

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **THE SOUTHERN TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Division: P Chin (Chief Gambling Commissioner)
K M Ford
P J Stanley

Date of Application: 31 January 2006

Date of Decision: 21 July 2006

Date of Notification
of Decision: 3rd August 2006

APPEAL BY THE SOUTHERN TRUST

Appeal

1. The Southern Trust (the "**Trust**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to add three conditions to the class 4 venue licence for the Windsock Tavern, Napier
2. The Trust requested that the Commission remove the three conditions from the venue licence

Gambling Act 2003

3. The key sections of the Act for this appeal are sections 67 and 70. These sections (in part) are as follows:

67. Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that –
 - (k) the class 4 venue is not used mainly for operating gaming machines; and

70. Content and conditions of class 4 venue licence

- (2) The conditions that the Secretary may add to a class 4 venue licence include –
 - (i) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act

72. Renewal of class 4 venue licence

- (5) The Secretary must refuse to renew a class 4 venue licence if –

to

- (b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67;
or

Facts

- 4 The venue opened in 1991 as a café called "Mango Jacks". In 1992, it became a restaurant and obtained a liquor licence. Gaming machines were installed in 2001.
- 5 In 2002, the venue was sold to the current venue operator, Double U Anchor Limited, and was renamed the "Windsock".
- 6 By letter dated 10 October 2003, the Secretary wrote to the Trust proposing not to renew the site approval ("site approval" is the previous term for "venue licence") because he considered gaming machines to be the primary activity at the venue. "Primary activity" was the test under the previous legislation applying, the Gaming and Lotteries Act 1977.
- 7 The proposal to not renew the site approval was challenged by the Trust and no further action was taken pending the introduction of the Gambling Act 2003.
- 8 Following the concerns raised by the Secretary in his letter dated 10 October 2003, the venue operator spent approximately \$100,000 upgrading the venue between October 2003 and March 2004. The upgrade included enhancing the venue's bar facilities and non-gaming activities, and introducing an aviation theme.
- 9 By letter dated 14 October 2005, the Secretary wrote to the Trust requesting financial information for the venue, including non-gaming machine turnover, venue payments made to the venue operator, and an audited set of accounts. The Trust provided the information sought.
- 10 By letter dated 9 August 2005, the Secretary proposed to refuse to renew the venue licence as he could not be satisfied that the venue would not be used mainly for operating gaming machines as required by section 67(1)(k) of the Act. The Trust responded to this by letter dated 22 September 2005.
- 11 On 23 September 2005, Trust representatives and the Secretary's gambling inspectors met to discuss the Secretary's proposed refusal to renew the venue licence.
- 12 By letter dated 12 January 2006, the Secretary wrote to the Trust advising that he would renew the venue licence, but with three conditions attached. The three conditions are as follows:

Condition - Venue payments;

Payments made by the Southern Trust to "Double U Anchor Limited" or any other venue operator for Windsock for the first 12-month period that this conditional class 4 licence has been issued do not exceed the non-gaming machine revenue generated through the

venue This condition does not derogate from the Limits and Exclusions on Class 4 Venue Costs Gazette Notice of 2 September 2004 and any provision of the Gambling Act 2003.

Condition - Requirement to keep and make available financial records;

The venue operator must have a financial report prepared annually for the business conducted at the venue. The financial report must include financial statements prepared in accordance with generally accepted accounting practice, and an auditor's report prepared by a chartered accountant based on the information contained in the financial report. The financial report must be available for inspection by any gambling inspector no later than 3 months after the end of the venue operator's financial year.

Condition - Availability of non-gaming activities;

The venue operator and the venue manager, as detailed on the class 4 venue licence must ensure that non-gaming activities are available for patrons to engage in at the class 4 venue. These non-gaming activities must be in addition to the sales and provision of liquor, non-alcoholic beverages and food at the venue. The range and type of non-gaming activities available to patrons can be at the discretion of the venue operator and the venue manager.

13. The Secretary added the three conditions pursuant to section 70(2)(i) of the Act in order to "promote and ensure compliance with this Act, namely section 67(1)(k)."
14. The Trust appealed the Secretary's decision to add these three conditions.

Submissions on behalf of the Trust

15. The Trust's primary submission was whether the term "used mainly" in section 67(1)(k) of the Act allowed the Secretary to impose as a licence condition "a one dimensional determinative test (the 50/50 test) that has the effect of making all other criteria irrelevant."
16. The Trust put forward five other grounds of appeal, which, in summary, are as follows:
 - (a) **Interpretation of facts** – the Secretary's basis for his decision to add conditions (as there had been "failure to comply with the statutory requirement of 67(1)(k)") is flawed because he has interpreted the facts incorrectly.
 - (b) **Actions of venue operator to ensure compliance** – The venue operator has always acted to achieve lawful compliance with the published "guidelines" that emphasize that multiple factors must be considered. If an absolute percentage figure is to become the determinative test, then a venue operator should know that figure in advance, and that percentage figure should be applied equally across the industry as a whole.
 - (c) **Use of the word "revenue"** – The use of the word "revenue" in the first condition, without further explanation, allows a broad interpretation of the condition, thus creating further uncertainty.

- (d) **Requirement to keep and make available financial records** – The different time periods for the financial records in the first and second conditions will make it difficult for the Secretary to properly assess compliance with the first condition
- (e) **Availability of non-gaming activities** – The third condition is so broad that it is uncertain why it is required.

Submissions by the Secretary

17 The Secretary made five principal submissions in support of his decision to add the three conditions, which are, in summary, as follows:

- (a) The three conditions added to the venue licence meet the statutory test under section 70(2)(i) in that they are consistent with, and will promote and ensure compliance with the Act
- (b) Section 67(1)(k) must be interpreted in the context of the prohibition of the conduct of gaming activities for commercial gain, and is intrinsically linked to venue payments made by gaming societies to venue operators, which must be limited to actual, reasonable and necessary costs.
- (c) The decision to withdraw the proposal to refuse to renew the venue licence, and grant a licence with conditions attached reflects his view that the venue is a reformed gaming shop which has demonstrated a genuine attempt to comply with section 67(1)(k), but still requires to be closely monitoring to ensure consistent and sustainable compliance with the Act.
- (d) The venue operator is demonstrating that it is able to comply with the three conditions.
- (e) The conditions are expected to be a temporary measure, intended to ensure compliance with section 67(1)(k). The conditions may be removed once he is confident that the venue operator does not need them in order to comply with section 67(1)(k).

Trust's submissions in reply

18 In summary, the Trust submitted the following in reply:

- (a) If the Secretary takes the view that the venue operator is able to comply with the three conditions, it is unfair to single out the venue operator to impose the specific conditions.

- (b) Any conditions imposed must be fair and reasonable, and it cannot have been Parliament's intention that a single "super-condition" be created that causes inequity between venues
- (c) Sales figures show a significant change in activity with bar sales increasing as a percentage of revenue
- (d) Different aspects of businesses fluctuate in financial performance with bona fide bars sometimes earning more from gaming activities than non-gaming activities. The Secretary's acceptance of this undermines his reasoning in imposing the first condition.
- (e) The Secretary does not adequately explain why the figure of 50% was chosen for the first condition.
- (f) The Secretary has the power to acquire financial information under sections 117 and 333 of the Act, so it is not clear how the (second) licence condition will "promote or ensure" compliance with the Act.

Preliminary matters

- 19. As noted in previous decisions, the appeal function exercised by the Commission under section 77 of the Act is conducted on a *de novo* basis.
- 20. Both parties made submissions regarding the perspective from which "use" of the premises is to be assessed in the context of section 67(1)(k). The Trust submitted that the use of the venue in section 67(1)(k) is the use the public makes of it, while the Secretary submitted that the use is that made by the venue operator, and stated that the phrase "used mainly for operating gaming machines" in sections 67(1)(k) and 65(2)(j) cannot refer to use by members of the public as gaming machines are operated by venue operators, on behalf of societies.
- 21. Although it is not determinative in this appeal, the Commission considers that the use referred to in section 67(1)(k) refers principally to use by the public. Adopting the alternative view would be problematic in circumstances in which the sole public use of the venue is class 4 gambling but the operator used most of the premises for private purposes. The issue under section 67(1)(k) is whether the use of the class 4 venue by the public is mainly for operating gaming machines.

Legal test

Interpretation of section 67(1)(k)

- 22 Under section 67(1)(k) and 72(5)(b), the Secretary must be satisfied that the venue is not used mainly for operating gaming machines before a class 4 venue licence can be granted or renewed. If the Secretary is subsequently not satisfied that this test continues to be met, he can cancel the licence, refuse to renew it or impose conditions to ensure that it is met. If the conditions are not complied with, the Secretary can cancel the licence.
- 23 The key phrase in section 67(1)(k) is “used mainly”. The term is not expressly defined and bears its ordinary and natural meaning in the context of the provision. The Oxford English Dictionary defines “mainly” as “in a great degree, greatly, considerably, very much, a great deal”, and “for the most part, in the main, as the chief thing, chiefly, principally”. The Commission considers that “mainly” is best defined by the second set of definitions - “for the most part” or, “in the main” – denoting relativity of use with other activities, rather than merely size.
- 24 Section 67(1)(k) therefore, focuses on how the class 4 venue is used “for the most part”, or “in the main”. It addresses actual activity - what in fact occurs - not what could potentially occur, and the assessment of activity is to be made with respect to the whole of the class 4 venue, and not just the part that is used for operating gaming machines.
- 25 The Commission noted that the Department of Internal Affairs (“DIA”) has guidelines to help determine whether venues are “used mainly” for operating gaming machines. These guidelines, published most recently in *Gambits* in December 2005, identify 11 matters (in bullet points) that the DIA considers for this purpose. Of these 11 matters, all, with the exception of the first (the relative turnover from the gaming machines and other activities at the venue) were considered by the DIA when it determined whether gaming machines were a venue’s “primary activity” under the Gaming and Lotteries Act 1977.
- 26 The Commission considers the concept of “used mainly” to be different from the concept of “primary activity”. Both concepts address relativity of use but impose a different test. Primary activity is simply the leading activity of all of the activities at the premises; if there are more than two, it may not amount to use “in the main”. On the other hand, if premises are used “in the main” for an activity, it will constitute the primary activity. The guidelines are useful indicators of use regardless of which test applies. The issue for the Secretary (and the Commission on appeal) is whether the venue is “used mainly” for operating gaming machines, not what the “primary activity” is.
- 27 In order for a venue to comply with section 67(1)(k), the use of gaming machines must not constitute use of the premises in the main. Such an assessment is a matter of overall

assessment and impression. There are a number of indicia which can be used – relative floor areas, prominence of gaming machines, promotion and extent of other activities, revenue streams and ability to participate in activities. However, as the Secretary submitted, no one matter is individually determinative of whether a venue is “used mainly” for operating gaming machines - they are all merely indicative of overall relative use. Use is to be determined by way of an overall factual assessment for the Secretary (at first instance) and for the Commission (on appeal) to make in the round, considering the venue as a whole.

Additional conditions

28. As noted in the Commission's decision GC16/06, section 70(2) provides the Secretary with broad powers to impose conditions. In addition to the express statutory limitations, further constraints on the Secretary's power are, however, implied by law. The Commission's analysis of these constraints is set out in GC16/06 and it is not necessary to replicate them fully in this decision. In summary, the Commission considers that it is required to determine the matter afresh having regard to all the information before it, and without being bound by the Secretary's views. It is required, in deciding whether to confirm, vary, or reverse the Secretary's decision to impose the conditions, to consider whether the conditions, in addition to being authorised, are fair and reasonable in the circumstances. In making its assessment, the Commission takes the following into account:
 - (a) whether the conditions are as a result of process of reason rather than a whim or arbitrariness;
 - (b) whether the conditions are proportionate; and
 - (c) whether the conditions are fair both to the individual faced with the conditions and the community
29. The key issue is a matter of factual assessment – whether the new conditions are properly imposed in order to ensure the venue meets the requirements of section 67(1) and is not used mainly for operating gaming machines. In making this assessment, the Commission considered the following:
 - (a) In the absence of the conditions, is the Commission satisfied that the venue meets the requirements of section 67(1) and is not used mainly for operating gaming machines?
 - (b) Will the imposition of the conditions assist in ensuring that the venue meets the requirements of section 67(1)?

(c) Are the conditions reasonable in all of the circumstances of the venue?

30. The three conditions were added under section 70(2)(i). This section expressly requires the conditions to be consistent with the Act and the Secretary (at first instance) or the Commission (on appeal) must consider that the conditions will promote or ensure compliance with the Act.

Assessing the Windsock venue

31. The Commission considered whether, in the absence of the conditions, it is satisfied that the venue is not used mainly for operating gaming machines, and determined that it was

32. The Commission assessed the venue and noted as follows:

- Relative floor space – approximately 30% of the total floor area is assigned to gaming activities.
- Prominence of gaming machines – the gaming machines are situated at the rear of the premises (having previously been located at the front of the premises).
- Promotion and extent of other activities – live music is widely promoted, as are bar and food facilities.
- Revenue streams – for the year ended 31 August 2003, 82% of the venue's total income came from venue payments by the Trust. For the year ended 31 August 2004, 80% of the venue's total income came from venue payments made from the Trust. For the year ended 31 August 2005, 62% of the venue's total income came from payments made from the Trust. Figures for 2006 indicate that non-gaming income will equate to approximately 49% of the venue's income, with gaming activities equating to approximately 51%.
- Staffing – approximately 60% of staff hours are assigned to non-gaming duties.
- Non-gaming activities – the venue offers a full bar and cocktail service, snacks and light meals, coffee, Sky television, live entertainment, music videos and stereo music.

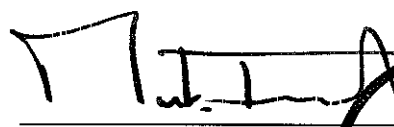
33. Assessing the venue overall, with no single factor being more determinative than any other, the Commission decided that the venue is not presently used mainly for operating gaming machines, but noted that the history of the venue warranted the Secretary maintaining a close scrutiny of the Windsock's operations to ensure ongoing compliance with section 67(1).

- 34 The Commission next considered whether the three conditions should remain to promote or ensure compliance with s67(1)(k), and whether they are fair and reasonable.
- 35 The Commission considered that difficulty arises in respect of the first condition because it equates “use” with “revenue”, and while there can be a correlation between the two, the relationship is not necessarily absolute and proportional. For example, a bar with class 4 gaming may be patronised by both a large number of individuals who spend a small amount of money on drinks but stay for hours watching sport or socialising, as well as a small number of individuals who gamble a large amount of money on the gaming machines. Similarly, a large audience listening to live music may produce little or no direct revenue at all. The Commission therefore determined that it is logically unsound to treat revenue as the sole indicator of use. It agrees that to do so would be to impose wrongly a “one-dimensional test” when a multi-dimensional assessment is required.
- 36 The Secretary submitted that revenue streams are just one factor in an overall evaluation of the Windsock venue. Similarly, the Commission noted the concluding paragraph to the DIA’s guidelines provides that “None of these factors are determinative. Each one contributes to an overall view on the role of gaming machines at a venue.” However, by imposing the first licence condition, the Secretary has elevated relative revenue streams above all other indicative measures, thereby reducing the importance of those other measures. The first licence condition would do the very thing that the Secretary submitted should not be done.
- 37 The position may have been different if the Trust or the venue operator made representations or provided undertakings to the Secretary that venue payments for the Windsock would not exceed non-gaming revenue, and the Secretary, in reliance on those representations or undertakings, imposed the first licence condition. In such an example, an estoppel issue would arise. This line of reasoning has been adopted in New Zealand in the Resource Management context - see *Springs Promotions Limited v Auckland City Council* [2006] 1 NZLR 846.
- 38 The Commission noted that the Trust provided the Secretary with financial details in September 2005, but concluded that the provision of this information did not constitute a representation, undertaking, or invitation resulting in the imposition of the first condition.
- 39 Taking into account all the above factors, the Commission decided that the first condition is inconsistent with the Act, is unnecessary to promote compliance with the Act, and is unreasonable. The Commission allows the appeal in relation to the first condition.
- 40 The Commission decided that the second condition is consistent with the Act, that it does promote compliance with the Act, and is reasonable as it assists the Secretary to monitor the Windsock’s use.

41. Unlike the first condition, which equates revenue with use, the second condition provides the means by which revenue can be quantified as part of an ongoing assessment of use. It is consistent with the need for the Secretary to maintain scrutiny of the relative use of the venue, and is reasonable as assisting with that requirement. The Commission therefore declines the appeal in relation to the second condition.
42. The Commission considered that the third condition could arguably assist in ensuring compliance with the Act because it requires the operator to offer a range of activities in which patrons may engage. The difficulty with the condition lies, however, with the second sentence, which removes the option of the venue having the provision of food and beverages as its main use. It effectively imposes a second "one-dimensional" determinative test relating to the number of activities on offer, when offering a range of activities is not necessary to meet the s67(1)(k) standard.
43. The Commission appreciates that the condition follows the Secretary's concern that the venue was a gaming shop and the importance of the venue maintaining changes made to address those concerns. However, the Commission does not believe it appropriate to fix these changes as a licence condition, while removing the option of building up food and beverage sales. The Commission therefore concluded that the third condition was not necessary to ensure compliance with section 67, and allows the appeal in relation to that condition.

Decision of the Division

44. For the reasons already provided, the Division unanimously allows the appeal in relation to the first and third conditions, and declines the appeal in relation to the second condition.
45. The Commission decided that it is important for the Secretary to maintain scrutiny of the Windsock to ensure compliance with section 67(1), but he can satisfactorily do this without the need to impose the first and third licence conditions.


Mark Ford
Acting Chairperson

for and on behalf of the
Gambling Commission



8th August 2006