IN THE MATTER of the Gambling Act 2003

AND on an appeal by **AIR RESCUE SERVICES LIMITED** against a decision by the Secretary of Internal Affairs in respect of the venue known as "Lord Barrington"

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
R D Bell

Date of Decision: 11 November 2011

Date of Notification of Decision: 21 December 2011

DECISION ON APPEAL BY AIR RESCUE SERVICES LIMITED

Appeal

1. Air Rescue Services Limited ("**ARSL**") appealed against the decision of the Secretary for Internal Affairs ("**the Secretary**") to refuse to grant a class 4 licence for the venue known as "Lord Barrington".

2. The Secretary based his decision on section 98 of the Gambling Act 2003 ("**the Act**"), interpreting section 98 to mean that where a venue was broadly described in a venue licence held on 17 October 2001, and then more narrowly described by the Secretary in subsequent licences, territorial authority consent is required when the bar moves within the 2001 area but outside the more narrowly described area. ARSL disputes the Secretary's interpretation of section 98, arguing that as long as a licence was held on 17 October 2001 for the venue described in the application, and a licensed venue has existed in that area at 17 October 2001 and until within 6 months of the present application, no territorial authority consent is required.

Background facts

3. Although the facts were not formally agreed, on examination of the evidence, they are generally undisputed, with one inconsequential exception. The principal issue in dispute is a legal one involving the interpretation and application of section 98. The relevant undisputed facts are set out below.

   (a) Lord Barrington is situated at 256 Barrington Street, Christchurch. The address "256 Barrington Street" was, and still is, occupied by a mall known as

Barrington Mall. The bar has had a number of previous incarnations within the mall.

(b) On 17 October 2001, a site approval was held by Pub Charity Incorporated for a bar known as Barrington Big Steak Pub. The venue was described in the site approval as being located at Barrington Big Steak Pub, 256 Barrington Street. The description on the licence did not specify a shop number within the mall. That licence was surrendered on 28 September 2005.

(c) On 26 April 2005, the Gambling Commission ("**Commission**") issued decision GC10/05, regarding a venue known as "Isobar". In that case, the Commission found that if a venue had been described as being located within a mall, the venue could move within the mall without requiring territorial authority consent. In response to the *Isobar* decision, the Secretary began a practice of describing venues in licences more narrowly, such as by shop number.

(d) On 19 October 2005, the Secretary granted a venue licence to Eureka Trust for a bar known as Robbies Bar and Bistro, located in the same physical place as Barrington Big Steak Pub. The Secretary issued a licence which described the venue as Shops 40-42, 256 Barrington Street, Christchurch, rather than 256 Barrington Street, Christchurch. This licence was surrendered on 14 June 2010.

(e) On 15 June 2010, the Secretary issued a licence to ARSL in respect of Robbies Bar and Bistro Barrington, with the address specified on the licence as Shops 40-42, 256 Barrington Street. The venue later became known as the Wheatsheaf Tavern and the venue continued to be described in the licence as Shops 40-42, 256 Barrington Street.

(f) On 21 July 2010, the Secretary was notified by ARSL that class 4 gambling was not being carried out at the venue, because of a major redevelopment of the mall. ARSL applied for an extension of the four week allowance for inactivity.

(g) On 28 July 2010, the Secretary refused the extension and proposed to cancel ARSL's licence for the venue. One of the reasons for the proposed cancellation was that the mall was going through a major redevelopment and the Secretary could not be satisfied that territorial authority consent would not be required by section 98. On 6 August 2010, the Secretary's decision not to extend the period of inactivity was appealed. However the appeal was

withdrawn on 5 October 2010 and the licence for the venue was surrendered on 13 October 2010.

(h) The mall underwent major renovations. The businesses were shuffled around within the existing space, and the shop spaces renumbered. The space now occupied by Lord Barrington are still within the mall, but in a slightly different location from its predecessors. There is a partial overlap between the pre- and post-renovation premises. The post-renovation premises of the Lord Barrington is partially next door to the pre-renovation premises, but the area where the gaming machines are situated has not changed at all – in effect, the bar space has shifted around the machines, which have not moved.

(i) The premises occupied by the Lord Barrington is now numbered Shop 71, and is still within the mall. Most of the physical premises that was previously called Shop 40-42 is now renumbered Shop 70.

(j) On 8 April 2011, ARSL applied for a class 4 licence in respect of Lord Barrington. The venue address given in the application did not include a shop number, and is the same as the 2001 venue description, namely 256 Barrington Street.

(k) On 11 July 2011, the Secretary refused the licence. In a letter of the same date, the Secretary set out two grounds for the refusal. The first is that under section 67(1)(f), territorial authority consent is required for the venue and it has not been obtained, and the second is that under section 67(1)(r), the licence must be refused if there are other factors likely to detract from achieving the purposes of the Act. As the submissions indicate that the purpose referred to is community involvement in decision-making about the provision of gambling, the second ground may be seen as an alternative basis for raising the same issue.

4. The only disputed fact is whether the change in the premises' location was a matter of choice with knowledge that it would require territorial authority consent:

(a) The Secretary contends that the Department was advised that ARSL had been given the choice of staying in the same location but had chosen not to, that ARSL knew, in making that decision, Lord Barrington would be located in a different place (as defined in the Act) from Robbies Bar and Bistro, and that ARSL knew that Shop 71 would be a "new venue for the purposes of section 98(b)".

(b) ARSL responded that it did not have a choice of staying in the same place. Venue licence holders are corporate societies that are reliant on venue operators to provide the premises for the operation of class 4 gambling, and ARSL could not choose to stay in premises when the previous venue operator had decided to move. ARSL did not believe that such a move would mean that the Lord Barrington would be located in a different place, as it believed that by moving within the mall, it would still be within the same place as licensed in 2001, so no territorial consent would be required by section 98.

The Commission considers that nothing turns on the factual elements of the dispute. Whether the move was with the consent or approval of the Appellant is immaterial.

Relevant Law

5. Under section 65(2)(b) and section 67, an application for a class 4 venue licence must be accompanied by a consent if required by section 98.

> **Section 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
>
> ...
>
> (f) the territorial authority has provided a consent (if required under section 98); and
>
> ...
>
> (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

6. Section 3 sets out the purpose of the Act:

> **Section 3 Purpose**
> The purpose of this Act is to—
> (a) control the growth of gambling; and
> (b) prevent and minimise the harm caused by gambling, including problem gambling; and
> (c) authorise some gambling and prohibit the rest; and
> (d) facilitate responsible gambling; and
> (e) ensure the integrity and fairness of games; and
> (f) limit opportunities for crime or dishonesty associated with gambling; and
> (g) ensure that money from gambling benefits the community; and
> (h) facilitate community involvement in decisions about the provision of gambling.

7. Section 98 relevantly provides that territorial authority consent is not required if there was a licence for the venue on 17 October 2001 and if a class 4 venue licence for the venue has been held by any society within a 6 month period prior to the application.

Section 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.

8. Section 4, the interpretation section, provides:

Section 4 Interpretation
(1) In this Act, unless the context otherwise requires,—
[...]
class 4 venue means a place used to conduct class 4 gambling

class 4 venue licence means—
  (a) a licence granted under section 67; or
  (b) a site approval
[...]
place includes—
  (a) a building, structure, or tent, whether fully or partly constructed; and
  (b) a room in a building or structure; and
  (c) a court or a mall; and
  (d) land; and
  (e) a vehicle, vessel, or aircraft; and
  (f) a caravan or a trailer or other conveyance

site approval means that part of an existing gaming machine licence that approves a place for gambling with gaming machines

9. The meaning of the word "place" is relevant because "class 4 venue" is defined in the Act as a place used to conduct class 4 gambling.

10. The width of the meaning and application of "place" has consequences which are not limited to the requirement of territorial authority consent. For example, the width of application of "place" affects a restrictive provision, preventing the proliferation of class 4 venues in the same place:

Section 65 Application for class 4 venue licence
(2) An application must be on the relevant standard form and be accompanied by...

  (k) for a class 4 venue that is not established before the commencement of this section, evidence that the class 4 venue is not to be part of a place at which another class 4 venue or a casino is located;

11. The meaning of the word "venue" is not defined in the Act. In the *Isobar* decision (GC10/05), the Commission held that "venue" should be given the same expansive meaning as "place", defined above, a position which both parties adopted in the appeal.

12. The Commission had regard to the Parliamentary Debates (Hansard) relating to the passage of the Act, the explanatory note accompanying the Bill, and the Select Committee commentary on the Bill. The debates were concerned with the wider principles at issue (whether community control should prevail over the status quo) rather than a close examination of the technical language used and its application at the margins.

13. Comments in the Parliamentary debates that only venues first licensed after 17 October 2001 will be subject to territorial authority control show that members of Parliament understood that the Act would allow the venues operating at 17 October 2001 to remain and not to be affected by territorial authority policy. Parliament discussed in general terms the need for community involvement, the broad power of the Secretary to make decisions, and the importance of territorial authority policies to control licensing of new venues, but there is no discussion on the intended meaning of the word "venue" under section 98 (or section 92) or how the provisions would work in practice.

14. The Select Committee report on the Bill recommended that the definition of "place" be amended to remove prior references to roads, streets and so on. The Select Committee suggested this amendment because applications for licences after the commencement of the Act must be accompanied by evidence that the class 4 venue is not part of a place at which another class 4 venue or a casino is located (section 65(k) above). The Select Committee was concerned that, if a road were the place described in the venue licence, no other venue would be able to be established on that road. The concern assumes a broad application of the broadly-defined "place".

15. The explanatory note did not aid in the proper interpretation of section 98.

The *Isobar* decision

16. Section 98 was discussed in a previous appeal (GC10/05) in respect of premises known as "Isobar" located in the Hornby Mall in Christchurch. The present appeal raises new issues with regard to the application of section 98 which were not present in that case. In the Isobar appeal, a bar held a class 4 venue licence for a named business described as located in the Hornby mall. A licence for a venue in those terms had been held on 17 October 2001. As part of major mall renovations, an extra part was added onto the mall, over the road from the original building, and the licensed bar was moved 75m

across the road to the new part of the mall. The bar was outside the original boundaries of the mall, but inside the new designated area of the mall.

17. On appeal from the Secretary's refusal to grant a licence because there was no territorial authority consent, the Commission found that section 98 did not apply, even though the bar was no longer in the same location within the mall and had moved to an area which was not even part of the original mall. The Commission considered the actual venue description on the venue licence held on 17 October 2001 and in the application under appeal, and found that the description was the same in each case.

18. In reaching its decision that no consent was required in those circumstances, the Commission discussed the nature of malls – they tended to be expanded and redeveloped periodically, and their boundaries could change. The geographical limits of a mall at any time are whatever area is occupied by the overall commercial enterprise incorporating the mall retail establishments. The Commission held that the venue specified in the licence held in October 2001 was in the same terms as the current licence application despite the move to a new location within the current mall that had not been part of the mall in 2001.

19. In response to the *Isobar* decision (GC10/05), the Secretary adopted a policy of using more specific descriptions in venue licences, principally by adding a shop number to subsequent licence venue descriptions. It appears that the policy was an attempt to narrow the site description so that section 98 territorial authority consent would be required if venues moved within a mall.

Issue

20. The general issue to be determined on the appeal is the proper interpretation and application of section 98, and, in particular, the meaning of "venue" in sections 98(b) and (c). The outcome turns on whether the Secretary's actions in describing venue locations more narrowly in later licences was effective in modifying the impact of section 98 on premises within malls.

21. The issue in this appeal differs from that in the Isobar decision, because in that decision the venue had never been described in a licence in any other way than in the 2001 licence whereas, in the present appeal, the Secretary's change in venue description was an intervening event. This difference means that the reasoning in Isobar is of little assistance to the issue of the impact of the Secretary's change in venue description and the Commission approaches its analysis afresh.

ARSL's submissions

22. ARSL submitted, in summary, as follows:

(a) It does not dispute that consent has not been granted, but rather it disputes that it is required at all.

(b) The purpose of section 98 is twofold – to allow for community involvement and also to preserve rights existing on 17 October 2001.

(c) Consent is only required by section 98 for a "new venue", being one for which no licence or site approval was held on 17 October 2001. Section 98 therefore requires consideration of the licensing position in 2001 only, and not subsequent venue descriptions for the same physical place. Consent is not required for a venue for which a class 4 venue licence was held on 17 October 2001 as long as the current venue is within that area. The submissions asserted, without further supporting analysis, that neither s98(c) nor (d) applied.

(d) A class 4 venue licence is able to be granted for a bar anywhere within Barrington Mall, regardless of shop number, because the bar would be in a place licensed in 2001.

(e) On 17 October 2001, Pub Charity held a venue licence with the approved site address being 256 Barrington Street, Christchurch. This covered the entire mall, not a particular shop within it. Lord Barrington is within the mall, so it is within the area licensed at 17 October 2001.

(f) Later changes to the description of the venue as a specific numbered shop are irrelevant in determining whether consent is required, as the sole focus of section 98 is on the position in 2001.

23. ARSL submitted that the *Isobar* decision supports its position because:

(a) The facts are almost identical, as the bar was located within a mall, the site approval in 2001 was for the whole mall, and the old and new locations were still within the mall and were part of the same venue, for the purposes of section 98.

(b) The facts in this appeal are less difficult than those in the *Isobar* decision as the relocation of Lord Barrington is not outside the original boundaries of the mall, whereas the *Isobar* moved outside of the original licensed area. In this

case, the move is to an adjacent shop within the mall, and there is even some overlap between the two sites.

(c) The Secretary misinterpreted passages in the *Isobar* decision, in particular paragraphs 8.1 and 8.2, by interpreting these passages to mean that territorial authority consent would be required in all cases of bars within larger places such as malls, if the description on the licence were subsequently made to be more specific. This is an incorrect interpretation, as only the 2001 position needs to be considered and in 2001 there was no specific description of the shop number on either the Barrington Mall venue licence or the Isobar venue licence. Paragraph 8.2 reads:

> It was open to the Department to define the approved site restrictively to correspond with the actual physical location of the bar. Had it done so, any change in location (even moving next door) would have necessitated an amendment to the class 4 licence as to the place and the consent of the territorial authority.

(d) The words "approved site" in paragraph 8.2 of the *Isobar* decision were only relevant to the pre-Gambling Act legislation (actually that used the term "site approvals") and "it was open" indicates that the Department's option was in the past and not continuing.

(e) The *Isobar* decision should not be distinguished on the basis of the changes made to the more specific description of the venue on later licences. These changes are "irrelevant" to the application of section 98 but the submissions lack any further supporting reasoning.

24. As Christchurch City Council has adopted a 'sinking lid' policy for class 4 gambling licences, the Department's adoption of a policy of describing venue locations more precisely following the *Isobar* decision, in conjunction with the sinking lid policy, is aimed at reducing the overall number of class 4 venues, but that is not a purpose of the Act.

25. The aim of section 98 is to preserve the licensing position as it was in 2001, under the previous legislative scheme. It is argued that section 98 is only concerned with "new venues" (actually not a term which appears in the Act) and it is not concerned with movements within places described on venue licences in 2001. Neither section 98 specifically, nor the Act generally, is aimed at reducing the number of venues or taking away licences held by venues on 17 October 2001.

26. The "other factors" relied on by the Secretary under section 67(1)(r) have not been specified. As these have not been disclosed, it assumes that the ground under this subsection is a repeat of the requirement to obtain territorial authority consent.

27. It should be awarded costs because the Secretary's attempt to differentiate this case from the *Isobar* decision is unreasonable and is not supported by the wording of section 98. Further, the *Isobar* decision clearly sets out the answer to this issue, making the appeal unnecessary. In addition, the correct position was set out in its letter accompanying its application.

Secretary's submissions

28. The Secretary submitted, in summary, as follows:

(a) Shop 71 is a "new venue" requiring consent under section 98, as a class 4 venue licence was not held for Shop 71, 256 Barrington Street, Barrington, Christchurch, on 17 October 2001.

(b) Section 98 requires that a licence be held for the whole venue continuously since 2001, and not just at 17 October 2001. As the licence issued on 19 October 2005 was for Shops 40-42, only and not the whole mall, it cannot be the case that the second licence applied to the entire mall from that date.

(c) A licence for the venue has not been held continuously without a break of more than 6 months. The application for a licence was made on 8 April 2011. The licence for Shops 40-42 came to an end on 13 October 2010. The application on 8 April 2011 was for a different venue to the previous licence, so it did not count as an application made within 6 months of the last one ending, and the time to apply for a licence for the previous venue without consent has now expired. Section 98(c) does not apply because a licence has never been held for Shop 71, 256 Barrington Street, Christchurch.

(d) The *Isobar* decision supports his position because the licence was only found to cover the whole mall because it had consistently been so described, and the Commission in that case based its decision on a strict reading of the description in the licence. He relies on paragraph 8.2 of the decision, the same statement that ARSL does.

(e) Following the *Isobar* decision, his Department made it a practice to make venue addresses in licences as specific as possible, including specifying shop numbers in malls. It did so in relation to the venue which is now Lord Barrington.

(f) Section 67(1)(r) provides a further ground for refusing the application, as the absence of the consent is inconsistent with one of the purposes of the Act,

which is to facilitate community involvement, so he must refuse the licence in the absence of territorial authority consent.

ARSL's submissions in reply

29. In addition to submitting that ARSL did not choose to move locations, and that the grounds under section 67(1) (f) and (r) are the same, it submitted that it should not be legitimate for local communities to object to premises moving to the next door shop in a mall. A chilling effect would result from effectively disallowing long-established pubs in malls from being moved slightly during a redevelopment. The result would be to discourage malls and shopping centres from being refurbished, while not achieving the proper purposes of the Act. The reply submissions did not further address the application of section 98(c).

Analysis

30. This appeal involves the interpretation and application of one of the "grandfathering" provisions of the Act. Section 98, like section 92, provides for the preservation, on certain terms, of a position which existed in October 2001. The terms for preservation in section 98 are different from those in section 92 but the provisions share a common thread in that they enable the preservation of states of affairs that would otherwise be contrary to the Act. Interpreting and applying such provisions involves drawing a line between competing values both of which are recognised by the Act. The conflict which section 98 is intended to resolve is between community control over gambling facilities in a territorial authority area and the preservation of a past and continuing position. While a purpose of the Act is to facilitate community involvement in decisions about gambling, community control is not unqualified but is balanced against the preservation of past positions if sufficient continuity is maintained.

31. The appeal requires the Commission to interpret section 98 and to apply it to the present circumstances. The Commission previously considered the meaning and applications of section 98 in the *Isobar* appeal but the circumstances of that appeal meant that the appeal could be disposed of quite simply. The present appeal presents the Commission with a more complex set of circumstances that have required it to give careful consideration to how section 98 should be interpreted and applied in a range of possible circumstances.

32. To provide context for the interpretation of section 98, the Commission starts by considering some of the related provisions:

(a) Section 92 covers class 4 venues for which a class 4 licence **was** held on 17 October 2001 and in respect of which there had not been a period of 6 months

or more when no class 4 licence was held. Those venues may operate the number of machines authorised prior to the Act up to a maximum of 18 gaming machines.

(b) Section 93 covers class 4 venues to which section 92 does not apply and in respect of which, at the commencement of the Act, a class 4 venue licence **is** held, which was issued after 17 October 2001 and prior to the commencement of the section. The section thus covers all class 4 venues for which a current class 4 licence had been issued prior to 19 September 2003 (the commencement of the provision), except those to which section 92 applied. It will include older venues (for which a licence was first issued prior to 17 October 2001 but which lack the required continuity), as well venues for which the first licence was issued after 17 October 2001 and before 19 September 2003.

(c) Section 93 imposes a maximum of 9 gaming machines and requires that all such venues must apply for territorial authority consent with 6 months (section 93(4)). Following the release of the territorial consent decision, those venues had to remove all gaming machines if consent was declined and remove any machines in excess of any conditions imposed on any consent given. Provision was made for cancellation of the class 4 venue licence if territorial authority consent was either not sought within 6 months or declined. In that event, the section 75 cancellation procedure did not need to be followed and there was no right of appeal (section 93(7)).

(d) Section 94 covers all class 4 venues to which section 92 does not apply in respect of which a class 4 venue licence **is** granted after 19 September 2003. Such venues are limited to a maximum of 9 machines or such greater number as approved by the Minister under section 96. Section 93 did not include the latter provision.

(e) In the Commission's view, section 93 was effectively an interim provision only, the effect of which was spent after territorial authority consent was obtained, as required by section 93(4), on application made within 6 months of 19 September 2003. In contrast to section 92, both section 93 and section 94 use the present tense in relation to the existence of the relevant licence so that, as soon as a new licence was issued for the venue after 19 September 2003, it was covered by section 94. Section 94 excludes from its effect only section 92 venues (not section 93 venues). Such an interpretation also removes any anomaly which would otherwise arise from the limitation of section 96

increases to section 94 venues. On that basis, all current class 4 venues are either section 92 or section 94 venues.

(f) Sections 95 and 96 relate to increases above the 9 machine limit imposed by section 94 in certain circumstances. Section 95 is limited to mergers of clubs and section 96 provides for the Minister to increase the permitted number of machines from 9 to a maximum of 18 machines. Any such applicant had to demonstrate a 'significant history' of operation, a further indication that section 93 venues were considered, on the issue of the first licence after 19 September 2003, to be section 94 venues.

33. It is against that background that section 98 must be interpreted. The section sets out the circumstances in which territorial authority consent is required. On its face, the section would appear to set out a series of independent, rather than cumulative, circumstances; if any of them applied, consent would be required:

(a) The first circumstance (a) is straightforward. Consent is required wherever it is proposed to increase machine numbers, with the express inclusion of increases under section 95 and 96. It appears to cover all venues, whether section 92, 93 or 94.

(b) The third circumstance (c) requires consent for a class 4 venue licence application if a class 4 venue licence has not been held for "the venue" (ie the venue in the application) within the last 6 months.

(c) The fourth circumstance (d) mirrors and reflects the obligation in section 93(4), both as to its application (ie not including section 92 venues) and the nature of the obligation (obtain territorial authority consent). Its effect is now spent.

(d) The second circumstance (b) is the most difficult because it is the only sub-section to include an exclusion ("unless....") and to mix both positive ("first time there is") and negative ("was not held") elements into a single circumstance.

34. It is useful to consider circumstance (b) first without the exclusion and see how it would apply to the classes of venue discussed in paragraph 35:

(a) Venues coming within section 92 do not require consent: the "first time" that an application was made predated the commencement of the section and, in any event, a class 4 venue licence was held on 17 October 2001.

(b) The position is identical, and for the same reasons, for venues for which a class 4 venue licence was held on 17 October 2001 but which do not otherwise fall within section 92 because of a break in the required section 92 continuity.

(c) The position is also identical for the remaining section 93 venues (ie those venues which were first licensed after 17 October 2001, but before the commencement of the Act). The reason is simply that, from the commencement of the section, no application in respect of the venue would be "the first time that there is an application". However, all such venues (and those in (b)) would have been required to obtain consent by section 93(4) (and section 98(d)).

(d) Consent is therefore required at the time of the first application for all venues not already licensed prior to the commencement of the Act. They are the only venues to which section 98(b) applies.

35. The Commission concludes that section 98(b) contains several elements that apparently add complexity but which in fact lack any functional purpose:

(a) The distinction apparently drawn between venues licensed on 17 October 2001 and those licensed subsequently but prior to commencement of the section is ultimately without substance. Sub-paragraph (b) has no application in either case.

(b) Without the addition of the words, "unless paragraph (c) or (d) applies", the Commission would consider whether any of the paragraphs applied, and, if so, hold that consent were required. It is unable to see the purpose of the additional words in sub-paragraph (b); nor is it clear what, if anything can be drawn from the omission of those words from the other sub-paragraphs.

Ordinarily the Commission is reluctant to adopt a construction which renders statutory language of no effect. It has considered carefully whether it can find a construction which would produce a different meaning or application depending on their presence or absence, but is unable to find one.

36. In the result, the questions to be asked on the appeal can be simplified accordingly:

(a) Is this the first time that there has been a class 4 licence application for the venue in the present application (section 98(b))? If so, consent is required.

(b) Has a class 4 license been held by any society for the venue in the present application within the last 6 months (section 98(c))? If not, consent is required.

37. The Secretary's submission would indicate the answer to the first question is "yes" but, in doing so, he focuses on the licence that he would issue (as his practice is to include a shop reference) rather than the terms of the application (which did not include one). The Applicant points out that the venue address on its application is identical to the address on the 2001 licence, so the answer would be "no".

38. The Secretary argues that the answer to the second question is "no" because the licence which he would issue would be for Shop 71, but the only licence issued within the previous 6 months was for Shop 40-42. The Appellant asserts the contrary, albeit without supporting reasoning.

39. It can be seen from the competing contentions that the Secretary's position involves a strict, technical construction of the issued licences. Having regard to the reasoning adopted by the Commission in the *Isobar* decision that is not surprising, but it appears to the Commission that maintaining such an approach could produce unpredictable outcomes and encourage highly technical constructions. Adopting such a strict technical approach would mean that the existing rights which section 98 aims to preserve would initially be easily defeated by the Secretary making minor changes to the venue description, with a possible response by the applicant being the completely artificial naming of a shop premises as 'Shop 40-42', even if it were now next door to shop 70.

40. The Commission does not consider that adopting an interpretation that would produce those sorts of outcomes would achieve the balance that Parliament intended between the competing interests which section 98 recognises. It does not consider that the apparent purpose of section 98 would be achieved by adopting an approach that meant that the grandfathered rights could be defeated by the unilateral act of the Secretary in issuing subsequent licences.

41. The purpose of section 98 is to clarify what is preserved and what is to be made subject to territorial authority consent. Putting to one side the consents that were required immediately after the commencement of the Act (section 93(4) and section 98(d)), section 98 clearly requires territorial authority consent in circumstances where there is an application to license a venue not previously licensed before the commencement of the Act (section 98(b)), a break between licences over 6 months (section 98(c)), or a proposed change in the number of machines (section 98(a)). These provisions indicate the change in circumstance which triggers the requirement for territorial authority consent.

42. While "venue" is not separately defined in the Act, "class 4 venue" is defined as "a place used to conduct class 4 gambling" and "place" itself is defined in very broad terms. The items within the definition of "place" include "a court or a mall" but also "a room in a building or structure". The Appellant contends for the former (that the place is 256 Barrington Street (the Barrington Mall)), whereas the Secretary argues that the place is a room identified by a specific shop number (that the place is variously the mall, shop 40-42 and shop 71)

43. The rationale for the decision to remove road or street (discussed at paragraph 14 above) indicates a presumption that the items would be given a broad construction and application. The offsetting consequence of adopting such a broad application to the Barrington Mall rather than a specific shop is that no other class 4 premises could be permitted in that place, namely the Barrington Mall (section 65(2)(k)). On the Secretary's alternative construction, each shop in the mall would be a different place so there would be no restriction on having more than one class 4 venue in the mall (provided consent were obtained under section 98).

44. The venue address for the licence in force on 17 October 2001 for the purposes of section 98(b) was 256 Barrington St, Christchurch (Barrington Mall). The present application seeks a licence for the identically described venue so territorial authority consent is not required under section 98(b). That does not mean that class 4 gambling could be conducted throughout the entire mall; it was always limited to a particular business within the mall. In this case, as the Secretary has submitted, the issued licence would refer to a specific shop within the mall and, for other purposes, the venue may be so restrictively interpreted.

45. In terms of section 98(c), a licence has been held for premises at 256 Barrington Street (the venue address in the application) within the last 6 months so section 98(c) does not apply).

46. On the Commission's approach, changes made by the Secretary to the venue description in intervening licences are not material to the operation of section 98. Neither is it material whether the move of shop premises within the mall was voluntary or forced upon the licence holder by circumstances, including decisions by the venue operator.

47. The Commission rejects the Appellant's argument that the adoption of 'sinking lid' policies by local authorities are contrary to the purpose of the Act simply because those policies are aimed at reducing the number of class 4 venues. The Act does not have a purpose of ensuring that the number of class 4 venues is preserved without qualification

and the express purpose of facilitating community involvement in decisions about the provision of gambling is neither expressly nor impliedly qualified so as to prevent a reduction in class 4 venues if that is the community's wish. Nor are the provisions to be interpreted with the particular aim of encouraging the redevelopment of malls and shopping centres. It is possible that mall redevelopments may break temporal continuity and require territorial authority consent. Section 98 only preserves rights which fall within its terms.

Costs

48. The Commission declines to award costs against the Secretary. The Commission's policy on awards of costs is well established. Awards of costs are exceptional and the present circumstances do not remotely justify an award of costs in terms of that policy. The Commission considers that the Secretary's conduct of the appeal was entirely appropriate and his contentions on the appeal were fairly arguable.

Decision

49. For the reasons already provided, the Division allows the appeal. The Division declines to award costs against the Secretary.

Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

21 December 2011

GAMBLING COMMISSION