

IN THE MATTER of the Gambling Act 2003
AND on an appeal by **EUREKA TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
M M Lythe
G L Reeves

Date of Appeal: 15 August 2006

Date of Decision: 16 November 2006

Date of Notification
of Decision: **14** December 2006

DECISION
ON AN APPEAL BY EUREKA TRUST

Appeal

1. Eureka Trust ("**Eureka**") appealed under section 61 of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary for Internal Affairs (the "**Secretary**") to impose a condition on its class 4 operator's licence.
2. Eureka requested that the Commission remove the condition. The Secretary asked the Commission to confirm his decision to impose the condition.

The Gambling Act 2003

3. The key sections of the Act for this appeal are as follows:

4. Key person means -

- (a) in relation to a class 4 operator's licence, a person who -
 - (i) is a trustee or other officer of a corporate society that is an applicant, for, or holder of, a class 4 operator's licence;
 - (ii) is the chief executive (or performs that function) of a corporate society that is an applicant for, or holder of, a class 4 operator's licence;
 - (iii) exercises significant influence in the management of a corporate society that is an applicant for, or holder of, a class 4 operator's licence; and
- (b) in relation to a class 4 venue licence, -
 - (i) a venue manager;
 - (ii) venue personnel;
 - (iii) a venue operator;
 - (iv) a person who is a director, chief executive, or senior manager of a venue operator, or any other person who the

Secretary reasonably believes to have a significant interest in the management, ownership, or operation of a venue operator:

- (v) a person contracted to service gambling equipment at a class 4 venue; and
- (c) in relation to a licensed promoter's licence, a person who ...

65. Application for class 4 venue licence

- (1) A corporate society may apply to the Secretary for a class 4 venue licence.
- (2) An application must be on the relevant standard form and be accompanied by –
 - (c) a copy of a class 4 venue agreement if required under subsection (3); and
- (3) The application must also be accompanied by a class 4 venue agreement unless the Secretary is satisfied that the applicant is a club that intends to operate gambling equipment at a non-commercial class 4 venue that –
 - (a) it owns or leases; and
 - (b) is mainly for the use of club members.

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 –
 - (a) ...
 - (b) be involved in decisions about, or in managing, the application or distribution of net proceeds from class 4 gambling conducted by a corporate society that operates at the venue (whether or not the net proceeds derive from that venue); or
 - (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 agreement; or ...

Facts

- 4. This appeal has arisen because Eureka has a contract with Gaming Machine Accounting & Investigation Services Limited ("**GMAIS**"), pursuant to which, GMAIS, for a fee:

- (a) processes grant applications made to Eureka; and
- (b) services Eureka's gambling equipment at all of its venues.

- 5. By letter dated 2 May 2006, the Department of Internal Affairs (the "**Department**") wrote to Eureka expressing concern that GMAIS, in performing both of these services, was in

breach of section 113(1)(b) and 113(1)(c) of the Act and offered Eureka the opportunity to comment.

6. Eureka responded by letter dated 24 May 2006, denying any breach of section 113 but proposing that the Department's concerns be addressed by Eureka taking over the processing of the grant applications and limiting GMAIS to service its gambling equipment.
7. By letter dated 8 June 2006, the Department responded, stating that it:

... accept[ed] that the proposed changes in respect of GMAIS ... will address concerns in relation to section 113 of the Gambling Act 2003 ...

The Department can advise that it now intends to progress Eureka Trust's class 4 operator's and venue licences renewal application ...

8. By letter dated 26 July 2006, the Department wrote to Eureka advising that its class 4 operator's and venue licences had been approved with the addition of two licence conditions. The first licence condition (the "**condition**") added is as follows:

Commencing 1 September 2006, Gaming Machine Accounting & Investigation Services Limited (GMAIS) can only provide services to Eureka Trust in respect of one of the following, but not both:

- (a) Processing grant applications, gaming net proceeds and net proceeds accounting documentation and administration for Eureka Trust.
- (b) Servicing gambling equipment at Eureka Trust venues.

9. The second licence condition is not relevant to this appeal.
10. Eureka appealed against the Secretary's decision to impose the condition on 15 August 2006.

Submissions on behalf of Eureka

11. Eureka submitted (in summary) that the condition should be removed for two reasons. First, the Secretary's decision to add the condition was based on the erroneous belief that GMAIS was managing the distribution of net proceeds in breach of section 113(1)(b) of the Act. Eureka submitted:

- (a) GMAIS does not manage the distribution of net proceeds – it provides purely administrative services; and
- (b) GMAIS does not recommend whether or not grant applications should be approved – it simply filters out the applications that can never succeed.

12. Secondly, the Secretary's decision to add the condition was based on an incorrect interpretation of section 113 of the Act – section 113, through section 65(3), applies to

clubs operating gambling equipment at non-commercial class 4 venues which are owned or leased by the club and used mainly by the club members. As neither Eureka nor GMAIS own or lease any of the venues, section 113 is not applicable.

13. Eureka supported its submissions with the affidavits of Barry Corbett, a Eureka trustee, and Peter Webb, a director of GMAIS.

Submissions by the Secretary

14. The Secretary submitted (in summary) as follows:
- (a) In the absence of the condition, the services provided by GMAIS to Eureka breach sections 113(1)(b) and 113(1)(c) of the Act;
 - (b) GMAIS is managing the application or distribution of net proceeds in breach of section 113(1)(b);
 - (c) Eureka has incorrectly interpreted section 113 of the Act. Section 113, through section 65(3), applies to all venues other than clubs operating gambling equipment at non-commercial class 4 venues which are owned or leased by clubs and used mainly by the club members. Section 113 also does not apply to Racing Boards or racing clubs pursuant to section 65(4);
 - (d) The imposition of the condition will ensure compliance with section 113(1)(b) and 113(1)(c);
 - (e) The condition is reasonable; and
 - (f) Eureka is estopped from appealing against the condition, as it was imposed in reliance on representations made, and undertakings provided, by Eureka.
15. The Secretary supported his submissions with the affidavits of Robert Brook and Robert Hunter, both Senior Gambling Inspectors employed by the Department.

Eureka's submissions in reply

16. In reply, Eureka refined its submission relating to sections 113 and 65(3), accepting that GMAIS is a key person in respect of a "venue licence", but it is not a key person in relation to "a venue to which section 65(3) applies".

Analysis

17. As a preliminary matter the Secretary invited the Commission to comment on whether GMAIS and its directors are key persons in relation to Eureka's class 4 operator's licence.

The Commission declined to do so as it was not a matter requiring resolution in relation to this appeal.

18. As a further preliminary matter, the Secretary submitted that Eureka's proposal dated 24 May 2006 amounted to an undertaking and having given such, Eureka is estopped from arguing against the condition.
19. The Commission notes, first, that Eureka's suggested resolution was put forward as a proposal for discussion purposes, rather than as a specific undertaking or representation. Secondly, an estoppel requires an element of detrimental reliance on an unambiguous representation. The imposition of a licence condition indicates that the Secretary did not rely on the proposal because if he had, there would have been no need to impose a condition. Thirdly, the licence condition that the Secretary added differs from Eureka's proposal as it allows GMAIS the choice of which services it will provide.
20. The Commission noted that the Secretary was right to point out the unattractiveness of the fact that Eureka was now challenging something which, in essence, it put forward, but a proposal put forward by Eureka for discussion does not estop it from arguing against the condition imposed.
21. The Commission identified the following issues arising for determination:
 - (a) Does section 113 apply to the venues that Eureka operates?
 - (b) Is GMAIS a key person in relation to such venues?
 - (c) Do the services supplied by GMAIS breach sections 113(1)(b) and (c)?

Does section 113 apply to the venues that Eureka operates?

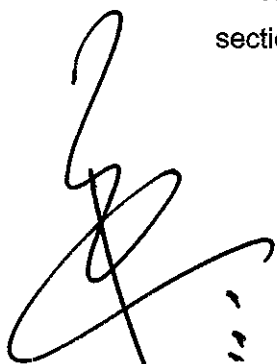
22. Section 113 prohibits key persons from being involved in certain activities or decisions, and applies only to "a venue to which section 65(3) applies".
23. Eureka interpreted section 65(3) as only applying to a club operating gambling equipment at a non-commercial class 4 venue owned or leased by the club and used mainly by club members. The Secretary interpreted section 65(3) as applying to commercial class 4 venues.
24. The Commission agreed with the Secretary's interpretation for four reasons. First, the drafting of section 65(3) indicates that all applications must be accompanied by a class 4 venue agreement, with certain clubs being an exception to the rule. Eureka's interpretation would transform the exception into the rule. Secondly, the purpose of section 65(3) is to require venues to have a class 4 venue agreement, this requirement

being more relevant for commercial venues, where the corporate society and venue operator are different entities. Thirdly, making commercial venues subject to section 113 is consistent with the apparent underlying policy intent of the Act, as conflicts of interest are more likely to arise in relation to commercial venues. Fourthly, Eureka's interpretation would lead to an absurdity as a club would never be able to comply with section 113(1) because the club fulfils the roles of corporate society, venue operator and grant recipient.

25. As Eureka does not operate at non-commercial venues, nor own or lease any such venues, the Commission determined that section 65(3) and section 113 of the Act apply in relation to venues which Eureka operates.

Is GMAIS a key person in relation to such venues?

26. As noted above, Eureka submitted in reply that although GMAIS is a key person in relation to a class 4 venue licence (as defined in section 4 of the Act), it is not a "key person in relation to the venue", to whom section 113 of the Act applies.
27. The phrase used in section 113, "key person in relation to a venue", does not occur anywhere else in the Act, and is not defined. "Key person" is defined in section 4 of the Act and has three sub-definitions, namely, key person in relation to a class 4 operator's licence; key person in relation to a class 4 venue licence; and key person in relation to a licence promoter's licence (this latter definition not being of relevance here).
28. "Key person in relation to a venue" cannot refer to a key person in relation to a class 4 operator's licence. If it did, an absurdity would result because the class 4 operator could not perform its functions without breaching section 113 – for example, it is the class 4 operator which decides who will receive grants.
29. The remaining possibility is that "key person in relation to a venue" means "key person in relation to a class 4 venue licence". This interpretation makes sense and is consistent with the purpose of the section. It appears that the Act has used the phrase "key person in relation to the venue" as shorthand for those key persons in relation to a class 4 venue licence for the particular venue under consideration.
30. On this test, as GMAIS is "a person contracted to service gambling equipment at a class 4 venue", it is a key person (under the section 4(b)(v) definition) within the meaning of section 113 of the Act.



Do the services GMAIS supply breach sections 113(1)(b) and (c)?

Section 113(1)(b)

31. Section 113(1)(b) is aimed at preventing key persons in relation to a venue from either "be[ing] involved in decisions about, or in managing the application or distribution of net proceeds from class 4 gambling". The Commission considers that decision-making and management are different concepts, with an element of overlap between the two. The two phrases do not carry a particular technical legal meaning, and should be given their ordinary meaning.
32. The Commission was required to determine, as a matter of fact, whether GMAIS's activities fell within the description of being involved in decisions or managing grants. The services that GMAIS performs are (in summary) as follows. First, it receives and assesses each grant application to ensure that it meets Eureka's administrative guidelines. Secondly, it prepares a schedule of all those that meet, and do not meet, an authorised purpose. Thirdly, after the trustees decide which applications to accept, it prepares the appropriate letters and cheques for applicants.
33. The Commission considered that by undertaking these tasks, GMAIS is involved in both decision-making and management, and, as it is a key person, is in breach of section 113(1)(b).

Section 113(1)(c)

34. Section 113(1)(c) prohibits key persons from providing services to the corporate society which operates at the venue, unless those services are listed in the class 4 venue agreement. A person who services gaming machines will, by definition, always be in breach of section 113(1)(c), unless those services are listed in the class 4 venue agreement. The services GMAIS provides to Eureka are not listed in any of Eureka's venue agreements, so GMAIS is in breach of section 113(1)(c).

Imposition of condition

35. The condition proposed by the Secretary provides that GMAIS can provide one of the two services to Eureka, but not both. Drawing on the approach taken by it in decision GC16/06, the Commission next considered whether the condition was necessary, would ensure compliance, and was reasonable.
36. The Commission concluded that the condition was unnecessary as section 113 already makes it plain that GMAIS cannot lawfully undertake both grant processing and repair services. If GMAIS provided only grant-processing services, it would not be a key person and there would be no breach as section 113 of the Act would not apply. If GMAIS

services Eureka's gambling equipment, GMAIS, as a key person, is precluded from involvement in the management and decision-making relating to grants. It is noted, furthermore, that GMAIS, as a key person, would be in breach of section 113(1)(c), unless GMAIS's repair services were specified in Eureka's venue agreements. The requirement for the Secretary to approve these venue agreements, pursuant to section 69 of the Act, provides a mechanism for the Secretary to ensure that Eureka does not make provision for GMAIS to undertake multiple services in breach of section 113.

37. In relation to compliance, the Secretary submitted that, in the absence of the condition, the services provided by GMAIS to Eureka breach sections 113(1)(b) and 113(1)(c) of the Act. Breach arises not from the absence of a condition, but from failure to comply with section 113. Future compliance by GMAIS and Eureka is for the Department by enforcing the existing statutory requirements, including the approval of venue agreements.
38. In relation to reasonableness, the Commission determined that it is not reasonable to impose an unnecessary licence condition which duplicates an existing statutory prohibition. The Commission also noted that it is not for it (or the Secretary) to stipulate which of the two services GMAIS will provide Eureka – that is for GMAIS and Eureka to resolve, provided this is consistent with the Act.
39. Two further observations can also be made about the condition. First, the condition inappropriately seeks to impose obligations on a party that is not subject to the operator's and venue licences. This could have been addressed by reframing the condition to impose relevant obligations on Eureka. Secondly, the Commission observes that the condition would, in any event, not have been effective if Eureka chose to contract someone other than GMAIS to undertake processing and repair services, again a matter which could have been addressed by more careful drafting.

Decision

40. For the reasons already provided, the Division unanimously allows the appeal.


Peter Chin
 Chief Gambling Commissioner

for and on behalf of the
 Gambling Commission

14 December 2006