

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **BLUEGRASS HOLDINGS LIMITED**

BEFORE THE GAMBLING COMMISSION

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

Date of Decision: 13 June 2013

Date of Notification of Decision: 1st August 2014

DECISION ON APPEAL BY BLUEGRASS HOLDINGS LIMITED

Introduction

1. Bluegrass Holdings Limited (the "**Appellant**" or "**Bluegrass**") appealed against a decision by the Secretary for Internal Affairs (the "**Secretary**") to cancel its class 4 operator's licence. The Secretary cancelled the licence under section 58(1)(a), (b) and (d) of the Gambling Act 2003 (the "**Act**").
2. The Secretary cancelled the licence relying on the following grounds:
 - (a) He was no longer satisfied of one of the grounds in section 52, a ground for cancellation under section 58(1)(a). The Secretary was no longer satisfied of the requirement that, after investigation, nothing caused him not to be satisfied of the suitability of the Appellant and its key persons (section 52(1)(h)). The Secretary was not satisfied of the suitability of Mike O'Brien, whom he considered to be a key person (although he was not named as such on the Appellant's application for a licence), having regard to his profile of past compliance with the Act. He was also no longer satisfied of the Appellant's suitability because of its failure to inform him that Mike O'Brien was a key person and because it had apparently breached section 118.
 - (b) Bluegrass had failed to comply with a relevant requirement of the Act, a ground for cancellation under section 58(1)(b). The Secretary considered that Bluegrass had breached section 118 of the Act, as it had sought and received loans from potential grant recipients, which were, at least informally, conditional



upon the potential grant recipients receiving future grants. The Secretary also considered that Bluegrass had failed to comply with section 57(1)(d), in that it had failed to apply to amend its licence when a new key person (Mike O'Brien) was added.

- (c) Bluegrass had provided misleading and false information in its application for a class 4 operator's licence, concerning its initial funding, a ground for cancellation under section 58(1)(d).

Procedural history

3. The appeal has an unusually protracted and complicated procedural history, as follows:

- (a) The Secretary's decision to cancel the class 4 operator's licence of the Appellant was notified by letter dated 3 July 2012, following the statutory hearing process set out in section 59.
- (b) Bluegrass filed an appeal with the Commission dated 4 July 2012.
- (c) On 30 July 2012 the Commission imposed its standard timetable directions for the filing of evidence and submissions on the appeal.
- (d) Bluegrass subsequently applied to vary those directions, seeking an additional 8 weeks to file its evidence and submissions. The requested variation was granted by the Chief Gambling Commissioner on 24 August 2012.
- (e) Bluegrass did not comply with the extended timetable, but instead, on 10 October 2012, after 6 weeks of the extended period had passed, filed an application seeking orders striking out certain paragraphs of the Secretary's decision and, by memorandum, a direction for an oral hearing of the appeal. The application was not accompanied by substantive submissions, in accordance with the Commission's established practice, but rather by a memorandum seeking new timetable orders in substitution for those made on 24 August 2012.
- (f) The Commission declined the request for directions for an oral hearing (before it had received any evidence or submissions on the appeal) and directed Bluegrass to file substantive submissions on the application to strike out.
- (g) In response, Bluegrass proposed to reframe its application and sought a teleconference to settle timetabling for a new application to be filed and dealt with.



- (h) Following the requested teleconference, Bluegrass filed a new application dated 31 October 2012, seeking determination of two questions as preliminary issues and related orders, with substantive submissions and evidence in support.
- (i) After considering the application and the submissions for Bluegrass and the Secretary, the Commission issued a decision (GC38/12) on 19 December 2012, declining the application for preliminary determination and asking counsel to confer and revert to the Commission with a proposed timetable for the filing of substantive evidence and submission on the appeal.
- (j) Bluegrass filed a judicial review proceeding on 11 February 2013, challenging the Commission's 19 December 2012 decision relating to the manner in which it proposed to deal with the issues relating to section 118 at the substantive hearing.
- (k) Subsequently Bluegrass filed an application for a stay of the appeal, pending the outcome of the judicial review proceeding. The grounds for the application were that the issues raised by the judicial review application were inextricably connected to the Commission's determination of the appeal, in that the Secretary's decision relied, in part, on an alleged breach of section 118, the allegation of breach was contested, and the judicial review was directed at the manner in which the Commission should be required to deal with the dispute about breach of section 118.
- (l) In the subsequent exchange of written submissions, the Secretary notified the Commission of a fundamental change of position, namely that the Secretary accepted that, in the present case, no breach of section 118 had occurred, and advised that he no longer relied upon that ground to support his decision to cancel the licence. He proposed to argue the appeal solely on the basis that the decision was justified on the remaining grounds set out in his decision on 3 July 2012.
- (m) In a decision of 24 June 2013 (GC17/13), the Commission declined Bluegrass's application for stay. It did so on the basis of the Secretary's concession, holding that, on the material before it, the concession was appropriately made with the result that there was then no longer any basis for the Commission to consider section 118 on the appeal. Since the judicial review application related solely to consideration of that section, there were no longer any common issues. The Commission also ruled on issues arising from unauthorised redactions by the Secretary in documents provided to the Commission, and by the Commission to Bluegrass.



- (n) On 10 July 2013, the Secretary applied to the Commission seeking approval of the redactions and seeking additional directions. In a decision of 24 October 2013 (GC39/13), the Commission:
- (i) approved the redactions, in the light of the Secretary's assurance that the redacted material did not relate to any matter still in issue and Bluegrass's withdrawal of its objections to them;
 - (ii) gave directions confirming its earlier directions (GC17/13 paragraph 22(b)) that both parties were free to put forward any new material, whether or not it had been before the Secretary when he made the original decision; and
 - (iii) declined to make any direction relating to the renewal of the cancelled licence, as being outside the Commission's jurisdiction.

4. In its June 2013 decision, GC17/13, the Commission summarised the issues raised by the appeal, following the Secretary's concessions, as follows:

- 23 In its decision released on 19 December 2012, the Commission framed the issue on the appeal as follows:

Should the decision of the Secretary to cancel the licence, under 3 of the 4 grounds under Section 58 be confirmed, varied, reversed or referred back to the Secretary with directions in the light of the information provided to the Commission by the Appellant and the Secretary?

- 24 The formulation remains correct but the grounds, for the purposes of the appeal, now require restriction. These grounds are now:
- (a) lack of satisfaction, after investigation, with the suitability of the Appellant and an alleged key person, namely Mike O'Brien;
 - (b) breach of a relevant requirement of the Act, namely s 57(1)(d) (failure to amend its licence when an allegedly key person (Mike O'Brien) was added); and
 - (c) the supply of materially false or misleading information in the Appellant's application for its licence.

5. The parties subsequently lodged affidavit evidence and written submissions with the Commission, the essential nature of which is summarised below.

Summary of Secretary's case

6. The evidence for the Secretary's case consisted principally of contemporaneous documents produced by two Departmental officials, from which the Secretary drew the inference that Mike O'Brien controlled Bluegrass. Although Mike O'Brien did not have a formal role or title in relation to Bluegrass, which was set up by his father, Patrick O'Brien, the Secretary considered that he exercised considerable influence over Bluegrass, including the acquisition of venues, venue relations and the allocation of net proceeds.

The Secretary did not consider Mike O'Brien to be a suitable key person. As a result, one of the section 52 grounds (section 52(1)(h) – key person suitability) was no longer met, which was a ground for cancellation under section 58(1)(a).

7. The Secretary considered that Mike O'Brien had been a key person since the Appellant's inception, and that the Appellant therefore provided false and misleading information in its application when it did not include him as a key person, and when Patrick O'Brien denied his involvement in Bluegrass during an interview with the Department of Internal Affairs ("DIA") in August 2009. This was a ground for cancellation under section 58(1)(d)(i). In the alternative, the Secretary submitted that Mike O'Brien became a key person at some later time, and the Appellant failed to comply with section 57(1)(d), which requires holders of class 4 operator's licences to apply to the Secretary to amend their licence if they propose to add a new key person. A failure to comply with any relevant requirement of the Act is a ground for cancellation under section 58(1)(b).
8. The Secretary also considered that the Appellant gave false and misleading information, in the course of its application for the licence, by stating that its funding would be from a finance company loan, supplemented by Patrick O'Brien's own funds. As the funding in fact came from loans from three racing clubs via Mike O'Brien, there was a further basis for invoking the ground for cancellation under section 58(1)(d)(i) (supplying information that is materially false or misleading in an application for a class 4 operator's licence).
9. The Secretary also placed before the Commission documents (which he appeared to have obtained after his decision) indicating conduct in breach of section 113, which prohibits the exercise of influence by venues over grant allocations. This was a new consideration, not forming part of the original decision and not previously identified to the Commission in the earlier pre-hearing applications. The Secretary advanced this as an additional reason for lack of satisfaction about the suitability of the Appellant.
10. The Secretary submitted that, for any or all of the above reasons, the Appellant was not suitable to hold a class 4 operator's licence, which is also a ground for cancellation under section 58(1)(a) (the Secretary is satisfied that any of the grounds in section 52 are no longer met).

Summary of Appellant's case

11. The Appellant challenged all of the grounds relied upon by the Secretary. The Appellant's evidence consisted of affidavits by Patrick O'Brien, the founder and original chairman of the Appellant and the father of Mike O'Brien, and Peter Gurr, the current chairman of the Appellant. The affidavits denied the Secretary's allegations from the perspective of each



deponent, and advanced alternative explanations for some of the inferences arising from the documents relied upon by the Secretary.

12. The Appellant submitted that, to the extent that the Secretary's submissions contradicted the evidence of Mr Gurr and Patrick O'Brien, the Secretary accused them of lying and therefore brought into issue their credibility. The Appellant sought an oral hearing, on the grounds that the Commission should assess the credibility of its deponents at an oral hearing.
13. The Commission considered the affidavit evidence and written submissions received and concluded that it would be assisted in reaching its decision by examining in person Patrick O'Brien and Mr Gurr, as the Appellant's counsel had sought. Accordingly it directed an oral examination of those deponents as part of its hearing on the papers.

Oral hearing

14. At the opening of the oral hearing on 13 May 2014, counsel for the Appellant proposed that examination of Patrick O'Brien was unnecessary because of a concession made by Bluegrass at the start of the hearing. Bluegrass conceded that Mike O'Brien became involved as a key person of Bluegrass and was a key person until Patrick O'Brien resigned as chairman. Bluegrass did not consider it necessary for Patrick O'Brien to be examined in relation to the truth of his statements regarding the funding of Bluegrass, because Bluegrass's submissions on appeal would now focus solely on conduct from 2012 onwards (when Mr Gurr took over as chairman) so the Commission would not be required to reach a conclusion on the source of the funds.
15. Bluegrass submitted that there would be no point in the Commission reaching a view on the funding, because a negative finding in respect of other pre-2012 conduct (the key person issue) was inevitable. The Appellant's position entailed acceptance, at least for the purpose of the appeal, that Mike O'Brien was not a suitable key person. The Appellant contended that its appeal would succeed or fail on the strength of its submission that, as a result of changes that had taken place in 2012, cancellation was now not an appropriate action irrespective of what had occurred previously. It confirmed, in its written submissions following the oral hearing, that its case depended on Mike O'Brien (and Patrick O'Brien) having no ongoing involvement in Bluegrass. On that basis, it did not offer Patrick O'Brien for examination and called Mr Gurr only.
16. In the course of Mr Gurr's examination, counsel for the Secretary started to examine Mr Gurr on a handwritten document which comprised one of two documents (the other being its typewritten version) that formed the basis for the Secretary's case that Bluegrass had breached section 113, a penal provision of the Gambling Act (the "**Section 113**



Documents”). At that point, the Commission raised with counsel and with Mr Gurr the privilege against self-incrimination. After counsel had conferred and Mr Gurr had conferred with counsel for Bluegrass, counsel advised the Commission that Mr Gurr had decided to exercise the privilege and to decline to answer any questions relating to the Section 113 Documents.

17. Following Mr Gurr's evidence, counsel for the Secretary advised that the Secretary would not insist on Patrick O'Brien being cross-examined, provided that the funding issue could be addressed in written submissions. Counsel for the Secretary also sought confirmation that the concession that Mike O'Brien was a key person included a concession that he had been a key person at the time that Bluegrass applied for its licence. Counsel for Bluegrass declined to confirm the concession as sought but stated:

I think it goes further than the respondent's own evidence, which says if Mike O'Brien wasn't a key person in the beginning, he ended up being one. I just don't see what a big issue it is. But that's the concession. That during the period he was a key person. That's all the respondent needs. So I don't think to say that he was at the commencement of it is necessary or even available on the respondent's affidavit. But it doesn't matter at the end of the day.

In the light of that response, counsel for the Secretary did not require Patrick O'Brien to be cross-examined.

18. At the close of the hearing, counsel for Bluegrass raised the prospect of Bluegrass filing further affidavit evidence. Counsel for the Secretary indicated that receipt by the Commission of further affidavits would be opposed. A timetable was imposed under which the Appellant would serve any proposed further affidavits prior to the date for final submissions, so that their receipt could be addressed by the parties in their submissions.
19. Following the hearing, the Appellant filed a second affidavit by Mr Gurr and an affidavit of Roebyna Bak, its manager. As directed at the oral hearing, the parties filed and served their final submissions simultaneously. The submissions addressed the receipt of the affidavits as well as the substantive issues. Shortly thereafter, despite there being no timetable provision to do so, the Appellant filed submissions in reply.

Factual background

20. The Commission received, principally from the Secretary, a large number of contemporaneous documents. The affidavit evidence for Bluegrass explained and supplemented what appeared from those documents. This section summarises the facts which emerged from the affidavit evidence. In the light of the concession that Mike O'Brien was a key person of Bluegrass prior to his father's resignation as chairman and director, the account largely omits the matters which related to that issue solely:



- (a) Bluegrass was founded by Patrick O'Brien, who was the Chairman of Harness Racing New Zealand at the time. He was frustrated about the limited extent to which harness racing benefited from class 4 grants and established Bluegrass as a trust with an express authorised purpose of assisting harness racing. As a result, Bluegrass expressly prioritises grants to harness racing outside Auckland in the authorised purposes in its licence.
- (b) By application dated 2 June 2009, Bluegrass applied for a class 4 operator's licence, listing Patrick O'Brien, Kevin Coffey, William Monk and Douglas Owen as its key persons.
- (c) On 13 July 2009, Patrick O'Brien and Kevin Coffey executed acceptance of a South Canterbury Finance loan offer for \$232,000.
- (d) On 19 August 2009, Patrick O'Brien was interviewed by DIA, in the course of which he said that the initial finance for Bluegrass came from him, that Bluegrass had secured a loan offer from South Canterbury Finance but for only 80% of the funding needed, so he would have to advance the other 20% (approximately \$50,000) himself. He also said, in response to a question, that Mike O'Brien had no involvement in Bluegrass.
- (e) Patrick O'Brien deposed that, presumably sometime between 19 August and 9 September 2009, he talked to his wife about getting a bank loan for 100% of Bluegrass's requirements secured against the house, but she was reluctant. His sons were present during the discussion. The next day Mike O'Brien offered to lend him \$300,000 for Bluegrass.
- (f) On 9 and 10 September 2009, Mike O'Brien obtained loans of \$100,000 from each of Kaikoura Trotting Club, Nelson Harness Racing Club and Marlborough Racing Club. On 11 September 2009 Mike O'Brien advanced \$300,000 to Patrick O'Brien, who in turn advanced \$300,000 to Bluegrass. The Secretary produced a written loan agreement, dated 20 December 2009, between Patrick O'Brien and Bluegrass stating that the loan for \$300,000 was drawn down on or about 2 June 2009.
- (g) On 25 October 2009, in a DIA interview, Mike O'Brien said that the only current loans that he had from racing clubs were one from Hawkes Bay Racing Club and a combined loan from Westport Trots, Oamaru Trots, Gore Gallops and Kurow Gallops.
- (h) In December 2009, a meeting between Patrick O'Brien and the DIA's manager of licensing took place. Patrick O'Brien later said (in a 2011 interview with the



DIA) that, although he had told the DIA previously that Mike O'Brien had nothing to do with Bluegrass, it did not occur to him to tell the DIA, at the December 2009 meeting, that Bluegrass's funding had come from Mike O'Brien.

- (i) On 22 December 2009, Bluegrass was granted a 6 month class 4 operator's licence.
- (j) In late May and early June 2010, the racing club loans were repaid as follows:
 - (i) On 31 May 2010, Roebyna Bak, the manager of Bluegrass, wrote a personal cheque for \$100,000 to Mike O'Brien and, on the same day, Mike O'Brien wrote a cheque for \$100,000 to Kaikoura Trotting Club.
 - (ii) Patrick O'Brien deposed that, presumably sometime between 31 May 2010 and 16 June 2010, the CEO of Harness Racing NZ telephoned Patrick O'Brien advising him of a loan from Kaikoura Trotting Club to Mike O'Brien for \$100,000, that this was the first he knew of the source of the loan, that he rang Mike O'Brien, who told him about the loans from Nelson and Marlborough Trotting Clubs, and that he went straight to BNZ, borrowed \$300,000 against his house and paid Mike back.
 - (iii) In fact Patrick O'Brien paid \$100,000 to Roebyna Bak by cheque on 16 June 2010 and, on 20 June 2010, he paid \$100,000 to each of Nelson Harness Racing Club and Marlborough Racing Club.
- (k) In May 2011, Mr Gurr became a director of Bluegrass.
- (l) On 4 July 2011, the Secretary wrote to Bluegrass proposing to cancel the licence, and Bluegrass subsequently made submissions on the proposal.
- (m) On 3 November 2011, Patrick O'Brien had a voluntary interview with DIA in which he agreed that he had previously said that Mike O'Brien would have no involvement in the management of Bluegrass, but said that he (Patrick O'Brien) did not consider dealing with banks about finance and venues to be management.
- (n) On 3 July 2012, after Bluegrass made further submissions to the Secretary, the Secretary cancelled Bluegrass's licence.
- (o) In September 2012, Patrick O'Brien resigned as a director of Bluegrass and all other directors (except Mr Gurr) resigned during September and October 2012.



- (p) In or around October 2012, Mr Gurr became Chairman of the Bluegrass Trust and John Gurr (Mr Gurr's father), Don Morrison and Graham Neill were appointed as directors. Don Morrison agreed to appointment on condition that neither Patrick nor Mike O'Brien would continue to be involved in Bluegrass. Shortly afterwards, Mr Gurr told Roebyna Bak that Mike O'Brien was not to come onto the premises and she was not to have any contact with him in the professional sense.
- (q) The Secretary produced an email dated 12 November 2012, from Ray McIntyre (a person associated with another corporate society and with Sideline / 331 Bar, a Bluegrass venue) to Mike O'Brien in which Mr McIntyre said:
- approximately \$90,000 of donations from Sideline and Robbies Belfast had been made at Mr McIntyre's suggestion while the venues had been with Bluegrass.
 - Sideline Bar/331 was agreed as just a "hold" for Mr McIntyre until a licence came through.
 - Mr McIntyre would give Mike O'Brien plenty of warning for Belfast when it was needed to go across. "In the meantime, you can of course do whatever with the donations apart from what's requested here and there."
 - Mr McIntyre asked if Bluegrass had considered the possibility of employing or contracting with him to be the new venue liaison manager for work in Christchurch. In the alternative, he would appreciate being engaged to do more LCD upgrades if any could be justified.
- (r) In late December 2013, it came to Mr Gurr's attention that Roebyna Bak had continued to have "significant contact" with Mike O'Brien.

21. The Secretary also produced a number of emails between Mike O'Brien and Ray McIntyre. These included emails in which Mr O'Brien asked Mr McIntyre not to send mail to Bluegrass with Mr O'Brien's name on it but to send applications to the Chief Executive Officer of Bluegrass, Ms Bak, without Mr O'Brien's name on them and to fax a note to Mr O'Brien so that he could make sure they were looked after (emails dated 14 June 2012).

Relevant Law

22. The relevant provisions of the Gambling Act 2003 are as follows:

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,—



- (a) the gambling to which the application relates is class 4 gambling; and
- (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; and
- (f) the applicant is able to comply with applicable regulatory requirements; and
- (g) the applicant will minimise the risks of problem gambling; and
- (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and
- (i) there are no factors that are likely to detract from achieving the purpose of this Act; and
- (j) a key person is not a key person in relation to a class 4 venue licence held, or applied for, by the applicant (except in the case of a club that intends to operate gambling equipment on its own non-commercial premises, the New Zealand Racing Board, or a racing club).

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



58 Suspension or cancellation of class 4 operator's licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that –
- (a) any of the grounds in section 52 are no longer met; or
 - (b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules, and minimum standards; or
 - (c) the class 4 venue agreement is no longer consistent with ensuring compliance with this Act or the licence; or
 - (d) the corporate society supplied information that is materially false or misleading in its application for–
 - (i) a class 4 operator's licence; or
 - (ii) a renewal or an amendment of a class 4 operator's licence; or
 - (iii) a class 4 venue licence; or
 - (iv) a renewal or an amendment of a class 4 venue licence.
- (2) In deciding whether to suspend or cancel a class 4 operator's licence, the Secretary must take into account the matters in section 52.

59 Procedure for suspending, cancelling, or refusing to amend or renew class 4 operator's licence

....

- (5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society of,-
- (a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or
 - (b) for a refusal to amend or renew, the reason for the refusal.

61 Appeal to Gambling Commission regarding class 4 operator's licence

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- (3) The Gambling Commission—
- (a) may request any information from the corporate society or the Secretary; and
 - (b) is not bound to follow any formal procedure; and
 - (c) does not need to hold a hearing; and
 - (d) must consider any information provided by the corporate society or the Secretary.
- (4) The Gambling Commission may then—
- (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.

62 Consequence of appeal regarding class 4 operator's licence

....

- (2) A class 4 operator's licence remains in force until-
- (a) the expiry of the period for an appeal under section 61(2); or
 - (b) the outcome of an appeal, if the Appellant-
 - (i) appeals a refusal to renew or amend the licence under section 61(1)(c) or (d); or
 - (ii) appeals a decision to suspend or cancel the licence under section 61(1)(e).

113 Key persons must not be involved in certain activities or decisions

- (1) A key person in relation to a venue to which section 65(3) applies must not—
- (a) provide application forms for persons or groups in the community to complete in order to apply for grants of net proceeds from class 4 gambling; or
 - (b) be involved in decisions about, or in managing, the application or distribution of net proceeds from class 4 gambling conducted by a corporate society that operates at the venue (whether or not the net proceeds derive from that venue); or
 - (c) provide, or be involved in decisions about who will provide, to the corporate society that conducts class 4 gambling at the venue, goods or services other than services listed in the class 4 venue agreement; or
 - (d) provide, or be involved in decisions about who will provide, goods or services to recipients of grants of net proceeds from class 4 gambling conducted by a corporate society at the venue if the goods or services constitute at least part of the authorised purpose for which net proceeds were granted; or
 - (e) be involved in decisions about who will provide goods or services to recipients of grants of net proceeds from class 4 gambling conducted by a corporate society that operates at the venue (whether or not the net proceeds derive from that venue) if the goods or services constitute at least part of the authorised purpose for which net proceeds were granted.
- (2) A key person in relation to a venue who contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- (3) A key person in relation to an operator's licence or the holder of a class 4 operator's licence who knowingly allows a key person in relation to a venue to contravene this section commits an offence and is liable on conviction to a fine not exceeding \$10,000.

Summary of issues

23. The ultimate issue for the Commission is whether the licence should be cancelled under section 58 on one or more of the following grounds:
- (a) One of the section 52 grounds (suitability) is no longer met (section 58(1)(a));
 - (b) The Appellant has failed to comply with a requirement of the Act (section 58(1)(b));
 - (c) The Appellant supplied information that was materially false or misleading in its application for a class 4 operator's licence (section 58(1)(d)(i)).
24. The factual issues raised by these grounds for cancellation have changed in the course of the appeal:
- (a) The Secretary conceded that his original view that Bluegrass had breached section 118 was in error but subsequently argued that the evidence before the Commission established a breach of section 113, linked to the current board of



Bluegrass. The evidence consisted of the Section 113 Documents, a handwritten and typewritten version of a document, the former found among the papers of the current chairman, Mr Gurr, and the latter found among the Bluegrass office records.

- (b) Bluegrass conceded that Mike O'Brien had been a key person of Bluegrass until his father, Patrick O'Brien, resigned in 2012 and that it had neither shown him as a key person in its application nor applied under section 57(1)(d) to add him as a key person on its licence. In the light of that concession, it elected not to have Patrick O'Brien examined on his knowledge of how Bluegrass had been funded, leaving the Commission to draw its own conclusions on whether Patrick O'Brien had provided materially false or misleading information to the Secretary on that issue. Bluegrass did so on the basis that the appeal should be determined by whether the Commission was satisfied that, as a result of the changes which had taken place since Patrick O'Brien stepped down in 2012, cancellation was now an appropriate outcome.

25. As a result, the separate issues for determination are:

- (a) Is the Commission satisfied that the Secretary's investigation does not cause it not to be satisfied about the suitability of Bluegrass to hold a class 4 operator's licence or the suitability of Mr Gurr to be a key person of a class 4 operator? More specifically, does the profile of past compliance of Bluegrass or Mr Gurr include a breach of section 113 or an indication of a willingness to do so?
- (b) Is the Commission satisfied that Mike O'Brien is no longer a key person (the Secretary's dissatisfaction with his suitability not being challenged on the appeal)?
- (c) Does either the provision by Bluegrass of false information concerning Mike O'Brien's role in its licence application or, alternatively, its failure to apply subsequently to amend its licence to add him as a key person, justify cancellation of its licence?
- (d) Did Bluegrass supply false and misleading information in its application about how its operation would be funded?
- (e) If so, in the light of the changes in its operation since 2012, do these acts or omissions justify cancellation of its licence?



Burden of proof

26. Most of the issues carry no burden of proof. The Commission made this clear in the first of its procedural decisions in relation to this appeal, GC38/12, in which the Appellant had sought directions that the Secretary be required to prove a then alleged breach of section 118 (since withdrawn) beyond a reasonable doubt. The Commission rejected this approach, holding (at [26]):

... [The Commission's] jurisdiction is to confirm, vary, reverse or refer back with directions a decision to cancel the Appellant's licence on the basis of its consideration of all of the material before it. Such appeals involve no particular onus on either party and involve no presumption in relation to the correctness or otherwise of the decision under appeal.

27. On all but one issue, the question for the Commission is whether it is satisfied that the ground is established on the basis of the evidence before it on the balance of probabilities. Cancellation under section 58(1)(b), for example, requires the Commission to be satisfied on the balance of probabilities that Bluegrass failed to comply with a requirement of the Act.
28. The exception arises in relation to the issue of suitability. The Commission may confirm the cancellation under section 58(1)(a) (one of the grounds under s 52 no longer met) if it is not satisfied of a positive, namely that the Appellant and all key persons are suitable. This arises from the double negative in the relevant section 52 ground, 52(1)(h), which provides:

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 –

...

- (h) Any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); ...

29. The starting point is that there is no presumptive right to a licence; rather a licence cannot be granted unless the Secretary is satisfied of the suitability of the applicant and its key persons. The prohibition on granting a licence unless the Secretary is satisfied places the effective onus on the applicant to satisfy the Secretary in order to obtain a licence.
30. The wording of section 52 requires doubts about satisfaction of the section 52 requirements to be resolved in favour of refusal of the licence. In the Commission's view, a similar approach should be taken on an appeal against cancellation for non-satisfaction of the section 52 suitability requirement. For the requirement to be met, the Secretary must be satisfied. The Commission considers that, on an appeal, it should ask itself the same question: is it satisfied that the Secretary's investigations do not cause it not to be

satisfied about suitability? If not satisfied, it may confirm the cancellation on that ground alone.

31. Section 58(2) supports this approach. Section 58(2) requires the Secretary (or the Commission on appeal) to take into account the matters in section 52 when deciding whether to suspend or cancel a licence. As no longer meeting a section 52 ground is itself a discrete ground of cancellation (section 58(1)(a)), the function of section 58(2) is to guide the exercise of the discretion to suspend or cancel. Speaking generally, however, if section 52 grounds are not met, cancellation would be a potential consequence, consistent with the fact that no licence can be granted or renewed unless all section 52 grounds are met.
32. The manner in which section 52 is expressed also applies to an assessment (for the purpose of section 52(1)(h)) of whether or not someone is a key person. When the Secretary is considering whether or not he is satisfied that there are no concerns regarding the suitability of an applicant's key persons, this will necessarily entail satisfaction about who the key people are. If the circumstances suggest that a person may be a key person (who is not so named on the application) and the Secretary has concerns about that person's suitability, doubts about whether he or she is a key person should be resolved in the same way as doubts about suitability, namely against the applicant. Otherwise, section 52(1)(h) would set a lower threshold for named key persons only: the question of suitability would not arise in relation to suspected key persons unless it could be established to a higher standard that they were key persons. This would be inconsistent with the purpose of section 52(1)(h), which is to preclude the grant of a licence unless the Secretary is positively satisfied that there are no concerns about the suitability of "any key person".

Factors relevant to suitability

33. The issues regarding suitability raise the question of what may be taken into account in determining a class 4 society's or key person's suitability. Section 52(1)(h) provides:

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,—
-
- (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); (emphasis added).

34. Subsection (4) provides:

In determining whether an applicant is suitable for a class 4 operator's licence, the Secretary may investigate and take into account the following things:



- (a) whether the applicant or a key person has, within the last 10 years,—
 - (i) been convicted of a relevant offence;
 - (ii) held, or been a key person in relation to a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused;
 - (iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt; and
- (b) the financial position of the applicant and the credit history of the applicant and each key person; and
- (c) the profile of past compliance by the applicant and each key person with—
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
 - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and
 - (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.

35. In *Caversham Foundation Limited* (decision GC06/10), the Commission considered whether to interpret section 68, the equivalent venue licensing provision to section 52(4), restrictively, by strictly confining consideration of material affecting suitability to the matters listed in that provision, or more liberally, by treating section 68 as identifying relevant matters to which regard must be had without necessarily precluding other matters from being considered in the assessment. It concluded that the more liberal interpretation best fitted the overall scheme of the Act as it enabled the Secretary (or the Commission) to have regard to information which the Act required to be supplied in applications, such as information on the history, character and qualifications of venue managers, despite those not being expressly listed as factors relevant to suitability under section 68.

36. However, the Commission has since had occasion to reconsider that view in a decision given earlier this year. In its decision on an appeal by Phoenix Charitable Trust Limited (decision GC04/14), the Commission considered the correct approach to section 52(1)(h) and (4), and reached the contrary conclusion, namely that it was not necessary to interpret section 52(4) in a non-restrictive manner in order to use all of the information provided in applications, as explained in the following passage:

37. ... The reason is that the section 52 grounds are not discrete but often contain a large degree of overlap with other grounds. For example, matters affecting financial viability (section 52(1)(c)), maximising net proceeds and minimising operating costs (section 52(1)(d)), application or distribution of net proceeds for authorised purposes (section 52(1)(e)), and ability to comply with applicable regulatory requirements, which

include controls on expenses and distributions (section 52(1)(f)), are often highly interrelated. For that reason, matters such as lack of experience or a record of incompetent or non-compliant management would not necessarily fall to be considered either under section 52(1)(h) or not at all. Such matters could give rise to lack of satisfaction about financial viability, ability to achieve regulatory compliance, maximisation of proceeds, minimisation of costs and minimisation of problem gambling risks.

38. As a result, the Commission considers that it should limit its consideration of suitability under section 52(1)(h) to those matters listed in section 52(4). To the extent that there are matters that might otherwise affect suitability in a more generalised sense, they should be considered under other section 52 grounds.

37. The Commission went on to consider the proper evidential basis for identifying and taking into account the matters listed in section 52(4), especially if there were a dispute about them. By way of example, in that appeal (as in this one), there was a dispute whether a particular individual was a key person. The Commission posed the question:

39. ... In applying section 52, should the Commission proceed on the basis that it is for the Secretary to establish that he is a key person, or for the Appellant to establish that he not?

The Commission answered the question, as follows:

40. In the Commission's view, the answer lies in the opening words of section 52; namely that the licence application must be refused unless the Secretary is satisfied, in this case, about the suitability of the Appellant or "any key person". Satisfaction under section 52(1)(h) requires satisfaction about both the identity of all key persons and the suitability "in terms of subsection (4)" of each of them. It is not sufficient for an applicant to assert that someone is not a key person or is suitable and argue that its assertion must be accepted unless the contrary is proven. That is not an appropriate approach to the test of satisfaction. Satisfaction means that there is nothing that might arise under section 52 which results in something other than satisfaction. If there are doubts they are to be resolved by refusing the application.

38. The decision in GC04/14 was issued prior to the oral examination on 13 May 2014. Both parties addressed the decision on their final submissions following the oral examination.
39. The Appellant relied upon the Phoenix decision, in particular a passage immediately prior to that cited above to the effect that section 52 is a licensing provision, not a penal one, to support its case that the proper focus of section 52 is on the present and future, not the past, and that the Commission could be satisfied about the suitability of the Appellant because neither Mike O'Brien nor Patrick O'Brien were now involved in its operation. It did not address whether section 52(4) should be construed restrictively or not.
40. Only the Secretary addressed the latter point, urging the Commission to adopt a non-restrictive approach to section 52(4), so that it could take a broad range of factors into account in assessing suitability, not simply those listed in section 52(4). However, the submission presented no compelling reason to change the view expressed in the Phoenix

decision. The Commission accordingly proceeded on that basis, although all matters raised for its consideration appeared to fall with section 52(4) in any event.

Receipt of further evidence

41. As paragraph 19 above records, the Appellant filed further affidavit evidence after the oral examination on 13 May 2014. The evidence consisted of an affidavit of Roebyna Bak, the CEO of the Appellant, who had not provided any earlier evidence, and a second affidavit of Mr Gurr. Ms Bak deposed that Mike O'Brien currently had no role whatsoever in relation to the operation of Bluegrass and that she had had a significant falling out with him since the Serious Fraud Office searched her house and wanted nothing further to do with him. Mr Gurr addressed again Mike O'Brien's lack of involvement in Bluegrass, the section 113 Documents (in respect of which he had invoked the privilege against self-incrimination at his oral examination) and the consequences of cancellation.
42. Both parties addressed whether the further evidence should be received in their final submissions:
 - (a) The Appellant submitted that the affidavits should be received in the interests of justice, that, as the Commission's role was at least partly inquisitorial, the Commission should receive any material information, and that the affidavits were, in any event, "strictly in reply".
 - (b) The Secretary objected to their admission on the grounds that the timing was inappropriate and the veracity of the deponents was questionable. He submitted that all of the evidence should have been filed earlier in the course of the appeal, no later than the Appellant's reply evidence at the end of January 2014, that it was unfair to allow additional evidence after examination of the original deponents and that it was particularly objectionable to receive affidavit evidence on a topic on which the deponent had invoked privilege in order to avoid cross-examination.
43. The circumstances create a degree of conflict between section 61(3)(d), which provides that, when considering an appeal regarding a class 4 operator's licence, the Commission must consider any information provided by the corporate society or the Secretary, and the exercise of the Commission's power to regulate its own procedure as it thinks fit (section 234 and Schedule 3, clause 2(1)).
44. The Commission has issued a Practice Note setting out the required manner and timing of the receipt of information from parties to an appeal and, in the course of the appeal, made timetable directions for the filing of affidavit evidence. The last timetable required



the Appellant to file its initial evidence by 6 December 2013, for the Secretary to file its evidence by 14 January 2014, and for the Appellant to file any evidence in reply by 28 January 2014. It subsequently directed an oral examination of the Appellant's deponents, which provided an opportunity for supplementary evidence within the confines of that process.

45. The Commission considered that the requirements of natural justice and the need to protect its processes from abuse might require sensible limits to be placed on the obligation to consider any information from the corporate society and the Secretary. In this appeal, it has been generous in the opportunities that it offered to the Appellant to place factual material before it and the Appellant had notice that the Secretary had put in issue, in his evidence and submissions, the matters addressed in the further affidavit evidence, yet the Appellant elected not to file that evidence when given the opportunity to file affidavit evidence in reply. The Commission expects appellants to comply with its directions regarding the filing of evidence on appeals. It should not be assumed that the Commission will necessarily receive evidence outside of its timetable directions.
46. The Commission decided however to deal with the further evidence submitted on the basis that it would be received and that, after considering it, the Commission would decide whether any further directions, such as to provide an opportunity for the Secretary to file evidence in reply, were required in the interests of justice. Having regard to the view that it has taken of the weight to be accorded to the further evidence received, it has decided that no further directions are required.

Analysis

Application of section 58

47. Section 58(1) provides a series of alternative grounds for the imposition of either suspension or cancellation. The establishment of a ground merely gives rise to a discretion to suspend or cancel; it does not result in either outcome automatically. Section 58(2) provides guidance on the exercise of the discretion that arises from the establishment of one or more grounds, stipulating that the Commission must have regard to "the matters in section 52".
48. The Secretary argues that three of the possible four section 58(1) grounds are established. Of those, only the first (non-satisfaction of suitability) directly engages section 52. The other two (non-compliance and supply of false or misleading information) do not do so directly. Although in certain circumstances either past or current non-compliances or provision of false information could provide a basis for concluding that the grounds in section 52 are no longer met, it is by no means automatic. Past non-compliances do not invariably result in cancellation of licences.



49. The Appellant's case recognises this feature of the statute and it has ultimately chosen not to defend the historical aspects of the Secretary's case because it regards them as no longer supporting a cancellation outcome. For that reason, it has not resisted a finding on the source of the original funding or Mike O'Brien's status prior to September 2012 on the basis that those matters no longer create section 52 concerns because they are historical and, irrespective of the true historical position, cancellation is no longer justified.
50. The Commission agrees generally with the contention that the non-compliance ground alone would not usually provide a sufficient independent basis for cancellation unless the non-compliance gave rise to a section 52 concern, such as suitability.
51. While the connection between the matters in section 52 and the provision of false or misleading information is not as direct as for failure to meet the section 52 grounds, in the Commission's view, misleading information can support cancellation as a stand-alone ground, applying section 58(2). The false information is likely to have been provided in an endeavour to avoid non-satisfaction with a section 52 ground, resulting in the grant or renewal of a licence which would otherwise have been refused. The connection between the provision of false and misleading information in a licence application and the matters in section 52 therefore arises in two possible ways:
- (a) If the matter concealed remained current, later discovery that the information provided was false or misleading could lead to a finding that one or more section 52 grounds are not met. In that event, section 58(1)(d) would add nothing material because section 58(1)(a) would be engaged and the connection to the matters in section 52 would be direct and obvious.
 - (b) In other cases, circumstances may have changed since the original deception so that the deception covered up a **past** failure to meet the requirements of section 52, but that failure is no longer current. That is what the Appellant here argues.
52. The Appellant argues that the provision of false information in the past does not touch on current section 52 satisfaction, because of major changes to the organisation since the application. It says that the changes in funding, governance and key persons from 2012 mean that any false information previously provided to the DIA on those matters in the 2009 licence application no longer conceals a current problem under section 52, so that cancellation is not appropriate. The false information should, in those circumstances, be seen as an isolated historical incident, similar to an isolated past breach, which might be adequately addressed by a suspension.
53. The Commission considers that the provision of false information so affects the integrity of the licensing regime that cancellation may be appropriate even if the earlier provision of

false or misleading information no longer conceals a current section 52 failure. Treating the holding of a licence as the status quo capable of being lost only if the effect of false information had not been rectified would fail to recognise that a privilege had been improperly obtained, would not ensure that dishonest applicants were deprived of the benefits of their dishonesty, and would fail to provide an adequate incentive for honest and truthful applications.

54. Section 58(1)(a) directly engages “the matters in section 52”. It provides that the Secretary may cancel (or suspend) a licence if the Secretary is satisfied that any of the section 52 grounds are no longer met. Section 52, in turn, provides more than a list of grounds: it primarily creates an obligation by the Secretary to refuse applications for licences, unless he is satisfied on the information presented to him, of a number of listed matters.
55. Section 58(1)(a) gives rise to a discretion to cancel or suspend. Guidance on the exercise of the discretion is provided in section 58(2), which stipulates that the Secretary must “take into account the matters in section 52”. The broader formulation in section 58(2) (“take into account”), compared to section 58(1)(a) (“grounds in section 52 no longer met”), supports the view that, in deciding whether to cancel or suspend under section 58(1)(a), the Secretary must consider the whole of section 52 (including the fact that the Secretary must refuse an application where any section 52 ground is not met).
56. Whether the grounds in section 52 are still met involves satisfaction about a present and future state of affairs, albeit informed by past events. As a result, the primary issue is whether there is present satisfaction about the suitability of the Applicant and its key persons, which, in turn, makes relevant the profile of past compliance.
57. For the foregoing reasons, the Commission first addressed the issue of whether the suitability ground in section 52 was currently met and then considered whether Bluegrass had provided false or misleading information in its licence application and the effect of that finding.

Is the Commission satisfied that there is no reason not to be satisfied of the suitability of Appellant or Mr Gurr?

58. Of the potentially relevant factors in determining suitability set out in section 52(4), the sole relevant factor is that set out in section 54(c)(i) – the profile of compliance of the Appellant and each key person with the Act, minimum standards, game rules, Gazette notices, and licence conditions. Nothing in section 58(4)(a) or (b) has been put forward as relevant to the present assessment. The Commission is not in a position, and has not been asked, to find that there was a breach of section 113 for the purposes of conviction



for an offence. Its consideration is confined to assessment of the suitability criteria in section 52, insofar as non-satisfaction of a section 52 ground is a ground for appeal under section 58(1)(a).

59. The Secretary's original submissions relied on issues occurring during Patrick O'Brien's time as chairman of Bluegrass (misleading information in the application and alleged concealment of Mike O'Brien's involvement) as affecting the Appellant's suitability, in addition to the later issues raised by the section 113 Documents. Following the oral hearing and the Appellant's focus on the suitability of the Appellant under the governance of a new board and the chairmanship of Mr Gurr, the Secretary's submissions on suitability have focussed more closely on the suitability of the Appellant under its present management.
60. The primary focus has shifted accordingly to the Section 113 Documents. Although section 113 relates primarily to key persons of venues (providing that key persons in relation to venues must not be involved in decisions about the application of net proceeds of the gambling at their venues), it also affects class 4 operators. Under section 113(3), key persons in relation to a class 4 operator, and class 4 operators, must not knowingly allow a venue key person to contravene the section.
61. The potential personal criminal liability of Mr Gurr as a key person was the reason that the Commission raised with him his privilege to decline to answer questions which might incriminate him. Mr Gurr's election to exercise his privilege not to be examined on the note, including whether it was his writing and what it meant, is material in circumstances in which the Commission must ask itself whether it is satisfied about his suitability and that of the Appellant. The Appellant was on prior notice of the relevance of the Section 113 Documents to possible liability under section 113 from the Secretary's evidence and submissions on the point. As a result of Mr Gurr's election, the Commission had no opportunity to see and hear him speak about the matter and the Secretary had no opportunity to cross-examine him. This limited the Commission's opportunity to assess his credibility on the matter and affects the weight that it is prepared to give to his later affidavit evidence, and the plausibility of the explanation then offered.
62. The key passages of the Section 113 Documents are as follows:

Before you/we go there you need to understand the importance of our relationships with the venue operators and the need to keep them and their clients satisfied. Basically no venues/no Bluegrass.

....

So for our trust to survive it is important to maintain venues. This can only be achieved by looking at Patrons applications favourably.

i.e. Nelson Soccer & Basketball for Hardys Bar
 Belfast Rugby at Robbies
 SouthTrust & Ethnic festivals for Alamo.

There is only a slim chance of retaining Robbies but none if we fail to support their requests. But as I have spoken about before 50/50 is more than acceptable to us.

The Documents went on to describe how the budget is drawn up each year. Although the first priority is the needs of racing, mainly harness racing, "it takes into account patrons needs and budgets for directors' personal pet projects".

63. The Secretary contended that the passages indicated a disregard by Bluegrass and its directors for the required distance between a society's venues and the society's decisions about the application of net proceeds from class 4 gambling at the venue. The Secretary submitted that the Section 113 Documents, in combination with the grants shown on the Bluegrass website in the 18 months prior to 30 September 2013, establish a breach of section 113(3) on the balance of probabilities, and certainly showed a willingness to breach it.
64. In his further affidavit, Mr Gurr explains the Section 113 Documents as follows:
- (a) The handwritten version of the Section 113 Documents is in his handwriting and he would have prepared it in about November 2012.
 - (b) It is correct that the survival of Bluegrass depended on its relationship with its contracted venues.
 - (c) The reference to "looking at patrons applications favourably" is unfortunate. All he had meant was it was desirable to give priority to requests from community organisations in the area of the venues so that the local community benefited from net proceeds obtained from within the area.
65. In the Commission's view, the section 113 Documents (both handwritten and typed) clearly indicate that the society, by its current chairman, was open to being influenced by its venue operators about grant allocation and took the view that allowing venue operators to exercise influence over grants was necessary to its survival. The note clearly links grant recipients to identified venue operator requests, contrary to section 113. The evidence suggesting non-compliance with section 113 is relevant to the Appellant's profile of past compliance with the Act, and therefore to its suitability under section 52(1)(h).
66. The Commission does not find Mr Gurr's evidence to be sufficiently credible and compelling to remove doubts about the suitability of the Appellant (and Mr Gurr, as its chairman) arising from the Section 113 Documents. The Commission weighs the

subsequently offered explanation in the context of Mr Gurr's decision not to be examined orally in relation to the documents; the apparent history of dishonest dealing with the Secretary in relation to the funding of the society and the role of Mike O'Brien (albeit that these events pre-dated Mr Gurr's involvement); the documentary evidence indicating that Mike O'Brien covertly exercised influence over the society's grants and operation, through its current manager Ms Bak, even after Patrick O'Brien's departure and the appointment of new directors; and Mr Gurr's assumption of his current role (and the departure of the O'Briens) only after the licence had been cancelled. Accordingly, the Commission is not satisfied that the Secretary's investigations do not cause it not to be satisfied about the suitability of the Appellant or its key persons.

Is the Commission satisfied that Mike O'Brien is no longer a key person of Bluegrass?

67. The starting point is the statutory definition:

key person means,—

- (a) in relation to a class 4 operator's licence, a person who—
 - (i) is a trustee or other officer of a corporate society that is an applicant for, or holder of, a class 4 operator's licence:
 - (ii) is the chief executive (or performs that function) of a corporate society that is an applicant for, or holder of, a class 4 operator's licence:
 - (iii) exercises significant influence in the management of a corporate society that is an applicant for, or holder of, a class 4 operator's licence; ...

68. The affidavit evidence of Patrick O'Brien relates to the period from establishment to his resignation as chairman and director, and is to the effect that his son, Mike O'Brien, was never a key person and "had very little to do with the operation... at any level". The Appellant has subsequently conceded that Mike O'Brien was in fact a key person prior to September 2012, but maintains that he is no longer a key person.

69. Mr Gurr deposed as follows:

- (a) When he brought in new directors in October 2012, the directors made a unanimous decision to "ban" Mike O'Brien. This arose because one of the directors (Don Morrison) made it clear he would only take up the position if there were no involvement by either Patrick or Mike O'Brien.
- (b) He acknowledged that, shortly before swearing his original affidavit, he became aware that Mike O'Brien had subsequently had "significant contact" with Roebyna Bak but said that this does not amount to influence:

I stand by my previous evidence which is that at no time did I ever hold the view that Mike was a key person. As far as I have been concerned he has had no influence over the day to day running of the trust and nor has

he had any influence in the grant decision making process at Trust level, either directly or through Roebyna Bak. Roebyna does not sit on meetings when decisions are made regarding applications.

70. The Appellant put forward the following further evidence that Mike O'Brien is no longer involved as a key person:

- (a) The evidence of Mr Gurr on oral examination that Mike O'Brien had had no involvement in Bluegrass since the time of the SFO interview in late 2013.
- (b) The affidavit evidence of Ms Bak to the same effect.
- (c) Mr Gurr's oral evidence that, after the SFO interview, Mr Gurr severely reprimanded Ms Bak and he was "100% certain" that she no longer has any contact with Mike O'Brien.
- (d) Mr Gurr's evidence that net proceeds decisions were made by the net proceeds committee, and that neither Roebyna Bak nor Mike O'Brien have any influence over the committee.

The Secretary criticised the lack of independent evidence that Mike O'Brien was no longer involved; however, it was not clear what other evidence the Appellant or Mr Gurr could have put forward to establish a negative proposition and none was put to him in cross-examination.

71. The Secretary argued that the following matters provide reason for the Commission not to be satisfied that Mike O'Brien has not continued to be a key person after September 2012:

- (a) Mr Gurr accepted that, when he was a director, prior to becoming chairman, he had no knowledge that Mike O'Brien had anything to do with Bluegrass but Bluegrass now concedes that he was a key person.
- (b) Mr Gurr accepted that, when he became chairman, he relied on Roebyna Bak for matters such as compliance with the Gambling Act and that, unbeknown to him, Ms Bak in turn relied on Mike O'Brien.
- (c) Mike O'Brien's emails to Ray McIntyre showed that Mike O'Brien actively concealed his role in Bluegrass, for example, asking for his name not to be mentioned on correspondence with Ms Bak.
- (d) Mr Gurr acknowledged that Ms Bak continued to have contact with Mike O'Brien after the new board of directors decided (in late 2012) that Mike O'Brien was to have no involvement in the Appellant and Mr Gurr gave Ms Bak explicit instructions to that effect.

- (e) Mr Gurr acknowledged at the oral hearing that, beyond his instructions to Ms Bak, he had not taken any steps to ensure that Mike O'Brien was no longer involved (although, to be fair to him, it is not clear what steps he could have taken, and none were put to him).

These matters indicate that, on his own evidence, Mr Gurr's previous attempts to ensure Mike O'Brien's non-involvement were not successful and that his awareness about Mike O'Brien's past involvement did not correlate with Mr O'Brien's actual involvement.

72. The Commission considers that, having regard to past events, Mr Gurr's assurances fall short of providing it with the necessary satisfaction about Mike O'Brien's role. The documentary evidence indicated that Mike O'Brien had exercised influence during a period when Mr Gurr believed that he had no role or influence whatsoever. The email from Ray McIntyre of 12 November 2012, shows that both Mr McIntyre and Mike O'Brien considered that key decisions were made by him. It is also material that Mike O'Brien's key person role, now conceded, was deliberately covert, with efforts made to remove all traces of his influence from the society's documents. In those circumstances, the Commission is not inclined to place much faith in appearances (which is what Mr Gurr's evidence amounts to) nor in the affidavit of Ms Bak received after the oral hearing. The Commission is not satisfied that Mike O'Brien is not a key person and is not satisfied that he is suitable to be a key person.

Did Bluegrass provide false and misleading information in its application?

73. Section 58(1)(d) provides:

58 Suspension or cancellation of class 4 operator's licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that—

...

- (d) the corporate society supplied information that is materially false or misleading in its application for—

- (i) a class 4 operator's licence; or

74. The Secretary submitted that the Appellant provided false and misleading information in relation to whether Mike O'Brien was a key person and in relation to the source of its funding. The Secretary's case relied on false and misleading information provided at an interview with Patrick O'Brien as well as in the application material for the licence.

75. Neither party made submissions on whether a statement made in an interview is the provision of information in an application. Section 50 treats the application as the

application form itself, separate from information provided with the application. Thus, section 50(2) provides that an application must be on the relevant standard form and accompanied by other documents (such as the corporate society's governing document, and profiles of each key person). Section 50(3) provides that the Secretary "may return an incomplete application, and the accompanying documents". However, section 51 indicates that the application process is not limited to the form and accompanying documents as it imposes an obligation on the Secretary to investigate and specifically provides for the Secretary to require additional information.

76. The issue is whether the words "in its application" in section 58(1)(d) refer only to the application form provided for in section 50 or whether it extends to "further information relating to the application" which the Secretary may require under section 52(2)(a). The most literal reading would limit it to the former. A purposive reading would extend it to any further information required and to an obligation to correct previously provided information (which is essentially predictive in nature about the future operation after a licence is granted) if the position were to change prior to the issue of the licence. The Commission notes that section 54 imposes an obligation to notify changes to key persons after issue of the licence and, in the case of additions, there is an obligation to apply to amend the licence (s 57(i)(d)), whereupon section 52 applies to the application requiring refusal if the Secretary is not satisfied about the matters specified in section 52 (s 57(4)). The Commission's preference is for the more purposive reading; the alternative construction would make it inessential to provide correct information to the investigation by eliminating the consequence for not doing so.
77. There is no dispute that the initial funding for Bluegrass came from Mike O'Brien by way of a loan, which Mike O'Brien had in turn borrowed from three racing clubs (Kaikoura Trotting Club, Nelson Harness Racing Club, Marlborough Racing Club). Nor is there any dispute that, in his interview of 19 August 2009, Patrick O'Brien informed the DIA that he intended to fund Bluegrass through a loan from South Canterbury Finance and an advance of his personal funds and that Mike O'Brien had no involvement in Bluegrass.
78. The Appellant submitted that, when Patrick O'Brien provided information on funding to the DIA, the information was correct, because it was only after the interview that he decided against using the South Canterbury loan offer. Patrick O'Brien deposed that South Canterbury Finance required personal guarantees from the directors and, as he did not want to ask them to do this, he decided to advance the funds himself, using a bank loan with his house as security. However, his wife did not want him to raise a loan against their house. His son, Mike O'Brien, was present at the discussion, and the next day offered to lend his father \$300,000. Patrick O'Brien said that he assumed that his son had \$300,000 available, and did not ask him where it came from. He also said, in a 2011



interview with the DIA, that it did not occur to him to tell the DIA, at a subsequent meeting in December 2009, that he had not borrowed the funding from South Canterbury as he had said he would but from Mike O'Brien, although he had been questioned about the latter's involvement at the earlier interview.

79. Patrick O'Brien deposed that he did not know that Mike O'Brien had borrowed the money from three racing clubs as he had not asked about the source of the money. He found out what had happened only after he got a phone call from Harness Racing New Zealand inquiring about a \$100,000 loan to Mike O'Brien from Kaikoura Trotting Club and Mike O'Brien had told him that the three racing clubs were the source of the \$300,000 loan.
80. The Commission does not need to decide whether Patrick O'Brien knew, or was wilfully blind about, the source of the funds which he borrowed from Mike O'Brien for Bluegrass because it is not now disputed that he borrowed \$300,000 from Mike O'Brien and that Mike O'Brien was a key person but that he had told the Department that Mike O'Brien had nothing to do with Bluegrass and that the funding was from South Canterbury Finance and his own funds.
81. The Commission finds that Bluegrass supplied the following information that was materially false and misleading in its application for its class 4 operators licence:
- (a) It told the DIA that the necessary initial funding for its operation would be provided by South Canterbury Finance (as to 80%) with the balance provided by Patrick O'Brien personally.
 - (b) It also told the DIA that Mike O'Brien had nothing to do with Bluegrass.
 - (c) In fact its initial funding was provided through Mike O'Brien, ultimately sourced from three racing clubs.
 - (d) Even if Patrick O'Brien were not aware of the ultimate source of the funds, he certainly knew that he had obtained the funds from Mike O'Brien, and not from South Canterbury Finance as he told the DIA.
 - (e) If he had told the DIA that he had borrowed the funds from his son, the DIA is likely to have required Mike O'Brien to disclose the source of the funds and he would not have been able to mislead the DIA, as he did in his October 2009 interview, that he had given no financial assistance to his father and had borrowed no money from the three racing clubs.
82. It is unlikely that the Secretary would have granted the licence application if he had known either that the money had been advanced by Mike O'Brien or that its ultimate source was



three racing clubs. The Appellant obtained its licence by providing materially false and misleading information to the Secretary.

83. It is common ground that Mike O'Brien was not shown on the licence application as a key person and that Bluegrass did not subsequently apply to amend its licence by adding him as a key person at a later date. It now concedes that Mike O'Brien was a key person until September 2012, after the Secretary had cancelled Bluegrass's licence. As a result the Commission also finds that the Appellant failed to comply with the requirements of either section 51(2)(a), which applies to the application stage, or section 57(1)(d), which applies after the grant of a licence.

Discretion

84. The Commission has found that three grounds of section 58(1) are established, namely:
- (a) A ground of section 52, namely the suitability requirement in section 52(1)(h), is no longer met by Bluegrass (section 58(1)(a));
 - (b) Bluegrass failed to comply with the requirements of either section 51(2)(a) or section 57(1)(d) of the Act (section 58(1)(b)); and
 - (c) Bluegrass supplied materially false or misleading information in its application for its class 4 licence (section 58(1)(d)).
85. Once the Commission was satisfied that the grounds to exercise the discretion under section 58 to cancel or suspend Bluegrass's class 4 operator's licence existed, it considered whether to suspend or cancel the licence. In doing so, it has taken into account (as required by section 58(2)), the matters in section 52.
86. The first ground is a finding that Bluegrass no longer meets a requirement of section 52 which is essential to obtain or renew a class 4 operator's licence. Section 58 provides for the exercise of a discretion, in contrast to the non-discretionary outcome for licence applications and licences renewals. As set out in paragraph 55 above, section 58(2) requires the matters in section 52 to be taken into account when considering the exercise of the discretion to suspend or cancel a licence. If the Commission is satisfied that a section 52 factor is no longer met, a relevant consideration in relation to the discretion to cancel is, therefore, the fact that satisfaction about the section 52 factors is a pre-requisite to the grant or renewal of a licence. The mandatory nature of the section 52 factors in the grant or renewal of a licence is a factor in favour of cancellation in such cases.
87. In the present case, the discretion whether to cancel is also influenced by the fact that Bluegrass applied to renew its licence in June 2012, as it was required to do. While no



decision has been made on that application pending the outcome of this appeal, it is clear that, if the application had been determined, it would have been declined for failure to meet an essential requirement, namely satisfaction of the ground in section 52(1)(h). In these circumstances, the Commission considers that cancellation is the appropriate outcome in the light of the matters in section 52.

88. The second ground relates to the failure of Bluegrass either to list Mike O'Brien as a key person in its application or, in the alternative, to apply subsequently to amend its licence in that regard. The failure relates to identification of a key person. That identification is important because satisfaction with the suitability of all key persons is an essential requirement under section 52 to obtain or renew a class 4 operator's licence. While past breaches of statutory requirements do not necessarily result in cancellation, in this case the breach is sufficiently connected to the matters in section 52 (key person suitability, s 52(i)(h)) as to make cancellation the appropriate outcome.
89. The third ground relates in a similar way to the matters in section 52. The provision of false and misleading information about Mike O'Brien's role and the provision of the Appellant's initial funding through him resulted in the Appellant being granted a licence in circumstances in which the licence application is likely to have been refused if the true position had been known. Section 52 is such a critical element of the licensing regime that serious deterrent consequences are appropriate to ensure that applicants are not tempted to deceive the Secretary in discharging his role under section 52. Having regard to the nature of the deception in this case, the Commission considered that cancellation is appropriate to deprive Bluegrass of the licence which it obtained by deception and to deter other applicants from similar attempts in the future. The circumstances of the case illustrate that detection of this sort of deception is difficult and it is important therefore that the consequences following detection are sufficiently serious to prevent the operation of licensing regime being undermined by the provision of false or misleading information for the advantage of applicants.
90. The Commission considers that cancellation is the appropriate outcome of the grounds established, whether singularly or in combination.

Date on which cancellation takes effect

91. The Appellant requested that, in the event that it confirms the cancellation, the Commission defer the effect of its decision for a period of 10 working days in order to allow it to wind up its affairs in such a way as to maximise net proceeds. The Appellant relied on section 59(5)(a) as the basis for specifying the date on which cancellation is to take effect.



92. As the Secretary has pointed out, that provision relates to the exercise of the Secretary's power of cancellation, and does not apply to the Commission directly. As required by section 59(5)(a), the Secretary notified Bluegrass that the date that the cancellation would take effect was 15 working days after 3 July 2014. It did not take effect on that date because of the effect of section 62(2)(b)(ii), which provides that the licence remains in force until the outcome of an appeal.
93. On appeal, pursuant to section 61(4)(a), the Commission may confirm, vary or reverse the decision of the Secretary. As the decision of the Secretary under section 59(5)(a) is a decision to cancel the licence with effect from the notified date, the Commission considers that its powers under section 61(4)(a) include a power to vary the decision by notifying a new date from which the confirmed cancellation would take effect, notwithstanding the provision in section 62(2)(b)(ii) that the licence remains in effect until the outcome of that appeal. In that regard, while the effect of the latter provision is spent upon the outcome of the appeal, the date for cancellation may be extended by exercise of the power to vary in the appeal decision itself. The Commission is satisfied that it has the power to delay the effect of cancellation as sought.
94. The Appellant did not provide cogent evidence of the likely financial effect of cancellation until the affidavit of Mr Gurr after the oral examination. The evidence should have been provided earlier and, by not filing it until after Mr Gurr's examination, the Secretary was deprived of the opportunity to challenge that evidence by cross-examination or reply affidavit (as the Secretary opposed the receipt of any additional evidence after the examination).
95. However, the Secretary has filed a memorandum in opposition to Bluegrass's request, in which he argues that:
- (a) two years have passed since the cancellation decision was made;
 - (b) the Appellant has therefore had more than a reasonable period of time to prepare for the confirmation of the decision;
 - (c) the cancellation is the result of serious concerns about the Appellant's operation;
 - (d) the beneficiaries of grants will not suffer loss because none of the proceeds can be earmarked in advance for particular beneficiaries;
 - (e) in any event, the Secretary understands that the Appellant has already taken steps to sell its gaming machines and transfer its venues so the claimed loss is already mitigated; and



- (f) if that is not the case, any loss to Bluegrass would benefit the society which took over its machines and venues so that there would be no net loss to the community as a whole.

96. The Commission recognises the force of many of the points which the Secretary makes. However, while it is not satisfied about the suitability of the Appellant and its key people, those concerns do not create such a level of risk or urgency as to affect materially the public interest if the cancellation were delayed for 10 working days. On balance, the Commission has decided to fix the date of cancellation at 10 working days after its decision is given, as sought.

Decision

97. For the reasons set out above, the Commission confirms the decision of the Secretary to cancel the class 4 operator's licence of Bluegrass, and varies the decision by amending the date on which cancellation takes effect to **18 August 2014**.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

1st August 2014