

IN THE MATTER of the Gambling Act 2003

AND on appeal by **PUB CHARITY**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Decision: 10 December 2010

Date of Notification of Decision: 21 December 2010

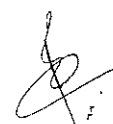
**DECISION
ON APPEAL BY PUB CHARITY**

Appeal

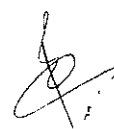
1. Pub Charity Incorporated (the "**Appellant**" or "**Pub Charity**") appealed under section 77 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to cancel the Class 4 venue licence for "Biddy Mulligans" Irish Pub in Hamilton (the "**venue**"). The Secretary cancelled the venue licence as he was not satisfied that the venue manager, Gordon Farrelly, is suitable to supervise the conduct of Class 4 gambling at the venue owing to a history of late banking, dishonoured cheques and t maintenance of an insufficient float.

Agreed facts

2. The parties filed an Agreed Statement of Facts which provided as follows:
 - On 13 September 2010, the Secretary decided to cancel the venue's Class 4 venue licence because of concerns relating to Gordon Farrelly – the venue operator and venue manager of Biddy Mulligans Pub in Hamilton.
 - Problems involving Mr Farrelly's late banking started in July 2004 and have continued since. Several warning letters have been sent to Mr Farrelly in respect of his late banking, and Pub Charity disconnected the gaming machines on several occasions pending the full payment of the GMP owed.
 - Between 20 September 2006 and 29 July 2007, Pub Charity advised the Secretary of 27 events of late banking by Mr Farrelly.



- In June 2007 Pub Charity sent representatives to train Mr Farrelly in cash management. The Secretary also sent inspectors to explain the importance of banking on time. In August 2007, Mr Farrelly completed "Analyst" training with Pub Charity.
- When Mr Farrelly continued to bank late, the Secretary issued two infringement notices against him (with fines of \$5,000) with respect to offences committed in July and October 2007.
- On March 2008, the Secretary warned Mr Farrelly that any further breaches of section 104 were likely to lead to the cancellation of the Licence.
- On 13 August 2008 the Secretary proposed to refuse to renew the licence, based on Mr Farrelly's continued late banking.
- On 8 September 2008, Pub Charity (on behalf of Mr Farrelly) submitted to the Secretary that the proposal to refuse to renew was onerous in the circumstances and contrary to natural justice and suggested establishing a direct credit facility to Pub Charity's account. No response to the proposal was received from the Secretary. The proposal to refuse to renew was not followed up by the Secretary.
- In April 2010 the Secretary issued a warning letter to Mr Farrelly, and in an interview with gambling inspectors on 20 April 2010, he was advised that his licence would be cancelled if he continued late banking.
- On 4 May 2010, a gambling inspector contacted Mr Farrelly to express concern about the number of dishonoured cheques. Mr Farrelly stated that sometimes he did not have a large enough float to pay out jackpots, and so it was convenient to have the cash from the machines.
- On 26 May 2010 a gambling inspector again contacted Mr Farrelly and expressed concern about the number of dishonoured cheques.
- On 27 May 2010, Mr Farrelly attended a one hour interview with gambling inspectors. Mr Farrelly admitted his business was struggling financially, which resulted in a number of his cheques being dishonoured.
- Between 14 June 2009 and 6 June 2010, Pub Charity reported at least 18 additional breaches of section 104, involving 32 dishonoured cheques.



- Pub Charity does not condone Mr Farrelly's actions, and accepts that he has failed to meet his obligations under section 104. Pub Charity accepts that a sanction is justified and inevitable.
- As at 6 June 2010, no GMP was outstanding.

The relevant statutory sections

3. The relevant law is as follows:

Gambling Act 2003

Venue manager means 1 natural person responsible for supervising the gambling and venue personnel at a class 4 venue and for banking the proceeds of class 4 gambling

67 Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—
- (a) ...
 - (c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 68, to supervise—
 - (i) the conduct of class 4 gambling at the venue; and
 - (ii) venue personnel; and
 - (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and
 - ...
 - (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and
 - (s) any other requirement set out in regulations or licence conditions is, or will be, met.

68 Determining suitability for class 4 venue licence

- (1) In determining whether a key person is a suitable person for the purpose of sections 66 and 67, the Secretary may investigate and take into account the following things:
- (a) ...
 - (b) the financial position and the credit history of the key person:
 - (c) the profile of past compliance by the key person with—
 - (i) this Act, minimum standards, game rules, *Gazette* notices, and licence conditions; and
 - (ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and

- (iii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act
- (2) The Secretary may take into account matters of a similar nature to those listed in subsection (1) that occurred outside New Zealand

74 Suspension or cancellation of class 4 venue licence

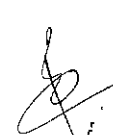
- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—
 - (a) any of the grounds in section 67 are no longer met; or
 - (b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence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

104 Gaming machine profits must be banked

- (1) A venue manager must bank all gaming machine profits from class 4 gambling into a dedicated account at a registered bank in the name of the holder of the class 4 operator's licence.
- (2) The gaming machine profits must be banked within the time frame specified in regulations made under section 371 or, if no time frame is specified, as soon as reasonably practicable.
- (3) If a venue manager contravenes this section, the holder of the class 4 operator's licence—
 - (a) must take immediate steps to disconnect all gaming machines at the class 4 venue and advise the Secretary of the disconnection; and
 - (b) must not reconnect the gaming machines at the venue until the gaming machine profits have been banked.
- (4) A person who contravenes subsection (1) or (3) commits an offence and is liable on summary conviction to a fine not exceeding \$5,000
- (5) In this section and section 105, gaming machine profits for a specified period means the turnover of the class 4 gambling in that period minus the total prizes paid in that period

Gambling (Class 4 Banking Regulations) 2006

4. Banking of gaming machine profits



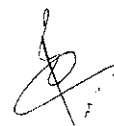
For the purposes of section 104 of the Act, a venue manager must bank all gaming machine profits within 5 working days beginning on the day that the profits are, or ought to be, calculated

The Appellant's submissions

4. The Appellant did not file any submissions but, together with the Secretary, filed an Agreed Statement of Facts.

Secretary's submissions

5. The Secretary submitted, in summary, as follows:
 - He cannot be satisfied about the suitability of Mr Farrelly to supervise the conduct of Class 4 gambling at the venue.
 - It is agreed between the parties that Mr Farrelly is a recidivist late banker who has resorted to the habitual use of gaming machine funds to deal with the cash management problems of his bar business. This led to a repeated pattern of payments by dishonoured cheques and consequent breaches of section 104(1).
 - Between September 2006 and July 2007, Pub Charity reported 27 events of late banking in breach of section 104(1).
 - Between 14 June 2009 and 6 June 2010, Pub Charity reported 18 weekly breaches of section 104(1) by Mr Farrelly, which included 32 incidents of dishonoured cheques
 - Mr Farrelly has not appealed the Secretary's decision – Pub Charity alone did, and it did not file submissions for the appeal
 - Pub Charity accepts that a sanction is justified and inevitable but has suggested that cancelling the venue licence is excessive and outweighs the offence.
 - There is no realistic prospect of Mr Farrelly ceasing to offend against section 104 given his pattern and recidivism since July 2004 and the current financial problems of the business
 - Cancellation of the venue licence is the only appropriate measure in the circumstances.
 - There are two key questions in this appeal They are:



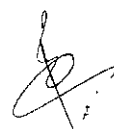
- whether the Commission is satisfied that any of the grounds in section 67 are no longer met (because if any grounds in section 67 are no longer met, the licence cannot be granted), and if so;
- whether the Commission considers it appropriate to exercise its discretion under section 74 to cancel the venue licence.

Are any of the grounds in section 67 no longer met?

- The following grounds are no longer met:
 - Section 67(1)(c) –Mr Farrelly's profile of past compliance is a relevant factor in determining his suitability.
 - Section 67(1)(d) – Mr Farrelly is the venue operator who controls the bank account of the business. Appointing a different venue manager is therefore not likely to resolve the problem (not that this has even been suggested as an option).
 - Section 67(1)(r) – There are other factors that are likely to detract from achieving the purpose of the Act; namely that in the 12 months prior to the Secretary's proposal, 32 cheques deposited by Mr Farrelly into Pub Charity's account were dishonoured. This suggests that the GMP was being used to pay for other matters.
 - Section 67(1)(s) – Given the consistent pattern of late banking and the lack of any realistic prospect of compliance in the future, the Secretary and the Commission cannot be satisfied that the necessary requirements will be met in the future.

Should the Commission exercise its discretion and cancel the venue licence?

- Even if the Commission determines that not all of the section 67 grounds are met, the decision to cancel the venue licence under section 74(1)(a) is still a discretionary one.
- The cancellation of the licence is the only appropriate sanction because:
 - The Commission can decide that no action is required, but even Pub Charity does not suggest this
 - He has issued many warnings, so issuing another one would be futile.

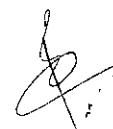


- He has already issued two infringement notices against Mr Farrelly with fines of \$5,000. There is no point in issuing further notices as this will only exacerbate Mr Farrelly's financial position, which led to his late banking problems in the first place.
 - Prosecuting Mr Farrelly will also be of no real consequence other than to aggravate his financial difficulties.
 - Suspension of the venue licence is not an available option following the Commission's recent decision GC22/10.
- Mr Farrelly's continuous breaches establish a pattern of recidivism which cannot be seen as a one-off problem. Considering the totality of Mr Farrelly's continuous offending and his profile of past compliance with section 104, he can no longer be satisfied of Mr Farrelly's suitability.
 - Suspending the venue licence will not render Mr Farrelly suitable and will not remove his concerns in terms of sections 67(1)(c) and (d). Nor will a suspension give him any reason to believe Mr Farrelly would then meet the requirement to bank on time and cease having his cheques dishonoured.
 - A punitive deterrent would have been appropriate if Pub Charity had committed a breach.
 - Mr Farrelly's repeated breaches are indicators of his systemic incompetence with cash management in times of financial hardship, rather than temporary lack of training, reliance on other staff members, or some other explanation. It is difficult to see how a lengthy suspension can achieve what the above measures have failed to achieve.

The Appellant's submissions in reply

6. The Appellant submitted in reply, in summary, that:

- It does not dispute the facts that the Secretary has relied on.
- The Secretary has imposed the most significant sanction available, but it expects him to be consistent with its sanctions, and asks the Commission to consider whether cancellation is consistent with contemporary sanctions imposed by the Secretary and the Commission.



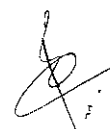
- The cost to the community of Mr Farrelly's non-compliance has been nil – all gaming machine profit has been accounted for.
- If loss or risk of loss are the measures by which the Secretary determines sanctions, then it questions why the same standards have not been applied in other cases. For example, the Secretary proposed a four day suspension for a society following an audit report which identified breaches by both the society and the individual venues amounting to over \$1 million. Further, the Secretary proposed suspensions of 21 days on venues associated with an orchestrated plan to influence and divert net proceeds to related parties. The amount involved was estimated to be over \$5 million p a. and the arrangements had been in place for several years.
- Sanctions proposed by the Secretary were increased by the Commission in decision GC11/10 and retained the same period in decision GC10/10. In both cases, venue operators were complicit and benefited from funds that should have been distributed to the community. Suspensions were for 5 and 6 days and combined losses to the community exceeded \$1 million.
- More recently, the Secretary has chosen suspensions of between 3 and 7 days, rather than cancellations, in addressing issues of late banking, albeit for lesser behaviour than Mr Farrelly's.
- Mr Farrelly has not re-offended since the Secretary proposed to cancel his licence.
- Mr Farrelly has indicated his intention to retire from the sector and has asked that he be allowed to do so with his reputation, to a large degree, intact.

Analysis

7. Pub Charity appealed the Secretary's decision to cancel the Class 4 venue licence for Biddy Mulligans Irish pub in Hamilton. There was no factual dispute between the parties, with an Agreed Statement of Facts detailing Mr Farrelly's history of late banking and dishonoured cheques, and the Appellant's submissions in reply stating that "Pub Charity does not dispute the facts that the Secretary has relied upon ...".
8. As it was unnecessary for the Commission to make any findings of fact, it turned its attention to considering what consequence, if any, should follow, the focus of the Appellant's submissions being that cancellation is too severe.



9. The Commission has the jurisdiction to cancel or suspend a licence pursuant to section 74(1)(a) of the Act. This provides that the Secretary (or the Commission on appeal) may cancel or suspend for up to six months a Class 4 venue licence if satisfied that any of the grounds in section 67 are no longer met. That is not the only ground for cancellation or suspension; other grounds include past or present non-compliance and providing false or misleading information.
10. The exercise of the powers under section 74 can be punitive, remedial or a combination of both. As the Commission has noted in previous decisions, the suspension or cancellation of a licence is discretionary – for example, the Commission being satisfied that any of the grounds in section 67 are no longer met does not automatically mean that suspension or cancellation must follow. The Commission may elect, in the light of the surrounding facts, not to cancel or suspend the licence.
11. On the undisputed facts, the Commission was satisfied that sections 67(1)(c), (r) and (s) are no longer met and so proceeded to consider whether to exercise its discretion to suspend or cancel Biddy Mulligans' licence. Section 74(2) provides that in deciding whether to suspend or cancel a Class 4 venue licence, the Secretary (and Commission on appeal) must take into account matters in section 67.
12. The Secretary's decision to cancel the licence was remedial in intent – to cure the lack of satisfaction concerning the suitability of the venue manager, a key person – rather than as a punitive measure for past or present breaches by the corporate society. Mr Farrelly has consistently failed to bank gaming machine proceedings on time and he presented numerous cheques which were subsequently dishonoured. This practice went on for six years and, from all of the information before the Commission, there is nothing to indicate that anything will change in the future. This is particularly so given Mr Farrelly's admission that his business is struggling, and that the DIA and Pub Charity gave him every opportunity possible to get his business practices on track. Indeed, it appeared to the Commission that the Secretary and the Appellant bent over backwards to help Mr Farrelly, but he consistently failed to take the chances offered to him.
13. Suspending the licence for a period of time does not seem to the Commission to be an appropriate response in all the circumstances. There is no reason to suppose that suspension would cure or address the section 67 concerns. Mr Farrelly's history is one of systemic and ongoing breach which has not responded to numerous prior interventions, both remedial and punitive. The appropriate remedy in the circumstances is for the licence to be cancelled.



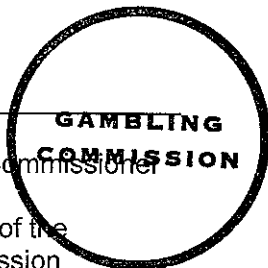
Decision

- 14 For the reasons already provided, the Division unanimously declines the appeal



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission



21 December 2010