GC10/24

IN THE MATTER of the Gambling Act 2003

AND an appeal by **BLUE WATER COMMUNITY TRUST** against refusal of class 4 venue licence application for class 4 venue licence for the **TRIDENT TAVERN**

BEFORE THE GAMBLING COMMISSION

Members:	S W Hughes KC (Chief Gambling Commissioner) S C L Pearson W A Acton S T Shaw C M Risk
Date of Appeal:	27 May 2024
Date of Decision:	9 August 2024
Date of Notification of Decision:	22 August 2024

DECISION ON AN APPEAL BY BLUE WATER COMMUNITY TRUST AGAINST REFUSAL OF APPLICATION TO AMEND CLASS 4 VENUE LICENCE FOR THE TRIDENT TAVERN

Introduction

1. Blue Waters Community Trust ("**Appellant**") appealed to the Gambling Commission ("**Commission**") against a decision by the Secretary for Internal Affairs ("**Secretary**") refusing to amend the Appellant's class 4 venue licence, specifically in respect of the address at which the Trident Tavern in Onehunga ("**Venue**") would operate.

Background to Appeal

2. The Venue is presently a tavern at 69 Selwyn St, Onehunga, Auckland. A class 4 venue licence has been held since before 17 October 2001 for gaming machines to be operated at the Venue. The Venue licence is held by the Appellant.

3. In July 2013, Auckland Council adopted what it calls its Class 4 Gambling (Pokie) Venue Policy, as required by the Gambling Act 2003 ("**Act**", all statutory references are to this Act unless otherwise stated). Under its policy, Auckland Council will not grant consent to establish any new class 4 gambling venue or to relocate of any existing venue. This is known as a "sinking lid" policy.

4. On 15 June 2023, the Appellant lodged a GC4A application to amend the Venue's address from 69 Selwyn Street to 190 Onehunga Mall and to replace the Venue's existing floor plan with the proposed floor plan at 190 Onehunga Mall. The application was made with reference to *ILT Foundation v The Secretary for Internal Affairs*[1] ("***Waikiwi***"), a decision of the High Court which held that the terms "venue" and "place" under the Act are distinct, with a "venue" capable of acquiring a new "place" while remaining the same "venue", provided that four criteria were met. The effect of the *Waikiwi* decision was to treat sufficiently minor site movements as continuing to remain the same venue, such that territorial authority consent was not required and local sinking lid policies had no effect.

5. The application was accompanied by a letter which set out that the four criteria from *Waikiwi* would be met; a floor plan for the new site; and an agreement to lease for the new premises. The covering email invited inspectors from the Department of Internal Affairs ("**Department**") to visit the new site on 20 June 2023.

6. On 31 July 2023, the Department advised the Appellant that applications for *Waikiwi* movements were being paused, pending the outcome of a judicial challenge to the continuing application of the *Waikiwi* decision brought in the High Court by Feed Families Not Pokies Aotearoa Incorporated ("***FFNPA***"). However, on 9 August 2023, the Department revised its position and advised the Appellant that its application for relocation would resume being processed under the *Waikiwi* precedent.

7. On 21 August 2023, the Appellant applied for an alcohol on-licence for the new site.

8. On 24 August 2023, the Secretary sent an email to the wider class 4 gambling industry advising that applications for *Waikiwi* movements made prior to 21 September 2023 would continue to be processed.

9. On 1 September 2023, Department staff visited both the old and the new sites. On 22 September 2023, Craig Holmes, a Gambling Regulator, reported to Lisa Vuong, Manager of Operations in Wellington, that, in his assessment, the proposed move would satisfy the *Waikiwi* criteria. On 25 September 2023, Mr Holmes's report was reviewed and approved by Ms Vuong.

10. On 29 September 2023, the Department advised the Appellant that it considered that the proposed relocation would satisfy the four *Waikiwi* criteria. However, the Department also advised that it required further information prior to approving and issuing an amended licence being: the date that the gaming machines would cease operating at the Venue's

[1] [2013] NZHC 1330.

original site; the date that the Venue would commence class 4 gambling at the new site; and a copy of the Venue's on-licence for the new site.

11. On 19 February 2024, the High Court released its decision in *Feed Families Not Pokies Aotearoa Incorporated v Secretary for Internal Affairs*[2] ("***FFNPA* decision**"), declaring that minor *Waikiwi* movements were relocations (meaning the replacement of one venue with another), under the Act as amended in September 2013. As a consequence, all relocations since September 2013 required territorial local authority consent. However the *FFNPA* decision preserved as unaffected, for the time being, venue licences which had already been amended in reliance on the *Waikiwi* decision.

12. On 1 March 2024, the Appellant informed the Department that the gaming machines would be relocated on, and operated at the new site from 25 March 2024 and provided a copy of the alcohol on-licence for the new site. The Secretary proposed, by letter dated 21 March 2024, to refuse to amend the Appellant's class 4 venue licence, advising that in the *FFNPA* decision, the High Court had declared that *Waikiwi* movements were relocations, such that territorial authority consent was required to amend the place at which class 4 gambling would operate. The Secretary gave the Appellant 20 working days to make written submissions on his proposal.

13. On 9 May 2024, the Appellant made submissions opposing the Secretary's proposal to refuse. On 27 May 2024, by decision letter (erroneously dated 21 March 2024), the Secretary refused the application to amend the class 4 venue licence. The Appellant filed a notice of appeal to the Commission the same day.

Decision under appeal

14. On 27 May 2024, the Secretary notified a decision to refuse the application to amend the Appellant's class 4 venue licence. The letter advised that the reason for the refusal was that the *FFNPA* decision had declared that, since September 2013, *Waikiwi* movements required territorial authority consent to amend the class 4 venue licence. As the Appellant had not provided evidence of the relevant territorial authority consent, the Secretary was required, under sections 73(5)(b) and 67(1)(f), to refuse the application to amend the licence.

Relevant legislation

15. The following provisions of the Act relevantly cover the process and requirements for amending a class 4 venue licence:

[2] [2024] NZHC 217.

65 Application for class 4 venue licence

…

(2) An application must be on the relevant standard form and be accompanied by—

(a) a description of the venue and its location; and

(b) a territorial authority consent if required under section 98; and

…

(d) a statement by the applicant of how it proposes to minimise the risk of problem gambling and underage gambling at the class 4 venue

…

(j) evidence that the class 4 venue is not to be used mainly for operating gaming machines; and

…

(l) evidence that the venue is suitable in all other respects to be a class 4 venue.

…

(5) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.

(6) The Secretary may request from the applicant any further information that the Secretary considers necessary to consider the application properly.

67 Grounds for granting class 4 venue licence

(1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—

…

(b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimised; and

…

(f) the territorial authority has provided a consent (if required under section 98); and

….

(k) the class 4 venue is not used mainly for operating gaming machines; and

…

(p) the risk of problem gambling at the class 4 venue is minimised; and

(q) the proposed venue is suitable in all other respects to be a class 4 venue; and

(r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

(s) the applicant is able to comply with all other applicable regulatory requirements.

69A Continuing obligations of corporate society in relation to class 4 venue licence

A corporate society that holds a class 4 venue licence must, in relation to class 4 gambling conducted at the class 4 venue for which the licence is held, ensure that, at all times,—

(a) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimised; and

…

(e) the venue is not used mainly for operating gaming machines; and

….

(g) the risk of problem gambling is minimised.

73 Amending class 4 venue licence

(1) A corporate society must apply to the Secretary to amend its class 4 venue licence if the corporate society proposes to—

…

(c) change any condition of the licence or any procedure that is a condition of the licence.

(2) An application must be on the relevant standard form and be accompanied by any items listed in section 65 that the Secretary requests in order to consider the application and effect the amendment.

(3) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant

(4) Sections 66 and 67 apply to an application for amendment as if it were an application for a class 4 venue licence.

(5) The Secretary must refuse to amend a class 4 venue licence if—

…

(b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67; or

(c) the Secretary is not satisfied that the applicant complies with section 69A; …

…

16. In September 2013, section 97A came into force. It allows for relocations under the Act and relevantly provides:

97A Effect of relocation

(1) This section applies when—

(a) a territorial authority has adopted a relocation policy (as defined in section 101(5)); and

> (b) in accordance with that policy, the territorial authority grants consent in respect of a venue (the new venue) to replace an existing venue (the old venue); and
>
> (c) a new class 4 venue licence is granted in respect of the new venue.
>
> (2) When this section applies,—
>
> (a) the Secretary must cancel the class 4 venue licence that relates to the old venue, in which case—
>
> (i) the cancellation takes effect on the date on which the new class 4 venue licence takes effect; and
>
> (ii) there is no right of appeal against the cancellation; and
>
> …

17. Section 101 (following amendment in 2013) requires territorial authorities to adopt class 4 venue policies, which may include relocation policies, having regard to the social impact of gambling within their districts as follows:

> **101 Territorial authority must adopt class 4 venue policy**
>
> (1) A territorial authority must, within 6 months after the commencement of this section, adopt a policy on class 4 venues.
>
> (2) In adopting a policy, the territorial authority must have regard to the social impact of gambling within the territorial authority district.
>
> (3) The policy—
>
> …
>
> (c) may include a relocation policy.
>
> (4) In determining its policy on whether class 4 venues may be established in the territorial authority district, where any venue may be located, and any restrictions on the maximum number of gaming machines that may be operated at venues, the territorial authority may have regard to any relevant matters, including:
>
> (a) the characteristics of the district and parts of the district:
>
> …
>
> (d) the cumulative effects of additional opportunities for gambling in the district:
>
> …
>
> (5) A **relocation policy** is a policy setting out if and when the territorial authority will grant consent in respect of a venue within its district where the venue is intended to replace an existing venue (within the district) to which a class 4 venue licence applies (in which case section 97A applies).

18. Section 102 requires each territorial authority to review its class 4 venue policy every 3 years and, on the next review after the commencement of the Gambling Harm Reduction Amendment Act 2013, which added provision for relocation policies, to consider specifically the inclusion of a relocation policy having regard to the social impact of gambling on high-deprivation communities within the district.

19. Section 67(1)(f) refers to the requirement for satisfaction that territorial authority consent has been obtained if required by section 98, which relevantly provides:

> **98 When territorial authority consent required**
>
> A territorial authority consent is required in the following circumstances:
>
> ….
>
> (c) if a corporate society proposes, in accordance with a relocation policy of the territorial authority, to change the venue to which a class 4 venue licence currently applies.

20. The following provisions concern continuity of gambling operations at class 4 venues:

> **71 Significant changes in relation to class 4 venue licence must be notified**
>
> (1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur: —
>
> …
>
> (f) the nature of the class 4 venue changes;
>
> (g) the corporate society has not conducted class 4 gambling at the venue for a period of more than 4 weeks (in which case the class 4 venue licence must be surrendered, under s 79(1)(a), unless the Secretary agrees that the venue may remain inactive for a further specified period).
>
> …
>
> **79 Surrender of class 4 venue licence**
>
> (1) A corporate society —
>
> (a) must surrender a class 4 venue licence to the Secretary in the circumstances described in section 71(1)(g)

21. Section 80 provides that class 4 licences are not transferrable.

22. An appeal to the Commission against a decision by the Secretary to refuse to amend a class 4 venue licence is relevantly provided for by section 77, as follows:

> **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—
>
> …
>
> (d) refuse to amend a class 4 venue licence held by the corporate society; or
>
> …
>
> (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—
>
> (a) its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary; and
>
> (b) the date on which its decision takes effect (which may be a date that is later than the date on which it makes the decision).

23. Class 4 venue is defined in section 4 to mean "a place used to operate class 4 gambling".[3]

24. The purpose of the Gambling Act is set out in section 3 as follows:

> (a) control the growth of gambling; and
>
> (b) prevent and minimise harm from gambling, including problem gambling; and
>
> (c) authorise some gambling and prohibit the rest; and
>
> (d) facilitate responsible gambling; and
>
> (e) ensure the integrity and fairness of games; and
>
> (f) limit opportunities for crime or dishonesty associated with gambling and the conduct of gambling; and
>
> (g) ensure that money from gambling benefits the community; and
>
> (h) facilitate community involvement in decisions about the provision of gambling.

Appellant's submissions

25. The Appellant lodged an appeal against the Secretary's decision on 27 May 2024 and filed submissions on 13 June 2024. The appeal challenged the Secretary's decision to refuse to amend the Appellant's class 4 venue licence and argued there were six means by which the Commission or Secretary could lawfully amend the licence.

[3] The meaning of class 4 gambling is set out in section 30 and comprises a set of criteria.

A decision had already been made in September 2023 which was preserved by the FFNPA *decision*

26. The Appellant submitted that the decision to amend the licence was in fact made in September 2023 and was preserved by the *FFNPA* decision as it concerned existing licences on the following basis:

(a) The Secretary made a decision to amend the licence in September 2023, following:

(i) the approval recommendation by Mr Holmes on 22 September 2023;

(ii) the confirmation of the recommendation by Ms Datuin on 25 September 2023; and

(iii) the Management review of the assessment by Ms Vuong on 25 September 2023.

(b) The Secretary's decision was communicated to the Appellant on 29 September 2023 as follows:

> … the GC4A application to amend the address of Trident Tavern, submitted on 16/06/2023 has been considered.
>
> Our assessment, based on the information provided, is that this relocation satisfies the four criteria required under the Waikiwi precedent.

(c) The Secretary has previously taken the view that a decision to issue a licence and the issue of a licence are distinct procedural steps.[4]

(d) Under section 72(4), sections 66 and 67 apply to renewal applications. The Secretary, in relation to renewal applications, should not take the view that he cannot renew licences which have already been amended under the *Waikiwi* precedent on the basis that territorial authority consent is required as they were expressly excluded from the immediate effect of the *FFNPA* decision.

The Commission and Secretary can and should phase in the interpretation from the FFNPA *decision in a manner similar to the* Matata *decision*

27. The Appellant submitted that the Commission and Secretary should allow a grace period, similar to that allowed by the Commission in *Appeal by Pub Charity Limited re Matata Hotel*, GC03/21 ("***Matata***"), within which the Appellant's application may still be considered under the *Waikiwi* precedent, despite the *FFNPA* decision. The Appellant's submissions in support of the argument were as follows:

[4] *New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge* GC09/16 at [6.1].

(a) In *Matata*, the Commission gave societies a grace period within which they could lodge applications to preserve their position as it had been prior to commencement of a practice, which the Secretary had encouraged and which relied upon an earlier incorrect interpretation of the Act.

(b) The Commission had previously considered that the consequences of new interpretations of existing law should be managed fairly to avoid "serious consequences",[5] and that operators should be able to regain positions that would be lost owing to understandable misapprehensions about the law.[6]

(c) The Secretary had provided guidance on applying for relocation under the *Waikiwi* precedent, which is a long-established practice lasting more than a decade.

(d) If the interpretation from the *FFNPA* decision is applied from the date of the decision, it will result in "serious consequences" for societies and the Appellant.[7]

(e) The case is analogous to *Matata* in that a society has acted in accordance with the Secretary's guidance, and a long-established practice which has now been determined to be contrary to the law, with serious consequences for the society.

The licence amendment should be backdated to prior to the FFNPA *decision*

28. Alternatively, the Appellant submitted that the Commission should direct the Secretary to issue a licence amendment backdated to September 2023, when it argued that the decision to approve the relocation was made, on the following basis:

(a) September 2023 is a logical date and is supported by the Secretary's prior actions.

(b) It is well settled that the Commission and Secretary have the power to backdate venue licences.[8]

(c) The licence should be backdated because:

(i) Strictly applying the *FFNPA* decision would be unfair.

(ii) Commercial arrangements have been entered into based on a prior reasonable interpretation of the statute.

[5] Appellant's submissions at [41]; *Matata* at [10.23].

[6] *Air Rescue Services Limited* GC26/10; *Kiwi Gaming Foundation re Woodend Tavern* GC19/21.

[7] Appellant's submissions at [44].

[8] *Air Rescue Services Limited* GC26/10; *Air Rescue Services Limited* GC14/15; *Grassroots Trust Limited* GC09/10; *Youth town Inc* GC10/20; *Matata.*

(iii) The exercise of the discretion will be one-off, so future applicants will not be able to claim reliance on prior established practice.

(iv) There was an express undertaking, through the Secretary's communications on 24 August 2023, that the Secretary would consider applications made prior to 21 September 2023 in accordance with the *Waikiwi* precedent.

(v) The Commission has indicated that assurances given by the Secretary and detriment suffered as a result of reliance on those assurances weigh in favour of exercising the discretion to backdate licences.[9]

(vi) An alcohol licence is not a legal requirement to amend a class 4 venue licence.[10]

(vii) The main cause of the delay in issuing the amended licence was the requirement by the Secretary that the Appellant have an alcohol licence; the proposed floor plan did not cause any concern regarding access and supervision; the Secretary could be satisfied that the four *Waikiwi* criteria were met; and the gaming room was constructed prior to the date of the *FFNPA* decision.

(viii) Delay caused by the Secretary insisting on an alcohol licence weighs in favour of exercising the discretion to backdate the licence.[11]

(ix) The issue of the alcohol licence was unduly delayed, taking 33 weeks instead of eight. Delay in the issue of the alcohol licence weighs in favour of exercising the discretion to backdate the licence.[12]

The application should be considered in accordance with the law at the date of application

29. The Appellant submitted, in addition to the foregoing phasing-in and backdating submissions, that the application should be considered in accordance with the law as it was at the time of the application, citing a statement from the Commission in *New Zealand Racing Board Re TAB Kapiti Lights and TAB Mangere Bridge*, GC09/16 in support.[13]

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[9] *Grass Roots Trust Limited* GC09/20; *Youthtown Inc* GC10/20.

[10] *The Southern Trust and Te Wheke Holdings* GC17/07 at [38], [40]-[42]; *Grassroots Trust limited* GC09/20; *Youthtown Inc* GC10/20 at [66] and [70].

[11] *Grassroots Trust Limited* GC09/20 at [44]; *Youthtown Inc* GC10/20 at [64]-[65].

[12] *Youthtown Inc* GC10/20

[13] At [8.18], [8.22] and [8.24].

The relocation of the venue was effective upon notification to the Secretary

30. The Appellant submitted that the *Waikiwi* movement was effective upon its notification to the Secretary in the application form submitted on 15 June 2023, and is therefore preserved under the *FFNPA* decision on the following basis:

(a) *Waikiwi* applications do not require new licences;

(b) the address of a venue is part of the description of the venue;

(c) section 71(1)(f) only requires societies to notify the Secretary if the address of a venue changes because the address constitutes part of the "nature" of a venue;

(d) the wording of section 70(1)(f) of the Act indicates that the location of a venue is part of the information on a licence and not a condition of the licence;

(e) the Secretary was notified and did not require a licence amendment application under section 71(4);

(f) amendment of the licence to reflect the new address can take place as part of the renewal of the licence.

The law is ambiguous and the ambiguity should be resolved by the Secretary recognising the Appellant's legitimate expectation that the relocation would be considered under the Waikiwi *decision*

31. The Appellant submitted that the grounds for legitimate expectation are clearly made out in this case and that, while neither the Commission nor Secretary can be required by legitimate expectation to act contrary to the law, they would not be acting contrary to the law in this instance for either of the following reasons:

(a) the Secretary decided to amend the licence in September 2023, when the practice of approving unconsented relocations under the *Waikiwi* precedent was lawful; or

(b) both the *Waikiwi* and the *FFNPA* decisions are of equal standing. *Waikiwi* cannot be distinguished on the ground that section 97A was enacted afterwards, because the enactment of section 97A did not affect the validity of the *Waikiwi* decision, as confirmed by a decision of the Commission.[14]

32. The Appellant argued that the Commission should prefer the decision in *Waikiwi* for the following reasons:

[14] *New Zealand Community Trust* GC04/19.

(a) it dealt directly with interpretations of the defined statutory terms "place" and "venue", which are critical to the practice of *Waikiwi* relocations, while the *FFNPA* decision did not;

(b) the *FFNPA* decision contained clear errors, for instance by outlawing moves within large shopping malls and within large certificates of title, contrary to the wide definition of "place" in section 4. Such moves accord with established practice;[15]

(c) the *FFNPA* decision has been appealed to the Court of Appeal.

The FFNPA *decision is "bad law" and should be disregarded*

33. The Appellant submitted that the *FFNPA* decision is "bad law" and the Commission is free to follow *Waikiwi*, pending clarification from the Court of Appeal, on the following basis:

(a) Section 97A did not change the meaning of the terms "venue" or "place". Parliament also did not amend the definitions of those terms in section 4 when section 97A was enacted.

(b) Section 98(c) only applies where there is a relocation resulting in a change of venue. Parliament intended section 98(c) to apply only to section 97A relocations, which amount to changes in a venue. A *Waikiwi* movement does not result in a change of venue, enabling small movements within shopping malls and large certificates of title to continue without the need to obtain a territorial authority consent.

(c) The purpose of enacting section 97A was to encourage relocation of venues from high deprivation areas to more suitable locations.

(d) Community input into the location of venues is preserved by the existence of gambling venue policies. It would be unduly costly and time-consuming for all concerned to involve territorial authorities in *de minimis* moves.

Secretary's submissions

34. The Secretary argued that the Commission should confirm the decision to refuse. There is no lawful mechanism by which the licence can be amended. A territorial consent is required before a licence can be amended for the following reasons:

[15] *New Zealand Community Trust* GC10/05; *Air Rescue Services Limited* GC35/11.

(a) Section 73(5)(b) requires the Secretary to refuse to amend a class 4 venue licence if any investigations carried out by the Secretary cause him not to be satisfied about any of the matters specified in section 67.

(b) Section 73(4) applies section 67 to an application for an amendment as if it were an application for a class 4 venue licence.

(c) Section 67(1)(f) requires the Secretary to refuse to amend a licence unless he is satisfied that the territorial authority has provided a consent if required under section 98.

(d) Section 98(c) requires a territorial authority consent if a corporate society proposes to change the venue to which a class 4 venue licence currently applies. The amendment application does so.

Status of the application to amend the Appellant's licence as at the date of the FFNPA *decision.*

35. The Secretary submitted that no decision was made in September 2023 for the following reasons:

(a) The Secretary lacks ability to amend licences under the *Waikiwi* precedent in a way which is separate from the statutory power to amend licences and the limitations on the exercise of that power.

(b) The Secretary must refuse to amend a licence unless he is satisfied about all of the matters specified in section 67. While the *Waikiwi* decision would have enabled the requirement in section 67(1)(f) to be satisfied without territorial consent, no decision on the satisfaction of the other criteria in section 67 had been made by the time the *FFNPA* decision was released.

(c) The steps taken by the Department in September 2023 did not constitute a decision to amend the class 4 venue licence for the following reasons:

(i) The only decision which the Act provided for was a decision to amend the licence in accordance with the application. Preliminary assessments of criteria do not constitute a statutory decision.

(ii) The High Court has previously held that a two-stage approach to granting consent under the Overseas Investment Act 2005, similar to that suggested by the Appellant, is unlawful.[16] The considerations in *Heatley*

[16] *Heatley v Chief Executive of Land Information New Zealand* [2023] NZHC 1856.

which led to the unlawful consent not being set aside do not apply in this case.

(d) At all times, the Secretary was awaiting further information from the Appellant prior to the amendment of the licence, being:

(i) confirmation of the layout of the Venue, which information is required by section 70(1)(f), because construction was still underway, and no on-site inspection had been arranged to verify the information which the Appellant had already provided;

(ii) proof of an acceptable main activity at the new Venue.

(e) Without the above, the Secretary was not satisfied of the requirements, specified by sections 67(1)(b), (k), (p), and (s), that:

(i) the possibility of persons under 18 years old gaining access to gambling would be minimised;

(ii) the main activity of the Venue would not be operating gaming machines;

(iii) the risk of problem gambling at the Venue would be minimised; and

(iv) the restrictions on the layout of venues, including the visibility of gaming machines and placement of ATMs imposed by regulations 5A and 5 of the Gambling (Harm Prevention and Minimisation) Regulations 2004, were satisfied.

(f) The Appellant also did not inform the Secretary when gambling would cease at the original site. The Secretary needed to know when gambling would cease prior to amending the licence. The Secretary does not amend licences when a venue is moving to a new site unless he knows when gambling will cease at the old site.

(g) The Secretary also requires notification of the date on which gambling would cease at the original site for it to be clear whether and when obligations arise under section 71(g) and subsequently section 79(1)(a).

(h) The distinction raised in *New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge,* GC09/16 was between decisions to grant and to issue a licence. Neither of these decisions arise in this case.

(i) The Commission has held that a licence records a legally effective authorisation, that there must be a decision to issue a licence in order for it to be a "licence" for the purposes of the Act; and that the Secretary is required to refuse to grant a venue licence unless satisfied that the applicant is able to comply with all other applicable regulatory requirements.[17]

(j) The Secretary did not delay in issuing the licence. The Secretary sought further information in September 2023 which was not provided until 1 March 2024.

The Matata phase-in approach

36. The Secretary submitted that the steps taken in *Matata* can be distinguished from the present case in two ways and should not be applied:

(a) *Matata* is a decision of the Commission which applies to particular facts, rather than a statement of law from the High Court. An example of the Commission deciding how to manage the consequences of a decision which it had reached in the course of an appeal does not provide a proper basis for the Commission to take steps to manage the consequences of a High Court declaratory judgment.

(b) The issue requiring management in *Matata* was unexpected, arising as a tangential issue on an appeal which neither of the parties had anticipated. In this case, the Appellant would have known that a potential consequence of the *FFPNA* proceeding would be that *Waikiwi* movements would not be permitted without territorial authority consent. Neither the Secretary nor the Commission should make a decision contrary to the law in order to relieve the Appellant from the consequences of a risk taken with knowledge of the potential consequences.

Backdating the licence amendment

37. The Secretary submitted that it would be inappropriate in this case to backdate an amended licence because:

(a) to be effective, the licence would need to be backdated to a date prior to the September 2013 amendments, as the *FFNPA* decision clarified the law from that date;

(b) there cannot be two concurrent licences held permitting gambling to operate at two different addresses, which would be the result if the licence amendment were backdated.

[17] *Matata.*

38. In response to the factors submitted by the Appellant as weighing in favour of the exercise of the discretion, the Secretary submitted as follows:

    (a) The Secretary did not give assurances that all applications for licence amendments under the *Waikiwi* precedent received by the specified date would be approved, necessarily or despite the outcome of the eventual *FFNPA* decision.

    (b) The Secretary's assurance cannot reasonably be read as an assurance to grant any application after the law had been clarified against a grant, as that would potentially be an assurance that the Secretary would make a decision that was contrary to law.

    (c) The delay in the licence amendment was due to construction. If the new site had been completed, ready to operate and proof of its main activity had been provided earlier, the amended licence might have been granted before the release of the *FFNPA* decision.

    (d) The Appellant would have been aware that the Department's assurance could not have extended past the date of the High Court decision and could be expected to have been advised of the risks if the new site was not ready to operate before an adverse *FFNPA* decision was released.

    (e) As a result of regulations 6 and 7 of the Gambling (Venue Payments) Regulations 2016, the venue operator is limited to receive only funds paid to them in accordance with the Gambling (Venue Payments) Regulations 2016, which are designed only to cover the costs of having the machines on the premises, not providing a venue operator profit. The operator should not be receiving a profit from gaming machines and so the venue operator cannot claim to have spent $400,000 in an attempt to profit directly from retention of the machines.

    (f) The Secretary does not require an alcohol on-licence before a licence can be issued and did not require it in this case. The delay in issuing the licence was because the new site was not ready to operate at the time of the *FFNPA* decision.

39. In response to the Appellant's submission that the Commission should backdate the licence amendment because the delay in granting the amendment was caused by the Secretary's policy for requiring an alcohol on-licence, the Secretary submitted as follows:

    (a) The delay in granting the amendment was because the new location was not ready to operate by the time of the release of the High Court decision.

(b) The Secretary does not require, as a matter of policy, an alcohol on-licence before a class 4 venue licence can be issued. The Secretary requires some form of proof of an acceptable main activity. Evidence of an on-licence is usually expected for the main activity of selling alcohol.

(c) The Secretary required evidence that the new location would be able to operate as a tavern. The Appellant did not contact the Secretary between September 2023 and February 2024 to progress consideration of the application nor to provide reliable, up to date assurances about site layout or primary activity. Ms Vuong visited the proposed new site after the *FFNPA* decision was released and it did not appear to her to be near ready to operate.

40. In response to the Appellant's submission that the Commission should backdate the licence amendment because the delay in issuing the licence was due to a delay in Auckland Council issuing a valid on-licence, the Secretary submitted that there is no standard time frame for processing an alcohol licence.

Applications must be considered in accordance with the law at the time of the application

41. The Secretary submitted that, in making his decision to refuse to amend the licence, he applied the law as it was at the time of the application, as the *FFNPA* decision declared what the correct interpretation of the Act had been since the September 2013 amendments. Sections 67(1)(f) and 98(c), interpreted as declared in the *FFNPA* decision, required the Secretary to refuse to amend a licence unless territorial authority consent had been given and that is what he did.

Relocation effective upon notification

42. The Secretary submitted that the relocation was not effective upon notification for the following reasons:

(a) A venue licence requires class 4 gambling to operate in a defined gambling area set out in a licence condition. The floor plan on the licence recorded the address of the Venue as being 69 Selwyn Street. If the floor plan of the new site were not identical to the old site in all respects, the Appellant would not be able to operate at the new site in accordance with that licence condition and therefore could not conduct class 4 gambling at the new location.

(b) It would be inconsistent with the scheme and purpose of the Act for class 4 venue licence holders to be able to relocate at will without approval by the Secretary.

Legitimate expectation – Ambiguity of the current law

43. The Secretary submitted that a claim of legitimate expectation does not compel the Secretary or Commission to grant the amended licence in this case for the following reasons:

(a) A claim of legitimate expectation cannot compel a public authority to act contrary to the law.

(b) Substantive legitimate expectation, if available in New Zealand, would only be upheld and relief granted in "truly exceptional" or "extremely rare" circumstances.[18]

(c) There is no ambiguity in the law – the *FFNPA* decision declares the substance of the law regarding movements of venues after the 2013 amendments and the *Waikiwi* decision declares the effect of the law before the 2013 amendments. The Secretary and Commission are bound to apply the *FFNPA* decision.

(d) Legitimate expectation requires reliance to be reasonable. It would be unreasonable to interpret the 24 August 2023 communication to the gambling industry as a representation that the Secretary would continue the practice of *Waikiwi* relocations without requiring territorial authority consent after the release of a High Court decision holding that *Waikiwi* movements were relocations requiring territorial authority consent. That is not a reasonable interpretation of the communication.

The FFNPA *decision is a statement of the law*

44. The Secretary submitted that it is not open to the Commission to hold that the High Court erred in law or otherwise to disregard the High Court's declaratory judgment. As a party to the *FFNPA* proceeding, the Commission is bound by the decision and is generally bound to comply with the law as it has been declared by the High Court. The Commission cannot lawfully pre-empt the appeal process or overturn High Court decisions.[19] The Commission's power to confirm, vary or reverse the Secretary's decision must be exercised consistently with the law.

[18] *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982 at [184]; *Petromont Holdings Ltd v Director-General of the Ministry for Primary Industries* [2020] NZHC 3242 at [61]; *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623 at [40].

[19] *TAB Kapiti Lights and Mangere Bridge* GC09/16.

Renewal of existing Waikiwi *relocated venues*

45. Following the *FFNPA* decision, the Secretary accepted that no territorial authority consent is required to renew licences which have already been amended under the *Waikiwi* precedent.

Submissions in reply

46. The Appellant filed submissions in reply on 11 July 2024. The reply submissions mostly disagreed with the Secretary's submissions, except that the Appellant agreed that venues which had already moved in reliance on the *Waikiwi* decision would not be required to provide a territorial authority consent at their next licence renewal.

Status of the application to amend the Appellant's licence as at the date of the FFNPA *decision*

47. The Appellant submitted that the Secretary could have been satisfied of the relevant statutory requirements in order to amend the licence, prior to the *FFNPA* decision, for the following reasons:

(a) The description of the class 4 venue and its location, as required by section 70(1)(f), had been provided prior to the *FFNPA* decision, as the Venue name, description and address had been provided on 15 June 2023.

(b) The primary activity of the Venue at the new location had been provided because the application letter of 15 June 2023 set out in detail what activities would continue at the 190 Onehunga Mall address and the Alcohol Licensing Inspector had no issue recommending in his report of 1 February 2024 that the alcohol licence be granted before the premises had been fitted out. The Alcohol Licensing Inspector's report also made it clear that the new site would operate as a tavern.

(c) The Secretary could be satisfied that the possibility of persons under 18 years old gaining access to gambling would be minimised as a floor plan had been provided and, on 22 September 2023, Mr Holmes had assessed the floorplan and confirmed there was no issue regarding access or supervision. The gaming room construction was completed in early 2024.

(d) The Secretary could be satisfied that the risk of problem gambling at the Venue would be minimised as the harm minimisation policy did not change and the venue manager and venue owner would not change. Mr Holmes had also concluded in his assessment that the proposed floorplan did not cause any concern regarding access and supervision.

(e) The Secretary could be satisfied about the ATM location as the floor plan provided in the Appellant's prior amendment application of 18 April 2023 showed the location of the ATM, which was right next to the bar and in direct line of sight.

48. The Appellant submitted further as follows:

(a) The Commission hears matters *de novo* and has sufficient information before it to decide to amend the licence with the amendment backdated to 1 February 2024, the date of the report from the Alcohol Licensing Inspector.

(b) The 29 September 2023 communication was framed as a decision and the peer review process was a decision.

(c) The Secretary had indicated that the licence would be amended because the 24 August 2023 communication had stated that applications made prior to 21 September 2023 would be considered under the *Waikiwi* precedent, and the Secretary had confirmed, in the 29 September 2023 communication, that the *Waikiwi* criteria were met. The remaining matters were merely procedural.

(d) The licence in this case is not being transferred but amended, and there is no reason that a venue licence cannot show two addresses, given that they are the same place. This is analogous to a venue licence showing a venue as shop 1 and 2 within a mall complex.

The Matata *phase-in approach*

49. The Appellant submitted that a phase-in approach, similar to that taken in the *Matata* decision can be taken, for the following reasons:

(a) The situation in *Matata* is sufficiently analogous to the present case in that both decisions concern the interpretation of the Act.

(b) The Commission is able to make determinations regarding the correct interpretation of the Act.[20]

(c) It is appropriate for the Commission to decide and determine how the consequences of all decisions concerning the Act are fairly managed.

(d) The *FFNPA* decision did not rule out a phased-in approach for the new interpretation of "venue" and "place". The decision mentioned the Secretary's 24

[20] *Prime Community Trust* GC06/05.

August 2023 communication without criticism and directed that prior licensing decisions made in reliance on *Waikiwi* on which third parties had relied were not invalidated, pending subsequent judicial reviews. A decision to amend the licence had been made before 19 February 2024 and not challenged by judicial review and was therefore preserved by the *FFNPA* decision.

(e) The *Matata* phase-in approach should not be reserved only for unexpected decisions. It has been a consistent practice used to avoid outcomes that would be unfair to operators who reasonably relied on an erroneous construction of the Act.

(f) The *FFNPA* decision was unexpected because the Commission had previously considered and determined the same issue in decision GC04/19. The expectation was that the outcome of the *FFNPA* decision would be the same as the Commission's decision, because the Commission had held that the argument that *Waikiwi* was no longer available because of the section 97A amendment was "weak and contrived".[21]

(g) It would not have been clear to the Appellant that a potential consequence of the *FFNPA* decision was that the practice of permitting *Waikiwi* movements would be declared unlawful and that the Secretary would not amend a licence in accordance with an application granted far in advance of the decision. The 24 August 2023 communication was clear that applications made before 21 September 2023 would be considered in accordance with the *Waikiwi* precedent. The Appellant was entitled to rely on this communication and on an expectation that the Secretary and Commission would adopt the *Matata* approach to phasing-in any new interpretations which might have arisen from the *FFNPA* decision. The communication also occurred after the Commission had confirmed, in *Kiwi Gaming Foundation re Woodend Tavern*[22], that its appeal powers were available if the Secretary reneged on written assurances to allow a phase-in period for the implementation of new interpretations.

Backdating the licence amendment

50. The Appellant submitted that it would appropriate for the Commission to backdate the licence amendment in this case, for the following reasons:

[21] Appellant's reply submissions at [17].

[22] GC19/21.

(a) Two concurrent licences can be held in respect of the same venue, permitting gambling to operate at two different addresses:

(i) It is possible for a single venue to be recorded as having two addresses. There are multiple venues which are located on corner locations, which have multiple addresses, and which are located on multiple floors.

(ii) It is possible for venues to be described widely by reference to the mall name, allowing the venue to operate within any shop located in the mall.[23]

(iii) Showing multiple addresses on a venue licence does not multiply the number of gaming machines which can be operated.

(iv) As a decision has been made that 69 Selwyn Street and 190 Onehunga Mall are the same venue, a backdated licence can record both addresses. The licence would only permit 18 gaming machines at any time.

(b) Backdating is appropriate to keep faith with assurances given. The assurances in this case were clear and made in the context of Commission decisions which had confirmed that any new interpretations would be phased in.

(c) It is naïve to say that a venue operator should not receive a profit from having gaming machines. Operators and managers take on a high level of regulatory and criminal risk to operate gaming machines, which they would not do if they could not profit. The Act does not provide that an operator cannot profit from operating gaming machines. The regulations provide for a straight commission to be paid which is very large in respect of high turnover venues.

(d) The Secretary had required an alcohol on-licence prior to amending the licence, as evidenced by the communication of 29 September 2023.

51. The Appellant also clarified that the Appellant's earlier submission that relocation was effective upon notification did not amount to a submission that once notification had been made, venues would be free to relocate as they please. Rather the submission on the point was best characterised as arguing that, if the new place is the same venue as the currently licensed place, the Venue is free to move to the new place without waiting for notification to be verified or accepted by the Secretary. In the Appellant's view, this would be consistent with the approach taken to other notifications, such as changes in venue managers.

[23] *New Zealand Community Trust* GC10/05.

52. The Appellant submitted that it is common practice during relocations for a licence to display incorrect floor plans for an extended period. The Appellant is not aware of the Secretary ever taking enforcement action in relation to the practice and is not aware of any communication from the Secretary to the sector advising that the practice is wrong or inappropriate.

53. The Appellant also argued that the Commission was free to direct that the backdated amendment to the licence should have no defined gambling area or that the defined gambling area should include both floor plans, by reference to the fact that section 70(2)(h) refers to plural "areas", suggesting that multiple areas might be permitted for conducting class 4 gambling on one venue licence.

Analysis

Application of the Waikiwi *and* FFNPA *decisions*

54. The Commission started by considering the 2013 *Waikiwi* decision and the 2024 *FFNPA* decision. The High Court's analysis in the *Waikiwi* decision, which predated the Gambling (Gambling Harm Reduction) Amendment Act 2013, primarily rested on the definitions of "venue" and "place" under the Act. There was no specific provision for relocation of venues under the Act prior to the 2013 amendment; a change of venue required a new venue licence. New venue licences required local territorial authority consent under section 98, in accordance with the authority's venue policy which was required under section 101. The effect of *Waikiwi* was that, provided that four criteria were met, insignificant movements were not a change of venue because, although the place of the Venue might change, the Venue itself remained the same. An immediate effect of *Waikiwi* was to allow societies to effect very minor movements without the need for territorial authority consent under section 98 and to preserve a right, under section 92, to continue to operate the number of gaming machines allowed as at 17 October 2001 (being a number which could not be authorised in the case of new licences under section 94).

55. The Gambling (Gambling Harm Reduction) Amendment Act 2013, which amended the Act with effect from September 2013, was intended to facilitate, if territorial authorities adopted suitable policies, the movement of venues from higher to lower deprivation areas, despite sinking lid policies aimed at both preventing any increase in the number of venues and the general replacement of existing venues. The amendments provided mechanisms through which societies could apply for relocations and preserve rights which they held under their current licences[24] and required local authorities to consider the adoption of new relocation

[24] Section 97A.

policies (which had not previously existed) which had regard to the social impact of gambling in high deprivation communities within each district.[25]

56. As recorded in *Appeal by New Zealand Community Trust*, GC04/19, after the 2013 amendments, which introduced relocation policies, came into effect four months after the release of the *Waikiwi* decision, the Secretary initially took the view that the continuing application of the *Waikiwi* decision was unaffected by the 2013 amendments. However, in May 2018, he reconsidered his earlier view and refused approve site movement applications without territorial authority consent. On appeal, in decision GC04/19, the Commission considered that it was bound by the *Waikiwi* decision and held that movements which had been held not to be changes of venue in terms of the Waikiwi decision continued not to constitute changes in venue (relocations) under the Act, following the 2013 amendments, and therefore did not require territorial authority consent under section 98(c).

57. However, in the *FFNPA* decision released in February 2024, the High Court declared that, since September 2013, venue movements which had been permitted to proceed without territorial consent relying on the *Waikiwi* decision were changes in venue (relocations) under the Act as amended and therefore required territorial authority consent under sections 67(f) and 98(c).

58. Despite stating the effect of the law since September 2013, the *FFNPA* decision expressly preserved, pending any subsequent judicial review, licences which had already been granted or amended in reliance on the *Waikiwi* decision.[26] In preserving those licences, the High Court anticipated that the use of its discretion regarding remedies might mitigate the future impact of the retrospective invalidation of those licence grants or amendments.[27]

59. Against that background, the Commission is in no doubt that it is bound to apply the *FFNPA* decision as a correct statement of the prevailing law concerning site movements since September 2013. It sees no lack of clarity or ambiguity in the decisions – the *Waikiwi* decision considered the Act prior to the 2013 amendments, while the *FFNPA* decision concerned the effect of those amendments on site movements.

60. That conclusion disposes of the last three of the Appellant's arguments, namely that the *FFNPA* decision should not be applied because it is incorrect, unclear or ambiguous or

[25] Sections 102(5A) and (5B).

[26] *FFNPA* decision at [44] and [47].

[27] At [46].

that, if the law as at 1 February 2024 were applied, it would be other than as declared by the High Court in the *FFNPA* decision.

61. In the latter regard, there is an important distinction between the situation in *Appeals by New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge*, GC09/16, on which the Appellant relies, and the present appeal. The context of the TAB appeals was unusual. They were brought against decisions by the Secretary refusing applications by reason of a statutory amendment which had not yet come into force. The Commission decided that it had been wrong to do so, and that the applicant was entitled to have the grant decision made in accordance with the law which applied at the date of the application. In order to preserve the position of the successful appellant, it ordered reconsideration of the applications on that basis, rather than applying the amendment which had since come into effect.

62. That is not the position in the present appeal. A major difficulty with the Appellant's argument is the assumed effect of the timing approach advocated. The *FFNPA* decision declared the legal effect of a statutory amendment which came into effect in September 2013, almost 10 years prior to the application; in contrast, the Commission's TAB decision concerned the effect of a statutory amendment that came into effect only after the application.

63. That leaves for consideration the remaining arguments for avoiding the application of the *FFNPA* decision on this appeal, namely:

    (a) A decision to amend the licence was in fact made in September 2023 and is preserved by the *FFNPA* decision as it relates to prior licence decisions made in reliance on the *Waikiwi* decision.

    (b) The relocation of the Venue was effected upon notification of the change of address to the Secretary so no licence amendment was or is required.

    (c) The Commission and Secretary can, and should, phase in the effect of the declaration in the *FFNPA* decision in order to ameliorate adverse consequences of its application to applicants, in a manner similar to the Commission's decision in the *Matata* appeal.

    (d) The licence amendment should be backdated to a date prior to the *FFNPA* decision so that the *FFNPA* decision would have no application.

    The first argument argues for a particular application of the preserving aspect of the *FFNPA* decision, the second aims to avoid its application entirely, and the remaining two

arguments ask the Commission to avoid applying the law as declared by the High Court by phasing in its effect or backdating the amendment.

Earlier amendment decision preserved by FFNPA *decision*

64. The premise of the preserved decision argument is that a positive amendment decision was made and communicated in September 2023, before the *FFNPA* decision in February 2024, and so is unaffected by the declaration as a prior decision made in reliance on the *Waikiwi* decision.

65. The Commission has previously held in *Appeal by New Zealand Racing Board*[28] that a decision under the Act is made by the Secretary only when formally communicated to the applicant in a way indicating finality. In that decision, an appeal was filed following what the Commission held was informal negative advice regarding an aspect of the expected outcome. On a jurisdictional challenge to the appeal filed, the Commission held that the statutory right of appeal required a decision by the Secretary and, when the appeal was filed, no decision had been made by the Secretary declining the application. The Commission's decision in that regard is consistent with the High Court authority, regarding the Overseas Investment Act 2005, cited by the Secretary in the summary at paragraph 35(c)(ii) above. The Commission also rejected, as material to that appeal, the distinction suggested by the Appellant[29] between the grant and the issue of a licence.

66. In the Commission's view, the communications relied upon by the Appellant do not meet the criteria for a decision in September 2023. The communications lacked the necessary formality, and the communication on 29 September 2023 did not indicate finality because it requested further information (not provided until March 2024) and referred to further steps required before the Appellant's licence could be amended. The 29 September 2023 communication recorded that the Secretary was not yet satisfied that the requirements in sections 67(c), (k), (p), 69A(e), and (g) were met but satisfaction of those grounds was required by section 67 in order to grant the application. The communications relied upon are similar to the communications in the *New Zealand Racing Board* appeal,[30] namely informal advice regarding a single aspect of the decision criteria.

67. The arguments advanced, that the Secretary was in a position to have made a decision on the amendment application in September 2023, even if correct, are not applicable to what was preserved in the *FFNPA* decision (namely, prior concluded decisions). However, as

[28] GC17/19.

[29] See paragraph 26(c) above

[30] GC17/19

the Secretary had identified a number of matters on which satisfaction was still required, the premise was not established factually in any event.

68. The preservation ruling in the *FFNPA* decision referred to concluded decisions made earlier by the Secretary in reliance on the *Waikiwi* decision, not partial considerations of aspects of yet to be determined applications. In the Commission's view, the September 2023 communications did not constitute a decision to amend the licence; no decision was made on the amendment application prior to the release of the *FFNPA* decision and preserved by it.

No amendment necessary

69. The argument that venues can relocate by giving notice of a change of address gives rise to the proposition that no amendment to the licence was required so that, as long as the *Waikiwi* criteria were met in fact, the Appellant may operate from the new premises without the Secretary first amending the venue licence (despite an application to amend the licence having been made).

70. The Commission concurs with the submissions of the Secretary in response to that argument. Amendments to the licence were required before the Appellant could lawfully operate from the intended new premises. The Venue licence permits gambling to take place only in a gambling area defined by reference to a floor plan of the original location. At a minimum, amendment of the floor plan, which forms part of the conditions of the Venue licence, was required prior to being able to relocate. That position was tacitly accepted in the reply submission, which endeavoured to overcome the difficulty arising from the need to amend the floor plan by reference to alleged past practices which did not require strict adherence to venue licence floor plans. However, the Commission considers that there is a material difference between a legal right to operate without an approved floor plan and past instances where that may not have been insisted upon in practice.

71. The argument that class 4 venue licence holders may relocate at will, without any form of approval from the Secretary, is fundamentally inconsistent with the substance of the *FFNPA* decision as it concerns relocations and more generally with the scheme and purpose of the Act.

Phasing in or delaying implementation of the FFNPA *decision*

72. The phase-in argument asked the Commission to determine the appeal by delaying giving effect to the *FFNPA* decision to benefit applicants for whom its effect would be adverse. It drew an analogy with suggestions made by the Commission in concluding the *Matata*

appeal,[31] to allow licence holders a limited opportunity to recover positions which might have been lost, having regard to the Commission's decision on a particular aspect of licence content and continuity under section 92, as a result of contrary assumptions made previously across the entire class 4 sector and in guidance given by the Department. The opportunity suggested in the *Matata* decision involved seeking licence amendments which had previously been assumed not to be necessary by all concerned.

73. However, the Commission does not consider the present circumstances to be analogous to those in the *Matata* appeal for the following reasons:

(a) Most importantly, the *Matata* decision did not involve a declaratory judgment of the High Court. Rather the decision concerned implementation of a conclusion reached by the Commission in the course of the relief phase of an appeal. The issue had not been anticipated by the parties, was raised by the Commission only in the course of the hearing, and required a second round of submissions, in the course of which the appellant and the Secretary concurred. The Commission's decision was contrary to the submissions received from the parties and to longstanding industry practice encouraged by the Department. In reaching its decision regarding implementation, the Commission had express regard to the Act's statutory purpose, including the rights and interests of territorial authorities.

(b) In contrast, the issue determined by the High Court in the *FFNPA* decision was known to be contentious in advance of the amendment application and the decision itself. The Department had indicated a cut-off for consideration of applications which relied on the *Waikiwi* decision because a decision in the *FFNPA* proceeding was expected and had the potential to affect the applicability of the *Waikiwi* decision.

(c) The Act's purpose and the rights and interests of territorial authorities under the Act were critical to the *FFNPA* decision and delaying its implementation would be inconsistent with the primacy accorded to those.

(d) Like the Commission's decision in *Matata*, the *FFNPA* decision included a determination of the correct construction and application of certain provisions of the Act, but also an indicative ruling regarding the scope of its future application, including what should be assumed to be preserved pending any future judicial review applications. The High Court's ruling on the scope of the *FFNPA* decision's

[31] GC03/21

application to other applications would be incompatible with the subsequent adoption by the Commission of the different approach to its recognition and implementation, as urged by the Appellant. The Commission declines to do so.

Backdating the amendment to avoid application of the FFNPA *decision*

74. The argument asked the Commission to reverse the Secretary's decision and to backdate its effect on the basis that doing so would avoid the effect of the *FFNPA* decision. The argument referred to decisions in which the Commission has granted backdated licences in the course of appeals (that is, set a commencement date prior to the appeal decision). The power to do so arises from the Act expressly limiting the end date, but not the commencement date, of venue licences.

75. The practice of backdating the commencement dates of venue licences arose in the context of section 92, which provides that societies which have held class 4 venue licences sufficiently continuously since 17 October 2001 may continue to operate the originally approved number of gaming machines. Unlike section 98(b), which concerns when an application is made, section 92 primarily concerns continuity of licence holding. The point of backdating the commencement date of venue licences on successful appeals is to preserve the continuity of licence holding in appropriate cases.

76. The present case is quite different. Not only has backdating the commencement of a licence never been done to avoid the effect of a declaratory judgment of the High Court, backdating the commencement of a licence would have no effect on the applicable law. The Appellant's argument does not have proper regard to the declaratory nature of the *FFNPA* decision (the meaning and effect of certain statutory amendments since September 2013) and the statements in it about its express scope and effect. Unlike a statutory amendment, the *FFNPA* declaratory decision did not effect any change in the law on its release.

77. While prior misapprehension of the law and reliance on assurances given by the Secretary have been referred to in the reasoning in prior decisions involving backdating, they have been only one of several factors considered in deciding to backdate commencement of a licence. Importantly, the assurances given in decisions GC09/20 and GC10/20, on which the Appellant relied, concerned the practice of backdating itself. No such assurances were given in the present case,[32] and there would be no reason to backdate the amendment to preserve continuity as a licence continued to be held. It follows from the same feature that,

[32] Similarly, no assurances were given about delaying or phasing-in the decision of the High Court nor to grant applications inconsistent with the anticipated *FFNPA* decision once released.

because the existing licence has continued to be held and operated, backdating the amendment would give rise to a new set of operational issues, making interim operations at the original site after the backdated amendment would be inconsistent with the amended licence conditions.

78. The Commission does not support backdating an amendment in the circumstances. It is not appropriate to do so and backdating the amendment could not sensibly avoid the application of the *FFNPA* decision in any event.

Conclusion

79. The Commission may confirm, vary or reverse a decision of the Secretary on appeal; or refer the matter back to the Secretary with directions to reconsider the decision.[33] The Commission's powers on appeal are ultimately constrained by the Act.[34]

80. Consideration of the effect of the *FFNPA* decision on the present appeal involves two elements:

(a) What effect does it have on the scope of the Commission's powers on appeal to amend the Appellant's licence?

(b) What, if anything, did it preserve?

81. In the *FFNPA* decision, the High Court declared that small movements previously permitted under the *Waikiwi* decision without territorial authority consent have been, since the Gambling (Gambling Harm Reduction) Amendment Act 2013 came into effect in September 2013, relocations under the Act as amended, requiring territorial authority consent under section 98(c). The Commission cannot exercise its power to confirm, reverse, vary or refer back the Secretary's decision in a way which is inconsistent with the *FFNPA* decision. As a result, the Commission could only grant, or direct the grant of, the licence amendment application, without territorial authority consent, if the circumstances were excluded from, or preserved by, the *FFNPA* decision.

82. However, the *FFNPA* decision does not exclude or preserve applications which were in train at the time of the decision. While the references to the kinds of prior decisions to be treated as unaffected by the *FFNPA* decision covered only three formulations, "licences

[33] Section 61(4).

[34] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410-411.

amended",[35] "amended licences granted"[36] and, potentially, "unlawful decision",[37] the most natural reading of the decision would limit the matters which should be treated as unaffected to prior decisions to issue or amend class 4 venue licences which had already been made and would exclude applications which were merely in train without a decision having been made. As no decision had been made to amend the licence prior to the *FFNPA* decision, for the reasons set out at paragraphs 65, 66 and 68 above, nothing in the *FFNPA* decision excludes its application to the appeal.

83. Pursuant to the *FFNPA* decision, all site movements since September 2013 require territorial authority consent and there was no prior decision to amend the Appellant's licence which has been excluded from the application of the *FFNPA* decision. The Secretary was therefore required to be satisfied, under section 67(1)(f), that the Appellant had obtained territorial authority consent for the move and was not so satisfied. On appeal, the Commission is in the same position as the Secretary. Accordingly, it confirms the Secretary's decision to refuse to amend the Appellant's licence.

Susan Hughes KC
Gambling Commissioner

for and on behalf of the
Gambling Commission

22 August 2024

[35] *FFNPA* decision at [2].

[36] At [47]

[37] At [44].