

IN THE MATTER of the Gambling Act 2003

AND an application by the Secretary for
Internal Affairs to suspend a casino
licence

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Acting Chairperson)
K M Ford
M M Lythe
P J Stanley

Date of Application: 9 November 2005

Date of Hearing: 12 April 2006

Date of Notification of Decision: 26 April 2006

**DECISION ON PRELIMINARY MATTERS RELATING TO
AN APPLICATION BY THE SECRETARY FOR INTERNAL AFFAIRS
TO SUSPEND A CASINO LICENCE**

Background

1. The Secretary for the Department of Internal Affairs (the "Applicant") applied on 9 November 2005 under section 144 of the Gambling Act 2003 (the "Act") to suspend the casino operator's licence held by Dunedin Casinos Management Limited ("DCML") (the "Respondent"). The application stated that it was based on three, interlinked, alleged breaches as follows:
 - (a) breach of condition 12 of DCML's licence;
 - (b) breach of condition 8.6 of DCML's licence; and
 - (c) breach of section 308(4) of the Act.
2. Together with the application, the Secretary filed and served affidavit evidence in support. The Secretary made his application after investigating the Respondent's actions in relation to a Dunedin woman, Christine Keenan, who was a patron of the casino.
3. In accordance with section 145(2) of the Act, the Gambling Commission (the "Commission") notified DCML and Dunedin Casinos Limited ("DCL"), of the application and the rights of those parties to file written submissions and to an oral hearing.



4. In accordance with section 145(3) of the Act, DCML and DCL were invited to file written submissions within 20 working days after the Commission's notice on 9 November 2005, or within a longer period should the Commission allow it, following an application for extension of time
5. DCML and DCL requested an oral hearing by letter dated 15 November 2005.
6. By letter dated 22 November 2005, counsel for DCML and DCL sought an extension to the 20 working day period within which to make written submissions until 31 January 2006, as counsel for DCML and DCL was unavailable. The Commission sought the Secretary's views on the proposed extension of time, and were advised that he did not oppose. The Commission allowed the extension on 24 November 2005, and the parties were notified accordingly.

Respondent's Submissions as to Jurisdiction and Procedure

7. In its submissions dated 26 January 2006 (received on 27 January 2006), DCML and DCL raised six preliminary issues which, they proposed, the Commission should address and determine prior to the hearing of the substantive application. The views of the Secretary were sought in relation to this proposal on 2 February 2006. The Commission also sought the views of the Applicant and Respondent on whether the Commission's hearing should be in public or private. The Secretary sought an extension until 22 February 2006 to respond. The Commission granted this request.
8. The Applicant supported the separate hearing of the preliminary and substantive issues by way of oral public hearing. The Respondent expressed no fixed view on whether the hearings should be in private or public, but raised potential concerns about the possible release of personal information about Christine Keenan (and perhaps others).
9. The Commission decided that the preliminary issues raised in the Respondent's submissions were best heard and determined before the substantive evidential hearing. Consideration of the matters raised might dispose of the need to continue with the hearing of the application. If not, a hearing of the preliminary issues would ensure that evidence presented at the substantive hearing was appropriately focused. The Chief Gambling Commissioner decided that the hearing of the application, both preliminary and substantive, would be open to the public.
10. The parties were notified accordingly, and a date was set by the Chief Gambling Commissioner for the hearing of preliminary Issues in accordance with section 145(4) of the Act.



Hearing

11. The hearing of preliminary issues was convened at the Commission's offices on 12 April 2006. The parties filed written submissions in advance, the Respondent on 27 January 2006 (as noted above), the Applicant on 24 March 2006, and the Respondent (in reply) on 31 March 2006. The Commission having read the written submissions, the purpose of the hearing was to allow the parties to amplify aspects of their submissions and to address questions from Commissioners. Oral submissions were made by the Respondent and the Applicant, with the Respondent exercising a right of reply.
12. The Commission appointed Commissioner Graeme Reeves as Acting Chairperson for the hearing of the preliminary issues. The Chief Gambling Commissioner recused himself from the hearing and determination of the application as the application is a matter of considerable local interest and profile in Dunedin, where the Chief Gambling Commissioner also serves as Mayor.
13. A discussion of the issues raised by the Respondent, and addressed in written and oral submissions by the Respondent and Applicant follows.

Identification of the Respondent

14. The Respondent said the Secretary's application incorrectly referred to DCL when DCML is the operator, and that the correct Respondent, DCML, should be identified.
15. The Applicant confirmed that DCML is the correct Respondent, and stated that all future documents filed would reflect this position.
16. In fact the application filed correctly cites DCML as the holder of the affected licence, and the confusion seems to have arisen from incorrect intituling on subsequent documents. The Commission considers this issue to have been resolved satisfactorily by the parties. No steps need to be taken to correct the intituling of the documents filed.

Retrospectivity

17. On this issue, the submissions centred on two matters (the second raised by the Commission). First, the application of section 144(a) to alleged breaches prior to 1 July 2004 (the date on which section 144 came into force), and second, the application of section 144(a) to alleged breaches prior to 1 April 2004, when DCML became holder of the operator's licence for Dunedin casino. It is convenient to consider the second matter first.



Application of section 144 prior to 1 April 2004

18. By letter to the parties dated 10 April 2006, the Commission observed that DCML had operated the Dunedin Casino since 1 April 2004, the operator's licence for the casino having previously been held by Aspinall (NZ) Limited. The Commission noted that, if the Secretary was relying on alleged breaches that took place prior to DCML operating the casino, the Commission would have to consider the basis upon which DCML could be responsible for such alleged breaches. The Commission noted that neither party had addressed the matter in written submissions, and invited parties to comment.
19. At the hearing, counsel for the Respondent stated that the Respondent was alert to the point, but had chosen not to pursue the matter as its primary submission was that a later cut off date applied, namely 1 July 2004.
20. Counsel for the Respondent also questioned whether a Responsible Gaming Programme ("RGP") had ever been adopted by DCML following the change of the associated licence casino operator from Aspinall (NZ) Limited to DCML. Counsel referred to Minutes of the Casino Control Authority ("CCA") dated 12 and 16 March 2004, confirming the intention that DCML, as the new operator, should adopt an RGP, but was unaware of the steps taken beyond that point.
21. Counsel for the Respondent stated that, if the Secretary had been wrong about the date of the licence, this could potentially vitiate the basis upon which the Secretary had been properly satisfied under section 144 and had applied to the Commission for suspension.
22. At the hearing, the Applicant clarified that it is not attempting to hold DCML responsible for alleged breaches that occurred during the period in which Aspinall (NZ) Limited was the licence holder. However, counsel submitted that the events prior to 1 April 2004 were relevant in that they could be taken into account in assessing DCML's responsibility for events after 1 April 2004. Counsel for the Applicant submitted that, in particular, the knowledge of Mr Rod Woolley, the General Manager of the casino, and of Mr Stuart McLauchlan, a director of DCL and subsequently DCML, could be attributed to DCML.
23. In support of this proposition, counsel cited the Privy Council case, *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 3 NZLR 7, and the Court of Appeal case, *Jessett Properties Limited v UDC Finance Limited* [1992] 1 NZLR 138. Counsel submitted that in the *Meridian* case, the Privy Council held that the knowledge of senior employees could be attributed to the company. While, generally, knowledge acquired by an agent can be imputed to the principal only if the agent were employed on the principal's affairs at the time the agent received the information, an exception applies



where the new principal acquires the agent for his or her knowledge. Such were the circumstances in the *Jessett* case.

24. Counsel for the Applicant submitted that Mr Woolley, Mr McLauchlan, and a number of other employees of the casino all knew of Mrs Keenan and her prior activities, and that this knowledge could be attributed to DCML. Reference was made by counsel to a file note of the meeting of the CCA on 12 March 2004 (when the CCA approved DCML as the operator), DCL's application for a change of operator, and the affidavit of Dermot Harris. This information was said to demonstrate that the change in operator from Aspinall (NZ) Limited to DCML involved no change of personnel (many of the personnel being longstanding employees) or style of management, and showed prior knowledge by Mr Woolley and Mr McLauchlan.
25. In reply, counsel for the Respondent accepted that some knowledge or information might be attributed but argued that it was incorrect that all of Mr Woolley's knowledge or information would be attributed, for example, knowledge that was confidential to Aspinall (NZ) Limited would not. Counsel submitted that there was no general rule that all knowledge would be attributed, and the *Jessett* and *Meridian* cases did not point to this. The Respondent distinguished *Jessett* on the basis that it dealt with the knowledge of the agent which then becomes that of the principal, but not circumstances where one agent has a relationship with one principal and then another. While acknowledging that some information, as a matter of law, will be attributed to a new employer, defining what information that may comprise in advance is difficult, and would need to be addressed by the Commission once all the evidence is before it.
26. As noted above, DCML has operated the Dunedin Casino pursuant to its casino operator's licence since 1 April 2004. The affidavit evidence in support of the application relates to activities that took place during 2002, 2003 and 2004. The Commission considers that there is no proper basis upon which DCML can be held liable for alleged breaches committed by another entity, Aspinall (NZ) Limited, which operated the Dunedin Casino pursuant to another casino operator's licence prior to 1 April 2004.
27. The Commission considers that it is impossible, at this preliminary stage, before the evidence is heard, to specify what knowledge or information can be attributed to DCML. The Commission is of the view that this issue can only be decided at or following the substantive hearing and having heard the submissions of the parties in relation to the evidence received.
28. Accordingly, the Commission does not at this stage make a decision on this point, but indicates that its initial view is that knowledge about the casino's customers and casino



operation gained by persons who later became senior employees and agents of DCML may be attributed to DCML.

Application of section 144 prior to 1 July 2004

29. In its written submissions, the Respondent contended that section 144(a) of the Act does not have retrospective application to alleged breaches during the period prior to 1 July 2004. In support, the Respondent referred to section 7 of the Interpretation Act 1999 and the general rule that statutes, particularly of a penal or sanctioning nature, are not retrospective unless this is express. The Respondent submitted that there is nothing in the Act that expressly states that it is retrospective. Further, sections 297 and 377, read in conjunction, do not amount to a statutory direction that the Act is retrospective and so support the proposition that it is not so intended.
30. The Applicant noted that section 90(c) of the Casino Control Act 1990 also provided for cancellation or suspension of DCML's licence for failure to comply with any term of the licence, and suggested that the Respondent was "attempting to use the introduction of the Gambling Act 2003 to somehow escape from its previous liability to have its licence suspended". The Applicant cited *Dental Council of New Zealand v Bell* [1992] 1 NZLR 438 in support of the proposition that Parliament cannot have intended a lacuna resulting in an act predating the entry into force of the new legislation being immune from complaint.
31. In its submissions, the Respondent argued that section 7 of the Interpretation Act 1999 is not a rebuttable presumption, and that section 144(a) does not come within the exceptions in section 4 of that Act. Section 144 does not expressly state it has retrospective effect, nor does the context of the enactment require a different interpretation.
32. The Respondent distinguished *Dental Council v Bell* from the current circumstances on the following grounds:
 - (a) The transitional provisions in the Act contemplate two parallel systems. Counsel suggested that Parliament had turned its mind to transitional measures and that any gap in the ability to pursue breaches prior to 1 July 2004 must be assumed to be part of a carefully thought out process;
 - (b) The jurisdiction in the current application is said to be penal;
 - (c) Section 7 of the Interpretation Act 1999 applies (the *Dental Council* case having been decided before the Interpretation Act 1999, when only a common law presumption applied)



33. In oral submissions, counsel for the Respondent cited the cases of *Lopdell v Audiophile Bar & Café Company Limited* (Unreported, High Court, Auckland Registry, AP 81/01, 18 February 2002, Paterson J) and *Davidson v Ross* [1996] 3 NZLR 340 as demonstrating the need for a clear case if provisions of a statute are to be applied retrospectively, even where to do so would have a beneficial effect. The reference in section 144 to circumstances where the licence holder "has breached" its casino licence could not, it was submitted, refer to a breach prior to the commencement of the Act itself.
34. In its oral submissions, counsel for the Applicant emphasised the continuity both of the suspension regimes applying under the Casino Control Authority Act 1990 and the Act, and the licence under section 122 of the Act. The only difference, it was submitted, was the change in the body responsible for dealing with alleged breaches. Counsel submitted that the changes between the two Acts were procedural and, consistent with the *Dental Council* case, Parliament cannot have intended an "amnesty" for breaches prior to 1 July 2004.
35. The issue of retrospectivity is limited to the period 1 April 2004 to 1 July 2004. Section 7 of the Interpretation Act 1999, which says that an "enactment does not have retrospective effect", applies to all legislation. Section 7 is, however, subject to the enactment providing otherwise (section 4(a) of the Interpretation Act 1999) or the context requiring a different interpretation (section 4(b)) and the presumption is, accordingly, rebuttable. As recent High Court authority indicates, section 7 reflects the common law presumption that statutes are not retrospective (see *Art Deco Society (Auckland) Inc v Auckland City Council* (HC Auckland, CIV 2005-404-1729, 15 December 2005, Asher J)).
36. In the present case, section 144(a) of the Act provides that the Secretary can apply to suspend a casino licence where "the licence holder is breaching or has breached this Act or a condition of the licence or minimum operating standards". The words "has breached" refers to a breach that took place prior to the application, and could be read as referring to a breach that took place either prior to or after 1 July 2004. Usually, such an ambiguity would be resolved by reference to section 7, but, in this case, there are a number of factors which point towards a contrary interpretation:
 - (a) The grounds for suspension or cancellation under the Act mirror those available under the Casino Control Act 1990. The maximum period of suspension under both Acts is six months. The changes between the Casino Control Act 1990 and the Act are essentially procedural in nature. The presumption against retrospectivity is generally inapplicable to procedural changes.
 - (b) The licence itself has continued unchanged (section 122 of the Act). There is no policy reason why Parliament would intend the Commission to treat identical



breaches of the same continuing licence differently depending on whether they occurred prior to or after 1 July 2004.

- (c) Section 377, a transitional provision, indicates that the Act was to be applied alongside (s377(2)) or in preference (s377(3)) to the Casino Control Act 1990 during the transitional period. This shows that Parliament did not intend the Act to operate prospectively only.
 - (d) If a retrospective interpretation were not adopted, there would be a lacuna in that there would be no statutory process to deal with breaches which took place prior to 1 July 2004, but were not the subject of an application by that date. Like Justice Tipping in the *Dental Council* case, the Commission does not think that Parliament intended that such breaches, possibly including serious ones, should have no consequence.
37. For the above reasons, the Commission's preliminary view is that section 144(a) of the Act requires a retrospective interpretation so that it applies to breaches of licence conditions which took place prior to 1 July 2004 (although in the present case this will be limited to the period after 1 April 2004). What is not clear to the Commission (for reasons of lack of particularity also raised below) is whether anything material turns on this issue. Because the application does not particularise the precise matters said to amount to breaches, it is not clear whether the issue requires determination or whether it will ultimately be a moot point. The Commission proposes to await the receipt of the particulars of the Applicant's case sought below and to consider the evidence at the substantive hearing before ruling finally on the issue if required. In the circumstances, it is preferable not to do so now, especially as it is also to consider, at the substantive hearing, the extent and applicability of prior acquired knowledge by senior employees of DCML.

Implied revocation of Responsible Gaming Programme

38. The Respondent submitted that DCML's RGP was impliedly revoked from 1 July 2004 by the requirement for DCML to have a Host Responsibility Exclusion Policy ("HREP"). As a consequence, the RGP was no longer a condition of the relevant licence which could be breached in terms of section 144 of the Act. The Respondent stated elsewhere in submissions that the RGP was revoked only "to the extent that it dealt with problem gamblers", but this was not pursued at the hearing. If the RGP was not revoked, the Respondent stated, there would be two inconsistent thresholds (subjective in the RGP and objective in relation to the HREP) for the period 1 July 2004 onwards, inconsistent policies applying to problem gamblers, and no scope to enforce the RGP historically or prospectively because section 308(4) does not apply.



39. The Applicant submitted that the period of alleged breaches traverses two different regulatory regimes, the first from 24 May 2002 until 1 July 2004, when licence condition 12 and the RGP applied. From 1 July 2004, section 308 of the Act and the HREP applied, the Applicant did not argue that DCML had breached the RGP in the period from 1 July 2004. The Commission observes that this distinction does not appear on the face of the application.
40. The Commission asked the parties at the hearing whether the RGP and HREP could co-exist, in light of section 122 of the Act. Counsel for the Respondent repeated the written submissions (summarised above). Counsel elaborated on why it was considered the RGP imposed a subjective threshold (in contrast to the HREP) by reference to the section headed "Time Out (Self Exclusion)" in the RGP (page 6, Exhibit A, to Debra Ferris' affidavit), counsel noting that the operator was required to believe that a patron may have a gambling problem.
41. Counsel for the Applicant acknowledged that the Act did not specifically state the RGP was revoked, but shared the view of the Respondent that the RGP no longer applied based on a reading of the RGP and HREP. Counsel referred, in particular, to page 9 of the HREP (Exhibit E, affidavit of Debra Ferris), relating to current self-exclusions. It was there recognised that pre-1 July 2004 self-exclusions were not enforceable under the Act, with the HREP stating that pre-1 July 2004 agreements would be maintained through the now legally enforceable exclusion order. From the transitional provision made, counsel took it that the RGP had been impliedly revoked.
42. The Commission's view is that the coming into force of the Act and the HREP did not result in condition 12 of DCML's licence and the RGP made under it becoming of no effect. There is nothing in the Act to support such a conclusion. Indeed, section 122(1) of the Act provides that the Respondent's existing casino operator's licence continued after the Act came into force. There are two problems with any argument that section 308 of the Act and the HREP impliedly repealed licence condition 12 and the RGP. First, implied repeal is a statutory interpretation doctrine which is predicated on the sovereignty of each Parliament. The present case does not concern statutes at all, but rather two documents which the licence holder has created. Secondly, a mechanism exists to resolve the issue of the two partially overlapping documents, namely an application to the Commission to vary licence conditions. If the Respondent thought that having to comply with both the RGP and HREP was a problem, it could have applied to vary or revoke licence condition 12 and the RGP approved by the CCA pursuant to condition 12.
43. The Respondent also questioned whether the RGP had a proper jurisdictional basis, as the powers of the CCA, under section 38 of the 1990 Act, did not entitle it to require



conditions dealing with harm minimisation. The Applicant disputed this, stating that the CCA could impose the conditions which it thought fit. The Commission will not examine this matter as it does not consider it has jurisdiction to make declarations about the validity of licence conditions made under the Casino Control Act 1990. The Commission considers that the High Court is the proper forum to resolve that issue.

44. In light of the above, the Commission invites the parties to reconsider their approach to the case. The existing confusion stems from the fact that the application itself gives limited particulars of the breaches alleged, and does not specify the dates or specific time periods on or during which the breaches are said to have occurred. The Applicant's evidence appears to rely on breaches from 2002 and 2003. The Commission considers that the Applicant should file an amended notice which gives sufficient particulars of the breaches, including the dates or specified time periods on which the actors or omissions said to constitute breaches were alleged to have occurred. As noted above, alleged breaches cannot pre-date 1 April 2004, when DCML became the licence holder, but evidence may be received relating to activities prior to that date, for the purpose of attributing relevant knowledge to DCML.

Condition 12 of DCML's licence

45. In its written submissions, the Respondent submitted that, in the event that it is found that condition 12 has not been revoked, the Respondent had not breached condition 12 as it has an RGP. It was contended that the Commission has no jurisdiction to suspend for a breach of the RGP itself, and that section 308(4) does not apply to condition 12.
46. In response, the Applicant pointed to condition 12.4 of the licence which states that:

The operating procedures for the casino shall comply with the requirements of the programme, as approved by the Authority from time to time.

47. At the hearing, counsel for the Respondent sought to distinguish breach of the RGP from non-compliance of the casino operating procedures with the HREP, to which condition 12.4 related. Counsel for the Applicant submitted that the CCA must have intended that the licence holder be required to comply with the RGP, and condition 12.4 must be interpreted accordingly.
48. The Commission agrees with the Applicant and considers that condition 12.4 requires the Respondent to comply with the RGP.

Suspension: Remedial or Penal?

49. The Respondent submitted that the Applicant seeks suspension of the licence as punishment for previous conduct, and that section 146 of the Act (headed "Notification of



suspension and cancellation") is structured on the basis that suspension is to be used solely for remedial and not for penal purposes. The Respondent stated that:

A statute should only be construed as creating penal outcomes if that is made abundantly clear in the statute. The apparently wide jurisdiction established in section 146(1) can only be interpreted in light of the specific provisions set out in subsections 2(c), (4) and (5) of that same section. All of these point to suspension being a remedial provision

50. The Applicant characterised the debate about whether suspension was penal or remedial as a "barren exercise" having no legal consequences. Under section 144 of the Act, the Secretary may apply either to suspend or to cancel an operator's licence. While cancellation is a penal outcome, a suspension may be for penal or remedial purposes, there being no obligation in the Act for suspension only to be used for remedial purposes.
51. The Commission acknowledges that the subsections in section 146 identified by the Respondent could support an interpretation that suspension is for remedial purposes. As noted by the Respondent, section 146(2)(c) requires the Commission, when notifying a licence holder of its decision to identify the matters necessary for the licence holder to get its "house in order", with subsections (4) and (5) relating to the revocation of suspension (where the reasons for the suspension have been resolved) and cancellation where they have not.
52. The Commission observes that, while these provisions indicate that suspension may be used to achieve remedial purposes, there is no explicit statement in the Act that suspension under section 144 is to be used only for such purposes.
53. The following points can be taken from the text and structure of sections 144 and 146:
 - (a) Sections 144 and 146(1) are the key jurisdictional provisions. They are expressed in wide, unqualified language and, on their face, apply to past breaches.
 - (b) The grounds for cancellation and the grounds for suspension are the same. Some of these grounds cannot be remedied, for instance if there has been a breach of the Act or licence condition (s144(a)), or if the licence holder has knowingly supplied false information (s144(c)).
 - (c) Section 146(2) is a procedural provision concerned with notification. In the Commission's view, it would be unusual to read the wide jurisdictional provisions down by reference to the narrower notification provisions.
 - (d) Section 146(4) provides that the "Commission may revoke a suspension if it is satisfied that the reasons for the suspension have been resolved". That is, even if



the reasons for the suspension have been resolved, the Commission can maintain the suspension. Any period of suspension after the reasons for the suspension had been resolved would, clearly, not be for remedial purposes. This subsection provides strong support for suspension being used as a corrective response to past breaches.

54. If suspension cannot be used as a sanction for past breaches then it follows that the only consequence available for prior breaches is to cancel the licence or to do nothing. The Commission is of the view that it is unlikely that Parliament intended such breaches to be dealt with only by the most serious sanction available (cancellation) or by taking no action at all.
55. As a practical matter, it takes several months for a suspension application to be heard. This time period provides a casino licence holder ample opportunity to rectify any ongoing breaches, thus precluding a suspension if it can only be imposed for present and continuing breaches. It is unlikely that Parliament intended suspension applications to be so easily thwarted.
56. For the above reasons, the Commission is of the view that suspension is available as a sanction for prior breaches of the Act or licence conditions.

Procedure

57. In its written and oral submissions, the Respondent submitted that the Commission would be acting inappropriately, and in breach of natural justice, if it required the Respondent to provide its evidence, by way of affidavit, in advance of a hearing. The Respondent stated that there is nothing in section 145 to require a Respondent to disclose its evidence in advance, and that such an approach would be inconsistent with other punitive jurisdictions that exist in New Zealand. It was also submitted that such a requirement would be inconsistent with the right of the Respondent to an oral hearing conferred in terms of section 145(5), providing the Respondent with an uncircumscribed right to call evidence.
58. The Applicant submitted that the Commission is entitled to, and should, require the Respondent to disclose its evidence in advance, citing section 4C of the Commissions of Inquiry Act 1908 in support (which applies to the Commission by section 225 of the Act).
59. The Applicant also cited *O'Neill v The Proceedings Commissioner* (1996) 10 PRNZ 168 and in particular comments that the Complaints Review Tribunal, exercising its powers as a Commission of Inquiry, can require parties to disclose their evidence in advance. In that case, Mr O'Neill judicially reviewed the decision of the Complaints Review Tribunal requiring briefs of evidence to be filed and served on a contemporaneous basis prior to



the hearing. Justice Goddard held that the interests of fairness meant that Mr O'Neill was entitled to receive the plaintiff's briefs of evidence before he was to provide his own briefs of evidence. The Applicant distinguished this case, and the caution urged by Justice Goddard about requiring filing of briefs of evidence in advance, on the basis that evidence has been and would be tendered in sworn form.

60. The Respondent distinguished the *O'Neill* case on the basis that it concerned a civil proceeding, where the relief sought was compensatory and remedial, and involved witness statements rather than affidavits. *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, a decision of the Full Court of the High Court, was cited by the Respondent for the proposition that civil proceedings which are sufficiently analogous to criminal proceedings, should be conducted in accordance with the criminal rules of procedure. The Respondent also questioned the Applicant's analysis of section 4C of the Commissions of Inquiry Act 1908, observing that section 4B was the section concerned with evidence before the Commission.
61. The Applicant, in turn, sought to distinguish the *Gurusinghe* case, on the basis that it related to a penal rather than regulatory matter (the case concerned disciplinary proceedings from the medical profession). The Applicant considered that it would be inappropriate and unworkable if the Respondent were not to provide in advance of the substantive hearing an indication of witnesses and evidence to be given. In the absence of this advance notice, the Applicant would apply to adjourn the hearing to enable it to investigate the matters testified by those witnesses. In oral reply, counsel for the Respondent expressed the view that the Secretary was effectively acting as prosecutor, and noted that it was not unusual for someone in a prosecutorial role to have to deal with issues as they arise, for example in criminal proceedings.
62. The Commission's Practice Note requires the filing of affidavit evidence together with the application. This is because, at the time the application is made, it is not known whether there will be an oral hearing. If there is no oral hearing, the matter will be dealt with on the papers. Filing and serving affidavit evidence gives the Secretary the factual basis upon which to make submissions and provides notice to the respondent casino licence holder of the basis for the Secretary's application.
63. Once the respondent requests an oral hearing, the complexion of the application changes. Section 145(5) reads:

The Secretary and the persons referred to in subsection (2)(b) are entitled to produce evidence and to appear and be heard at the hearing, personally or by counsel or agent, and to call, examine, and cross-examine witnesses.



64. The Commission reads section 145(5) as giving the Applicant and the Respondent the right to produce evidence (including by affidavit), to make submissions, to call and lead oral evidence from witnesses, and to cross-examine the opposing party's witnesses. The Commission considers that its right to "regulate its procedure as it thinks fit" at its meetings (which includes hearings) in clause 2(1) of schedule 3 to the Act is subject to section 145.
65. The Commission is of the view that it would be inconsistent with the Respondent's right to call and examine witnesses to direct the Respondent to file and serve its evidence in affidavit form in advance. However, the position is not the same in relation to briefs of evidence which do not constitute evidence until they are read out by the witness at the hearing. The Commission does not consider that to direct an exchange of briefs of evidence is inconsistent with the rights of the Applicant and the Respondent to call and examine witnesses. However, the only advantages to such a course would be to speed up the hearing (as the evidence in the briefs would not need to be transcribed) and to ensure the parties are not taken by surprise. In this case, the Commission sees the potential advantages of a live hearing where no prior exchange of evidence has taken place – seeing and hearing witnesses give evidence which has not been carefully crafted by lawyers – as outweighing the potential benefits achieved by an exchange.
66. The Commission, therefore, makes no direction as to the pre-trial exchange of affidavits or briefs. However, each party is directed to file and serve a list of potential witnesses and an estimate of the likely hearing time. This is to enable the application to be dealt with efficiently. The right in section 145(5) is to an oral hearing, not a right to keep the identity of prospective witnesses secret.
67. The affidavits already filed and served by the Applicant will be admitted into evidence at the hearing and can be supplemented with additional oral evidence (by the same witnesses or others) if the Applicant so chooses. The deponents should be present at the hearing so that they can be cross-examined by the Respondent if it so chooses.

Decision

68. The Commission is of the view that the preliminary legal issues raised by the Respondent should be answered as follows:
- (a) DCML is the correct Respondent and no steps need to be taken to correct the intituling on the documents filed.
 - (b) The Commission's preliminary view is that section 144(a) applies to breaches of licence condition that took place prior to 1 July 2004 but its final decision will await



receipt of particulars of the Applicant's case and the receipt of evidence at the hearing.

- (c) The Applicant can only rely, as relevant breaches, on acts and omissions which occurred when DCML held the casino operator's licence for Dunedin casino after 1 April 2004. The Commission's preliminary view is that knowledge of senior employees of DCML gained prior to 1 April 2004 can be taken into account if relevant.
- (d) Licence condition 12 and the RGP made under it were not impliedly revoked by s308 of the Act and the HREP, but remained in effect after 1 July 2004.
- (e) Licence condition 12 can be breached notwithstanding that DCML had an RGP.
- (f) Suspension can be used as a sanction for prior breaches.
- (g) The Secretary and DCML are to file and serve a list of witnesses and an estimate of the hearing time. This is to be done by 2 June 2006. If any additional witnesses are identified by either party after this date, an amended list must be filed and served by the party in question as soon as is reasonably practicable.

69. The Secretary should file an amended application by 12 May 2006 as specified in paragraph 44 above.

70. Subject to the estimates of time not requiring different arrangements, the Chief Gambling Commissioner has decided that the Commission will hear the substantive application on 31 July and 1 August 2006.



Graeme Reeves
Acting Chairperson

for and on behalf of the
Gambling Commission

26 April 2006