

**IN THE MATTER** of the Gambling Act 2003

**AND** on appeals by **EFX HOLDINGS LIMITED AND FRANCIS XAVIER GARDINER**

**BEFORE THE GAMBLING COMMISSION**

Members: G L Reeves (Chief Gambling Commissioner)  
L M Hansen  
D C Matahaere-Atariki

Date of Decision: 13 March 2015

Date of Notification  
of Decision: 25 March 2015

**DECISION ON APPEALS BY EFX HOLDINGS LIMITED AND FRANCIS XAVIER GARDINER**

**Introduction**

1. EFX Holdings Limited ("**EFX**") and Francis Xavier Gardiner ("**Mr Gardiner**") (together referred to as the "**Appellants**") appealed, under section 77 of the Gambling Act 2003 (the "**Act**"), against a decision of the Secretary for Internal Affairs (the "**Secretary**") to cancel the class 4 venue licence for the Star Hotel, Kawakawa. As the appeals involved the same parties, premises and allegations, the Commission heard them together.

**The Gambling Act 2003 and Regulations**

2. The key sections of the Act relevant to these appeals are as follows:

**Gambling Act**

**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—
  - ...
    - (c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 68, to supervise—
      - (i) the conduct of class 4 gambling at the venue; and
      - (ii) venue personnel; and
    - (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and

**68 Determining suitability for class 4 venue licence**

- (1) In determining whether a key person is a suitable person for the purpose of sections 66 and 67, the Secretary may investigate and take into account the following things:
- (a) whether he, she, or it has, within the last 7 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:
    - (iv) been a director of a company that has been placed in receivership or put into liquidation, and been involved in the events leading to the company being placed in receivership or put into liquidation:
    - (v) been prohibited or disqualified from acting as a director or promoter of, or in any way, whether directly or indirectly, being concerned or taking part in the management of, a company under section 382, 383, or 385 of the Companies Act 1993:
    - (vi) been prohibited from acting as a director or directly or indirectly being concerned, or taking part, in the management of a company under section 299 of the Insolvency Act 2006:
  - (b) the financial position and the credit history of the key person:
  - (c) the profile of past compliance by the key person with—
    - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
    - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and
    - (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
    - (iv) a licence or a site approval issued under a previous gaming Act.
- (2) The Secretary may take into account matters of a similar nature to those listed in subsection (1) that occurred outside New Zealand.

**74 Suspension or cancellation of class 4 venue licence**

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—
- (a) any of the grounds in section 67 are no longer met; or
- 2) In deciding whether to suspend or cancel a class 4 venue licence, the Secretary must take into account the matters in section 67.

**76 Consequences of suspension, cancellation, or refusal to amend or renew class 4 venue licence**

- (1) The suspension or cancellation of, or refusal to amend or renew, a class 4 venue licence does not affect—
- (a) the obligation of the corporate society to apply or distribute the net proceeds from the class 4 gambling in accordance with this Act and the licence; and
  - (b) any condition added to the licence by the Secretary relating to records that must be maintained and reporting requirements.

- (2) The Secretary may decide to withdraw a suspension before the end of the suspension period if the reasons for the suspension are resolved to the satisfaction of the Secretary.
- (3) The Secretary may decide to cancel a suspended licence at the end of the suspension period if the reasons for the suspension are not resolved to the satisfaction of the Secretary.
- (4) Section 75(5) and (6) apply to the cancellation of a suspended licence.
- (5) Subject to section 78, a licence that is suspended or cancelled or refused to be renewed or amended remains in force or unchanged (as the case may be) until the period for making an appeal expires.
- (6) A corporate society is not entitled to a refund of fees, taxes, or levies paid in relation to class 4 gambling if the Secretary suspends, cancels, or refuses to amend or renew its class 4 venue licence.

#### **77 Appeal to Gambling Commission regarding class 4 venue licence**

- (1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—
  - (a) refuse to grant a class 4 venue licence to the corporate society; or
  - (b) amend or revoke a condition of the licence, or add a new condition to it; or
  - (c) refuse an application by the corporate society for the renewal of a class 4 venue licence; or
  - (d) refuse to amend a class 4 venue licence held by the corporate society; or
  - (e) suspend or cancel a class 4 venue licence held by the corporate society.
- (2) An appeal must be in writing and must be made within—
  - (a) 15 working days after the date of the notice of the Secretary's decision; or
  - (b) any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in paragraph (a).
- (3) The Gambling Commission—
  - (a) may request any information from the corporate society or the parties to the agreement or the venue manager 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 parties to the venue agreement, and the venue manager and the Secretary.
- (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.
- (5) The Gambling Commission must give notice of its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

#### **78 Consequences of appeal regarding class 4 venue licence**

- (1) The conditions of a class 4 venue licence remain unchanged pending the outcome of an appeal if the appellant appeals an amendment or revocation of a condition or the addition of a new condition under section 77(1)(b).
- (2) A class 4 venue licence remains in force until—
  - (a) the expiry of the period for an appeal under section 77(2); or
  - (b) the outcome of an appeal, if the appellant—
    - (i) appeals a refusal to renew or amend the licence under section 77(1)(c) or (d); or
    - (ii) appeals a decision to suspend or cancel the licence under section 77(1)(e).

**104 Gaming machine profits must be banked**

- (1) A venue manager must bank all gaming machine profits from class 4 gambling directly into a dedicated account for gaming machine profits specified by, and in the name of, the holder of the class 4 operator's licence at a registered bank in New Zealand.
- (2) The venue manager must bank the gaming machine profits within the time frame specified in regulations made under section 371 or, if no time frame is specified, as soon as reasonably practicable.
- (3) If a venue manager contravenes subsection (1) or (2), the holder of the class 4 operator's licence—
  - (a) must advise the Secretary of the contravention as soon as possible after becoming aware of the contravention; and
  - (b) must immediately—
    - (i) take steps to disable all gaming machines at the class 4 venue and advise the Secretary of the disablement; or
    - (ii) request the Secretary to disable all gaming machines at the class 4 venue by means of the electronic monitoring system; and
  - (c) must not subsequently enable, or if paragraph (b)(ii) applies, request the Secretary to enable, the gaming machines at the class 4 venue until the gaming machine profits have been banked in accordance with subsection (1).
- (4) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$5,000.
- (5) In this section and sections 105 and 105A, **gaming machine profits** means the turnover of class 4 gambling minus the total prizes paid.

3. A "key person" in relation to a venue is defined in section 4 of the Act:

**4 Interpretation**

**key person** means,—

in relation to a class 4 venue licence,—

- (i) a venue manager;
- (ii) venue personnel;
- (iii) a venue operator;
- (iv) a person who is a director, chief executive, or senior manager of a venue operator;

4. Clause 4 of the Gambling (Class 4 Banking) Regulations 2006 provides as follows:

**Regulations****4 Banking of gaming machine profits**

For the purposes of section 104 of the Act, a venue manager must bank all gaming machine profits within 5 working days beginning on the day that the profits are, or ought to be, calculated.

**Background**

5. On 31 October 2014, the Secretary cancelled the class 4 venue licence for the Star Hotel pursuant to section 74(1)(a) of the Act. The Secretary cancelled the licence following 18 instances of "late banking" of gaming machine profits ("**GMP**") between April 2014 and October 2014. The late bankings were in breach of section 104 of the Act and clause 4 of the Gambling (Class 4 Banking) Regulations 2006. As such, the Secretary was not satisfied that:

- (a) Mr Gardiner, as the venue manager of the Star Hotel, is suitable to supervise the conduct of class 4 gambling at the venue, and its personnel (section 67(1)(c) of the Act); and
- (b) EFX, as the venue operator of the Star Hotel, is suitable to be a key person in relation to the class 4 venue licence (section 67(1)(d) of the Act).
6. On 18 November 2014, the Appellants appealed the Secretary's decision to the Gambling Commission.
7. Following receipt of the notices of appeal, the Commission, in accordance with its standard notified procedure, requested from the Secretary a copy of all material relevant to the appeals. The Secretary provided the information on 3 December 2014.
8. On 4 December 2014, the Commission wrote to the Appellants, notifying them of the need to file their submissions and evidence within 20 working days (namely, by 12 January 2015). The Commission did not receive any evidence or submissions but, on 12 January 2015, it was copied into an email from Pub Charity (the corporate society authorised to conduct class 4 gambling at the Star Hotel) to the Secretary which stated as follows:
- Has Frank Gardiner advised you that he intends to 'walk out' of the premises on Jan 26th and hand it back to the landlord? I assume he also intends to withdraw his appeal.
9. Having received no communication from the Appellants, the Commission first contacted the Secretary's Department, the Department of Internal Affairs ("DIA"), on 19 January 2015 to enquire whether the Appellants had provided any indication whether they were withdrawing or continuing with their appeals. The DIA advised that it had had no relevant contact with the Appellants.
10. On 20 January 2015, the Commission emailed the Appellants to clarify whether they were continuing with their appeals. The Commission's email advised, *inter alia*, that, as the Appellants had already breached the timetable for the filing of evidence and submissions, if they failed to file any material to support the appeals, "it is possible that the Commission will ... dismiss the appeals at its meeting on 13 February 2015." The Commission received no response from the Appellants.
11. On 27 January 2015, the Commission emailed the Appellants again, seeking clarification whether they were intending to continue with their appeals.
12. The Appellants responded on 29 January 2015, stating that they had been "busy with the handover of the Hotel," but did not address whether they were intending to proceed with the appeals. The Commission responded to the Appellants on 29 January 2015 seeking further clarification, but received no response.



13. On 3 February 2015, the Commission again emailed the Appellants regarding their appeals. In doing so the Commission cautioned the Appellants that, unless they filed supporting material, or sought an extension of time to do so, "there is a real possibility that the Commission will dismiss both appeals." The Commission received a response later that day. The Appellants stated that they were intending to continue with their appeals, but they did not seek an extension of time or otherwise indicate when they intended to file evidence and submissions. The Appellants also stated that they would provide the Commission with a medical certificate relating to Mr Gardiner's health (which the Commission subsequently received).
14. On 4 February 2015, the Commission emailed the Appellants, asking when they would file their evidence and submissions, and in particular, whether the Appellants could file their documents within 10 working days. The Commission received no response.
15. On 9 February 2015, the Commission received a Memorandum from the Secretary, together with an affidavit of Richard Mead in support. The Memorandum submitted that, since the Secretary's decision to cancel the venue licence for the Star Hotel, the Appellants had late banked gaming machine profits on three further occasions; namely for the weeks ending 30 November 2014, 11 January 2015 and 23 January 2015, and invited the Commission to dismiss the appeals at its meeting on 13 February 2015. Mr Mead's affidavit provided evidence of the additional late bankings.
16. By email dated 11 February 2015, the Commission wrote to the Appellants and the Secretary to inform them that the Commission would consider the appeals at its meeting on 13 February 2015, as follows:

Dear All

The purpose of this email is to advise that the Commission will consider these appeals at its meeting this Friday, 13 February 2015. In its deliberations, the Commission will consider all material filed to date, together with any material filed between now and Friday. Should the Appellants have evidence or submissions that they wish the Commission to consider, they should ensure that it is filed before Friday.
17. Nothing further was received prior to 13 February 2015, when the Commission considered the appeals.
18. On 16 February 2015, the Appellants responded to the Commission's email dated 11 February 2015. They stated that they wanted to participate in the appeal process, and that Mr Gardiner has been receiving treatment for a medical condition.
19. On 17 February 2015, the Commission wrote to the Appellants to inform them of the outcome of the Commission's consideration. The Commission's letter in full is as follows:
  1. Following the failure of the Appellants to file and serve evidence and submissions in support of the appeals when initially directed to do so, the



Gambling Commission has recently communicated with you on a number of occasions in an endeavour to confirm whether you wished to continue with your appeals and, if so, when you would file your supporting evidence and submissions.

2. By emails dated 3 February 2015 and 16 February 2015, you informed the Commission that the appeals would be pursued but you failed to advise when the supporting documents would be filed and served.
  3. On 9 February 2015, the Secretary for Internal Affairs filed a memorandum and affidavit inviting the Commission to dismiss the appeals at its meeting on 13 February 2015. In light of the request, the Commission wrote to you by email dated 11 February 2015 "to advise that [it] would consider these appeals at its meeting [on] Friday, 13 February 2015." The email noted that the Commission would consider all material filed to that point, together with any new material filed before the Commission meeting. No new information was received from you, whether by way of material to support the appeals or to persuade the Commission to delay the substantive consideration of the appeals.
  4. The Commission considered the appeals for the first time at its meeting on 13 February 2015. The Commission decided not to dismiss the appeals as the Secretary sought, but instead to adjourn them to its next meeting on 13 March 2015 in order to allow the Appellants one final opportunity to present material in support of the appeals.
  5. If you take up the opportunity offered, you are asked to address, in your evidence and submissions, the following matters, in addition to any general submissions or evidence which you wish to submit:
    - (a) the late bankings alleged by the Secretary, including any late bankings that have taken place following the Secretary's decision to cancel the class 4 venue licence for the Star Hotel;
    - (b) whether the Appellants are still operating the Star Hotel (as this point is not clear from your email communications); and
    - (c) full details of Mr Gardiner's health issues.
  6. In order to allow the Secretary the opportunity to respond prior to the hearing on 13 March 2015, the Appellants' submissions and evidence must be received by the close of business on **3 March 2015**.
  7. The Commission wants to make it quite clear that, if material in support of the appeals is not filed within the stipulated time, the appeals are unlikely to succeed and the Secretary's decision is likely to be confirmed on 13 March 2015.
20. The Appellants did not file any evidence or submissions by 3 March 2015 or at any time before the Commission considered the appeals on 13 March 2015.
  21. On 10 March 2015, the Secretary informed the Commission of a further instance of late banking by the Appellants; the late banking was for the week ending 30 January 2015.
  22. On 11 March 2015, the Commission received two emails from the Appellants. Both emails were directed to the Secretary and sought information not directly relevant to the appeals under the Official Information Act 1982. Neither email indicated that the Appellants would be filing evidence or submissions in relation to these appeals.



### Analysis

23. The Appellants appealed against the Secretary's decision to cancel the class 4 venue licence for the Star Hotel in Kawakawa. The Commission sought submissions and evidence in accordance with its standard procedure, but the Appellants failed to file anything to support their appeals, despite numerous invitations from the Commission to do so.
24. The uncontradicted information before the Commission is that 22 separate instances of late banking of GMP occurred between April 2014 and January 2015, in breach of section 104 of the Act and clause 4 of the Gambling (Class 4 Banking) Regulations 2006. In the light of the history of repeated late bankings, the Commission is not satisfied that either Mr Gardiner or EFX are suitable to be key people in relation to the class 4 venue licence for the Star Hotel. As a result, like the Secretary, it is not satisfied that the grounds in sections 67(1)(c) and (d) of the Act are met.
25. The finding of non-satisfaction that the section 67 grounds are met is a ground, pursuant to section 74(1)(a), to suspend or cancel the relevant class 4 venue licence. In exercising its discretion whether to exercise the power of suspension or cancellation, the Commission (on appeal) must take into account the matters in section 67 (section 74(2)).
26. If a section 67 ground is no longer met, an essential matter for the grant or renewal of a licence is absent (see sections 67 and 72(4)). Taking the matters in section 67 into account would therefore include having regard to the fact that the Secretary is required to refuse such an application when he is not satisfied of all of the section 67 grounds. This consideration tends to support a conclusion that, if the Secretary or Commission were no longer satisfied of one or more of those grounds, the licence should not continue but rather should be cancelled.
27. The result is not automatic and there may be countervailing considerations but, in this case, the Appellants have put forward no basis for the Commission to reach a contrary conclusion. The basis for the Secretary's original decision is, if anything, strengthened by the additional instances of last banking which occurred since the Secretary's decision, the indication that Mr Gardiner suffers from health issues for which no details have been provided, and that it is even unclear whether the Appellants still occupy the premises. The obligation to bank GMP is an important one, aimed at ensuring that the community obtains the intended benefit of the permitted gambling activity.
28. In the Commission's view, on the basis of the information before it, cancellation of the class 4 venue licence for the Star Hotel is an appropriate remedial step, to remove a

licence from a venue which no longer meets the required standard to hold one, in circumstances where the public interest strongly favours the Appellants ceasing to have responsibility for the management of the class 4 venue and for the banking of GMP.

### Decision

29. The Commission confirms the decision of the Secretary to cancel the class 4 venue licence for the Star Hotel, Kawakawa, under section 74(1)(a) of the Act.



Graeme Reeves  
Chief Gambling Commissioner  
for and on behalf of the Gambling Commission



25 March 2015