

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **THE SOUTHERN TRUST INCORPORATED** and **TE WHEKE HOLDINGS LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Appeal: 23 March 2007

Date of Decision: 24 August 2007

Date of Notification of Decision: 11 September 2007

DECISION
ON AN APPEAL BY THE SOUTHERN TRUST INCORPORATED
AND TE WHEKE HOLDINGS LIMITED

Appeal

1. The Southern Trust Incorporated ("**TST**") and Te Wheke Holdings Limited ("**TWH**") (together referred to as the "**Appellants**") appealed, under section 77 of the Gambling Act 2003 (the "**Act**"), against a decision by the Secretary for Internal Affairs (the "**Secretary**") refusing to grant a class 4 venue licence for the premises known as "After 5", located at 1207 Eruera Street, Rotorua (the "**Venue**").

Relevant provisions of the Gambling Act 2003

2. Section 65 of the Act provides as follows:

65. Application for class 4 Venue Licence

- (1) A corporate society may apply to the Secretary for a class 4 venue licence
- (2) An application must be on the relevant standard form and must be accompanied by –
 - (a)
 - (b) a territorial authority consent if required under section 98; and
.....

- (j) evidence that the class 4 venue is not to be used mainly for operating gaming machines; and ..
- (5) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.
- (6) The Secretary may request from the applicant any further information that the Secretary considers necessary to consider the application properly.

3. Section 98 of the Act provides as follows:

98. When territorial authority consent is required

A territorial authority consent is required in the following circumstances:

- (c) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last 6 months:

Facts

4. In June 2006, Ms Tammy Haira became interested in using a site at 1207 Eruera Street, Rotorua for a bar, and incorporated TWH for this purpose. The site was being used as a bar called "Bar 3", which operated gaming machines. Bar 3 was not a commercial success and the corporate society operating gaming machines there, the New Zealand Community Trust ("NZCT"), formally surrendered its class 4 venue licence for Bar 3 on 19 September 2006.
5. In August 2006, TWH entered into a lease for the Venue. TWH began upgrading the Venue in November 2006. On 6 December 2006, it applied for a liquor licence. On 15 March 2007, the Rotorua District Council told Ms Haira that the application had been opposed and that the matter would be heard before the Rotorua District Licensing Authority.
6. On 16 March 2007, there was a telephone conversation between Mr Campbell Wilson, TST's Compliance Manager, and Mr Robert Hunter, a Senior Gambling Inspector employed by the Secretary, about a possible application for a class 4 venue licence for the Venue. Mr Wilson told Mr Hunter that a liquor licence had not been issued for the Venue and asked whether an affidavit from the Venue operator would be sufficient evidence as to the Venue's main activity. Mr Hunter told Mr Wilson that the best evidence would be a liquor licence and that an affidavit would not suffice in the circumstances.
7. Notwithstanding Mr Hunter's advice, on 16 March 2007, Miss Haira swore an affidavit in which she expressed confidence that a liquor licence for the Venue would be issued to TWH in the near future, and that she was aware that the operation of gaming machines could not be the primary activity at the Venue. The affidavit stated that TWH would not operate gaming machines contrary to these requirements.
8. On 19 March 2007, the Secretary received an application for a class 4 venue licence from TST. The application was on a standard Department of Internal Affairs application form and

supplied all information that the form requested. The application did not include a copy of a liquor licence, as one had not been issued, but included Ms Haira's affidavit.

9. On 20 March 2007, the Secretary returned the application to TST as an incomplete application, under section 65(5) of the Act, on the basis that insufficient information had been provided to him to establish that the Venue was not going to be used mainly for operating gaming machines.
10. The Appellants considered the return of the application to be a refusal to issue a class 4 venue licence for the Venue and, on 23 March 2007 appealed to the Commission the Secretary's decision to refuse to grant the licence.
11. On 13 April 2007, the Rotorua District Council issued a Building Compliance Report for the Venue. A liquor licence was also issued on the same day (a building code consent being a prerequisite to the liquor licence being issued). The liquor licence was provided to the Secretary on 16 April 2007.
12. After the appeal was filed, the Secretary informed the Commission that he did not consider that he had made a decision refusing to grant the class 4 venue licence, but had instead exercised his powers under section 65(5) of the Act and returned an incomplete application.
13. In pre-hearing discussions, the parties agreed to treat the return of the application as amounting to a decision to refuse to grant a class 4 venue licence. The parties also agreed to limit the scope of the appeal to the following two matters:
 - (a) whether the information provided by TST with its application was, at 20 March 2007, sufficient to meet the requirement of section 65(2)(j) of the Act; and
 - (b) if the requirement of section 65(2)(j) was only met when the temporary liquor licence was received on 16 April 2007, whether a territorial authority consent is now required under sections 65(2)(b) and 98(c) of the Act, in order for the Secretary to be able to consider the application.

Submissions on behalf of the Appellants

14. The Appellants submitted, in summary, that:

(a) Although there is no statutory requirement for a liquor licence to be filed with an application for a class 4 venue licence, the Secretary rejected the application for no other reason than the absence of a liquor licence accompanying the application.

(b) A liquor licence is not necessarily conclusive proof that gaming will not be the dominant purpose of the venue.

- (c) A sworn affidavit from the venue's owner that the venue will not be operated mainly for gaming machines is better evidence than a liquor licence.
- (d) Ms Haira's affidavit contained all the necessary information to allow the application to be considered.
- (e) In returning the application, the Secretary's actions amounted to a decision to reject the application on the improper basis that no liquor licence had been submitted with the application. The Commission should order the Secretary to consider the application as submitted.

Submissions by the Secretary

15. In relation to the first agreed matter on appeal, the Secretary submitted, in summary, that:
- (a) Where an application is submitted for a new class 4 venue licence, a liquor licence is helpful, but not essential, to establish that a venue will not to be used mainly for operating gaming machines.
 - (b) It is possible to meet the requirements of section 65(2)(j) without a liquor licence, provided other compelling evidence is provided.
 - (c) With a new tavern with no history of operation, the existence of a liquor licence is relevant to show that liquor will be provided at the venue, and may assist an applicant to meet the 65(2)(j) requirements.
 - (d) In the absence of a liquor licence, or any evidence of other activities, he is justified in not being satisfied that the venue will not be used mainly for operating gaming machines.
 - (e) The Appellants provided insufficient evidence to satisfy the requirement of section 65(2)(j). The only evidence provided was an affidavit from Ms Haira in which she stated that she was confident that a liquor licence would be granted. However, she was not in a position to be confident as the liquor licence application was opposed. As such, he could not be satisfied that the venue would have a primary activity at all.
16. In relation to the second agreed matter on appeal, the Secretary submitted, in summary, that:
- (a) The temporary liquor licence issued on 13 April 2007 constitutes sufficient evidence for the purposes of section 65(2)(j).

- (b) The Appellants should file a new class 4 venue licence application with a territorial authority consent, as more than six months has now expired since the previous licence was surrendered.
- (c) Alternatively, if the Commission is of the view that the Appellants' original application can be reassessed, the application was only effectively filed on 16 April 2007 when he received the liquor licence. This date is outside the six-month period and so a territorial authority consent is needed.
- (d) While the Commission can make decisions relying upon material not available to him, it would be inappropriate for the Commission to make a decision on the original rejected application based upon information received after he made his decision because of the 6 month rule in section 98(c) of the Act. To do so would circumvent Parliament's intent.

17. In addition, the Secretary submitted:

- (a) When the parties agreed to limit the appeal to the two agreed points, counsel for the Secretary acknowledged that, if the Commission accepted the Appellants' submissions, he would issue the venue licence. However, he has since discovered information that causes him concern in relation to a possible key person associated with the application. If the appeal is upheld, he now asks that the application be returned to him to reconsider and make a new decision.
- (b) Counsel for the Secretary orally informed the Commission that he is otherwise satisfied that the application meets the Act's requirements for the issue of a class 4 venue licence.

Appellants' submissions in reply

18. In reply, the Appellants submitted, in summary, that:

- (a) The Secretary acknowledged that there is no requirement that a liquor licence be supplied with an application for a class 4 venue licence, but his practice is at odds with this stated position.
- (b) Ms Haira was entitled to be confident that a temporary liquor licence would be granted. Whatever concerns were held by the parties opposing TWH's liquor licence application, they were satisfied within 18 days of Ms Haira's affidavit being sworn, and the only factor which held up the grant of a temporary liquor licence was building work.

- (c) Rather than returning the application as being incomplete, the Secretary should have granted the venue licence with a special condition that the venue not operate unless it had a current liquor licence.
- (d) The affidavits in reply address the Secretary's concerns about the possible key person.

Analysis

Preliminary Matter

19. Although the parties accepted that the Secretary's return of the application amounted to a refusal to grant a class 4 venue licence, it is necessary to comment briefly on the return as it goes to the Commission's jurisdiction to hear the appeal.
20. Section 77(1)(a) gives the Commission power to hear appeals from a refusal by the Secretary to grant a class 4 venue licence. Section 77 does not confer power on the Commission to hear an appeal from the return of an incomplete application by the Secretary.
21. Section 65 of the Act governs applications for class 4 venue licences. It provides that a corporate society may apply to the Secretary for a class 4 venue licence, that the application must be on the relevant standard form and be accompanied by certain specified documents, information and evidence, including evidence that the venue is not to be used mainly for operating gaming machines (section 65(2)(j)). The Act does not specify what evidence is required to demonstrate that venue will not be used mainly for operating gaming machines. It is clear however that it does not specify that a liquor licence must be provided to satisfy section 65(2)(j). A liquor licence may assist in satisfying section 65(2)(j), but the requirement may also be adequately addressed by other evidence.
22. As the Act does not require a liquor licence to be provided with an application, the return of the application on the basis that it was incomplete without one was incorrect.
23. The Secretary returned the Appellants' application to TST on the basis that it was incomplete, pursuant to section 65(5) of the Act, as the application did not include a liquor licence. Section 65(5) does not confer power to return an application which supplies the specified information in cases where the information, in the Secretary's opinion, is insufficient for the licence to be granted. It only allows the return of an application in which the standard form has not been completed or for which one or more of the matters listed in section 65(2)-(3) have not been provided at all. If insufficient evidence has been provided, the Secretary should ask for further information under section 65(6) of the Act, or decline the application. As the application met the statutory requirements for a valid application (whether or not it would be granted), the return constituted a refusal of the application.

Key Issues

24. As noted above, the parties agreed to limit the scope of the appeal to the two points identified at paragraph 13. However, in the Commission's view, the two points do not adequately capture the issues required to dispose of the appeal. The first issue, whether the information provided by TST with its application was sufficient to meet the requirements of section 65(2)(j), assumes incorrectly that the Commission will consider the appeal only by way of rehearing (being limited to the information before the Secretary at the time of the refusal). As the Commission noted in decision GC06/06, and in subsequent decisions, the Commission hears appeals on a *de novo* basis, which means that it considers matters afresh, having regard to all the information before it, irrespective of whether the Secretary had that information when he made his decision and whether the original information justified his decision. Section 77(3)(d) of the Act provides that the Commission must consider all information put before it by the parties. This includes the liquor licence issued after the Secretary made his decision.

25. For the future assistance of the parties who framed the questions by agreement, the Commission provides answers to them as follows:

- (a) The answer to the first issue is "yes". In the Commission's view, the affidavit of Miss Haira satisfied the requirements of the Act, especially with the addition of a condition that the venue could not operate unless it held a current liquor licence. The actual prior issue of a liquor licence was not necessary in order to reach that conclusion.
- (b) The answer to the second issue is "not required". The express pre-condition for the second issue is not met.

However, as the Commission has already indicated, neither issue is truly material to deciding the appeal as the answers do not determine the result of the appeal.

26. The Commission considers that the following two issues are necessary to dispose of the appeal:

- (a) In the circumstances, is there now a requirement for a territorial authority consent which affects the decision on appeal? (This is, the second issue with the pre-condition removed.)
- (b) If the grounds for the appeal are established, should the Commission allow the appeal, or should it refer the matter back to the Secretary for his further consideration?

Is a territorial authority consent required?

27. Section 65(2)(b) of the Act provides that an application for a class 4 venue licence must be on the relevant standard form and must be accompanied by a territorial authority consent, if required under section 98 of the Act. Section 98(c) provides that a territorial authority consent is required if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last six months. The remainder of section 98 is not applicable.
28. In the present case, NZCT held a class 4 venue licence for the Venue (then known as "Bar 3") until 19 September 2006. The Appellants' application for a new class 4 venue licence was received by the Secretary on 19 March 2007, within the six month period, albeit on the last day. A territorial authority consent is not, therefore, required.
29. If the Commission were to decide to refer the application back to the Secretary for him to reconsider (this will be addressed below), in the Commission's view, the Appellants would still not need a territorial authority consent because section 77(4)(b) of the Act is a power to direct the Secretary to reconsider his original decision. That is, the Secretary has to reconsider whether or not the original application, together with any further information, is sufficient for a class 4 venue licence to be granted. The original application did not require a territorial authority consent as it was made within the six month window and the position is no different when it is reconsidered by the Commission on appeal or if the Commission were to direct the Secretary to reconsider it.

If the grounds for the appeal are established, should the Commission allow the appeal or refer the matter back to the Secretary?

30. The grounds for the appeal were, in summary, that the Secretary wrongly refused to issue the class 4 venue licence owing to an incorrect view that a liquor licence was required as evidence to establish that the Venue would not be used mainly for operating gaming machines.
31. The grounds for the appeal have been established as the Secretary accepts that:
- (a) a liquor licence is not required under section 65(2)(j);
 - (b) the return of the application did amount to a refusal to issue a licence;
 - (c) except for new concerns about a possible key person suitability, he is otherwise satisfied that the application meets the requirements of the Act; and
 - (d) a liquor licence has been issued (and is further confirmation of the affidavit evidence that the Venue will not mainly be used for operating gaming machines).

32. The Commission has gone on to consider whether to allow the appeal, thereby effectively directing the Secretary to issue the class 4 venue licence, or whether to refer the matter back to the Secretary for further consideration. Either option is available to the Commission, pursuant to section 77(4) of the Act. The Commission noted the Secretary's submissions and evidence about possible key person suitability concerns, together with his suggestion that, if the Commission accepted the Appellants' submissions, the matter should be referred back to him for further consideration.
33. In the context of this appeal, the Commission decided that the interests of justice favoured the immediate issue of the licence. In appeals before the Commission, it is common for Appellants to have the benefit of a favourable status quo with the appeal acting as a stay until the issues are determined. However in this case, the status quo is unfavourable to the Appellants because the decision was a refusal to grant a licence. This has resulted in the Appellants having to file an appeal to correct a decision to refuse to consider their application on the basis that a liquor licence was required, when it was not.
34. The Commission considers that the key person concerns do not justify a decision to refer the application back to the Secretary, particularly as the Secretary has ongoing powers to suspend or cancel licences if the continuing requirements to hold a licence (such as key person suitability) are not met. Accordingly, the Commission declined to refer the application back to the Secretary for further consideration.

Decision

35. The Commission allows the appeal and directs the Secretary to issue TST with a class 4 venue licence for the Venue. The decision on appeal does not limit or restrict the Secretary's powers to suspend or cancel the licence once issued if the continuing requirements are not met, including those relating to key persons.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the Gambling Commission

September 2007