

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

**BEFORE THE GAMBLING COMMISSION**

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

Date of Application: 10 July 2013

Date of Decision: 13 September 2013

Date of Notification  
 of Decision: 24<sup>th</sup> October 2013

**DECISION ON AN APPLICATION BY SECRETARY RE REDACTIONS IN DOCUMENTS AND OTHER DIRECTIONS IN AN APPEAL BY BLUEGRASS HOLDINGS LIMITED**

**Introduction and 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) Gambling Act 2003.
2. The Commission has previously issued two decisions on interlocutory matters relating to this appeal, the last of which, GC17/13, declining an application for stay, was issued on 24 June 2013. That decision set out the lengthy procedural history of the appeal and the relevant law. In paragraphs 23 and 24 of decision GC17/13, the Commission summarised the current issues raised by the appeal as follows:
  23. In its decision released on 19 December 2012, the Commission framed the issue on the appeal as follows:
 

Should the decision of the Secretary to cancel the licence, under 3 of the 4 grounds 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?
  24. The formulation remains correct but the grounds, for the purposes of the appeal, now require restriction. These grounds are now:
    - (a) lack of satisfaction, after investigation, with suitability of the Appellant and an alleged key person, namely Mike O'Brien;
    - (b) breach of a relevant requirement of the Act, namely s 57(1)(d) (failure to amend its licence when an allegedly now key person (Mike O'Brien) was added); and

(c) the supply of materially false or misleading information in the Appellant's application for its licence.

3. In the same decision, the Commission also addressed an issue raised in the course of argument on the application for stay, namely redactions which the Secretary had made to copies of documents that he had provided to the Commission and to the Appellant in accordance with the Commission's standard directions in Class 4 appeals. The Secretary had made the redactions on the basis that the information could be withheld under the Official Information Act. The Commission pointed out that the Secretary was not engaged in making disclosure under that Act but was providing information to the Commission pursuant to a request made under section 61(3)(a) of the Gambling Act.
4. The Commission dealt with the issue of redaction in paragraphs 28 and 29 as follows:
  28. If the Secretary wishes to make redactions to appeal disclosure documents, he must seek the Commission's agreement to that course, supported by reasonable grounds to justify redaction. Those grounds would need to address why, for example, a limited access or confidentiality direction would not sufficiently protect the interest of concern. The submissions for the Secretary indicate that the Secretary would be comfortable with any orders that the Commission considers appropriate in relation to the disclosure documents in this appeal.
  29. The Commission directs that, within 10 working days, the Secretary must **either** replace all disclosed documents containing redactions with copies without redactions or the Secretary must apply to the Commission for orders approving redaction, restricting access or for confidentiality. In the latter event, the Commission will make timetable orders for dealing with the application.
5. On 10 July 2013, the Secretary made an application to the Commission, seeking approval of the redactions and seeking additional directions.

#### **The Secretary's application and submissions**

6. The application by the Secretary seeks the Commission's approval of his earlier redactions, with the result that neither the Commission nor the Appellant would see the redacted information, on the following grounds:
  - (a) the documents are not relevant to the appeal;
  - (b) withholding the redacted material is necessary in the interests of justice and maintenance of the law; and
  - (c) the redaction does not prejudice the Appellant.
7. As to the first ground, the Secretary submitted that the material relates to Mike O'Brien's relationship with Class 4 venues and racing clubs and was collated as part of a case alleging breach of section 118 which the Secretary has now abandoned. Accordingly, the material is no longer relevant to the appeal. Presumably that is also the basis for the asserted lack of prejudice to the Appellant.

8. Even if the Commission regarded the material as potentially relevant, the Secretary submitted that the Commission should permit him to withhold the redacted material as being in the interests of justice and the maintenance of the law. It is said that the material was collated in relation to separate ongoing investigations carried out by the Department of Internal Affairs in conjunction with other enforcement agencies, including criminal investigations in which it is not the lead agency. The Secretary submits that release of the redacted material has the potential to undermine the integrity of those ongoing investigations.
9. As to directions:
- (a) The decision to cancel the licence was issued on 3 July 2012 but, by virtue of section 62(2)(b)(ii), the licence continues in force (and has done so for more than 12 months). An application for renewal of the licence was made in June 2012 (shortly before the cancellation decision was made) and, notwithstanding the cancellation decision and appeal, a second renewal application was made in June 2013.
  - (b) During the intervening period, the Secretary has become aware of further matters affecting the suitability of the Appellant and its key person.
  - (c) The Secretary is concerned that the "usual administrative process" of licence renewal may conflict with the appeal process and is now considering whether the renewal application should be dealt with and, if so, whether he should refuse to renew it, giving rise to a further right of appeal.
  - (d) The difficulty is seen as arising from the existence of information gained after the cancellation decision of 3 July 2012. The Secretary considers that he cannot "rely on" it to support the cancellation decision, but he considers it to be highly relevant to whether the licence should continue. He did not offer a reason why he should not place relevant information before the Commission on the appeal; presumably it is because he considers that doing so would be to "rely on" it.
  - (e) He seeks directions about whether the material should be put to the Commission as part of its *de novo* consideration of the appeal or relied upon as the basis of a new decision under section 56, declining to renew the licence.
  - (f) The Secretary's view is that any renewal consideration would be artificial but possibly required as part of the Department's usual administrative process.
10. The Commission directed the parties to file submissions on the application, highlighting as key issues:



- (a) in relation to the direction to approve the withholding of redacted material, the powers of the Commission to request information and to provide it to another party;
- (b) the legal and procedural position which arises when there is an application to renew a licence which has been cancelled by the Secretary but which continues in force as the consequence of an appeal; and
- (c) the consequence of the Secretary gaining new information, relevant to a decision under appeal, during the course of the appeal.

#### **Appellant's submissions**

11. The Appellant originally raised the issue of unauthorised redaction before decision GC17/13 and the removal of section 118 issues from the appeal. As the Secretary says that the redactions relate only to section 118 matters and are irrelevant to the appeal, the Appellant no longer wishes to pursue the redaction issue. It does so however solely on the basis that the Secretary will not rely on any of the withheld material for the appeal and expressly reserves the right to raise the issue in the future if the Secretary uses any of the redacted information.
12. The Appellant argues that the effect of section 62(2) is that the licence is not cancelled until the outcome of the appeal; as it remains in force, the cancellation does not take effect until then.
13. The issue is the interaction between section 56 (which preserves licences as long as a renewal application has been made and not refused) and section 62(2) (which preserves licences pending appeal outcomes), with particular emphasis on the position of a licence holder once an appeal succeeds.
14. If the appeal succeeds, the licence would not be cancelled. The licence in question in this case would be the 2011-2012 annual licence. The Appellant submits that, in that event, the now no longer cancelled 2011-2012 licence would continue in force only because of the effect of a June 2012 application for renewal and section 56(6). However, if no renewal application had been made, the position would be more difficult for the licence holder because the Act is not explicit about the effect of a successful appeal after the expiry of a licence that has continued in force pursuant to section 62(2).
15. One possible means of providing for the situation might be for the Commission to deal with the position in the appeal decision by specifying a new expiry date for the no longer cancelled licence in order to allow the Appellant sufficient time to make a renewal application. However, such a remedy may be prevented by the provision in section



- 53(1)(b) that a licence expiry date must not be more than 18 months after its commencement.
16. The Appellant points out that section 62(2) has no effect once the appeal decision is made. At that point, for the foregoing reason, an application for renewal must be in place for the licence to be preserved by section 56(6).
  17. The Appellant submits that there is no difficulty with the licence being preserved under two different provisions at the same time because they have the same practical effect.
  18. The Appellant concedes that arguably only one renewal application was necessary (not the second one made in June 2013) because neither licence preservation provision (s 62(2) or section 56(6)) is time-limited and the licence could be renewed for up to 18 months from the date the appeal is allowed (such a renewal being based on the June 2012 application for renewal). The Appellant submits that, when a licence is kept in force by section 62(2), a renewal application is required in order for it to continue in force after a successful appeal. The real issue is how a renewal application should be treated by the Secretary, pending the outcome of a cancellation appeal.
  19. The Appellant argues that the Secretary's submission that it is not feasible to make no decision pending the cancellation appeal decision is contradicted by the Secretary's own practice, in some cases, of taking a lengthy period, sometimes years if a matter is under investigation, to process renewal applications. There is a parallel between such investigations and the appeal process.
  20. The Appellant submits that renewal applications made during the course of an appeal against cancellation should be held unprocessed for three reasons:
    - (a) The appeal outcome is likely to have a significant effect on the eventual renewal decision. The Appellant does not concede that the appeal outcome is determinative however. It says that there may be "new issues to be considered on renewal". In so arguing, the Appellant departs from the logic of his initial argument, which assumed a successful appeal. If the cancellation decision were upheld, the cancellation would be confirmed and, logically there would be no licence to renew. Therefore, the Appellant argues for an independent right of preservation which is not lost if the cancellation appeal fails.
    - (b) During the cancellation appeal, there is only one possible outcome of the renewal application, namely refusal to renew, because the Secretary will presumably remain of the view that the section 52 criteria are not met. However, if he refused the renewal application, it would lead to a further appeal



that, in turn, would trigger the separate preservation provision in section 62(2). The Commission would then need to work out how to deal with two appeals.

- (c) If annual renewal applications were not made, licence fees payable on renewal would not be collected. There are two aspects to this:
- (i) If the appeal fails, the fees for the renewal application should be refunded (since the Secretary does not need to consider the application – a point which appears inconsistent with what is summarised in para 20(a)).
  - (ii) If renewal applications were not required, the Department would lose revenue.

21. The Appellant argues that there must be a limit on the ability to introduce new material in the course of the appeal without putting it through the cancellation procedure set out in section 59. The Appellant repeats its earlier submissions (para 14-19 of its 24 May 2013 submission), undeterred by the fact that the Commission expressly rejected that argument in decision GC17/13, ruling that section 59 applies only to the Secretary's initial decision and has no application to the Commission's procedure in hearing an appeal, which is governed by section 61.
22. It argues that the appeal should now proceed on a narrow basis, without expansion by new material, especially as it no longer seeks the redacted material. It is now concerned that the alternative would be delay. In essence it wishes to separate out the old and new material, requiring the Secretary to limit the material before the Commission on the present appeal to matters taken into account in the cancellation decision of 3 July 2012, leaving all other matters to a separate renewal decision which should not be considered until after the appeal is heard (on a confined basis). In doing so, the Appellant did not address the breadth of the issues as expressed in decision GC17/13 (see para 2 above).

**Reply submission by Secretary**

23. In the light of the Appellant's indication that it no longer pursued the redacted information, the Secretary did not address the issue of redaction, apparently assuming that compliance with a direction by the Commission is a matter under the control of the parties and therefore resolved.
24. The Secretary describes, without further explanation, the appeal preservation (section 62(2)) and renewal application preservation (section 56(6)) provisions as complementary. Like the Appellant, the Secretary recognised the practical impossibility of the Secretary granting renewal of a licence that he had cancelled and also recognised

that the preserving effect of section 62(2) is spent with the issue of the appeal decision (although the licence cannot expire prior to the appeal decision). He also concurred with the Appellant that a decision to refuse renewal would give rise to a further appeal (and associated licence preservation).

25. The Secretary wants renewal applications for cancelled licences to be made because they provide him with updated financial information and income in the form of application fees. He submits that a renewal application is also necessary to preserve the licence if the appeal succeeds. He agrees with the Appellant that, if the appeal fails, the renewal application fees should be refunded but only on a "pro rata basis". He also observed that his jurisdiction to renew a licence depends on him having received an application.
26. As a matter of practice, in cases like the present, he receives renewal applications and holds them unprocessed although he recognises that there is no express statutory authority for that course and, to the contrary, it appears to be contradicted by section 56(5), which requires the Secretary to refuse to renew a licence if not satisfied that the section 52 criteria are met. Nevertheless, he asks the Commission to approve his current approach.
27. Contrary to the Appellant's submission (and to his earlier position as set out in the application), the Secretary considers that he may place new material before the Commission on the current appeal. While the material was not before the Secretary when he made the cancellation decision, it is nonetheless relevant, particularly to rebut the Appellant's expected submission that circumstances have changed (positively for the appeal) since the 3 July 2012 cancellation decision.
28. The Secretary submits that the new material does not raise any new issues because it is relevant to the issues on appeal as set out by the Commission. He does not support a suggestion that the new material be sent back to the Secretary for reconsideration or excluded from the appeal.

### **Relevant law**

29. The relevant provisions of the Gambling Act 2003 are as follows:

#### **56 Renewal of class 4 operator's licence**

1. A corporate society may apply to the Secretary for a renewal of its class 4 operator's licence before the expiry of the licence.
2. An application must be on the relevant standard form and be accompanied by –
  - (a) any items listed in section 50 that the Secretary requests in order to consider the application and effect the renewal; and
  - (b) if applicable, any items necessary to effect an application for a class 4 venue licence.

...

4. Sections 51 and 52 apply to an application for renewal as if it were an application for a class 4 operator's licence.
5. The Secretary must refuse to renew a class 4 operator's licence if-
  - (a) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 52; or
  - (b) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, licence conditions, game rules, and minimum standards.
6. A class 4 operator's licence continues in force after its expiry dates if-
  - (a) The corporate society has applied for renewal before the expiry date; and the application has not been refused.

#### **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
  - (c) the class 4 venue agreement is no longer consistent with ensuring compliance with this Act or the licence; or
  - (d) the corporate society supplied information that is materially false or misleading in its application for–
    - (i) a class 4 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.

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

1. If the Secretary proposes to suspend, cancel, or refuse to amend or renew a class 4 operator's licence, the Secretary must notify the corporate society of–
  - (a) the proposal to suspend, cancel, or refuse to amend or renew the licence; and
  - (b) the reason for the proposed suspension, cancellation, or refusal; and
  - (c) the corporate society's rights, and the procedure to be followed–
    - (i) before the suspension or cancellation takes effect; or
    - (ii) as a result of the refusal to amend or renew the licence.
2. The corporate society may make written submissions to the Secretary concerning the proposed suspension, cancellation, or refusal to amend or renew within–
  - (a) 20 working days after the date of the notice under subsection (1); or
  - (b) Any longer period that the Secretary allows if an application for an extension is made within the time period specified in paragraph (a).
3. The Secretary must consider any submissions made by the corporate society.
4. If the Secretary decides to suspend a licence, the Secretary must notify the corporate society of–
  - (a) the date that the suspension takes effect; and

- (b) the suspension period (up to 6 months); and
  - (c) the reason for the suspension; and
  - (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
  - (e) the consequences of not dealing with the matters identified.
5. If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society of,-
- (a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or
  - (b) for a refusal to amend or renew, the reason for the refusal.
6. If subsection (4) or subsection (5) applies, the Secretary must also notify the corporate society of-
- (a) the right to appeal the decision; and
  - (b) the process to be followed for an appeal under section 61.

**61 Appeal to Gambling Commission regarding class 4 operator's licence**

...

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.

**62 Consequence of appeal regarding class 4 operator's licence**

...

2. A class 4 operator's licence remains in force until-
- (a) the expiry of the period for an appeal under section 61(2); or
  - (b) the outcome of an appeal, if the Appellant-
    - (i) appeals a refusal to renew or amend the licence under section 61(1)(c) or (d); or
    - (ii) appeals a decision to suspend or cancel the licence under section 61(1)(e).

**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.

30. The relevant provisions of the Commissions of Inquiry Act 1908 (COI Act) are as follows:

**4B Evidence**

1. The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a court of law.

**4C Powers of investigation**

1. For the purpose of the inquiry the Commission or any person authorised by it in writing to do so may-
  - (a) Inspect and examine any papers, documents, records, or things;
  - (b) Require any person to produce for examination any papers, documents, records, or thing in that person's possession or under that person's control, and allow copies of or extracts from any such papers, documents, or records to be made;
  - (c) Require any person to furnish, in form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records as aforesaid.
  
3. For the purpose of the inquiry the Commission may of its own motion, or on application, order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Commission, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy.

31. The Commission's published procedure for the hearing of appeals against decisions of the Secretary is to obtain from the Department of Internal Affairs a copy of the relevant file. In practice, that step is achieved by a standard letter from the Commission to the Secretary enclosing a copy of the notice of appeal and requesting the following documents:

- (a) copies of all documents generated by the Department in relation to the matter;
- (b) any proposal letter by the Secretary;
- (c) any submission of the Appellant;
- (d) the decision letter of the Secretary;
- (e) all original evidence relied upon by the Secretary in reaching his decision; and
- (f) a copy of the Class 4 licence.

In this case, the Commission sent a letter in those terms to the Secretary on 5 July 2012. The documents received contained the redactions that are the subject of the present application before the Commission.

32. The Commission's published practice note for the hearing of Class 4 appeals provides:

27. The Commission will consider and determine appeals from decisions made by the Secretary under section 224(1)(g)-(k) anew, as though it is the decision maker in the first instance. In doing so, the Commission will make its own independent decision on the basis of the material then before it and without being limited by the Secretary's decision. It may confirm, vary, or reverse a decision of the Secretary or refer a matter back to the Secretary with directions to reconsider his decision.

33. Many of the Commission's previous decisions, including two earlier decisions in the course of this appeal (GC38/12, paragraphs 16 and 20; GC17/13, paragraphs 17 and 20(b)), similarly record its view that the provisions of section 61(3) mean that it hears Class 4 appeals on a *de novo* basis.

34. The Commission has also previously considered the issue of directions which may be made in relation to documents received by the Commission (GC02/12) and concerning the possibility of renewal of a Class 4 licence which has been cancelled but is the subject of an appeal resulting in a statutory stay of the cancellation decision (GC20/12).

#### **Analysis - Redaction**

35. In the *First Sovereign Trust* decision (GC02/12), the Commission outlined the basis on which it receives and deals with documents that it requests in the course of appeals. In summary:

- (a) The Commission rejected the suggestion that the Official Information Act applies and that documents requested by the Commission could be withheld from disclosure on grounds available under that Act.
- (b) It also rejected the suggestion that the provision of information to it by the Secretary was a form of, or analogous to, discovery.
- (c) It held that it had express power, under section 4C(1)(b) of COI Act (which applies to it pursuant to section 225 Gambling Act), to require any person to produce documents to it and permit copies to be made, and, under section 4C(1)(c), to require anyone to furnish any information that it may require.
- (d) It also held that, pursuant to section 4C(3), the Commission could order documents or information provided to it to be supplied to anyone appearing before it and could impose conditions on the supply or use of that information.

36. In addition to those statutory powers, section 61(3)(a) of the Gambling Act separately empowers it to request information from the Appellant or the Secretary in the course of an appeal such as the present appeal.

37. Neither of the parties addressed either the fact of the request made or the Commission's statutory powers. By doing so, both treated compliance with a statutory request by the Commission as if it were an inter parties "discovery" issue and appear to have assumed that parties should be free to ignore the Commission's statutory requests for information if the parties agreed that providing the information was not necessary.
38. For the reasons summarised above, and in an earlier decision in this appeal (GC17/13, paragraphs 17 and 22(a) to (e)), the Commission takes a different view. The Commission has been given express powers of inquiry to be exercised in its role of determining appeals. Its power to request or require information is not contingent on the parties' agreement that the information is relevant and that disclosure is necessary. On an appeal, the Commission is not limited to the information that the parties choose to place before it.
39. The Commission has nevertheless considered whether, as a matter of pragmatism, it should reconsider the ambit of its earlier request for information and refrain from exercising its powers under section 4C(1) of COI Act to obtain what the parties now agree is of no relevance to the appeal issues. In the light of the Appellant withdrawing its objection to the redactions, it has decided not to take the step of formally requiring the redacted information to be provided.
40. The Secretary has advised the Commission that the redacted material does not relate to any of the issues that the Commission has framed but rather relates exclusively to matters no longer in issue. The Appellant has accepted that assurance and the Commission has no reason to do otherwise. The Appellant was prepared to accept the Secretary's assurance on the express basis that the Secretary would not rely on any of the redacted material in the course of the appeal and that the Appellant reserved the right to raise the issue again if the Secretary did so. The Secretary took no issue with the Appellant's position in his submissions in reply and is presumed therefore to accept it (and the attendant risk that the issue may be raised later).
41. The Commission will make no further directions on the issue of redactions at this stage of the appeal.

**Analysis – new evidence**

42. It is convenient to deal with the issue of receipt of new evidence next as the Commission's conclusion on that issue forms part of its analysis on the other issues, and because the subject has already been the subject of two earlier decisions by the Commission in this appeal.
43. The Commission's views on the approach to appeals required by section 61(3) are longstanding. They are set out in numerous appeal decisions, and in paragraph 27 of its



published practice note. Its most recent re-statement of its view that appeals are heard *de novo*, without being restricted to the information originally before the Secretary, were in previous decisions on this appeal.

44. In decision GC38/12, the Commission said:

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)).

...

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....

45. The Commission's ruling (in GC 38/12), that both the Appellant and the Secretary are entitled to provide fresh information to the Commission and to have the Commission consider it, includes newly acquired information, changes in position and matters that have occurred since the original decision. The Appellant advised the Commission in its submissions prior to decision GC17/13 that the Appellant's circumstances have changed, positively for retention of its licence, since June 2012. The Secretary's submissions on the present application point out that precluding the Secretary from putting new material before the Commission would preclude him from rebutting the Appellant's case that there had been a positive change in circumstances.

46. In decision GC17/13 (at paragraph 22(b)), the Commission reconfirmed its view on the receipt of new material as follows:

The Commission must consider all information put forward by the Appellant and the Secretary (section 61(3)(d)). That information includes advice that the Secretary no longer contends that his decision can be supported on a particular ground, a position that is common ground with the Appellant. It also includes information regarding subsequent changes to the Appellant's operation (see paragraph 11(h) above).

47. Neither party addressed the Commission's comments on this issue in GC38/12 and GC17/13. In the absence of cogent argument to the contrary, the Commission has no reason to doubt the correctness of its earlier statements. In the Commission's view, the Secretary may put forward material relevant to the appeal, even if he did not rely on it when making the original decision. This is consistent with section 61(3)(d), with its prior decisions in this appeal (and others), and with how it has previously framed the issue in this appeal (see para 2 above).

**Analysis – directions**

48. The remaining part of the application seeks directions on the possibility of renewal of the cancelled licence. There is a degree of common ground in the submissions received, with which the Commission concurs:
- (a) The licence remains in force after the cancellation decision by virtue of section 62(2).
  - (b) If the appeal succeeds, the cancellation decision would be reversed in some manner.
  - (c) Section 62(2) has no continuing effect after the cancellation appeal decision is given.
  - (d) The Secretary's power to renew a licence depends on him having received an application for renewal.
  - (e) Neither of the preservation provisions, namely section 62(2) and 56(6), is time-limited. Their effect is terminated only by the occurrence of a stated event. It follows, for that reason, that the June 2013 renewal application was not necessary as any effect that the June 2012 application had on the question of the licence remaining in force would have continued until that application had been determined.
  - (f) If the Secretary were to consider the renewal application (at any time after it was made in June 2012), refusal of the application would be inevitable as the Secretary had already formed the provisional view that he was not satisfied that the requirements of section 52 were met and he has continued to hold that view ever since.
  - (g) The likely result of refusal would be a further appeal that would engage a parallel section 62(2) preservation.
49. The problem that the requested direction seeks to address arises because, while the Act provides expressly for preservation of licences in two separate circumstances, it makes no express provision for reconciling their application when the underlying events overlap. The issue would not have arisen if the Secretary had dealt with the renewal application in preference to concluding the cancellation decision or at the same time and it seems to the Commission that doing so would have practically prevented the potential overlap of the provisions.
50. The Commission does not have a general declaratory jurisdiction. Its powers are limited, in the present case, to determining an appeal against cancellation and to making



any necessary procedural directions regarding its hearing. As the Secretary has not dealt with either of the applications for renewal, the Commission does not have before it an appeal on a decision whether or not to renew.

51. The key procedural direction affecting the appeal hearing is the one just dealt with, namely the scope of the material which the Commission may receive on the appeal. It is not clear to the Commission what basis it would have to engage with issues which may or may not arise in the future from the fact that the cancellation decision was made after an application for renewal had been received but which has not since been determined by the Secretary.
52. The parties have raised a concern that, in the absence of application for renewal which had not been refused, a successful appeal against cancellation would restore the previously cancelled licence only after it would usually have expired with the result that the licence would have no effect despite the successful appeal against its cancellation. The concern and suggested solution of an undecided renewal application give rise to a number of questions:
- (a) What is the status of a renewal application made before a decision is made to cancel a licence? Can an application be made to the Secretary to renew a licence after the Secretary has issued a decision cancelling it? Does the answer to either question depend on whether or not an appeal against cancellation has been filed?
  - (b) If an application for renewal is received during the course of a decision to cancel a licence, or after a cancellation decision has been made, and the cancellation decision is appealed, should the Secretary deal with the renewal application and, if so, when?
  - (c) Can the Commission provide effective relief by use of its power to vary when allowing an appeal against cancellation to avoid accidental expiry of the licence which it has upheld or does survival of the licence after a successful cancellation appeal depend on a renewal application being made before the appeal decision is given?
  - (d) If a renewal application is required to preserve a licence whose cancellation is reversed on appeal, does it follow that the renewal application similarly preserves a licence whose cancellation is upheld?

However, of those questions, only question (c) could possibly arise in the course of the present appeal and it certainly has not arisen yet.

53. It is not clear to the Commission why the Secretary has proceeded, as he has, to make a decision to cancel a licence without also deciding an application for renewal of that licence. In this application, each party has suggested a different reason why a decision on the renewal application should not have occurred pending the cancellation appeal and the consequence of not making a decision:

- (a) The Appellant argues that, because the Secretary's decision would be inevitably the same, the Secretary ought not to make it. However, despite the foregoing, it suggests that the cancellation decision (including appeal) outcome would not be determinative as there may be other (or new) issues to be considered on renewal after cancellation is determined. It does not identify any such issues or explain why they would not be considered in the course of the decision on cancellation by addressing the common key issue (satisfaction with the section 51 criteria) to both cancellation (s 58(2)) and renewal (s 56(5)) decisions. The Appellant's case is that renewal requires separate but later determination, irrespective of the outcome of the cancellation appeal.
- (b) The Secretary also proceeds on the basis that the result would inevitably be the same if the renewal application were dealt with pending the cancellation appeal but does not explain why it was not dealt with. He differs from the Appellant in arguing that a renewal application is only effective, and a decision required, in the event of a successful cancellation appeal so that no determination of the renewal application is required (or possible) in the event of the appeal against cancellation failing. This proposition may run into some difficulty with the wording of sections 56(6) and 59. The former preservation provision does not recognise an exception to its express terms (a renewal application has been made and has not been refused) in the form of an unsuccessful cancellation appeal decision. Neither is an unsuccessful appeal against cancellation an exception to the procedure stipulated by section 59.
- (c) A third possibility is that a cancelled licence cannot be the subject of a valid renewal application.

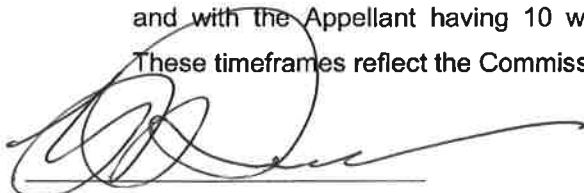
All of the foregoing propositions have their difficulties. Ultimately however the Commission does not see it as appropriate to reach any conclusion now on these matters as they are not presently issues in this appeal.

54. In the future, the Secretary might consider avoiding the problem entirely by bringing unsatisfactory licences to an end by refusal to renew instead of or, in appropriate cases, by cancellation as well, using the required section 59 process for both decisions at the same time. By doing so, the potential operation and associated complexities of a

parallel preservation provision are avoided and both decisions could be challenged in a single appeal.

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

55. In the light of the reservation of position by the Appellant and the Secretary's acceptance of that position, the application to approve the redactions without seeing the withheld material made is deferred. For the reasons set out above, the Commission will make no immediate order to require immediate disclosure of the withheld material.
56. The Commission directs that both parties are free to place before it for its consideration any information that they regard as material to the issues on the appeal. The material is not limited to what was before the Secretary on 3 July 2012 and includes information on subsequent changes in the circumstances of the Appellant.
57. The Commission declines to make any directions in relation to the renewal applications before the Secretary. Whether and when the Secretary deals with the renewal applications that he received in June 2012 and June 2013 is a matter for him and outside the scope of the present appeal.
58. Finally, the Commission directs the Appellant to file and serve its evidence and submissions on the appeal within a further 20 working days, with the Secretary's evidence and submissions to be filed and served a further 10 working days thereafter and with the Appellant having 10 working days to file submissions strictly in reply. These timeframes reflect the Commission's standard timetable for appeals.



Graeme Reeves  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

24<sup>th</sup> October 2013  
 GAMBLING  
COMMISSION