IN THE MATTER of the Gambling Act 2003

AND of an appeal by **THE LION FOUNDATION LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Application: 16 December 2010

Date of Decision: 15 April 2011

Date of Notification of Decision: 8th June 2011

DECISION
ON AN APPLICATION FOR COSTS BY THE LION FOUNDATION

Background

1. On 5 March 2010, the Secretary for Internal Affairs (the "**Secretary**") added a licence condition to the class 4 venue licence for the Kilbirnie Tavern ("**Kilbirnie**" or the "**Venue**"). The condition provided that "Gaming Machines must not be capable of being played by people who are in areas where smoking is permitted". The Lion Foundation (the "**Appellant**" or "**Lion**"), which holds the class 4 venue licence for Kilbirnie, appealed to the Gambling Commission (the "**Commission**") against the imposition of the condition. The Commission upheld Lion's Appeal in decision GC31/10. Lion now applies for costs against the Secretary.

Relevant law

2. 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.
>
> (3) The Gambling Commission has no power to—
> (a) acquire, hold, or alienate property; or
> (b) employ people.

(4) Powers conferred on the Gambling Commission by this subpart are additional to powers conferred on the Gambling Commission by the application of the Commissions of Inquiry Act 1908.

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 of 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.

3. 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 in 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 the Appellant

4. Lion submitted, in summary, that:

(a) The Commission does not normally award costs, but this was a highly unusual case and one in which the Secretary's conduct justified an award of costs to ensure that the Commission's processes were not abused.

(b) The decision appealed from was the third time the Secretary had imposed, or sought authority to impose, a condition preventing simultaneous smoking and class 4 gambling in the open gaming area at the Venue. A substantially identical condition was the subject of a successful appeal to the Commission by the Appellant in 2007 in decision GC03/07. Following the Commission's decision, the Secretary brought declaratory proceedings in the High Court, the purpose of which was to have the Court make declarations directing the Commission on certain issues. The High Court made only one declaration, which expressly did not impugn the decision of the Commission (*Secretary for Internal Affairs v Kilbirnie Tavern Ltd & Ors* HC Wellington CIV 2007-485-1988, 7 May 2008).

(c) Despite the decisions in GC03/07 and the High Court, the Secretary imposed a similar condition without further evidence or new circumstances to support the condition. The most recent appeal was the result of the Secretary's refusal to accept the outcome of the two earlier proceedings. The Secretary's conduct was an abuse of process and had not been in good faith.

(d) In its decision on an application for costs by First Sovereign (decision GC03/06), the Commission considered the key question to be whether "the Secretary conducted himself in such a way as to justify an award of costs against him in circumstances where the Commission's usual approach is not to award costs". The Commission noted that the material before it had indicated that both parties had negotiated in good faith and acted properly. There was, therefore, no basis to award costs. However, the Commission also acknowledged that the Secretary had no "special immunity" based on "public policy reasons".

(e) In its decision on an application for costs by the Caversham Foundation (decision GC06/10), the Commission commented that, although it would not normally award costs, it "may do so in cases where a party's conduct justifies or requires an award of costs to ensure that the Commission's processes were not abused".

(f) The Commission's power to award costs was not limited to situations of bad faith and procedural misconduct; these were merely examples of the type of behaviour that may result in an award of costs.

(g) Section 11 of the Commissions of Inquiry Act gives complete freedom to the Commission to award costs. As a result, the Commission's decision to award costs should also consider the analogous costs procedures governing the courts.

(h) The courts were not limited to awarding costs based on the conduct of a party during the litigation or hearing. They could consider the decision to commence proceedings and order a party to pay indemnity costs if the party had "acted vexatiously, frivolously, improperly or unnecessarily in commencing ... a proceeding". (Rule 14.6(4) High Court Rules.)

(i) It would not ordinarily seek costs against the Secretary, however the circumstances of this case were unique. The Secretary's procedural misconduct required it to undertake this third proceeding, being a second appeal on substantially the same condition and in relation to the same Venue. The cost of doing so amounted to over $62,000 in legal fees and disbursements, in addition to which there were the administrative and executive time costs to Lion.

(j) In deciding to impose a similar condition on a second decision, the Secretary argued he was not satisfied that the risk of problem gambling at the Venue was minimised and referred to "new" evidence which had emerged confirming the link between smoking and problem gambling.

(k) There was no new basis for the Secretary to impose the condition. There had been no change in circumstances regarding Kilbirnie's open area since the Commission's previous decision. There was no new evidence in relation to the open area at Kilbirnie or in relation to the link between smoking and problem gambling. The Secretary's conduct was therefore an abuse of process, which had forced Lion to expend considerable time and expense in bringing the further appeal.

(l) The appeal was unnecessary and a waste of time and cost. It accordingly sought a decision requiring the Secretary to pay it $60,294.58 for the costs incurred by it, excluding GST, in bringing the appeal.

Submissions by the Secretary

5. The Secretary opposed a costs award on the grounds that:

(a) He had not acted in bad faith, nor did his actions amount to procedural misconduct.

(b) His approach was simply the consequence of the statutory duty imposed upon him, the uncertainties arising from difficult legislative provisions, and the decisions that were made by the Commission and High Court. In summary:

(i) In considering Lion's application to renew its venue licence for Kilbirnie, he was bound by the Act to decide whether he was satisfied that the risk of problem gambling was minimised.

(ii) The statutory provisions relevant to that duty were not clear-cut. The Secretary was uncertain what approach he should follow after the Commission's first decision in relation to Kilbirnie (decision GC03/07). After seeking legal advice from both Crown Law and senior counsel, he determined that the appropriate course to take was to seek the assistance of the High Court by way of declaratory judgment.

(iii) The High Court held that he had acted appropriately in bringing declaratory judgment proceedings. The High Court clarified with more precision the questions that were required to be addressed by the Secretary when considering the imposition of a condition, and set out an approach to the issues that suggested a different focus from the Commission's first decision.

(iv) He followed the High Court's approach in relation to his most recent decision.

(v) The Commission's second Kilbirnie decision (decision GC31/10) adopted an approach with a different focus again, demonstrating not only the inherent difficulty with the legislative provisions, but also that there is room for different views in the present case, such that there could be no valid criticism of him in forming the opinion that he did.

(c) He took the High Court proceedings in order to clarify whether he should consider himself "bound" by the Commission's decision, or whether he was still required to ask the question posed by the statute and give his own answer. The purpose of the declaratory judgment proceedings was to clarify for the Secretary how he should proceed on renewal applications. Lion agreed, at the time of the High Court proceedings, that, upon later applications, the Secretary would need to evaluate the statutory criteria afresh. This is what he did in the decision that led to the present appeal. He cannot be criticised for having done so.

(d) The High Court recognised the difficulty of resolving the inherent tension within the Act between allowing the activity of gambling at all and the focus in the Act on the minimisation of the risks associated with gambling. For that reason the High Court dismissed Lion's application for costs.

(e) The Commission's most recent decision (decision GC31/10) indicated that there may have been a misconception about the Commission's earlier Kilbirnie decision and a potential misinterpretation of the High Court judgment. This demonstrates the complexity of the current issues. Moreover, the Commission disagreed with Lion's characterisation of his decision as "re-litigating" the issue and with Lion's submissions regarding the burden of proof. These matters demonstrate the difficulty of the issues arising from the legislation.

(f) The matter was complicated factually as well as legally. There was a large volume of survey evidence and expert evidence, including evidence that had only become available after the Commission's first decision. The evaluation of all the material raised difficult issues. Given the extensive evidence available to the Secretary, and the fact that the Secretary was required to form an honest opinion in light of the High Court's judgment, it cannot be said that the Secretary made a decision that was not reasonably open to him or that he acted in bad faith.

(g) Lion's argument that the Secretary has refused to accept the outcome of the two earlier proceedings is similar to one Lion advanced on an unsuccessful

application to strike out the declaratory judgment proceedings. In dismissing the strikeout application, Associate Judge Gendall held (7 May 2008) that it was the Court's constitutional function to interpret the legislation so that the Secretary was able to comply with his duty (*Secretary for Internal Affairs v Kilbirnie Tavern Limited* HC Wellington CIV 2007-485-1988 7 May 2008). Both the decision in relation to the strikeout application and the substantive High Court decision proceeded on the basis that the Secretary would be required to make the decision required of him under the Act following the outcome of the declaratory judgment proceedings.

(h) He had simply done what the statute required him to do. Moreover, he was acting on the advice of both Crown Law and senior counsel. Rather than acting with procedural impropriety, he has been faithful to the matters required of him.

The Appellant's submissions in reply

6. In reply, the Appellant submitted, in summary, that:

(a) The Secretary submitted that his second decision to impose a condition banning simultaneous smoking and class 4 gambling at the Kilbirnie Tavern was simply the consequence of the statutory duty imposed upon him. He also submitted that he was not bound by the first decision of the Commission and was still required to ask whether he was satisfied that the risk of problem gambling at the Venue was minimised as a consequence of the Venue permitting simultaneous class 4 gambling and smoking.

(b) This was a gross simplification of the position and, if correct, would effectively render the appellate jurisdiction of the Commission null and void.

(c) Taken to its logical conclusion, the Secretary's position was that every single decision-making power he had under the Act could be exercised in complete disregard of an existing Commission decision, even on precisely the same subject matter. This was contrary to the intention of the Act that the Commission's decisions have effect and are not subject to further appeal.

(d) The Secretary must have regard to the previous decisions of the Commission and must evaluate them as relevant considerations. The Secretary was bound by principles of administrative law, including in relation to procedural propriety, and must be a fair and reasonable decision-maker.

(e) The Secretary submitted that, in the declaratory judgment proceeding, Lion agreed that the Secretary would not be bound to renew the venue licence for the

Kilbirnie Tavern and would therefore still evaluate the statutory criteria of whether the risk of problem gambling was being minimised. This was not correct. Lion agreed that the Secretary was not bound to grant the renewal, as a consequence of the first Commission decision, if the Secretary was not satisfied that the risk of problem gambling was being minimised at the Venue. However, Lion did not expect that the Secretary would make the same decision, to impose the same condition on the Venue in circumstances where there was nothing new to support the imposition of the condition. Lion did not expect (or agree) that any earlier decision of the Commission would be rendered ineffective and irrelevant.

(f) Lion expected that, absent any different circumstances at Kilbirnie, if the Secretary imposed a condition banning simultaneous smoking and gambling, it would again be overturned by the Commission.

(g) In turn, the Secretary should have expected to lose the second Kilbirnie Tavern appeal because the first Commission decision and the High Court judgment did not support the imposition of such a condition at the Venue. If this was not the case, the Secretary was proposing that every time he considered the issue of venue licence renewal for Kilbirnie Tavern, he could disregard the Commission's previous decision and make the same decision to impose the same condition.

(h) The particular circumstances of this case strongly justified an award of costs against the Secretary. There was no incentive for any appellant to challenge a decision by the Secretary, and there was little "worth" in the Commission making a decision, if the Secretary could unjustifiably disregard it without any consequences.

(i) The Secretary was not legally fettered by the previous decisions of the Commission, but must have regard to those decisions if nothing had changed in the factual circumstances of the case. The onus must be on the Secretary to show that there were circumstances, different from those existing during his initial decision making process, to justify making the same decision again.

(j) If the Commission did not award costs against the Secretary, there would be nothing to discourage a cycle of decision-making by the Secretary in which decisions, although successfully appealed and overturned by the Commission, would continue to be made and would continue to require re-appeal. If there were no costs consequence, the Commission would be at risk of endorsing the Secretary's ability to disregard the effect of any Commission decision.

Analysis

7. The Commission first considered whether it had jurisdiction to award costs when the conduct complained of was the Secretary's conduct in making the decision subject to the appeal, rather than merely the Secretary's conduct in the course of the appeal. The Commission considered that it did have jurisdiction. Section 11 of the Commissions of Inquiry Act specifically envisaged the possibility of an award of costs in respect of pre-hearing conduct by providing for costs against persons who procured the inquiry to be held.

8. The Commission next considered its approach to costs as set out in the Practice Notes and previous decisions. The Practice Notes state that the Commission will not normally award costs. Factors relevant in considering whether to award costs include whether a party has demonstrated bad faith or procedural misconduct.

9. The Commission followed this approach in the two previous applications by class 4 societies for costs: *First Sovereign and Tauranga Hotels Limited* (decision GC03/06), and *Caversham Foundation* (decision GC30/08). In each of those cases, the Secretary made a decision which was appealed to the Commission. In each case, after receiving the appellant's submissions and evidence, the Secretary reassessed his previous decision and made a new decision, which removed the need for the appeal. In each case, the Commission held there was nothing in the way the Secretary had conducted himself which would justify an award of costs against him in circumstances where the Commission's usual practice was not to do so. In decision GC03/06, the Commission considered that both parties had negotiated in good faith and, in decision GC30/08, the Commission considered that, far from being criticised, the Secretary, as both original decision-maker and active party before the Commission, should be commended for reassessing his earlier decision in light of the matters placed before the Commission.

10. In decision GC30/08, the Commission also stated, at paragraph 22:

> Finally and most crucially, Caversham's submissions focus entirely on the Secretary's decision which is the subject of the appeal, not on the conduct of the appeal by the Secretary. An award of costs by the Commission is concerned with the Commission's own process (the appeal) not the earlier decision of the Secretary. There is no suggestion that the Secretary misconducted himself before the Commission, which is the only proper basis for an award of costs on an appeal. Such an application for costs is misconceived.

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.

14. The Commission next considered whether it should impose costs in respect of the present appeal. The Commission considered that the factors in favour of and against an award of costs were finely balanced. Based on the considerations set out below, a majority of the Commission decided by a fine margin that an award of costs should not be imposed.

15. The Commission had serious concerns about both the Secretary's decision and his arguments and evidence in support of his decision on appeal. In particular:

    (a) The Secretary's submissions were premised on what appeared to the Commission to be almost a wilful misinterpretation of the High Court decision. The Secretary accepted the High Court's statement that the interests of operators, those who conduct gambling and the community were relevant, but submitted that their interests were relevantly and completely addressed by the fact the Act allowed gambling, despite the risk of problem gambling, so that their interests were not relevant to the decision under appeal. This submission ignored the High Court's ruling that, in considering whether to impose a condition, the Secretary was to have regard to the interests of the operators of gaming machines – and through them the community – and gamblers themselves.

    (b) The Secretary put before the Commission a considerable volume of evidence, most of which the Commission found to be irrelevant. The Secretary did not provide more convincing evidence than he did in the previous Kilbirnie appeal to demonstrate that the placement of gaming machines in a smoking area would increase the risk of problem gambling to such a clear extent as to justify a

standard licence condition nationally. In addition, the evidence put forward to support the Secretary's submission that non-problem gamblers would not be affected by the condition was poorly directed. Rather than demonstrate that those likely to be affected by the condition at any given time would not be adversely affected, the Secretary's evidence focused on the gambling population as a whole or on class 4 gamblers generally.

(c) The Secretary's approach overall was a matter of concern. First, rather than assessing the evidence against the guidance provided by the Commission's previous Kilbirnie decision and the High Court judgment, the Secretary interpreted the High Court judgment in a contrived manner, in an attempt to persuade the Commission it had erred in the first Kilbirnie decision. Secondly, he burdened the Commission and Appellant with a significant volume of evidence, much of which was irrelevant. The Commission was left with the impression that the Secretary was prepared to take almost any step to justify his attempt at "legislative" action by a licence condition.

(d) It was a matter of concern to the Commission that the Secretary's costs submissions did not acknowledge any error on his part. In fact, the Secretary emphasised the fact that the statutory decision was a matter for his satisfaction. The Commission was concerned that in a case in which it and the High Court had provided guidance as to the appropriate statutory test for satisfaction, which differed from the Secretary's preferred interpretation, there was a danger that his preference for his own interpretation would continue to dominate his decisions in future. If that were to occur, it would be unfair that appellants would have to meet the legal costs of the inevitable successful appeals.

16. However, there were also several important factors that weighed against an award of costs:

(a) Although the Secretary's approach was in error, the Commission did not consider that it was clear that the Secretary had acted in bad faith or that his approach amounted to misconduct. At several points in his submissions, the Secretary referred to the Commission's concerns in the previous Kilbirnie decision, and argued that the evidence on the present appeal addressed those concerns. Although the Commission generally disagreed with the helpfulness of the further evidence provided by the Secretary, and considered that the Secretary ought to have exercised better judgment over the selection of evidence, the Commission appreciated that the Secretary's submissions regarding the evidence (as opposed to the submissions regarding the legal consequences of the High Court decision)

were a genuine attempt to address the deficiencies in the evidence in the previous Kilbirnie decision.

(b) Although the Secretary's approach was misguided, it was not in defiance of the Commission's first Kilbirnie decision, in which the objection to the use of venue-specific conditions to effect legislative change was not made explicit.

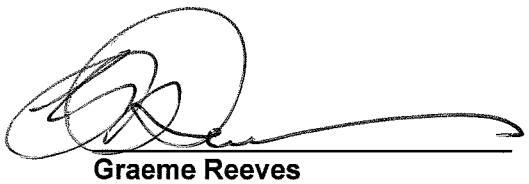
(c) The Secretary was acting on legal advice from Crown Law Office and external senior counsel. That indicates that his actions were considered and not frivolous or in bad faith.

(d) It was not the case that the Secretary was precluded by the Commission's earlier Kilbirnie decision from considering the imposition of a similar condition. Had there been a history of harm suffered from open air gambling, or other more pertinent evidence regarding the risks of gambling while smoking or at the Kilbirnie Tavern, the Commission's decision on the appeal might have been different.

17. Both the majority and the minority of the division found the competing factors to be finely balanced. Although a majority of the Commission ultimately decided against an award of costs, the Commission anticipates that its decision and reasoning will provide guidance regarding the future conduct of appeals

Decision of the Commission

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



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

8th June 2011