IN THE COURT OF APPEAL OF NEW ZEALAND

CA75/2013
[2013] NZCA 627

BETWEEN	THE SECRETARY FOR INTERNAL AFFAIRS Appellant
AND	PUB CHARITY First Respondent
	THE GAMBLING COMMISSION Second Respondent

Hearing: 5 November 2013

Court: Harrison, French and Miller JJ

Counsel: K G Stephen and P D Appleton for Appellant
F M R Cooke QC and M S Smith for First Respondent

Judgment: 10 December 2013 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The order made in the High Court setting aside the Secretary for Internal Affairs' decision of 27 June 2011 is quashed and the Secretary's decision reinstated.

C The order made in the High Court quashing the decision of the Gambling Commission is confirmed.

D Pub Charity's appeal is remitted to the Gambling Commission for fresh consideration in accordance with this judgment.

E There will be no award of costs on the appeal.

F Leave is reserved to the parties to seek further directions in this Court regarding the issue of costs in the High Court if required.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Section 58(1)(b) of the Gambling Act 2003 (the Act) empowers the Secretary for Internal Affairs to suspend a class 4 operator's licence if the Secretary is satisfied that the operator "is failing, or has failed, to comply with any relevant requirement of [the] Act".

[2] The key issues in this appeal are:

(a) Can the power to suspend conferred by s 58(1)(b) be used to impose a penalty for past non-compliance with the requirements of the Act?

(b) In exercising the power of suspension in this case, did the decision-maker fail to take relevant factors into account and/or breach the rules of natural justice?

[3] The first issue is an issue of statutory interpretation. In order to resolve that issue and address the arguments raised by counsel, it has been necessary to consider a number of different provisions contained in the Act. Rather than set all the provisions out in full in the text of the judgment, we have for ease of reference attached an appendix of the key sections.

Background

[4] Pub Charity is a not-for-profit corporate society licensed under the Act to operate gaming (pokie) machines. The operation of gaming machines is one of

several types or classes of gambling regulated by the Act. Gaming machines fall within a category called "class 4".[1]

[5] The Act allows class 4 operators to have machines at numerous sites. Pub Charity operates approximately 1,787 gaming machines located at 178 venues throughout New Zealand. The venue owners, typically pubs and clubs, look after the machines on a day-to-day basis and receive a venue fee in accordance with a venue agreement each of them has with Pub Charity. In addition to its operator's licence, Pub Charity is also required to hold a venue licence for each venue in which its gaming machines are placed.[2] The income from the machines goes to Pub Charity, which must distribute the proceeds for authorised charitable or community purposes.[3]

[6] In order to maximise the amount available for distribution, the Act requires class 4 operators like Pub Charity to maximise net proceeds and minimise operating costs.[4] One of the controls that has been imposed, via a *New Zealand Gazette* notice under s 116, is a requirement that in any 12 month period an operator's venue costs must not exceed 16 per cent of the combined gaming machine profits[5] from all of the operator's machines.[6] This requirement is known as "Limit D".

[7] In the year ended 31 July 2009, Pub Charity breached Limit D. Its venue costs amounted to 16.46 per cent of turnover, an overspend of some $286,275.

[8] The breach came to the attention of the Secretary for Internal Affairs. After giving Pub Charity an opportunity to be heard, he decided to suspend its licence for one day on account of the breach.[7] In making that decision (which we shall call the

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1 Gambling Act 2003, s 30.
2 Gambling Act, s 31.
3 Gambling Act, s 106.
4 Gambling Act, s 52(1)(d).
5 "[G]aming machine profits" is defined by s 104(5) of the Gambling Act as the turnover of the machines in a specified period minus the total prizes paid in that period.
6 "Limits and Exclusions on Class 4 Venue Costs" (17 July 2008) 114 *New Zealand Gazette* 3027.
7 Letter from Rob Abbott (Northern Region Manager of the Gambling Compliance Unit) to M Hayes (Chairman of Pub Charity) regarding the suspension of Pub Charity's class 4 operator's licence (27 June 2011).

Secretary's first decision), the Secretary relied on ss 52(1)(d) and 106 of the Act.[8] He considered that an aspect of deterrence was required and that Pub Charity should be penalised by the loss of one day's profits, which would roughly equate to the amount of the overspend. The day for the suspension was fixed as 25 July 2011.

[9] Pub Charity appealed the suspension to the Gambling Commission (the Commission).[9] The Commission held that the jurisdictional analysis in the Secretary's decision was flawed.[10] In particular, the Commission found the Secretary had been wrong to equate non-compliance with Limit D with a breach of ss 52(1)(d) and 106 of the Act and wrong to calculate the suspension period by reference to the number of days it would take for gaming machine profits to equal the amount overspent.

[10] Having found the Secretary had erred, the Commission then considered the matter afresh. It held that compliance with Limit D is a requirement of the Act for the purposes of s 58(1)(b) and that accordingly a breach of Limit D is a ground for suspension under the section. It followed in the Commission's opinion that grounds for suspension existed but on a different basis to that relied upon by the Secretary. Noting that the *Gazette* notice limits are not mere targets and that non-compliance with the limits should generally have consequences, the Commission rejected Pub Charity's submission that no suspension should be imposed. The Commission stated that breaches of Limit D are preventable because operators should be looking forward, forecasting possible trends and adjusting costs accordingly.

[11] The Commission concluded that a one-day suspension was still appropriate and dismissed the appeal.

[12] The Commission's decision was issued on 16 March 2012. By that time, the date originally fixed by the Secretary for the suspension (25 July 2011) had passed.[11]

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8 Section 52(1)(d) states that the Secretary must refuse to grant a class 4 operator's licence unless satisfied that the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling. Section 106 creates an offence of failing to apply or distribute net proceeds from class 4 gambling to or for authorised purposes.

9 Exercising its right of appeal under s 61 of the Gambling Act.

10 *Pub Charity* GC06/12, 16 March 2012.

11 By virtue of s 62, the appeal postponed the date on which the suspension was to take place.

The Secretary then notified Pub Charity that the one-day suspension would instead take place on 16 April 2012 (the Secretary's second decision).[12]

[13] Dissatisfied with this outcome, Pub Charity issued judicial review proceedings in the High Court. It contended that both the Secretary and the Commission had misapplied the suspension power in s 58(1)(b) by invoking it for purely punitive purposes. Pub Charity further contended that even if there was a power to impose a suspension for punitive purposes, the Commission had failed to take relevant criteria into account and had breached the rules of natural justice. It sought an order declaring that the Commission's decision was unlawful and either an order setting the suspension decision aside or a declaration that the Secretary had no jurisdiction to re-designate the suspension date.

High Court decision

[14] The judicial review proceeding was heard by a Full Court of the High Court comprising MacKenzie and Collins JJ.

[15] In its decision, the Full Court considered the scope of the suspension power under s 58(1)(b).[13] It concluded that the section does not permit a short suspension for the purpose of imposing a penalty for a past non-continuing breach, as occurred in this case. In the view of the Court, the suspension power is exercisable only where there is an ongoing breach capable of remedy. It followed that the suspension on Pub Charity had not been validly imposed.

[16] This conclusion was contrary to an earlier High Court decision, *The Trillian Trust v The Secretary for Internal Affairs*, in which Simon France J had held that the power to suspend under s 58(1)(b) was available as a sanction for past breaches.[14] In coming to a different conclusion, the Full Court reasoned as follows:

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12 Letter from Rob Abbott (Northern Region Manager of Gambling Compliance Unit) to M Hayes (Chairman of Pub Charity) regarding the suspension of Pub Charity's class 4 operator's licence (4 April 2012).

13 *Pub Charity v The Gambling Commission* [2012] NZHC 3530, [2013] NZAR 249.

14 *The Trillian Trust v The Secretary for Internal Affairs* HC Wellington CIV-2010-485-2411, 14 November 2011 at [33].

(a) Contrary to a submission made by the Commission, the absence of any other statutory penalty for the breach does not mean Parliament should be presumed to have intended suspension would be available.

(b) Parliament should not be presumed to have intended to impose a penalty without clear language.

(c) The use of the past tense in s 58(1)(b) – "is failing or *has failed*" – does not support the use of suspension in a case such as the present one.[15] The reason for the past tense is that s 58(1) is directed at the initiation of the suspension process and it would be impractical to have that dependent on the Secretary being satisfied of a future failure.

(d) Section 59(4)(d) of the Act requires that in imposing a suspension, the Secretary must notify the operator of the matters to be dealt with in order for him to consider withdrawing the suspension before the end of the suspension period. The natural meaning of s 59(4)(d) is that it is a mandatory requirement that applies to every suspension, which in turn supports the interpretation that suspension is only intended to address ongoing deficiencies.

(e) The interconnected licensing structure of the Act is such that suspension would harm all the venue owners who have venue agreements with Pub Charity. Yet the venue owners are not at fault. This is an important consideration in determining the scope of the suspension provision.

(f) The combined effect of the above matters leads to the view that the imposition of a short period of suspension to impose a penalty for a single past breach of an operator's licence for the purpose of deterring that operator or others from similar breaches is not within the scope of the suspension power in s 58. (We interpolate here that the Full Court

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[15] Emphasis added.

appears to have wrongly characterised Pub Charity's breach as a breach of its licence conditions. Correctly analysed, a breach of Limit D is a breach of a statutory requirement. Nothing, however, turns on the error.)

[17] Having found the suspension power had been exercised for an improper purpose, the Full Court made an order under s 4(2) of the Judicature Amendment Act 1972 setting aside the Secretary's first decision and consequently an order setting aside the Commission's decision.

[18] Because of the view it had taken on the scope of the suspension power, it was not necessary for the Full Court to address the other grounds raised by Pub Charity in its statement of claim, which related to issues of alleged procedural impropriety on the part of the Commission.

[19] Following receipt of the High Court decision, the Secretary filed the current appeal, citing Pub Charity as the first respondent and the Gambling Commission as the second respondent.

[20] Before addressing the arguments advanced on appeal, it is necessary for us to consider two procedural matters.

Two procedural matters

Whose decision is being challenged?

[21] There was some confusion in the papers as to which decision was the subject of the judicial review proceedings. Was it the Secretary's decision (and if so which one) or was it the decision of the Commission?

[22] Mr Cooke QC explained that there was some uncertainty about the status of the Secretary's decision following the appeal to the Commission. Section 61(4) states that on appeal the Commission may confirm, vary or reverse the Secretary's decision or refer it back to the Secretary for reconsideration. In this case, the Commission did none of those things. It upheld the suspension on different grounds

and only dismissed the appeal, technically leaving the Secretary's decision as the operative decision. Counsel agree the appropriate procedural course would have been for the Commission to have varied the Secretary's decision and set the new date itself or sent the matter back to the Secretary for that to be done. As it was, Mr Cooke found it necessary to refer to the decisions of both decision-makers in the statement of claim.

[23] It was common ground that in his first decision the Secretary had indeed been wrong to rely on ss 52(1)(d) and 106. It was also common ground that in issuing his second decision (imposing the new date), the Secretary must be taken to have adopted the Commission's reasoning.

[24] In those circumstances, we consider that it was essentially the Commission who was the decision-maker for the purposes of judicial review and that our focus should be on the reasoning of the Commission.

The role of the Commission in these proceedings

[25] As it had done in the High Court, the Commission provided extensive submissions and through counsel Mr Browne sought to appear at the hearing of this appeal. The submissions were adversarial in nature and advanced arguments in support of the Secretary's appeal. Mr Cooke objected to the Commission adopting that approach and opposed the Commission being granted leave to be heard.

[26] The High Court granted leave. However, we consider that Mr Cooke's objections are well-founded.

[27] It is a well-established principle that decision-makers should not become protagonists in appeals from their own decisions.[16] The proper course is to abide the decision of the court and not enter the fray. The decision should speak for itself. Exceptionally, the court may allow a decision-maker to appear where the court considers it may benefit from the decision-maker's assistance, for example in matters

[16] *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA). Also see the useful review of the authorities in *Fonterra Co-Operative Group Ltd v The Grate Cheese Company Ltd* (2009) 19 PRNZ 824 (HC).

relating to the administration of the legislation at issue. A court will also sometimes hear from a decision-maker on questions of jurisdiction. The present case did involve a question of jurisdiction. However, the submissions filed by the Commission went beyond that. Further, this was not a situation where the Court did not have the benefit of full argument on each key issue from the competing parties. Both the Secretary and Pub Charity filed comprehensive submissions.

[28] In those circumstances, we declined to grant Mr Browne leave to appear.

Can the power to suspend conferred by s 58(1)(b) be used to impose a penalty for past non-compliance with the requirements of the Act?

The statutory framework

[29] Section 58 provides:

> **58 Suspension or cancellation of class 4 operator's licence**
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> (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 operator's licence if the Secretary is satisfied that—
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> (a) any of the grounds in section 52 are no longer met; or
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> (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
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> (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.

Competing submissions

[30] On appeal, counsel for the Secretary contended that the reasoning of Simon France J in *Trillian* was to be preferred to that of the Full Court in this case. Mr Stephen contended that s 58(1)(b) expressly refers to past breaches and that empowering the Secretary to temporarily suspend licences is consistent with the scheme of the Act and its purposes.

[31] In Mr Cooke's submission, however, the Full Court was right to hold that the use of the suspension power for the purpose of imposing a penalty for a past breach was invalid. Developing the reasoning of the Full Court, Mr Cooke emphasised that s 58(1)(b) should not be read in isolation. Rather, it needs to be read in the light of five other key provisions, namely ss 58(2), 59(4)(d) and (e), and 60(2) and (3). Only then, Mr Cooke submitted, is it possible to correctly understand the function that the suspension power plays in the wider licensing regime.

[32] Under the Act, the Secretary has the power to suspend, cancel, refuse to amend or refuse to renew a class 4 operator's licence.[17] Licences come up for renewal every 18 months.[18]

[33] Section 60 deals with the consequences of suspension, cancellation or refusal to amend or renew. Section 60(2) states that the Secretary may decide to withdraw a suspension before the end of the suspension period if the reasons for the suspension are resolved to his satisfaction. As for s 60(3), it provides that the Secretary may decide to cancel a suspended licence at the end of the suspension period if the reasons for the suspension are not resolved to his satisfaction.

[34] Mr Cooke contended that s 60(2) and (3) make it clear that the reasons for suspension must relate to ongoing matters that need to be resolved and that are capable of amounting to grounds for cancellation. This is also made clear, in his submission, by s 59(4)(d) and (e). These provisions state that if the Secretary decides to suspend a licence, then he must notify the operator of the matters to be dealt with in order for him to consider withdrawing the suspension before the end of

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[17] Gambling Act, ss 56–58.
[18] Gambling Act, s 53.

the suspension period and the consequences of not dealing with the matters identified.

[35] Like s 60(2) and (3), s 59(4) deals specifically and solely with suspension, which Mr Cooke submitted was in itself significant. He further emphasised that the requirements in s 59(4) are expressed to be mandatory and, as the Full Court held, apply to all suspensions. Also significant in his submission was s 58(2). Section 58(2) states that the Secretary must take the matters in s 52 (grounds for refusing to grant an operator's licence) into account when deciding whether to suspend a licence. According to Mr Cooke, this provides a strong indication that Parliament did not intend the suspension power to be used to impose a penalty because the matters in s 52 would be irrelevant for that purpose.

[36] Mr Cooke further argued that the overall scheme of the Act supports the Full Court decision. The suspension power is contained in subpart 4, which also deals with the powers to issue, condition, amend, renew, and cancel licences. The inclusion of all those provisions in the same subpart is, in Mr Cooke's submission, important. It demonstrates that suspension is simply part of the overall licensing regime, designed to facilitate the licensed activities in the manner authorised by the Act. If Parliament had intended that one of the above powers should exist for the purpose of imposing a penalty, it would surely have said so and provided guidance as to how such a highly problematic power was to be exercised.[19] Yet it has not done so.

[37] The absence of any reference in the Act or in any of the parliamentary materials to a penalties regime administered by the Secretary is, Mr Cooke argued, very telling, especially having regard to the highly prescriptive and comprehensive nature of the Act. Also very telling is the existence of provisions criminalising breaches of some, but not all, of the Act's requirements.[20] The existence of those provisions is in Mr Cooke's submission inconsistent with an intention to create a

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[19] The power is argued to be highly problematic because those harmed by the penalty are not the wrongdoers, the size of the financial detriment is disproportionate to any realistic penalty and the requirements that may be breached are extensive and varied in nature.

[20] See, for example, Gambling Act, ss 15, 16, 19, 83 and 84.

parallel system at administrative level allowing the imposition of sanctions for breach of any requirement.

Our analysis

Textual construction

[38] As will be readily apparent, Mr Cooke's submissions have some force.

[39] However, we have come to the view that the interpretation adopted by the Full Court involves an unwarranted gloss on the plain meaning of s 58(1)(b) and would undermine the purposes and policy of the Act. The section unambiguously states that the power of suspension is available if the operator "has failed" to comply with any of the relevant requirements of the Act. The "has failed" is an alternative to the "is failing", as is made clear by the separation of the two by commas. The section therefore clearly indicates that a single past breach will suffice. This point was never fully addressed by the High Court in this case.

[40] Mr Cooke attempted to overcome the difficulty by conceding that a single past breach could constitute grounds for suspension but only if it was a breach of such an egregious nature that it placed the operator's licence in jeopardy and/or raised concerns about its general operation going forward. We do not accept that construction. It would have been an easy matter for the legislature to have specified such limits on the Secretary's power in s 58(1)(b), but it did not.

[41] The only qualifier to the phrase "any requirement" of the Act is the word "relevant". Mr Cooke suggested that "relevant" means relevant to the power to suspend (that is, requirements that if breached would justify suspension). However, we consider that is a strained and circular interpretation. In context, "relevant" can only mean pertaining to class 4 operators. A further point is that Mr Cooke's construction would make s 58(1)(a) largely redundant.

[42] We also reject Mr Cooke's argument that the matters in s 52 could never be relevant to a suspension for an historic breach. It will be recalled that s 58(2) states that in deciding whether to suspend the Secretary must take into account the matters

in s 52. The matters in s 52 include an operator's previous history of compliance,[21] which is likely to be of critical importance in considering whether to impose a penalty. We accept that not all the matters in s 52 will be relevant, but that must be so in cases of ongoing breaches as well.[22]

[43] What then of ss 59(4)(d) and (e) and 60(2) and (3)? Mr Cooke's argument depends very heavily on those four provisions, which he submits are irreconcilable with the use of suspension as a penalty for an historic breach. We disagree.

[44] The full text of the four provisions is contained in the attached appendix. However, for convenience, we set out the relevant subsections:

> **59 Procedure for suspending, cancelling, or refusing to amend or renew class 4 operator's licence**
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> …
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> (4) If the Secretary decides to suspend a licence, the Secretary must notify the corporate society of—
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> ...
>
> (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.
>
> …
>
> **60 Consequences of suspension, cancellation, or refusal to amend or renew class 4 operator's licence**
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> …
>
> (2) The Secretary may decide to withdraw a suspension before the end of the suspension period if the reasons for the suspension are resolved to the satisfaction of the Secretary.
>
> (3) The Secretary may decide to cancel a suspended licence at the end of the suspension period if the reasons for the suspension are not resolved to the satisfaction of the Secretary

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[21] Gambling Act, s 52(4)(c).

[22] Mr Stephen suggested that s 58(2) relates to the decision of choosing between suspension and cancellation and it is in that context that the Secretary must have regard to the matters in s 52. We do not accept that interpretation, which we consider contrary to the natural and ordinary meaning of the section.

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[45] The first point to make is that the powers contained in s 60(2) and (3) (to withdraw a suspension or cancel the licence depending on whether the reasons for the suspension have been resolved) are discretionary. Yet if Mr Cooke's interpretation were correct, resolution of the reasons for the suspension should bring the suspension to an automatic end.

[46] The second point is that s 59 is a procedural provision. Its heading says so. It would be unusual for a procedural provision to trump or qualify a substantive provision like s 58(1)(b) that confers a power in such unambiguous terms.

[47] Thirdly and most importantly, s 59(4)(d) and (e) (the requirement to notify the operator of the matters to be remedied in order for the Secretary to consider withdrawing the suspension before the end of the suspension period and the consequences of not remedying them) clearly relate to the discretions in s 60(2) and (3). The fact they are discretions must inform the interpretation of s 59(4)(d) and (e).

[48] In our view, the correct interpretation is that the procedural requirements are only triggered if the Secretary is contemplating exercising the discretions. To put it another way, in describing what matters must be included in the suspension notice, s 59(4)(e) does not say it is rectification of every breach that led to the suspension. Rather, the provision requires notification only of those matters that, if resolved, would be considered by the Secretary as grounds for withdrawing the suspension. If the Secretary considers that none exist, it cannot be a breach of s 59(4)(e) for the notice not to specify them. It is only if they exist that the Secretary comes under an obligation to include them in the notice.

[49] Understood in that light, the four provisions are consistent with the use of a suspension power as a penalty for a past breach when the operator is not in jeopardy of having its licence cancelled and there are no remedial actions it can take to reduce the period of the suspension.

Statutory policies and purposes

[50] We are further reinforced in our interpretation of s 58(1)(b) by consideration of the policy and purposes of the Act. The purposes of the Act are listed in s 3. Importantly, they include ensuring that money from gambling is used to benefit the community.[23] Limit D directly bears on that purpose. Compliance with Limit D (and the other controls) is therefore integral to the workings of the licensing system. Yet if the Full Court's interpretation were correct, it would defeat that purpose. It would leave the Secretary without any effective means of enforcement in the event of a breach that by its very nature will usually only come to light at the end of the financial year and therefore will almost always be a past non-continuing breach. In the vast majority of cases, cancellation or a subsequent refusal to renew will not be realistic options. There is a strong public interest in ensuring that class 4 operators are held to account and that the requirements of the Act can be enforced in a practical and efficient manner. Parliament could not have intended otherwise.

[51] In coming to this conclusion, we have not overlooked Mr Cooke's further arguments about the existence of a criminal penalties regime and the absence of any express criteria regulating the use of suspension as a penalty. However, we do not consider either of those arguments to be compelling.

[52] As Simon France J pointed out in *Trillian*, penalties are often provided in legislation with little express guidance as to the criteria that will influence their imposition and quantum. It is left to those who administer the scheme to provide that guidance, as has happened in the case of this legislation. As for the existence of a criminal penalties regime, this Court has already held in *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* that the use of a suspension power to enforce compliance with licensing standards may operate in tandem with offence provisions.[24] The two are not mutually exclusive but complementary and it is open to the licensing inspectorate to choose between them. In *Karara Holdings*, the Court held that a single instance of conduct (sale of liquor to minors) could be grounds for a short period of suspension as part of licensing enforcement. In other

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[23] Gambling Act, s 3(g).

[24] *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* [2003] NZAR 752 (CA).

words, it was a proper use of the suspension power to discipline and to send a message in order to encourage future compliance by the transgressor and the rest of the sector.

[53] Although *Karara Holdings* concerned a different statute – the Sale of Liquor Act 1989 – the suspension provisions are similar to those in the Gambling Act and both statutes regulate an activity that may cause harm. We consider the reasoning and the general principles of *Karara Holdings* to be equally applicable in this case. We refer in particular to the Court's emphasis on the use of suspension as a means of enforcing licensing standards in order to maintain the integrity and effectiveness of the licensing system. As Simon France J held in *Trillian*, the same rationale exists in the Gambling Act and the suspension power is rightly seen as a tool available to maintain the integrity and effectiveness of the system. There is no reason or need to limit the power to one that is only to be exercised as an adjunct to other powers.

[54] It is correct that in *Karara Holdings* this Court said that the suspension power may not be used solely for a punitive purpose, but it is clear from reading the decision as a whole that the Court was not intending by those words to exclude the use of suspension for the purposes of individual or general deterrence or indeed denunciation. What is required is that the decision-maker have future compliance and the wider interests of the integrity of the system in mind.

[55] Mr Cooke argued that suspension for a single breach of Limit D does not deter because the suspension only impacts on the venue owners. We do not accept that argument. In our view, suspension provides a powerful incentive for operators to comply because, apart from anything else, suspension must inevitably impact on the operator's relationship with its venue owners. The latter may look elsewhere for an alternative operator who complies with its obligations and avoids shutdowns. Certainly, Pub Charity cares enough about the suspension to appeal to the Commission and issue judicial review proceedings. The suspension therefore obviously does matter to Pub Charity. We are satisfied there is a deterrent effect and that the suspension enhances future compliance both by the operator in question and others.

[56] As regards the unfairness of punishing innocent venue owners, we note that under the Act the contractual rights of venue owners are made expressly subject to licensing requirements.[25] Parliament clearly intended that the latter should be paramount. In those circumstances, suspension cannot be ruled out merely because it affects venue owners who are not themselves at fault. For Limit D breaches, considerations of unfairness to venue owners must also be tempered by recognising that it is they who are the likely beneficiaries of any excessive expenditure. To preclude suspension on account of unfairness to them is to misunderstand the regulatory objective and to deny the Secretary an important statutory remedy that derives much of its effectiveness vis-à-vis the operator from its impact on venue owners.

[57] A related argument raised by Mr Cooke is that because gamblers will not be able to use Pub Charity's machines, suspension will result in less money being available for community purposes, which is contrary to the purposes of the Act. In our view, the argument is based on a misinterpretation of the statutory purposes, which do not include maximising revenue from gambling. On the contrary, the first purpose listed in s 3 is to limit the growth of gambling and the second purpose is to minimise the harm it causes. Some gambling is authorised and some is prohibited. The statute does provide that money from gambling should benefit the community but that can only mean "money from such gambling as there is". In any event, it is reasonable to take the long-term view that the benefits achieved by future compliance will outweigh any short-term loss.

[58] In our view, the Full Court was wrong to place the weight it did on the impact of suspension on innocent venue owners. It is not a matter that justifies distinguishing *Karara Holdings*. Nor does it justify reading down the plain meaning of s 58(1)(b).

Conclusion

[59] For all the reasons traversed above, we conclude that the power to suspend conferred by s 58(1)(b) may be used to impose a sanction for past non-compliance

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[25] See, for example, ss 69 and 70(2).

with the requirements of the Act, including in circumstances where the breach does not constitute grounds for cancellation and where no remedial action can be taken by the operator.

[60] Suspension may properly be viewed as a useful part of a graduated approach to enforcement, arising between a warning and cancellation.

[61] That is not to say that every breach of the Act should automatically result in a suspension. The power should only be exercised if the Secretary considers suspension is necessary for the purpose of maintaining the integrity and effectiveness of the licensing system. That will of necessity entail a consideration of the transgressor's culpability, the importance of the requirement breached, the matters in s 58(2) to the extent they are relevant and issues relating to deterrence and accountability. Of particular importance will be the profile of the licence holder's past compliance with the Act and its licence conditions.

[62] Insofar as the Commission's use of the suspension power was intended to hold Pub Charity to account for its breach and thereby encourage more accurate forecasting in order to maintain the effectiveness of the class 4 licensing system, it was clearly in our view a proper exercise of the power within the scope of s 58(1)(b).

Did the Commission fail to take relevant considerations into account and/or breach the rules of natural justice?

[63] As already mentioned, Pub Charity also challenged the Commission's decision on alternative grounds, which the Full Court was not required to address. Those matters are, however, relied upon in a notice filed by Pub Charity for the purposes of this appeal.

[64] It is therefore necessary for us to examine the relevant aspects of the Commission's decision in more detail.

[65] Under the heading "[a]nalysis", the Commission first considered the reasoning of the Secretary, who, it will be recalled, had held that exceeding Limit D amounted to a breach of ss 52(1)(d) and 106. The Commission held that the

Secretary's reasoning was flawed and that, correctly analysed, neither section applied. The Commission then went on to state that this error was not, however, determinative of the appeal because it was entitled to consider the matter afresh, unencumbered by the Secretary's approach. In the Commission's view, compliance with Limit D was "a requirement of the Act" for the purpose of s 58(1)(b) and therefore could provide a ground for suspension under that section.[26]

[66] Having reached that conclusion, the Commission then considered what, if any, period of suspension should be imposed on Pub Charity.

[67] The Commission expressly rejected the recovery method used by the Secretary to calculate the period and addressed various mitigating factors raised by Pub Charity. These included issues about the adequacy of the notice that had been given regarding changes to calculating Limit D, and steps that Pub Charity had taken to rectify the impact of the breach by further reducing costs in subsequent years. The Commission said it considered the case was comparable to a decision it had recently issued in another case, *Blue Waters Community Trust*,[27] and noted that non-compliance with the *Gazette* notice limits should generally have consequences. The Commission assessed Pub Charity's overall culpability as low. The steps it had taken following the breach, especially its unilateral recovery of funds, were positive and meant in the view of the Commission that only a minimal suspension, namely one day, was appropriate. A one-day suspension had also been imposed in *Blue Waters*.

[68] On appeal, Mr Cooke submitted that the Commission acted with procedural impropriety, failed to take relevant considerations into account and breached the rules of natural justice or procedural fairness.

[69] The first complaint is that because the Commission's reasons for imposing a one-day suspension were different from the Secretary's reasons, the Commission was required to follow the procedural requirements of s 59(1) and (4) but failed to do

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26 *Pub Charity*, above n 10, at [29].
27 *Blue Waters Community Trust* GC01/12, 1 February 2012.

so. In effect the argument is that the Commission was required to issue a fresh notice of a proposed suspension.

[70] We consider this argument lacks merit. Under s 77(3) of the Act, the jurisdiction of the Commission is de novo and it is not bound to follow any formal procedures. More importantly, there was no prejudice to Pub Charity. It knew that the suspension power under s 58(1)(b) was under consideration and it knew that the reason why that power was being considered was because of its breach of Limit D for the financial year ended July 2009. Further, for reasons already discussed, the obligation under s 59(4) was not triggered in this case.

[71] Also lacking merit in our assessment is a complaint about the following passage in the Commission's decision:[28]

> The fact that Pub Charity was able to "recover" $300,000 in the following year suggests that Pub Charity was previously not truly minimising its costs, and instead has been spending up to the full 16%. If Pub Charity had truly been minimising its costs, recovery in the following year would have been practically impossible. Limit D is thus being treated as a compliance target rather than as merely an additional limit on costs, and so has, it seems, Regulation 10 and the 37.12% return. The Commission does not make this point to be critical of Pub Charity in particular. In circumstances where the Secretary's enforcement practices require societies to be focused on the "statutory benchmarks", a society which is prepared to make a "recovery" by not spending up to its "entitlement" deserves credit for its choice.

[72] In Mr Cooke's submission, the comment that Pub Charity was not truly minimising its costs (and hence breaching its obligations under s 52(1)(d)) was made in breach of natural justice because Pub Charity was never given an opportunity to address that issue.

[73] The offending passage appears in the final section of the Commission's decision, headed: "Maximising net proceeds and minimising costs – some comments". The comment was not a formal finding. It comes after the Commission has already concluded that a one-day suspension should be imposed on Pub Charity and it is made in the context of some general observations about the approach of the sector and the Secretary towards the *Gazette* limits. As submitted by Mr Stephen, it is consistent with the role of the Commission to be making such statements in its

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[28] At [44].

decisions. There has been no breach of natural justice such as would vitiate the decision.

[74] Much more meritorious in our view is Mr Cooke's third complaint, which concerns the Commission's reliance on the *Blue Waters* decision. Pub Charity says the two cases are not comparable and that it was denied any opportunity to comment on the comparison. *Blue Waters* was released after Pub Charity had provided its submissions to the Commission. Had Pub Charity been given the opportunity to comment, Mr Cooke submitted it would have been able to identify some crucial differences between the two cases. These include the fact that while both cases involved a breach of Limit D arising from reduced revenue, the Blue Waters Community Trust was only a two-venue operator. Its ability to forecast revenue and manage any reduction in revenues was therefore much greater than that of Pub Charity with its 178 venues. The effect of a one-day suspension was also significantly less. For Blue Waters the financial detriment was only $10,000, whereas for Pub Charity it would be $286,000. Mr Cooke contended that these differences mean that Pub Charity should receive either a lesser penalty (such as a delayed opening) or no penalty at all.

[75] We accept that the *Blue Waters* decision appears to have underpinned the penalty imposed on Pub Charity, and accordingly agree with Mr Cooke that the situation is similar to that addressed by this Court in *Secretary for Justice v Simes*.[29] In *Simes,* the Legal Services Agency had taken into account decisions that had been made about other practitioners when imposing a sanction on Ms Simes. This Court held it was necessary for Ms Simes to have an opportunity to comment on the relevance and significance of the other decisions, which were not readily available to her.

[76] In our view, in circumstances where the *Blue Waters* decision post-dated the parties' submissions and underpinned the Commission's decision, it was a breach of natural justice for the Commission not to draw Pub Charity's attention to *Blue Waters* and invite it to make further submissions. Had it done so, the outcome might still have been the same. But it might also have been different.

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[29] *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044.

[77] We also agree with Mr Cooke's further submission that, like the Secretary, the Commission failed to take into account relevant s 52 matters despite being required to do so by s 58(2). In particular, the Commission failed to take into account Pub Charity's past record of compliance with its obligations. Mr Cooke advised us that apart from this one breach, Pub Charity has an unblemished record.

[78] In our view, the failure to give Pub Charity the opportunity to be heard on the relevance of the *Blue Waters* decision and the failure to comply with s 58(2) mean that the Commission's decision cannot stand.

Conclusion

[79] In those circumstances, and having regard to our conclusion on the first issue, we consider the appropriate course of action is for us to remit the matter to the Commission for fresh consideration of Pub Charity's appeal in accordance with this judgment.

[80] In order for that to be able to happen, it is necessary to reinstate the Secretary's first decision so as to give the Commission jurisdiction to hear the appeal.

[81] As regards costs, it was agreed that if we were to uphold the Secretary's argument on the jurisdictional point but return the matter to the Commission for reconsideration then the matter should be viewed as "a draw" and costs should lie where they fall. We agree and therefore make no order as to costs. Costs were reserved in the High Court. We are unsure whether any order was subsequently made. If an award was made in favour of Pub Charity, then our provisional view is that it is unsustainable in light of this judgment. To preserve the position, we grant the parties leave to come back to this Court for any further orders that may be necessary relating to costs in the High Court.

Result

[82] The appeal is allowed in part.

[83] The order made in the High Court setting aside the Secretary for Internal Affairs' decision of 27 June 2011 is quashed and the Secretary's decision reinstated.

[84] The order made in the High Court quashing the decision of the Gambling Commission is confirmed.

[85] Pub Charity's appeal is remitted to the Gambling Commission for fresh consideration in accordance with this judgment.

[86] There will be no award of costs relating to this appeal.

[87] Leave is reserved to the parties to seek further directions in this Court regarding the issue of costs in the High Court if required.

Solicitors:
Crown Law Office, Wellington for Appellant
Paul Cheng & Co, Wellington for First Respondent
Wilson Harle, Auckland for Second Respondent

APPENDIX: KEY PROVISIONS

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,—

(a) the gambling to which the application relates is class 4 gambling; and

(b) the applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and

(c) the applicant's proposed gambling operation is financially viable; and

(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

(f) the applicant is able to comply with applicable regulatory requirements; and

(g) the applicant will minimise the risks of problem gambling; and

(h) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of the applicant or any key person, in terms of subsection (4); and

(i) there are no factors that are likely to detract from achieving the purpose of this Act; and

(j) a key person is not a key person in relation to a class 4 venue licence held, or applied for, by the applicant (except in the case of a club that intends to operate gambling equipment on its own non-commercial premises, the New Zealand Racing Board, or a racing club).

(2) In assessing financial viability under subsection (1)(c), the Secretary must consider, among other things, the ability of the applicant to reward winners and pay levies, taxes, and other costs, as well as apply or distribute the net proceeds from the class 4 gambling to or for authorised purposes.

(3) The Secretary may refuse to grant a class 4 operator's licence if an applicant fails to provide the information requested by the Secretary in accordance with section 51.

(4) In determining whether an applicant is suitable for a class 4 operator's licence, the Secretary may investigate and take into account the following things:

(a) whether the applicant or a key person has, within the last 10 years,—

(i) been convicted of a relevant offence:

(ii) held, or been a key person in relation to a class 3 or class 4 operator's licence, a class 4 venue licence, a casino licence, or a licensed promoter's licence under this Act or any licence under previous gaming Acts that has been cancelled, suspended, or for which an application for renewal has been refused:

(iii) been placed in receivership, gone into liquidation, or been adjudged bankrupt; and

(b) the financial position of the applicant and the credit history of the applicant and each key person; and

(c) the profile of past compliance by the applicant and each key person with—

(i) this Act, minimum standards, game rules, Gazette notices, and licence conditions; and

(ii) the Racing Act 2003 or the Racing Act 1971 (and any rules of racing made under either of those Acts); and

(iii) previous gaming Acts, and regulations made under previous gaming Acts; and

(iv) a licence or a site approval issued under a previous gaming Act.

(5) The Secretary may take into account matters of a similar nature to those listed in subsection (4) that occurred outside New Zealand.

(6) If the Secretary decides to refuse to grant a class 4 operator's licence, the Secretary must notify the applicant of—

(a) the reason for the decision; and

(b) the right to appeal the decision; and

(c) the process to be followed for an appeal under section 61.

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.

60 Consequences of suspension, cancellation, or refusal to amend or renew class 4 operator's licence

(1) The suspension or cancellation of, or refusal to amend or renew, a class 4 operator's licence does not affect—

(a) the obligation of the corporate society to apply or distribute the net proceeds from the class 4 gambling in accordance with this Act and the licence; and

(b) any condition added to the licence by the Secretary relating to records that must be maintained and reporting requirements.

(2) The Secretary may decide to withdraw a suspension before the end of the suspension period if the reasons for the suspension are resolved to the satisfaction of the Secretary.

(3) The Secretary may decide to cancel a suspended licence at the end of the suspension period if the reasons for the suspension are not resolved to the satisfaction of the Secretary.

(4) Section 59(5) and (6) apply to the cancellation of a suspended licence.

(5) Subject to section 62, a licence that is suspended or cancelled or refused to be renewed or amended remains in force or unchanged (as the case may be) until the period for making an appeal expires.

(6) A corporate society is not entitled to a refund of fees, taxes, or levies paid in relation to class 4 gambling if the Secretary suspends, cancels, or refuses to amend or renew its class 4 operator's licence.