

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **BLUEGRASS HOLDINGS LIMITED**

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
A K Foote

Date of Application: 18 February 2013

Date of Decision: 14 June 2013

Date of Notification
of Decision: 24 June 2013

**DECISION ON AN APPLICATION FOR STAY IN AN APPEAL
BY BLUEGRASS HOLDINGS LIMITED**

Introduction and background

1. Bluegrass Holdings Limited (the "**Appellant**" or "**Bluegrass**") has appealed against a decision by the Secretary for Internal Affairs (the "**Secretary**") to cancel its class 4 operator's licence. The Secretary cancelled the licence under section 58(1)(a), (b) and (d) of the Gambling Act 2003 (the "**Act**"). The Secretary cancelled the licence relying on the following grounds:
 - (a) He was no longer satisfied of one of the grounds in section 52, a ground for cancellation under section 58(1)(a). The Secretary was no longer satisfied of the requirement that, after investigation, he be satisfied of the suitability of the Appellant and its key persons (section 52(1)(h)). The Secretary was not satisfied of the suitability of Mike O'Brien, whom he considered to be a key person (although he was not named as such on the Appellant's application for a licence), having regard to his history of compliance with the Act. He was no longer satisfied of the Appellant's suitability because of its failure to inform him that Mike O'Brien was a key person and because it had apparently breached section 118.
 - (b) Bluegrass had failed to comply with a relevant requirement of the Act; a ground for cancellation under section 58(1)(b). The Secretary considered that

Bluegrass had breached section 118 of the Act, as it had sought and received loans from potential grant recipients, which were, at least informally, conditional upon the grant recipients receiving future grants. The Secretary also considered that Bluegrass had failed to comply with section 57(1)(d), in that it had failed to apply to amend its licence when a new key person (Mike O'Brien) was added.

- (c) Bluegrass had provided misleading and false information in its application for a class 4 operator's licence, concerning its initial funding; a ground for cancellation under section 58(1)(d).
2. This application by the Appellant follows the appeal to the Commission against the Secretary's decision, the decision of the Commission issued on 19 December 2012, declining an earlier application for the determination of separate issues prior to hearing of the substantive appeal, and a subsequent judicial review proceeding commenced by the Appellant on 11 February 2013 under CIV 2013-485-242.
3. The present application has an unusually protracted and complicated procedural history, as follows:
- (a) The Secretary's decision to cancel the class 4 operators' licence of the Appellant, Bluegrass Holdings Limited, was notified by letter dated 3 July 2012, following the statutory hearing process set out in section 59.
 - (b) Bluegrass filed an appeal to the Commission dated 4 July 2012.
 - (c) On 30 July 2012 the Commission imposed its standard timetable directions for the filing of evidence and submissions on the appeal.
 - (d) Bluegrass subsequently applied to vary those directions, seeking an additional 8 weeks to file its evidence and submissions. The requested variation was granted by the Chief Gambling Commissioner on 24 August 2012.
 - (e) Bluegrass did not comply with the extended timetable, but instead, on 10 October 2012, after 6 weeks of the extended period had passed, filed an application seeking orders striking out certain paragraphs of the Secretary's decision and, by memorandum, a direction for an oral hearing of the appeal. The application was not accompanied by substantive submissions in accordance with the Commission's established practice; but rather by a memorandum seeking new timetable orders in substitution for those made on 24 August 2012.
 - (f) The Commission declined the request to make directions for an oral hearing before it had received any evidence or submissions on the appeal and directed Bluegrass to file substantive submissions on the application.



- (g) In response, Bluegrass proposed to reframe its application and sought a teleconference to settle timetabling for a new application to be filed and dealt with.
- (h) Following the requested teleconference, Bluegrass filed a new application dated 31 October 2012, with substantive submissions and evidence in support.
- (i) After considering the application and the submissions for Bluegrass and the Secretary, the Commission issued its decision on 19 December 2012, declining the application and asking counsel to confer and revert to the Commission with a proposed timetable for the filing of substantive evidence and submission on the appeal.
- (j) Bluegrass responded by advising that it had been instructed to seek judicial review of the Commission's decision of 19 December 2012 and proposing to defer timetabling directions until the judicial review proceeding had been filed and served, with standard timetable orders (ie those made on 30 July 2012) to apply if that had not occurred by the end of January 2013.
- (k) The judicial review proceeding was filed on 11 February 2013.
- (l) Bluegrass then filed the present application for a stay of the appeal before the Commission, pending the outcome of the judicial review proceeding. The grounds for the application were that the issues raised by the judicial review application were inextricably connected to the Commission's determination of the appeal, in that the Secretary's decision relied, in part, on an alleged breach of section 118, that the allegation of breach was contested, and the judicial review was directed at the manner in which the Commission should be required to deal with the dispute about a breach of section 118.
- (m) On 26 February 2013, the Commission made timetable directions for the filing of submissions on the stay application. Both parties filed submissions on 12 March 2013. On 19 March 2013, both parties filed further memoranda. The memorandum from Bluegrass was in the nature of a reply to the Secretary's submissions of 12 March 2013.
- (n) The memorandum of 19 March 2013 on behalf of the Secretary was of a different nature. It notified the Commission of a fundamental change of position by the Secretary, advising the Commission that the Secretary proposed to amend the grounds of his decision of 3 July 2012 cancelling the licence. The Secretary accepted that, in the present case, no breach of section 118 had occurred and advised that he no longer relied upon that ground to support his



decision to cancel the licence. He proposed to argue the appeal solely on the basis that the decision was justified on the remaining grounds set out in his decision on 3 July 2012; namely the provision of materially false or misleading information in its application for a licence (section 58(1)(d)(ii)) and non-satisfaction about the suitability of a key person, Mike O'Brien (section 58(1)(a) and section 52(1)(h)). The Secretary submitted that his change in position meant that section 118 was no longer relevant to the appeal and, accordingly, neither was the judicial review proceeding, which was concerned with how the Commission should determine the disputed issue of its breach. He submitted that his change of position meant that the principal ground for the stay application was no longer relevant.

- (o) The Commission recognised that the change in position rendered much of the previously received submissions of doubtful materiality and that Bluegrass would need the opportunity to file further submissions addressing the change in position and its effect on the application for stay. Accordingly, the Commission gave Bluegrass the opportunity to make further submissions on the change of position and its implications for the stay application and made timetable directions for the filing of further submissions by agreement.
- (p) Bluegrass presented its further submissions on 24 May 2013 and the Secretary's submissions in reply were received on 5 June 2013. It is principally those submissions that the Commission addresses in dealing with the application for stay; all earlier submissions adopting the position that the Secretary intended to argue that there had been a relevant breach of section 118.

4. The foregoing procedural history reveals that Bluegrass has already enjoyed, for a period of about 12 months, the benefit of an automatic statutory stay of a cancellation decision that arises on commencement of an appeal, as provided by section 62(2)(b)(ii). The events set out above detail why it still retains the benefit of a licence, which was cancelled by the Secretary on 4 July 2012, without lodging any evidence or submissions on the substantive merits of the appeal. By the current stay application, it proposes to extend further the effective period of the stay of the decision under appeal.

Relevant law

5. The relevant sections of the Act are as follows:

58 Suspension or cancellation of class 4 operator's licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that—

- (a) any of the grounds in section 52 are no longer met; or
- (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
- ...
- (d) the corporate society supplied information that is materially false or misleading in its application for—
 - (i) a class 4 operator's licence; or
 - (ii) a renewal or an amendment of a class 4 operator's licence; or
 - (iii) a class 4 venue licence; or
 - (iv) a renewal or an amendment of a class 4 venue licence.
- (2) In deciding whether to suspend or cancel a class 4 operator's licence, the Secretary must take into account the matters in section 52.

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- (3) The Gambling Commission—
 - (a) may request any information from the corporate society or the Secretary; and
 - (b) is not bound to follow any formal procedure; and
 - (c) does not need to hold a hearing; and
 - (d) must consider any information provided by the corporate society or the Secretary.
- (4) The Gambling Commission may then—
 - (a) confirm, vary, or reverse the decision of the Secretary; or
 - (b) refer the matter back to the Secretary with directions to reconsider the decision.

6. Schedule 3, clause 2(1) of the Act applies by virtue of section 234, and provides:

2 Meetings

- (1) The Gambling Commission may regulate its procedure as it thinks fit.

The power to stay an appeal pending a judicial review proceeding

- 7. The Commission's power to stay or delay dealing with an appeal is not expressly conferred but arises under the provision in Schedule 3 above to the effect that the Commission may regulate its own procedure as it thinks fit.
- 8. The Appellant submits that the Commission should adopt a similar approach to that of the High Court when considering whether to grant interim orders under section 8 of the Judicature Amendment Act 1972. The Commission is urged to start by asking whether

the stay is necessary to preserve the position of the applicant and then, if it is, to consider the balance of convenience, the public interest and overall justice.

9. Without necessarily accepting that the Commission is in the same position as the High Court considering a section 8 application, the Commission accepts that the existence of a material pending judicial proceeding, including a judicial review challenge to an issue arising in the conduct or determination of an appeal could provide a reason for staying or delaying an appeal hearing. The Commission would need, in such cases, to balance the competing benefits and detriments of delay from the perspective of the fair and efficient administration of the licensing regime created by the Act.
10. The Commission is cited as a party to the judicial review proceeding and is aware of the issues that it raises. The proceeding challenges and seeks to set aside the decision of the Secretary that the Appellant breached section 118, and, alternatively, the Commission's directions (set out in its earlier decision) for the conduct of the appeal in relation to that issue. It seeks directions that, in the absence of a conviction, neither the Secretary nor the Commission may decide that the Appellant breached section 118 and impose any consequence, and, in the further alternative, that the Secretary bears the onus of proof of establishing a breach of section 118 beyond reasonable doubt, so that the plaintiff has no obligation to produce any evidence or submissions on the allegation of breach until the Secretary's evidence as been lodged. The judicial review proceeding focuses exclusively upon the issue of breach of section 118 and its determination.

Appellant's submissions

11. The Appellant submitted, in summary, as follows:
 - (a) The change in stance by the Secretary fundamentally changes the basis for the original decision. To date, section 118 has been the main focus of the Appellant's response in both the appeal and judicial review.
 - (b) The remaining grounds are insufficient to justify the cancellation decision.
 - (c) The change raises potential jurisdictional issues. Although the Commission approaches appeals on a *de novo* basis, an appeal requires the process in section 59 to be followed beforehand.
 - (d) The change of position amounts to the Secretary having made his decision on different grounds. Although the section 59 proceedings involved three notified grounds for the proposed decision, reducing them to two for the purposes of the appeal means that the Appellant did not have the opportunity of addressing the "final" grounds globally.



- (e) There are common factual underpinnings for all three grounds.
 - (f) The factual basis for the remaining grounds of providing false or misleading information and unsuitability of a key person is disputed.
 - (g) One of the potential outcomes of the appeal is the referral of the matter back to the Secretary, with directions to reconsider the decision.
 - (h) There have been changes to the Appellant's operation. While the Commission could receive this evidence itself, it should instead refer the matter back to the Secretary under section 62(4)(b).
 - (i) Referring the matter back to the Secretary may render the judicial review unnecessary.
 - (j) In the alternative, the issues on appeal should be defined restrictively and, even then, only if the judicial review has been resolved. A list of issues was put forward in the submissions, but expressly without commitment by the Appellant to be limited to those issues.
 - (k) The withdrawal of the section 118 ground is not in itself an answer to the judicial review application. Because the judicial review relates to the procedure to be followed by the Commission, in order to address the judicial review, it is necessary to determine the procedure to be followed in the appeal.
 - (l) There are issues about redaction of information in documents provided by the Secretary.
12. The Commission observes that, while most of the submissions address the question of stay, a number of them, such as paragraph 10(b), (f) and (h) above, address the substantive merits of the appeal for which the stay is sought, and the last relates to a procedural issue which potentially affects the process of substantive determination.

The Secretary's submissions

13. The Secretary submitted, in summary, as follows:
- (a) The change in position is not so fundamental as to change the decision.
 - (b) The change does not involve the addition of any new ground. The Appellant had the opportunity to respond to the remaining grounds prior to the decision of 3 July 2012.
 - (c) There is no breach of due process or natural justice and no undue prejudice to the appeal continuing.



- (d) The Commission should not refer the matter back to the Secretary under section 61(4)(b).
- (e) Because the Commission hears appeals on a *de novo* basis, the Commission can consider an appeal on different grounds from those considered by the Secretary.
- (f) There are no longer any arguable grounds for a stay and the Appellant has not demonstrated any need for a stay, pending the resolution of the judicial review proceeding, having regard to the change in the Secretary's position.

Analysis

14. The Commission's first consideration is to characterise correctly the Secretary's change of position. In the memorandum of 19 March 2013, the Secretary purported to amend the grounds of his decision and the Appellant's argument on jurisdiction (as summarised above) assumes that he may do so, but with the consequence of having to restart the hearing procedure set out in section 59.
15. The Commission considers that the parties have legally mischaracterised the Secretary's change in position. The Act provides for a right of appeal to the Commission against the Secretary's decision. Section 61(3) of the Act provides that, in the course of the appeal, the Commission may request further information from the Appellant or the Secretary and must consider any information provided to it by either. In contrast to the Commission's powers, which include an express power to reconsider its prior decisions (section 226(3)), the Secretary has no express power to reconsider his decisions.
16. Having regard to the scheme of the Act, the Commission does not view the Secretary's change in position, despite how it is expressed, as an effective amendment of the decision of 3 July 2012, which is now before the Commission by way of appeal. Rather, what the Secretary has done in reality is to notify the Appellant and the Commission that he does not intend to argue on the appeal that there has been a relevant breach of section 118. The Commission considers that it is entitled to proceed with the appeal on the assumed basis of that commitment by the Secretary.
17. However, the commitment of the Secretary (not to argue on the appeal that there has been a breach of section 118) would not necessarily put that issue beyond the scope of the appeal. The reason for that conclusion is the *de novo* jurisdiction of the Commission which allows the Commission to make any of the orders set out in section 61(4) of the Act after considering any information before it, which includes the original reasons for the decision.



18. It follows that, while the issues raised in the judicial review, which relate to section 118 and the consequences of its penal nature, have the potential to affect the procedure and outcome of the appeal, that is only the case to the extent that the Commission leaves open the possibility of a determination which involves a finding of a breach of section 118.
19. The Commission received detailed submissions from the Appellant in the course of the previous application contending that there is no prospect of a finding of a breach of section 118, even on the Secretary's view of the facts. Because the Secretary advised that he intended to argue otherwise, for the reasons set out in that decision, the Commission left that issue to the substantive appeal determination. Now that the Secretary has disavowed supporting his decision on that ground, effectively conceding that the Appellant's argument is correct, there is nothing to prevent the Commission from concluding now that the matter is no longer in issue on the appeal. Having regard to the Secretary's changed position, this would involve the Commission deciding that it sees no basis for it to give the issue of an alleged breach of section 118 any further consideration itself and ruling that the matter will not be further considered on the appeal. Such an outcome is in fact what the Appellant sought to achieve by its earlier, unsuccessful, application.
20. The Commission regards the previous submissions made for the Appellant, namely that section 118 does not address the receipt of a benefit prior to obtaining a class 4 licence, to be compelling. The Secretary's allegation of breach treated funding, alleged to have been received prior to the grant of the licence, as constituting a breach of section 118. In the context of the prior application for determination of a separate question, the Appellant argued that, even assuming the contested facts in favour of the Secretary, as a matter of law, no such breach could be found. The Commission agrees. The Secretary has now effectively reversed his prior indication that he would contest the Appellant's argument and has effectively conceded the point. In the Commission's view, there is now no apparent basis for the Commission to consider section 118 further, and it so rules.
21. The effect of this ruling disconnects the issues raised in the judicial review from the remaining issues in the appeal. The judicial review pleading, and the application for stay, focus exclusively in section 118 and the implications of its penal nature for the Commission's determination of the, now withdrawn, allegation of its breach. A stay of the appeal is neither necessary to preserve the position of the Appellant on the issues in the judicial review proceeding nor beneficial for the Commission's determination of the substantive appeal issues.
22. The Commission has concluded that none of the grounds advanced by the Appellant for stay are made out for the following reasons:



- (a) Advice by the Secretary that he will not endeavour to support his decision by arguing one of three grounds on the appeal does not amount to a new or amended decision. The cancellation decision has been made and is now before the Commission on appeal. The statutory scheme provides that the power to reverse, amend or reconsider it now lies with the Commission. It is a separate matter for the Secretary however to decide what matters he puts forward in arguing the appeal. He is not bound by, or limited to, the terms of his earlier decision.
- (b) The Commission must consider all information put forward by the Appellant and the Secretary (section 61(3)(d)). That information includes advice that the Secretary no longer contends that his decision can be supported on a particular ground, a position that is common ground with the Appellant. It also includes information regarding subsequent changes to the Appellant's operation (see paragraph 11(h) above).
- (c) As a result, the submission that the Secretary must recommence the section 59 process is misconceived. The section 59 process concluded on 3 July 2012 and the resulting decision is now the subject of an appeal. The appeal process is governed by section 61.
- (d) The submission that the Commission should refer the matter back to the Secretary overlooks the fact that such an order is a final dispositive order under section 61(4). The Commission may indeed make such an order, but only after it has completed the steps in section 61(3). Those steps include the direction that the Appellant file its evidence and submissions, but that has not occurred.
- (e) Even assuming that the Commission has power to make such an order despite the incompleteness of the section 61(3) process, it is not prepared to make such an order before it has embarked on any substantive consideration of the merits.
- (f) Removing the issue of whether there has been a relevant breach of section 118 from the scope of the appeal disconnects the judicial review issues from the appeal issues. The Appellant has presented no cogent argument to the contrary. There is no need to narrow the appeal issues any further.
- (g) The existence of common or related factual underpinnings makes no difference as the Appellant's challenge to the Commission's earlier decision is based on a technical legal argument relating to the possibility of a finding of breach of an obligation with potentially penal consequences.



(h) None of the other matters advanced (disputed merits, redaction of documents) are relevant to the issue of whether a stay should be granted and can all be addressed in the course of hearing the appeal.

23. In its decision released on 19 December 2012, the Commission framed the issue on the appeal as follows:

Should the decision of the Secretary to cancel the licence, under 3 of the 4 grounds under Section 58 be confirmed, varied, reversed or referred back to the Secretary with directions in the light of the information provided to the Commission by the Appellant and the Secretary?

24. The formulation remains correct but the grounds, for the purposes of the appeal, now require restriction. These grounds are now:

- (a) lack of satisfaction, after investigation, with suitability of the Appellant and an alleged key person, namely Mike O'Brien;
- (b) breach of a relevant requirement of the Act, namely section 57(1)(d) (failure to amend its licence when an allegedly now key person (Mike O'Brien) was added); and
- (c) the supply of materially false or misleading information in the Appellant's application for its licence.

25. The Commission will approach the appeal on the basis that the decision cannot be justified by reference to a breach of section 118 as it accepts that the language of section 118 precludes such a finding on any party's view of the facts. Breach of section 118 will therefore not be an issue under either section 58(1)(a) (suitability of the Appellant or a key person) or section 58(1)(b) (breach of a relevant obligation). All other matters remain open for consideration, including the alleged breach of section 57(1)(d).

26. As there is no other sound reason why it would be just and efficient to delay the hearing of the appeal, the Commission declines to stay or further delay the appeal.

Redactions and directions

27. The Appellant has raised the issue of redactions from documents that the Secretary was directed to lodge with the Commission, each bearing a notation that the redacted information has been withheld under the Official Information Act. The disclosure was not made under the Official Information Act so the reasons to withhold under that Act do not apply automatically. Rather, the disclosure was given pursuant to a request for information by the Commission under section 61(3)(a).

28. If the Secretary wishes to make redactions to documents which he is directed to disclose on an appeal, he must seek the Commission's agreement to that course, supported by reasonable grounds to justify redaction. Those grounds would need to address why, for example, a limited access or confidentiality direction would not sufficiently protect the interest of concern. The Secretary's submissions indicate that he would be comfortable with any orders that the Commission considers appropriate in relation to the disclosure documents in this appeal.
29. The Commission directs that, within 10 working days, the Secretary must **either** replace all disclosed documents containing redactions with copies without redactions **or** the Secretary must apply to the Commission for orders approving redaction, restricting access or for confidentiality. In the latter event, the Commission will make timetable orders for dealing with the application.
30. In the event that no such application is made by the Secretary, the Commission directs the Appellant to file and serve its evidence and submissions on the appeal within a further 20 working days, with the Secretary's evidence and submissions to be filed and served a further 10 working days thereafter and with the Appellant having a further 10 working days to file submissions strictly in reply. Those timeframes reflect the Commission's standard timetable for appeals.

Decision of the Commission

31. The application for stay is declined. The Commission makes the directions set out in paragraphs 29 and 30 above.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

24 June 2013

