

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **FILTHY FEW
MOTORCYCLE CLUB
TAURANGA INC**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
L M Hansen

Date of Decision: 14 June 2012

Date of Notification
of Decision: *ghd* July 2012

**DECISION
ON AN APPLICATION FOR COSTS BY FILTHY FEW MOTORCYCLE CLUB TAURANGA INC**

Background

1. On 14 September 2011 the Filthy Few Motorcycle Club Tauranga Inc (the "**Appellant**" or "**Filthy Few**") applied to the Secretary for Internal Affairs (the "**Secretary**") for a Class 3 operator's licence to conduct a lottery in Tauranga.
2. The Secretary declined the application on 18 November 2011.
3. On 6 December 2011, the Filthy Few filed an appeal against the Secretary's decision with the Gambling Commission.
4. In accordance with Commission's directions, the Filthy Few filed an Agreed Summary of Facts, affidavit evidence and submissions on the appeal. The Secretary did not file evidence or submissions in opposition. Instead, on 17 February 2012, he withdrew his letter of 18 November 2011, reversing his earlier decision to decline the application and thus removing the need for the appeal to continue. Following the Secretary's action, the Filthy Few applied to the Commission for an award of costs against the Secretary.

Relevant law

5. The relevant law is as follows:

Gambling Act 2003

225. Gambling Commission is Commission of Inquiry

- (1) Within the scope of its jurisdiction, and subject to this Act, the Gambling Commission, (including any Division) must be treated



as if it were a Commission of Inquiry under the Commissions of Inquiry Act 1908.

- (2) Accordingly, the Commissions of Inquiry Act 1908 applies to the Gambling Commission.

Commissions of Inquiry Act 1908

11. Power to award costs

The Commission, upon the hearing of an inquiry, may order that the whole or any portion of the costs of the inquiry or any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held:

Provided that no such order shall be made against any person who has not been cited as a party or authorised by the Commission, pursuant to section 4A of this Act, to appear and be heard at the Inquiry or summoned to attend and give evidence at the Inquiry.

6. The relevant Commission Practice Notes are as follows:

38. The Commission will not normally award costs but reserves its right to do so.
39. Factors which will be relevant in considering whether to order payment of costs, and fixing the amount of an award, will include whether any party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct.

Submissions by Filthy Few

7. Filthy Few submitted, in summary, that:

- (a) The Commission has jurisdiction to award costs under section 225 of the Gambling Act 2003 (the "**Act**") and section 11 of the Commission of Inquiry Act 1908 (the "**Col Act**"). The Commission had commenced upon "the hearing of an inquiry" for the purposes of the Col Act. The discretion to award costs is broad and unfettered.
- (b) Commission decision GC03/06 (First Sovereign Trust and Tauranga Hotels Limited) records that the Commission's starting point is that it does not normally award costs, but that it may do so where a party's conduct justifies or requires an award of costs.
- (c) The Commission's practice note records its reluctance to award costs, but reserves the ability to do so. Relevant factors in exercising the discretion include whether a party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct.
- (d) It challenges comments by the Commission in a previous decision that costs should be focussed on conduct before the Commission, pointing out that section

11 of the Col Act refers to the ability to award the costs “of the inquiry or any party thereto.”.

- (e) Costs must be considered on the merits of the case as a whole and any party's conduct must be considered in the context of the case as a whole – not just a breach of a procedural direction.
- (f) It is an unjustified and unlawful restriction on the discretion to award costs by limiting the discretion to matters of conduct in the appeal only.
- (g) Similarly procedural misconduct as referred to in the practice note cannot be limited to conduct within the appeal process itself. Procedural misconduct could, for example, be evident through a breach of natural justice by the Secretary in assessing the merits of an application (which is what is alleged in this case).
- (h) These submissions are supported by Commission decision GC16/11 which provides, at paragraph 13:

Whether or not that is the case, the circumstances of the present appeal demonstrate that the Commission's costs jurisdiction should not be as restrictively exercised as indicated in the passage quoted above. The Commission agrees with the Appellant that an award of costs may be appropriate to deter parties from ignoring the Commission's prior decisions and treating them as ineffective. While costs should remain exceptional and will generally involve bad faith or procedural misconduct, the Commission will not restrict itself to considering only conduct during an appeal and, in awarding costs, may take into account conduct which brought about an appeal.

- (i) It alleges that the Secretary's decision breaches natural justice.
- (j) It is not that the Secretary's decision is blighted by bad faith, but rather that he has:
 - completely failed to assess the merits of the Appellant's application;
 - done no more than rubber-stamp a Police objection without any reference back to the Appellant; and
 - acted in breach of natural justice.
- (k) There has been a failure to allow the Appellant a fair hearing on its application and there is apparent bias towards the Police objection. This is demonstrated by the fact that the Secretary has chosen to grant Class 3 licences to the Appellant in past, multiple applications, and based on identical grounds.
- (l) The Police had sought to introduce untrue and speculative allegations against the Appellant. The Secretary did not make any proper inquiry into those allegations,

did not consult with the Appellant and, in his decision letter, quoted the Police objections verbatim as justification for refusing the application.

- (m) Costs awards are to recompense a successful party in a proceeding but also they have the effect of emphasising the need to comply with proper procedure at first instance.
- (n) In this case there is a real need to emphasise to the Secretary that any applicant for a licence must be treated fairly and responsibly. The “blatant breach of natural justice cannot go without recognition”. It is inadequate for the Secretary simply to withdraw from the proceeding by recognising the merits of the Appellant’s case. That does nothing to recompense the Appellant for its costs, nor bring home to the Secretary the need to act responsibly and in accordance with natural justice.
- (o) Costs are justified and are sought. The Appellant’s costs in this case are \$10,000 including GST, and it seeks an order in the full amount.

Submissions by the Secretary

8. The Secretary submitted, in summary, that:

- (a) In May 2011, he carried out a review of matters to be taken into account in relation to applications for class 3 licences. He did so because concerns had been raised that organised criminal groups may use a class 3 operator’s licence to legitimise the holding of large amounts of cash. His concern was that money could be laundered by using a gambling licence process. Following the review, he decided that closer consideration should be given to applications for class 3 operator’s licences made by groups with strong criminal associations.
- (b) On 14 September 2011, he received an application for a class 3 operator’s licence submitted by the Filthy Few. In considering the application, he made enquiries pursuant to section 36 of the Act. Amongst other things the enquiries involved obtaining a Police report. The Police report raised concerns about the suitability of the applicant and its officers. In particular, he was concerned about the criminal activities and associations of the applicant, and some of the members having criminal convictions. He was concerned that there was the potential for the licence to be used to allow the group to launder money under the auspices of running a raffle.
- (c) He refused the Filthy Few’s application for a class 3 operator’s licence. He was then advised that the Filthy Few had appealed his decision, and subsequently received submissions and evidence from the Appellant.



- (d) He considered the Appellant's appeal documents and reconsidered his earlier decision in the light of them. In particular he reflected on the weight to be placed on the Appellant's (relatively good) history in relation to the conduct of previous raffles, and balanced that against the concerns about the club's alleged criminal activities, and the risk of money laundering.
- (e) Considering all of the available material, including the new material filed as part of the appeal, he decided to reverse his earlier decision, and advised the Appellant that he withdrew his earlier decision.
- (f) When exercising its discretion to award costs, the Commission is guided by its Practice Note. The introduction to the Practice Note provides that it is not to be seen as a set of inflexible rules, but should be followed unless there is good reason not to.
- (g) The general reluctance to award costs is borne out by previous decisions by the Commission.
- (h) The Appellant claims that the Secretary acted in breach of natural justice by simply "rubber stamp[ing] a Police objection". However his discretion was not exercised solely on the basis of information provided by Police. Any application considered under the Act must be guided by the purposes of the Act. There will be times when decisions will be finely balanced and there are often competing interests to be weighed.
- (i) In this case, investigations were carried out as required under section 36. On the one hand the Secretary was faced with an applicant who had a relatively unblemished history in running raffles but on the other hand, he was faced with an applicant who created legitimate concerns about its suitability to conduct Class 3 gambling, based on the information provided by the New Zealand Police.
- (j) The initial decision was as a result of weighing those competing considerations in the light of the various purposes of the Act, and the requirement in section 37(1)(g) of the Act to refuse a licence where investigations by the Secretary do not cause him to be satisfied about the suitability of the applicant or its officers.
- (k) There was no breach of natural justice. He followed the statutorily mandated path for considering applications and made his decision on the basis of the information presented to him at the time.



- (l) The general approach to his consideration of the application in the first instance is supported by the Commission's Hells Angels decision, GC05/12. In that case, the Commission stated that:

... information about convictions and the criminal reputation of the organisation, combines with the money laundering risk to provide a basis for a lack of satisfaction about the true purpose of the gambling (section 37(1)(b)) and the likely application or distribution of the net proceeds (section 37(1)(e)) ...

- (m) In relation to the Appellant's argument that the Secretary denied it a fair hearing, this fails to grasp the fact that the Secretary is not charged with conducting a "hearing", but rather receiving applications and carrying out inquiries necessary to determine them.
- (n) It is relevant to note that, unlike other parts of the Act, there is no provision for a Society to make written submissions to the Secretary concerning a refusal to grant an application for a Class 3 operator licence. Likewise, there is no provision in the Act for the Secretary to consider additional submissions following his decision not to grant a licence. As such, the process commonly adopted in other parts of the Act involving negotiation and reconsideration of applications and decisions, was unavailable to both parties in this instance.
- (o) Notwithstanding that, as soon as new, fuller information was placed before him, by way of appeal submissions and evidence, he promptly reconsidered his earlier decision. Accordingly, there was no failure to follow proper process and neither was there any element of bad faith.
- (p) He should not be criticised for taking steps to resolve an appeal prior to hearing. If he were susceptible to costs in such circumstances, he would be better served to continue with the appeal, with all the associated costs for the Appellant.
- (q) The Commission has considered whether the Secretary's conduct justified an award of costs in previous decisions. In each of these decisions, the Commission found that there was nothing in the way the Secretary had conducted himself that would justify an award of costs against him in circumstances where it was not the Commission's usual practice to do so.
- (r) In the decision GC30/08, the Commission held that:

As the Secretary is both the original decision-maker, and an active party before it, the Commission expects him to reassess his earlier decision in the light of the matters placed before the Commission. The Secretary's actions in reassessing his earlier decision in the course of the appeal are to be commended, not criticised and punished. ...

- (s) There is no conduct in this case that warrants a departure from the normal approach not to award costs. On the contrary, he has acted in a conventional manner envisaged by the governing statute and has responsibly reconsidered his decision at an early stage once additional information came to hand. This conduct, rather than justifying an award of costs, militates against it.
- (t) Finally, if the Commission is minded to award costs, the \$10,000 sought by the Appellant is far too high, particularly in relation to what the Appellant's counsel had to do and would probably represent full indemnity costs. If costs are to be awarded, they should be no more than a modest contribution of \$1,000.

Filthy Few's submissions in reply

9. In reply, Filthy Few submitted, in summary, that:

- (a) It did not provide any new information as part of the appeal.
- (b) The Secretary has a clear duty to be fair and impartial when making a decision and for that purpose, the rules of natural justice have application. To receive, and to then accept without enquiry, a lengthy Police objection (which was quoted verbatim in the Secretary's decision) is clearly indicative of a breach of natural justice. There can be no other interpretation of the Secretary's refusal other than that he accepted the Police objections verbatim without enquiry – he has rubber-stamped them.
- (c) The reference in the Secretary's submissions to the fear of money laundering is new. The Secretary's decision letter of 18 November 2011 makes no reference to money laundering at all, although the police letter of 9 November 2011 did. To introduce an additional reason now in the form of submissions is not only inappropriate but entirely unhelpful to both the Appellant and the Commission.
- (d) The Secretary effectively delegated his statutory function to the New Zealand Police.
- (e) The Commission has an obligation to ensure fairness between the parties to an appeal. Costs are not only compensatory but serve to address misconduct by a party. The Secretary's conduct in this case deserves a reprimand from the Commission in the form of a costs award. In addition, the Appellant is entitled to be compensated for its costs relating to the appeal, which proved effective. The Secretary's decision was not, as submitted by the Secretary, the result of new information.



- (f) The advice that the Secretary was withdrawing the 18 November 2011 decision came from the Senior Legal Advisor in the Department of Internal Affairs. It is not sufficient that proper legal advice was taken by the Secretary only after the initial decision and the Appellant's objection.
- (g) The Secretary's submission regarding the level of costs is subjective and speculative. At counsel's hourly rate of \$600 plus GST, the costs of \$10,000 (including GST) are more than justified.
- (h) It seems that the Secretary's primary point is that full indemnity costs should not be awarded. That is a matter for the Commission. However an award of 10% (\$1,000) would not be sufficient compensation in any realistic or substantial way. Nor would it act as a deterrent to the Secretary from future actions which delegate decision making powers to third parties in clear breach of the statutory duty of enquiry and reasoned responsible decision-making.

Analysis

10. The Appellant's submissions challenged comments in an earlier decision of the Commission (GC30/08) which it had reconsidered and expressly resiled from in decision GC16/11 in the following passage:
 11. The Commission considered that, in light of the issues raised in the present application and appeal, the policy refinement set out at paragraph 22 of decision GC30/08 ought to be reconsidered. In that decision, the Secretary took no active part in the appeal, conceding the position and reversing the appealed decision without making submissions.
 12. The present appeal demonstrates that the distinction between conduct prior to the hearing and conduct before the Commission is not usually so clear-cut. As is usually the case in class 4 appeals, the Secretary not only makes a decision, he actively participates in the appeal in an endeavour to justify it. In such cases, it is artificial to attempt to distinguish between the basis for the decision and the argument advanced on appeal.
 13. Whether or not that is the case, the circumstances of the present appeal demonstrate that the Commission's costs jurisdiction should not be as restrictively exercised as indicated in the passage quoted above. The Commission agrees with the Appellant that an award of costs may be appropriate to deter parties from ignoring the Commission's prior decisions and treating them as ineffective. While costs should remain exceptional and will generally involve bad faith or procedural misconduct, the Commission will not restrict itself to considering only conduct during an appeal and, in awarding costs, may take into account conduct which brought about an appeal.
11. The Commission does not treat its discretion to award costs in the technical and legally confined manner suggested. In its Practice Note and in its earlier decisions, the Commission has set out its usual policy approach to the exercise of its discretion. Its Practice Note is not legislative in nature, lending itself to construction arguments, but is intended as an indication of its usual approach as a guide to parties before it. The



Appellant's submissions ask the Commission to alter fundamentally its prior approach and practice. From the outset, the Commission consciously adopted a practice against awarding costs on matters which come before it as a matter of course, with costs invariably following the event. It considered that, in the context of its role of hearing appeals against decisions of the Secretary, costs should be awarded only exceptionally and in circumstances where a party's conduct requires the Commission to mark its disapproval of the party's conduct. Usually this will involve a degree of bad faith or some other conduct which justifies condemnation by the Commission.

12. The Appellant's submissions suggest both that the Commission should adopt a costs policy which has a compensatory focus, in which the successful party ordinarily receives compensation for legal expenses from the unsuccessful party, and that, in addition, the material before the Commission justifies it taking a view that the Secretary has committed a "blatant breach of natural justice", deserving of the most punitive award of costs; namely indemnity costs.
13. The application for costs has come about following the Secretary's reversal of his earlier decision declining to grant the Appellant a Class 3 operator's licence. In reaching his later decision, the Secretary submitted that he considered all of the available material, "including the new material filed as part of the appeal".
14. The Commission shares the Appellant's doubts that anything in the Appellant's submissions or evidence would have been truly new to the Secretary. It appeared to the Commission that, rather than reaching a different decision as a result of exposure to new factual material, the Secretary simply reconsidered the material, which was largely previously in his possession, in the light of the arguments advanced in the appeal and, as the result of rebalancing the weight to be given to the competing considerations, came to a different conclusion, obviating the need for the appeal to continue (and saving the Appellant the further expense of reviewing and responding to evidence and submissions in opposition).
15. The Commission remains of the view that its power to award costs should continue to be used sparingly and on an exceptional basis. The matters which come before the Commission involve regulation of gambling activity in the public interest, not the resolution of private disputes. The Secretary is invariably a party to appeals, which arise from the exercise of his statutory functions. The Commission's appeal powers are exercised on a *de novo* basis, with the Commission able to take account of information not before the Secretary. Appeals are in respect of class 3 or class 4 gambling activity, the net proceeds of which must be applied or distributed to authorised, essentially community, purposes. Awards of costs would thus have the effect of transferring funds back and forth between

the Secretary and the community, depending on the outcomes of appeals. The Commission declines to adopt a new general practice of awarding costs in favour of successful parties to appeals. It is even less likely to do so when it has not been required to make a decision on the merits of the appeal.

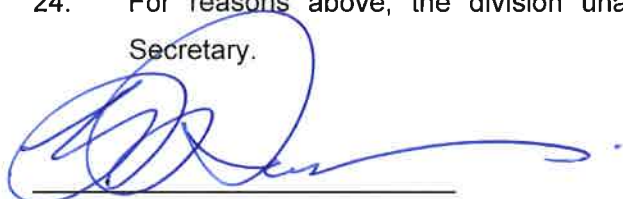
16. The Commission also rejects the Appellant's submission that it should conclude, from the later reversal of the initial decision and the quoting of the Police report in the original decision letter, that the Secretary committed a "blatant breach of natural justice", failed to address the merits of the application, "rubber stamped" the Police objections (effectively delegating his decision to the Police), and showed bias (by virtue of having regard to the Police objections). The Commission considers that these assertions lack any reasonable basis and the explanation given for the Secretary satisfied it that the Secretary's conduct is not deserving of any criticism or punishment.
17. The submission ignores the statutory obligations of the Secretary. He is required to undertake investigations under section 36(1), which include specific provision for a Police report. He must refuse to grant a class 3 operator's licence unless he is satisfied that his investigations, including the receipt of the Police report, do not cause him not to be satisfied about the suitability of the applicant. The default position is that a licence will not be granted because of the requirement for the Secretary to be positively satisfied of the matters in section 37(1). These are matters on which different views may well be reasonably held and changed in good faith.
18. The Commission has considered four previous applications for costs – GC03/06 by First Sovereign Trust and Tauranga Hotels Limited, GC30/08 by Caversham Foundation Limited, GC16/11 by The Lion Foundation Limited and GC35/11 by Air Rescue Services Limited. None of these applications have been successful.
19. The present appeal does not differ materially from two earlier applications where it has declined to award costs. In decisions GC03/06 and GC30/08 the Secretary made decisions which were appealed to the Commission. After receiving the Appellant's submissions and evidence, the Secretary reconsidered his earlier decision and reversed it, obviating the need for the appeal.
20. In decision GC30/08 the Commission observed that the Secretary, as both the original decision-maker and an active party before the Commission, may well reassess his earlier decision in the course of the appeal. If that reassessment results in the Secretary changing his view and reversing the decision, removing the need for the appeal, he is generally to be commended, not criticised, for that course of action. This is what the

Secretary has done in this case and it is not something which the Commission considers should be discouraged.

21. There was nothing to indicate to the Commission that the Secretary had conducted himself in such a way as to justify an award of costs against him in circumstances where the Commission's usual practice is not to award costs and it has decided to maintain that practice.
22. Although indemnity costs of \$10,000 were sought, neither of the parties addressed in their submissions whether the Commission's jurisdiction to award costs is unlimited in quantum or limited by a scale of costs fixed in 1903 under the predecessor to the Col Act, the Commissioners Act 1903. In *Riddiford v Attorney General* [2012] NZCA 112, the Court of Appeal held that a scale of costs prescribed under the 1903 Act limits Commissions of Inquiry to awarding costs to a maximum of £300, or \$600. Although the body in question in that case was the Land Valuation Tribunal, the Commission's powers to award costs have the same source (see section 225 of the Act).
23. As the Commission has reached a decision to decline to award costs against the Secretary, it did not need to decide whether its jurisdiction is so limited. The Commission notes the issue so that future applicants for costs are cognisant of the need to address it and so that the Secretary and his Department can consider whether a new scale of costs should be introduced, provision for which is made for under section 14 of the Col Act.

Decision of the Commission

24. For reasons above, the division unanimously declines to award costs against the Secretary.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

 July 2012