

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **PERRY**
FOUNDATION

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
M M Lythe
G L Reeves

Date of Appeal: 8 February 2006

Date of Decision: 9 June 2006

DECISION
ON AN APPEAL BY PERRY FOUNDATION

Appeal

1. Perry Foundation (the "**Appellant**") appealed under section 77(1)(e) of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary of Internal Affairs (the "**Respondent**" or the "**Secretary**") to cancel the class 4 venue licence held by the Perry Foundation for the Panmure Super Bowl, 532A Ellerslie Panmure Highway, Auckland. The Appellant sought reinstatement of the licence.

Gambling Act 2003 and Gambling (Harm Prevention and Minimisation) Regulations 2004

2. The Appellant's licence was cancelled pursuant to section 74(1)(a) which provides that:

(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; ...

3. Section 67 of the Act provides (in part):

67(1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that –

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

(s) any other requirement set out in regulations or licence conditions is, or will be, met

4. Regulation 4 of the Gambling (Harm Prevention and Minimisation) Regulations 2004 (the "**Regulations**") provides as follows:

4. Unsuitable class 4 venues

The following venues are declared unsuitable to be a class 4 venue:

- (a) a venue at which the primary activity is anything other than onsite entertainment, recreation, or leisure focused on persons 18 years and over, including (without limitation) –
 - (i) a dairy, supermarket, or other similar venue:
 - (ii) a fast-food outlet or other similar venue:
 - (iii) an office:
 - (iv) a private residence:
 - (v) a sports stadium:
 - (vi) a circus, fair, amusement parlour, arcade or park, theme park, or other similar venue:
- (b) a venue that is not a fixed permanent structure, including (without limitation) –
 - (i) a tent or marquee:
 - (ii) a vehicle, vessel, aircraft, trailer, or other conveyance:
- (c) a footpath (whether or not undercover):
- (d) a concourse area (whether or not enclosed):
- (e) an internet-café or cyber-café, or any other venue at which the primary activity is electronic media (including games):
- (f) a library, art gallery, museum, theatre, cinema, or other similar venue:
- (g) a place of worship.

Facts

5. An Agreed Statement of Facts was filed by the parties. The Appellant filed affidavit evidence from the owner of the premises, Mr Lum, the Chief Executive Officer of the Perry Foundation, Mr Paterson, and the Chief Executive Officer of Ten Pin Bowling New Zealand Incorporated, Mr Nevatt.
6. The Respondent did not file evidence, but set out additional factual matters in its written submissions relating to the inspections undertaken by the Department of Internal Affairs (the "**Department**"), promotional material collected from the site, and the website of the Panmure Superbowl.
7. By letter dated 10 October 2005, the Respondent advised the Appellant that it proposed to cancel the class 4 venue licence for the Panmure Superbowl and stated the following reason for the proposed cancellation:

The reason for the proposed cancellation, based on the outcome of its inspections, is that the Department is not satisfied that the Venue's primary activity is on site entertainment, recreation or leisure focused on persons 18 years and over, as required by section 67(1)(s) and Regulation 4. The

Venue's primary activity is ten pin bowling, which is focused on persons of all ages, including the very young. This conclusion is supported when the Venue's subsidiary activities, which have a clear youth focus, are also taken into account.

8. The Appellant lodged submissions, opposing the proposed cancellation.
9. By letter dated 30 January 2006, the Department gave notice that it had decided to cancel the licence, with effect from midnight on Friday 24 February 2006.
10. On 9 February 2006, the Appellant lodged an appeal of the Respondent's decision.
11. Class 4 gambling at the Panmure Superbowl premises is conducted in the bar area. The bar is of similar size to an average tavern, with the gaming machines being located at one end. The only access from the bar to the ten pin bowling area is a small exit adjoining the café/kitchen area.
12. The Panmure Superbowl is open from 9.30am until 11.30pm on Mondays, Tuesdays, Thursdays and Sundays, and until midnight on Wednesdays, Fridays and Saturdays. It was common ground that the primary activity for the premises, as a whole, is ten pin bowling.
13. At the time of the Department's inspections, the venue operator was Zone Holdings Limited. On or about 12 December 2005, the venue was sold to the current owner and operator, Maritone Holdings Limited.
14. The Division of the Commission hearing the appeal visited the premises during the morning of 9 June 2005 as members of the public and unaccompanied by the parties. The visit was limited to what could be seen by an ordinary member of the public entering the premises, the purpose being for Commissioners to see in three dimensions what had already been represented to the Commission by photographs and a plan, and in evidence.

Submissions on behalf of Appellant

15. The notice of appeal listed two grounds of appeal. The first was that the relevant class 4 venue comprises only the bar within the Panmure Superbowl. As a consequence, the venue complies with the Regulations as the primary activity of the bar is the sale of liquor. The second and alternative ground of appeal (ie if the class 4 venue was held by the Commission to be the entire Panmure Superbowl) was that the Panmure Superbowl is not in breach of Regulation 4 of the Regulations because the primary activity (ten pin bowling) is recreation focused on persons 18 years and over.
16. In relation to the first ground, the Appellant noted that "class 4 venue" is defined as "a place used to conduct class 4 gambling." In submitting that the "place" at Panmure Superbowl was the bar, the Appellant relied on Mr Lum's evidence that:

- (a) The bar is a physically separate location which has its own toilets and external entry. There is a small accessway between the bar to the ten pin bowling area.
- (b) The bar is fully stocked and is of a similar size or bigger than an average tavern.
- (c) The Department's inspector, Mr Batenburg, wrote in answer to the question of whether the venue is geared toward minors, that it was "Almost like 2 venues ...".

17. In relation to the second ground, the Appellant submitted:

- (a) Regulation 4(a) should be construed narrowly. To do otherwise would be to make redundant Regulations 4(b) to 4(g).
- (b) It could be presumed from the omission to refer to ten pin bowling venues in Regulation 4(a) that such venues are suitable and prohibited by Regulation 4 only if the primary activity is not focused on persons over 18 years of age.
- (c) The reference in Regulation 4 to "the focus of the primary activity" contemplates that a venue is not unsuitable merely because some persons under 18 years participate in the primary activity.
- (d) The Respondent had incorrectly taken into account subsidiary and ancillary activities in making its determination that the venue was unsuitable.
- (e) The Department had insufficient evidence reasonably to conclude that the primary activity was not focused on persons over 18 years. In support of this contention, the Appellant relied on the evidence of Mr Lum and Mr Nevatt that:
 - (i) Ten pin bowling is an adult dominated sport.
 - (ii) 86% of Panmure Superbowl's turnover is generated from adults.
 - (iii) 99% of all league bowlers at Panmure Superbowl are over 18 years.
 - (iv) Income generated from junior bowling in a sample month (April 2005) was slightly less than 20% of the total bowling income and 14% of Panmure Superbowl's entire income. Income generated from junior bowling in January, February and March 2006 was respectively 14%, 21.5% and 8% of bowling income.
 - (v) 54% of the Panmure Superbowl's operating hours are outside hours that persons under 18 would attend (due to school hours or lateness in the day).

- (vi) External marketing is targeted at people over 18 years of age, reference being made to radio advertising on More FM (which it was stated has a strong audience in the 25-44 age bracket), the Auckland Entertainment Book and by website.
- (vii) Adult bowling is more lucrative and for this reason the venue management markets to persons over 18.
- (viii) The "vast majority" of people who visit the venue are over 18.

Submissions on behalf of the Respondent

18. The Respondent submitted that:

- (a) Regulation 4 refers to a venue in its entirety as opposed to the class 4 venue. For Panmure Superbowl, the venue is the premises as a whole not the bar.
- (b) The venue has an "all ages" focus, and the primary activity is not focused on onsite entertainment, recreation or leisure focused on persons 18 years or over. It is not necessary to ascribe a percentile or proportional value to the business generated by youth; it is sufficient that the focus is not limited to persons 18 years and over.
- (c) In addition to section 67(s) and Regulation 4, sections 67(1)(b), (q), and (r) indicate that the Secretary is able to take into account a broad range of factors in determining suitability.
- (d) There is a legislative presumption first, against granting a licence under section 67(1) and second, that a venue is unsuitable under Regulation 4(a), where the primary activity is anything other than onsite entertainment, recreation or leisure focused on persons 18 years or more.
- (e) Regulation 4(a) provides a general rule for classifying unsuitable venues, with examples, while Regulations 4(b)-(g) provides a list of venues that are inherently unsuitable for class 4 gambling. The words "without limitation" in 4(a) make it clear that the list in 4(a)(i) to (vi) is not exhaustive.
- (f) The Secretary was not wrong to consider secondary activities in making his decision that the venue was unsuitable. Secondary activities are relevant as they may indicate that the venue is focused on all ages.
- (f) Cabinet Papers relating to the Regulations support an interpretation of Regulation 4(a) to the effect that ten pin bowling venues are unsuitable if the focus is not on persons over 18 years.

- (g) Ten pin bowling venues will not be caught by Regulation 4 in circumstances where such venues have "such a scant youth participation/focus that it would preclude an all ages focus and [would] thereby be analogous to a pub."

19. In submitting that the primary activity had an all ages focus, the Respondent relied on promotional material collected from the venue and the venue's website, which included promotions for juniors, families, birthday parties and school groups.
20. The Respondent submitted that the statistics provided by the Appellant relating to income, turnover and numbers of persons over 18 attending the venue were not robust or determinative. It was submitted that league representation was not indicative of broader junior youth participation at the venue, and that the source of turnover generation is different from the group upon whom the primary activity is focused. The evidence showed, it was submitted, that the venue is concentrating and directing attention to the family/youth market. In the alternative, the statistics provided by the Appellant, if relevant, supported a view that bowling was not focused on persons over 18 years.

Submissions in reply

21. The Appellant's submissions in reply largely repeated the Appellant's earlier submissions. Appellants are reminded that a reply should address only new points or matters raised in the Respondent's submissions and evidence which are not foreseen and dealt with in original submissions and evidence. Matters raised by the Appellant of this nature included the following:

- (a) The Respondent has not filed any evidence. The evidence filed on behalf of the Appellant is sworn, uncontested evidence. Comments in the inspector's report provided to the Commission are hearsay, and accordingly must be given little (if any) weight.
- (b) The Secretary has misconstrued section 67(1)(b). The Secretary is required to be satisfied that the possibility of persons under 18 years accessing class 4 gambling is minimal. The issue is not access generally to the venue.
- (c) Sections 67(1)(b), (q) and (r) are not relevant as the Secretary has previously been advised that the only ground for cancellation is section 67(1)(s).
- (d) The Cabinet papers referred to by the Respondent are an inadequate basis for concluding Parliament intended Regulation 4 to apply to ten pin bowling venues.

Preliminary matters

22. As noted by the Appellant, the Secretary has filed written submissions but no affidavit evidence. The Secretary's written submissions include legal arguments and factual

inferences based on the Appellant's evidence, but also outline factual matters based on information available to the Secretary, but which is not in evidence.

23. As an appeal is by way of *de novo* hearing, consideration should be given by the parties to how they should place factual information before the Commission for use in the appeal. The Commission draws to the attention of parties its Practice Notes (paragraph 33) which specifies as follows:

The Commission's preference is to receive from the parties to an appeal an agreed statement of facts covering relevant factual matters which are not in dispute. Beyond this, factual material **must be presented to the Commission by way of sworn affidavit.**

[Emphasis added]

24. Despite the non-compliance with the Practice Notes, the Commission is required to consider the factual information contained in the submissions. Section 77(3)(d) of the Act provides:

(3) The Gambling Commission—

(d) must consider any information provided by the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

25. The requirement that the Commission must consider information submitted to it does not, however, dictate the weight which it should receive. In the current circumstances, the Commission does not consider the factual material set out by the Secretary in his submissions to be contentious. Indeed, the Respondent has relied principally on the Appellant's own evidence to argue that the venue has an "all ages" focus and accordingly is unsuitable. In the circumstances of this appeal, a more extensive Agreed Statement of Facts should probably have been utilised.

26. The circumstances may be different, however, where the facts are contentious. For the future, the Commission's preference is to receive factual information, which is not agreed, in the form of sworn evidence, and cautions parties that unsworn statements in legal submissions and otherwise placed before the Commission, for example as part of information provided to the Commission and the appellant at the outset of an appeal, may not receive the same weight.

Key issues

27. The Commission's jurisdiction on appeal is *de novo*. It reconsiders the Secretary's decision having regard to the information before it and is not restricted to the information before the Secretary or to the grounds stated by the Secretary for his decision. This appeal gives rise to the following issues arose for consideration and determination by the Commission:

- (a) What is the venue? The bar within the Panmure Superbowl or the premises as a whole?
- (b) If the venue constitutes the entire Panmure Superbowl premises, is the primary activity of the venue, on the facts, something other than onsite entertainment, recreation or leisure focused on persons 18 years and over?

The issues relate principally to the requirements of section 67(1)(q) that the venue be suitable for class 4 gambling, Regulation 4 specifying that certain premises are not suitable for this purpose either inherently or in view of the focus of the primary activity.

28. A finding for the Appellant on the first ground would mean that it was unnecessary for the Commission to consider the second. The Appellant contends, and the Respondent has not disputed that, if the relevant class 4 venue is the bar only, the venue would not be unsuitable in terms of Regulation 4 (or at all, for that matter) because the focus of the primary activity of the bar is the sale of liquor, limited to persons over 18 years.
29. A "class 4 venue" is defined in section 4 of the Act as "a place used to conduct class 4 gambling". The definition of "place" includes a building and a room (amongst other things). Accordingly, what constitutes the class 4 venue in any given instance will vary from case to case depending on the facts and the terms of the particular licence. As noted by the Commission in its decision GC10/05, relating to an appeal by the New Zealand Community Trust, the Secretary has the ability to licence individual parts of a building as class 4 venues, if that is necessary or desirable.
30. In determining what constitutes the class 4 venue in the current circumstances, the Commission starts by considering the licence issued by the Respondent. The licence identifies the venue as the Panmure Superbowl, located at 523A Ellerslie Panmure Highway. It describes the venue as a "hotel". This appears to be somewhat inapt; although there is a bar at the location, it is not a hotel.
31. Different aspects of the licence support different conclusions. On the face of the licence, the place within which class 4 gambling is permitted is the business premises called "Panmure Superbowl" at 532A Ellerslie Panmure Highway. It is not restricted to any more specific area of the premises, irrespective of where the gaming machines are in fact located at present. On the other hand, the description of the venue as "hotel" might support a construction that the venue is the bar area of the premises only.
32. The Commission also considered, a matter of fact and impression, where the class 4 gambling activities were located at the address, whether the various activities undertaken in the building were sufficiently co-ordinated so that the entire building appeared to be one business, or whether the activities were separate with the result that several

businesses appeared to operate within the one building. In making such an assessment, the Commission adopted the point of view of a consumer. Would a member of the public gain the impression, from the get up, advertising and operation of the activities at Panmure Superbowl that the activities (bowling, bar, café, megazone) formed one enterprise or more than one?

33. From the evidence before it and its own visit, the Commission considered that a consumer visiting the premises would gain an impression that the bar was distinct from the remainder of the Superbowl business, which otherwise formed a contiguous whole. The size of the bar, the fact it was walled off from the rest of the venue (except for a limited access way), the separate external access, and the positioning of gaming machines at the far end of the bar gave the impression that the bar was a separate business from the remainder of the premises and functioned on an independent basis. In contrast, the other activities at the Panmure Superbowl were located in a contiguous area and were apparently highly integrated.
34. Notwithstanding these observations and the reference in the licence to "hotel", the Commission was not prepared to decide conclusively that the relevant venue was the bar only. As in its earlier decision, it considers that the terms of the licence have primacy and that, if the licence were intended to apply only to part of the premises, the licence would specify the particular part and its location on its face. The licence does not do so in this case and, on the information before the Commission, class 4 gambling may be lawfully undertaken anywhere within the Panmure Superbowl venue although, if not restricted in fact to the bar area, other considerations would come into play. The Commission accordingly moved on to consider the second issue.
35. The Appellant argued that Regulation 4(a) must be narrowly construed to avoid making Regulation 4(b) to (g) redundant.
36. The Commission does not agree that the Regulation should be interpreted to avoid any overlap between Regulation 4(a) and 4(b)-(g). Regulation 4(a) is concerned with the **primary activity** of the venue, while Regulation 4(b)-(g) is concerned with the **type** of venue. Because Regulation 4(a) and (b)-(g) concern different things, there is no requirement to interpret the Regulation to avoid overlap.
37. A venue which falls into Regulation 4 (b)-(g) is inherently unsuitable as a class 4 venue whether or not its primary activity is focused on persons over 18. An adult cinema would be unsuitable on that basis.
38. Equally, the Commission draws little from the omission of Regulation 4(a) to refer specifically to ten pin bowling alleys. It is clear, from the phrase "including (without limitation)", that Regulation 4(a) applies to venues beyond those listed depending on the

focus of the primary activity at each such venue. Ten pin bowling alleys will be suitable or otherwise under Regulation 4(a) depending on the focus of the primary activity of each such venue.

39. The concept of a "primary activity" recognises that a venue may have a number of activities present, although it assumes that there will be one primary or dominant activity, the other activities at the venue being incidental or ancillary. Class 4 gambling is never supposed to be the "main use" of the venue (section 67(1)(k)).
40. Determining what the primary activity is in any given case is a question of fact. In the present case, if the venue is Panmure Superbowl, there is no dispute between the parties that the primary activity of the venue is ten pin bowling. Incidental or ancillary activities include video games, sale of food and beverages, and class 4 gambling. The application of Regulation 4(a) is assessed on the focus of the primary activity, not the ancillary activities, although the nature of the ancillary activities may affect the assessment of the focus of the primary activity.
41. The word "focused" in Regulation 4(a) does not carry a particular legal meaning, and the Commission gives it its ordinary meaning of "a centre of interest or activity" or "close or narrow attention; concentration". While the focus of the primary activity must be on persons over 18 years of age, exclusive attention to, or participation by, persons over 18 is not required.
42. The Commission considered that the test for suitability proposed by the Respondent was too narrow, in suggesting that the venue had to be "analogous to a pub" in the sense that persons under 18 years were excluded from entry. A venue is not rendered unsuitable merely because of the presence of persons under 18 years. Regulation 4(a) requires assessment of the focus of the primary activity, as distinct from the venue itself.
43. Having considered the evidence and information before it (including the impressions gained from its visit to the premises), the Commission was satisfied that Panmure Superbowl is a suitable venue in all respects to be a class 4 venue and, in particular, that the focus of the primary activity (ten pin bowling) was the onsite entertainment, recreation and leisure of persons 18 years and over.

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Decision of Division

41. The Commission decided to allow the appeal and reinstate the Appellant's licence, having determined that the venue met the requirements of section 67(1) and Regulation 4 of the Regulations.



GAMBLING
COMMISSION
Peter C. Finn
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

26 June 2006