

IN THE MATTER of the Gambling Act 2003

AND on appeal by **AIR RESCUE SERVICES LIMITED**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
P J Stanley
M M Lythe

Date of Decision: 17 September 2010

Date of Notification of Decision: 5 October 2010

**DECISION
ON APPEAL BY AIR RESCUE SERVICES LIMITED**

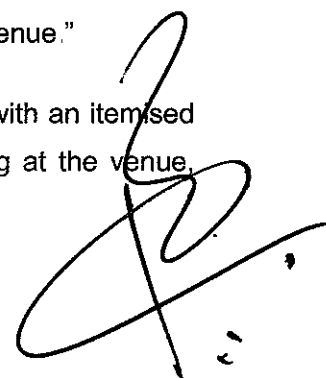
Appeal

1. Air Rescue Services Limited (the "**Appellant**" or "**Air Rescue**") appealed, under section 61(1)(b) of the Gambling Act 2003 (the "**Act**"), against a decision by the Secretary for Internal Affairs (the "**Secretary**") to add a condition to its venue licence for Robbies Bar and Bistro ("**Robbies**" or "**Venue**") providing that Air Rescue may only operate a total of nine gaming machines at the Venue. The Secretary based his decision to add the condition on the basis that section 92 did not apply to the Venue, because there was a period of six months or more since 17 October 2001 when no class 4 venue licence was held in respect of the Venue. Air Rescue appealed on the ground that it that it was entitled to a maximum of 18 machines under section 92.

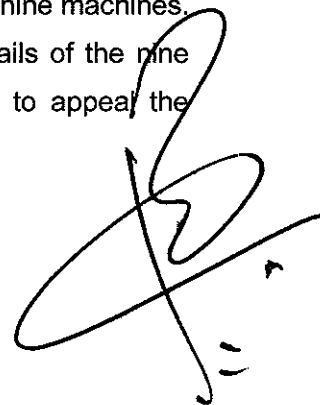
Background

2. The facts were largely not in dispute. The primary issue on appeal is a legal one, regarding the proper interpretation and application of section 92 of the Act. The relevant are as follows:
 - (a) A licence was held in respect of the Venue (formerly the Railway Hotel) from at least 1995 until 28 April 2009, and a licence was held on 17 October 2001, for the purposes of section 92(1)(a).
 - (b) On 19 October 2003, the Lion Foundation (which held a class 4 venue licence in respect of the Venue at that time) notified the Secretary as it was required to do so under section 89 of the Act that the number of gaming machines lawfully operated at the Venue on 22 September 2003 was 14.

- (c) The Venue changed societies to Eureka Trust on 30 August 2004.
- (d) Eureka surrendered its class 4 venue licence in respect of the Venue on 27 April 2009. For the purposes of section 92, the six month period from that date ran until 27 October 2009.
- (e) On 23 October 2009, the Appellant applied to the Secretary for a venue licence for Robbies. The application form gave details of one gaming machine that it proposed to operate. A covering letter to the application stated as follows:
 - (i) The Venue did not at that time hold a liquor licence, as the building was under construction. A licence would be applied for as soon as possible on completion.
 - (ii) The Appellant intended to operate 18 gaming machines at the Venue and an amendment to the application would be submitted once the equipment and associated paperwork were available.
 - (iii) The Appellant was unable, at that time, to provide any information in support of a venue expenses claim, because the Venue had not been operational for a period of time, and therefore no recent data was available. The Appellant would complete the necessary calculations as soon as practicable and forward the varied venue agreement to the Department at the earliest opportunity.
- (f) The Secretary responded on 3 November 2009, inviting the Appellant to complete the application by providing:
 - (i) a current on-licence; and
 - (ii) a completed venue expenses schedule and the most recent venue expenses schedule from the previous society.
- (g) On 9 November 2009 the Appellant provided the Secretary with a letter from the Tasman District Council confirming that "upon receipt of a complete application for an on-licence and subject to no objections being received, there should be no impediment to the issue of an on-licence for the Venue."
- (h) On 10 November 2009, the Appellant provided the Secretary with an itemised list of costs associated with the operation of class 4 gambling at the venue, based on the previous operator's costs.

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- (i) On 19 November 2009 the Secretary wrote to the Appellant proposing to refuse to issue the new class 4 venue licence because he could not complete the checks required under section 67 and assess compliance of the Venue with the Act as the Venue was still under construction.
- (j) On 11 December 2009 the Appellant filed an application to amend the original application by adding 17 more gaming machines.
- (k) On 17 December 2009, Air Rescue responded to the Secretary's proposal to refuse to issue the licence, stating that the Secretary ought to be able to have satisfied himself of the compliance issues raised in the proposal on the basis of the detailed plans Air Rescue had filed in its application.
- (l) On 20 January 2010 Air Rescue advised the Secretary that the Venue was approaching completion, and invited the Secretary to conduct an inspection. On 26 January 2010 a Department inspector wrote stating that it would arrange an inspection. Air Rescue followed up on 17 February 2010, asking if the inspection had taken place. On 18 February 2010 the Secretary advised Air Rescue that an inspector would visit the Venue in the first week of March 2010.
- (m) On 3 March 2010 the Secretary's inspectors visited the Venue and reported that the venue layout complied with the Act, but that the staff had not yet been trained on harm prevention and minimisation.
- (n) By 15 April 2010 the Secretary was satisfied that all the requirements in section 67 were met and was prepared to issue the licence. He then advised the Appellant of his intention to issue the licence for nine machines only and requested that the Appellant designate the details of the nine machines that it wished to operate.
- (o) Air Rescue disputed the Secretary's interpretation regarding the 9 machines, claiming that it was entitled to 18. Air Rescue emailed the Department on 5 May 2010 to say that, without prejudice to its view that it was entitled to operate 18 machines at the Venue and without prejudice to its rights of appeal (or review), it wished to proceed with the licensing of the Venue for nine machines. On 10 May 2010, Air Rescue provided the Secretary with details of the nine machines that it wished to operate, while reserving the right to appeal the condition.
- (p) The licence was issued for nine machines on 11 May 2010.

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- (q) The present appeal was lodged

The relevant statutory sections

3. Section 92 provides for 18 machine venues in the following terms:

92 Limit on number of gaming machines for which class 4 venue licence held on 17 October 2001

- (1) This section applies to a class 4 venue for which—
- (a) a class 4 venue licence was held on 17 October 2001; and
 - (b) there has not been a period of 6 months or more since 17 October 2001 when no class 4 venue licence was held.
- (2) A society must not operate more than 18 gaming machines at a class 4 venue.
- (3) The number of gaming machines notified to the Secretary under section 89(1), and the models and serial numbers of the gaming machines, must be treated as a condition of the class 4 venue licence and the society must not change the gaming machines, or operate more than that number of gaming machines at the venue, unless—
- (a) a new class 4 venue licence is obtained that allows the change; or
 - (b) the licence is amended to allow the change.
- (4) The limit in subsection (2) and the condition as to number imposed under subsection (3) may be overridden under section 95 or reduced by regulations made under section 314(1)(a).

4. Section 92(3) refers to a notice requirement (referred to in paragraph 2(b) above) which is set out in section 89:

89 Notification required

- (1) A society that operates gaming machines on the commencement of this section must notify the Secretary, in the manner that the Secretary reasonably requests, within 1 month after the commencement of this section of—
- (a) the class 4 venues where the gaming machines were lawfully operated (on the day 3 days after the commencement of this section); and
 - (b) the number of gaming machines lawfully operated at each class 4 venue (on the day 3 days after the commencement of this section); and
 - (c) the serial number and model of each gaming machine at each class 4 venue (on the day 3 days after the commencement of this section).
- (2) If the Secretary decides to cancel a class 4 operator's licence because a society has not complied with subsection (1)—
- (a) the Secretary is not required to follow the cancellation procedure under section 59; and

- (b) the Secretary must notify the society that the class 4 operator's licence is cancelled from the date of notification; and
- (c) there is no right of appeal from the decision.

5. Section 94 provides for venues to which section 92 does not apply and for which a class 4 licence is granted after the commencement of the section:

94 Limit on number of gaming machines for venue with venue licence granted after commencement

- (1) This section applies to a class 4 venue—
 - (a) to which section 92 does not apply; and
 - (b) for which a class 4 venue licence is granted after the commencement of this section.
- (2) A corporate society must not operate at a class 4 venue more than the greater of—
 - (a) 9 gaming machines; or
 - (b) the number of gaming machines approved by the Minister under section 96.
- (3) The limits in subsection (2) may be reduced by regulations made under section 314(1)(a)

6. As part of their submissions, both parties refer to section 98, which provides for the circumstances in which a territorial authority consent is required:

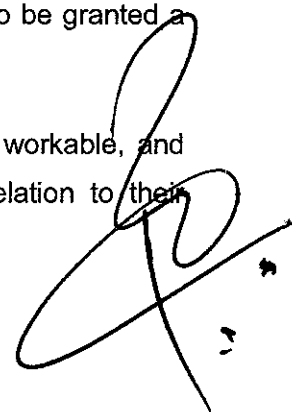
98 When territorial authority consent is required

A territorial authority consent is required in the following circumstances:

- (a) if a society proposes to increase the number of machines that may be operated at a class 4 venue (whether by way of an application for, or amendment to, a class 4 venue licence, and whether or not in association with an application for ministerial discretion under section 95 or section 96):
- (b) unless paragraph (c) or paragraph (d) applies, the first time there is an application for a class 4 venue licence for a venue for which a class 4 venue licence was not held on 17 October 2001:
- (c) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last 6 months:
- (d) on the commencement of this section, in accordance with section 93 for a class 4 venue—
 - (i) to which section 92 does not apply; and
 - (ii) for which there is a class 4 venue licence granted after 17 October 2001 and before the commencement of this section

Air Rescue's submissions

7. Air Rescue argued that Robbies is a section 92 Venue (and subject to a maximum limit of 18 gaming machines) because a class 4 venue licence was held in respect of the Venue on 17 October 2001, and there has not been a period of six months or more since 17 October 2001 when no class 4 venue licence was held in respect of the Venue. Air Rescue advanced two alternative arguments to support its contention that there has been no six month period in which no licence has been held for the Venue:
- (a) It is sufficient for the purposes of section 92 that a completed application for a licence is received by the Secretary before the end of the six month period.
 - (b) The licence should, in the circumstances, be backdated.
8. Air Rescue based its primary argument, that it is sufficient for the purposes of section 92 that a completed application be received within the six month period, on the following:
- (a) In decision GC17/07, the Commission held that the consent of a territorial authority was not required under section 98(c) where the Secretary had *received* an application for a new class 4 venue licence within the six month period, (albeit, in that case, on the last day). This reasoning should also apply to section 92(1)(b), so that computation of the relevant six month period should be the same. The intention of the two sections is essentially to allow the status quo to remain where a venue ceases to operate for up to six months.
 - (b) The High Court's comments in *First Sovereign Trust v Tauranga Hotels Limited* HC Wellington CIV 2005-485-512, 22 March 2005 are relevant. In that case, the applicant had applied for a venue licence in respect of an 18 machine venue the day after the previous licence was surrendered or expired but, towards the end of the six month period, the Secretary had proposed to decline the application. The 20 day period following the proposal within which the applicant was entitled to make submissions would have brought the process beyond the six month period. The Court made interim orders that the Secretary grant the licence for a day before the end of the six month period (in order to restart the calendar), noting, in doing so, that "process should not dominate or compromise the applicant's statutory opportunity [to be granted a licence for 18 gaming machines]".
 - (c) Air Rescue's interpretation produces a result that is practical, workable, and sensible, by providing corporate societies with certainty in relation to their



rights. The alternative interpretation proposed by the Secretary would produce significant uncertainty and would have the following consequences:

- (i) A corporate society would not know how many machines it could operate at a venue when it made its application, since the corporate society could not anticipate how long it would take for the Secretary to consider an application.
- (ii) In accordance with *First Sovereign*, where a corporate society become concerned that its application would not be processed in time, it will need to seek assistance from the High Court.
- (iii) An applicant's rights could be frustrated by unwarranted delay by the Secretary, which cannot have been intended by Parliament.
- (iv) In combination with the Secretary's prior unwillingness to consider a venue licence application until the Venue was completed, venue owners undertaking anything more than minor work at a venue would be at significant risk of the venue losing the ability to operate 18 machines, whereas the intention of the Act was to allow for significant work to be able to be completed (by providing for six months).

9. In the alternative, Air Rescue argued that the commencement date of the licence should be backdated to the date of application, in this case 23 October 2009. Air Rescue submitted that the commencement date appeared to have been backdated to 1 November 2009, with an expiry date of 31 October 2010.¹

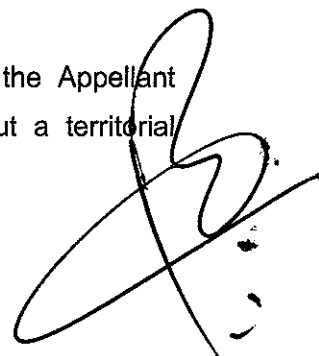
10. Accordingly, Air Rescue Services sought confirmation from the Commission that section 92 applied to the Venue, and asked the Commission to vary the decision of the Secretary and the licence to allow Air Rescue to operate 18 machines. Alternatively, Air Rescue sought that the Commission vary the Secretary's decision and the licence:

- (a) as to the dates for which the licence was issued to record that the licence was issued for the period from 23 October 2009; and
- (b) to confirm that section 92 applies to the Venue and that the Appellant is entitled to operate 18 machines at the Venue.

¹ The commencement date shown on the licence is 2 November 2008. Air Rescue made its submissions on the assumption that the date was a typographical error, and the commencement date was in fact 1 November 2008, which assumption the Secretary has since corrected.

Secretary's submissions

11. The Secretary submitted that section 92(1)(b) determines when the pre-Act entitlement to operate 18 machines can no longer be "grandfathered" owing to gaps in the licensing cover. This requirement could not, in his submission, be circumvented by filing premature applications relating to demolished premises or premises that were under construction.
12. While the Secretary conceded that there were no key factual disputes, he submitted that the history of the venue must be considered comprehensively. The history included the fact that the last corporate society to hold a venue licence for the Venue, Eureka, breached sections 77(1)(g) and 79(1)(a), which require a corporate society to notify the Secretary if its operation has been inactive at a venue for four weeks, and to surrender the licence unless it has received the Secretary's approval to maintain a longer period of inactivity. In the Secretary's submission, if Eureka had complied with sections 77(1)(g) and 79(1)(a), it would have surrendered its licence in August or September 2008, rather than April 2009. Furthermore, when the Secretary cancelled Eureka's venue licence for the Venue, Eureka appealed the decision (for the sole purpose, the Secretary submitted, of obtaining the benefit of an automatic stay), before eventually abandoning its appeal, after which the licence was finally cancelled/surrendered on 27 April 2009. The Secretary submitted that, although Eureka's "brazen abuse of process" and "clear breaches of the Act" cannot be attributed to the Appellant, they were relevant to the assessment of the "bona fides" of the licence in the "broader purposive scheme of sections 89-94". The Secretary implied that the Appellant should not benefit from the windfall of Eureka's breaches, which meant that the licence had already continued in force for a much longer period than it should have, before 27 April 2009.
13. The Secretary made three alternative arguments in his submissions:
 - (a) The decision to issue a licence authorising the Appellant to operate up to nine machines at the Venue was correct in law pursuant to sections 92(1) and 94;
 - (b) Accepting the Appellant's legal argument should lead, on the evidence, to a finding that the maximum number of machines at the Venue cannot exceed one without a consent from the territorial authority;
 - (c) Alternatively, if the Commission rejected both of the above, the Appellant cannot operate more than 14 machines at the Venue without a territorial authority consent, pursuant to section 92(3).



14. In support of his primary argument, that the decision to issue a licence for nine machines was correct under sections 92 and 94, the Secretary submitted, in summary:

- (a) Section 92(1)(b) means that a six month period when no licence is held breaks the continuity requirement and leads to the loss of the “grandfathered” status. On 28 October 2009, the Venue was still unlicensed and had been for six months. The filing of the incomplete application for one machine on 23 October 2009 did not stop the calendar.
- (b) Whereas the Secretary’s interpretation accords with the plain words of section 92(1)(b), the Appellant’s interpretation requires the Commission to read words into section 92(1)(b) as follows:

There has not been a period of 6 months or more since 17 October 2001 and until the date on which an application for a new class 4 venue licence was filed when no class 4 venue licence was held.

- (c) Importing a temporal link to the filing of the application into section 92(1)(b) would create an incentive to file incomplete applications for the sole purpose of preserving the 18 machine entitlement.
- (d) The application that Air Rescue filed on 23 October 2009 was so incomplete that it was not possible to grant a licence pursuant to it.
- (e) Air Rescue’s interpretation is not assisted by section 98(c) because, although the two sections are indirectly related, they serve different purposes. Section 92(1)(b) refers to the number of machines that can lawfully be operated at a venue and the point at which an “old” venue loses its pre-Act entitlement and becomes subject to the same provision as any “new” venue. Section 98(c) defines a procedural requirement to attach a territorial authority consent to a class 4 application under sections 65(2)(b) and 67(1)(f). Further, the language and content of section 98(c) (together with sections 65(2)(b) and 67(1)(f)) expressly link the requirement of a territorial consent to the time of filing of the application.

15. In the alternative, the Secretary submitted that, if the Appellant’s argument that it was sufficient for the purposes of section 92(1)(b) to have filed the application was correct, the Appellant was entitled only to one machine. The Secretary submitted that the fact that the Appellant added 17 machines to the application almost two months after the initial application indicated when the Appellant would have filed its application if it had not been for the ramifications of section 92(1)(b). To allow the Appellant to “put a foot in the door” with an application for one machine to stop the calendar, complete the

purchase of 17 more machines and then seek to add them to the existing application by amendment would deprive section 92(1)(b) of its meaning and purpose. If the Commission accepted the Appellant's argument, the Appellant would be entitled to one machine, as that is all that it applied for on 23 October 2009. The later "amendment" to 17 machines was a new application, and would require territorial authority consent under section 94 to operate up to nine machines.

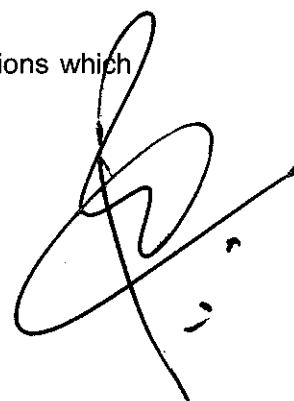
16. As a second alternative argument, the Secretary submitted that, if the Commission accepted that:
- (a) filing the application, albeit incomplete, within six months from 27 April 2009 met the requirement in section 92(1)(b); and
 - (b) the Appellant, having included only one machine in its original application, was able to add more machines while preserving the original application date for the purposes of section 92(1)(b);

then the maximum number of machines that the Appellant could have included in its application was 14 by virtue of section 92(3). This is because the number of machines lawfully operated at the Venue on 22 September 2003 and notified to the Secretary under section 89 was 14. The Appellant cannot operate more than 14 machines without Territorial Authority consent pursuant to section 98(a).

17. The Secretary concluded that section 92(1)(b) imposed a duty of diligence on societies that wish to retain pre-Act numbers of gaming machines. The Act does not deprive venues of pre-September 2003 numbers of gaming machines, so long as those venues maintain reasonable continuity of operation. This venue had not maintained the required continuity of operation either technically or in substance.

The Appellant's submissions in reply

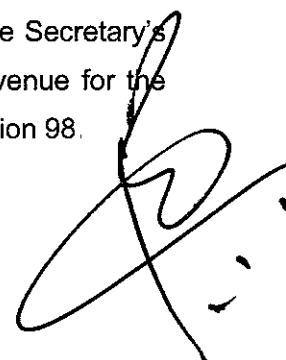
18. The Appellant submitted in reply, in summary, that:
- (a) The Appellant's interpretation would only result in successful applications "stopping the clock". An ultimately unsuccessful application would not.
 - (b) Eureka's breaches are irrelevant.
 - (c) Its interpretation is consistent with the Act as a whole. Other sections which support the view that the application date is generally relevant are:



- (i) Section 72(6), which provides that a venue licence continues in force after its expiry date, provided that an application for renewal has been made before the expiry date (and has not been refused);
- (ii) Section 56(6), which includes a similar provision in relation to an operator's licence;
- (iii) Sections 62 and 78, in relation to appeals, which provide for the status quo to be maintained once an appeal is filed.

The above sections demonstrate, in the Appellant's view, a focus on the application date. The Appellant argues that this focus acknowledges the need for certainty in the licensing process and recognises that it is difficult, if not impossible, for a society to determine when a renewal application would need to be made in order to ensure that the Department or Secretary would make a decision before the expiry of a licence.

- (d) If the Secretary's interpretation is accepted, it is possible, and even likely, that a society could apply for a licence well within the six month period but that the six month period would run out while the application was still being considered. In such a case, the society would have a right of appeal to the Commission, but might be deprived of its right under section 92 if the six month period ran out during the course of that appeal
- (e) It is the Secretary's interpretation, rather than the Appellant's, that is likely to create an incentive to file incomplete applications, because societies will file them as early as possible in order allow maximum time for them to be processed.
- (f) The Secretary did not return the application as incomplete and is estopped from now asserting that it was incomplete. The Appellant successfully applied for a licence on 23 October 2009 regardless of when that licence was issued.
- (g) The Secretary does not provide any compelling policy reason for interpreting section 92 differently from section 98. Both sections relate to the number of machines that can be operated at a venue and both effectively allow a six month grace period before previous entitlements will be lost. The Secretary's interpretation, however, means that a venue might be a "new" venue for the purposes of section 92, but an 'old' venue for the purposes of section 98.



- (h) The Appellant also filed, as part of its evidence in reply, a copy of a letter from Tasman District Council dated 18 December 2006, which it claims is territorial authority consent to operate 18 machines at the Venue. The letter states:

This is to certify that the application for an increase from 14 to 18 gaming machines at the Railway Hotel, 321 Queen Street, Richmond, complies with the Tasman District Council's Venues Policy under the Gambling Act 2003. As the Railway Hotel had a Class 4 venue licence prior to October 2001, this Policy does not restrict the number of machines up to the maximum permitted under the Act.

- (i) Both the Secretary's alternative grounds can be dismissed on the basis that a territorial authority consent has been obtained, and provided. In relation to the argument that, even if the Appellant had "stopped the clock", it did so for only for one machine, for the purposes of section 92, the number of machines licensed is irrelevant. For the purposes of section 92(1)(b), a licence to operate one machine is no different from a licence to operate 18 machines. Provided that the requirements of section 98 are met, there is nothing in the Act to prevent a venue that has operated only one machine continuously since 17 October 2001 from applying to be permitted to operate 18 machines.
- (j) The Secretary's interpretation compromises the intention of section 92, because rather than allowing a period of six months of non-operation, it reduces that period by weeks or months in order to allow the applicant to make a "complete" application with sufficient time for the Secretary to process the application.
- (k) The Appellant's application to include a further 17 machines was not a new application for a venue licence on a new date. Rather, it was an application to amend the licence applied for on 23 October 2010, and this was how both parties treated it. Section 92(3)(b) specifically allows an increase in the number of machines operated at a venue to be dealt with as an amendment. Accordingly, the Secretary's letter of 11 May 2010 recorded that the Appellant's licence was granted in response to the Appellant's application on 23 October 2009.
- (l) The Secretary did not address the alternative relief sought by the Appellant, that the licence be amended to commence on or before 27 October 2009. Despite the Secretary's assertions that the Appellant's application was incomplete, the fact remained that the application made by the Appellant on 23 October 2009 was processed by the Secretary and resulted in the granting of a licence for the period from 1 November 2009 to 31 October 2010. (This

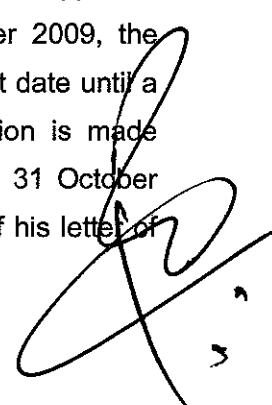
argument was based on the Appellant's assumption that the dates actually shown on the licence – 1 November 2008 to 31 October 2009 – were in error).

Further information

19. Following the Secretary's submissions, the Commission sought more information from the Secretary (with a right of reply by the Appellant) on the Secretary's practice of backdating and whether or not the Secretary had backdated the licence in this case. Both parties also sought, and received, leave to file further evidence in relation to the purported territorial consent from Tasman District Council.

Backdating of licences

20. The Secretary submitted, in summary, that:
- (a) He never backdates the commencement date of new licences. He does backdate the commencement date of renewed licences to the expiry date of the previous licence (but not to the date on which the application was received).
 - (b) The Secretary did not backdate the Appellant's venue licence in the present case and the dates on the licence, 1 November 2008 to 31 October 2009, were not a typographical error. The dates on the venue licence for the Venue were the date of Air Rescue's operator's licence. This is because the Secretary is obliged under section 70(1)(b) to state on all class 4 venue licences the commencement and expiry date, but must balance this requirement with the fact that he will not always know what the expiry date will be. The uncertainty over the expiry date of a venue licence arises from the fact that a venue licence automatically expires when the operator's licence expires. The Secretary therefore considers the expiry date of the operator's licence to be the expiry date of all associated venue licences (except where he issues venue licences for a shorter term).
 - (c) In this case, the Appellant applied for the venue licence shortly before the expiry of its operator's licence, on 31 October 2009. As the Appellant applied to renew its operator's licence before 31 October 2009, the Appellant's operator's licence continues in force beyond that date until a decision is made on the renewal; however until a decision is made regarding the renewal application, the expiry date remains 31 October 2009. The Secretary then stated at paragraphs 12 to 14 of his letter of explanation:

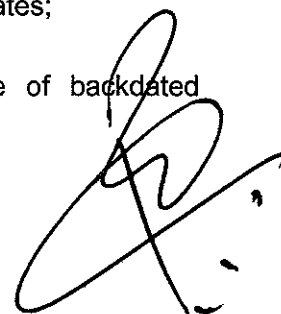


As for the Licence at issue: This venue licence was issued on 11 May 2010, which should also be its correct commencement date. A question still exists as to the expiry of the Licence. Because it was issued at a time when its associated operator's licence continued in operation under s 56(6) with the stated expiry date of 31 October 2009, it is difficult to determine what is the correct expiry date in law. It is the view of the Secretary that, in practical terms, this venue Licence will not have a designated expiry date until its associated operator's licence is renewed.

The above creates a tension between the requirements in s70(1)(b) and s72(6), as well as between s53(1)(b) and 56(6). The Secretary's solution to this problem has always been to state on all venue licences the commencement and expiry dates of the operator's licence. This practice has led in this case to a meaningless statement on the Licence. The Licence was issued on 11 May 2010, but its stated dates of commencement and expiry were those of the associated operator's licence, i.e. 1 November 2008 to 31 October 2009.

21. The Appellant replied, in summary that:

- (a) The Secretary's approach to venue licensing indicates a misunderstanding of the Act. Although a venue licence cannot be **issued** without an associated operator's licence, it can remain in force despite its associated operator's licence ceasing to exist.
- (b) There is no statutory justification for treating applications for new licences differently to applications to renew licences.
- (c) There would be no mischief in specifying the application date as the commencement date because it would be impossible for the Applicant to lawfully conduct gambling at the venue in question before a licence was issued.
- (d) The venue licence should include all necessary information on its face and should not contain meaningless statements.
- (e) There is nothing to prevent the Commission from granting a venue licence for Robbies with a commencement date of 23 October 2009 and an expiry date of 31 October 2010 (to align with the next likely expiry date of the Appellant's operator's licence). Such an approach:
 - (i) would be consistent with the Act and with the Secretary's obligation to issue licences with both commencement and expiry dates;
 - (ii) would be consistent with the Secretary's practice of backdated licences issues following renewal applications; and



- (iii) would avoid the need for the meaningless statement and factual impossibility identified by the Secretary.

22. In the alternative, the Appellant submitted that Venue was licensed for all the relevant period. Section 71(1)(b) requires the Secretary to specify an expiry date and a commencement date. The Secretary has clearly done so: the commencement date was 1 November 2008 and the expiry date was 31 October 2009. The Venue has therefore not had a period of six months without a licence.

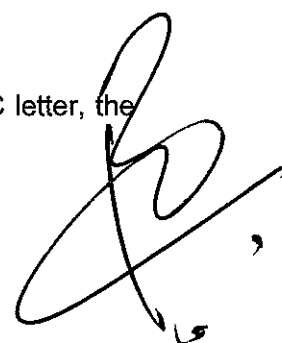
Territorial authority consent

23. The Secretary filed an affidavit by Jean Hodson, manager of regulatory services at Tasman District Council (“TDC”). Ms Hodson was the author of the 18 December 2006 letter, which the Appellant relied on as territorial authority consent for 18 machines. Her evidence is that the letter relied upon by the Appellant is not a consent.

24. Ms Hodson deposed that the letter was in response to an application by Eureka Trust on 14 December 2006 to increase the number of gaming machines at the Venue from 14 to 18. Eureka’s cover letter stated that the Venue had “always been licensed as an 18 machine venue” and that it had been Eureka’s own decision to operate fewer machines. An excerpt of the licence was attached to the application, and it stated that the maximum number of machines allowed at the Venue was 18. Ms Hodson now understood that the section 89 notification for the Venue was only for 14 machines, and that page 3 of the licence (with which she was not provided) listed only 14 machines. She appears to have thought that, while 18 was the maximum legal entitlement for the venue, a territorial authority consent was still required to allow the effective increase from 14.

25. Ms Hodson further explained that, having been led to believe that the Venue was already licensed to operate 18 machines, TDC issued the letter dated 18 December 2006 certifying that the Council’s policy did not “restrict the number of machines up to the maximum permitted under the Act.” This was not a consent, merely a certificate confirming that the requested increase complied with the Council’s policy at the time. If TDC had known that the number notified under section 89 was 14 and that the increase to 18 machines did require a consent, such a consent would not have been given because TDC’s policy at the time did not permit increases to 18 machines in non-club venues.

26. In response to the Secretary’s submissions and evidence regarding the TDC letter, the Appellant submitted:

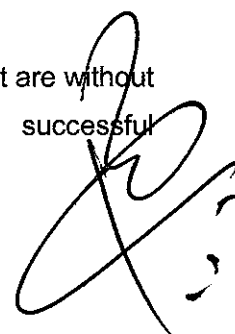
A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a series of loops and a long horizontal stroke extending to the right.

- (a) On the fact of it, the TDC letter of 18 December 2006 was a territorial authority consent. Eureka's letter to TDC included a completed standard application form produced by TDC and the cover letter specifically referred to the need for Eureka to obtain territorial authority consent.
- (b) Eureka, and now the Appellant and the venue operator (in making provision for 18 machines in its redevelopment), have relied on the TDC letter as being a territorial authority consent. That interpretation is clearly available from the letter itself and it appears that the Department also initially considered the letter to be a consent. In the circumstances TDC (and the Secretary) must now be estopped from denying that the letter is a territorial authority consent.
- (c) The Hodson affidavit does not correctly record the effect of TDC's policy. The policy does not include a provision specifically permitting the increase but nor does it contain any provision preventing the consent from being granted. It is not necessary for a territorial authority consent to include empowering provisions in order for the territorial authority to be able to grant an increase in machines.
- (d) If the Secretary's first alternative argument is accepted, then any society operating fewer machines than the number it may operate (under the condition imposed by section 92(3)) would need a territorial authority consent to increase the number of machines it actually operates within its section 92(3) limit. Necessarily, it follows that a society that temporarily removes one machine (and seeks amendment to its licence, as required under section 73) will need a territorial authority consent to put that machine back in. That position cannot practically be correct. The Appellant would not have needed territorial authority consent to increase machine numbers had the application been to an increase to 14 machines only. Accordingly, if the Commission accepts that the statutory maximum number of machines able to be operated at the venue is 18, but does not accept that the Appellant has territorial consent, for an increase to that number, the Appellant is entitled to operate up to 14 machines

Analysis

27. The appeal raises the following questions:

- (a) Should section 92(1)(b) be interpreted so as to apply to venues that are without licences for six months but in respect of which ultimately successful applications are filed for licences within the six month period?



- (b) If not, what is the period of the licence which was, or should have been, issued?
- (c) What licence should now be issued with respect to dates of commencement and expiry and to the number of machines?
28. The first issue for determination is the status of the Venue, whether it is a section 92 Venue (with a potential maximum of 18 machines) or a section 94 Venue (limited to a maximum of 9 machines). It is an issue of statutory interpretation and application based on common facts.
29. Section 92 governs the maximum number of gaming machines at certain venues for which venue licences were held on 17 October 2001. It is limited to venues for which licences were held on 17 October 2001, *and* for which a licence has been held for a specified continuous period. Those venues are subject to an increased cap of 18 machines. The cap is still a limit rather than an entitlement, so that venues for which licences were held at 17 October 2001 but which operated fewer than 18 machines on 22 September 2003 are limited to that lesser number, and cannot increase the number of machines (within the 18 machine cap) without obtaining a new class 4 licence that allows that change (section 92(3)) or amending the licence (section 92(3)(b)).
30. The Commission first considered whether section 92(1)(b) should be interpreted so as to apply to venues that are without licences for six months but in respect of which ultimately successful applications for licences are filed within six month. The Commission concluded that it should not be so interpreted for the following reasons:
- (a) The wording of section 92(1)(b) regarding the computation of time differs expressly and fundamentally from the wording of section 98(c) and from the other provisions to which the Appellant has referred, in respect of the same matter. The decision in GC 17/07 was concerned with the computation of time under section 98(c) which is expressly delimited by the filing of the application (in that it requires a state of affairs as at that date). Section 92 contains a fundamentally different requirement – a state of affairs which must be maintained continuously and which is not delimited by filing an application. The Commission is not prepared to construe as functionally identical two provisions which Parliament has chosen to express in different terms.
- (b) The interpretation suggested by the Appellant is wholly at odds with the decision in *First Sovereign Trust v Tauranga Hotels*. Not only does the decision contain a number of statements to the contrary, but an essential

element in the Court's reasoning was the need for the **issue** of a licence (not a mere application) in order for the opportunity in section 92 to be preserved.

In the Commission's view, calculation of the period in section 92(2)(b) is not affected by the mere filing of an application within the period.

31. Although the Appellant's argument that section 92(1)(b) should be read as if a mere application satisfied the requirement of the subsection fails, that is not necessarily the end of the matter for two reasons:

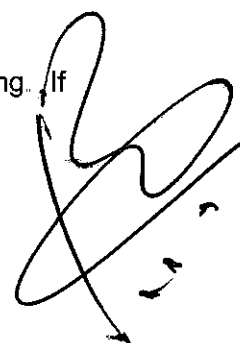
- (a) On 11 May 2010 the Secretary issued a venue licence for the period 1 November 2008 to 31 October 2009 and the Secretary has confirmed that the decision to do so was deliberate (and not a typographical error as the Appellant assumed). Technically, the effect of doing so was to restart the 6 month period on 1 November 2009.
- (b) In any event, the Secretary has the power to backdate the effective commencement of a licence and therefore should consider whether to use that power in order to preserve sufficient continuity in appropriate cases. The Commission has the same power on appeal.

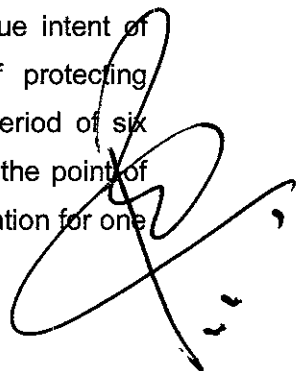
32. The licence issued on 11 May 2010, and the subject of the appeal, has many difficulties:

- (a) It was issued more than 6 months after the application was made.
- (b) It specified a commencement date more than a year prior to the date of application and an expiry date only a few days after the application date.
- (c) By the date of issue, it had been expired for just over six months.

33. The Secretary, and now the Commission on appeal, can specify a commencement date prior to the date of issue and the effect of doing so will be retrospective, such that the condition in section 92(1)(b) could be satisfied by backdating the commencement date of the licence:

- (a) Section 70(1)(b) requires the commencement and expiry date to be specified, but does not restrict the commencement date and restricts the expiry date only by reference to the commencement date (not more than 18 months later).
- (b) There is no reason to imply into section 70(1)(b) a restriction on backdating. If such a restriction had been intended, the section would have said so.



- (c) In addition, the ability to backdate the commencement date is potentially useful in preserving continuity in any situation in which that is considered appropriate. An obvious situation where that might be appropriate would be on appeal. In the case of a successful appeal, it would be odd to imply a restriction on the Commission's powers such that it could not restore the successful appellant to the position in which it ought to have been originally.
- (d) Such an approach is consistent with the *First Sovereign* decision cited above. The Court was prepared to make interim orders to preserve the applicant's position so that the Court would be in a position to provide an effective remedy in the event that the judicial review application were successful. The Commission is not prepared to construe its powers by implication so as to prevent it granting an effective remedy on appeal.
34. The form of the licence issued is inherently contradictory and has, in the Commission's view, created confusion. On 11 May 2010 the Secretary issued a licence which states on its face that it commences on 1 November 2008 and expires on 1 October 2009, but he submits that the licence was not backdated. His reason for saying so seems to be that he considers that, contrary to what the document that he issued says, the licence actually commenced on 11 May 2010 and does not (yet) have an expiry date.
35. The Commission has concluded that it must rectify the confusion created by the licence issued by the Secretary. The problem seems to have arisen from an unnecessary attempt to achieve the impossible, namely, the issue of a licence with complete and accurate foresight about its future expiry. That was neither necessary nor possible. All licences issued under the Act are for periods which can be shortened by the intervention of subsequent events. In this case, the Secretary should have selected an appropriate commencement date and set an expiry date of up to 18 months time without being concerned whether the licence might be brought to an end by a later event and its statutory consequences.
36. The Commission considers that the Secretary has made an error in the commencement and expiry dates of the licence issued on the application, so the next issue for the Commission is fixing the appropriate commencement date in all the circumstances.
37. In the Commission's view, the submissions of neither party reflect the true intent of section 92, the Appellant contending that there is a presumption of protecting "grandfathered" rights at virtually all costs (and asserting a "right" to a period of six months of non-operation), with the Secretary approaching the matter from the point of view that attempts to preserve the rights (by, for example, making an application for one
- 

machine) are somehow improper. In the Commission's view, the correct position lies between these extremes:

- (a) Section 92 is a "grandfathering" provision. It provides for those who had an existing right to continue to enjoy it in the future if certain conditions are met, although no similar new rights would be conferred in the future.
- (b) The preserved position is therefore aberrant, not the general or current rule. It is difficult to discern an intention to see such aberrations preserved at all costs.
- (c) On the other hand, Parliament clearly intended that those rights should continue to be enjoyed by those who were qualified to hold them. There is no discernable intention that they should casually be lost, especially by delay or error on the part of the Secretary.
- (d) The continuity requirement is maintaining a venue licence with a gap of no more than 6 months. Difficulties may arise with delay in dealing with an application (and any appeal), whether this is the result of unwarranted delay by the Secretary or the sort of difficulties which are inevitably created when a venue undergoes redevelopment. These concerns were noted by the High Court in the *First Sovereign* decision and the Court was prepared to grant relief against them to preserve the statutory opportunity.
- (c) It would be reasonable for backdating powers to be exercised to protect the applicant against loss of statutory opportunity arising from unwarranted delay or error by the Secretary **in appropriate cases**.
- (d) The Secretary should consider whether and how an application made with a view to preserving a section 92 position can be dealt with so as to preserve the opportunity. This includes such possibilities as granting a licence for a day (to restart the calendar) as the High Court did in *First Sovereign*, granting the licence subject to extensive conditions (a possibility suggested in *First Sovereign*) or backdating the commencement date.
- (e) This does not mean that the Secretary should necessarily conclude that preservation is appropriate in all cases but, in this case, he appears to have started from the dubious position that all applications that seek to preserve the statutory opportunity are wrong in principle.
- (f) In the circumstances, there is nothing objectionable in principle in seeking a one-machine licence in order to preserve continuity (although doing so may

bring section 98 into effect) or to seek a licence for premises which are undergoing renovation.

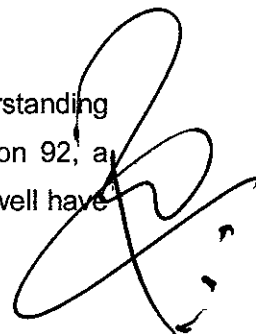
- (g) On the other hand, the history of the Venue is relevant and the Secretary has a valid point, so far as the exercise of a discretion goes, that the Venue should have been without a licence for a much longer period, the effective end date being the result of a breach by the former licence holder of a statutory obligation to surrender the licence, and a procedurally cynical appeal which preserved an unlawful position and was then abandoned. The present circumstances are very different from those before the High Court in *First Sovereign*.

38. The reason for saying that the history of the Venue is relevant is that the focus of section 92(1)(b) is on the venue, not the applicant. The acts of the former licence holder are not attributed to the applicant. Rather, the applicant seeks to take advantage of the particular history of the venue. In doing so, the applicant is fixed with the entire relevant history, not just the favourable parts, or the parts for which it has responsibility.

39. Section 92 aims to permit retention of a grandfathered position at venues which have maintained reasonable continuity of licensed operations. While the Commission does not think that section 92 needs to be applied strictly, without relief against delay or error by the Secretary and possibly taking into account events outside the applicant's control, the Secretary may also conclude that the discretion to backdate should not extend to venues which in reality lack the intended continuity in other than a technical sense, especially when the technical continuity has arisen from a breach and a meritless appeal.

40. The Commission has decided that, in this case, the licence commencement should be backdated to the date of application, namely 23 October 2009. The effect of doing so will preserve the status of the venue under section 92. The decision to do so has not been easily reached. Normally the sorts of concerns raised by the Secretary about the venue's history would result in a view that the intended continuity had not been maintained in substance and, generally speaking, applications made at the very end of the six month period could not necessarily expect the exercise of a backdating discretion as a matter of course (especially if they lack sufficient detail to be granted). The following matters however have tipped the balance in favour of backdating:

- (a) The Appellant appears to have proceeded on the basis of a misunderstanding of what was required to satisfy the continuity requirements of section 92, a matter on which the Commission has now ruled. The Appellant may well have



made commercial arrangements on the basis of its erroneous assumption. Following this decision clarifying the effect of section 92, future applicants will not be able to claim to be in a similar position.

- (b) The licence issued contained critical errors as to the commencement and expiry dates which the Commission has rectified in this appeal. Again, these circumstances would not be expected to recur.
- (c) The Secretary appears to have proceeded on the basis that an application brought for the purpose of preserving the position under section 92 was objectionable in principle and therefore gave no consideration to whether steps should be taken to preserve the position under section 92

The Commission considers that, by a small margin, the position of the Appellant, whose appeal has resulted in clarification of the position, should be preserved. In future cases, the Secretary will need to make his own assessment of whether, in all the circumstances, discretion should be exercised to preserve section 92 status. The answer will not necessarily be positive, especially in cases where reasonable continuity of licensed operation has not been maintained in substance, including for reasons of reconstruction.

- 41. The final issue on the appeal relates to the number of machines for which a licence should be issued. While, in the particular circumstances, the Commission is prepared to allow the appeal on terms which preserve the section 92 status of the Venue, and maintain the permitted number of machines at 14, the evidence before the Commission regarding the facts which impact on the application of section 98 is unsatisfactory. The Commission has decided that the preferable course is to refer the application back to the Secretary for a decision on the application of section 98.
- 42. In the Commission's view, neither section 98(b) nor section 98(c) apply to the Venue: it had a class 4 venue licence on 17 October 2001 and an application was made within six months after the previous licence was held. Only section 98(a) has potential application. The relevant increase referred to, in a case like the present, is a proposed increase in the last permitted number of machines. The last permitted number prior to the original application was 14. The original application sought only one machine and was accordingly not an increase (and section 98 had no application). On 11 December 2009, an amendment was made to the application, which had still not been granted, increasing the number applied for to 18. That was an increase on 14 and territorial consent was required under section 98(a). It is clear from the correspondence that the Secretary treated the decision as one made on an amended application. If that had no

been the case and the original application for one machine had been granted, an application to increase the permitted number of machines above one would have brought section 98(a) into effect.

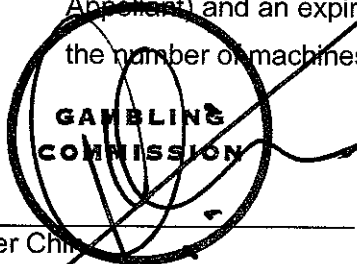
43. The remaining issues should now be considered by the Secretary and it will be for the Secretary to decide, among other things, whether, in all the circumstances, the letter of 18 December 2006 satisfies the requirement of section 98 and, if so, whether an increase in the number of machines to 18 should be allowed. As a result, the Commission fixes the expiry date as late as permitted under the Act to enable the remaining issues to be resolved while giving the licence some currency.
44. A referral back to the Secretary allows the section 98 issues to be considered properly by the Secretary. It also allows other issues which may affect an increase in the number of machines to be considered by the Secretary, including design and construction issues, and harm minimisation. In this case, because the Secretary has taken the view that he was dealing with a section 94 venue, no consideration has been given to other issues against the possibility that section 92 might apply.
45. In summary:
- (a) Section 92 requires the continuation of a venue licence with a gap of no more than 6 months since October 2003. The period of 6 months is not stopped by a mere application.
 - (b) The Secretary, and the Commission on appeal, has a broad discretion on specifying the commencement of a licence and the commencement may be backdated to a date prior to the decision.
 - (c) When an application is made for a new licence of a venue that is subject to section 92, consideration should be given by the Secretary to exercising his powers in such a way as to preserve section 92 status. This should not be presumed or automatic, but neither should section 92 status be lost simply through procedural delay or inaction.
 - (d) The Commission, on appeal from an application with potential section 92 status, should consider what the appropriate start date should be for the licence so that the Appellant is placed in the position in which it ought to have been.
 - (e) In this case, the licence should be backdated to the date of application to preserve the status of the Venue under section 92 and the number of machines

increased to 14 (from the 9 permitted by the Secretary) in order not to create new section 98 issues for the Appellant.

- (f) The Secretary should now consider whether the application to increase the number of gaming machines to 18 should be allowed.

Decision

46. For the reasons already provided, the Division allows the appeal. It directs the Secretary to issue a venue licence with a commencement date of 23 October 2009 permitting the use of 14 machines (the details of which will need to be provided by the Appellant) and an expiry date as late as the Act allows and otherwise refers the issue of the number of machines back to the Secretary to consider.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

5 October 2010