

**IN THE MATTER** of the Gambling Act 2003  
**AND** of an appeal by **BLUEGRASS HOLDINGS LIMITED**

**BEFORE A DIVISION OF THE GAMBLING COMMISSION**

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

Date of Decision: 7 December 2012

Date of Notification  
of Decision: 19 December 2012

**DECISION  
ON AN APPLICATION BY BLUEGRASS HOLDINGS LIMITED**

**Background**

1. Bluegrass Holdings Limited (the “**Appellant**” or “**Bluegrass**”) has appealed against a decision by the Secretary for Internal Affairs (the “**Secretary**”) to cancel its class 4 operator’s licence. The Secretary cancelled the licence under section 58(1)(a),(b) and (d) of the Gambling Act 2003 (the “**Act**”). The Secretary cancelled the licence relying on the following grounds:
  - (a) He was no longer satisfied of one of the grounds in section 52, a ground for cancellation under section 58(1)(a). The Secretary was no longer satisfied of the requirement that, after investigation, he be satisfied of the suitability of the Appellant and its key persons (section 52(1)(h)). The Secretary was not satisfied of the suitability of Mike O’Brien, who the Secretary considered to be a key person (although he was not named as such on the Appellant’s application for a licence), having regard to his history of compliance with the Act. The Secretary was no longer satisfied of the Appellant’s suitability because of its failure to inform the Secretary that Mike O’Brien was a key person and because it had apparently breached section 118.
  - (b) Bluegrass had failed to comply with a relevant requirement of the Act, a ground for cancellation under section 58(1)(b). The Secretary considered that Bluegrass had breached section 118 of the Act, as it had sought and received loans from potential grant recipients, which were, at least informally, conditional upon the grant recipients receiving future grants. The Secretary also considered that Bluegrass had failed to comply with section 57(1)(d) in that it

had failed to apply to amend its licence when a new key person (Mike O'Brien) was added.

- (c) Bluegrass had provided misleading and false information on its application for a class 4 operator's licence, concerning its initial funding, a ground for cancellation under section 58(1)(d).

2. Bluegrass applied to the Commission for orders that two issues be decided as separate, preliminary issues, prior to the hearing of the substantive appeal and, depending on the answers to the proposed questions, as to the approach to be taken to the hearing of substantive appeals. The terms of the application were:

The Appellant applies to the Commission for orders:

- (a) that the following questions be determined separately from any other question and before any substantive hearing in this appeal:

Question One:

Does the Commission have jurisdiction to determine that the Appellant has breached section 118 of the Gambling Act?

Question Two:

As a matter of law, can the Appellant be found to have breached section 118 given that:

- (i) the Appellant was not the holder of a class 4 operator's licence in September 2009 when the alleged breach of section 118 occurred; and
- (ii) the Appellant received the loan in question from Patrick O'Brien, who is not a grant recipient or potential grant recipient.
- (b) if the answers to Question One and Question Two are both affirmative, directing that the Appellant has the same rights at the hearing of the section 118 matters before the Commission as the Appellant would have had before a District Court sitting in its criminal jurisdiction, and in particular:
- (i) that the Respondent bears the onus of proof and is required to present his evidence in respect of the section 118 matters first and to prove his allegations beyond reasonable doubt; and
- (ii) that until the Respondent has proved his allegations to that standard, the Appellant has the right to be presumed innocent.

### Relevant law

3. The relevant law is as follows:

#### **Gambling Act 2003**

##### **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 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

...

- (d) the corporate society supplied information that is materially false or misleading in its application for—
    - (i) a class 4 operator's licence; or
    - (ii) a renewal or an amendment of a class 4 operator's licence; or
    - (iii) a class 4 venue licence; or
    - (iv) a renewal or an amendment of a class 4 venue licence.
- (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.

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...

- (3) The Gambling Commission—
- (a) may request any information from the corporate society or the Secretary; and
  - (b) is not bound to follow any formal procedure; and
  - (c) does not need to hold a hearing; and
  - (d) must consider any information provided by the corporate society or the Secretary.
- (4) The Gambling Commission may then—
- (a) confirm, vary, or reverse the decision of the Secretary; or
  - (b) refer the matter back to the Secretary with directions to reconsider the decision.

**118 Certain persons must not seek, receive, or offer benefits with conditions attached**

- (1) A holder of, or key person in relation to, a class 4 operator's licence or a class 4 venue licence must not knowingly receive or seek money, a benefit, an advantage, a privilege, or a gift from the following persons if the receipt has a condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
- (a) a grant recipient or potential grant recipient:
  - (b) a person that sells, repairs, services, or maintains gambling equipment.
- (2) A key person in relation to a class 4 venue licence must not knowingly receive or seek money, a benefit, an advantage, privilege, or gift from the following persons, if the receipt has a condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
- (a) a holder of a class 4 operator's licence if the holder operates at that venue:
  - (b) a key person in relation to a class 4 operator's licence if the holder operates at that venue.

- (3) A holder of, or key person in relation to, a class 4 operator's licence, or person that sells, repairs, services or maintains gambling equipment must not knowingly offer money, a benefit, an advantage, a privilege, or a gift to the following persons if the receipt has a condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
  - (a) a grant recipient or potential grant recipient;
  - (b) a key person in relation to a class 4 venue licence.
- (4) Subsections (2) and (3) do not prevent the holder of a class 4 operator's licence paying a key person in relation to a class 4 venue costs associated with the class 4 venue if the costs—
  - (a) do not exceed the amounts specified in any venue agreement; and
  - (b) do not exceed the limits in section 116; and
  - (c) are otherwise lawful.
- (5) A person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.
- (6) To avoid doubt, this section applies whether—
  - (a) the condition is attached either before or after the money is received by the person concerned; or
  - (b) any money is actually received by the person concerned.

#### **225 Gambling Commission is Commission of Inquiry**

- (1) Within the scope of its jurisdiction, and subject to this Act, the Gambling Commission (including any division) must be treated as if it were a Commission of Inquiry under the Commissions of Inquiry Act 1908.
- (2) Accordingly, the Commissions of Inquiry Act 1908 applies to the Gambling Commission.
- (3) The Gambling Commission has no power to—
  - (a) acquire, hold, or alienate property; or
  - (b) employ people.
- (4) Powers conferred on the Gambling Commission by this subpart are additional to powers conferred on the Gambling Commission by the application of the Commissions of Inquiry Act 1908.

4. Schedule 3, clause 2(1) of the Act provides:

#### **2 Meetings**

- (1) The Gambling Commission may regulate its procedure as it thinks fit.

5. The Commissions of Inquiry Act 1908 (“**COI Act**”) provides:

#### **4 Commissioners' powers**

- (1) For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of citing parties . . . and conducting and maintaining order at the inquiry.

**Submissions by the Appellant**

6. The Appellant submitted, in summary, that:

- (a) The Commission has jurisdiction to make the orders sought:
  - (i) The COI Act applies to the Commission.
  - (ii) Section 4, COI Act provides that a commission of inquiry has the powers of the District Court in the exercise of its civil jurisdiction.
  - (iii) The District Court Rules 2009 govern the District Court's procedure in the civil jurisdiction. The District Court Rules incorporate High Court Rule 10.15, which provides for any question to be heard separately from any other question before, at or after any trial.
  - (iv) Rule 10.15 is also available to the High Court in its appellate jurisdiction.
- (b) The purpose of an order under Rule 10.15 is to expedite proceedings by limiting or defining the scope of the trial in advance, or obviating the need for a trial altogether. These are principles which the Commission recognises in its provision for pre-hearing conferences in its Practice Notice (clause 21).
- (c) The Secretary chose not to lay criminal charges in the District Court in respect of the section 118 allegations, thereby denying the Appellant the ability to defend itself in a District Court with the usual protections of criminal procedure. The orders sought by the Appellant relating to the nature of any hearing of section 118 allegations need to be made before the Appellant can begin preparing its evidence and submissions in respect of the section 118 allegation. If the Commission decides that it has jurisdiction to determine whether a breach of section 118 has occurred and that as a matter of law it is possible for the Appellant to have breached section 118, the parties will need certainty as to the standard and onus of proof and whether the presumption of innocence applies.
- (d) If the Secretary were confident of a conviction in the District Court, then he should have no objection to the same burden and standard of proof applying in the Commission as would have applied in criminal proceedings in the District Court. If the Secretary were not confident of a conviction in the District Court, it was not appropriate for him now to gain an unfair advantage, at the expense of the Appellant's rights, simply because he did not lay charges in the District



Court in time. The Commission should not condone “forum shopping” of this nature.

- (e) It accepted that the preliminary hearing might cause some delay resolving the appeal. However the hearing of the preliminary matters could be done on the papers and the Appellant could prepare its evidence and submissions on those questions within 15 working days.
- (f) Although a decision on the preliminary matters would not automatically result in an end to the litigation, it could conceivably lead to:
  - (i) the Secretary deciding that the remaining allegations were not sufficient to support a cancellation decision; or
  - (ii) the Commission being able to determine that the remaining matters should be referred back to the Secretary.
- (g) If either Question One or Question Two was answered in the Appellant’s favour, this would reduce the hearing time for the substantive appeal. If section 118 is at issue at the substantive hearing, the Appellant intends to instruct senior counsel. It is also likely that a two-day hearing would be required (including witnesses). The cost to the parties, and to the Commission, would be considerable. A preliminary hearing could significantly reduce the likely cost.
- (h) There would be no disadvantage to the Secretary if the preliminary questions were determined separately. The Appellant’s concerns engaged fundamental issues of procedural fairness and potential abuse of power. Its position was supported by the Chief Justice’s dissenting judgment in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC). The risk to the Appellant’s rights outweighed any disadvantage to the Secretary.

### **Secretary’s submissions**

7. The Secretary did not oppose the application for the Commission to hear certain preliminary questions of law. However, he submitted that societies should not generally make such applications as the Act envisaged a formal appeal process and undue delays should be avoided. In this instance, the Secretary submitted that the Commission should decide only the first question, namely whether it had jurisdiction to determine a section 118 matter. The second question, regarding whether or not the Appellant could be found to have breached section 118 based on two factual assertions, involved consideration of facts which were best left to the substantive appeal.



8. The Secretary did not oppose the Commission considering, as a preliminary matter, the onus and standard of proof, and the presumption of innocence, to be applied in the substantive hearing. The Secretary submitted that the substantive hearing was an appeal within the ambit of the Act, and there was no reason for the Commission to depart from the usual civil standard of proof, which applied in all appeals before it.
9. The Secretary submitted that the parties should each have 10 working days to file submissions on the preliminary questions to limit any further delay.

#### **Appellant's submissions in reply**

10. In reply, the Appellant submitted that Question Two involved a question of law and was appropriately dealt with as a preliminary matter. The Appellant contended that the essential elements of section 118 cannot, as a matter of law, be made out, so submissions on this issue would have to be dealt with at the start of the substantive hearing in any case. Therefore, there was no disadvantage in hearing Question Two as a preliminary matter, and the potential for a large part of the substantive appeal to be avoided.

#### **Analysis**

11. The Appellant has filed an application seeking two directions. The first proposed direction is that two specified questions be determined separately and in advance of the remaining issues on the appeal (the "**section 118 Questions**"). The second proposed direction is that, if the questions in the first direction are answered in the affirmative, for directions relating to the hearing of certain aspects of the appeal.
12. The section 118 Questions ask whether the Commission has jurisdiction to determine that the Appellant has breached section 118 and whether, as a matter of law, the Appellant can be found to have breached section 118 in the light of two stated factual assumptions (that the Appellant was not the holder of a licence when the breach was said to have occurred and that the Appellant received the loan in question from Patrick O'Brien, who is neither a grant recipient nor a potential grant recipient).
13. The Commission considers that it has the power, if it considers it appropriate to do so, to determine separate questions in the course of deciding an appeal. It doubts, however, that its power arises because it has had conferred on it the civil jurisdiction of the District Court, as submitted by the Appellant. While the Commission must be treated as if it were a Commission of Inquiry and accordingly the COI Act applies to it (section 225 Gambling Act), the section of the COI Act relied upon by the Appellant (section 4) gives the Commission the powers of a District Court in its civil jurisdiction only "in respect of citing parties ... and conducting and maintaining order at the inquiry." The Commission



is inclined to the view that the effect of the section is confined to its express terms so that it does not confer on it the entire civil jurisdiction of the District Court.

14. The Commission has the express power to regulate its procedure generally as it thinks fit (section 234 and Schedule 3, clause 2(1) of the Act). In addition, in relation to appeals regarding a Class 4 operator's licence, it is not bound to follow any formal procedure (section 61(3)(b)). As the Appellant notes, the Commission has indicated in its Practice Note that it aims to achieve a fair, orderly and efficient disposal of matters before it. It considers that the procedural flexibility conferred on it by the foregoing provisions may be used for that purpose. While it does not consider that the District and High Court rules cited by the Appellant have direct application to it, its approach to regulating its procedure reflects the sentiments captured by Rule 1.2 of the High Court Rules ("just, speedy and inexpensive determination"). The real issue for the Commission is therefore not whether it can determine separate questions in the course of an appeal (as it is satisfied that it can) but whether or not it ought to determine the proposed preliminary questions in this particular appeal.
15. For the reasons set out below, the Commission does not consider that the proposed questions are suitable for separate determination in the context of the appeal, nor that attempting their prior determination would improve the speed and efficiency of the determination of the appeal.
16. The Commission's jurisdiction on the appeal arises under section 61 (an appeal against the cancellation of a Class 4 operator's licence). Certain procedural requirements are mandated in section 61, including the lack of any formal procedure outside of what section 61 itself requires. The Commission's powers on appeal are limited to confirming, varying, reversing or referring back with directions, the cancellation decision under appeal (section 61(4)). The *de novo* nature of the appeal hearing is apparent from the requirements of section 61, including the Commission's power to seek fresh information from the appellant and Secretary and the obligation for it to consider any information provided by the appellant and the Secretary (section 61(3)).
17. The *de novo* nature of appeal hearings means that determination of separate issues are likely to be uncommon as they would usually require the Commission to be able to analyse the scope of the potential issues in advance sufficiently restrictively so as to make separate determination appropriate and worthwhile. Such an analysis is not impossible, as indicated by the Commission in decision GC22/10 (New Zealand Community Trust re Tomo's Sports Bar) where the Commission was able to determine the appeal conclusively on a narrow issue (and without hearing contentious evidence), but the potential issues in this appeal are not confined in the same way. This is



especially the case when the appeal materials (evidence and submissions), which might have had the potential to narrow the issues, have not even been received by the Commission.

18. On its face, the current appeal does not reduce to a single issue in the same way. The Commission does not consider that attempting to answer the questions posed will result in the speedy and economical determination of the appeal. The cancellation power has been exercised by the Secretary on the basis of three of the possible four grounds for cancellation under section 58:
  - (a) A ground in section 52, specifically the satisfaction of the Secretary, after investigation, with the suitability of the Appellant an alleged key person (section 52(1)(h)), is no longer met – section 58(1)(a).
  - (b) The failure of the Appellant to comply with a relevant requirement of the Act, specifically section 57 and section 118 – section 58(1)(b).
  - (c) The Appellant supplied materially false or misleading information in its application for the licence – section 58(1)(d).
19. The first ground of cancellation relied upon by the Secretary is concerned with suitability, which is assessed by reference to section 52(4). The things which may be taken into account include both convictions for relevant offences (section 52(4)(a)(i) and (ii)) and the profile of past compliance with relevant legislation (section 52(4)(c)). The separate provision for the latter indicates that assessment of past compliance is not limited to considering relevant convictions. Matters which touch on compliance with section 118 are relevant to each of the three grounds of cancellation, but are not the sole basis relied on by the Secretary in relation to any of the three grounds.
20. The *de novo* nature of the appeal means that the issues may not necessarily be confined to those relied upon by the Secretary initially and may be supplemented and widened by new information received by the Commission in the course of the appeal. Even if that transpires not to be the case, the substantive matters underlying the grounds relied upon appear to be inter-related. Both of those factors lead the Commission to the view that the application has too narrow a focus.
21. The Commission is hearing an appeal under section 61, not hearing a charge under section 118 with potential to impose a summary conviction and criminal sanction. The Commission does not understand the Appellant to ask it to determine whether it can hear a charge under section 118 but, rather to determine whether it can decide whether section 118 has been complied with as a matter of fact.

22. In the absence of a conviction under section 118 (which seems to be common ground), the relevance of compliance with section 118 to the first ground of the Secretary's decision (suitability of the Appellant and possibly a key person) would be limited to it being one element of an assessment of suitability. It would also appear to be one element of the second ground (compliance with relevant requirements of the Act). It does not directly affect the third ground (although the substance of that ground and section 118 appear to be factually connected by the disputed role of Mike O'Brien in the affairs of the Appellant). In these circumstances, the Commission is of the view that the section 118 Questions are better decided, if necessary, as part of the substantive appeal when all the relevant information is before the Commission.

*Second proposed direction*

23. The second proposed order seeks directions which in substance are a statement of legal rights, in the event that the Commission answered the section 118 Questions in the affirmative. To recap, the section 118 Questions were:
- (a) whether the Commission has jurisdiction to determine a breach of section 118; and
  - (b) whether as a matter of law, the Appellant can be found to have breached section 118 in two stated factual circumstances.

If the Commission answers these in the affirmative, the Appellant seeks, in its proposed second order, directions that the Secretary bears the onus of proof; is required to present his evidence first; is required to prove his allegations beyond reasonable doubt; and that, until the Secretary has proved the allegations, the Appellant has a right to be presumed innocent.

24. As framed, the proposed second order assumes that the Commission will decide to determine the section 118 matters question separately, as the second order is conditional on an affirmative answer to the section 118 Questions. It assumes that, if the Commission answers one or both of the section 118 Questions in the negative, the second orders would not be necessary, but if it answers them both in the affirmative, the second order (or at least a ruling on the issues in the second proposed order) would be necessary.
25. The Commission considers that, although it has declined to determine the section 118 Questions in advance and therefore the condition on which the second order is sought is not, strictly speaking, met, the parties will also want to know its view on the standard and onus of proof in the present situation, namely where it has decided that the section 118 Questions should be decided as part of the substantive hearing. The Commission notes

that the Appellant submitted, in support of its application, that if the Commission decides that it has jurisdiction to determine whether a breach of section 118 has occurred and that as a matter of law it is possible for the Appellant to have breached section 118, the parties will need certainty as to the standard and onus of proof and whether the presumption of innocence applies.

26. The Commission considers that the proposed second order attempts to reframe the appeal issues inappropriately. The Commission is not engaged in the hearing of charges brought under section 118; it is hearing an appeal against a cancellation decision under section 61. The proposed directions, including a requirement for the Secretary to present his evidence first and prove allegations beyond a reasonable doubt, are not consistent with the express procedural powers and obligations of the Commission under section 61, including its power to seek information from the parties. Its jurisdiction is to confirm, vary, reverse or refer back with directions a decision to cancel the Appellant's licence on the basis of its consideration of all of the material before it. Such appeals involve no particular onus on either party and involve no presumption in relation to the correctness or otherwise of the decision under appeal. The Commission does not consider that it is appropriate to approach an appeal on the basis that the Secretary is presumed to be in error, which is in substance what the proposed directions provide.
27. In the Commission's view, the proposed second order confuses the need for a Court to find the elements of an offence established beyond reasonable doubt before entering a criminal conviction and, for example, the statutory standard to be applied by the Secretary, or by the Commission on appeal, under section 52 (a requirement to decline to grant a licence application unless positively satisfied of a series of stipulated matters) in deciding whether to cancel or suspend a licence under section 58. In that regard, the Commission notes the requirement (section 58(2)) to take the matters in section 52 into account in all decisions whether to suspend or cancel a licence, irrespective of which of the 4 possible grounds are relied upon.
28. The Commission also notes section 354 which expressly provides, for the avoidance of doubt, that the provisions of Subpart 8, involving proceedings for offences under the Act, do not prevent the Secretary from exercising his powers under Part 2. The fact that certain breaches of the Act may be the subject of summary criminal charges does not exclude those matters from consideration in the course of the licensing functions of the Secretary under Part 2, although the existence of pending criminal charges which are co-extensive with the grounds for cancellation may affect the timing of the exercise of those functions in order to avoid replication without sufficient reason (*First Sovereign Trust & anor v Secretary for Internal Affairs & anor*, CIV-2010-485-828, High Court



Wellington, 22 July 2010, Joseph Williams J). No such considerations arise in this case as it is common ground that no charges are pending and none can now be laid. In addition, importing criminal process into the Commission's appeal procedures, as proposed by the directions sought, would be inconsistent with the reasoning in the *First Sovereign* decision, which noted (para [42]) the differences between the Commission's procedures on appeal and criminal proceedings.

29. For the reasons set out above, the Commission declines to determine the proposed questions separately or to make the hearing directions sought. It doubts that the directions would ensure a speedy and efficient determination of an appeal in which the issue is "Should the decision of the Secretary to cancel the licence, under 3 of the 4 grounds available under section 58, be confirmed, varied, reversed or referred back to the Secretary with directions in the light of the information provided to the Commission by the Appellant and the Secretary?" The section 118 matters are best dealt with in the course deciding the ultimate issue on the appeal in the light of the information which it receives from the parties and the submissions which they make in the substantive appeal.

#### **Decision of the Commission**

30. For the reasons set out above, the Commission declines the application.



Graeme Reeves  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

19 December 2012

