GC11/14

IN THE MATTER of the Gambling Act 2003

AND on appeals by **BLUEGRASS HOLDINGS LIMITED AND STANMORE STAR INVESTMENTS LIMITED**

BEFORE THE GAMBLING COMMISSION

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

Date of Decision: 11 July 2014

Date of Notification of Decision: 21 August 2014

DECISION ON APPEALS BY BLUEGRASS HOLDINGS LIMITED AND STANMORE STAR INVESTMENTS LIMITED

Introduction

1. Bluegrass Holdings Limited ("**Bluegrass**") and Stanmore Star Investments ("**Stanmore**") appealed to the Gambling Commission, pursuant to section 77(1)(e) of the Gambling Act 2003 ("**Act**"), against a decision by the Secretary for Internal Affairs (the "**Secretary**") cancelling the venue licence for Sideline Bar ("**Sideline**"). The Secretary cancelled the licence under section 74(1)(a) of the Act because he was no longer satisfied of certain grounds under section 67. Bluegrass is the holder of the venue licence for Sideline. Stanmore is the venue operator.

Decision under appeal

2. The Secretary cancelled the class 4 venue licence for Sideline for the following reasons:

   (a) He was no longer satisfied that there were no reasons not to be satisfied about Sonya McIntyre's suitability, in terms of section 68, to supervise:

      (i) the conduct of class 4 Gambling at the venue; and

      (ii) venue personnel,

   (section 67 (1)(c)).

(b) He was not satisfied that there were no other factors likely to detract from the purpose of the Act (section 67(l)(1)). In particular he was concerned about the influence of Ray McIntyre. However, he expressly stated that this was not based on an opinion about Mr McIntyre's suitability.

3. The reason that the Secretary was no longer satisfied of Mrs McIntyre's suitability was that he considered that she had deliberately provided false information to gambling inspectors during formal inquiries about financial interests in the Sideline business, in particular during an interview on 8 March 2012. In making his decision, he considered that this conduct constituted an offence of obstruction under section 346(1)(d) of the Act but subsequently, in his submissions, he argued more generally that it was relevant to Mrs McIntyre's profile of past compliance. The Secretary formed this view after becoming aware (in 2013) of an email exchange between Sonya McIntyre and her brother-in-law, Ray McIntyre, dated 7 March 2012 ("**7 March emails**"). In his email, Mr McIntyre wrote:

> In relation to your meeting with the DIA tomorrow...
>
> There is no issue if Terry is there to help. Remember not to answer questions you don't know the answer to, just say you don't know the answer and that you will get back to them on it.
>
> Have the meeting in the bar, NOT in the small office – it will save temptation for them to ask about things they can see in there.
>
> Remember that you do a significant amount of the pokie room hours to match the venue cost schedule – AND REMEMBER THAT YOU OPEN AT 7.30am SO IF YOU HAVE THE BAR HOURS PLASTERED ANYWHERE< PLEASE REMOVE THEM ☺
>
> You bought the business yourself with savings and a mortgage over your house
>
> They will ask you about me – you will say that I am just your lovely brother–in-law. They will ask why did you go to Bluegrass, and you simply say the truth, that I asked you if you would go with them, and you said ok. You are aware that the majority of the funds raised will go to racing, as that is what Bluegrass does. They may ask you if you know Roebyna at Bluegrass – you do not – you have only dealt with her over the phone. They may ask you if you know Mike O'Brien, and you do not.
>
> Not sure what else they may ask. They may ask about PAK Group again due to their name on the sale and purchase agreement. Just say you know Paul Kofoed, he knew you were looking for a bar and offered it to you first. And you said ok.
>
> Be co-operative, but don't offer any information unless they ask for it.
>
> If they want copies of ANY paperwork, DO NOT give it to them there and then. Politely tell them it is at home and get their email address to send it to. I'll see what it is before we send anything.
>
> And finally, can you get me a copy of the Lion Foundation venue agreement and venue costs schedule please, so I can take that to the next step. I have spoken to the lawyer and I need to start with the agreement before I put pen to paper ☺

4. Mrs McIntyre responded on the same day:

> Anything else!!!!!!!!!!!!! I don't mind lying but the lovely brother-in-law bit?

5. The Secretary considered that the 7 March emails demonstrated a prior intention to mislead the Department concerning the funding of Sideline, and that Mrs McIntyre did, in fact, mislead the Department. The Secretary's position was that Mrs McIntyre had said in her 8 March 2012 interview with the Department of Internal Affairs that she was funding the purchase of the business with a combination of a bank loan and personal savings. Prior to granting the licence, the Department became aware, from a series of emails sent to it by Mrs McIntyre after the 8 March 2012 interview and before the grant of the venue licence to Bluegrass, that the initial purchase had, in fact, been funded by way of a loan from Ray McIntyre. However, following the Department's much later receipt of copies of the 7 March emails, the Secretary formed the view that Mrs McIntyre had deliberately misled the Department in her 8 March 2012 interview and that, as a result, the Secretary was no longer satisfied of Mrs McIntyre's suitability.

Procedural background

6. After the parties had filed evidence and submissions, including submissions in reply by Bluegrass and Stanmore, the Commission released its decision in relation to an appeal by Phoenix Charitable Trust Limited (decision GC04/14) ("***Phoenix* Decision**"). The *Phoenix* Decision concerned a refusal by the Secretary to grant a licence to the Phoenix Charitable Trust. Amongst other things, the Secretary had been concerned about Ray McIntyre's role in the Phoenix Charitable Trust and about his suitability. It was proposed that the Sideline Bar be one of Phoenix's venues.

7. Because the *Phoenix* Decision had set out the Commission's views on several legal issues that were also relevant to this appeal, the Commission invited further submissions from the parties. All parties filed further submissions. In addition, the Appellants filed further evidence, addressing factual matters that had arisen in the *Phoenix* Decision. Although these factual matters had not been regarded by the Commission as relevant to the present appeal to that point, it nevertheless received the further information proffered by the parties on those factual matters.

Relevant provisions

8. The relevant provisions are as follows:

> **4 Interpretation**
>
> **key person** means,-
>
> ...

(b) 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: ...

...

venue manager means 1 natural person responsible for supervising the gambling and venue personnel at a class 4 venue and for banking the proceeds of the class 4 gambling

66 Secretary must investigate applicant for class 4 venue licence

(1) The Secretary must undertake any investigations the Secretary considers necessary to determine—

...

(b) whether the venue manager and venue operator are suitable persons in terms of section 68.

....

(3) In undertaking investigations, the Secretary may—

(b) require the applicant and any key person to provide further information relating to the application and to undergo an independent investigation into its financial position and credit history by a person nominated by the Secretary:

....

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

...

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

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 or she has, within the last 10 years,—

(i) been convicted of a relevant offence:

(ii) held, or been a key person in relation to, a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused:
(iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt:

(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
(b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules, and minimum standards; or
(c) the class 4 venue agreement is no longer consistent with ensuring compliance with this Act or the licence; or
(d) the corporate society supplied information that is materially false or misleading in its application for—

(i) a class 4 venue licence; or
(ii) a renewal or an amendment of a class 4 venue licence; or
(iii) a class 4 operator's licence; or
(iv) a renewal or an amendment of a class 4 operator's licence.

(2) In deciding whether to suspend or cancel a class 4 venue licence, the Secretary must take into account the matters in section 67.

Submissions on behalf of Bluegrass

9. Bluegrass submitted, in summary, that:

(a) Mrs McIntyre's reference to lying in the 7 March emails was merely a light-hearted joke, which the Secretary had taken out of context.

(b) Mrs McIntyre denied having stated in the 8 March 2012 interview that no one else (other than the bank) had lent her money for the purchase of the business.

(c) The emails that Mrs McIntyre sent the Department following the 8 March 2012 interview were consistent with Mrs McIntyre's account of the meeting, namely that either questions about the source of funding were not asked at all or, if they were, they were not understood by Mrs McIntyre. When all the

correspondence was taken together, it was clear that Mrs McIntyre neither intended to mislead, nor actively misled, the Secretary.

(d) It was relevant that, after receiving the emails in which Mrs McIntyre explained that Ray McIntyre had made the initial loan for the purchase of Sideline, the Secretary had nevertheless granted the licence.

(e) There were no other factors likely to detract from achieving the purposes of the Act.

10. Bluegrass submitted, in the alternative, that even if Mrs McIntyre's responses in the 8 March 2012 interview amounted to obstruction under section 346, she was nevertheless a suitable venue manager, for the following reasons:

(a) She had an otherwise excellent record of compliance.

(b) The maximum fine under section 346 ($2,000) was low in comparison to other breaches of the Act, and it could therefore be seen as a less serious, administrative breach.

(c) If the purpose of section 346 was to assist the Secretary in conducting his functions under the Act, it was relevant that Mrs McIntyre promptly made full disclosure following the interview, so at most the Secretary was only slightly delayed in performing his functions by the alleged breach.

(d) A single breach could only justify a finding of unsuitability if it were a serious breach, particularly in light of the serious personal consequences for a key person of a lack of satisfaction about suitability.

(e) The allegation was more than 18 months old and there was no suggestion that the venue had not been compliant since then.

11. As a further alternative argument, Bluegrass submitted that, although the Secretary approached the issue in terms of suitability, in reality the Secretary was seeking to impose a punitive sanction. Even if obstruction were made out, cancellation would be a disproportionate response. The "highest" at which the Secretary's case could be put was that Mrs McIntyre made some attempt to mislead the Department at the 8 March 2012 interview, but then thought the better of it only a few days later and provided a full and candid explanation.

Submissions on behalf of Stanmore

12. Stanmore submitted, in summary, that:

(a) Mrs McIntyre was suitable. The fact that her venue had a liquor licence and a TAB licence demonstrated integrity and compliance and the venue's banking of gaming proceeds was always on time.

(b) Ray McIntyre had no influence over Mrs McIntyre nor did he have an interest in Sideline.

(c) Mrs McIntyre did not mislead the Department on 8 March 2012.

(d) In her emails following the 8 March 2012 meeting, Mrs McIntyre provided the Department with the further information it sought. She had no idea how important it was, until they asked for further information, and she then responded with a full explanation.

Secretary's submissions

13. The Secretary submitted, in summary, that:

(a) The 7 March emails were an instruction by Mr McIntyre to lie about how the purchase was funded (by saying that it was from a combination of savings and a mortgage), and showed willingness on the part of Mrs McIntyre to follow that instruction.

(b) In the 8 March 2012 interview, Mrs McIntyre informed representatives of the Department that she used $100,000 in personal savings and took out a $150,000 bank loan.

(c) Mrs McIntyre later informed the Department, in an email dated 20 March 2012, that she had received a loan from her brother-in-law. That email was only sent because the Department had sent her an email requiring copies of documents to corroborate what she had said about using her savings and getting a bank loan and she realised that she could not maintain the deception. It was only in emails dated 27 March 2012 and 29 March 2012 that she informed the Department that Mr McIntyre had, in fact, provided the full initial purchase price.

(d) The provision of false information was a critical feature of Mrs McIntyre's profile of past compliance, and justified a finding that she was unsuitable in terms of section 68. It was also *prima facie* obstruction under section 346(1)(d), and therefore additionally relevant to her profile of past compliance in the sense of being a breach of the Act.

(e) Mrs McIntyre had also breached section 66(5), which provides that a person required to provide information under section 66 must do so as promptly as is reasonable in the circumstances. It was unacceptable for accurate information to be provided only after investigators had asked questions to expose the fact that false information had been supplied initially.

(f) Mrs McIntyre's continued denial that she had provided false information was a factor that was likely to detract from achieving the purposes set out in section 3 of the Act.

(g) As a result of Mrs McIntyre's conduct, the Commission could not be satisfied that she was suitable to supervise the conduct of class 4 gambling at Sideline or to supervise venue personnel. The Secretary must be able to rely on venue managers and key persons to act honestly and consistently with the Act, and their role required a high degree of compliance with the Act. The Commission could not be satisfied of such compliance on Mrs McIntyre's part.

(h) Cancellation was necessary to maintain the effectiveness and integrity of the class 4 licensing system. Even if Mrs McIntyre's record were otherwise good (a matter on which the Secretary was silent), cancellation was appropriate in light of her intention to mislead, the fact that a proper account of facts was only supplied once it was clear that her account was being investigated, and the continued denial that false information was provided initially.

(i) There was a strong public interest in ensuring that class 4 venue managers were held to account.

(j) The seriousness of a consequence for a key person was not relevant to the degree of certainty that the Commission was required to have about whether a key person were suitable, although it may be relevant to deciding whether the consequence should be suspension or cancellation in a borderline case.

Submissions in reply on behalf of Bluegrass

14. In reply, Bluegrass submitted, in summary, that:

(a) The primary evidence that the Secretary relied on in relation to the 8 March 2012 meeting was an unsworn file note. Neither of the Department representatives present at the meeting had filed affidavit evidence as part of the appeal. The only sworn evidence before the Commission of what was said at the 8 March 2012 meeting was that of Sonya McIntyre; accordingly it should be preferred.

(b) The only matter about which Mrs McIntyre was said to have misled the Secretary was, on the Department's own account, immaterial (because the Department was aware that the initial funding came from Ray McIntyre when the licence was granted).

(c) It was not sufficient for the Secretary to decline to take a position on the remainder of Mrs McIntyre's profile of past compliance. In the absence of evidence to the contrary, the Commission could be satisfied that Mrs McIntyre's record was otherwise excellent.

(d) Section 66(5) simply required that information was provided as promptly as was reasonable in the circumstances.

(e) At the time of the 8 March 2012 interview, Sideline was the subject of a venue licence held by the Lion Foundation. This was relevant to Mrs McIntyre's evidence that she did not appreciate, from the 8 March 2012 interview, exactly what information the Department wanted.

(f) Mrs McIntyre explained the full position regarding funding in her 20 March 2012 and 27 March 2012 emails, without any further questions from the Department, let alone the Department exposing the fact that "misinformation was originally supplied".

(g) Mrs McIntyre's comment in Stanmore's submissions, that she "had no idea how important" the financial information was to the Department until it asked for further information, did not support the allegation that she was unaware of the importance of providing accurate information.

(h) If the Commission did not accept that Mrs McIntyre did not mislead the Department, it was nevertheless highly relevant that she later supplied comprehensive and correct information. Otherwise there would be no incentive for participants in the sector to voluntarily correct any wrong information.

Stanmore's submissions in reply

15. In reply, Stanmore submitted (by way of a letter from Mrs McIntyre), in summary, that:

(a) The Secretary's case involved false accusations.

(b) The file note of the 8 March 2012 meeting was not an accurate representation of the meeting. The inspectors did not take notes during the meeting, and the answers attributed to Mrs McIntyre in the note were not the kind of language someone would use when speaking.

(c) Mrs McIntyre agreed that she would have said that nobody else had a financial interest in Sideline, as that had always been the case. Ray McIntyre had never had a financial interest in the bar; his loan was to her personally. But, contrary to the Department's file note, she never said "no one or any other party or person lent or gave me money".

(d) Mrs McIntyre bought the bar with her own money, which was tied up as equity in her home. Ray McIntyre lent her money personally and temporarily, when she could not get access to all of her money exactly when she needed it. When it became clear that the Department wanted to know where the money was coming from ultimately, she made it clear that Mr McIntyre had lent her the money.

Further submissions and evidence following the Commission's decision in the Phoenix appeal

Bluegrass

16. Following the *Phoenix* Decision, Bluegrass submitted, in summary, that:

(a) The present appeal could be distinguished on the basis that it involved a cancellation, rather than a refusal to renew a licence. Whereas the Secretary must refuse to renew a licence if he was not satisfied about a matter set out in section 67, the Secretary had a discretion whether to cancel a licence when he was no longer satisfied of a section 67 ground.

(b) It was not necessary for the Secretary (or Commission) to resolve doubts about the suitability of a venue manager or key person by cancellation. Breaches could be, and were, dealt with in a number of ways, such as by doing nothing, giving a warning or working with the operator to achieve compliance.

(c) A different approach in cancellation decisions was also justified, because the particular person, necessarily, had not been considered unsuitable until the matter which gave rise to cancellation.

(d) A "systemic" approach was appropriate in making an assessment of suitability based on a profile of past compliance. What mattered was whether the Secretary was satisfied of likely future compliance. A single instance of non-compliance should not be a sufficient basis on which to find that a key person is unsuitable.

17. The Appellants also filed further affidavits. Sonya McIntyre deposed, in relation to factual matters that arose in the *Phoenix* Decision, as follows:

(a) At the time of her interview with the Department on 8 March 2012, the bar was opening at 7.30 am for breakfast, and had been since December 2011. This was a change from the hours of the previous owner, who sometimes opened as late as 10 am.

(b) She had not been aware of emails between Mike O'Brien (a person involved with another class 4 operator, whose emails with Ray McIntyre were relevant to the *Phoenix* Decision) and Ray McIntyre about Sideline, and they were not written on her behalf.

(c) The 7 March 2012 email from Ray McIntyre regarding opening hours was simply an example of the type of occasional advice that she used to seek.

(d) Ray McIntyre has no involvement in the bar; although she used to ask him for advice occasionally, she would no longer do so.

(e) She did not want to lose her business and, if necessary, she would "reluctantly" step aside and let her husband run the bar, rather than lose the value that they had built up in the business.

18. Bluegrass also filed three other affidavits. Jodie McCluskey, an employee at Sideline, deposed that Mrs McIntyre was in charge and that when Mrs McIntyre was away, her husband, Terry McIntyre, or the duty manager, Nicola Bradley, stood in. She had not worked under anyone else at Sideline. Nicola Bradley, the duty manager, deposed that Mrs McIntyre was a good employer. Roebyna Bak, the CEO of Bluegrass, deposed that Bluegrass had terminated its arrangements with Total Gaming Solutions (Ray McIntyre had been contracted to provide gaming machine servicing to Sideline as a sole trader using the name Total Gaming Solutions).

Stanmore

19. Mrs McIntyre said, on behalf of Stanmore, that she was unsure how the bulk of the *Phoenix* Decision related to her appeal. She had no financial or ulterior reason to sign with Phoenix and, as far as she was concerned, if the Phoenix Trust was not approved to operate, she would stay with the society that currently held the venue licence.

The Secretary

20. The Secretary submitted that the *Phoenix* Decision supported his decision to cancel the venue licence for the Sideline Bar for the following reasons:

(a) The Commission's findings in the *Phoenix* Decision, that it was not satisfied that Mr McIntyre's relationship with Sideline Bar would cease, and that there were serious doubts about his suitability, supported cancellation. In this

respect, the Secretary departed from his previous position, that concern about Mr McIntyre's influence on Sideline did not take the form of lack of satisfaction of his suitability.

(b) The factual findings in the *Phoenix* Decision supported his submission that Ray McIntyre instructed Sonya McIntyre to lie, and that she deliberately acted on this instruction.

(c) The Commission found, in the *Phoenix* Decision, that an apparent instruction to lie did not comply with statutory or regulatory requirements. Acting on an instruction to lie must be an even clearer instance of non-compliance. Further, Sonya McIntyre deliberately concealed Ray McIntyre's covert engagement in the sector. Mrs McIntyre would also have been in breach of the venue costs schedule, and therefore the *Gazette* Notice (which requires compliance with costs schedules), by claiming different opening hours from those in actual operation.

(d) Total Gaming Solutions Limited (of which Terry McIntyre is the sole shareholder and director) appeared to be the source of a $95,000 payment in August 2012 by Sonya McIntyre to Ray McIntyre, whereas Sonya McIntyre claimed the $95,000 was lent to her by her parents.

(e) Non-satisfaction of section 67 factors also amounted to non-compliance. The Commission could not be satisfied that there were no other factors likely to detract from the purposes of the Act (section 67(1)(r)), as Sonya McIntyre's involvement as a key person would likely detract from the purpose of limiting crime and dishonesty associated with gambling in terms of section 3(f) of the Act. Nor could the Commission be satisfied that any other requirement in the Act or regulations would be met (section 67(1)(s)).

21. In relation to the interpretation of section 68 (determining suitability for class 4 venue licence), the Secretary submitted that the section should be read as "broad enough to encompass all considerations relevant to the Secretary's (and the Commission's) judgment as to key person suitability, even those not specifically listed in section 68", including dishonesty or incompetence, or non-compliance with another regulatory regime. He submitted that the following matters were "so serious that they justify a finding of unsuitability on the basis of a one-off breach":

(a) Mrs McIntyre deliberately provided false and misleading information to the Secretary, demonstrating dishonesty.

(b) Mrs McIntyre misled the Secretary in order to conceal the activities of Ray McIntyre, showing disregard for the requirements of the Act and undermining the important function of suitability assessments in licensing decisions.

Further information on venue hours

22. After considering the further evidence and submissions on the venue opening hours, the Commission considered that the material received did not deal clearly enough with the implications arising from the 7 March emails and sought further information from all parties on the actual operating hours and the operating hours provided for in the venue agreement and relevant venue costs schedule. Venue costs schedules set out the amounts payable by a class 4 operator to a venue for venue operating costs. These costs are subject to the limits set out in the *Gazette* Notice "Exclusions on Class 4 Venue Costs Notice 17 July 2008". The venue costs schedules require the Secretary's approval (as part of the approval of class 4 venue agreements) under section 69(1)(b).

23. Mrs McIntrye advised as follows:

(a) Opening hours had not been displayed in the venue either by her or the previous owner.

(b) The prevailing venue costs schedule at the time of the interview provided for class 4 gambling to open at 8.00 am.

(c) The proposed new venue costs schedule with Bluegrass provided for gambling to open at 7.30 am.

(d) The Smart Operator reports showed opening hours of 7.30 am to 11 pm and, in June and July 2012, showed machines in operation between 8.00 am and 8.30 am each day.

24. The Secretary advised as follows:

(a) The prevailing venue costs schedule at the time of interview provided for class 4 gambling to open from 9.00 am.

(b) Sideline's liquor licence, under the Sale of Liquor Act, limited the sale of liquor to between 9.00 am and 11.00 pm.

(c) Section 25 of the Sale of Liquor Act required Sideline, as the holder of an on-licence, to display its hours of operation in the venue.

(d) Under the venue operator's licence, gambling could only be conducted when the primary activity, on-licensed sale of liquor, was available.

(e) Electronic Monitoring System ("**EMS**") records show the gaming machines were powered up each day at precisely 7.30 am. The precision and regularity indicated use of an electronic timer.

(f) EMS records showed that there were few days on which there was any class 4 gambling activity prior to 10.00 am and, in only one case, was that activity paid (as opposed to the use of remaining credits available on the gaming machine).

Analysis

25. The Commission identified the following issues as arising for determination:

(a) Did Stanmore/Mrs McIntyre deliberately provide information to the Department that was false and misleading?

(b) Is the Commission satisfied of Mrs McIntyre's suitability as a venue manager?

(c) Should the Commission consider cancellation on the basis of Ray McIntyre's involvement and suitability?

(d) Are there other factors likely to detract from the purposes of the Act?

(e) In light of the above, should it reverse, uphold or vary the cancellation?

Mrs McIntyre's conduct and her suitability

26. The Secretary's finding of misleading conduct, and accordingly his original submissions and affidavits, focused entirely on Mrs McIntyre's explanation of how she funded the purchase of Sideline. It was based in large part on the 7 March emails.

27. The Commission's finding in the *Phoenix* Decision, that the (same) 7 March 2012 email contained an apparent instruction to mislead the Department about venue hours, resulted in the parties making further submissions on whether Mrs McIntyre misled the Department about venue hours. The relevant portion of the email states:

> Remember that you do a significant amount of the pokie room hours to match the venue cost schedule – AND REMEMBER THAT YOU OPEN AT 7.30am SO IF YOU HAVE THE BAR HOURS PLASTERED ANYWHERE PLEASE REMOVE THEM.

Mrs McIntyre replied:

> Anything else!!!!!!!!!!!! I don't mind lying but the lovely brother-in-law bit?

28. There was a suggestion in the information received on the matter that failure to display hours may be in breach of a sale of liquor regulatory requirement, but that does not come within the relevant "profile of past compliance". The Commission considers that, in making an assessment of suitability under section 67(1)(c), it is required to limit its

consideration to the matters in section 68. Although the Secretary urged the Commission to follow its earlier decision in *Caversham Foundation Limited* (decision GC06/10) and apply a sufficiently liberal interpretation of sections 67 and 68 as to allow it to take other matters into account, such as compliance with other regulatory requirements, the Commission had reconsidered its earlier approach in the *Phoenix* Decision. That reconsideration was one of the reasons that it offered the opportunity to the parties to make further submissions. Nothing in the Secretary's submissions has caused the Commission to change the view expressed in the *Phoenix* Decision.

29. The Commission does not regard compliance with liquor licensing requirements as coming within the scope of the relevant profile of past compliance (although it may provide a basis for lack of satisfaction with another section 67 ground, such as that any other requirement in the Act or regulations will be met (section 67(1)(s)). However, in this case, the Commission does not think that this new concern, raised only at the very end by the Secretary, is sufficient to affect materially its overall assessment.

30. Where the received information differs on the subject of venue hours, the Commission adopts the Secretary's information as it is better supported by documents. However, the venue hours information does not indicate any issue with compliance with gambling law obligations as it appears neither that class 4 gambling was offered when the primary activity was not available, nor that the availability of class 4 gambling did not match the venue costs schedule in the venue agreement. The information provided on venue hours has not had any material effect on the Commission's view of Mrs McIntyre's suitability.

31. The information regarding the funding of the purchase of Sideline is a different matter. Mrs McIntyre's responses to the Department adversely affect the Commission's view of her profile of past compliance, for the following reasons:

    (a) Ray McIntyre's instruction in the 7 March emails was to say that she had used her savings and a bank loan to purchase the business. Only one of the answers which she was briefed to give was said by Mr McIntyre to be the truth (and it was not this one).

    (b) The contemporaneous Departmental file note records her giving that answer (and saying that no one else gave or lent her money for Sideline) and is further supported by the Departmental email of 9 March 2012 asking for copies of the documentation to support that answer.

(c) Despite Mrs McIntyre's sworn assertion to the contrary, the Commission considers, on the basis of the contemporaneous documents, that she did give the false answer as Ray McIntyre had instructed.

(d) Mrs McIntyre corrected the misinformation in the course of the emails of 20 and 27 March 2012 only when it had become clear to her that she had been caught out by the Department's request for supporting documentation.

(e) Mrs McIntyre's subsequent statements in interviews and in her evidence denying what she had said on 8 March 2012 and attempting to justify or explain the provision of false information were unconvincing and implausible. These included statements that it was correct to have said that she had used her savings, although in fact she had no savings, because that was a reference to the equity in a house which was security for a bank loan and that she had thought that the fact that she had borrowed the entire purchase price initially from Ray McIntyre and still owed him $95,000 was not relevant to the Department's inquiries of her.

(f) The Commission considers that, although her email response was indeed a light-hearted joke, the 7 March emails show that she nevertheless anticipated questions about the funding, realised that the answer given would be important and had been briefed to answer dishonestly. Her statement in the 8 March 2012 interview was in line with that brief. The later provision of corrected information was forced from her by the Department's unanticipated demand for supporting documents.

32. Mrs McIntyre's answers to the Department relate to her profile of past compliance with the Act because the Act provides for the Secretary, in his investigation to assess the suitability of the venue manager, to require the applicant, the venue manager and any other key person to provide information relating to the application and to undergo investigation into its financial position (sections 66(3)(a) and 66(5)). It may also amount to an attempt to obstruct a gambling inspector (section 346) in the course of discharging a duty to investigate the venue licence application (section 66(1)) and the exercise of the powers to do so (sections 66(2) and 66(3)). In other respects, the Commission accepts, in the absence of any material to support a contrary view, that Mrs McIntyre's profile of past compliance is otherwise unexceptionable.

33. The Commission accepts the submission for the Appellants that not all instances of non-compliance necessarily result in lack of satisfaction about suitability. It does so despite the following passage in *First Sovereign Trust v Secretary for Internal Affairs* HC Wellington CIV 2010-485-828, 22 July 2010, Joseph Williams J (at [40]):

> [The] suitability test required that the Secretary be satisfied (among other things) that the applicant has no relevant convictions..., and no history of non-compliance under the Act.

34. In the Commission's view, the passage was intended be read in the context of the particular case, in which a key person of a class 4 operator was alleged to have a history of non-compliance because of an alleged offence under the Act (which is not expressly identified in the decision but which appears, by implication, to be under section 106). It was not intended to provide an accurate statement of how the suitability provisions work generally, but was rather a shorthand framing of the particular issue before the Court. The express statutory requirement is satisfaction that the Secretary's investigations do not cause the Secretary (or Commission on appeal) not to be satisfied about the suitability of the venue manager of any other key person; section 68 sets out the matters which may be taken into account in making that assessment but does not dictate its outcome. It is possible to have been convicted of a relevant offence or to have not complied with a gambling regulatory requirement in the past without necessarily being assessed as unsuitable. The full context of past conduct is important.

35. In that regard, the appearance of even a single example of dishonesty in the course of dealings with the Department is a matter of serious concern to the Commission in assessing the suitability of those involved in the conduct of class 4 gambling. The conduct of Mrs McIntyre in her dealings with the Department during its investigation of the venue licence application in 2012, as set out above, causes the Commission not to be satisfied about her suitability to supervise the conduct of class 4 gambling at the venue. The Commission's assessment is significantly affected by its view that Mrs McIntyre gave deliberately false information on a matter which she knew was material to the Secretary's investigation. It would not have reached the same conclusion if it had thought that the misinformation had been provided innocently and later voluntarily corrected.

Ray McIntyre

36. The Secretary's cancellation decision was on the express basis that it did not involve a finding as to Ray McIntyre's suitability; his decision was based solely on his assessment of Sonya McIntyre's suitability. This was not the position that he took in refusing to grant a licence to Phoenix, which was based in large part on his non-satisfaction of Mr McIntyre's suitability. In light of the Commission's finding in the *Phoenix* Decision, that it was not satisfied of Mr McIntyre's suitability, both parties assumed that that issue was relevant to the present appeal.

37. It is important to place the Commission's findings in the *Phoenix* Decision in their proper context. The findings were limited to the position of Phoenix. That part of the decision amounts to no more than a finding that, on the information then before the Commission, it was not satisfied about either Ray McIntyre's suitability or his lack of future connection to Sideline. That is not a determination reached on the material before the Commission on this appeal and it is not a determination binding on the parties to this appeal.

38. Having previously expressly disclaimed any reliance on the suitability of Ray McIntyre on this appeal, the Commission does not consider that it would be fair to allow the Secretary to change his position in his final submissions. Doing so would also be an unnecessary expansion of the scope of the appeal inquiry.

39. The Commission declines to find that satisfaction about the suitability of Ray McIntyre is a material consideration on this appeal.

Any other factors

40. The Secretary suggested that non-satisfaction of a section 67 factor may itself amount to a non-compliance for suitability purposes. He also submitted that the Commission should not be satisfied that there were no other factors that are likely to detract from achieving the purposes of the Act or that the requirements in regulations or licence conditions will be met (section 67(1)(r) and (s)). The suggested other factors were the fact that Mrs McIntyre had followed Ray McIntyre's instructions to lie to gambling inspectors.

41. Satisfaction about suitability is itself a section 67 factor. As non-satisfaction of any section 67 factor is a potential ground for suspension or cancellation, the Secretary's submission that it is also a non-compliance produces an unwarranted circularity. Non-satisfaction of a section 67 factor is not an instance of non-compliance (and therefore relevant to suitability). The submission also mischaracterises the person on whom the obligation created by section 67 is imposed – it is not the applicant but the Secretary.[1]

42. For the reasons recognised in the Appellant's submissions, the requirements of section 67(1), subsections (c) and (s) overlap considerably. Much of the focus of suitability assessment is on the likelihood of future compliance. The matters raised by the Secretary cause the Commission not to be satisfied of the matters in sections 67(1)(c) and 67(1)(s). The Commission does not consider that there is any separate reason to be not satisfied of section 67(1)(r).

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[1] *The Trillian Trust v The Secretary for Internal Affairs* HC Wellington, CIV 2010-485-2411, 14 November 2011, Simon France J at [36].

Discretion

43. Bluegrass relied on the discretionary language in section 74, arguing that, whereas a refusal to grant is an automatic consequence of non-satisfaction in applications for licences or renewal, the Secretary and Commission have a discretion in respect of existing licences. It submitted that this was not because there was a presumption of suitability which needed to be displaced, but because the particular key person had necessarily not been considered unsuitable until the issue giving rise to the cancellation comes up. Further, cancellation (as opposed to a refusal to grant) had a punitive effect, insofar as it involved taking away an existing privilege.

44. The Commission acknowledges that the consequence of a finding that one or more of the grounds for suspension or cancellation exists is not automatic but rather gives rise to a discretion. Pursuant to section 74(2), the discretion must be exercised taking into account "the matters in section 67".

45. If a section 67 factor 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 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. However, the result is not automatic and there may be countervailing considerations.

46. In this case, the Appellants submitted that, if the Commission were not satisfied with her suitability, Mrs McIntyre could simply cease to be a key person, leaving the Commission satisfied. However, there was an underlying lack of reality and substance in the submission. Mrs McIntyre is an owner/operator; her disengagement would not be easily achieved and would be difficult to police; the Appellants have put forward no specific means by which this could be achieved. The suggestion that she would cease her involvement and be replaced by her husband does not leave the Commission in any greater position of satisfaction about the section 67 grounds.

47. The Appellants' submissions also suggested that cancellation was too severe a consequence for the non-compliance. That argument assumed, incorrectly in the Commission's view, that the power to suspend or cancel should be exercised purely punitively. However cancellation would not necessarily have a punitive aim in this case. It would be essentially remedial, to remove a licence from a venue which does not meet the required standard to hold one.

48. However, the Commission considers that the circumstances of the present appeal also give rise to the possible need for a punitive response. Supplying false or misleading information in the course of an application is itself an additional ground for suspension or cancellation (section 74(1)(d)), although it was not a ground explicitly relied upon by the Secretary. The importance of the truthfulness and reliability of the information provided to the Department in the course of the investigation that the Secretary must carry out (section 66) and that informs his assessment of the satisfaction required by section 67 is also relevant. There is a need for deterrent consequences for the dishonest provision of information to protect the integrity of the licensing process, especially in cases where detecting dishonesty is difficult. In this case, until he unexpectedly obtained the 7 March emails, the Secretary was inclined to attribute Mrs McIntyre's conduct to confusion on her part; his view changed when he saw the prior email exchange.

49. The Commission considers that cancellation may also be appropriate to ensure that those who benefit from dishonest responses to the Secretary lose that benefit (as well as to deter others from acting similarly in the future).

50. In the Commission's view, there is a lack of substantial contrary considerations to displace the section 67 matters that favour cancellation on both remedial and deterrent grounds. The Commission considers that cancellation is the appropriate outcome in the light of its views about Mrs McIntyre's conduct and suitability.

Date on which cancellation takes effect

51. As required by section 75(5)(a), the Secretary notified the corporate society, the parties to the venue agreement and the venue manager of the date on which the cancellation would take effect. It was approximately three weeks after the date of the decision letter. It did not take effect on that date because of the effect of section 78(2)(b)(ii), which provides that the venue licence remains in force until the outcome of an appeal.

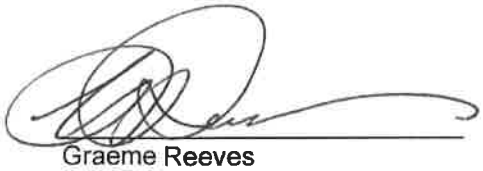
52. On appeal, pursuant to section 77(4)(a), the Commission may confirm, vary or reverse the decision of the Secretary. As the decision of the Secretary under section 75(5)(a) is a decision to cancel the licence with effect from the notified date, the Commission considers that its powers under section 77(4)(a) include a power to vary the decision by notifying a new date from which the confirmed cancellation would take effect, notwithstanding the provision in section 78(2)(b)(ii) that the licence remains in effect until the outcome of that appeal. In that regard, while the effect of the latter provision is spent upon the outcome of the appeal, the date for cancellation would be extended by exercise of an appeal power to vary the decision.

53. Neither party made submissions on the question of notification. Mrs McIntyre gave evidence of the difficulty that an adverse decision would cause for her and her business.

Although the evidence was not given on this issue, the Commission has had regard to it in deciding that she should be allowed a short period to put her affairs in order. Bearing in mind that the initial decision did not have immediate effect, the Commission considers that the cancellation decision which it has decided to confirm should take effect 15 working days after the release of its decision.

Decision

54. For the reasons set out above, the Commission confirms the decision of the Secretary to cancel the class 4 venue licence, and varies the decision by amending the date on which cancellation takes effect to 11 September 2014.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

21 August 2014