

IN THE MATTER of the Gambling Act 2003

AND on appeal by **NEW ZEALAND
COMMUNITY TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Decision: 17 September 2010

Date of Notification of Decision: 5 October 2010

**DECISION
ON AN APPLICATION FOR AN ORAL HEARING OF AN APPEAL BY NEW ZEALAND
COMMUNITY TRUST AND ON THE APPEAL ITSELF**

Application and appeal

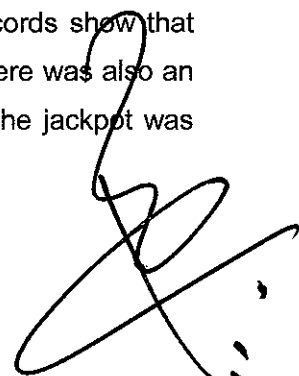
1. New Zealand Community Trust (“**NZCT**” or the “**Appellant**”) appealed to the Gambling Commission (the “**Commission**”) against a decision by the Secretary for Internal Affairs (“**Secretary**”) suspending its Venue licence for Tomo’s Sports Bar (“**Tomo’s**” or the “**Venue**”) for a period of three days. The Secretary suspended the licence under section 74(1)(a) on the grounds that he was not satisfied that one of the grounds under section 67 (Grounds for granting a Venue licence) was met, namely he was not satisfied that the risk of problem gambling at the Venue was minimised (section 67(1)(p)). The Secretary was no longer satisfied that the risk of problem gambling was minimised because of an incident in which an excluded gambler gambled at the Venue in breach of his exclusion order.
2. On 21 July 2010 NZCT applied to the Commission for its appeal to be heard by way of an oral hearing. NZCT based its application on differences between the affidavit evidence of witnesses for the Secretary and for NZCT which, NZCT submitted, could only be resolved by the Commission’s making findings as to credibility. This, in turn, required an oral hearing, with the witnesses available for questioning. The Secretary opposed the application on the basis that examination at an oral hearing before the Commission would have a detrimental effect on one of the key witnesses and might also undermine the scheme of the exclusion orders for problem gamblers generally.
3. The contested application for an oral hearing came before the Chief Gambling Commissioner as a pre-hearing issue. He took the view that, if the differences in the factual accounts given by the witnesses, Mr Munro and Ms Edwards, were material to

the outcome of the appeal, an oral hearing would certainly be required. Rather than simply granting the application for an oral hearing however, he gave initial consideration to the materiality of the disputed evidence to the potential outcome of the appeal. Having reached a tentative conclusion that the factual dispute would not materially affect the outcome, he referred that conclusion to the Division hearing the appeal.

4. For the reasons set out in this decision, the Division decided that the evidential matters in dispute were not material to the ultimate decision on appeal, and that the substantive appeal should be decided on the material available to the Commission in favour of the Appellant. The application for an oral hearing is therefore declined, and the appeal is allowed.

Background

5. At the outset of the appeal, the Appellant and the Secretary settled an agreed statement of facts. In his submissions, the Secretary resiled from his agreement to certain key facts. Nevertheless, the following facts were not in dispute.
 - (a) The Appellant has a venue licence for class 4 gambling at Tomo's. The venue operator at Tomo's is Brix Sports Bar Limited ("**Brix**"). The venue manager is Alan Thompson.
 - (b) On 10 March 2009, Rawinia Edwards, who is employed as a duty manager at Tomo's, issued an exclusion order prohibiting George Munro from entering the gambling area of Tomo's for a period of two years. The exclusion order was issued in response to a request by Mr Munro.
 - (c) On 3 September 2009, Mr Munro played the gaming machines at Tomo's.
 - (d) At or about 4.13pm an accumulated credit of \$600.00 was cancelled on gaming machine number nine. Mr Munro was playing on gaming machine nine at the time the credit was cancelled. Another patron, Trudy Karaka, claimed the \$600.00 from Ms Edwards at Mr Munro's request. Ms Edwards paid the credit to Ms Karaka.
 - (e) At or about 4.26pm Mr Munro was playing on machine number 14 and won a jackpot of \$927.30. Electronic monitoring system ("**EMS**") records show that the jackpot went off on machine number 14 at 4:26.51 pm. There was also an accumulated credit of \$270.00 for machine number 14 when the jackpot was won.



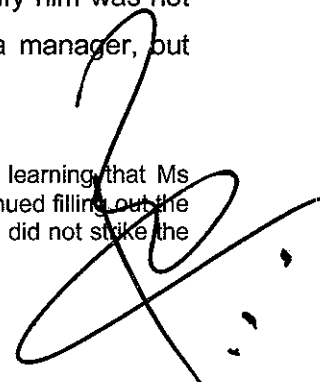
- (f) Ms Karaka attempted to claim the jackpot and the accumulated credit from Ms Edwards at Mr Munro's request. When Ms Edwards asked if Ms Karaka had won the jackpot, she admitted that she was collecting the jackpot for Mr Munro. Ms Edwards advised Ms Karaka that she could not pay the jackpot because Mr Munro was an excluded person. Ms Edwards rang her supervisor, Alan Thompson, who confirmed that she could not pay the jackpot.¹ Mr Thompson arrived at the Venue soon afterwards and told Mr Munro that he could not receive the jackpot because he was excluded.

Appellant's submissions

6. The Appellant claimed that:

- (a) Ms Edwards was the sole staff member on duty when Mr Munro played the gaming machines at the Venue. She was not aware that Mr Munro was in the gaming room until just before 4.26pm. She had seen Mr Munro earlier in the day when she was standing outside the bar having a cigarette. She greeted him and he kept walking down the road.
- (b) When Ms Karaka claimed the \$600.00 credit for machine number nine, Ms Edwards did not know, and had no reason to believe, that Mr Munro had been playing the machine at the time the credit was cancelled.
- (c) Between 2.45 pm and 4.26 pm (the time during which the Secretary claims that Mr Munro was in the gaming room, the length of which the Appellant disputes) Ms Edwards entered the gaming room at least five times, 2.50 pm, 3.16 pm, 3.19 pm, 4.16 pm and 4.26 pm. This is supported by EMS records, which show that, at 3.16 pm, 3.19 pm and 4.26 pm hopper refills were carried out (which require a staff member to enter the gaming room) and that, at 2.50 pm and 4.13 pm, cancelled credit was paid (which requires a staff member to enter the gambling area in order to reset the machine). Ms Edwards also deposed in her affidavit that she is likely to have gone into the gaming area at other times during this period to check on the players and clear away empty glasses.
- (d) Ms Edwards did not see Mr Munro on any of the occasions that she went into the gaming room before 4.26 pm. Her failure to see and identify him was not due to any inadequacy on her part in fulfilling her duties as a manager, but because Mr Munro took steps to hide himself.

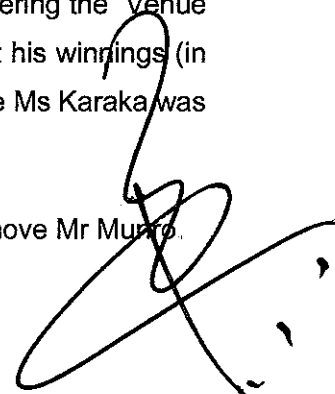
¹ There was a dispute as to whether Ms Edwards ended the transaction immediately upon learning that Ms Karaka was collecting the money for Mr Munro, or whether, as the Secretary claimed, she continued filling out the papers and counted out the money, before stopping and ringing Mr Thompson. The difference did not strike the Commission as particularly material.



- (e) At or about 4.26pm, Ms Edwards entered the gambling area to carry out a hopper refill on gaming machine number 15. Gaming machine number 15 is immediately adjacent to gaming machine number 14. Mr Munro was playing gaming machine number 14
- (f) While carrying out the hopper refill on gaming machine number 15, Ms Edwards recognised Mr Munro as an excluded person. Ms Edwards returned to the bar to verify that Mr Munro's exclusion order was still current. She confirmed that it was and she was about to return to the gambling area to remove him when the jackpot alarm behind the bar indicated that a jackpot had been won on one of the gaming machines. A receipt from the EMS records indicated that the jackpot was won at 4.26.51 pm on gaming machine number 14. The jackpot prize was \$927.30. Mr Munro was playing at gaming machine 14 at the time the jackpot was won. There was also an accumulated credit of \$270.00 on gaming machine number 14 at the time the jackpot was won.

7. The Appellant submitted, in summary, that:

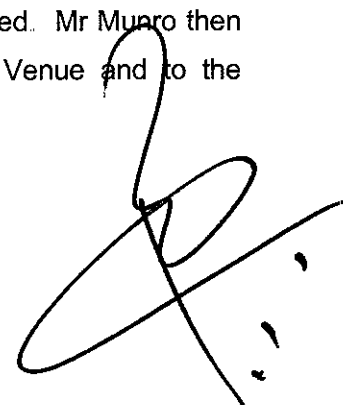
- (a) Ms Edwards did not knowingly allow Mr Munro to enter the gaming area.
- (b) The Venue was adequately staffed when Mr Munro gambled there on 3 September 2009. Although Ms Edwards was the only staff member at the Venue, this was adequate as it was an off-peak time. The Department's own *Class 4 Venue Labour Costs Bench-marking Project Report* issued in December 2008 acknowledged that venues without a substantial non-gaming clientele during the morning and each afternoon might make do with a single staff member, namely the duty manager.
- (c) EMS records confirm that Ms Edwards regularly entered the gaming room.
- (d) NZCT's venue-specific harm-minimisation policy is comprehensive and, among other things, requires the venue manager to enter the gambling area at least every 30 minutes.
- (e) While it was not disputed that Mr Munro was known to Ms Edwards, Mr Munro took deliberate steps to avoid her, for example by delaying entering the Venue when he saw her at the entrance, asking Ms Karaka to collect his winnings (in return for giving her a percentage); and moving machines while Ms Karaka was collecting the winnings.
- (f) As soon as she recognised him, Ms Edwards took steps to remove Mr Munro.



- (g) NZCT and the Venue have a range of measures in place that minimise the risk of harm at the Venue.
- (h) In light of Clifford J's finding in *Secretary for Internal Affairs v Kilbirnie Tavern Ltd*, HC Wellington CIV 2007-485-1980, 14 November 2008, the focus of any inquiry into section 67(1)(p) is whether the risk of problem gambling has been minimised to the extent practical, bearing in mind that the Act allows gambling and the risk of problem gambling cannot be eliminated.

Secretary's submissions

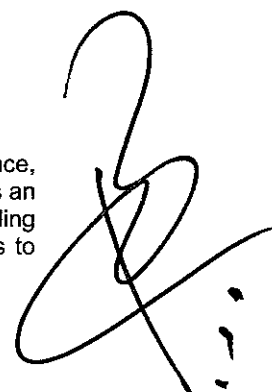
- 8. The Secretary initially agreed with the Appellant's statement of the case, but considered that Ms Edwards' failure to realise for over an hour that an excluded person was present and playing the gaming machines was evidence that the Venue was not minimising the risk of problem gambling, either because the level of staffing was inadequate and resulted in poor supervision of the gaming area, or because Ms Edwards failed to fulfil her supervisory duties.
- 9. In his submissions on appeal, however, the Secretary changed his position on the facts and the reasons to support suspension. The change in position came after he put Ms Edwards's affidavit to Mr Munro, and Mr Munro confirmed his original statement, which conflicts with the affidavit of Ms Edwards. Mr Munro was "adamant" that Ms Edwards recognised him and allowed him to enter the Venue. Following Mr Munro's confirmation of his evidence in the face of conflicting evidence, the Secretary considered himself bound to make his submissions accordingly. He therefore relied, in his submissions, on Mr Munro's version of events, which, in the Secretary's view, gave rise to the following "less charitable scenario":
 - (a) At approximately midday on 3 September 2009, Mr Munro entered the gambling area of the Venue. He did not see Ms Edwards there. He saw a different staff member who did not identify him as an excluded person. He spent 30-40 minutes at the gambling area and left the Venue after winning approximately \$200.
 - (b) Mr Munro went back to the Venue at approximately 2.45 pm. Ms Edwards was standing at the door, saw him and greeted him as he entered. Mr Munro then (contrary to Ms Edwards' evidence) proceeded into the Venue and to the gaming machines.

A large, stylized handwritten signature in black ink, located in the bottom right corner of the page. The signature is highly cursive and difficult to decipher, but it appears to be a name with a prominent initial.

- (c) Ms Edwards knew that Mr Munro was in the gaming room every time she entered it, because she had knowingly allowed him into the Venue. She permitted him to gamble and acquiesced to his breach of his exclusion order.
- (d) At 4.12 pm Mr Munro decided to cash his reserved credit of \$600 on machine number nine. He went out of the gambling area and turned toward the bar area. He hesitated as to whether or not to approach the bar and finally decided to ask Ms Karaka to approach the bar on his behalf (the Secretary referred to video footage of Mr Munro's movements, exhibited to Mr Thompson's affidavit). The Secretary submitted that Mr Munro's hesitation, as shown on the CCTV footage, reflected his contemplation as to whether Ms Edwards, who had allowed him to enter the gambling area and play the machines, would go one step further and would pay him the cancelled credit. The Secretary submitted that the way in which he initially headed towards the bar, and then changed his mind was not the action of a man trying to hide from Ms Edwards. In fact, he was in full view of the bar for a short time (although the Secretary acknowledged that Ms Edwards was busy at the bar and probably did not notice him approaching the bar).
- (e) Even if Ms Edwards had only recognised Mr Munro at 4.26 pm, as she deposed, it was her duty to ask him there and then to leave. She did not.
- (f) Ms Edwards went so far as to sign the jackpot payment and to permit Ms Karaka to sign for receipt of payment, even after realising that it was Mr Munro who had won the jackpot. This suggests that she intended to pay the jackpot to Ms Karaka. She admits that by this time she was aware that he was excluded.
- (g) Having signed the slip, Ms Edwards then stopped short of payment. The Secretary submitted that she stopped at this point because it was a step too far for her to move from passive knowledge to the active step of paying the jackpot to an excluded person.
- (h) As part of this scenario, the Secretary now claims that Ms Edwards breached section 312(3) of the Act. Section 312(3) provides:

312 Offences relating to breach of exclusion order

- (3) Every Venue manager, or holder of a casino operator's licence, or person acting on behalf of either of those persons, commits an offence who knowingly allows a person to enter the gambling area of a class 4 Venue or casino Venue, or knowingly fails to remove a person who has entered those areas,—

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the bottom.

- (a) in breach of an exclusion order issued under section 310(1); or
 - (b) in breach of a condition of re-entry imposed under section 310(2).
10. The Secretary acknowledged that the two versions of events were inconsistent. He argued that Mr Munro's evidence had not changed markedly since his initial statement. He submitted that an assessment of Ms Edwards' veracity must take into account the fact that elements of the present case might jeopardise her suitability as a person involved with class 4 gambling.
11. The Secretary submitted that accepting that Ms Edwards had breached section 312 would have an effect on her suitability of a key person of the Venue. He argued that the obligation to minimise a risk required an active approach, which in turn would entail Venue staff regularly monitoring the gaming area; and maintaining an awareness of who was in the area and any behaviour indicative of problem gambling. The Appellant should not expect to "avoid sanction" by claiming Venue staff were unaware of breaches unless they had made an active effort to maintain awareness. Ms Edwards failed in her duty by not appreciating that her responsibility to minimise risk of problem gambling was an active one.
12. The bulk of the Secretary's submissions dealt with Ms Edwards' alleged breach of section 312(3). The Secretary claimed that the alleged offence "puts in doubt" the Venue's ability to minimise the risk of problem gambling. The Secretary also raised (but did not pursue) the question of Ms Edwards' suitability as a key person. He submitted, at paragraph 7 of his submissions:

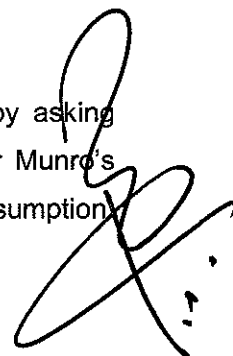
After originally agreeing to withdraw allegations of breaching section 312(3) from his case, the Secretary is now bound by [Mr Munro's] evidence and the reassurance provided by Mr Munro, to submit that an offence under section 312(2) was committed, in a manner that not only puts in doubt the Venue's ability to minimise the risk of problem gambling, but also casts a shadow on Ms Edwards' suitability as a key person.

Appellant's submissions in reply

13. Although the Appellant has filed evidence in reply, it has not filed submissions in reply because it was agreed that it would wait until the outcome of the application for oral hearing. This means that the Commission will be deciding the appeal without the benefit of the Appellant's submissions in reply. The Commission wishes to emphasise that it will only rarely take such a step and that it only does so in this case because it is satisfied that, for the reasons set out below, requiring the Appellant to file submissions in reply would be unnecessary and that proceeding to allow the appeal without the filing of reply submissions will not create a risk of injustice.

Application for an oral hearing

14. The Appellant sought an oral hearing on the basis that the Commission needed to hear the evidence in order to assess the credibility of Mr Munro and Ms Edwards on the disputed matters of fact. Although he understood the Appellant's reasons for applying for an oral hearing, and although he understood that the differences in the affidavits of Mr Munro and Ms Edwards were likely to present the Commission with difficulties, the Secretary opposed the application because of his concern that an "adversarial court-like setting" would be counter-productive to Mr Munro's treatment for problem gambling. It might also, in the Secretary's view, be detrimental to other problem gamblers who consider applying for self-exclusion. The Secretary wished to encourage problem gamblers to seek help, as Mr Munro did from the Problem Gambling Foundation (on whose advice he had excluded himself from class 4 venues in Gisborne). The Secretary considered that requiring Mr Munro to give evidence before the Commission would have the opposite effect. It was suggested instead that counsel for the parties would interview Mr Munro in the hope that, by doing so, counsel for the Appellant would not require Mr Munro to give evidence.
15. In the Commission's view, the approach suggested by the Secretary was unrealistic and failed to accord with the requirements of natural justice. Faced with concerns about the therapeutic interests of Mr Munro and other problem gamblers and a desire to impose a punitive outcome on the licenceholder, the Secretary could not reasonably expect the Commission to elevate his concerns about the former to the point where the licenceholder challenging the imposition of a penalty based on a disputed account of events would not receive a fair hearing or be able to challenge the case against it effectively. In such cases, the Secretary may have to choose which interest he wishes to advance. He may well find that the Commission will only allow the matter to proceed without witnesses being called for examination if the Appellant's account of events is accepted.
16. In the usual case, where the material facts had not been agreed, the Chief Gambling Commissioner would likely have ordered an oral hearing. Assuming that the disputed facts were material, the Commission would not have been in a position to resolve the conflicts on the basis of the affidavit evidence alone. An oral hearing would have been necessary for the Commission to reach a view about the credibility of the opposing witnesses.
17. In this case, the Commission has approached the question of materiality by asking initially what the result of the appeal would be if it assumed the truth of Mr Munro's account. It has concluded that the appeal should be allowed, even on that assumption.



In these unusual circumstances, it has not only declined the application for an oral hearing (on the basis that the factual dispute is immaterial), it has decided to give its substantive decision on the appeal. In more normal circumstances, it would have directed an oral hearing if the Secretary did not accept the Appellant's evidence.

The Appeal

18. The issue on appeal was whether the Secretary's decision to suspend NZCT's licence for three days should be upheld, varied, or dismissed. The question for the Commission, as part of its consideration of the application for an oral hearing, was whether, if Mr Munro's evidence were accepted, the Commission would uphold the Secretary's decision. By approaching the matter on this hypothetical basis, the Commission has not in fact reached any such conclusion on the matter of assumption, and it should not be inferred that the Commission has formed any negative view about the credibility of Ms Edwards.

The relevant statutory sections

19. The Secretary suspended NZCT's licence under section 74(1)(a) for three days. Section 74 provides:

74 Suspension or cancellation of class 4 Venue licence

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 Venue licence if the Secretary is satisfied that—
- (a) any of the grounds in section 67 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
 - (c) the class 4 Venue agreement is no longer consistent with ensuring compliance with this Act or the licence; or
 - (d) the corporate society supplied information that is materially false or misleading in its application for—
 - (i) a class 4 Venue licence; or
 - (ii) a renewal or an amendment of a class 4 Venue licence; or
 - (iii) a class 4 operator's licence; or
 - (iv) a renewal or an amendment of a class 4 operator's licence.
- (2) In deciding whether to suspend or cancel a class 4 Venue licence, the Secretary must take into account the matters in section 67.

20. The Secretary gave section 67(1)(p) as his ground for suspension. Section 67 provides, in relevant part:

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

(p) the risk of problem gambling at the class 4 Venue is minimised.

21. The requirements of section 67, that is, the matters of which the Secretary must be satisfied in order to grant a class 4 venue licence, can broadly be described as systemic requirements. They are not one-off events; rather, they are ongoing states of affairs such as:

- (a) that the applicant holds a class 4 operator's licence (section 67(1)(a));
- (b) likely access of persons under 18 years old (section 67(1)(b));
- (c) the suitability and qualifications of key persons (section 67(1)(c) and (d));
- (d) consent of a territorial authority, if necessary (section 67(1)(f));
- (e) the primary purpose of the venue (section 67(1)(k));
- (f) the specifications and ownership of the gambling machines (section 67(1)(g) and (i));
- (g) whether the venue agreement will enable the venue to comply with the Act and whether it includes necessary information (section 67(1)(j)).

22. It is implicit in the nature of the section 67 matters, as well as the statutory scheme, that the section 67 requirements be satisfied on an ongoing and forward-looking basis. The Secretary must not grant or renew a licence unless he is satisfied about these states of affairs. Section 74(1) provides that, if the Secretary is satisfied that any of the section 67 factors are *no longer* met, he may suspend or cancel the licence. Before doing so, he must follow the hearing process set out in section 75. After considering any submissions received, if the Secretary decides to suspend a licence because he is no longer satisfied that a section 67 requirement is met, he must, as with suspension for any other ground, inform the corporate society, or the parties to the agreement of the venue manager, of the matters to be dealt with in order for the him to consider withdrawing the suspension before the end of the suspension period (section 75(4)(d)).

Several of the factors listed in section 67(1), are expressly matters that may be the subject of the imposition of conditions under section 70(2), for example procedures to encourage responsible gambling at the venue (section 70(2)(g) and conditions to minimise the possibility of persons under 18 years old gaining access to class 4 gambling at the venue (section 70(2)(b)). The legislative scheme provides two different remedies, therefore, for dealing with concerns about whether the relevant conditions of section 67 are met on an ongoing basis.

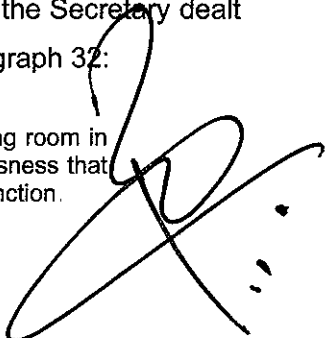
23. The discretion whether to suspend or cancel a licence (including to do so in preference to the imposition of a condition) when the Secretary is no longer satisfied of the section 67 requirements, together with the ability to shorten a suspension if the licence holder addresses certain matters, provides the Secretary with a range of responses when the necessary preconditions to a Venue licence are assessed as having ceased to be met. However, in the Commission's view, the Secretary must exercise his discretion in a way that takes into account the nature of the section 67 factors as ongoing or systemic requirements, in contrast, for example, to past or continuing non-compliances (section 74 (1)(b) or supply of false or misleading information (section 74(1)(d)).
24. In this case, the Commission considers that the Secretary has exercised his discretion to suspend under section 74 in a way that fails to take into account the systemic nature of the section 67 requirements. Both the Secretary's primary and alternative case involve his not being satisfied of section 67(1)(p) on the basis of a single incident. The Secretary's primary argument was that, because a duty manager breached section 312(3) (which requires deliberate conduct with actual knowledge), the risk of problem gambling at the Venue was not minimised and therefore he was no longer satisfied of section 67(1)(p). The Secretary's alternative case was that Ms Edwards' actions fell below the standard required of a staff member at a class 4 Venue. Ms Edwards' failure to notice Mr Munro, in the Secretary's alternative submission, indicates that she did not adhere to appropriate harm-minimisation procedures and therefore he is no longer satisfied that the risk of problem gambling at the Venue is minimised.
25. In the Commission's view, a single incident of problem gambling does not necessarily establish that the risk of problem gambling is not minimised, although it is possible that the circumstances of a single incident might reveal flaws in a venue's procedures and systems regarding the minimisation of the risk of problem gambling. Further examination of the circumstances surrounding an incident might lead to the conclusion that the risk of harm was not being minimised. But it is also possible that such an incident might be the materialisation of an inherent risk, which has been minimised, but which can never be removed. Such an approach is consistent with that taken by Clifford J in *Secretary for Internal Affairs v Kilbirnie Tavern Ltd & Ors* HC Wellington CIV 2007-

485-1988 14 November 2008, in which His Honour recognised the tension between the fact that the Act allows gambling, and the requirement to minimise the risk of harm:

... the duty to minimise the risk of problem gambling is not an absolute one, but rather is to be exercised consistently with the extent to which gambling is permitted by the Gambling Act.

26. In this case, the Secretary does not appear to have concluded that a systemic problem underlies the events of 3 September 2009. If he considered the events to be symptomatic of a broader problem, the Commission would have expected the Secretary to have identified the systemic characteristic or deficiency which created an ongoing avoidable risk. As the Secretary has taken action under section 74(1) because he is *no longer* satisfied of a certain continuing state of affairs, the Commission would expect his response to be aimed at preventing that state of affairs from continuing, for example by proposing cancellation of the licence, by imposing a new licence condition or by supplementing the suspension with a condition shortening the suspension if remedial action were taken.
27. There is no suggestion that the circumstances that have led the Secretary to conclude that the risk of problem gambling is “no longer being minimised” are going to change. Ms Edwards continues to be employed by the Venue without objection by the Secretary. He has imposed a suspension but otherwise has not required the Venue to make any changes to its operation. That is, the very circumstances in place at the time of the incident, which led him to say that he is no longer satisfied that the risk of problem gambling is minimised, will continue after the end of the suspension period. It is not clear how the Secretary can be content for those circumstances to continue in the future, despite his dissatisfaction that section 67(1)(p) is met, or how he thinks that those same circumstances will allow him to be so satisfied in the future, despite their not being satisfactory at the moment. In the Commission’s view, the latter would tend to undermine his assertion that the current circumstances do not allow him to be satisfied that the risk of problem gambling is minimised, whereas the former would undermine the purpose of section 67. Neither is a satisfactory conclusion.
28. Although the Secretary referred to no longer being satisfied that a requirement of section 67(1)(p) is met, his purpose in imposing the sanction appears, in fact, to have been punitive or deterrent in response to the occurrence of a specific event. As much is clear from the procedural history to the suspension. In his decision letter, the Secretary dealt with the suspension under the heading “sanction”. He stated at paragraph 32:

I am of the view that the failure by Ms Edwards to monitor the gaming room in any way whatsoever, and the resulting harm from that, is of a seriousness that warrants more than a warning and a suspension is the appropriate sanction.



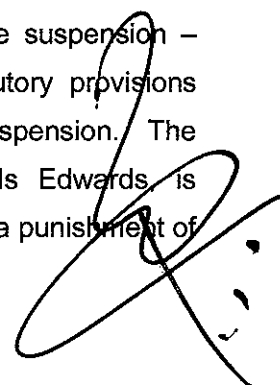
29. Furthermore, in outlining the basis for a period of three days' suspension in the proposal letter, the Secretary compared the case to others involving **breaches** (and consequent sanctions) such as the *Eureka* case, which the Secretary described as "administrative breaches albeit they reflected 'a general culture of tardiness and neglect'" and cases involving third instances of late banking. The Secretary concluded (at paragraph 36) that:

Taking into account the circumstances of the present breach, the harm that it caused Mr Munro, and comparing it with other cases, I believe that a suitable suspension is three (3) days.

30. A punitive or deterrent suspension might well be appropriate if NZCT had breached a section of the Act or regulations or rules or a licence condition. However, the only alleged breach, for which the Secretary seeks to punish the Appellant, is that of an employee of the Venue in respect of which it holds a Venue licence. The Secretary's thinking is revealed in part by the report of the Department Inspector which states:

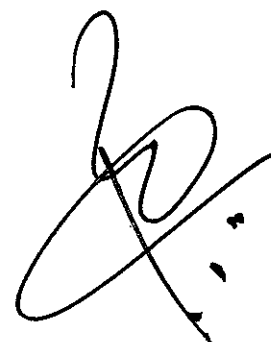
As this was the second incident of an excluded person gambling at the Venue in a short time and a prosecution would not be viable [presumably because at that stage the Inspector considered Ms Edward did not know Mr Munro was in the gaming room] a proposal to suspend the Venue licence would be appropriate.

31. The Commission does not think that a breach of section 312 by an employee is a proper basis for suspension under section 74, at least on the case that the Secretary has put forward. Offences under section 312(3) are personal ones, attributable only to the person who has knowingly allowed the excluded gambler to gamble. It is the venue manager or person acting on the venue manager's behalf (in this case, Ms Edwards) who would commit the offence. The offence is not attributable to the employer of the person committing an offence, nor to the class 4 operator for the Venue. In the absence of a provision creating vicarious liability of corporate societies for specific actions of venue key persons, the Commission does not think it is permissible to punish the Appellant for an alleged breach by a key person at one of its venues. A sanction for a breach of section 312 requires action to be taken against the person breaching the section, not the licenceholder.
32. In summary, both the Secretary's primary and alternative cases are flawed, in that they assume that a single event of problem gambling, whether deliberate or as a result of inattention, of itself establishes a systemic failure to minimise the risk of problem gambling. Further, the Secretary's apparent purpose in imposing the suspension – punishment of a breach – is inconsistent with the purpose of statutory provisions (sections 74(1)(a) and 67(1)(p)) under which he has imposed the suspension. The Secretary's primary case, alleging a breach of section 312 by Ms Edwards, is particularly problematic as a ground for suspension, because it involves a punishment of



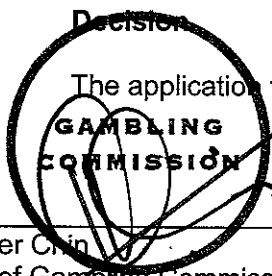
the Appellant for an alleged breach by another party. The Commission does not consider that section 74 can be invoked as a means for punishment of a corporate society in this manner; only breaches by the corporate society can be punished by suspension (section 74(1)(b)).

33. The Commission therefore concluded that it would not uphold the suspension decision on either of the Secretary's cases. Consequently, the factual dispute was not material to the disposition of the appeal because, regardless of whose version of the facts the Commission accepted, it would not uphold the suspension on the basis on which it was imposed by the Secretary:
- (a) If the Secretary's version of facts were accepted, the Commission would not uphold the suspension of NZCT's licence as a punishment for Ms Edwards's breach. Nor would it uphold the suspension when the Secretary, in the course of the section 75 process, had not made a breach of section 312 and the continued employment of Ms Edwards the basis for invoking the section 74 power by reference to the requirements of section 67(1)(p).
 - (b) If the Commission accepted the Venue's version of events, it would similarly not uphold the suspension on the basis of section 67(1)(p) on the Secretary's alternative argument. While single episodes can reveal systemic flaws which would justify cancellation or suspension pending charges, the Secretary has not formulated or made out such a case. The Commission's view on the evidence is that the incident is the result of efforts made by Mr Munro to avoid detection (an inevitable and unavoidable risk), not a systemic weakness in the Venue operation.
34. In the Commission's view, the suspension decision suffered from a lack of clarity, confusing the punitive aspects of section 74 (which are frequently relevant, but not in this case where the licenceholder did not breach any obligation), with the remedial aspects of the provision to change an unsatisfactory *status quo*. The suspension was imposed without remedial focus for an alleged breach by someone other than the licenceholder. It cannot stand.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a series of loops and a long horizontal stroke extending to the right.

Decision

35. The application for an oral hearing is declined and the appeal is allowed.



Peter O'Connell
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

5 October 2010