

**IN THE MATTER** of the Gambling Act 2003  
**AND** of an appeal by **HARDY'S BAR  
(2014) LIMITED**

**BEFORE A DIVISION OF THE GAMBLING COMMISSION**

Members: G L Reeves (Chief Gambling Commissioner)  
D C Matahaere-Atariki  
W N Harvey

Date of Decision: 9 October 2015

Date of Notification  
of Decision:  December 2015

**DECISION  
ON AN APPEAL BY HARDY'S BAR (2014) LIMITED**

**Introduction**

1. The Appellant, Hardy's Bar (2014) Ltd ("**Appellant**" or "**Hardy's Bar**"), has appealed to the Commission against conditions that it says the Secretary for Internal Affairs ("**Secretary**") imposed when granting a class 4 venue licence to Air Rescue Services Limited ("**Air Rescue**"). The alleged conditions were that its sole director and shareholder, Mr Hinks, cease his other occupation as Operations Manager to the Nelson Suburbs Football Club ("**Club**"), which received some funding from Air Rescue, and that he abide by an attestation that he would not breach sections 113 and 118 of the Gambling Act 2003 ("**Act**").
2. The Secretary says that he did not impose such conditions. Rather, after he informed Mr Hinks of the reasons why he was unlikely to grant a licence, Mr Hinks voluntarily resigned and provided the attestation, both of which the Secretary relied on in reaching the necessary determination of satisfaction to allow him to grant the licence. He says that he has made no decision that the Commission has jurisdiction to reconsider on appeal.

**Factual background**

3. Hardy's Bar operates a licensed premises, gaming bar and TAB operation in central Nelson. Mr Hinks's family trust lent money to the previous owner of the business. It



suffered financial difficulty so Mr Hinks incorporated Hardy's Bar to purchase the business to protect the trust's investment. The trust loaned Hardy's Bar the funds for the purchase. Hardy's Bar continued with Air Rescue as its preferred corporate society for a class 4 operator's licence. Under that licence, Mr Hinks would be a key person as defined in section 4.

4. Air Rescue lodged the application for the licence on 25 September 2014. The decision making process took longer than usual because the Secretary had concerns about the application. Of relevance to this appeal, Mr Hinks was contracted (through his company GOH Nelson Ltd) as the Operations Manager for the Club. One of his responsibilities was to apply for grant funding from class 4 societies, including Air Rescue. He also volunteered as administrator for Soccer Nelson Inc, which also received funding from Air Rescue. The Secretary's concern was that Mr Hinks's role as a key person under the proposed licence and his involvement with the Club and Soccer Nelson Inc would lead to breaches of sections 113 and 118 of the Act. The Secretary considered that, as section 67(1)(r) required him to be satisfied that nothing detracted from the purposes of the Act, he could not grant a licence when a breach of sections 113 or 118 would likely occur.
5. After discussions with staff at the Department of Internal Affairs ("**Department**"), Mr Hinks and Mr Steans (on behalf of Air Rescue) suggested that a breach would be avoided by Mr Hinks not participating in any applications for or decisions about funding from Air Rescue, and receiving payment of his fees from other Club funding sources. Mr Hinks sent the Secretary a sworn attestation to confirm that he would abide by sections 113 and 118. Specifically, he made a commitment that he would:
  - (a) continue to volunteer for Soccer Nelson Inc and provide services as Operations Manager to the Club, but not as a Committee member or Secretary;
  - (b) not provide any trust application forms to Soccer Nelson Inc or the Club;
  - (c) not be involved in any way with applications made by to Soccer Nelson Inc or the Club to Air Rescue nor attempt to influence any decision;
  - (d) not arrange quotes for any equipment or services applied for as an authorised purpose, this role being for the secretaries of Soccer Nelson Inc and the Club;
  - (e) leave meetings when recommendations relating to Air Rescue were discussed, which absences would be recorded in the minutes; and



- (f) receive payment from the Club for his services as Operations Manager from funds other than those received from Air Rescue.

He further stated that no applications made by Soccer Nelson Inc or the Club would have any conditions attached. The attestation was co-signed by Mr Steans.

6. On further consideration, the Secretary formed the view that Mr Hinks's role as Operations Manager would breach section 118(1), regardless of the aforementioned safeguards. He considered that, as a key person, Mr Hinks would knowingly receive money (his contract fee) from a grant recipient (the Club), which would be subject to a number of conditions (the terms of his contract for services).
7. On 20 January 2015, the Department contacted Mr Steans to explain the Secretary's position and provided a range of options. Air Rescue discussed with Mr Hinks the option of him terminating his contract with the Club. Air Rescue contacted the Secretary to indicate that Mr Hinks was willing to terminate his contract with the Club if the Secretary gave him an assurance that a licence would be granted. Although the Secretary did not give that assurance, on 21 January 2015, Mr Hinks advised that he had terminated his contract with the Club.
8. On 26 January 2015 the Secretary granted the licence. The covering letter to the licence contained an additional paragraph which stated:

As you are aware, aside from the normal licensing enquiries, the decision to grant this licence was based on Gary Hinks discontinuing his role with Nelson Suburbs Football Club; the provision of an attestation by Mr Hinks in relation to sections 113 and 118 of the Gambling Act 2003, and confirmation by Mr Hinks that Carmen Cartwright was not to be involved in the running of Hardys Bar in any way. Please be advised that these matters will likely form part of any future audits relating to either Air Rescue Services or Hardys Bar.

9. The letter went on to record that there was a right of appeal against the conditions added to the licence. The only conditions formally recorded in the licence were the standard conditions.
10. Since Hardy's Bar filed its appeal, the Court of Appeal released a judgment regarding the correct interpretation of section 118.<sup>1</sup> It held that the conditions relevant to the statutory prohibition did not extend to ordinary contractual terms. The Secretary conceded that, in light of that judgment, Mr Hinks's continued employment with the Club would not breach section 118, which the Secretary had seen as the major impediment to granting the licence, and as a result of which Mr Hinks had discontinued his position with

---

<sup>1</sup> *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398.



the Club. In light of that decision and the Secretary's concession, the appeal is solely focused on section 113.

### **Summary of issues**

11. Prior to filing substantive submissions, the Secretary raised two issues of jurisdiction in a memorandum dated 2 March 2015. The Secretary argued that the scope of the appeal provision relied upon, section 77(1)(b), neither included a decision to grant a new licence subject to conditions nor a decision not to impose conditions. He further submitted that the challenged conditions had not been imposed. There are therefore two separate jurisdiction issues:
  - (a) whether the Act confers a right of appeal against conditions imposed when a licence is granted; and
  - (b) whether the Secretary did in fact impose conditions in this case.
12. If the Secretary did impose conditions and that decision can be appealed, the substantive issue is whether the Commission should exercise its discretion to confirm, reverse or vary the conditions. This involves two further issues:
  - (a) Can the Secretary impose conditions to control the risk of a breach of section 113 of the Act?
  - (b) If so, what conditions would be reasonable to reduce the risk that Mr Hinks might breach section 113 of the Act?
13. As neither party argued that, if the Secretary did impose the challenged conditions, they should be confirmed, the appeal focused on whether any conditions imposed should be varied or removed.

### **Jurisdiction on appeal**

14. The appeal was filed under section 77 of the Act, which relevantly provides:

#### **77 Appeal to Gambling Commission regarding class 4 venue licence**

- (1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—
  - (a) refuse to grant a class 4 venue licence to the corporate society; or
  - (b) amend or revoke a condition of the licence, or add a new condition to it; or
  - (c) refuse an application by the corporate society for the renewal of a class 4 venue licence; or

- (d) refuse to amend a class 4 venue licence held by the corporate society; or
  - (e) suspend or cancel a class 4 venue licence held by the corporate society.
- ...
- (4) The Gambling Commission may—
    - (a) confirm, vary, or reverse the decision of the Secretary; or
    - (b) refer the matter back to the Secretary with directions to reconsider the decision.
- ...

### **First jurisdiction issue – is there a right of appeal against a condition?**

15. Interpretation of section 77, which provides for the right of appeal, requires consideration of its statutory context. The power to impose conditions arises under sections 70 (as to conditions imposed when licences are granted and their later amendment by the Secretary) and 73 (as to amendments sought by a licence holder), the material provisions of which are as follows:

#### **70 Content and conditions of class 4 venue licence**

- (1) A class 4 venue licence must include the following information and conditions:
  - (a) the name of the corporate society that holds the licence; and
  - (b) the commencement date and expiry date of the licence; and
  - (c) the authorised purpose of the corporate society; and
  - (ca) the name of the class 4 venue; and
  - (d) the name of the venue operator; and
  - (e) the name of the venue manager; and
  - (f) a description of the class 4 venue and its location; and
  - (g) conditions about the class 4 gambling that may be conducted at the venue, including the number of gaming machines that may be operated; and
  - (h) details of the gambling equipment that may be operated at the venue; and
    - (i) conditions to prevent class 4 gambling being conducted at the venue unless the primary activity of the venue is offered and available at that time; and
    - (j) any other conditions added by the Secretary.

...

- (2) The conditions that the Secretary may add to a class 4 venue licence include—



- (a) conditions to ensure that both the venue operator and the venue manager can supervise effectively—
    - (i) the class 4 gambling at the venue; and
    - (ii) the venue personnel:
  - (b) conditions to minimise the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue:
  - (c) conditions concerning the banking of money from the gambling:
  - (d) conditions regarding the application or distribution of net proceeds from the class 4 gambling to or for authorised purposes:
  - (e) if the corporate society accepts applications for the distribution of net proceeds from gambling, conditions about the process for making, and the provision of information about how to make, an application:
  - (f) conditions regarding the display of the class 4 venue licence at the venue:
  - (fa) conditions to minimise the possibility of problem gambling at the venue:
  - (g) conditions encouraging responsible gambling at the venue:
  - (h) conditions specifying areas within a class 4 venue as the only areas permitted for conducting class 4 gambling:
  - (i) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act.
- (3) The Secretary may—
- (a) amend or revoke a condition of a class 4 venue licence; or
  - (b) add new conditions to a class 4 venue licence.
- (4) If the Secretary decides to amend or revoke a condition or add a new condition to a class 4 venue licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager, of—
- (a) the right to appeal the decision; and
  - (b) the process to be followed for an appeal under section 77.

....

### **73** Amending class 4 venue licence

- (1) A corporate society must apply to the Secretary to amend its class 4 venue licence if the corporate society proposes to—
- (a) change any gambling equipment at the venue; or
  - (b) increase the number of gaming machines that it may operate at the venue; or
  - (c) change any condition of the licence or any procedure that is a condition of the licence.

- (2) An application must be on the relevant standard form and be accompanied by any items listed in section 65 that the Secretary requests in order to consider the application and effect the amendment.
- (3) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.
- (4) Sections 66 and 67 apply to an application for amendment as if it were an application for a class 4 venue licence.
- (5) The Secretary must refuse to amend a class 4 venue licence if—
  - (a) the applicant does not hold the associated operator's licence; or
  - (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
  - (c) the Secretary is not satisfied that the applicant complies with section 69A; or
  - (d) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, including the obligations set out in section 69A, minimum standards, game rules, Gazette notices, and licence conditions.

16. Also potentially relevant are sections 75 (procedure for refusing to amend class 4 venue licence) and 78 (consequence of an appeal regarding a class 4 venue licence), the material provisions of which are as follows:

**75 Procedure for suspending, cancelling, or refusing to amend or renew class 4 venue licence**

- (1) If the Secretary proposes to suspend, cancel, or refuse to amend or renew a class 4 venue licence, the Secretary must notify the corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager of—
  - (a) the proposal to suspend, cancel, or refuse to amend or renew the licence; and
  - (b) the reason for the proposed suspension, cancellation, or refusal; and
  - (c) their rights, and the procedure to be followed—
    - (i) before the suspension or cancellation takes effect; or
    - (ii) as a result of the refusal to amend or renew the licence.
- (2) The corporate society or the parties to the venue agreement, and the venue manager may make written submissions to the Secretary concerning the proposed suspension, cancellation, or refusal to amend or renew within—
  - (a) 20 working days after the date of the notice under subsection (1); or
  - (b) any longer period that the Secretary allows if an application for an extension is made within the time period specified in paragraph (a).

- (3) The Secretary must consider any submissions made by the corporate society or the parties to the venue agreement, or the venue manager.

....

- (5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager of,—
- (a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or
- (b) for a refusal to amend or renew, the reason for the refusal.
- (6) If subsection (4) or subsection (5) applies, the Secretary must also notify the corporate society or the parties to the venue agreement, and the venue manager of—
- (a) the right to appeal the decision; and
- (b) the process to be followed for an appeal under section 77.

#### **78 Consequences of appeal regarding class 4 venue licence**

- (1) The conditions of a class 4 venue licence remain unchanged pending the outcome of an appeal if the appellant appeals an amendment or revocation of a condition or the addition of a new condition under section 77(1)(b).
- (2) A class 4 venue licence remains in force until—
- (a) the expiry of the period for an appeal under section 77(2); or
- (b) the date that the Gambling Commission specifies under section 77(5), if the appellant—
- (i) appeals a refusal to renew or amend the licence under section 77(1)(c) or (d); or
- (ii) appeals a decision to suspend or cancel the licence under section 77(1)(e).

17. As the subject of the appeal is the imposition of licence conditions, section 77(1)(b) primarily governs the right of appeal. Under section 77(1)(b), the appeal must be against a decision to “amend or revoke ... or add a new condition”. The Commission’s powers on appeal are tied to the decision made: as subsection (4) refers to “the decision” of the Secretary, it refers back to one of the decisions outlined in subsection (1). The first issue that the Secretary raised is whether the language in section 77(1)(b) applies to a decision to grant a new licence on non-standard conditions.
18. On a strict and literal construction, section 77(1)(b) arguably applies only to appeals against decisions to **change** conditions after a licence is granted. The terms “amend” and “revoke” suggest the existence of prior conditions that are altered. Similarly, the addition of a “new” condition suggests that there are pre-existing “old” conditions. However a broader interpretation is also possible: the Secretary might be considered to

“add a new condition” to a licence whenever he includes a condition that is not one of the standard licence conditions.<sup>2</sup>

19. In his initial memorandum the Secretary submitted that the narrow interpretation was correct. He highlighted that section 70(2) gives the Secretary the power to “add” non-standard conditions to a licence, whereas section 70(3) gives the power to “add new” conditions. The latter can only apply to existing licences with existing conditions: one cannot decide to amend, revoke or add new conditions to a licence before it exists. He submitted the use of the word “new” in the appeal jurisdiction is significant: it denotes that an appeal is limited to the exercise of the power under section 70(3). The Secretary submitted that a licence holder could challenge non-standard conditions imposed on new licences only by subsequently applying to the Secretary to amend them under section 73. If the Secretary refused to do so, the licence holder could then appeal under section 77(1)(d).
20. In the Commission’s view, the broader interpretation is correct. It is unlikely that section 77 is intended to operate in the more limited fashion suggested by the Secretary’s narrow construction. The statutory context generally indicates an intention to provide comprehensive appeal rights. There appears to be no logical reason why Parliament would intend that a licence holder could not challenge the propriety of a non-standard condition imposed on a licence merely because it was imposed when the licence was issued, but an appeal would be available against condition changes made at a later time.
21. The anomalous result of the Secretary’s contention is further highlighted when regard is had to the statutory procedure required by section 75. The procedure only applies if the Secretary refuses a licence holder’s application to amend a licence. It does not apply to the decision by the Secretary to impose or alter a condition. On the Secretary’s construction, he would have the power to impose any condition that he liked on the issue of a licence, with no prior notice or hearing, and the imposition would not be subject to any right of appeal. Imposition of a condition when granting a new licence would therefore be the only exercise of licensing power by the Secretary not subject to appeal and subject therefore to challenge only by way of judicial review (and within the limitations of that jurisdiction).
22. In addition, the alternative amendment process suggested by the Secretary under sections 73 and 75 would be cumbersome and would add cost and delay. Unnecessary costs incurred by licence holders diminish the funds available for distribution to the community, which is the very purpose of Class 4 gambling.

---

<sup>2</sup> The standard conditions are provided for in section 70(1) and non-standard conditions in section 70(2).



23. Accordingly, the Commission considers that an appeal under section 77(1)(b) is available whenever the Secretary imposes a non-standard condition on granting a licence under section 70(2) as well as when he amends licence conditions under section 70(3).
24. In interpreting section 77(1)(b), consideration should also be given to the effect of section 78(1), which provides that, in the event of an appeal under section 77(1)(b), “the conditions of a class 4 licence remain unchanged”. In his later submissions, the Secretary expressed concern that applicants may agree to conditions in order to obtain licences, only to appeal the conditions immediately after the grant in order to take advantage of a statutory stay under section 78.
25. Section 78(1) is silent as to what the conditions are “unchanged” from. There are three possible interpretations of section 78(1), namely:
- (a) The conditions would be unchanged from the position before the Secretary decided to impose them. In other words, the Secretary’s decision to impose conditions (but not the related decision to grant the licence) would be suspended pending the outcome of the appeal. On this interpretation, the holder of a newly granted licence, which is granted subject to conditions, could better his or her position by appealing, effectively being able to operate as if granted a licence without the contentious conditions.
  - (b) The Secretary’s decision would be unchanged in all cases while the appeal is pending. Such a construction would produce a consistent outcome, regardless of when the conditions were imposed, but, in some cases, would result in a practical inconsistency with section 78(2). By way of illustration, if the Secretary had the option of declining to renew a licence or renewing a licence with conditions that the licence holder opposed, the licence holder would be in a better position pending appeal if the licence were not renewed (because the licence would remain in force pending the appeal) than if the Secretary imposed conditions (because, under the second alternative interpretation, the licence holder would remain subject to the challenged conditions pending the appeal).
  - (c) The conditions would be unchanged from those initially imposed but the effect of subsequent changes in conditions would be suspended pending the outcome of the appeal. On this construction, section 78(1) would have a different result depending on whether the condition appealed were an original condition (in which case section 78(1) would preserve it pending the appeal) or

a later change (in which case section 78(1) would preserve the original conditions pending the appeal).

26. The Commission considers that the third interpretation is the correct one in statutory context. It ensures that section 78(1) cannot be used to strip the original licence grant of its conditions (in order to obtain something in the interim which the appellant had never previously enjoyed), as the Secretary fears; but it allows a licence holder to challenge changes to the originally imposed conditions with the benefit of interim relief, consistent with the sort of preservation of position that arises on loss of licences (section 78(2)). Such an approach preserves the *status quo ante*, which the Commission considers to be the objectively indicated underlying legislative intent, while neither of the alternatives does. In this case, as the conditions were imposed on grant of the licence, they have continued in effect despite the appeal, pending its outcome.
27. A similar result would be achieved if the Commission were to adopt the first interpretation and also interpret section 77(1)(b) narrowly, to exclude an appeal against conditions imposed when a licence were granted. Licence holders would thereby be unable to better their position by taking advantage of a section 78 stay. However, as outlined earlier, the narrow interpretation of section 77(1)(b) would be anomalous, illogical and impractical. For that reason, the Commission prefers the broad interpretation that confers comprehensive appeal rights in combination with the third interpretation of section 78.

### **Second jurisdictional issue - Did the Secretary impose conditions?**

#### *Appellant's initial submissions*

28. Hardy's Bar submits that the additional paragraph in the covering letter indicates that the Secretary intended Mr Hinks to be subject to two conditions:
- (a) He was to discontinue his role with the Club;
  - (b) He must abide by the attestation provided.

It submits that, once the Secretary expressly noted that those matters would be the subject of future audits, Mr Hinks was not free to ignore them. The intent was to impose obligations that constrained his actions and activities. If they are not conditions, they are unenforceable and the Secretary's comments would have no meaning or application.

29. Hardy's Bar also submits that it is free to appeal against the imposition of what it says are conditions. It relies on *Eureka Trust* (decision GC39/06) where the Commission noted that an appellant was not estopped from arguing against a condition that was

based on its own proposal.<sup>3</sup> It says that, at the time of agreeing to those conditions, Mr Hinks was under significant financial pressure to obtain the licence; without it, his newly acquired business would fail and his family trust would lose its investment. As Mr Hinks's options were "at best, limited and, at worst, nonexistent", it should not be precluded from appealing against the conditions.

30. In terms of the merits of the condition, Hardy's Bar argued there is a difference between ensuring the criteria for granting a licence are met and ensuring subsequent compliance with the Act. It submitted that the effect of the attestation does no more than affirm Mr Hinks's commitment to comply with the law, which is already a legal obligation. Therefore, it is redundant to impose it as a condition. It further submits that Mr Hinks's role with the Club was primarily administrative, albeit highly valued by the Club, and it is disproportionate to require him to resign from the position.

*Secretary's initial submissions*

31. The Secretary submits that the appeal is based on a misunderstanding about the obligation to comply with licence conditions imposed under section 70(1) and (2) of the Act and the requirement to comply with statutory obligations, such as those under section 113. The latter obligation may be relevant to the decision about whether to grant a licence. Under section 67(1)(r), the Secretary cannot grant a licence unless he is satisfied there are no factors likely to detract from the purpose of the Act, which includes limiting opportunities for crime and dishonesty associated with gambling. Therefore, the Secretary cannot grant a licence when he knows that, immediately upon granting the licence, a breach of section 113 would likely occur. To that end, the Secretary communicated with Mr Hinks to ensure that he understood his obligations and to find out how he would adhere to them.
32. According to the Secretary, if Mr Hinks considered that he would not have breached the Act by maintaining his contracted role, he could have done nothing. If the Secretary had refused to grant the licence, Hardy's Bar could have appealed that refusal. Instead, he chose to terminate his contract with the Club and provide the attestation. He argues that, as Mr Hinks had already done so before he granted the licence, it could not be a licence condition.
33. The Secretary says that the purpose of the additional paragraph in the cover letter, quoted above, was to remind Air Rescue of the events that led to the licence grant and to highlight that it would likely form part of any future audit. It was proper to do so because an audit can take into account compliance with the Act generally; an

---

<sup>3</sup> *Eureka Trust* (decision GC39/06) at [20].



inspector's power is not limited to compliance with licence conditions. He says that the reference to a right of appeal in the letter was an error and should be disregarded.

34. As Hardy's Bar relies on section 77(1)(b) of the Act, the Secretary submits that, even if that provides a right of appeal, it only applies if he imposed conditions. As he did not, the Commission has no jurisdiction to reconsider anything. He suggested that it would be more appropriate for Hardy's Bar to seek judicial review in the High Court, as its true complaint is the procedure the Secretary followed in making his decision and the Secretary's original interpretation of section 118 (since conceded).

*Appellant's submissions in reply*

35. In reply, Hardy's Bar accepted that the Secretary was entitled to ensure compliance with the Act, including sections 113 and 118, when issuing a class 4 licence. However, it submitted that the Secretary took this a step further in explicitly linking his decision in this case to his view of those sections (although it is not clear to the Commission how he could have done otherwise).
36. Hardy's Bar submits that determining whether there is a condition or not is a matter of substance, not form. The fact that the additional paragraph in the cover letter was not repeated in the conditions section of the licence is not determinative. It suggests that failing to do so was merely an accident. It argues that, in reserving his right to audit those matters, the Secretary must have had a purpose. That purpose was to require Mr Hinks not to resume his role with the Club and to comply with the attestation; that is imposing conditions.
37. The Appellant's submissions quote the definition of "condition" from *The Concise Oxford Dictionary* which states it is "a stipulation, something upon the fulfilment of which something else depends; and circumstances, esp those affecting the functioning or existence of something". Hardy's Bar submits the Secretary's decision to refer specifically to the matters in issue in the cover letter is clear evidence that those matters were something beyond general compliance with the Act. They were conditions, albeit in disguise.
38. Hardy's Bar was dismissive of the Secretary's claim that the reference to the right of appeal in its cover letter was in error. It says that the Secretary is trying to circumvent the statutory appeal rights that Parliament set out in the Act by imposing an obligation in communications but claiming that, as it is not formally a condition, it cannot be challenged.



## Analysis

### *Meaning of "condition"*

39. The term "condition" may have a number of legal meanings, depending on context. One definition refers to obligations that restrict future conduct by requiring or prohibiting certain actions. In the Commission's view, the Act uses the term "condition" in this way. For example, section 70(2) contemplates that the Secretary may impose specific directions on how a licence holder may bank money, distribute proceeds, minimise problem gambling and so on. Section 70(2)(i) authorises the addition of conditions consistent with the Act to promote or ensure compliance with it.
40. The term "condition" may also mean the prerequisites or criteria that must be fulfilled in order to obtain something. Section 67 of the Act requires the Secretary to be satisfied that certain criteria are met before he may grant a licence. The application's success is contingent on satisfying these matters and, if they are not satisfied after the licence is granted, it may be suspended or cancelled under section 74(1)(a). However, in the Commission's view "conditions", as the term is used in the Act, are not evaluative criteria like the prerequisites to a licence:<sup>4</sup> rather they are specific obligations imposed on licence holders.
41. Although the two definitions can be contrasted at a conceptual level, the distinction may not always be clear. For example, if the Secretary required an applicant to take a specific action in order to satisfy a criterion, even though there were other options available to it, and doing so restricted the applicant's future conduct, he may have in substance imposed a condition. In contrast, it may be the case that an obligation can only be fulfilled in one way. If the Secretary advises the applicant of his opinion to that effect, he has not imposed a condition.
42. The Commission is satisfied that it should assess the substance of what has occurred (rather than focusing solely on its form) in order to determine if it amounts to the imposition of a binding obligation or mere advice of what future compliance would be. Each case will turn on an assessment of its own facts.

### *Application to this case*

43. The fact that the alleged conditions are not recorded in the conditions section of the licence is not determinative. It is necessary to consider all of the circumstances to decide if the Secretary's actions amounted to the imposition of a condition.

---

<sup>4</sup> Section 74(1)(a) refers to them as "grounds"

44. The attestation and resignation arose out of discussions between the Secretary and Mr Hinks, recorded in email exchanges from 24 November 2014 to 23 January 2015. The emails suggest that, because the Secretary was aware of the financial pressure that Mr Hinks faced, he tried to work with Mr Hinks and Mr Steans to resolve outstanding issues and progress the application. To that end, the Secretary was open about the problems that the application faced and offered his opinion about the steps which could be taken to resolve them. The Secretary is correct that Mr Hinks was free to take a different view on those matters and to appeal any decision that he disagreed with. He chose not to and made voluntary concessions in order to guarantee the Secretary's satisfaction necessary to obtain the licence.
45. The strongest indication that the alleged conditions are were not imposed as conditions is an email dated 5 December 2014 from Ms Weight of the Department to Mr Hinks and Mr Steans. Ms Weight explicitly stated that Mr Hinks's undertaking could not be made into licence conditions because they would replicate section 113. A further indication is the failure to set the matters out in the part of the licence in which the formal licence conditions are recorded (as required by section 70(1)(j)).
46. In addition, although somewhat equivocal, the additional paragraph in the cover letter might be explained without it being a condition:
- (a) The reference in the cover letter to an audit does not necessarily turn the attestation and resignation into conditions. As the Secretary submits, the Act confers broad powers of inspection to ensure compliance with the Act generally, under sections 117 and 332. The additional paragraph gives notice to Hardy's Bar and Air Rescue that those matters may be audited for compliance. However the Secretary does not make clear what the source of those obligations would be: if they are not conditions, it is not clear how those specific matters would be auditable obligations under the Act.
  - (b) The fact that the letter later refers to a right of appeal against additional conditions does not necessarily turn the attestation and resignation into conditions. In the light of the Secretary's recorded view that he could not impose conditions, it is likely that the reference was indeed an error, as the Secretary submits.
47. However, viewed cumulatively, the Commission finds that the Secretary's actions constituted an attempt to control Mr Hinks's future conduct, albeit without formally doing so:



- (a) The Secretary's grant of the licence was clearly contingent on the resignation and attestation. The email correspondence indicates that, if he had not received those assurances, he would not have granted the licence. The Secretary naturally wished to ensure that Mr Hinks would continue to abide by them in the future. Imposing a condition is the normal way of ensuring that commitments and undertakings which result in the grant of a licence are directly enforceable.
- (b) The effect of the Secretary recording both his reliance and the possibility of auditing those matters is a clear indication that Mr Hinks must act accordingly in the future. The reference to audit is an indication that they were to be treated as obligations.
- (c) Although the Secretary considered imposing a condition formally, he considered that he was constrained from doing so because it would replicate the provisions of the Act.

48. Seen in that light, the terms of the Secretary's letter, followed by a contention that he had not imposed a condition, produced unfair uncertainty for Mr Hinks. The Secretary apparently sought to hold Mr Hinks to his resignation and attestation (because they were material to the Secretary's decision to grant a licence) by communicating to him that they are, in substance, matters of obligation and subject to audit but without formally imposing them as conditions.

49. The Secretary's recorded concern that, if these matters were treated as conditions, every aspect of his discussions with applicants could potentially become a condition of uncertain ambit is overstated. In this case, the "conditions" are identifiable because he chose to record his reliance on those specific matters in the covering letter. Whether it was appropriate and fair to do so, rather than recording them as conditions, is a matter addressed below. As noted earlier, when the fulfilment of prerequisites becomes, in substance, a condition will not always be clear cut, but room for uncertainty is reduced when the Secretary chooses to record matters relied upon in terms apparently intended to restrict the licensee's future actions in a particular manner. The alternative suggestion, that he recorded matters that may be audited, without formulating them as specific conditions (or otherwise stating the source of the obligations), creates even more uncertainty for licence holders.

50. The Commission finds that the Secretary's letter had the effect of imposing the stated matters as conditions on the licence granted, albeit that they were not imposed formally in the standard manner. Accordingly the Secretary's decision to do so is subject to the Commission's jurisdiction on appeal and may be confirmed, reversed or varied.



*Should conditions be imposed?*

51. On appeal, the Commission has jurisdiction to confirm, reverse or vary the conditions that were in substance imposed by the Secretary. Two further issues are relevant to how the Commission should exercise its discretion:
- (a) Can conditions be imposed to control the risk that an applicant will breach section 113 of the Act?
  - (b) If so, was there is such a risk in this case and what conditions are reasonable to reduce it?
52. This appeal focused on whether reversal or variation was appropriate. In part, this was because the Secretary's own position was that conditions were not necessary. Further, once it was conceded that the Secretary's original interpretation of section 118 could not be sustained, it followed that the conditions imposed as a consequence must have been excessive. The Commission therefore sought submissions, without prejudice to the jurisdiction arguments, on the appropriateness of imposing the following conditions on Mr Hinks working for a recipient of Air Rescue funding, namely the Club or Soccer Nelson Inc:
- (a) Mr Hinks does not hold the position of Secretary or Committee member;
  - (b) The grant recipient keeps all grant funds it receives from Air Rescue in a separate bank account;
  - (c) Mr Hinks is not involved in any decisions about the expenditure of those funds;
  - (d) Mr Hinks leaves the room whenever decisions about the expenditure of those funds is discussed and his absence is minuted; and
  - (e) Mr Hinks does not receive any payment from those funds directly or indirectly.
53. The Secretary's decision was also based on an undertaking not to employ Carmen Cartwright because the Secretary was not satisfied that she was a suitable person. The Commission considers that this undertaking should be treated consistently with the other matters raised in the letter.

**Further submissions**

54. In his further submissions, the Secretary argues that assurances sought and relied upon in deciding whether to grant a licence should not be considered to be implied conditions. If they were, neither party would have any clarity about the conditions imposed on any licence. Further, if they were, a licence holder could make concessions in order to

secure a licence, only to appeal those concessions on the basis that they were imposed conditions.

55. The Secretary accepts that the proposed conditions would not simply repeat the obligations of the Act: they impose greater restrictions on Mr Hinks. However, the Secretary submits that, following *Eureka Trust* (decision GC39/06), conditions should not be imposed to attempt to prevent the commission of a criminal offence. The Secretary considers that Mr Hinks understands his responsibilities and the onus is on him to ensure that he complies with the Act. The Secretary considers the Department can utilise its statutory powers to remedy a breach of section 113, regardless of whether a licence condition is in place. The Secretary further submits that such conditions would indirectly impose obligations on third parties, the grant recipients, who are not subject to the licence. Those parties and Air Rescue have not had an opportunity to be heard in this appeal.
56. In its further submissions, Hardy's Bar argues that, although section 113 prohibits Mr Hinks from being involved in or influencing the decision making process, it does not prohibit all contact or involvement with grant recipients. Hardy's Bar considers that *Eureka Trust* (decision GC39/06) effectively held that the Secretary should address a breach of section 113 by prosecution, licence suspension or cancellation, not by a licence condition that simply repeated the law. However, it considers that the proposed licence conditions would provide a greater degree of clarity and certainty and were therefore pragmatic and prudent. Contrary to the Secretary's submissions, it says that the conditions would not impose obligations on third parties – compliance would remain its and Air Rescue's responsibility.

**Can the Secretary impose conditions to control the risk of a future breach of the Act?**

57. Under section 67(1)(r), the Secretary cannot grant a licence when he considers a breach of the Act, such as a breach of section 113, would likely occur. Section 70(2)(i) of the Act permits the Secretary to impose any conditions "consistent with [the] Act that the Secretary considers will promote or ensure compliance with [the] Act". It is therefore surprising that the Secretary appears to have formed the view that it would be inappropriate to impose conditions that would reduce the risk of future breaches of section 113 and rely solely on prosecution of breaches after the event. His view appears to be based on an erroneous understanding of *Eureka Trust* (decision GC39/06), which is distinguishable from this case.
58. In the *Eureka Trust* case, the trust had engaged a contractor to process its grant applications, gaming net proceeds, proceeds accounting documentation and

administration. The same contractor also serviced the trust's gambling equipment at its licensed venues. The Secretary considered that the dual roles breached section 113. Faced with renewal of its licence being refused, the trust proposed that it would take back the grant processing and limit the contractor to servicing its equipment. The Secretary imposed a condition that the trust could engage the contractor to provide grant processing services or to service its equipment but not both. The Commission held that the proposal did not amount to an undertaking, so the trust was not estopped from appealing against the conditions.<sup>5</sup> The Commission agreed with the Secretary's underlying position that to provide both services would be a clear breach of section 113. However, it considered that the condition was unnecessary because section 113 already made that clear.<sup>6</sup> The condition amounted to nothing more than a statement that the trust should not breach section 113.

59. The present case is distinguishable on two grounds. In *Eureka Trust*, the condition merely repeated the substance of the section, instead of providing specific directions about how the risk of a future breach would be avoided in order to satisfy the Secretary that the criteria for a licence would be met. The difference is best explained by example using the facts of the *Eureka Trust* case. If the Secretary had imposed a condition that the trust was prohibited from involving the contractor in grant processing (reflecting the election for compliance made by the trust), the condition would not have merely reflected section 113 in the same way that a condition providing a choice did. Similarly, in the present appeal, a condition prohibiting the engagement of a particular person in a key role is not the same as a statement that a failure to restrict employment in the future to suitable persons only might have licence consequences.
60. If the Secretary has a concern which would prevent satisfaction, the concern may be met by imposing a condition which reduces a specific risk. In this case, the proposed conditions set out specific limitations on Mr Hinks's future conduct to minimise the risk of breaching section 113. This is not simply a general undertaking not to breach the Act (as in the *Eureka Trust* decision).
61. The second ground of distinction from *Eureka Trust* is that, in this case, Mr Hinks did not just put forward a proposal, he gave an undertaking. Although the decision was not specifically based on the point, it is consistent with other cases considered by the Commission that involved recording applicants' undertakings as conditions. For example, in *The Southern Trust Inc and Te Wheke Holdings Ltd* (decision GC17/07), the Secretary was concerned that the venue's main activity would be gambling using gaming machines because the venue did not have a liquor licence. The applicant

---

<sup>5</sup> *Eureka Trust* (decision GC39/06) at [20].

<sup>6</sup> At [36]-[38].



submitted a sworn affidavit from the venue manager that she had applied for a licence and was certain that she would be successful. The Commission noted that the Secretary could have granted a licence subject to the condition that the venue held a liquor licence.<sup>7</sup>

62. Similarly, in *The Southern Trust* (decision GC22/06), the Secretary had concerns about the use of the venue. He obtained financial records from the trust about the venue's turnover and accounts. One of the conditions imposed by the Secretary was that the venue's revenue from gaming machines could not exceed its revenue from other sources. The Commission considered that the condition focused inappropriately on the proportion of turnover as if that were a fair and reliable measure of the venue's use. However, if the trust had made representations or given undertakings to the Secretary that the venue's revenue from gaming machines would not exceed its revenue from other sources, the Secretary could have imposed a licence condition to that effect.<sup>8</sup> The Commission accordingly would have upheld the condition if it had reflected an undertaking given by the trust but reversed it solely because it was inappropriate to impose the particular condition unilaterally.
63. These cases demonstrate that the Commission has previously approved the practice of recording undertakings and representations as conditions, so long as they go beyond the obligations imposed already by the Act. Doing so provides transparency about the basis upon which the licence was granted. It enables the Secretary to grant licences in cases where he would not otherwise be satisfied that the section 67 criteria were met. It also provides proper notice of obligations about future conduct that makes compliance easier to monitor and enforce and a clear basis for audit.

#### **Can conditions indirectly constrain a grant recipient?**

64. Contrary to the Secretary's submission, the *Eureka Trust* decision did not find that a condition could not, in substance, restrain a third party's actions. Rather, the Commission decided that the conditions should be expressed as obligations on the licence holder, even though in reality it would affect the licence holder's relationship with a third party.

#### **Is there a risk that the Act would be breached in this case?**

65. Even when a condition is based on an applicant's undertaking to reduce the risk of the applicant breaching the Act, it might be disproportionate to impose it if little risk of that kind existed or the constraint were unreasonable. The Commission considers that it

<sup>7</sup> *The Southern Trust Inc and Te Wheke Holdings Ltd* (decision GC17/07) at [25](a).

<sup>8</sup> *The Southern Trust* (decision GC22/06) at [36]-[37].



should assess the level of risk in this case, bearing in mind that the applicable licence standard is its satisfaction with the criteria.

66. The Secretary's concerns about section 113 were based on the role that Mr Hinks performed for Soccer Nelson Inc and the Club. Although the former was described as being more administrative, both roles involved dealing with grant applications and the use of grant funds. It is difficult to argue that Mr Hinks's occupation of these roles does not produce an elevated risk of breach that might be difficult to detect. The difficulty of monitoring Mr Hinks's participation in prohibited conduct strengthens the case for the imposition of conditions to reduce that risk.

### **Conclusion**

67. The Secretary informally imposed conditions that are not appropriate, in the light of the subsequent concession regarding the scope of section 118. However, there remains a risk of Mr Hinks breaching section 113. The licence should be subject to reasonable conditions under section 70(2)(i) aimed at reducing the risk of breach of section 113. It is preferable to do so by imposing conditions than to rely on the Secretary detecting breaches subsequently and taking punitive action under the Act.

### **Decision of the Commission**

68. The Commission varies the decision of the Secretary to impose special conditions. In varying the decision, the Commission directs that the licence contain the following special conditions:

1. Mr Hinks is prohibited from providing services to the Nelson Suburbs Football Club ("**Club**") unless:
  - (a) Mr Hinks does not hold the position of Secretary or Committee member;
  - (b) The Club keeps all grant funds it receives from Air Rescue Services Ltd ("**Air Rescue**") in a separate bank account;
  - (c) Mr Hinks is not involved in any decisions about the expenditure of those funds;
  - (d) Mr Hinks leaves the room whenever decisions about the expenditure of those funds is discussed and his absence is minuted; and
  - (e) Mr Hinks does not receive any payment from those funds.
2. Mr Hinks is prohibited from providing services to Soccer Nelson Inc unless:

- (a) Mr Hinks does not hold the position of Secretary or Committee member;
- (b) The Soccer Nelson Inc keeps all grant funds it receives from Air Rescue in a separate bank account;
- (c) Mr Hinks is not involved in any decisions about the expenditure of those funds;
- (d) Mr Hinks leaves the room whenever decisions about the expenditure of those funds is discussed and his absence is minuted; and
- (e) Mr Hinks does not receive any payment from those funds.

3. Carmen Cartwright may not be employed in any capacity at the venue.

  
Graeme Reeves  
Chief Gambling Commissioner

for and behalf of the  
Gambling Commission

11/12  
December 2015

  
GAMBLING  
COMMISSION