


IN THE MATTER of the Gambling Act 2003
 AND of an appeal by THE SOUTHERN
 TRUST INCORPORATED – THE
 SAIL AND ANCHOR, TIMARU

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
 L M Hansen
 R D Bell

Date of Appeal: 20 October 2011

Date of Decision: 16 March 2012

Date of Notification
 of Decision:  May 2012

DECISION
 ON AN APPEAL BY THE SOUTHERN TRUST INCORPORATED –
 THE SAIL AND ANCHOR, TIMARU

Background

1. The Southern Trust Inc Corp (the “**Appellant**” or the “**TST**”) appealed against a decision by the Secretary for Internal Affairs (the “**Secretary**”) to impose a condition on the class 4 venue licence for “The Sail and Anchor”, in Timaru.
2. The Secretary added the special condition pursuant to sections 67 and 70 of the Gambling Act 2003 (the “**Act**”) because he was not satisfied that the possibility of persons under 18 years of age gaining access to class 4 gambling at the venue was minimal. TST requested the Commission to reverse the Secretary’s decision to impose the condition. The Secretary asked the Commission to confirm his decision.

Relevant law

3. The relevant law is as follows:

Gambling Act 2003

- 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 –
- ...
- (b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimal;



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- ...
- (2) The conditions that the Secretary may add to a class 4 venue licence include—
- ...
- (b) conditions to minimise the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue:
- ...
- (g) procedures to encourage responsible gambling at the venue:
- ...
- (j) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act.
- (3) The Secretary may—
- (a) amend or revoke a condition of a class 4 venue licence; or
- (b) add new conditions to a class 4 venue licence.
- (4) If the Secretary decides to amend or revoke a condition or add a new condition to a class 4 venue licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager, of—
- (a) the right to appeal the decision; and
- (b) the process to be followed for an appeal under section 77.

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- ...
- (4) The Gambling Commission may—
- (a) confirm, vary, or reverse the decision of the Secretary; or
- (b) refer the matter back to the Secretary with directions to reconsider the decision.

Background

4. This appeal has arisen because the gaming room at the Sail and Anchor is accessible by two entrances – one from a wind trap foyer immediately inside the venue's front door, and the other one from the bar. The foyer entrance provides access into the gaming machine area without the need to enter the main part of the venue. The Secretary is concerned that persons under the age of 18 years could use this entrance to gain access to the gaming machines at the venue.
5. On 15 February 2011, the Secretary wrote to TST proposing to add a condition to the venue licence which would require the wind trap entrance to be closed at all times that the gaming machines are in operation.
6. On 23 March 2011, TST made submissions opposing the imposition of the condition.
7. On 30 September 2011, the Secretary wrote to TST stating that:

This letter is to notify you that I have decided to add a licence condition to the class 4 venue licence (the "**Licence**") granted to The Southern Trust for the venue known as The Sail, located at 51 Sofia Street, Timaru, Canterbury (the "**Venue**"). The licence condition is:

Access – The internal door between the two entrance doors, the "wind trap" area giving access directly into the gaming area must remain closed and locked at all times that the gaming machines are

in operation, and may only be used to meet fire, health and safety regulations specific to the venue. The internal entrance(s) to the gaming machines must be in direct line of sight to the main bar serving area.

The Secretary for Internal Affairs (the "**Secretary**") considers it necessary to add the licence condition in order to minimise the possibility of persons under the age of 18 years and excluded persons from entering the gaming machine room. The reasons for this conclusion are provided in detail below.

8. On 20 October 2011, TST filed a notice of appeal challenging the Secretary's decision to impose this condition.

Submissions by the Appellant

9. The Appellant submitted, in summary, as follows.
- (a) Gambling Commission decision GC16/06, an appeal by The Lion Foundation, considered the Department's decision to impose new licence conditions on venues which provided access to gaming rooms by external doors. That decision set out the key issues and legal tests for consideration.
 - (b) The Commission went on to make a factual assessment of the 11 Lion Foundation venues. It is significant that the venues had external access to the gaming machines and the condition added to each venue by the Secretary required "... the external door giving direct access to the gaming room ... to be closed."
 - (c) The Commission determined that the condition was reasonable in each case but provided further direction by amending the conditions for two venues, the additional part of the special condition contained a requirement that the "... internal entrance(s) to the gaming machine area must be in **direct line of sight to the main bar serving area.**" (emphasis added)
 - (d) The 'direct line of sight' point has been used by the industry as the basis for venue design involving entrance doors.

Applying the legal tests

- (e) The key test is whether, in the absence of the condition, the measures in place at the venue are sufficient to ensure that the possibility of minors gaining access to class 4 gambling is minimal.
- (f) The evidence, and the ability of the Commission to view the venue, will provide proof that the measures at the venue are sufficient, and that there is no need for the special condition.

- (g) If that test is satisfied then it is not necessary to complete the remainder of the analysis from the *Lion* decision; namely, looking at whether the special condition is reasonable.

Likelihood of a reduction in risk of access by minors

- (h) In assessing the likelihood of access by minors, the Department has not provided any detailed evidence that any such problem exists at the venue.
- (i) The Act does not require the elimination of access by minors but that:
- ... the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimal;
- (j) The Southern Trust has provided research which indicates that there is not an identifiable problem at a national level. As such, there would need to be evidence specific to the venue to impose the special condition.
- (k) The main reason the Secretary imposed the condition was because he is concerned about the direct line of sight from the main bar area to the internal doors of the gaming room. However there is a direct line of sight to the internal entrance – it is through a glass door with ample viewing capacity, and anyone standing in the internal entrance is easily seen.
- (l) Staff at the main bar have direct line of sight to anyone entering the foyer area from outside, and so they also have direct line of sight to the internal entrance to the gaming area.
- (m) Staff can also see directly into the gaming area through an additional set of internal doors.
- (n) It accepts that during busy times staff at any venue will sometimes have their direction diverted. However this is addressed by the fact that additional staff are on duty at those times, including security at the external doors.
- (o) The current controls are therefore effective in dealing with potential access by minors.
- (p) Standard Class 4 Venue Licence Conditions are issued pursuant to section 70 of the Act. Those standard conditions include a requirement that the venue not offer any gambling unless it accompanies the venue's primary activity.
- (q) The venue therefore has statutory mechanisms to control the access of minors through the Sale of Liquor Act 1989 and the primary activity standard condition.

The existence of the liquor licence condition means that the likelihood of minors gaining access to gaming machines is negligible.

Submissions by the Secretary

10. The Secretary submitted, in summary, as follows:

In the absence of the new condition, are the current measures at the venue sufficient?

- (a) The Trust submits that the current measures in place at the venue are sufficient. The sufficiency of those measures is assessed below.

Direct line of sight from the main bar area to the internal entrance

- (b) The view of the internal entrance to the gaming room (through the glass panelling of the wind trap door) is not ideal. The ability to view and identify patrons through the glass panelling is only possible from the bar service area if staff are standing in the service area. Even then, and assuming that bar staff are looking in the right direction at the right time, there is only a brief opportunity to make an assessment of a patron as he or she moves through the wind trap. From other areas of the bar, staff cannot even make this assessment as they are unable to view the internal entrance.
- (c) This situation is exacerbated depending on staffing levels. The Trust has noted that the Venue has additional staff during busier periods but when fewer staff are on duty, the range of tasks undertaken by staff must broaden. When one staff member is on duty he or she may not even be in the bar area itself.
- (d) There is also an internal entrance from the bar into the gambling area. However, if these doors are open, only a handful of the gaming machines are visible from the bar service area.
- (e) The direct line of sight is insufficient to address the risk.

The obligations pursuant to the Sale of Liquor Act and the Primary Purpose licence condition

- (f) The Secretary accepts that the Venue takes its responsibilities under the Sale of Liquor Act seriously. However, it cannot be said that compliance with those duties necessarily minimises the risk of underage gamblers gaining access to the gaming room via the wind trap entrance.
- (g) Mr Cahill, the venue's owner, states that his primary concern in relation to minors entering the Venue rests with his liquor licence. Each week on a Saturday night,

his staff turn away approximately 6 patrons at the door who are thought to be under 18 and could not produce adequate identification.

- (h) No doubt in order to reduce or minimise the risk of minors entering the bar and putting his liquor licence at risk, Mr Cahill has recognised that it is necessary to station a staff member at the front door to identify and stop minors from entering.
- (i) A logical conclusion from this is that minors are approaching the Venue on a regular basis with an expectation that they will be able to enter. Mr Cahill has recognised that the best way to minimise or prevent minors from entering the premises is to have security stationed at the front entrance on a Saturday night.
- (j) A similar argument can be applied to the gaming room access. Without the additional vigilance, minors can enter the wind trap area and access to the gaming room undetected.
- (k) The Venue's obligations, under the Sale of Liquor Act, assist in preventing minors entering the gaming room, but only to the extent that extra staff are employed to monitor the front entrance.

At busy times, additional staff are located at the front entrance to the premises

- (l) The Secretary accepts that if staff are located at the front entrance, then the chance of a minor entering the gambling room via the wind trap is minimal.

Research indicates that there is not an identifiable problem at a national level

- (m) The Trust has provided information which shows that 40 minors between the ages of 14 and 17 sought help for their gambling problems. When considering the absolute prohibition on persons less than 18 years of age accessing class 4 gambling and the duties class 4 venues have in minimising this possibility, it is of great concern that this number of youth could gamble in a class 4 environment to the extent they present with class 4 problems.
- (n) Presentation rates are a subset of overall participation rates.
- (o) The Trust also provides information from the University of Auckland's "Youth 07" report. From a sample group of 8,391 students, 161, or 1.9% of the 13-17 year olds had conducted class 4 gambling in the previous year. This is not an inconsequential figure. If this figure is extrapolated for the national school population of this age range, it implies 5,370 students accessed class 4 gambling in a one year period.



- (p) Rather than indicating that minors accessing class 4 gambling is already minimal, the research indicates that the “possibility” of access, as anticipated by section 67(1)(b) of the Act, is very real. In instances where supervision is compromised, this possibility is heightened.

Will the imposition of the condition at the venue minimise the risk of access?

- (q) Imposing the condition will reduce the possibility of access by minors to class 4 gambling. Closing the wind trap entrance to the gaming room would require minors who wanted to access the gaming machines to enter the main part of the Venue before entering the gaming room.
- (r) The need to enter the Venue proper will not only afford the staff a better opportunity to assess the age of patrons heading for the gaming machines, but will also be an important deterrent to potential underage gamblers who will have to reconsider any intention to slip through to the gaming room unnoticed.

Is the condition reasonable in all of the circumstances of the venue?

- (s) In considering this question, the following questions are relevant:
- (t) whether the condition is a result of process of reason rather than a whim or arbitrariness;
- (u) whether the condition is proportionate, weighing the benefits gained from imposing the condition compared to the costs and the detrimental effects incurred; and
- (v) whether the condition is fair to the Venue, the society and to the community.

Process of reason

- (w) The Trust has not suggested that the special licence condition is whimsical or arbitrary and not a result of a process of reason.

Proportionality of condition to potential inconvenience

- (x) The Trust has not identified any significant detriment to its operations if patrons were required to enter the Venue proper before accessing class 4 gambling. Mr Wilson deposes that with the wind trap entry available, gamblers need not negotiate their way through bar patrons. In addition, gamblers who wish to remain “under the radar” are allowed to do so as they will not need to associate with drinkers.

- (y) The doors from the wind trap into the bar are in close proximity to the bar room entrance into the gaming room. This allows gambling patrons to access the gaming room entrance almost immediately as they enter the bar proper. A patron entering the bar for gambling purposes only is not required to walk the length of the Venue before accessing the gaming room, the entrance is immediately to their left. Any exposure by gambling patrons to persons drinking is minimal before they enter the gaming room.
- (z) He accepts that the special licence condition will cause difficulty for gambling patrons who wish to avoid detection by bar staff and remain "under the radar". It will necessitate them entering the bar room where they can easily be detected by bar staff and bar patrons.
- (aa) The benefits gained from patrons entering the gaming room via the bar room entrance are that staff will be in a better position to identify who is entering the gaming room. Staff will not be required to focus their attention on the wind trap area. This would be especially beneficial to the Venue when staffing is minimal.
- (bb) The special condition will assist the Venue not only to comply with its obligation under the Act but also with its liquor licence, in particular the special condition will assist staff to readily identify who is entering the gaming room. It will also ensure that minors who intend to drink are not accessing the bar room via the wind trap access into the gaming room.
- (cc) A condition that assists a Venue to meet its licence obligations, particularly harm prevention and minimisation obligations, outweighs any perceived inconvenience to gambling patrons by having to enter the gaming room via the bar room entrance.
- Is the condition appropriately imposed for reasons other than risk of access by minors such as problem gambling and harm minimisation?***
- (dd) In the four appeals on this issue to date, the Secretary has made submissions that similar conditions are appropriately imposed for harm prevention and minimisation reasons. For example, people experiencing problems with class 4 gambling seek the anonymity that unsupervised access provides. In those cases the Commission has not addressed this aspect of the Secretary's submissions as it was satisfied on the primary ground.
- (ee) He is of the view that the condition has been appropriately imposed under section 70(2)(b) of the Act, so makes no submissions in relation to harm minimisation.

- (ff) Should the Commission accept the submission that the risk is minimal if the front entrance to the Venue is monitored, then the special licence condition could be varied to allow access to the gaming room via the wind trap entrance at times when a staff member is monitoring the front entrance to the Venue.

The Appellant's submissions in reply

11. In reply, the Appellant submitted, in summary, that:

- (a) Bar staff have reasonable viewing of the entrances from their normal working position.
- (b) Mr Thomson also states that he and Inspector Clark could "see into the lobby through the glass paneling" from the main bar service area. This indicates that the layout provides adequate monitoring during the normal course of business.
- (c) Mr Thomson states that bar staff have insufficient time to make a determination about the age of a person entering the bar. Two issues arise in reply. First, under the liquor licence it is essential that bar staff check the age of patrons. The policy of checking identification for anyone who looks under 25 years of age means that this is rigidly followed. If there is an uncertainty about determining the age of someone then bar staff must check that person's age.
- (d) Secondly, the approach to the entrance to the venue includes a covered outside passageway. The passageway provides bar staff with a longer period to notice patrons entering the premises.
- (e) If staff are moving about the bar area then they can see the gaming area through the internal doors. If the bar is quieter then bar staff can easily move from the bar service area to check on the gaming area. When it is busier then there will be more staff on duty including a staff member positioned at the bar service area.
- (f) All venues have blind spots for the external and internal access points.
- (g) Those venues that regularly only have one staff member on duty will experience periods when no-one is actively monitoring the entry and egress of patrons.
- (h) The need to attend to various tasks such as deliveries, paperwork, changing kegs, re-stocking chillers, opening safes to top up floats, all require the staff member to leave the main serving area of the bar. The key issue is responsible supervision.

- (i) At the Sail it is a natural action to look towards the door where patrons enter. Patrons enter through glass doors and therefore they create a silhouette when entering.
- (j) Of the five sting operations conducted by Timaru City Council, the person has been detected on every occasion.
- (k) The venue operator has never been prosecuted or even investigated in relation to a minor gaining entry to the Sail.
- (l) The Secretary's submissions regarding minors attempting to access the venue assumes that minors know the layout of the venue and then make a calculated run at the gaming machines. However, minors would not know the layout of the venue because there is no external viewing of the gaming area.
- (m) The layout provides a very good deterrent to any minor who might like to attempt to gain access because he/she has no way of knowing whether they will be immediately detected.

Visit to the venue

12. The Commission visited the venue on two occasions in one day in March 2012. The purpose of the visits was to gain an impression of the venue's layout and operating practices that had been represented to the Commission in the parties' submissions and evidence. The visits were unaccompanied by representatives of either party and conducted as a member of the public.

Analysis

13. The Commission has, in four previous decisions, GC16/06, GC37/06, GC22/08 and GC29/08, considered the closure of secondary entrances into class 4 gaming areas. In decision GC16/06, the Commission set out a framework for considering the validity of proposed licence conditions. That framework is applicable to the present appeal.
14. It is not necessary to repeat that framework verbatim, but the Commission considered the following:
- (a) In the absence of the condition, are the measures in place sufficient to satisfy the Commission that the possibility of minors gaining access to class 4 gambling at the venue is minimal?
 - (b) Will the imposition of the condition minimise the risk of access?

- (c) Is the condition reasonable in all of the circumstances of the venue?
- (d) Is the condition appropriately imposed for reasons other than risk of access by minors, such as problem gambling and harm minimisation?

In the absence of the condition, is the possibility of minors gaining access to class 4 gambling minimal?

15. The Commission considered whether, in the absence of the condition, the possibility of minors gaining access to class 4 gambling at the venue is minimal, and determined that it is not.
16. The Commission noted that the secondary entrance into the gaming machine area is visible from the bar, but that the view is partially obscured by wood panelling and partially obstructed (on occasions) by sunlight reflecting from the glass panels. The Commission considered the view to be unsatisfactory to identify adequately minors in the lobby.
17. Further, the Commission considered the (limited) view to be of no use at all unless staff members position themselves permanently at the bar and look at the secondary entrance. The Commission considered that this would be highly unlikely in a working environment where staff are required to move around to serve patrons and address the venue's general needs.
18. This was confirmed by the Commission's two visits as the sole staff member at the venue spent most of his time in the "back of house" area which has no view to the lobby. Indeed, during the first visit, the barperson did not enter the bar at all despite calls from the Commission for assistance. The Commission left the bar after several minutes, entirely unnoticed. The Commission returned to the bar later on the same day and again the staff member was back of house and did not emerge for several minutes, despite the Commission making audible calls for assistance.
19. The Commission concluded that the risk of access to class 4 gambling by minors was not minimal and that the imposition of the condition under section 70(2)(b) was appropriate.
20. The Secretary made submissions in relation to whether the possibility of minors gaining access to class 4 gambling at the venue would be minimal if a staff member was stationed at the front door to identify and stop minors from entering. The Commission was of the view that the possibility of minors gaining access to class 4 gambling using the secondary door would be minimal if the front entrance was staffed in this manner. The Commission amended the special condition to allow for this. It now provides as follows:

~~Access – The internal door to the gaming room (in the “wind trap” area between the two entrance doors), the “wind trap” area giving access directly into the gaming area, must, subject to the exception below, remain closed and locked at all times that when the gaming machines are in operation, and may only be used to meet fire, health and safety regulations specific to the venue. The internal door may, however, be used to access the gaming room when the venue’s front entrance is staffed to identify and stop minors from entering the premises. The internal entrance(s) to the gaming machines must be in direct line of sight to the main bar serving area.~~

Will the imposition of the condition at the venue minimise risk of access?

21. The Commission next considered whether the condition imposed by the Secretary was potentially effective in minimising the possibility of underage access, and concluded that it was. Closing the secondary entrance would require minors who wanted to access the gaming machines to enter the bar before turning to enter the gaming room. The Commission concurred with the Secretary’s submission that this would also act as a deterrent to minors entering the venue.

Is the condition reasonable in all of the circumstances of the venue?

22. The Commission considered that the condition was reasonable, given all of the circumstances of the venue, as it would reduce the possibility of access by minors to class 4 gambling. The Commission considered that very little, if any, detriment would be suffered as a result of closing the secondary entrance, and that any detriment would not be disproportionate to the benefit gained.

Imposition of the condition on harm minimisation grounds

23. Under sections 70(2)(g) and 70(2)(i), conditions may be added relating to procedures to encourage responsible gambling at the venue which the Secretary considers will promote and ensure compliance with the Act.
24. Having determined that the condition could be appropriately imposed under section 70(2)(b), it was unnecessary for the Commission to determine whether it could also be imposed pursuant to section 70(2)(g) and 70(2)(i).

General observations

25. As noted above, the Commission visited the venue on two occasions on one day in March 2012. These visits helped the Commission to reach its conclusion that the possibility of minors accessing class 4 gambling from the secondary door is not minimal. However the visits also caused the Commission to question whether the possibility of minors accessing class 4 gambling from the main entrance was minimal, in the light of the level of staffing and the conduct of the staff on that occasion. During the first visit, no staff appeared in the bar at all. During the second visit (which lasted about 45 minutes), the barperson did not emerge from the back of house area for several minutes, despite audible calls for

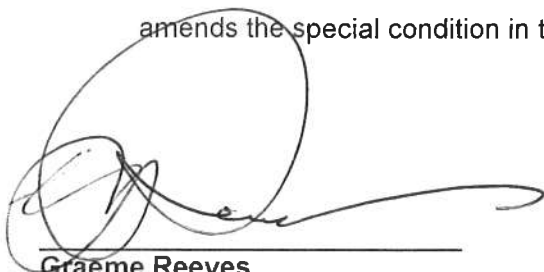


assistance. When he did emerge, the barperson served several bar patrons before returning to the back of house area. At no time when the Commission was present did he check the gaming machine area, despite the lengthy periods of absence, during which time minors or banned gamblers could have easily accessed class 4 gambling at this venue.

26. The Commission therefore gave serious consideration to referring the matter back to the Secretary, under section 77(4)(b) of the Act, with directions for him to reconsider whether the venue should continue to be licensed to conduct class 4 gambling at all in its current format, or without significant changes to the layout and operation of the venue. Ultimately the Commission decided that it would not do so, but would instead record its concerns in this decision, and leave it to the Secretary to consider them with the Appellant and the venue owner.

Decision of the Commission

27. For the reasons already provided, the Commission confirms the Secretary's decision and amends the special condition in the manner set out in paragraph 20 above.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

10th May 2012

