GC17/14

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **FIRST SOVEREIGN TRUST LIMITED**

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
R D Bell

Date of Decision: 15 August 2014

Date of Notification of Decision: 7th November 2014

DECISION ON AN APPEAL BY FIRST SOVEREIGN TRUST LIMITED

Introduction

1. First Sovereign Trust Limited (the "**Appellant**" or "**FSTL**") appealed against a decision by the Secretary for Internal Affairs (the "**Secretary**") to refuse to renew its class 4 operator's licence.

2. The Secretary refused to renew FSTL's licence under section 56(5)(a) Gambling Act 2003 (the "**Act**") for the following reasons:

(a) [redacted]

(b) He was not satisfied that, in accordance with section 52(1)(h) of the Act, Halvor King, Malcolm Short, Peter Anaru and Kerry Bird were suitable to be key persons of FSTL, in the light of their profile of past compliance with the Act, in particular with reference to:

[1] The Commission has been advised that a name suppression order remains in force, [redacted] in order to comply with the order

(i) their decisions and actions in permitting First Sovereign Trust ("**FST**") (FSTL's predecessor) to pay, from gross proceeds, legal costs in a defamation proceeding against the New Zealand Racing Board ("**Defamation Costs**"); and

(ii) their decisions and actions in permitting FSTL to pay, from gross proceeds, legal costs for name suppression in a [redacted] ("**Name Suppression Costs**").

(c) He was not satisfied that, if the licence were renewed, FSTL would:

(i) maximise the net proceeds and minimise the costs of the gambling (section 52(1)(d)); or

(ii) apply or distribute net proceeds to the community (section 52(1)(e)),

because of its management by the key persons named above, and because of its past actions in paying from gross proceeds, the Name Suppression Costs.

Background

3. The appeal followed a number of court decisions in proceedings between the Secretary and FST/FSTL and FSTL's key persons which provide relevant context.

FST

4. FST was established in 2003. It was settled by First Sovereign Trust Limited, of which the sole shareholder was Mr Bird. At all relevant times, Mr King, Mr Short and Mr Anaru were trustees of FST.

5. FST entered into a management agreement with Administration Management Services ("**AMS**") in 2004. Mr Bird was the sole director of AMS. Under the contract, AMS assumed full administrative control of FST's affairs. [redacted]

6. In 2008, the Department of Internal Affairs laid charges against Mr Bird (under the Crimes Act 1961 and Gambling Act) and FST (under the Gambling Act) in relation to grants made by FST to the Waikato Racing Club.

7. In June 2009, the Secretary proposed to refuse to renew FST's licence. The proposed refusal was based on the findings of a 2009 audit report, regarding the quantum of payments to AMS, and the grants made by FST to the Waikato Racing Club.

8. In January 2010, the Secretary decided to refuse to renew FST's licence.

9. FST appealed the refusal to renew to the Gambling Commission. It then sought a stay of the appeal until the charges against Mr Bird and FST had been heard by the District Court. The Commission declined to grant a stay. FST successfully sought judicial review of the Commission's stay decision. In *First Sovereign Trust v Secretary for Internal Affairs* HC Wellington CIV 2010-485-828 22 July 2010 ("**Stay Decision**"), the High Court directed that the Commission adjourn the hearing of the appeal until after the charges against Mr Bird and FST had been dealt with.

10. In October 2010, the District Court dismissed the Crimes Act charge against Mr Bird on the basis that there was no case to answer. On 19 November 2010, Mr Bird was found not guilty of the remaining charge against him under the Gambling Act. Following Mr Bird's acquittal, the Secretary withdrew the charge against FST.

11. On 26 November 2010, the New Zealand Racing Board ("**NZRB**") issued a press release implicating FST in the misappropriation of funds in relation to Waikato Racing Club. The press release claimed that a National Business Review ("**NBR**") article of the same date made it clear that the "misappropriation of funds involving First Sovereign Trust and Waikato Racing Club" was first identified as a result of the NZRB's audit processes.

12. On 10 December 2010, the NBR published a statement from the NZRB, clarifying that its earlier press release was not intended to impugn the reputation of FST.

13. In 2011, FST and Messrs Short and Bird brought defamation proceedings against the NZRB. The case was heard in July 2012. Mr Bird was awarded $20,000 in damages. The jury made no award in favour of Mr Short or FST.

14. Meanwhile, in June 2010, the trustees of FST had bought the business of AMS, thus ending the AMS contract. The Secretary became aware of this in September 2010.

15. The Secretary considered that the purchase price for the AMS business and contract, $2.4 million, involved an improper payment of net proceeds. In 2013 the Secretary commenced proceedings in the High Court against AMS, Sidewalk Investments Limited (the shareholder of AMS) and Kerry Bird, seeking orders under section 112 of the Act, to recover net proceeds improperly paid. The Secretary was unsuccessful. In *The Secretary for Internal Affairs v Administration Management Services Limited & Ors* [2013] NZHC 3498 ("**AMS Judgment**"), the High Court held that the payment of $2.4 million was not a payment of net proceeds as the Secretary had not established that the amount was not an actual, reasonable and necessary cost of conducting the gambling and therefore had not established that it fell within the section 4 definition of net proceeds.

16. At some point after March 2011, FST transferred its operations to FSTL.

FSTL

17. Prior to the Stay Decision, the Trust formed FSTL, with the intention that it would become licensed as a corporate society under the Act and eventually take over all of FST's venues.

18. FSTL applied for an operator's licence in December 2009.

19. On 30 March 2010, the Secretary refused to grant an operator's licence to FSTL. FSTL appealed the decision to the Gambling Commission. The appeal did not proceed, pending the outcome of the criminal proceedings referred to in paragraph 6 above, in the light of the Stay Decision (see paragraph 9).

20. In December 2010, the Secretary reversed his decision refusing to issue a licence to FSTL, and a licence was granted on 1 March 2011.[2]

21. [redacted]

22. [redacted]

23. [redacted]

[2] As a result, FST did not proceed with the appeal against refusal to renew described in paragraph 9.

[redacted]

24. [redacted]

Relevant law

25. The relevant provisions of the Gambling Act are:

4 Interpretation

...

net proceeds, in relation to gambling, means the turnover of the gambling plus interest or other investment return on that turnover plus proceeds from the sale of fittings, chattels, and gambling equipment purchased from that turnover or investment return less—

(a) the actual, reasonable, and necessary costs (including prizes), levies, and taxes incurred in conducting the gambling; and
(b) the actual, reasonable, and necessary costs incurred in complying with whichever of the following apply to the gambling:
  (i) this Act or any other relevant Act:
  (ii) an operator's licence:
  (iii) a venue licence

5 Meaning of conducting gambling

In this Act, **conducting gambling** includes any of the following activities:

(a) organising, using, managing, supervising, and operating (but not playing) gambling or gambling equipment:
(b) distributing the turnover of gambling (for example, by paying prizes, meeting costs, or making grants):
(c) selling tickets to participate in gambling:
(d) promoting gambling:
(e) assisting in activities described in paragraphs (a) to (d).

52 Grounds for granting class 4 operator's licence

(1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—
  (a) the gambling to which the application relates is class 4 gambling; and
  (b) the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and
  (c) the applicant's proposed gambling operation is financially viable; and
  (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
  (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and

(f) the applicant is able to comply with applicable regulatory requirements; and
(g) the applicant will minimise the risks of problem gambling; and
(h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and
(i) there are no factors that are likely to detract from achieving the purpose of this Act; and
(j) a key person is not a key person in relation to a class 4 venue licence held, or applied for, by the applicant (except in the case of a club that intends to operate gambling equipment on its own non-commercial premises, the New Zealand Racing Board, or a racing club).

...

(4) In determining whether an applicant is suitable for a class 4 operator's licence, the Secretary may investigate and take into account the following things:

(a) whether the applicant or a key person has, within the last 10 years,—
(i) been convicted of a relevant offence:
(ii) held, or been a key person in relation to a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused:
(iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt; and

(b) the financial position of the applicant and the credit history of the applicant and each key person; and
(c) the profile of past compliance by the applicant and each key person with—
(i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
(ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and
(iii) previous gaming Acts, and regulations made under previous gaming Acts; and
(iv) a licence or a site approval issued under a previous gaming Act.

...

56 Renewal of class 4 operator's licence

(1) A corporate society may apply to the Secretary for a renewal of its class 4 operator's licence before the expiry of the licence.
(2) An application must be on the relevant standard form and be accompanied by—
(a) any items listed in section 50 that the Secretary requests in order to consider the application and effect the renewal; and
(b) if applicable, any items necessary to effect an application for a class 4 venue licence.
(3) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.
(4) Sections 51 and 52 apply to an application for renewal as if it were an application for a class 4 operator's licence.
(5) The Secretary must refuse to renew a class 4 operator's licence if—
(a) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 52; or
(b) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, licence conditions, game rules, and minimum standards.

(6) A class 4 operator's licence continues in force after its expiry date if—
(a) the corporate society has applied for renewal before the expiry date; and
(b) the application has not been refused.

106 Corporate society must apply or distribute net proceeds from class 4 gambling to or for authorised purpose

(1) A corporate society must apply or distribute the net proceeds from class 4 gambling only to or for an authorised purpose specified in the corporate society's licence.
(2) A corporate society that fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding $10,000.
(3) A court that convicts a corporate society of an offence under this section may—
(a) make whatever orders are necessary to recover an amount of proceeds wrongly applied or distributed or to safeguard an amount not applied or distributed; and
(b) order the application or distribution of an amount of proceeds not yet distributed.
(4) The effect of a conviction under this section is that—
(a) the class 4 operator's licence and all class 4 venue licences held by the corporate society are cancelled; and
(b) the corporate society does not have a right to appeal the cancellation.

Appellant's submissions

26. [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

27. In relation to the Defamation Costs and the Name Suppression Costs, FSTL submitted, in summary, as follows:

(a) Determining the suitability of key persons solely on the basis of two instances of expenditure would be a misapplication of the statutory test. The relevant factor in section 52(4)(c)(i), a person's "profile of past compliance", required a long-term, holistic view of the person's suitability.

(b) A finding of unsuitability based on excessive expenditure would be inconsistent with the treatment of other instances of over-spending, such as in the decisions *The Southern Trust* (GC10/10) and *The Trusts Charitable Foundation* (GC11/10).

(c) Allegedly excessive expenditure did not of itself amount to a breach of any statutory obligation: it was not a contravention of section 106, nor of the requirement in section 52 relating to maximising net proceeds and minimising operating costs. There were no relevant limits set under section 116 (which empowers the Secretary to limit the operating costs of corporate societies). Therefore, the allegedly excessive expenditure did not involve non-compliance and did not engage the potentially relevant section 52(4) suitability factor (section 52(4)(c)(i)).

(d) The definition of net proceeds was simply a definition, and did not create an independent obligation to incur only costs that met that definition (i.e. only costs which are actual, reasonable and necessary in conducting the gambling or regulatory compliance).

(e) In any case, the costs were reasonable and necessary and did not involve the expenditure of net proceeds.

(f) The approach to assessing the reasonableness of decisions by trustees was set out in the *AMS* Judgment.

(g) The Defamation Costs and Name Suppression Costs were necessary for the protection of FST's and FSTL's reputation, which in turn was a reasonable cost in conducting gambling. The Act made competition for venues inevitable, and the statutory regime required trustees to ensure the ongoing viability and success of their corporate society. The advantage in setting up a competitive

environment of this kind could only have been the efficiency gains to be obtained through a competitive process (for obtaining venues). FST had demonstrated efficiency gains, as recognised in the *AMS* Judgment.

(h) In the *AMS* Judgment, the High Court recognised the value of AMS's goodwill in holding that the amount that FST paid to purchase AMS was not unreasonable. The Defamation Costs and Name Suppression costs were made to protect the same goodwill that the Court recognised in the *AMS* Judgment.

(i) The Name Suppression Costs were a small amount. The Defamation Costs were a significant sum, but should be seen in the context of FST's annual revenue of $22 million and the fact that its "very survival" was threatened by the potential reputational damage.

(j) The defamation proceedings were successful. Although FST was not awarded any damages, this was only because, as a corporate body, it could not obtain damages unless it proved actual loss.

(k) The Defamation Costs were related to the successful defence of charges against Mr Bird, [redacted] and the successful defence of the proceedings brought by the Department against AMS. All involved steps that were necessary to preserve the integrity and goodwill of FSTL and to preserve its very existence.

(l) Even if the costs were improper, they were one-off costs and did not support non-renewal. Nor did they warrant a finding that FSTL would not maximise net proceeds or minimise operating costs in the future.

Secretary's submissions

28. [redacted]

(a) [redacted]

(i) [redacted]

[redacted]

(ii) [redacted]

(iii) [redacted]

(iv) [redacted]

(v) [redacted]

(vi) [redacted]

(vii) [redacted]

(b) [redacted]

(c) The Commission should take a broader approach to suitability than it did in the recent *Phoenix* decision (GC04/14) and should not consider itself confined to

the factors set out in section 52(4). However, even if the Commission was confined to the factors set out in section 52(4) when considering suitability, it should not be satisfied of X's suitability, because an attempt to achieve something under the Act by means of a falsehood was non-compliance with the Act, and came within section 52(4)(c)(i).

(d) [redacted]

(e) [redacted]

29. In relation to the Defamation Costs and Name Suppression Costs, the Secretary submitted:

(a) Corporate societies could only incur costs that were actual, reasonable and necessary in conducting the gambling or in complying with the Act and licensing requirements.

(b) As neither the Defamation Costs nor the Name Suppression Costs were directed at activities defined as "conducting gambling" (or compliance), they were not costs that could be met from gross proceeds.

(c) The costs were also neither necessary nor reasonable. The Defamation Costs were not reasonable because the NZRB had made an unreserved apology, which had been published in the NBR. Further, FST's claim could not have succeeded (and did not succeed) in any event, because it had suffered no financial loss. [redacted]

(d) The Defamation Costs and Name Suppression Costs were cause not to be satisfied of the suitability of the key persons who allowed those costs to be incurred, because they were serious instances of non-compliance and showed a pattern of poor expenditure decisions. Nor had the key persons shown any insight into their errors.

(e) The costs were incurred for competitive reasons. It is not an answer for FSTL to say that such spending allowed it to increase its net proceeds (by maintaining or increasing the number of venues associated with the Appellant). From the perspective of the sector as a whole, a venue moving from one operation to another would not necessarily result in an overall increase of net proceeds to the community.

(f) The Secretary had seen no indication that the key persons understood the provisions of the Act and no indication that similar payments would not be made in the future. The scale of projected legal costs for the 2013/2014 year was cause for concern that there would in future be similar expenditure on legal costs.

(g) The costs were also cause not to be satisfied that that FSTL would maximise net proceeds and minimise operating costs (section 52(1)(d)) or that it would distribute net proceeds to authorised purposes (section 52(1)(e)) because the key persons had demonstrated a pattern of incurring improper costs, had not acknowledged that the costs were improper and had not provided any evidence to show that it would not incur such costs again in the future.

Appellant's submissions in reply

30. [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

(f) [redacted]

(g) FSTL had complied with the relevant statutory limitations on costs (section 116 and the Gambling (Net Proceeds) Regulations 2004).

(h) The Defamation Costs and Name Suppression Costs were necessary to protect its reputation, which in turn was necessary to retain venues and maximise net proceeds. Accordingly, on the Secretary's argument, the costs were actual, reasonable and necessary costs in complying with the Act (in maximising net proceeds and minimising costs).

(i) The *AMS* Judgment was relevant to its profile of past compliance, because in it the Court considered FST's performance over the entire period of its licensed activities and found that its arrangements achieved the purposes of the Act.

(j) It was not possible to read the "maximising net proceeds" criterion as one directed at a consideration of whether net proceeds over all corporate societies were higher. The fact that one society had been more effective at maximising net proceeds by attracting venues from other societies unambiguously satisfied the criterion.

(k) The budget for legal services was based on the possibility that the Secretary would take further steps against FSTL. The present appeal justified FSTL having made such provision.

(l) It was wrong to say that FSTL's key persons were not remorseful. On each occasion on which FST/FSTL or its key persons had denied allegations, the courts had found in their favour. In this case, FSTL considered that it was in the

same position but, if it were wrong, it would ensure that the behaviour was not repeated.

Analysis

31. The appeal raised the following issues:

(a) [redacted]

(i) [redacted]

(ii) [redacted]

(b) In relation to the Name Suppression Costs and Defamation Costs:

(i) Was the propriety of past spending decisions in which they had been involved relevant to the assessment of key person suitability?

(ii) If so, did the Commission have cause not to be satisfied concerning the suitability of Messrs King, Short, Anaru and Bird?

(iii) Was the Commission satisfied that FSTL would maximise net proceeds and minimise operating costs (section 52(1)(d))?

(iv) Was the Commission satisfied that FSTL would distribute the net proceeds from class 4 gambling for authorised purposes (section 52(1)(e))?

Approach under section 52 on an application for renewal

32. On an application for renewal, sections 51 (Secretary must investigate applicant) and 52 (grounds for granting a class 4 operator's licence) apply as if it were an application for a new class 4 operator's licence. Section 56(5)(a) expressly provides that the Secretary must refuse to renew the licence if any investigations cause him not to be satisfied about any of the matters specified in section 52. Section 52 provides, in relevant part:

> **52 Grounds for granting class 4 operator's licence**
>
> (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—
>
> ...

> (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
> (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and
> ...
> (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and
> ...

33. As set out in the *Phoenix* decision (GC04/14), section 52 is a licensing provision, not a penal one. It is intended to ensure that licences are only granted to, or renewed for, applicants who satisfy the Secretary (or, on appeal, the Commission) that the section 52 grounds are met. There is no starting presumption of satisfaction to be displaced. As the decision-maker must be satisfied of each of the grounds, any aspect that could result in dissatisfaction is, practically speaking, something for the applicant to deal with in such a way that satisfaction is achieved. The requirements are expressed to be present (as to suitability) or future, but past circumstances are relevant to the assessment (expressly so in the case of suitability, albeit within the confines of section 52(4)). In considering past events, it may not be necessary for the Commission to make firm findings of fact (although it may do so); doubt arising from a disputed event may affect the satisfaction assessment if the Commission concludes that enough concern is raised over an allegation that it is not positively satisfied of a section 52 ground, even without making a positive finding of fact on the allegation. That is because the applicable test is one of satisfaction.

[redacted]

34. The Commission first considered whether conduct which was potentially subject to a conviction for a relevant offence could only be considered in relation to suitability under section 52(4)(a)(i), and therefore could only be taken into account if there had been a relevant conviction. "Relevant offence" is defined in section 4 as including offences involving dishonesty and crimes considered by the Secretary or Commission to be relevant and serious. In the Commission's view, providing for consideration of convictions for relevant offences in relation to suitability does not mean that conduct which might potentially have been the subject of a criminal charge could only be considered if charges were brought and a conviction entered (and not as part of the individual's "profile of past compliance" under section 52(4)(c)).

35. Such a limited approach to considering conduct potentially subject to criminal charges would sit uneasily with section 354, which provides:

> To avoid doubt, this Part does not prevent the Secretary from exercising his or her powers under Part 2.

The first-mentioned Part is Part 4 (Harm prevention and minimisation enforcement and other matters), sub-part 8 (Proceedings, evidence, etc) and the following section, section 355 (Proceeding for offences), provides a limitation period to lay charges and controls who may file a charge. In the Commission's view, section 354 is an indication that the possibility of a prosecution for an offence is not intended to interfere with the Secretary's licensing powers (which are found in Part 2).

36. The Commission also noted that, in *Z*, the relevant section of the Dental Act 1988 before the Supreme Court, section 54, provided that disciplinary proceedings could follow criminal proceedings that had resulted in a conviction, if the conviction reflected adversely on the practitioner's fitness to practice. Section 54 was silent on conduct which resulted in an acquittal. The majority in *Z* held, at [131], that this was because conduct resulting in an acquittal would not in itself reflect adversely on fitness to practice. Whether or not it was an abuse of process to lay disciplinary charges following an acquittal in relation to the same conduct was not governed by the Dental Act. Similarly, the Commission considered that the fact that a conviction for a relevant offence would have been a factor in considering suitability under section 52(4)(a)(i) did not mean that conduct potentially giving rise to a relevant conviction could not be considered under another limb of section 52(4).

37. [redacted]

38. [redacted]

39. [redacted]

[redacted]

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

[redacted]

44. [redacted]

45. [redacted]

46. [redacted]

[3] The District Court judgment in the Gambling Act charge, annexed to Mr King's affidavit, records that the charge was under section 118, Gambling Act.

47. [redacted]

48. [redacted]

49. [redacted]

50. [redacted]

[redacted]

51. [redacted]

52. [redacted]

53. [redacted]

[redacted]

54 [redacted]

55. [redacted]

Should the Commission take a broader approach in relation to the assessment of suitability than it did in the *Phoenix* decision?

56. The Secretary asked the Commission to reconsider the approach it had taken to assessing suitability under section 52(1)(h) in the recent *Phoenix* decision, submitting that the Commission should return to the approach it had set out in its earlier *Caversham Foundation Limited* decision (GC06/10). Section 52(1)(h) provides:

> **Grounds for granting class 4 operator's licence**
>
> (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that,—
>
> ...
>
> (h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4);...

Subsection (4) provides for matters that the Secretary may investigate and take into account when determining whether an applicant is suitable for a class 4 operator's licence (as set out at paragraph 25 above).

57. In *Caversham*, the Commission considered the suitability of a venue key person under the equivalent venue licensing provisions (sections 67(1)(d) and 68). It considered that section 68 (which set out an equivalent list of factors relevant to suitability to section 52(4)) provided an inclusive, rather than exclusive, list of relevant factors, and that the suitability inquiry could take into account other factors not listed in that section. It considered that the more liberal approach best fitted the overall scheme of the Act because it enabled the Secretary (or the Commission) to have regard to information which the Act required to be supplied, such as information on the history, character and qualifications of venue managers, despite those not being expressly listed as factors relevant to suitability under section 68.

58. However, in the *Phoenix* decision, the Commission reconsidered this approach in relation to the suitability inquiry under sections 52(1)(h) and 52(4). It held that its consideration of suitability under section 52(1)(h) should be limited to those matters listed in section 52(4). It came to this conclusion on the basis that factors which might affect suitability in a broader sense, but which were not listed in section 52(4), would usually be relevant under other section 52 grounds. There was, therefore, no need to interpret section 52(4) expansively, in order to ensure that relevant information could be taken into account on applications for licences (or for licence renewal).

59. The Secretary submitted that the Commission should take a broader approach to suitability factors, and consider factors not specifically listed in subsection (4) for the following reasons:

(a) There were matters not listed in section 52(4) that were nevertheless relevant to a person's suitability in a general sense, for example dishonesty, incompetence or non-compliance with another regulatory regime. As these matters might affect satisfaction of other section 52(1) grounds, there was no practical reason why they should not be considered in relation to suitability as well.

(b) Restricting suitability considerations to the section 52(4) factors could lead to an absurd result where an applicant could be refused a licence for lack of satisfaction of section 52 grounds because of a particular person's past actions and involvements, but without the refusal arising from dissatisfaction about the suitability of that person as a key person.

(c) This would also create a "second tier" of unsuitable persons, who were not "unsuitable" in terms of section 52(4), but whose involvement in a corporate society would result in the society not satisfying section 52. This would be difficult for societies and the Department to manage.

60. The Secretary submitted that, under this broader approach, X was unsuitable, because the provision of accurate information by a corporate society to the Secretary was essential for the Secretary to maintain regulatory oversight over class 4 gambling.

61. The Commission considered the Secretary's submissions, but was not persuaded to depart from the *Phoenix* approach. Section 52(1)(h), which requires satisfaction in relation to suitability, expressly limits the material consideration to the factors set out in section 52(4). Reading the subsections together in this way does not prevent the Secretary, or Commission, from taking factors outside section 52(4) into account if they are relevant under other section 52(1) grounds. Indeed, the Secretary's submissions recognised this, arguing instead that it would be more straightforward to be able to take into account all concerns relating to key persons under the suitability limb of section 52, both in this and future licensing decisions. The Commission did not consider that the fact that it would be easier and more straightforward to do so was a sufficient reason to displace the clear statutory language, particularly as section 52 does not elevate the suitability requirement above any of the other factors in respect of which the Secretary must be satisfied in granting a licence. Although the Secretary was correct that the express restriction on matters which could be taken into account in relation to suitability could create a situation where a matter concerning a key person might affect satisfaction with other grounds but not suitability, this is apparently what Parliament intended.

62. [redacted]

(a) [redacted]

(b) [redacted]

63. [redacted]

[redacted]

64. [redacted]

65. [redacted]

(a) [redacted]

(b) [redacted]

66. [redacted]

67. [redacted]

[redacted]

68. [redacted]

69. [redacted]

Defamation Costs and Name Suppression Costs

70. The Defamation Costs and Name Suppression Costs were potentially relevant to three grounds of which the Commission must be satisfied under section 52: the suitability of key persons (section 52(1)(h)); the maximisation of net proceeds and minimisation of operating costs (section 52(1)(d)); and the distribution of funds to authorised purposes (section 52(1)(e)).

71. As the Commission set out in the *Phoenix* decision, the section 52 grounds are not discrete, but often contain a large degree of overlap with other grounds. In this case, satisfaction about three relevant grounds involved consideration of the same matters, namely past expenditure on the Defamation Costs and Name Suppression Costs. Contrary to the Appellant's submissions, satisfaction of every section 52 factor does not necessarily turn on whether or not past spending was in breach of a specific obligation (although any such breach would be relevant). If the Commission considered that the costs were not properly incurred, or was doubtful as to whether they were properly incurred, this might cause the Commission not to be satisfied of one or more of the identified section 52 grounds.

The AMS Judgment

72. The Appellant relies on the *AMS* Judgment in support of the following propositions:

(a) The case validated FST's overall business approach to date, including its success in attracting venues from other class 4 societies, and was therefore relevant to the profile of past compliance of FST and its key persons.

(b) The case set out the appropriate approach in assessing the reasonableness of costs.

(c) The Court's findings were relevant to a holistic assessment as to whether FSTL will maximise its net proceeds and minimise its operating costs.

(d) The case recognised that Mr Bird and the management team were key drivers of FST's success, and the Secretary must address this if he was now to establish that the key persons are not suitable.

Generally, the Appellant tended to present the AMS Judgment as an overall endorsement of the FST/FSTL business practices to date, which the Secretary and Commission must reject in order not to be satisfied.

73. The *AMS* Judgment involved an application by the Secretary under section 112 for the recovery of funds paid by FST to AMS to purchase its business. The Secretary

contended that the $2.4 million buy-out figure was not a reasonable or necessary cost, and therefore involved an improper payment of net proceeds, recoverable under section 112. The High Court found against the Secretary. After setting out FST's evidence regarding the genesis of both FST and the AMS management contract, it made the following findings:

(a) It rejected the proposition that the purchase was unreasonable because it was the product of an unreasonable contract. The length of the contract (10 years) was not unreasonable. Although the Secretary's concern that the length prevented FST from testing the market at intervals to see if it could achieve a better price was valid theoretically, the Secretary did not provide any evidence that there was in fact a market or that FST could have done better. Similarly, although the Court accepted that the remuneration formula was conceptually flawed, because it allowed AMS to charge what it liked up to a maximum without being subject to oversight by the Secretary (because AMS was not itself subject to the Act), the Secretary did not offer any benchmarks or guidelines as to what would be a reasonable management cost. Nor did the Secretary challenge FST's evidence that what AMS charged was in the middle of the industry range of practice.

(b) It rejected the proposition that the purchase price was unreasonable in the circumstances. Each party had independent legal advice and independent valuations and the $2.4 million figure was within the valuers' range. The views of the Department's witnesses carried less weight than the evidence of the independent valuers.

(c) The $2.4 million was not expended merely to avoid the AMS contract, but rather represented the purchase price of the AMS business.

(d) In relation to its specific consideration of section 112, the Court held that it was not improper for FST to take steps to prevent its own demise (FST faced a refusal to renew its licence because of the ongoing cost of the AMS management contract) and to sort out its contract and secure management arrangements. There was nothing inherently improper in using gambling proceeds to acquire a gambling management business or to buy out a management contract. It had happened in other cases without objection by the Secretary. Therefore, the only issue was quantum. The Secretary had not provided any evidence to show that the valuations were flawed. The Secretary appeared to assume that FST could just wind up and start again without AMS

or Mr Bird, but this ignored the fact that venue relationships were with AMS and Mr Bird, and it was this expertise and goodwill that FST had bought.

(e) Following its comments on the expertise and goodwill that FST had bought, the Court went on to observe (at [127]):

> In saying that, I recognise there is an issue about the appropriateness of spending money for reasons of obtaining or maintaining a competitive advantage. It is not a straight forward issue because the Act sets up an environment of competition by providing for unlimited licences but capped machine numbers. My observation about First Sovereign legitimately securing its management arrangements is not intended to be a more general comment on competition expenditure. It merely responds to a specific challenge by the Secretary in this case.

Treatment of costs under the Act

74. The Act places three controls on operator costs (as opposed to venue costs):

(a) Section 116 provides for the Secretary to set limits on, or exclude, certain costs. No such limits have been set, other than in relation to venue costs (costs payable by societies to venues).

(b) The Gambling (Class 4 Net Proceeds) Regulations 2004 set a minimum amount of net proceeds (37.12% of gross proceeds) that corporate societies are required to distribute (reg 10), and also set timing requirements for their distribution (reg 11).

(c) Section 106 requires corporate societies to apply or distribute net proceeds only for authorised purposes (and section 4 defines net proceeds as gross proceeds after deduction only of costs that are actual, reasonable and necessary in the conduct of the gambling or regulatory compliance).

Of these, only the last is potentially relevant to this appeal.

75. The Commission has previously set out its view of the combined effect of section 106 and the section 4 definition of net proceeds. In *The Southern Trust* (GC10/10) and *Trusts Charitable Foundation* (GC11/10), the Commission held that, when read together, the obligation in section 106 to distribute all net proceeds, and the definition of net proceeds as all turnover excluding actual, reasonable and necessary costs, meant that any expenses which fell outside the actual, reasonable and necessary costs of conducting the gambling and regulatory compliance could not be met from gambling turnover because the expenditure would breach the section 106 distribution obligation. The Commission stated in *The Southern Trust*:

> The statutory scheme is clear: holders of class 4 operator's licences must return all net proceeds to the community, and they must maximise those net proceeds.

> The definition of net proceeds is fundamental and ultimately controlling of society activity. Net proceeds are defined as all of a society's gambling revenue less only the actual, reasonable and necessary costs which a society incurs "in conducting the gambling" and complying with statutory requirements and licence conditions. Any cost incurred that is not actual, reasonable and necessary in conducting the gambling, or in compliance, is not excluded from the definition of net proceeds and is therefore subject to the section 106 distribution requirement. Although section 106 does not say "all" net proceeds, its requirement that net proceeds (defined as "all turnover" less specified items) be distributed "only" to authorised purposes has the effect of requiring all net proceeds to be distributed for authorised purposes.

The Commission went on to find that the definition of net proceeds, when combined with section 106 and section 52(1)(e) (which requires the Secretary to be satisfied that net proceeds will be returned to authorised purposes), had the effect that societies could only incur costs using gambling turnover that were actual, reasonable and necessary in conducting the gambling or in legal compliance. This analysis was adopted by the High Court in *Secretary for Internal Affairs v Integrated Commercial Solutions* HC Auckland CIV 2010-404-5253 18 April 2011 at [56]), although the Court did not comment specifically on the section 106 point.

76. In this appeal, both parties ostensibly proceeded on the basis that the Defamation Costs and Name Suppression Costs were not incurred in breach of section 106. However, the Secretary nevertheless considered that an obligation arose from the definition of net proceeds, combined with section 106, to incur only actual, reasonable and necessary costs. FSTL, by contrast, submitted that section 4 was a definition only, and placed no obligation on corporate societies. As it had not breached any obligation, it submitted, the Defamation Costs and Name Suppression Costs did not amount to non-compliance for the purposes of the suitability inquiry; nor were they relevant to the other section 52(1) factors.

77. The parties' submissions in relation to section 106 appeared to be based on the High Court decisions in *Trillian Trust v Secretary for Internal Affairs* HC Wellington 2010-485-2411, 14 November 2011, and the *AMS* Judgment.

(a) In *Trillian*, the Secretary had imposed a suspension under section 58(1)(b) for a breach of section 52(1)(d). Counsel for the Secretary accepted in oral argument that the Secretary's analysis was flawed (section 52 imposed an obligation only on the Secretary) but then suggested that the relevant breach was of section 106. The Judge (at [40] and [41]) expressed doubt about the argument, on the basis that the definitional standard was vague and the consequence of a section 106 conviction severe. Using the example of the purchase of a single bottle of wine not being necessary or reasonable, he doubted that those circumstances were intended to be caught by section 106,

a penal provision. However, the Court cautioned that this was not the basis for its decision, and that it had not heard full submissions on the point.

(b) In the *AMS* Judgment, the Court determined the outcome of the Secretary's application on the construction of section 112 and its application to the facts. The Court found that, as the expenditure in question was reasonable and necessary, it did not form part of net proceeds and was not improper, and therefore the section 112 application (for the recovery of net proceeds) failed. However, the Court also considered, *obiter*, whether the expenditure was in breach of section 106. The Court considered that section 106 did not prevent expenditure in excess of what was necessary and reasonable, and suggested that it only applied to the formal distribution of funds after incurring actual expenditure, whether reasonable and necessary, or otherwise (at [134] – [135]). However, the Court had held (at [11]) that there was "a general overriding limit on all expenditure, namely that costs must be 'actual, reasonable and necessary'". The Court therefore concluded that there was an obligation to limit expenditure (namely that costs must be "actual, reasonable and necessary") but the source of it was not section 106. It appears (at [138]) that the Court saw the overall scheme of the Act as the source of the obligation but found that there was no specific obligation that an operator could breach.

78. More recently, in *Pub Charity v Department of Internal Affairs* [2014] NZHC 1096, the High Court held that the scheme of the Act was to maximise the percentage of gaming proceeds returned to the community, and that this was achieved by three basic rules, the second of which was that expenses could only be incurred if they were necessary and were reasonable in their quantum (at [7]). Further, the Court held (at [38]) that section 116 merely provides for additional limits, beyond the obligation that expenses be reasonable and necessary. This answers FSTL's submission in this appeal that, because the Secretary has not imposed limits under section 116 on costs other than venue costs, there are no limits on incurring costs except venue costs.

79. In both *AMS* and *Integrated Commercial Solutions*, the Court found that payments of gross proceeds to meet costs that were not actual, reasonable or necessary in conducting the gambling or compliance are, by definition, use of net proceeds and may be recoverable under section 112(c), which provides for the recovery of net proceeds which have been improperly paid.

80. Accordingly, although doubt has been expressed in two High Court decisions whether a payment of unreasonable and unnecessary costs is a breach of section 106, all decisions have consistently concluded that the scheme of the Act obliges corporate

societies to incur only costs that are actual, reasonable and necessary in the conduct of the gambling, or in legal compliance. The Commission did not consider that it was necessary for the Secretary to establish a breach of a specific statutory provision for the expenditure to potentially be relevant under section 52(4)(c)(i). That subsection refers to a "profile of compliance" which is broad enough to include whether conduct is consistent with obligations arising under the scheme of the Act. In light of the authorities discussed above, the Commission considered that expenditure by societies that was not actual, reasonable or necessary was a matter of compliance with the Act and relevant to section 52(1)(h) as well as the other matters requiring satisfaction under section 52.

Actual, reasonable and necessary costs in conducting the gambling

81. The Act does not define the concept "actual, reasonable and necessary". In *Integrated Commercial Solutions*, the Court held that the Departmental Guidelines previously in existence prior to the Gambling Act 2003 (referring to a 2004 High Court decision *Pub Charity v Attorney-General* HC Wellington CIV 2003-485-1106, 25 May 2004) evinced the intention of the Act. In the earlier *Pub Charity* case, the Court held, (at [47]):

> ... The guidelines provide that "actual" expenses are based on actual, rather than projected, expenses and are able to be substantiated. "Reasonable" expenses take into account the size of the operation and normal market values for the goods or services provided. "Necessary" means necessary to the gaming operations. The society must exercise good business practice and due care to ensure that expenses are clearly related to the society's function of raising funds for authorised purposes.

The Court in *Integrated Commercial Solutions* went on to hold that reasonableness and necessity were to be judged by the dictates of the gambling operation, rather than within some wider frame.

82. The Secretary submitted, not only that the Defamation Costs and Name Suppression Costs were not reasonable or necessary, but that they were not incurred in conducting the gambling, and therefore were unauthorised payments of net proceeds. Section 5 defines conducting gambling as follows:

> **5 Meaning of conducting gambling**
>
> In this Act, conducting gambling includes any of the following activities:
>
> (a) organising, using, managing, supervising, and operating (but not playing) gambling or gambling equipment:
> (b) distributing the turnover of gambling (for example, by paying prizes, meeting costs, or making grants):
> (c) selling tickets to participate in gambling:
> (d) promoting gambling:
> (e) assisting in activities described in paragraphs (a) to (d).

83. FSTL submitted that the costs were costs in managing, organising or promoting the gambling, all of which were broad concepts. Alternatively, they fell under (e), in

assisting the management, organisation and promotion of gambling. FSTL submitted that the costs were necessary to protect its reputation and goodwill, which in turn were necessary to its success as a gambling operator.[4] Further, the legislative regime contemplated competition between societies for venues (by limiting the total number of gaming machines, but not the number of societies, with the result that new entrants to the industry must attract venues from other operators). FSTL submitted that the advantage that the legislative regime saw in competition must be the efficiency gains to be obtained and that FST achieved the legislative objective of efficiency by increasing the size of its operation (and its turnover) by attracting new venues, while decreasing its costs as a percentage of gross proceeds. In this respect, FSTL also contended that the costs were reasonable and necessary in compliance with the Act (limb (b) of the section 4 definition of net proceeds), because they were reasonable and necessary in allowing FST/FSTL to maximise net proceeds and minimise operating costs.

84. FSTL submitted that the AMS Judgment supported the appropriateness of the type of expenditure in issue because, in concluding that it was reasonable for FST to purchase the AMS business, the Court recognised the value of the goodwill which FST and FSTL were protecting with the Defamation Costs and Name Suppression Costs. In FSTL's submission, the AMS Judgment endorsed its competitive business model, in the finding that FST had been successful in attracting and maintaining venues and that, as its operation had grown, its operating costs had decreased as a percentage of its gross proceeds.

85. Although the AMS Judgment recognised the commercial success of the FST/AMS contract, the Commission did not consider that the AMS Judgment provided authority for the proposition that competitive expenditure to protect a society's market position was a reasonable or necessary expense of conducting the gambling. In setting out the background to the FST/AMS contract, the Court described the arrangement as a "successful" one for both parties, under which FST achieved annual growth of almost 40%, while, at the same time and, although the AMS management fee grew, it represented an ever-decreasing percentage of FST's turnover. However, the Court's finding that the purchase of the AMS business was a necessary cost was based on it being necessary for the conduct of FST's gambling operation, rather than necessary for it to maintain a competitive market position. Further, in its consideration of whether the buy-out was reasonable (in which context the Court made its comments about Mr Bird's experience and the value of the goodwill that he had built up), the Court was careful to observe (at [127]) that its finding that the purchase was reasonable in the circumstances

[4] As to the scope of "conducting the gambling", see paragraph 86 below.

was not to be taken as a more general comment on the appropriateness of spending money in order to obtain or maintain a competitive advantage.

86. The Commission considered competitive spending in the *TTCF* decision, in which it held that costs "incurred in the conduct of the gambling" did not extend to the use of gambling proceeds for expenditure, the principal purpose of which was competition with other societies for venues. The Commission noted that longstanding concerns about competition for class 4 venues, resulting in excessive spending of proceeds for the benefit of venue operators at the expense of the community, had received judicial recognition in the 2004 *Pub Charity* case and commented that the 2003 Act appeared to have deliberately adopted a narrow range of permissible costs. The Commission held in *TTCF*, at paras 83 and 84:

> ... In *Pub Charity v the Attorney-General* CA103/4 8 November 2004, the Court of Appeal considered an appeal by a class 4 society against a decision of the High Court dismissing an application for judicial review. In its judgment, the Court set out a revealing discussion of the class 4 gambling environment prior to the enactment of the Gambling Act 2003 and the actions taken by the Secretary in order to curb "competitive" spending. The Court accepted (at [8]) that the ability for venues to move their custom between societies had led to an increase in site payments being paid by some operators competing for venues and that, by inflating expenses in this way, operators reduced the profit available for authorised purposes. The Court considered that the standard licence condition, requiring the society to apply gaming funds only to "expenses that are actual, reasonable and necessary to the society's gaming machine operations," entitled the Department to limit allowable costs to those caused by the gambling operation. The Court's comments, like those of the Government Administration Committee referred to at paragraph 81 above, relate specifically to venue expenses but reveal a consistency of object.
>
> It is worth noting that the 2003 Act's definition of net proceeds did not adopt the broader purposive element ("to the society's gaming machine operations") which had been used in the licence condition previously imposed by the Secretary. In the Commission's view, the words "incurred in conducting the gambling" and in legal compliance are more limited and restrictive in their scope than "the society's gaming machine operations" and deliberately so. Spending on competition for venues may arguably have come within the former licence condition but does not fit within the deliberately narrower language used by the 2003 Act.

87. In *TTCF*, the Commission also noted the difficulties that would arise in assessing necessity and reasonableness in relation to competitive spending, stating, at paragraph 78:

> ... once competitive spending is seen as necessary, the amount which is reasonable cannot easily be objectively determined by a third party; what is reasonable will be whatever is required to win the resulting competition with other societies and leave the society in better financial health than otherwise.

88. In this case, the competitive spending at issue was less direct than in *TTCF*, but was similarly justified on the basis that it was reasonable and necessary in maintaining FST's/FSTL's position in the industry, and the efficiencies, which FSTL submitted, were consequent on the large number of venues at which it operated. As in the *TTCF*

decision, the Commission considered that, if spending on the maintenance of reputation was seen as a necessary cost in conducting the gambling, there would be no sensible measure of reasonableness to control spending that affected a society's image, relationships or reputation. What was reasonable would depend on what a society was willing to pay to promote its brand in competition with other societies.

89. The Commission was not convinced by FSTL's submission that the Act must have had the aim of promoting competition between societies and therefore impliedly supported competitive expenditure. In the Commission's view, competition for venues is a by-product of the effect of several converging policy factors, all of which had independent justifications; competition arose from restricted numbers of venues and machines as a result of local community control and grand-parenting provisions. Moreover, the Commission observed that competition between societies was aimed at obtaining remunerative venues, rather than reducing costs and increasing net proceeds. Such competition was not beneficial to achieving the purposes of the Act, but rather created difficulties, which had to be managed by regulatory oversight. The Act does not have, as a purpose, the creation or fostering of competition between societies for valuable venues; indeed, much of the regulatory focus on cost reduction was to guard against the undesirable effect of such competition, namely the transfer of value to venue operators at the expense of the community.

90. Against that background, the Commission did not consider that the Defamation Costs and Name Suppression Costs were necessary costs incurred in conducting the gambling. The costs were aimed at protecting FST's/FSTL's reputation and maintaining its market share of venues. Such expenditure falls outside the legislative language ("conducting the gambling" and compliance). While the expenditure might be said to be connected to the Appellant's gaming operation generally (and might therefore fall within the wider pre-2003 limitation, "to the society's gaming machine operations"), the scope of the defined terms in section 4 and 5 is narrower, listing activities central to conducting the gambling itself. The Commission does not consider that promoting a particular society's reputation or competitive advantage is conduct in promoting, or assisting with the promotion of, gambling. The "promotion" referred to relates to gambling activity, not the reputation of individual societies.

91. Nor does the Commission consider that the costs were reasonable costs in conducting the gambling. The Defamation Costs involved a significant sum expended in pursuit of an intangible result, in circumstances where the press release complained of had been publicly retracted. Even if the protection of market share were a necessary cost in the conduct of gambling, FSTL's evidence of detriment was of inquiries from grant recipients concerned about the effect of any future enforcement action on their grants, and queries

from its bank manager, not of a loss of venues. Moreover, the jury's adverse finding in respect of FST can only have been on the basis either that the press release was not defamatory of FST or that FST could not demonstrate any financial loss (FST's submission is that it was the latter); either rationale undermines the argument that the proceedings were reasonable and necessary to maintain market share and ensure the maximisation of net proceeds. The Commission noted evidence from Mr Bird that the Court left the issue to the jury on the basis that it was not necessary for FST to show that it had suffered any particular pecuniary loss, if it could put forward an evidential basis of the importance of its reputation of its business model. It also noted that the ruling recorded that the evidence did, "just", lay a foundation for such an inference. However, for the reasons given above, the Commission does not consider the protection of reputation to be a necessary cost in conducting the gambling.

92. [redacted]

93. There is a further aspect to the assessment of reasonableness. Societies, as a matter of definition, are precluded from having a commercial purpose. They conduct gambling and, after meeting the actual, reasonable and necessary cost of conducting the gambling and legal compliance, they are obliged to distribute or apply all of the remainder (net proceeds) for an authorised purpose. Authorised purposes must be approved in the course of licensing and are limited, by statutory definition, to charitable purposes, non-commercial purposes beneficial to the community and horse racing. Societies cannot retain any of the surplus for themselves and the incurring of expenditure is therefore at the expense of the applicable authorised purposes.

94. Commercial organisations have a direct interest in minimising unnecessary costs because they benefit from the saving. In the Commission's view, it is unlikely that management of a commercial entity would have approved substantial expenditure on legal fees without good prospects of a resulting net economic benefit to the entity. In incurring such expenditure, management is spending what otherwise would be the entity's profits.

95. Societies are not subject to the same economic discipline because they do not benefit themselves from the surplus produced by cost saving. When FST decided to incur substantial legal expenditure on defamation proceedings, the most likely beneficiaries were the individual plaintiffs, such as Mr Bird, with the likelihood of a damages recovery

for FST being considerably more remote, but the cost of the decision would be borne ultimately by the community. In the Commission's view, such considerations justify rigorous scrutiny of society expenditure and do not lead it to conclude that the concept of what is actual, necessary and reasonable in conducting the gambling should be loosely and permissively construed and applied.

Satisfaction with section 52 grounds

96. Having concluded that it was not satisfied that the Defamation Costs and the Name Suppression Costs met the requirement of incurring only actual, reasonable and necessary costs of conducting the gambling, the Commission finally considered the effect of its view of the particular conduct on its assessment of satisfaction with the relevant section 52 criteria which, in this case, related to maximising net proceeds and minimising costs, distributing or applying all net proceeds to authorised purposes and the suitability of the key person responsible for the conduct. It was required to ask whether, as a result of incurring the Defamation Costs and the Name Suppression Costs, it was not satisfied that FSTL would maximise returns and minimise costs and distribute (or apply) net proceeds only to authorised purposes. These are forward-looking assessments about future conduct, informed by past events. It was also required to consider whether it was satisfied with the present suitability of the relevant key persons, based on their profile of past compliance.

97. In relation to the former, in the absence of any reason to think otherwise, it would be difficult for the Commission to be satisfied that similar expenditure would not occur in the future, especially when the society contended strongly that such expenditure was appropriate. However, although setting out the reasons for the expenditure and their views why it was justified, the society's key persons also made it clear that, if the Commission reached a contrary conclusion, their future conduct would conform to the Commission's decision in this appeal. In the Commission's view, FSTL management has taken more from than the *AMS* Judgment than was warranted, in particular that it amounted to an unqualified endorsement of competitive expenditure generally, but the view taken by FSTL management was not baseless.

98. The Commission is satisfied that FSTL and its key persons will be guided by this decision. It accepts the affidavit evidence of Mr King and Mr Bird that future decisions will be based, not on the views expressed in FSTL's submissions, but on the Commission's views expressed in this decision. On that basis, it is satisfied that FSTL will maximise net proceeds and minimise costs and that it will distribute all net proceeds to authorised purposes. It is satisfied that, notwithstanding that some past decisions

have involved excessive expenditure, the key persons are suitable. It considers that FSTL's licence should be renewed.

Notification of decision

99. Prior to the Commission's hearing, FSTL had filed memoranda asking the Commission to give prior notice of the decision to the parties, before issuing the decision formally, if the Commission dismissed the appeal. Pending the conclusion of the appeal, FSTL's licence remained on foot by virtue of section 62(2). However, a decision confirming the Secretary's decision would take immediate effect, rendering any judicial review of the Commission's decision, as well as an application to review of the Secretary's underlying decision (with which FSTL could not proceed before exhausting its appeal right) nugatory. FSTL then sought interim relief to this effect from the High Court. The matter was resolved by the Commission undertaking to the High Court, at its request, to notify the parties of the date of delivery and result of its decision on appeal at least 15 working days prior to delivery. The undertaking was not dependant on the result. Accordingly, the Commission notified the parties of the date of release of the decision and the result of the appeal on 14 October 2014, more than 15 working days prior to the release of this decision.

Decision

100. For the reasons set out above, the Commission reverses the decision of the Secretary refusing to renew FSTL's class 4 operator's licence.

Graeme Reeves
Chief Gambling Commissioner
for and on behalf of the Gambling Commission

7th November 2014

GAMBLING COMMISSION