

IN THE MATTER of the Gambling Act 2003
AND on appeal by **THE BRUNNER
RUGBY LEAGUE CLUB**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
L M Hansen

Date of Decision: 18 March 2011

Date of Notification of Decision: *6th* May 2011

**DECISION
ON APPEAL BY THE BRUNNER RUGBY LEAGUE CLUB**

Appeal

1. The Brunner Rugby League Club ("**Appellant**") or ("**Brunner**") appealed to the Gambling Commission ("**Commission**") under section 61(1)(c) of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs ("**Secretary**") to refuse to renew its class 4 operator's licence for the period 1 April 2009 to 31 March 2010. The Secretary refused to renew the licence on the ground that he was not satisfied that the Appellant's gambling operation was financially viable (section 52(1)(c)). The Secretary also raised concerns about whether the net proceeds from the class 4 gambling at Brunner would be applied to or distributed for authorised purposes (section 52(1)(e)) and, in his submissions on the appeal, whether the Commission could be satisfied that the Appellant would comply with relevant licence conditions (section 56(5)).

Relevant law

2. The relevant sections provide:

56 Renewal of class 4 operator's licence

- (1) A corporate society may apply to the Secretary for a renewal of its class 4 operator's licence before the expiry of the licence.

...

- (4) Sections 51 and 52 apply to an application for renewal as if it were an application for a class 4 operator's licence.

- (5) The Secretary must refuse to renew a class 4 operator's licence if—

- (a) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 52; or



- (b) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, licence conditions, game rules, and minimum standards.

52 Grounds for granting class 4 operator's licence

- (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—

...

- (b) the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and
- (c) the applicant's proposed gambling operation is financially viable; and
- (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
- (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes;

...

- (2) In assessing financial viability under subsection (1)(c), the Secretary must consider, among other things, the ability of the applicant to reward winners and pay levies, taxes, and other costs, as well as apply or distribute the net proceeds from the class 4 gambling to or for authorised purposes.

..

3. The relevant licence conditions, conditions 1 and 4, provide:

Condition 1 – Minimum return to authorised purpose:

The minimum amount of net proceeds that a licence holder must apply and/or distribute for authorised purpose(s) is the proportion equivalent to 37.12% of its GST exclusive gross proceeds for each of its financial years, unless the Secretary has approved the accumulation of funds in accordance with licence condition 4 of these Class 4 Operator's Licence Conditions.

For the purposes of this condition, "gross proceeds", in relation to class 4 gambling has the same meaning as defined in regulation 3 of the Gambling (Class 4 Net Proceeds) Regulations 2004.

...

Condition 4 – Funds distributed regularly

The holder of a class 4 operator's licence that does not mainly distribute net proceeds to the community must ensure that it applies and/or distributes net proceeds to or for the authorised purpose(s) shown on the licence regularly and frequently so that there is no accumulation of funds in the dedicated account or dedicated accounts established for the purposes of section 104 and section 105 of the Act, unless the Secretary has approved the accumulation of funds in those accounts over a longer period of time for a project approved by the Department.

4. Regulations 10 and 11, although applicable only to distributing societies and not to societies which, like the Appellant, mainly apply net proceeds, are relevant by way of comparison. They provide:

10 Minimum amount of net proceeds to be distributed for authorised purposes

- (1) The minimum amount of net proceeds that a licence holder must distribute for authorised purposes is the proportion equivalent to 37.12% of its GST exclusive gross proceeds for each of its financial years.
- (2) The first financial year in relation to which a licence holder must comply with subclause (1) is the financial year that commences after the commencement of this regulation.
- (3) This regulation is subject to regulation 11.

11 Timing requirements for distribution of proceeds for authorised purposes

- (1) A licence holder must distribute for authorised purposes,—
 - (a) during each of its financial years at least every quarter, all or nearly all of the net proceeds from the class 4 gambling during the financial year, and
 - (b) within 3 months after the end of each of its financial years, any remainder of the net proceeds from the class 4 gambling during the financial year.
- (2) The first financial year in relation to which a licence holder must comply with subclause (1) is the financial year that commences after the commencement of this regulation.

Background

5. The Secretary decided to refuse to renew the Appellant's operator's licence on 16 September 2009. The Secretary considered that the Appellant was not financially viable because:
 - (a) It had incurred excessive costs as a result of which the net proceeds in 2008 equated only to 25.85% of gaming revenue.
 - (b) Gaming machine proceeds ("GMP") revenue had dropped from nearly \$118,000 in 2006 to \$101,000 in 2008.
 - (c) It had advanced a total of \$28,205 from other (non-gaming) divisions of the club to enable it to continue operation.
 - (d) Its liabilities outweighed its assets.
 - (e) Its forecast net proceeds for the coming year (2010) were only 30.8% of gaming revenue.
6. The Appellant appealed to the Commission on 18 September 2009. There was a substantial delay between the initial filing of submissions by the parties and the Commission's consideration of the decision, in order to allow the Secretary to complete

a review into revenue expectations for class 4 gambling carried on by clubs (which usually operate from their own premises, rather than from commercial venues) compared to class 4 gambling in pubs and similar venues. The Secretary completed his review and issued guidelines on “exercising discretion in relation to the licence condition describing the minimum returns to authorised purposes” (“**Guidelines**”) in September 2010.

Appellant’s submissions

7. The Appellant submitted that conditions 1 and 4 of its operator’s licence were *ultra vires* because they contradicted or made redundant regulation 9 of the Gambling (Class 4 Net Proceeds) Regulations 2004 (“**Regulations**”). Regulation 9 provides that Part 2 of the Regulations, which includes regulations 10 and 11, applies to corporate societies that mainly distribute net proceeds. The Appellant submitted that the Secretary had acted outside his powers by imposing the conditions, because they effectively made the Appellant subject to the Regulations even though class 4 societies that mainly apply net proceeds are specifically excluded from the Regulations by regulation 9.
8. In relation to financial viability the Appellant argued:
 - (a) The Commission should reconsider the Kiwi Community Trust decision, decision GC19/09, insofar as that decision appeared to require all funds generated within a year to be used only towards that year’s 37.12% requirement. The Appellant argued that the interpretation of the Regulations in the Kiwi Community Trust decision prevented societies from retaining cash to pay debts as they fell due.
 - (b) The Department of Internal Affairs had known and approved of the Appellant’s practice of retaining undistributed funds and applying them in the following years for several consecutive years.
 - (c) The Appellant’s past distribution history was not indicative of likely future performance in the light of recent operational changes. In particular, the Appellant no longer had venue agreements with two poor performing venues.
 - (d) For the financial year to 31 December 2009, the Appellant applied 39.12% of net proceeds that it had generated to authorised purposes.
 - (e) The Appellant had at all times had sufficient funds to reward winners, pay levies, pay taxes and meet its operational costs.
 - (f) The Appellant’s total assets exceeded its total liabilities.

- (g) Forecasts for 2010 indicated that the Appellant would comfortably exceed the minimum distribution requirement of 37.12%.

Secretary's submissions

9. The Secretary began his submissions by providing background information about the appeal and the Appellant. The Appellant's situation, in the Secretary's submission, was an unusual one. It is a club that mainly applies its gaming machine proceeds to its own purposes; however, rather than conducting the gambling operation from its own premises, it operates a total of five gaming machines from two commercial venues. The Appellant's circumstances therefore touched on three different ways of distinguishing between different types of class 4 operators. These are:
- (a) The nature of the society (club/non-club).
 - (b) The method of dealing with grants (apply/distribute).
 - (c) The nature of the venue (commercial venue/club premises).
10. The Secretary made the following submissions in respect of the validity of the licence conditions:
- (a) This was not an appeal against the imposition of a licence condition. The Appellant had had several opportunities to appeal the condition (upon its imposition or its reimposition on renewal of the licence) but had not.
 - (b) The reason that clubs, as opposed to corporate societies operating from pubs, were not subject to the Regulations was because Parliament, upon the Secretary's recommendation, considered it would be more appropriate to impose minimum returns by licence condition. The rationale was that, because clubs mainly apply their net proceeds, it was appropriate for clubs to have greater flexibility, particularly regarding the timeframe within which they made their applications, and such flexibility could be better achieved by licence conditions. The Secretary submitted that, when it was decided to impose the minimum distribution requirement by licence condition, rather than by regulation, it was understood that clubs would nevertheless be subject to the same minimum amount requirement.
 - (c) The empowering provision to create licence conditions is not in the Regulations but in the Act alongside the regulation making power. Rather than contradict the Regulations, the conditions complemented them by providing a more flexible form of regulation for societies that mainly apply net proceeds to

authorised purposes. There was no basis on which to argue that, when regulations cover a particular area, licence conditions could not be used to cover a related but separate area, which is expressly not covered by the Regulations.

- (d) In relation to the question of financial viability, the Secretary submitted:
- (i) The Appellant had fallen short of meeting licence condition 1 each year since 2008. Although in the 2008 financial year the Appellant claimed a return equal to 37.58% of GMP to authorised purposes, it in fact only applied 25.86% of that year's GMP. The remainder was made up of net proceeds that had been retained from an earlier year and from cash freed up by depreciation.
 - (ii) Unaudited financial statements for the 2009 financial year showed that the Appellant had only 26.35% of its GMP available for application to authorised purposes and that it topped this up with a transfer of \$12,500 from its sporting operation, so that the amount applied to authorised purposes was equal to 39.10% of its GMP. Further, it apportioned some of its venue costs to its rugby league account and reported them as a separate non-gambling item, thus reporting a lower amount of venue costs than was really the case.
 - (iii) The Appellant's gaming operation was not financially viable taking into account the requirements to comply with licence condition 1 (under sections 56(5)(a) and 52(1)(c)).
 - (iv) The Appellant was not able to comply with licence condition 1 based on its current and previous financial position (under sections 56(5)(a), 56(5)(b) and 52(1)(f)).

11. Following the completion of his review of the treatment of net proceeds from societies operating gaming machines from their own premises, and the resulting guidelines, the Secretary filed the following additional submissions:

- (a) The Guidelines provided a framework for considering an application to renew the class 4 operator's licence of a society operating gaming machines on its own premises, where the applicant had failed or would fail to meet the minimum return to authorised purposes stated in its licence conditions. The Guidelines allow for the exercise of discretion in certain cases.



- (b) The Guidelines should not apply to clubs that operated gaming machines from commercial venues for the following reasons:
- (i) The Guidelines arose out of a concern that enforcing the 37.12% return would have a negative effect on small town club rooms and push them into “the commercial hotels arena”.
 - (ii) Allowing a percentage return of less than 37.12% was not included in the original cabinet legislative policy. For that reason, the review and Guidelines were limited in scope. Extending the discretion to all clubs would signal a complete departure to cabinet policy and require cabinet approval.
 - (iii) There was a public policy rationale to allow some discretion in the case of a struggling club room which sought to keep its gaming machines on its premises, as an incentive to attract membership or patronage. That rationale did not exist where the struggling club operated its machines from a commercial tavern and where the venue payments paid by the club to that venue are one of the main reasons for the clubs financial difficulties, was the case with the Appellant.
- (c) Finally, the Secretary submitted that, even if the Guidelines did extend to clubs that operate from commercial premises, the Appellant would not meet the criteria for the exercise of discretion.

Appellant’s submissions in reply

12. The Appellant maintained that condition 1 was unreasonable for the following reasons:

- (a) The Secretary had acknowledged (in the Guidelines) that a universal licence condition requiring a 37.12% return was inappropriate. However the Appellant’s condition was set as part of a universal policy, with no regard to its specific circumstances.
- (b) The Appellant was a small, rural club, operating a total of five machines from two venues, in very small towns, but was subject to the same minimum return as large societies operating hundreds of venues. The Secretary had given no regard to what percentage may be reasonable in order to be satisfied that the purpose of conducting class 4 gambling was to raise money for authorised purposes.



- (c) The Department's Guidelines stated that, in the years 2005–2009, the minimum return was not met by 200 (out of 455) clubs on 337 occasions.
 - (d) The minimum return requirement was, in the Appellant's circumstances, contrary to the Act's harm minimisation purposes because, in order to comply, the Appellant must encourage its patrons to spend more money on the machines.
 - (e) New compliance costs, including the introduction of the Electronic Monitoring System and Player Information Displays had required the Appellant to incur significant capital expenditure.
 - (f) A licence condition requiring a minimum percentage return was not necessary to satisfy the Secretary that the Appellant was financially viable or that its purpose in having gaming machines has to raise funds for authorised purposes.
13. The Appellant submitted that it should not be prejudiced in its approach to this appeal by the fact that it has not formally objected to the condition, because it was not aware that it could challenge the condition before it engaged counsel following the proposal to refuse to renew. The Appellant submitted that it was open to the Commission to consider the validity of the condition due to the *de novo* nature of the appeal.
14. The Appellant submitted that, if it was accepted that the condition was unreasonable, then there were three key criteria against which the renewal of the licence should be considered:
- (a) financial viability: section 52(1)(c) and section 52(2);
 - (b) whether the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes: section 52(1)(b); and
 - (c) whether the society will maximise the net proceeds and minimise costs: section 52(1)(d).
15. The Appellant submitted that it was financially viable; there was no suggestion that its purpose was any other than to raise money for authorised purposes; and that it operated an extremely modest cost structure.

Further Submissions

16. Because of the lapse in time between the Appellant's bringing the appeal and the filing of the Appellant's submissions in reply, the Commission considered that it would be



assisted by seeking updated financial information from the Appellant, and submissions on that information from both parties.

17. The Appellant filed further submissions and an affidavit annexing audited accounts for 2009 and draft accounts for 2010. The Appellant submitted that no changes were anticipated for 2010. The Appellant submitted, and its draft accounts appeared to support, that in 2010 it would have returned more than 37.12% of net proceeds if it were not for the significant legal costs incurred in relation to the appeal. However, the Appellant recorded the legal costs incurred as a result of the appeal in its accounts for the non-gambling arm of a club.
18. In his additional submissions, the Secretary recorded that the Appellant's GMP in 2010 was less than what it was in 2009 and, as had been predicted by the Secretary in his previous submissions, it proved the Appellant's forecasts for 2010 to have been unrealistic. The Secretary also questioned the accuracy of the draft financial accounts for 2010. He submitted that the Appellant had under-reported indirect costs incurred by the gambling operation and instead recorded those costs in the Rugby League account in order to produce enough proceeds to be available for applications to authorise purposes:
 - (a) The Appellant's draft 2010 accounts recorded a significant reduction in the gaming account's indirect costs such as accountancy and legal fees, management and staffing fees, telephone maintenance and insurance. At the same time, the Appellant's rugby league account recorded significant increases in the same areas.
 - (b) In its submissions the Appellant accepted that legal fees which it had incurred to protect its gaming licence were debited to the rugby league account, and that to do otherwise would have meant reducing the available net proceeds to below the minimum threshold. The Secretary submitted that this was an incorrect practice and that the Appellant had consistently adopted an inappropriate practice of cost attribution between the two accounts.
 - (c) The Secretary also noted that the Appellant had reported grants totalling a greater amount than the net proceeds available in 2010. This would normally mean a deficit. That deficit was avoided by an amount of \$25,927, recorded in the accounts as a "prior period adjustment – grants made repaid", transferred from the rugby league account to the gaming account. No additional information had been provided to explain this transfer. The Appellant then recorded a net surplus of \$19,342 for 2010. No additional information was



provided by the Appellant to explain why those additional net proceeds had not yet been applied and how by accumulating them the club met licence condition 4.

19. The Appellant filed an affidavit responding to the criticisms made in the Secretary's submissions on the additional information, as follows:
- (a) The Secretary had failed to record that many of the expense areas of the rugby league account had in fact decreased not increased.
 - (b) The increased legal fees related to the extraordinary attendances incurred in proceeding with the Gambling Commission appeal. These costs were seen by the club as a cost incurred protecting an asset of the club rather than a normal operational cost of running the club. The reason for the reduction between 2009 and 2010 of some of the indirect gaming costs was not because those costs were being transferred to the non gaming arm of the operation, but because in 2009 the gambling arm had incurred several extraordinary costs, including costs incurred as part of the requirements to upgrade the gaming machines with player information displays and the loss on sale of the machines by the Appellants from two poorly performing venues.
 - (c) The Appellant, as had always been the case, remained able to pay prize money, gaming levies, gaming taxes and other costs associated with the gaming. Further, its assets exceeded its liabilities.
 - (d) The reason for the \$25,000 transfer from the rugby league account to the gaming account was that in 2010 it was discovered that the club had adopted an incorrect practice of making grants for GST inclusive amounts. The GST component for all grants made over the last three years was requested to be returned. This occurred and was detailed in the 2010 accounts as a "prior period adjustment – grants made repaid".
20. The affidavit concluded that the Appellant's authorised purpose funds generated each year were modest compared to funds generated by bigger societies. However, the funding of between \$40-\$55,000 each year was truly significant for the rugby club. Without the funding received from the gaming operation, the club could not continue to provide the level of services that it currently provides.

Analysis

21. The Commission first considered whether, on the updated accounts provided by the Appellant, it was satisfied that the Appellant was able to comply with licence condition 1.



If it was so satisfied, this would obviate the need to consider other issues raised regarding the validity of the conditions, and whether or not the Secretary should exercise discretion towards imposing conditions requiring minimum returns on corporate societies in similar circumstances to the Appellant.

22. The Commission was ultimately satisfied, on the most recent accounts available to it, that the Appellant had a financially viable operation and should be able to meet its licence conditions. It did not reach that conclusion by a significant margin, however, and considers that the Secretary should maintain a close eye on the returns from the gambling operation and how they are applied. The Commission considered that the Appellant had improved both its total revenue and the amount, as a proportion of revenue, that it was applying or distributing to authorised purposes. The Commission took into account the fact that Brunner's GMP had increased in comparison to 2008. Although the 2010 GMP was slightly lower than in 2009, this might be explained by the fact that, for part of 2009, Brunner had more machines. The fact that Brunner had achieved a level of GMP nearly consistent with 2009, but increased the percentage of GMP available for application suggested that Brunner's financial performance had improved. The Appellant was no longer relying on internal loans to meet licence condition 1 and, on the face of the 2010 accounts provided to the Commission, would have met the licence condition, but for the costs incurred on appeal. The Commission concluded that the appellant would be able to meet the relevant licence conditions (section 56(5)(b)) and that it would be financially viable, taking into account the minimum return requirement in its licence conditions.
23. The Commission also considered whether the Appellant would apply its net proceeds to authorised purposes (section 52(1)(e)) and maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling (section 52(1)(d)). These issues were raised by the Secretary, but not covered in his evidence. Rather, the Secretary's submissions and evidence were concerned largely with the Appellant's financial viability and the validity of the licence conditions. The Appellant gave evidence that it operated a modest cost structure, including relying on volunteers where possible, and that it applied its net proceeds to authorised purposes. The Commission was satisfied on the evidence before it, subject to the observations below, that the Appellant would apply its net proceeds to authorised purposes and minimise its operating costs (thereby maximising net proceeds).
24. In reaching its decision the Commission also wished to record the following:
- (a) The reason that the Commission was satisfied that the Appellant was financially viable had much to do with events which occurred in the lapse in



time between the filing of the appeal and the provision of additional submissions. The Commission had the benefit of more information than the Secretary had at the time of his original decision. It was largely on the basis of the Appellant's improved performance, and updated accounts, that the Commission was satisfied that the Appellant was financially viable.

- (b) The Commission did not agree with the Appellant's proposition that the legal costs of the appeal were properly recorded in the rugby league account. It considers that better scrutiny is required of the accounts of mainly applying clubs to ensure that annual net proceeds of the gambling operation are properly identified and their subsequent application or distribution tracked. However the Commission accepted that the cost of the appeal was an extraordinary or one-off cost and that, while it should have been recorded as a cost of the gambling operation, it was appropriate to adjust for that cost when considering, on the basis of previous performance, whether the Appellant would be able to meet the 37.12% requirement in future.
- (c) The Commission was concerned by aspects of the Appellant's previous accounting practices, in particular the transfer of money from the rugby league account to the gambling account, in order to improve the appearance of the gambling account figures. The Appellant should not be allowed to use loans from the rugby league account to increase artificially the apparent level of its applications to authorised purposes as a percentage of GMP, and expects that any such practice in future could well lead to findings of financial unviability or non-compliance with the licence condition.
- (d) The Commission was also concerned by the recorded surplus of net proceeds that appear not to have been distributed. Unless the Secretary approves the accumulation of those funds, Brunner will be in breach of licence conditions 1 and 4 if it does not apply the surplus to authorised purposes without delay. The regulation of distribution or application of net proceeds by mainly applying clubs provides for the possibility of greater flexibility in appropriate cases. However, accumulation of net proceeds requires approval which should only be given for sound reasons and those reasons do not include the building of a fund to disguise future poor performance of the gaming operation. It confirms the views expressed in the Kiwi Trust appeal (GC19/09) and does not consider that those views would result in societies being unable to pay debts as they fell due.



25. The appeal raised a number of complex and important issues. Ultimately, because of its findings on the updated figures, it was not necessary for the Commission to decide many of the other issues raised by the parties such as the reasonableness of the licence conditions. However the Commission considers it important to record its views on the following:

- (a) The Appellant submitted that it had not previously been aware of the ability to appeal against the imposition of licence conditions, and this was why it had not appealed the condition within the required time when the condition was imposed, either on issue of its licence or on renewal of its licence. The Commission considered that there may be circumstances in which it is appropriate to consider the reasonableness of a licence condition as part of an appeal against a refusal to renew. However, it expected class 4 operators and class 4 venues, who wished to challenge such licence conditions, to do so as an appeal against licence conditions rather than not complying and challenging the condition in the context of a decision arising from the non-compliance. The difference between an appeal against a licence condition and an appeal against renewal following breach is not merely technical. The Secretary's powers to renew licences are different to his powers to impose or alter licence conditions and are governed by different provisions of the Act. Although the Commission may consider the appropriateness of a licence condition as part of an appeal in another ground, its preparedness to do so should not be assumed.
- (b) The Secretary stated that one of the reasons for the imposition of the 37.12% minimum return was that it was the minimum return that corporate societies could make in order for him to be satisfied that corporate societies were, among other things, financially viable. There is an inherent circularity in such a proposition. In the Commission's view, the minimum return obligation is aimed at providing a check that the community benefit justifies the class 4 gambling permitted by the licence rather than assessing financial viability. Financial viability is not measured solely according to the ability to meet minimum returns although such a condition obviously affects such an assessment. In this case, the Commission was satisfied on the information before it that the Appellant's gambling operation was financially viable and that the Appellant would comply with its licence condition.
- (c) The assessment of achievement of the minimum return requirement, together with associated timing obligations for distribution or application, is fairly easy in the case of societies that mainly distribute net proceeds because the period of



distribution is closely aligned with the return period and there is little potential for circularity when funds are distributed by a society to other entities. The potential fluidity between the accounts of the gaming arm and the rugby league arm of the Appellant demonstrate the difficulties that arise in relation to clubs that mainly apply the net proceeds to their own purposes. The Commission was concerned by this fluidity and by the apparent use, in the past, by the Appellant of its rugby league account to prop up the gaming account, when in fact the purpose of the gaming account should be to raise money for the rugby league arm as its authorised purpose. The Commission was concerned by the opacity of the relationship between the two accounts and considered that the appeal had raised the potential need for greater scrutiny by the Secretary of the accounts of clubs that operate mainly to apply net proceeds to their own authorised purposes.

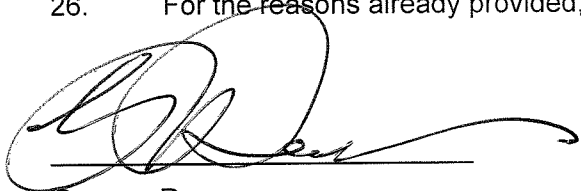
- (d) The Commission considers that the wording of licence condition 1 did not help the position because it combined, in a single condition, a minimum standard of financial performance (a minimum proportion of gross GMP in a period) with a timing obligation for its application. Despite the potential difficulty created by the fusing of those obligations in condition 1, the Commission considered that its intended effect was not to allow financial performance to be obscured by delays in application or the creation of financial reserves but was rather to prevent the accumulation of funds unless permitted by the Secretary. Even in those cases, the resulting accumulation of proceeds should not reduce the need to continue to achieve an acceptable annual net return. In the light of condition 4, there is potential to reduce confusion by separating the requirement to achieve acceptable returns (condition 1) from the timing of their application or distribution (condition 4). To be clear, the Commission expects the Appellant to apply the surplus that it has recorded in its 2010 accounts to authorised purposes without delay, if it has not already done so.
- (e) The Commission did not consider the minimum proceeds conditions to be *ultra vires* simply because they had a similar effect on clubs that mainly apply net proceeds as regulations 10 and 11 of the Regulations have on societies that mainly distribute net proceeds. The conditions are separately authorised under the Act and supplement rather than conflict with the regulations. The decision not to impose the obligation by regulation but to leave it to individual licence conditions is consistent with an intention to allow flexibility of application. Accordingly the Secretary is not precluded by 2004 Cabinet policy from exercising the discretion conferred on him under the Act in relation to such



licence conditions. Because it was satisfied that the Appellant would comply with its licence conditions, the Commission did not consider it necessary to consider these issues further.

Decision

26. For the reasons already provided, the Division allows the appeal.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

6th May 2011

