1 July 2008 – The Secretary renewed the venue licence. Turner was still a key person.
 - Mid 2008 – Turner committed four breaches of section 104, for which he was warned in August 2008.
 - 28 August 2008 – Turner was convicted of three charges under section 15 (providing credit for gambling) and warned of the potential implications regarding suitability.
 - Turner breached section 104 on two further occasions in late 2008 and early 2009.
 - 25 January – 23 February 2009 – key persons and patrons played gaming machines at the Venue after-hours on at least five occasions on a weekly basis.
 - 25 March 2009 – Caversham applied to have the licence renewed.
- (f) Turner had to resign as a director of the venue operator company in December 2008, following a ruling of the Liquor Licensing Authority finding him unsuitable to be a director of the venue operator. He was replaced as sole director by his partner, Spicer. In a subsequent decision, on 6 May 2009, the Liquor Licensing Authority also found Spicer to be unsuitable. On 20 July 2009, the Secretary found Spicer to be unsuitable as a key person for breaching licence condition 1, which prohibits the conduct of gambling unless the primary activity of the Venue is offered at the same time. On 20 July 2009, Turner replaced Spicer as director of the venue operator; in doing so he breached an order of the Liquor Licensing Authority, which had prohibited him from returning to the position until December 2009 at the earliest.

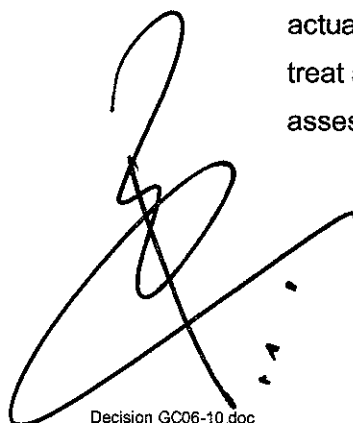
19. He considers Turner to be unsuitable because:

- he failed to heed the several warnings that he received;
- the previous renewal of the licence should have given him an opportunity to pay more attention to compliance with the Act; instead he offended in new ways;
- future compliance can be assessed according to key person's history of compliance: decision GC 43/06;
- Turner's conduct as manager led to his being found unsuitable by the Liquor Licensing Authority under the Sale of Liquor Act; and
- the breaches by venue personnel, including his partner, Spicer, reflect Turner's inability to supervise venue personnel and the conduct of Class 4 gambling after-hours.

Submissions by Caversham in reply

20. In reply, Caversham submitted, in summary, as follows:

- The Secretary did not address its argument that the events that preceded the first renewal of the licence on 1 July 2008, were clearly not sufficient at that time to find that the Secretary could not renew the licence due to Turner being unsuitable. The fact that the Secretary renewed the licence, when he would have been required to refuse to renew it if he considered Turner to be unsuitable, can only mean that at the time, the three incidents preceding the application for renewal were not a cause of concern to the Secretary. Those three issues therefore, must have limited relevance in determining Turner's suitability at this point in time.
- It takes issue with the Secretary's submission that Turner breached section 310 of the Act. Turner received a warning letter from the Secretary alleging a breach of section 310 of the Act but it is not accepted that his actions amounted to a breach of section 310 of the Act. The Secretary has a practice of issuing warning letters and then treating the allegation of breach raised in the letter as constituting an actual breach. However the two are quite distinct and the Commission should not treat a warning letter as evidence of an actual breach of the Act and relevant to an assessment as to suitability.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

- The offending of others is an irrelevant consideration when assessing Turner's suitability.
- The views of the Liquor Licensing Authority are not relevant to the Commission's assessment of Turner's suitability.
- The Secretary does not take issue with its submissions with respect to late banking.
- If Turner is deemed not to be suitable, and the licence is not renewed, this will have an adverse effect on his livelihood and that of his family.

Analysis

Preliminary Issue

21. In response to a query raised by the Secretary suggesting that the appeal might be an abuse of process, Caversham advised that the business at the Venue was not about to be sold and that the appeal was not an abuse of process. As Caversham in fact undertook a substantive prosecution of its appeal, there is no reason to think that the appeal is an abuse of process. The appeal is a genuine challenge to the Secretary's decision, not simply a device to delay its implementation.

Substantive Issues

22. Caversham appealed the Secretary's decision refusing to renew the Class 4 venue licence for "The Crossing on Kaiapo". There is no material factual dispute between the parties, nor is there any dispute that the Commission must refuse to renew Caversham's venue licence for the Crossing if it is not satisfied that Mr Turner is suitable as a key person. The sole issue for the Commission, therefore, is whether or not it is satisfied that Mr Turner is a suitable key person.
23. The relevant sections of the Act make clear that the suitability of the venue manager is a fundamental consideration in the assessment by the Secretary (and, on appeal, the Commission) of whether to grant and or renew a venue licence. The Act requires the Secretary to undertake investigations into the suitability of the venue manager and requires him to refuse to grant or refuse to renew the licence unless he is satisfied of, amongst other things, the venue manager's suitability.
24. The parties' arguments regarding what conclusions may be drawn from the agreed facts regarding Mr Turner's suitability raise the following issues:

- Whether the Secretary/Commission can look at the combined effect of all the breaches, or whether those that occurred before the Secretary's most recent finding that Mr Turner was suitable are irrelevant;
- The significance of the particular breaches, particularly:
 - (i) whether or not the incidents of after-hours gambling are relevant to an assessment of Mr Turner's suitability; and
 - (ii) the gravity of the breaches subject to the warning letters.

Can the Commission consider the overall effect of all incidents in the Agreed Statement of Facts?

25. The key difference between the parties' positions is the significance that they accorded to the range of breaches – the Secretary's assessment of Mr Turner's suitability was based on a holistic assessment of all the breaches and incidents recorded in the Agreed Statement of Facts, whereas Caversham sought to reduce the overall effect of the breaches by disaggregating them, arguing that each must be considered in its own right, rather than considered in combination with other breaches.
26. In the Commission's view, Caversham's approach is not correct for several reasons. First, section 67(1)(c) of the Act provides that the Secretary may take into account the "profile of past compliance" by the key person with the Act and a number of relevant regulations and rules. The concept of a "profile" requires taking a long term, holistic view of a person's actions.
27. It follows that several individual breaches, none of which on their own would lead to a finding of unsuitability, may, when combined, suggest that a key person is unsuitable. This necessarily requires considering breaches that, at the time they occurred, did not lead the Secretary to find the Appellant unsuitable. The Secretary's renewal of a licence, implying the suitability of any key persons, does not prevent the consideration at a later date, and in combination with later events, of prior matters affecting the key person from the previous licence period. To treat each licence period discretely, would be inconsistent with the Act's concern with the need to be positively satisfied about the suitability of key persons and its provision to consider that person's "profile of past compliance".
28. Further, Caversham's argument impliedly reverses the relevant statutory test. The test is not whether the Secretary can show that he has adequate grounds for dissatisfaction; rather it requires him to be positively satisfied with the key person's suitability.

29. In any event, Caversham's argument fails to appreciate the *de novo* nature of the Commission's jurisdiction by attempting to seal matters off from a later inquiry by the Commission on appeal because of prior decisions of the Secretary. In the Commission's view, the Secretary is not precluded from reassessing the cumulative effect of past conduct, and the Commission, on appeal, is certainly not so constrained.

The specific incidents

30. Although the Commission will consider Mr Turner's actions and breaches in the round, such an assessment necessarily requires examination of the relevance and seriousness of each particular incident.
31. The most significant matter, at least in the way the parties have framed their submissions, is the incidence of after-hours gambling. Caversham argued that the after-hours gambling cannot be taken into account in assessing Mr Turner's suitability because he was not aware of the actions of Spicer and Solomon.
32. While the Commission does not necessarily agree that its satisfaction with the suitability of a venue manager is limited to proved prior knowledge of those breaches, it has been necessary to consider whether the incidence of after-hours gambling is a relevant consideration as a matter of statutory construction. Further matters relied upon by the Secretary were the contemporaneous liquor licensing problems encountered by Mr Turner or the business while under his management. The statutory construction issue similarly affects whether those matters can be taken into account as well.
33. The issue arises from sections 66, 67 and 68 of the Act, which relevantly provide as follows:

66 Secretary must investigate applicant for class 4 venue licence

- (1) The Secretary must undertake any investigations the Secretary considers necessary to determine—
- (a) whether the applicant is eligible and suitable to be granted a class 4 venue licence; and
 - (b) whether the venue manager and venue operator are suitable persons in terms of section 68.

...

67 Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that
- (a) the applicant holds a class 4 operator's licence; and

- (b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimal; and
- (c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 68, to supervise—
 - (i) the conduct of class 4 gambling at the venue; and
 - (ii) venue personnel; and
- (d) any investigations earned out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and

68 Determining suitability for class 4 venue licence

- (1) In determining whether a key person is a suitable person for the purpose of sections 66 and 67, the Secretary may investigate and take into account the following things:
 - (a) whether he or she has, within the last 10 years,—
 - (i) been convicted of a relevant offence:
 - (ii) held, or been a key person in relation to, a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused:
 - (iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt:
 - (b) the financial position and the credit history of the key person:
 - (c) the profile of past compliance by the key person with—
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
 - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and
 - (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.
- (2) The Secretary may take into account matters of a similar nature to those listed in subsection (1) that occurred outside New Zealand.

34. Their interpretation also requires consideration of the relevant definitions as follows:

4 relevant offence means –

- (a) a crime involving dishonesty: or
- (b) a crime considered by the Secretary or the Gambling Commission, as the case may be, to be relevant and serious: or
- (c) an offence against this Act, the previous gaming Acts, the Racing Act 2003, or the Racing Act 1971; or
- (d) an offence against a regulation made under the previous gaming Acts, the Racing Act 2003, or the Racing Act 1971.

Venue manager means 1 natural person responsible for supervising the gambling and venue personnel at a class 4 venue and for banking the proceeds of class 4 gambling

35. Although sections 66 and 67 seemingly require a broad ranging assessment of all factors which would logically bear upon the suitability of a venue manager to supervise both the conduct of the gaming operation and the staff, they do so expressly "in terms of section 68". Those words have caused the Commission to consider whether their effect is to require the Secretary, and the Commission on appeal, to treat section 68 as containing an exhaustive list of matters that can be taken into account when determining key person suitability. Neither party identified or addressed this issue directly in their submissions, although the Caversham submissions challenged relevance more generally.
36. The following matters support such a restrictive interpretation of the effect of section 68:
- (a) Section 68 lacks express words indicating that a non-restrictive interpretation is required. Non-restrictive provisions commonly contain words to indicate that the list is not exhaustive or conclusive or does not limit what can be taken into account, or they may conclude with a phrase such as "any other matter which the Secretary considers relevant". Examples of non-restrictive provisions in the Act include:
- (i) Section 7(3) provides that the list of factors that mean that a person has a significant influence in a casino in section 2(1) does not limit subsection (2) of the same section, which provides that a significant influence includes any influence that the Secretary or Commission considers to be a significant influence.
- (ii) Section 12(2) provides that an increase in opportunities for casino gambling "includes but is not limited to" the factors set out in that subsection.
- (iii) Section 53(2) lists conditions (a) to (f) as conditions the Secretary may include in a licence, then includes as (g) "any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance".

No similar expressions appear in section 68. The fact that they are used elsewhere in the Act suggests that the omission may have been deliberate.

- (b) Section 66(1) provides that the Secretary must undertake any investigations the Secretary considers necessary to determine whether the venue manager and

venue operator are suitable persons "in terms of section 68". Subsection (3) lists matters that the Secretary may require from the applicant or refer to the police as part of his investigations. Subsection (6) provides that subsection (3) does not limit subsection (1). However, if subsection (1) is itself already limited by the express reference to section 68, the lack of restriction indicated in subsection (6) may not alleviate the concern.


- (c) The matters included in section 68 are highly self-evident. If section 68 had not been enacted, there would be no doubt that conviction for relevant offences, poor credit history, loss of gambling licences (directly or by association) or personal non-compliance with gambling law obligations would be relevant. It is inconceivable that they would not be. This may suggest that the purpose of section 68 is to limit the matters to be considered to those key considerations and not others. It is not easy to see that it has any other purpose. Generally speaking, the Commission is reluctant to interpret statutes in such a way as to render express provisions pointless and of no effect.
- (d) Subsection (2) of section 68 arguably reinforces that view. In the absence of subsection (2), it would not have occurred to anyone taking a reasonably expansive view of section 68(1) that the considerations were limited territorially so that overseas gambling convictions, overseas credit history and the like would be irrelevant. The insertion of subsection (2), expressly extending the ambit of section 68(1) to overseas activities, arguably indicates that section 68(1) should be restrictively interpreted. If that were not the case, subsection (2) would have no purpose or effect. It is not expressed as being for the avoidance of doubt.

37. The considerations listed in section 68 consist of convictions for relevant offences (a defined term), holding a licence which has been cancelled, suspended or not renewed, being a key person in relation to such a licence, financial position and credit history, and the past compliance by the key person with gambling law obligations. If the provisions were approached on a restrictive basis, matters, which logically related to suitability to supervise staff and the conduct of Class 4 gambling but which were not expressly mentioned in section 68, could not be considered by the Secretary or the Commission. If section 68 were interpreted in this manner, the surprising effect would be that the Secretary could not consider many matters that would ordinarily be regarded as highly relevant to the assessment of key person suitability. For example, he could not consider known criminal associations (not involving convictions of the key person), a history of non-compliance with other forms of business regulation (such as liquor licensing), or a track record as an incompetent or dishonest manager of businesses or similar enterprises. More specifically to this appeal, it would mean that the Commission could

not consider the incidence of after-hours gambling at the Venue under Mr Turner's management (as it did not result in the conviction of Mr Turner, the cancellation, suspension or loss of the venue licence of which he was a key person, and did not involve non-compliance by him) or any of the liquor licensing issues.

38. The Commission considered the result of such an interpretation to be so unlikely as a matter of intended policy, that it should consider the sections within the wider ambit of other provisions of the Act to see if a different view were thereby indicated. As a result, it considered that section 68 cannot have been intended to set out an exhaustive list of relevant considerations for the following reasons:

- While section 68 is not expressly non-exhaustive and does not conclude with a convenient, "catch-all" provision, such as "and consider any other matter which the Secretary considers relevant", neither does it include the word "only", or similar word expressly restricting consideration only to those matters listed.
- Section 65(2)(e) of the Act provides that applications for venue licences must be accompanied by a profile of the venue manager and the venue operator, including details of their experience in Class 4 gambling, history in gambling, character, and qualifications. The Commission thought it would be odd for the Act to require applicants to provide the Secretary with information on the history, character and qualifications of venue managers if he could not, in turn, take that information into account in determining the suitability of the venue manager, which a restrictive construction of section 68 would require.
- A "venue manager" is defined by section 4 as a person responsible for two things, the first of which is supervising the gambling and venue personnel at a Class 4 venue. As section 65(2)(e) appears to recognise, the ability to supervise gambling and personnel depends on a wide range of factors. Furthermore, the Secretary has the power under section 70(2)(a) to take positive steps to ensure effective supervision of the gambling and venue personnel via licence conditions. Again, the Commission thought it would be odd if the Secretary could not, as part of an application for a venue licence, consider factors that are logically relevant to one of the two key functions of a venue manager, and in relation to which he has the power to impose licence conditions, simply because those factors were not listed in section 68.



Section 71(1)(d) provides that a corporate society holding a Class 4 venue licence must notify the Secretary and provide details if the venue manager ceases to be the venue manager or is incapable of performing the duties of his or her position.

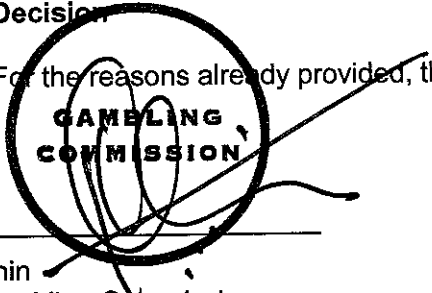
The requirement to notify the Secretary if a venue manager is incapable of performing his/her duties also appears to be at odds with a restrictive interpretation of section 68, as it would omit from the list of relevant factors any consideration of ability or capacity to manage the operation.

- Finally, section 67(1)(r) contains a broad requirement that the Secretary not grant (or renew, by virtue of section 72) a venue licence unless he is satisfied that there are "no other factors that are likely to detract from achieving the purpose of this Act".

39. As it concluded that section 68 of the Act should not be read restrictively, the Commission considered that it could, and should, consider circumstances such as the incidence of after-hours gambling and the liquor licensing problems in its assessment of key person suitability. The former are not relevant on the basis that the Commission finds that he participated, encouraged or even knew about the events beforehand. Rather the occurrence of such events at the Venue under Mr Turner's management casts doubt over his suitability to supervise the Venue staff. The Commission also considered the late bankings in 2007, 2008 and 2009; the failure to issue an exclusion order; and the conviction for providing credit for gambling, all of which fall expressly within section 68.
40. Making an overall assessment of all matters before it, the Commission was not satisfied that Mr Turner is a suitable person to supervise the conduct of Class 4 gambling at the Venue and the venue personnel. While the failure to issue an exclusion order was a very technical breach, and the banking failures, while more frequent than the Commission would expect, were not the most serious, they, together with the conviction, the incidence of after-hours gambling, and the history of non-compliance in the liquor licensing area, meant that it was not satisfied that Mr Turner is suitable to be the venue manager.
41. Caversham's submission as to the effect on Mr Turner (and his family) of a non-renewal of licence is not a material consideration in its own right. At best, it might affect final weighing of factors in a borderline case. The Commission must refuse to renew the licence if it is not satisfied about Mr Turner's suitability. In that event, it has no residual discretion, regardless of the effect of its assessment on key persons such as Mr Turner.
42. Having concluded that it is not satisfied that Mr Turner is suitable to hold the key person position of venue manager in the context of Caversham's application to renew the venue licence for the Crossing, the Commission has no option under section 72(5) of the Act but to uphold the decision to refuse to renew the licence.

Decision

43. For the reasons already provided, the Division dismisses the appeal.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

30 March 2010