

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **PUB CHARITY**
against suspension of Class 4
venue licence at McGinty's Turf
and Sports Bar

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
R D Bell

Date of Appeal: 17 November 2011

Date of Decision: 14 June 2012

Date of Notification
of Decision: 17th July 2012

DECISION
ON AN APPEAL BY PUB CHARITY INCORPORATED AGAINST SUSPENSION OF CLASS 4
VENUE LICENCE AT MCGINTY'S TURF AND SPORTS BAR

Background

1. On 17 November 2011, Pub Charity ("**Appellant**") filed an appeal against a decision by the Secretary for Internal Affairs ("**Secretary**") to suspend Pub Charity's class 4 venue licence for McGinty's Turf and Sports Bar ("**McGinty's**") for one day. The Secretary had suspended the licence under section 74(1)(b) Gambling Act ("**Act**") on the ground that there had been a failure by the Appellant to provide problem gambling awareness training in breach of Regulation 12 of the Gambling (Harm Prevention and Minimisation) Regulations 2004 ("**Regulations**").
2. The Secretary's decision to suspend the venue licence for McGinty's arose from a complaint emailed by a problem gambling treatment provider to the Department of Internal Affairs ("**Department**") on 17 June 2011. The treatment provider complained that she had, shortly beforehand, accompanied a client, who wanted to self-exclude, to McGinty's and had asked to complete the necessary self-exclusion form. The sole staff member, Josephine Legg, was unable to issue the exclusion order as she appeared to lack the necessary knowledge about the exclusion procedure.
3. On 20 June 2011, Ms Legg received formal training in relation to harm minimisation and problem gambling awareness from a representative of Pub Charity. After 20 June 2011,



the treatment provider returned to McGinty's with the same client. On the second visit, Ms Legg issued an exclusion order to the client.

4. Following the treatment provider's complaint, the Department began an investigation. The Department concluded from its investigation that, in breach of Regulation 12, Ms Legg had been in sole charge of the bar on Tuesdays since April 2011 but had not received training in harm minimisation or problem gambling awareness from the holder of the operator's licence, the Appellant, until 20 June 2011.
5. On 14 September 2011, the Secretary wrote to Pub Charity proposing to suspend its venue licence for McGinty's. Pub Charity made submissions on the proposal on 11 October 2011. On 14 November 2011, the Secretary decided to suspend the licence. Shortly thereafter Pub Charity filed its appeal.

Factual matters

6. Initially the appeal documents raised significant factual issues between the parties concerning the nature and extent of problem gambling awareness training which Ms Legg had received prior to 20 June 2011, much of it focused on the Gaming Bar Book, a documentary resource which the Appellant provides to the venues where it operates.
7. The Secretary filed evidence to support a submission that Ms Legg had received no adequate training before 20 June 2011 as follows:
 - (a) Ms Legg deposed in an affidavit as follows:
 - (i) In the period prior to 20 June 2011, she often worked as the sole charge duty manager. She usually did so every Tuesday but also did so at other times.
 - (ii) When, in mid June (prior to 20 June) 2011, a patron and a problem gambling counsellor came in while she was on duty and said that the patron wished to exclude herself, she did not understand what that meant and did not know what to do.
 - (iii) She later told Mr Persen, the venue manager, what had happened and he arranged for someone from Pub Charity to give her training a few days later. The training included recognition of the signs of problem gambling and the procedure for exclusion. Only after she had received that training, did she understand what had been requested earlier and how to go about it.



- (iv) Prior to that, she had "received no training whatsoever in relation to problem gambling and how to exclude people".
 - (v) Mr Persen had not given her any training regarding exclusion. The training which he had given her relating to the Gaming Bar Book was limited to dealing with gaming machine problems such as recording machine faults.
- (b) It was common ground that Ms Legg did not exclude the problem gambler when requested during the first visit, in breach of section 310.
 - (c) When interviewed in the initial investigation, both Ms Legg and Mr Persen said that Ms Legg received problem gambling awareness training on 20 June 2011. Neither mentioned her having received any relevant training prior to that date.
 - (d) Although there is provision to record such details, there is no record in the Gaming Bar Book at McGinty's of Ms Legg having received problem gambling awareness training prior to 20 June 2011.
 - (e) There is no record in the Gaming Bar Book of a problem gambler having requested, but not received, an exclusion notice.
 - (f) The fact that Ms Legg successfully issued an exclusion order following the training on 20 June 2011 suggests that her failure to issue one on the prior occasion arose from a lack of training.
8. Pub Charity did not dispute that Ms Legg had not received problem gambling awareness training from a Pub Charity staff member before 20 June 2011. It raised a number of matters, some of which were not challenged in evidence but others of which directly contradicted the evidence of Ms Legg:
- (a) Pub Charity deposed that it had no knowledge of Ms Legg's employment in any capacity at McGinty's until after the alleged incident, that it had no control over, or awareness of, who was on duty and that long established staffing arrangements at McGinty's had not changed for some time. Pub Charity said that it was not responsible for the training of a staff member under Regulation 12(1) until it was notified that she was a staff member and that she was in sole charge of the venue at times.
 - (b) Pub Charity contended that it had nevertheless discharged its responsibility to provide problem gambling awareness training to Ms Legg by providing the Gaming Bar Book to the venue. The book was specifically designed to take



account of the transient nature of employment in the hospitality sector and venue managers were trained by Pub Charity staff how to use the book and how to train staff at an “entry level” until more formal training arrangements were made.

- (c) Pub Charity contended further that Ms Legg had in fact received all necessary training prior to 20 June 2011. It filed affidavit evidence from the venue manager, Max Persen, that he personally had provided training in problem gambling awareness to Ms Legg. It also filed corroborative evidence from Blake Lattin, the representative who had undertaken Ms Legg’s training on 20 June 2011, that, when he did so, he had gained the impression that she was familiar with the training material and appeared to have been trained previously.
- (d) Pub Charity suggested that the anonymous email from the treatment provider “clearly describes Ms Legg’s behaviour in her attempt to issue an exclusion notice as thwarted, not from a lack of training but by her inability to locate the Gaming Bar Book and the exclusion notices in it” and that the reason that the Secretary did not file affidavit evidence from the treatment provider was because of the “potentially unhelpful nature” of her testimony.
9. Because the affidavit evidence of Mr Persen directly and Mr Lattin indirectly, contradicted that of Ms Legg and the implications drawn from the Department’s investigation, the Commission directed that the appeal should proceed by way of an oral hearing with the witnesses for the Appellant and the Secretary being called for examination by the parties and the Commission. The Commission did not think that it could make findings on core factual disputes without seeing, hearing and examining the witnesses. The parties were so informed.
10. The Appellant then advised the Commission that Mr Persen had expressed strong opposition to the idea of attending any hearing for examination on his affidavit evidence. As a result of that and the cost of securing the attendance of Mr Lattin (who was living in Western Australia), it was not prepared to require the attendance of either of them to give evidence. It said that, if their attendance at the hearing were required, it would have no choice but to abandon the appeal.
11. In response, the Commission advised the Appellant that the oral hearing was required only because one of the grounds for the appeal was a contention that Ms Legg’s evidence was false and should be rejected in favour of the contrary evidence of Mr Persen. If the appeal grounds required the Commission to evaluate the evidence of Ms Legg and Mr Persen and make credibility findings in the areas of disputed fact, it would set the appeal



down for an oral hearing and require the witnesses to attend for examination. If the Appellant wished to avoid an oral hearing because it did not wish to make its witnesses available, it could elect either to withdraw the appeal or to limit the grounds of appeal so as to remove the factual dispute. In the latter case, it could elect to advance only those grounds of appeal which did not involve challenging the evidence of Ms Legg. They included its lack of knowledge or notification of her employment or role and the adequacy of the provision of the Gaming Bar Book and its training of venue managers in its use for the training of new staff. Neither of those grounds involved disputed facts. If an appeal were limited to those grounds and did not involve a challenge to Ms Legg's evidence, no oral hearing would be required.

12. The Appellant notified the Commission that it elected to adopt the latter course. It also suggested that the Secretary should nevertheless obtain affidavit evidence from the complainant treatment provider. As a result, the Secretary filed an affidavit by the complainant. It was consistent with the evidence of Ms Legg.
13. The Commission accordingly proceeded to consider the appeal on the restricted grounds notified by the Appellant. In doing so, it accepted Ms Legg's evidence as to the timing and extent of the training that she received. It also accepted the evidence of the Appellant that it provided both the Gaming Bar Book to McGinty's and training to Mr Persen and the duty manager in how to use the book and that the venue operator did not notify the Appellant of the employment of Ms Legg or of the fact that she was periodically being left in sole charge of the venue, until shortly before 20 June 2011.

Relevant law

14. The Secretary's power to suspend class 4 venue licences is set out in section 74 of the Act:

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—

...

- (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

...

15. Section 4(3) of the Act provides:

References to this Act include regulations made or continued under this Act.

16. Regulation 12 provides:

12 Requirement to provide problem gambling awareness training

- (1) The holder of a class 4 venue licence or casino operator's licence must, in relation to a venue at which it conducts gambling, provide problem gambling awareness training—
 - (a) in the case of a class 4 venue, to the venue manager and any other venue personnel so as to ensure that there is always a trained person at the venue when class 4 gambling is available:
 - (b) in the case of a casino venue, the manager of the venue and any employee of the venue who is in direct contact with players in the course of his or her duties at the venue.
- (2) As a minimum, the training referred to in subclause (1) must enable the manager or employee to whom the training has been provided to—
 - (a) approach a player that the manager or employee has reasonable grounds to believe may be experiencing difficulties related to gambling:
 - (b) provide information to a player about the characteristics of problem gambling (including recognised signs of problem gambling):
 - (c) provide information to a player about the potential risks and consequences of problem gambling:
 - (d) provide information to a player about how to access problem gambling services:
 - (e) remind a player that the venue manager or the holder of a casino operator's licence (as the case may be) may identify a person that the manager or operator has reasonable grounds to believe is a problem gambler and ban the player from the gambling area of the venue concerned for up to 2 years:
 - (f) remind a player that he or she can identify himself or herself as a problem gambler and request that the venue manager or casino operator (as the case may be) exclude the player from the gambling area of the venue for up to 2 years.
- (3) The holder of a class 4 venue licence must ensure that an employee who has received problem gambling awareness training is present at the class 4 venue at all times when gambling activities are available to players.

Submissions by the Appellant

17. Because of the extent to which the appeal submissions had involved the initial factual dispute, the Appellant's submissions, on the matters ultimately in issue, were largely made in reply, as follows:
 - (a) It had no knowledge of Ms Legg's employment in any capacity at McGinty's until after the incident involving the problem gambler, so arranging training before then was not possible.

- (b) It had no control over, or awareness of, who was on duty at McGinty's. It believed that long-standing staffing arrangements at McGinty's, under which one of either Mr Persen or Ms Hoisman (the duty manager) was always on duty, had not changed for some time.
- (c) It was not "vicariously responsible" for ensuring that training had been provided to any staff member who was left in sole charge, without notice that she was a staff member and that she had sole charge of the venue at times.
- (d) In the alternative, if it was "vicariously responsible" for ensuring that any staff member who might be left in sole charge, regardless of whether Pub Charity knew of that staff member, received problem gambling awareness training, then it had discharged that responsibility by providing the Gaming Bar Book to the venue. The book (a copy of which was provided to the Commission) was specifically designed in response to the transient nature of employment in the hospitality sector, and venue managers were trained by Pub Charity staff in how to use it and how to train staff at an "entry level" until more formal training arrangements could be made.

Submissions by the Secretary

- 18. The Secretary's submissions were almost entirely factual, as set out at paragraph 7 above. He submitted that the holder of a class 4 venue licence is required to provide problem gambling awareness training so as to ensure that there is always a trained person at the venue when class 4 gambling is available. He submitted that, in this case, a punitive suspension was appropriate because the failure to train Ms Legg resulted in a problem gambler failing to achieve self-exclusion when requested, which was the very consequence that Regulation 12 seeks to avoid.

Analysis

- 19. The Commission first considered what obligations Regulation 12 placed upon class 4 licence holders. The Appellant's submissions essentially asked the Commission to construe Regulation 12(1) as requiring it to provide problem gambling awareness training only to venue personnel, whom it knows, or should reasonably be aware, may be left in a sole charge role. In the Commission's view, this interpretation cannot be supported either on the face of Regulation 12(1) or when Regulation 12 is read as a whole and in particular in light of Regulation 12(3), which provides:

The holder of a class 4 venue licence must ensure that an employee who has received problem gambling awareness training is present at the class 4 venue at all times when gambling activities are available to players.



20. Regulation 12(3), together with Regulation 12(1), clearly places responsibility on class 4 venue licence holders to ensure that there is always a trained person on site when class 4 gambling is available. Regulation 12(2) sets out the content of that obligation by providing the minimum standard of training to be provided. When Regulation 12 is read as a whole, the effect is to place a positive obligation on the licence holder to ensure that it has undertaken sufficient training and has arrangements in place with venue management so that at least one person who has received adequate training is always present. Far from the licence holder being “vicariously responsible” for the training of venue personnel (as contended by Pub Charity), the regulations make the licence holder responsible as a principal both for such training and for staffing arrangements.
21. In the Commission’s view, Regulation 12 thus imposes a strict obligation (that is, not limited by their actual knowledge) on class 4 venue operators to provide sufficient training to venue personnel and to have arrangements in place with venue owners, so as to ensure that a trained person is always present. These are responsibilities of the class 4 venue licence holder, so that a prima facie breach occurs whenever there is an absence of a trained person. In this case, in light of Ms Legg’s affidavit and the Appellant’s ultimate acceptance of her evidence, the Commission considered that there was nobody present at McGinty’s who had received problem gambling awareness training on the day that the complainant and problem gambler first visited in June 2011.
22. Such a conclusion was consistent with the submission made by Pub Charity that, prior to 20 June 2011, it was not aware that Ms Legg was regularly left in sole charge or, indeed, that she worked there at all. It was clear that Pub Charity moved quickly to provide training once it became aware of the incident which gave rise to the suspension, but the evidence went no further than an indication that it provided training only once a venue told it that it left persons, other than those already trained, in sole charge. It was clear to the Commission that the requirements of Regulation 12 were not met on the day that the problem gambling counsellor and her client sought exclusion or on many other days between April and 20 June 2011.
23. The Commission appreciated the difficulties which a class 4 operator might face in achieving invariable compliance with Regulation 12. It seemed to the Commission that non-compliance should not have punitive consequences if an operator could show that any non-compliance had occurred despite its best endeavours.
24. The Commission accordingly went on to consider whether Pub Charity had demonstrated that it had exercised due diligence, so that it could show absence of fault on its part in relation to the non-compliance with Regulation 12. In order for there to have been an absence of fault, Pub Charity would have had to have undertaken all reasonable steps to



avoid the non-compliance, such that its ignorance of Ms Legg's employment, including in her regular sole charge role, was reasonable. In this respect, the Commission considered the affidavit evidence of Mr Lattin that:

- (a) the owner of McGinty's, Mr Stewart, had been adamant he did not want casual bar staff having any role in the management of gaming machines;
 - (b) Mr Persen and Ms Hoisman were highly trained;
 - (c) Mr Persen had expressed the view that he did not want bar staff (other than him or Ms Hoisman) to be left in sole charge;
 - (d) training of Mr Persen and Ms Hoisman in harm minimisation had been provided two years previously;
 - (e) Mr Lattin had no reason to believe that staffing practices had changed;
 - (f) Mr Persen was aware of the need for someone trained in problem gambling to be present; and
 - (g) Mr Lattin called on each of the venues for which he was responsible approximately every 30 days or as an incident or operational need may require.
25. The Commission also had regard to the fact that the Gaming Bar Book made it clear, at several, highly visible, points, that a person trained in harm minimisation awareness must be present at the venue whenever gambling is available.
26. On the other hand, Pub Charity provided no evidence of any prior arrangements or procedures that it had in place to ensure that trained staff were always present. There was no evidence of the imposition of an express obligation by Pub Charity on McGinty's to keep Pub Charity informed of staffing changes or a clear instruction to close the gambling operation if no trained staff were on duty.
27. In addition, despite Mr Lattin's monthly visits, Ms Legg's weekly shifts in sole charge of McGinty's from April 2011 did not come to light until June 2011, when Mr Lattin happened to call Mr Persen regarding an unrelated matter and learned of the incident which gave rise to the complaint. Pub Charity stated in a letter to the Department dated 16 August 2011 that there had been an error on the part of McGinty's in notifying it, and that it had made changes to the way it operated nationally to prevent further occurrences. The letter stated that:

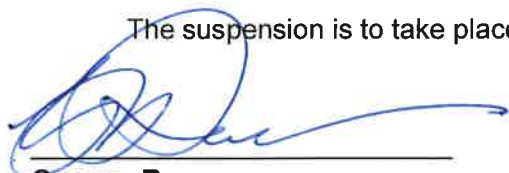
While we do our best to ensure that these breaches do not occur and by in large we are successful in our endeavours, we also continually review and change our

processes. The area staff are now required to ask if anyone new has been employed in the venue every time they visit and we are also continuing to communicate the requirements around staff training and notification in our "Jackpot" magazine and correspondence.

28. The Commission had little difficulty in dismissing the contention that mere provision of the Gaming Bar Book to McGinty's and prior training of Mr Persen and Ms Hoisman met the Appellant's obligations under Regulation 12. The circumstances of the case, and the evidence of Ms Legg, demonstrate that the obligation had not been discharged by those steps. While the Gaming Bar Book is no doubt a useful training resource, its mere provision (even if accompanied by training of one or two staff) does not go close to discharging the Appellant's responsibilities.
29. It would appear that Mr Lattin had not been required by Pub Charity to ask McGinty's about supervision of the gambling activities and changes to its staffing or to check the training log in the course of his monthly visits. Such a requirement had been added after the complaint and investigation.
30. The Commission considered that, on the evidence before it, Pub Charity did not take all reasonable steps (in terms of both its dealings with the venue management and its training obligations) to ensure that a properly trained person was present at McGinty's whenever class 4 gambling was available. What happened was not despite the Appellant's best endeavours.
31. Members of the Division went on to consider the adequacy of the one day suspension imposed by the Secretary. The Commission regards the circumstances which gave rise to the complaint as serious. It was very concerned that a problem gambler who had decided to take the difficult step of seeking self-exclusion (to avoid ongoing harm) had not been able to make good the commitment on the day in question. It is fortunate that the position was able to be remedied subsequently. That may not always be the case.
32. In this case the Appellant's failure to exercise control over its gambling operation, to make adequate enquiries of the venue management and to provide the necessary training led to regular breaches of an important obligation over a period of about three months. The Appellant was reluctant to acknowledge its responsibilities; rather it attempted to minimise them. The importance of problem gambling awareness training of venue staff generally and of the licence holder's responsibility for ensuring the presence of a properly trained person at all times while the class 4 gambling is available to the public needs to be emphasised. In the Commission's view, the suspension should be increased to two days.

Decision of the Commission

33. For the reasons above, the division varies the decision of the Secretary to suspend the venue licence at McGinty's for one day, increasing the suspension to two days and also varying date of the suspension (set as 12 December 2011 in the Secretary's decision).
The suspension is to take place on **Monday 30 July 2012** and **Tuesday 31 July 2012**.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

17th July 2012

