

IN THE MATTER of the Gambling Act 2003
AND on an appeal by WHITEHOUSE
TAVERN TRUST

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
K M Ford
M M Lythe

Date of Appeal: 13 July 2006

Date of Decision: 16 November 2006

Date of Notification
of Decision: 12 December 2006

DECISION
ON AN APPEAL BY WHITEHOUSE TAVERN TRUST

Appeal

1. Whitehouse Tavern Trust ("**Whitehouse**") appealed under section 61 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to suspend Whitehouse's class 4 operator's licence for one month.

Gambling Act 2003

2. The key sections of the Act relevant to this appeal are as follows:

4. Interpretation

authorised purpose means, -

- (a) for class 1 gambling, class 2 gambling, and class 3 gambling, any of the following purposes:
 - (i) a charitable purpose;
 - (ii) a non-commercial purpose that is beneficial to the whole or a section of the community;
 - (iii) promoting, controlling, and conducting race meetings under the Racing Act 2003, including the payment of stakes;
 - (iv) an electioneering purpose;
 - (b) for class 4 gambling, any of the purposes specified in paragraph (a)(i) to (iii).

electioneering purpose means the purpose of a group or an individual standing for election to public office (including, for example, candidates in a national or local body election or candidates for election to community trusts or energy trusts)

net proceeds, in relation to gambling, means the turnover of the gambling ... less –

- (a) the actual, reasonable, and necessary costs ... incurred in conducting the gambling; and ...
- (b) the actual, reasonable, and necessary costs incurred in complying with whichever of the following applies to the gambling:
 - (i) this Act or any other relevant Act;
 - (ii) an operator's licence;
 - (iii) a venue licence

52. Grounds for granting class 4 operator's licence

- (1) The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that, –
 - (d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and
 - (e) the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and

58. Suspension or cancellation of class 4 operator's licence

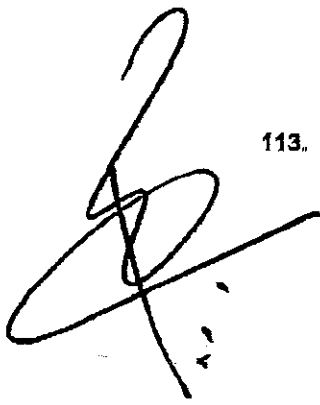
- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that –
 - (a) any of the grounds in section 52 are not longer met; or
 - (b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules, and minimum standards; or ...
- (2) In deciding whether to suspend or cancel a class 4 operator's licence, the Secretary must take into account the matters in section 52.

59. Procedure for suspending, cancelling, or refusing to amend or renew class 4 operator's licence

- (4) If the Secretary decides to suspend a licence, the Secretary must notify the corporate society of –
 - (d) the matters to be dealt with in order for the Secretary to consider withdrawing the suspension before the end of the suspension period; and ...

113. Key persons must not be involved in certain activities or decisions

- (1) A key person in relation to a venue to which section 65(3) applies must not –
 - (c) provide, or be involved in decisions about who will provide, to the corporate society that conducts class 4



gambling at the venue, goods or services other than services listed in class 4 venue agreements; or ...

Facts

3. This appeal has arisen following an audit by the Secretary of Whitehouse's gaming machine operations during the period 1 February 2004 to 31 January 2005. The audit identified four payments that the Secretary considered to be in breach of the Act or licence conditions. Those payments were as follows:
 - (a) In August 2004, Whitehouse made a payment of \$1,279.27 for a venue manager, Mr Roger Garrick, to attend the 2004 Australasian Gaming Expo.
 - (b) On 30 June 2004 and 30 September 2004, Whitehouse paid Mr Garrick wages totalling \$5,842.50 for services to the Trust.
 - (c) On 9 September 2004, Whitehouse made a payment of \$1,000 to Mr Glenn Archibald's Papakura Mayoral electoral campaign.
 - (d) On 9 June 2004, Whitehouse made a grant of \$25,000 to the Ardmore Tenants Association (the "ATA") to assist with legal fees to challenge, in the Environment Court, noise restrictions imposed by the Papakura District Council on the Ardmore Aerodrome.
4. By letter dated 20 March 2006, the Secretary wrote to Whitehouse proposing to suspend its class 4 operator's licence for one month because of these breaches. The Secretary provided Whitehouse with the opportunity to make submissions on his proposal, with Whitehouse making made submissions by letter dated 12 May 2006.
5. By letter dated 26 June 2006, the Secretary wrote to Whitehouse stating that:

... in accordance with sections 58 and 59 of the Act, [he has] decided to **suspend** your class 4 operator's licence (Licence No. 162) for a period of one (1) month with effect from midnight on 21 July 2006 until midnight on 20 August 2006.
6. Whitehouse appealed this decision by notice of appeal dated 13 July 2006.

Submissions on behalf of Whitehouse

7. Whitehouse submitted (in summary) as follows:

- (a) Sending Mr Garrick to the 2004 Australasian Gaming Expo was an actual, reasonable and necessary cost.
- (b) Wages paid to Mr Garrick were in technical breach of the Act, but Mr Garrick's services were needed to assist the other trustees.

- (c) The payment towards Mr Archibald's Mayoral campaign was not significant.
 - (d) The grant to ATA was charitable, as the ATA was seeking to preserve the aerodrome's charitable uses. Further, the Secretary was wrong to conclude that the payment was not charitable because the ATA and the Papakura District Council had competing views.
8. Whitehouse supported its submissions with affidavits from Mr Allan McCreddie, the chairman of Ardmore Airfield Tenants' and Users Association, and Mr Ross Thrupp, a Whitehouse trustee.

Submissions by the Secretary

9. The Secretary submitted (in summary) as follows:
- (a) Payment for Mr Garrick to attend the 2004 Australasian Gaming Expo was not a reasonable and necessary cost. Neither venue operators nor venue managers have a proprietary interest in the machines and do not need to keep up to date with technical advances within the industry. Further, the Expo did not assist with training needs.
 - (b) There was no need for Mr Garrick to provide his services as two of the other trustees were sufficiently experienced to undertake the work.
 - (c) The payment to Mr Archibald's Mayoral campaign was not an actual, reasonable and necessary cost.
 - (d) The grant to ATA was not for an authorised purpose stated on the face of its licence, so breached licence condition 52(e) of the "Gaming Machine Licence Conditions Set B -- Public Premises". Further, the grant was not for a charitable purpose as caselaw provides that trusts for the purpose of changing the law are not charitable.
10. The Secretary supported his submissions with affidavits from Andrew Morgan, a former gambling inspector of the Department of Internal Affairs ("DIA"), and John Hennebry, a senior DIA gambling inspector.

Submissions in reply

Whitehouse submitted in reply (in summary) that:

- (a) The Secretary indicated the suspension would be withdrawn if Whitehouse recovered \$5,200 of the "misused" funds. Whitehouse did recover this sum, but the Secretary did not withdraw the suspension.

- (b) The payment to ATA was charitable.
 - (c) Non-trustees do attend expos such as the 2004 Australasian Gaming Expo.
 - (d) The Trust has a good record of compliance.
12. Whitehouse supported its submissions in reply with two affidavits from Mr Maurice Hayes. Mr Hayes is the sole director of Salutation Hotels Limited, the venue operator.

Legal test

13. In considering this appeal, the Commission adopted the following approach:
- (a) The Commission classified each disputed payment as either a grant or an operating cost. In classifying the payments, the Commission adopted a "substance over form" approach.
 - (b) If the payment was an operating cost, the Commission considered whether it was an actual, reasonable, and necessary cost incurred in conducting the gambling or in compliance with the Act or licence conditions. This requirement follows from section 52 of the Act, which imposes an obligation on class 4 operators to minimise operating costs so as to maximise net proceeds, and the Act's definition of "net proceeds".
 - (c) If the payment was a grant, the Commission considered whether it was for an "authorised purpose", as required under section 52(1)(e). The Act's definition of "authorised purpose" can be further limited by the trust deed, as has occurred in the current case.
 - (d) If the payments complied with the Act and licence conditions, the Commission considered that the appeal should be allowed. If one or more of the payments did not comply, it recognised that it had jurisdiction to suspend the licence for up to 6 months, but was not required to exercise its discretion to suspend.

Payment for Mr Garrick to attend the 2004 Australasian Gaming Expo

14. The payment was an operating cost which the Commission concluded did not satisfy the "actual, reasonable and necessary" test and was in breach of section 52(1)(d) of the Act.
15. The Secretary, as an annexure to his submissions, provided an agenda of items covered at the Expo. There was nothing in this agenda that the Commission considered would require Mr Garrick's attendance.

16. The Commission also considered that there was force in the Secretary's submission that sending a venue manager who had no proprietary interest in the gaming machines, to this Expo could not be justified, especially in circumstances where two trustees also attended.
17. By way of observation, the Commission noted that Whitehouse annually sends two trustees to the Australasian Expo as a matter of course. While the Secretary did not raise this as an issue, the Commission questioned whether this practice could be justified given the overriding obligation for Whitehouse to minimise operating costs, and its small size. It would be prudent, in the Commission's view, for Whitehouse to send only one trustee to such an Expo, and for that trustee to report his/her findings to the other two trustees.
18. The Commission accepted that there might be occasions when it is difficult to determine whether a payment is an actual, reasonable and necessary cost because the test involves an element of judgement and subjectivity. However on any sensible application of this test, Mr Garrick's attendance at this Expo was clearly not one of those occasions.

Wages paid to Mr Garrick

19. Whitehouse retained Mr Garrick to provide consultancy advice on grant processing procedures and understanding of monthly reports, at the same time that he was employed as a venue manager of the Whitehouse Tavern. Mr Garrick received two payments of wages for his services, one on 30 July 2004 and one on 30 September 2004, each for \$2,921.25.
20. Initially the Secretary alleged that both payments were in breach of section 113(1)(c) of the Act, which Whitehouse accepted. The Secretary subsequently amended his position, noting that the first payment took place before the Act came into effect, so section 113 could not apply to that payment. Instead, the Secretary submitted that this payment may have breached licence condition 8 of the standard conditions in force at the time. Licence condition 8 provided as follows:

Condition 8. Fiduciary duty and conflicts of interest

The society shall at all times ensure that its principal officers, site operators, employees, gaming machine services contractors, representatives, or any associated person;

- (a) act in accordance with the society's fiduciary duty to make the maximum returns to the authorised purpose(s) on the face of the licence and to limit expenses to those that are actual, reasonable and necessary; ...

21. The Secretary produced evidence that during the period that Mr Garrick was providing his services to the Trust, two of the Trust's three trustees, Mr Scown and Mr Everest, were experienced trustees, Mr Everest, in particular, having been a Whitehouse trustee for over four years at the time of the first wage payment.

22. As Whitehouse produced no evidence to counter this, or to demonstrate why Mr Garrick's services were required, the Commission determined that Mr Garrick's services were not necessary, and that Mr Everest (at least) should have been conversant with Whitehouse's processes and procedures.
23. Accordingly, the Commission determined that the first payment of wages to Mr Garrick was not an actual, reasonable and necessary expense, and breached licence condition 8.
24. Whitehouse accepted that the second payment of wages was made in breach of section 113(1)(c) of the Act. The Commission agreed.

Mayoral payment

25. Whitehouse did not dispute that the payment made by it of \$1,000 towards Mr Archibald's 2004 Papakura Mayoral election campaign was wrongful.
26. Whitehouse accounted for this payment as a "sundry expense" as part of its operating costs and as such, the Secretary submitted that the issue was whether the payment was an "actual, reasonable and necessary cost".
27. The Commission did not consider this payment to be an operating cost because, adopting a substance over form approach, the payment was, in substance, a grant to Archibald's Mayoral campaign. This being the case, the applicable test is whether the payment was made for an authorised purpose.
28. The definition of "authorised purpose" for class 4 gambling expressly excludes payments made for an "electioneering purpose", the Act's definition of which includes individuals standing for election in local body elections.
29. The payment was a grant for an electioneering purpose, was not lawful, and breached section 52(1)(e) of the Act.

Grant to ATA

30. The payment to the ATA was a grant towards legal fees to challenge, in the Environment Court, noise restrictions imposed by the Papakura District Council on the use of the Ardmore Aerodrome. The payment was made at a time when the relevant provisions of the Act were not in force. Whitehouse was however subject to the standard set of conditions known as "Gaming Machine Licence Conditions Set B – Public Premises", licence condition 52(e) of which provided as follows:

- (e) The Society shall make grants only to the authorised purposes stated on the face of its licence.

31. At the time of the grant, June 2004, the following authorised purposes were stated in Whitehouse's licence:

1. To provide funds to support amateur sporting groups (such as rugby, soccer, netball and the like) throughout the South Auckland area in their specific sporting pursuits. No payments and/or donations are to be given to professional sports people.
2. To provide funds and support for charitable organisations (such as St. Johns, IHC and the like) in the provision of welfare, health and medical assistance. Also to assist bona fide community cultural groups (such as school kapa haka and the like).
3. Donations to bona fide organisations that provide youth development, education and training (such as the Scouts, Church groups and the like).

32. The grant to the ATA does not come within any of these authorised purposes and was therefore made in breach of licence condition 52(e).

33. Whitehouse, in a letter dated 12 May 2006 to the Secretary, argued that its trust deed allowed it to distribute funds for any charitable purpose, so the grant was lawful. The Secretary appeared to accept this, to a point. This is irrelevant, as licence condition 52(e) specifically requires any distributions from gaming machines to be made only to the authorised purposes stated on the face of the licence.

34. Having determined this payment was unlawful, it was unnecessary for the Commission to consider whether or not the purpose of the grant was charitable.

Suspension

35. The Commission concluded that all payments were made in breach of the Act or licence conditions. Pursuant to section 58 of the Act, there is jurisdiction to suspend Whitehouse's operator's licence, although the Commission has discretion whether or not to do so.

36. Section 58 provides that the Secretary (or the Commission on appeal) may suspend a class 4 operator's licence for up to six months. Initially the Secretary imposed a one month suspension, but amended his position (in circumstances that will be described shortly), suggesting that a seven day suspension would be more appropriate.

37. The Commission felt some unease with the Secretary's handling of the suspension period. Section 59(4)(d) of the Act provides that if the Secretary decides to suspend a class 4 operator's licence, he must notify the corporate society of the matters to be dealt with in order for him to consider withdrawing the suspension before the end of the suspension period. The Secretary did this in his letter to Whitehouse dated 26 June 2006, where he stated that Whitehouse must recover the money for Mr Garrick's

attendance at the Australasian Gaming Expo, and the money paid for his wages. These payments totalled \$7,121.52 (out of a total of over \$33,000.00).

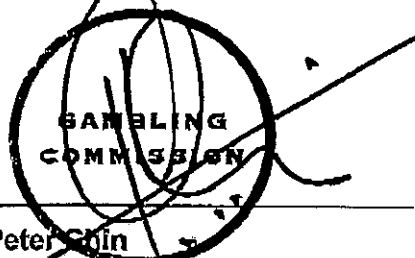
38. In his submissions to the Commission, the Secretary (informally) indicated that he would consider the withdrawal of the suspension if the sum of \$5,200 was recovered, this lesser sum being the total for Mr Garrick to attend the Expo and the second of his two wage payments.
39. By email dated 24 October 2006, the Appellant's solicitor informed the Secretary and the Commission that the Trust had recovered the \$5,200. By letter dated 27 October 2006, the Commission asked the Secretary what effect the recovered payment had on the suspension. The Secretary responded by letter dated 2 November, stating that he would not withdraw the suspension, but believed that a seven day period of suspension was now appropriate.
40. The Commission considered it unfair on Whitehouse for the Secretary to state that he would consider the withdrawal of the suspension if Whitehouse recovered \$5,200, but when this sum was recovered, he did not do so.
41. The Commission notes that section 59(4)(d) does not provide for the Secretary to automatically withdraw the suspension should the corporate society deal with the matter(s) identified, rather it provides for him to "consider" withdrawing the suspension. However, in order for the section to have any effect, there can only be limited situations where the Secretary does not withdraw the suspension following the corporate society addressing the matters identified. In this instance, the Secretary was concerned that Whitehouse would continue to breach section 52(1)(d) and send venue managers to future Australasian Gaming Expos.
42. As Whitehouse did deal with the matters that the Secretary identified, the Commission gave serious consideration to exercising its discretion not to suspend Whitehouse's operator's licence, but determined that this was not appropriate, given the flagrancy and significance of the breaches. Not to suspend Whitehouse in these circumstances would mean it suffered no consequence for its wrongdoing, and would avoid suspension by recovering a relatively small sum of money at the eleventh hour.
43. The Commission has taken the following factors into account in reaching its decision:
 - (a) The Secretary formally warned Whitehouse about sending inappropriate personnel to expos, but only two months after this warning, the trustees voted to send Mr Garrick to the 2004 Expo.

- (b) The Act does not allow class 4 grants to be made for electioneering purposes. Whitehouse attempted to circumvent this.
- (c) The grant to the ATA was outside the purposes stated on the face of Whitehouse's licence, and was for a significant sum of money.
- (d) Whitehouse committed multiple breaches, involving a significant amount of community money.
- (e) Whitehouse has not shown any contrition.
- (f) Whitehouse recovered \$5,200 as sought by the Secretary, but the Secretary did not withdraw the suspension.

44. Having considered all of the above, and the evidence and submissions presented by both parties, the Commission suspends Whitehouse Tavern Trust's class 4 operator's licence for four consecutive days, to be nominated by Whitehouse, to be taken within one calendar month of the date of this decision. For the sake of clarity, Whitehouse cannot include any statutory holidays as part of the suspension period.

Decision

45. For the reasons already provided, the Division unanimously declines the appeal and suspends Whitehouse Tavern Trust's class 4 operator's licence for a period of four days.



**GAMBLING
COMMISSION**

Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

12 December 2006