

**IN THE MATTER** of the Gambling Act 2003

**AND** an appeal by **MAINLAND FOUNDATION LIMITED** against decision to cancel the Class 4 Venue licence for the venue, **THE DAILY**

**BEFORE THE GAMBLING COMMISSION**

Members: L M Hansen (Chief Gambling Commissioner)  
D C Matahaere-Atariki  
W N Harvey  
S C L Pearson

Date of Appeal: 25 November 2020

Date of Decision: 9 April 2021

Date of Notification of Decision: 14 April 2021

**DECISION ON AN APPEAL BY MAINLAND FOUNDATION LIMITED AGAINST DECISION TO CANCEL THE CLASS 4 VENUE LICENCE FOR THE VENUE, THE DAILY**

**1. INTRODUCTION**

- 1.1 On 25 November 2020, Mainland Foundation Limited (the "**Appellant**") lodged an appeal with the Gambling Commission against a decision of the Secretary for Internal Affairs (the "**Secretary**") to cancel the class 4 venue licence in respect of a venue, The Daily, 511 Main Street, Palmerston North ("**Venue**").
- 1.2 The decision appealed against was communicated by letter dated 5 November 2020. The ground for the cancellation was failure to comply with section 79(1)(a) of the Gambling Act 2003 (all statutory references are to this Act unless otherwise stated) following the refusal by the Secretary to agree to extend the period of inactivity specified by section 71(1)(g).
- 1.3 The notice of appeal set out the grounds of appeal, namely that:
- (a) the decision not to permit an extension to the inactivity period was made in error;
  - (b) the decision to cancel the licence was made in error; and
  - (c) both decisions involved misapplication of the policy of the Department of Internal Affairs ("**DIA**") regarding extensions to the statutorily permitted period of inactivity.

## 2. PROCEDURAL HISTORY

2.1 The progress of the underlying processes and the appeal were affected by delays on the part of the Appellant, with which the Secretary took issue. The following is a summary of the course of the relevant events down to the receipt of submissions on the appeal from the parties:

### Application for extension of period of activity

- On 19 June 2020, the Appellant lodged a request for agreement by the Secretary to extend the permitted period of inactivity for a class 4 venue in respect of the Venue. The request advised that class 4 gambling had ceased on 14 May 2020<sup>1</sup> (so the statutory period ended on 11 June 2020) and sought the Secretary's agreement to extend the permitted period of inactivity until 14 November 2020 (a period of 6 months from cessation). The reason given for the request was that the venue operator was still assessing its business after Covid-19 temporary closures.
- On 27 July 2020 DIA sought more specific information about the reason that venue operator required a period of 6 months to assess its business.
- On 7 September 2020, after no response was received to the request for further information and after a telephone conversation on 11 August 2020 (in which the requested information was promised within 48 hours but none was received), the Secretary declined the request for extension and asked the Appellant to surrender the venue licence by 14 September 2020.

### Cancellation of venue licence

- On 17 September 2020, the Secretary issued a proposal to cancel the class 4 venue licence for the Venue, for failure to comply with the obligation in section 79(1)(a) to surrender the Venue's licence following refusal of the request for extension. The proposal outlined the statutory right to make submissions on the proposal within 20 working days and to seek an extension of time.
- On 15 October 2020, the Appellant lodged submissions on the cancellation proposal.
- On 5 November, DIA issued a decision letter cancelling venue licence for the Venue.

### Appeal

- On 25 November 2020, the Appellant lodge the present appeal.
- On 10 December 2020, DIA provided its file to the Commission and to the Appellant.
- Counsel for the Appellant and DIA subsequently jointly proposed a timetable for the exchange of evidence and submissions under which the Appellant would file its

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<sup>1</sup> The affidavit evidence (Read, para 6) is that no class 4 gambling has taken place since 21 March 2020.

submissions by 5 February 2021. The Commission made orders accordingly on 16 December 2020.

- On 5 February 2021, the Appellant sought an extension of 4 working days, without setting out any reasons. When DIA opposed the extension, the Commission sought reasons from the Appellant.
- On 9 February 2021, the Appellant responded indicating that the extension was required in order to gather evidence relating to reduced student attendance at Massey University and redeployment of military personnel at Linton Military Camp. The Commission granted the requested extension.
- On 15 February 2021, after no submissions had been filed by the extended date (12 February 2021), the Commission made further inquiry of the Appellant.
- On 17 February 2021, after no response had been received, the Commission made a further inquiry to which it received a response on 18 February 2021 seeking a further extension until 19 February 2021.
- On 19 February 2021, despite opposition by DIA, the request for extension was granted but no submissions were received that day.
- On 22 February 2021, the Commission advised the parties that the appeal would be considered at the Commission's scheduled meeting on 5 March 2021 on the material then before it.
- On 4 March 2021, the Appellant and DIA both filed submissions on the appeal. The DIA's submissions were prepared without notice of the Appellant's submissions and DIA objected to the Commission receiving the Appellant's submissions after the extended date.
- On 5 March 2021, the Commission deferred its consideration of the appeal in the light of the late receipt of submissions from both parties. It advised the parties that the appeal would be considered at its next meeting, on 9 April 2021, and made timetable orders providing the Secretary with an opportunity to file replacement or supplementary submissions by 19 March 2021 and for the Appellant to file submissions strictly in reply within a further 7 days.
- On 19 March 2021, DIA filed supplementary written submissions.
- No submissions in reply were received from the Appellant by 26 March 2021.

### **3. LEGISLATION**

3.1 The underlying issue arises from sections 71(1)(g) and 79, which provide as follows:

**71 Significant changes in relation to class 4 venue licence must be notified**

- (1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur:
  - (a) a key person in relation to the class 4 venue licence is convicted of a relevant offence;
  - (b) a key person in relation to the class 4 venue licence is placed in receivership, goes into liquidation, or is adjudged bankrupt;
  - (c) a key person in relation to a class 4 venue licence breaches a rule of racing made under section 37 of the Racing Industry Act 2020;
  - (d) the venue manager ceases to be the venue manager or is incapable of performing the duties of his or her position;
  - (e) the venue manager changes;
  - (f) the venue operator changes;
  - (g) the nature of the class 4 venue changes;
  - (g) the corporate society has not conducted class 4 gambling at the venue for a period of more than 4 weeks (in which case the class 4 venue licence must be surrendered, under section 79(1)(a), unless the Secretary agrees that the venue may remain inactive for a further specified period).
- (2) Notification must be made before, or as soon as practicable after, an event listed in subsection (1) occurs.
- (3) The powers and obligations in section 66 apply to a notification as if the notification were an application for a class 4 venue licence.
- (4) The Secretary may require the corporate society to apply for an amendment under section 73, or may invoke the suspension or cancellation provisions under sections 74 and 75, as a result of the notification.

**79 Surrender of class 4 venue licence**

- (1) A corporate society—
  - (a) must surrender a class 4 venue licence to the Secretary in the circumstances described in section 71(1)(g);
  - (b) may surrender a class 4 venue licence to the Secretary at any other time.
- (2) The surrender of a class 4 venue licence does not affect—
  - (a) the obligation of the corporate society to apply or distribute the net proceeds from the gambling in accordance with this Act and the licence; and
  - (b) any condition relating to records that must be maintained and reporting requirements.

3.2 The effect of those provisions may be summarised as follows:

- (a) Section 71 is a notification provision which requires the society which holds the class 4 venue licence to notify the secretary if any of 8 separate events occur.
- (b) Receipt of the notification empowers the Secretary to do any of the things set out in sub-section (4), namely, to require the society to apply for an amendment or to invoke the suspension or cancellation provisions in sections 74 and 75.
- (c) The last of the listed things requiring a report is the society not conducting class 4 gambling at the venue for a period of more than 4 weeks.

- (d) In addition to the obligation to notify such a period of inactivity, section 71(1)(g) imposes a subsidiary obligation, by means of the words in brackets, namely an obligation to surrender the venue licence unless the Secretary agrees that the venue may remain inactive for a further specified period.
- (e) The subsidiary obligation in brackets is confirmed and reinforced by section 79, which provides, not only for voluntary surrender of venue licences, but also an obligation for the surrender by the society of a venue licence in the circumstances described in section 71(1)(g).

3.3 The provisions relating to cancellation of class 4 venue licences are sections 74 and 75, which relevantly provide as follows:

**74 Suspension or cancellation of class 4 venue licence**

- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—

...

- (b) the corporate society is failing, or has failed, to comply with all relevant requirements of this Act, including the obligations set out in section 69A, minimum standards, game rules, *Gazette* notices, and licence conditions; or

....

- (2) In deciding whether to suspend or cancel a class 4 venue licence, the Secretary must take into account the matters in section 67.
- (3) The Secretary may exercise the power of suspension conferred by this section in respect of any breach that falls within any of paragraphs (a) to (d) of subsection (1) whether or not—
  - (a) the breach continues at the time that the power is exercised or is proposed to be exercised;
  - (b) a penalty is prescribed for the breach.

**75 Procedure for suspending, cancelling, or refusing to amend or renew class 4 venue licence**

- (1) If the Secretary proposes to suspend, cancel, or refuse to amend or renew a class 4 venue licence, the Secretary must notify the corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager 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) their 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 or the parties to the venue agreement, and the venue manager 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 or the parties to the venue agreement, or the venue manager.
- (4) If the Secretary decides to suspend a licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager 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.
- (4A) Where the licence is suspended because of a continuing breach, the Secretary must notify the society of—
  - (a) the matters to be dealt with in order for the Secretary to consider withdrawing the suspension before the end of the suspension period; and
  - (b) 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 or the parties to the venue agreement, and the venue manager 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 or the parties to the venue agreement, and the venue manager of—
  - (a) the right to appeal the decision; and
  - (b) the process to be followed for an appeal under section 77.

3.4 The right of appeal against a decision to cancel a venue licence is provided by section 77, which relevantly provides as follows:

**77 Appeal to Gambling Commission regarding class 4 venue licence**

- (1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—
  - (a) ...
  - (b) (e) suspend or cancel a class 4 venue licence held by the corporate society.
  - (c) ....
- (2) An appeal must be in writing and must be made within—
  - (a) 15 working days after the date of the notice of the Secretary's decision; or
  - (b) any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in paragraph (a).
- (3) The Gambling Commission—
  - (a) may request any information from the corporate society or the parties to the agreement or the venue manager 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 parties to the venue agreement, and the venue manager and the Secretary.
- (4) The Gambling Commission may—
  - (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.
- (5) The Gambling Commission must give notice of—
- (a) its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary; and
  - (b) the date on which its decision takes effect (which may be a date that is later than the date on which it makes the decision).

#### 4. SUBMISSIONS

4.1 Despite the indication given in the email of 9 February 2021, that the delay in filing the Appellant's submissions was the need to obtain supporting evidence, no supporting evidence was filed by the Appellant with its written submissions.

4.2 The written submissions for the Appellant dated 4 March 2021 may be summarised as follows:

- (a) The key issue is whether the Secretary should have agreed to extend the period of non-activity as requested.
- (b) The Venue has held a licence for its gaming machines since 17 October 2001. In recent years, it has operated as a night club, without offering table service to its patrons.
- (c) The effect of the Covid-19 Alert Levels on the Venue was as follows:
  - (i) On 25 March 2020, as a consequence of the Covid-19 Alert Level restrictions, the Venue was required to close and all class 4 gambling ceased.
  - (ii) On 14 May 2020, the Alert Level restrictions were relaxed to Alert Level 2, permitting food and beverage service to re-open but expressly on condition that all customers were seated at a table. That was understood to mean that class 4 venues could re-open provided that their customers were seated at either tables or gaming machines.
  - (iii) On 8 June 2020, the restrictions were relaxed to Alert Level 1.
  - (iv) On 12 August 2020, Alert Level 2 restrictions were re-imposed.
  - (v) On 21 September 2020, the restrictions were relaxed again to Alert Level 1.
  - (vi) On 14 February 2021, Alert Level 2 restrictions were re-imposed but were moved back to Alert Level 1 on 17 February 2021.
  - (vii) On 28 February 2021, Alert Level 2 restrictions were re-imposed.

- (d) Because the Venue did not offer table service, it had to be closed whenever Alert Level 2 restrictions came into effect. While the Venue was permitted to open on 8 June 2020, the venue operator elected to keep the Venue closed because of uncertainty about the possibility of further restrictions. The operator's other venues, which offer table service, were re-opened when Alert Level 2 came into effect.
- (e) The application for extension of the period of class 4 gambling inactivity was declined because the decision to remain closed was seen as a commercial decision, rather than the result of the operation of unforeseen circumstances outside the control of the operator.
- (f) The relevant unforeseen circumstances are the Covid-19 pandemic and the uncertainty of the timing and detail of future Alert Level Orders, leading to uncertainty about the timing of future restrictions. The fact that the uncertainty creates a commercial risk does not take it outside the DIA guidelines.
- (g) Most requests for an extension are underpinned by commercial considerations. Requests are frequently granted to permit refurbishment or relocation of the gaming room, all of which are commercially motivated and none of which are the product of unforeseen circumstances.
- (h) In the circumstances produced by the Covid-19 pandemic, the request for extension was reasonable and should have been granted.

4.3 Written submissions and an affidavit of Anna Leigh Reid, Manager Operations with the DIA Regulatory Services unit, were filed on behalf of the Secretary on 4 March 2021. The affidavit evidence was to the following effect:

- (a) The Daily has not conducted class 4 gambling since 21 March 2020. Its permitted activity is a tavern.
- (b) DIA responded to the Covid-19 pandemic and Alert Level restrictions by a suite of responses, including waiving fees, automatically extending licenses and advising that enforcement of certain requirements would be relaxed. In particular, societies were advised that there was no need to seek agreement for class 4 non-activity during Alert Levels 3 and 4. Guidelines were issued for operating at Alert Level 2, including advice that inactivity periods would be treated as running from 2 weeks after commencement of Alert Level 2.
- (c) As taverns were not permitted to operate until 21 May 2020, the suspended section 71(1)(g) period was treated as recommencing 2 weeks after that date, on 4 June 2020.



- (d) The request for agreement to non-activity sought agreement to a period of 6 months with an indication that the period would be spent assessing the future, with no clear indication that class 4 gambling would recommence in 6 months.
- (e) The decision to cancel was made having specific regard to whether the earlier decision to refuse agreement to extend the period of inactivity had been correct. Providing a lengthy period to a venue operator to consider the future of the business was not regarded as an appropriate reason to agree to such a request.
- (f) The DIA inactivity policy and the number of applications, granted approvals, refused approvals and superseded applications in each of the last 3 years was provided.
- (g) Facebook posts by The Daily revealed that, in fact, the Venue recommenced operation as a night club at 11pm on 12 June 2020, following the move to Alert Level 1.

4.4 The provided internal DIA policy guidance recommends that requests for extension should be granted in the following circumstances:

- Damage by fire, storm, earthquake, flood, accidental building collapse.
- Malicious damage, vandalism, theft.
- Other unforeseen circumstance outside the control of the society or venue operator.
- Rebuilding after mergers approved under section 95 and new premises approved under section 96.

4.5 The initial submissions for the Secretary were to the following effect:

- (a) The general statutory position is that class 4 venue licences must be used and should not be permitted to remain idle. Permitted departures from the general position should have real merit and not merely reflect a preference to remain idle.
- (b) As a matter of legislative history, as initially proposed in the Responsible Gaming Bill, societies would have been required to seek an amendment of the venue licence if they proposed to cease to conduct class 4 gambling. There was then no equivalent to section 71(1)(g). On the recommendation of DIA, the Bill was amended to replace the initially proposed obligation to seek an amendment of the licence with an obligation to give notice to the Secretary of the cessation of class 4 gambling, accompanied by an obligation to surrender the venue licence. Subsequently, prior to enactment, cessation of operation was replaced by a period of more than 4 weeks without any class 4 gambling activity and provision for the Secretary's agreement to extend the period of inactivity.

- (c) From the legislative history, it was clearly intended that inactive venues should not be allowed to continue without oversight and that cessation of operation should generally bring the licence to an end. The inherent ambiguity in the original term “cease” was clarified and became “not conducted class 4 gambling for a period of more than 4 weeks” and the Secretary was given a period extension discretion in order to prevent injustice.
  - (d) The internal DIA policy guiding the exercise of the discretion captures the statutory intent – relief should be granted for natural disasters and other unavoidable and unexpected events, not to accommodate preferences. The statutory obligation to surrender, as opposed to a mere obligation to notify, supports such a strict approach. The legislative decision to replace a proposed obligation to apply for amendment with a statutory obligation to notify and surrender was clearly deliberate.
  - (e) The policy is consistent with section 3(g) which relates to money from gambling benefitting the community. As class 4 gambling directly benefits the community, the community benefit is reduced if class 4 gambling ceases.
  - (f) Inactivity applications and failures to surrender have been used inappropriately in attempts to preserve grandparented rights in cases where licences should have been surrendered. Permitting continued inactivity without good reason would be preserving an aberrant position at all costs, something which the Commission has held in earlier decisions, should not be the case<sup>2</sup>.
  - (g) The request was made in order to allow the venue operator to “assess his business”, without any supporting information as to what would be done in that regard, and how long it would take. It was made without revealing that the primary business was, in fact, operating as usual so there would be no issue with compliance with section 69A (the prohibition on using a venue mainly for gambling).
  - (h) The permitted primary activity is the operation of a tavern, not a night club. There was nothing to prevent the operator using temporary tables and seating during Alert Level 2.
- 4.6 On 19 March 2021, the Secretary took the opportunity to file additional evidence and submissions in reply to the Appellant’s submissions.
- 4.7 The evidence took the form of a second affidavit by Ms Reed, to the following effect:

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<sup>2</sup> *Appeal by Air Rescue Services Limited* GC26/10, para 37(b). See also *Appeal by Youthtown Limited re Kina’s Sports Bar* GC10/20, para 63(m).

- (a) Extension of inactivity periods is not granted, in her experience, for refurbishment or relocation for purely commercial reasons. They are routinely granted, however, when they relate to earthquake strengthening or fire damage.
- (b) The request provided no explanation why the gaming machines had remained turned off from June 2020, when the primary activity was permitted to operate, and was in fact operating, in the usual way.
- (c) It now appears, from local newspaper interviews published on 29 May 2020 and 29 August 2020, that the venue operator had assessed his businesses and decided to cease class 4 gambling at the Venue, choosing to use it solely as a night club as that use had proved to be relatively more profitable.
- (d) No supporting communications from the venue operator were provided to the Secretary or to the Commission. The submissions by the Appellant that the venue operator was considering changing the Venue from a night club to a traditional bar (see submission dated 15 October 2020) and that the Venue would remain shut until the risk of Alert Level changes had passed (see submissions of 4 March 2021) both appear to be unfounded.
- (e) Further Facebook posts indicated that the Venue had been open and operating during Alert Level 1, had closed temporarily at Alert Level 2 and has since extended its hours and recruited new staff.

4.8 The additional reply submissions for the Secretary addressed the frequent charges in the supporting reasons advanced by the Appellant (and the lack of evidential support for them), as follows:

- (a) The original reason advanced for the request (19 June 2020) was the need for the venue operator to assess his business as a result of Covid-19.
- (b) The reason advised in the submissions in response to the licence cancellation proposal (15 October 2020) was that the venue operator intended to change the business from a night club to a traditional bar. Renovation work was said to have already started.
- (c) In the course of correspondence regarding extension of time for appeal submissions, the Appellant indicated that the delay was the result of the need to gather evidence of loss of patronage from students studying remotely and redeployment at a local military base, rendering the class 4 gambling operation unviable.
- (d) The appeal submissions (4 March 2021) offered yet another reason, a decision not to reopen the Venue in June 2020 because of future uncertainty about Alert Level changes.

- (e) However, the primary night club business was re-opened in June 2020 and has remained open during all Alert Level 1 periods. Nothing has been advanced to explain the decision to cease class 4 gambling (which has few additional requirements for “staffing, stock movement and security management”, the concerns raised by the Appellant).
- (f) The appeal submissions said nothing about renovations to the Venue, or the alleged decline in patronage.
- (g) Only the facts relating to the imposition of Alert Level restrictions were accepted. The various reasons advanced for extension of the period of non-activity were expressly not accepted by the Secretary. They were unsupported by evidence or even supporting documents from the venue operator and were contradicted by statements by the venue operator published in the local press.
- (h) In the event that the Secretary’s decision is confirmed, the Secretary intends to seek an award of costs as a result of the Appellant’s conduct of the appeal, including the absence of proper information to support the initial request, inconsistency in its submissions over the timetabling breaches and a lack of good faith in advancing the appeal grounds.

## **5. ANALYSIS**

- 5.1 The legal position is largely common ground. The Appellant sought the Secretary’s agreement to an extended period of inactivity, the request was refused, the Secretary undertook the statutory cancellation process, at the end of which a decision to cancel the licence was made. The reason for cancellation was the unexplained period of inactivity and the lack of substance advanced for the request to permit a longer period of inactivity. That is, the cancellation was the result of the application of sections 71(1)(9) and 79 only and not broader considerations. An appeal was lodged.
- 5.2 It is common ground that the appeal should be decided by the Commission deciding whether the request for an extended period of 6 months should have been agreed by the Secretary. However, framing the issue in that manner does not properly capture the real issue on appeal. It overlooks the passage of time as a result of the exercise of the appeal rights (and associated statutory stay which arises under section 78(2)(b)(ii)) and the Commission’s powers on appeal.
- 5.3 The cancellation decision was issued on 5 November 2020, only 9 days before the end of the originally requested period of inactivity. A successful appeal would require the Commission either to reverse the decision (so the licence were not cancelled) or to refer it back to the Secretary with directions which would be expected to lead to the same result. However, reversal of the cancellation decision would realistically need to address the requirements of sections 71(1)(g) and 79 after 14 November 2020. The Commission, putting itself in the

Secretary's position, would need to agree to a new period of inactivity which extended beyond the date of this decision (or give the Secretary directions to make a similar decision). However, the Appellant advanced no case for extension beyond November 2020 but instead framed the appeal issue in purely historical terms (should the Secretary have agreed, in September 2020, to extend the period of inactivity to 14 November 2020?). Even if the answer were "yes", it would not follow that the cancellation decision should now be reversed unless accompanied by the grant of a further period of permitted inactivity beyond the date of the Commission's decision. The period of inactivity sought initially has already long expired by virtue of the statutory cancellation process, the exercise of an appeal right and the resulting statutory stay and no case was advanced on appeal for its extension.

- 5.4 It is clear that the appeal has been brought in an endeavour to maintain sufficient licensing continuity to retain grandparented rights made available under section 92 (as to the maximum number of gaming machines) and section 98 (as to the requirement for territorial authority consent). It is an unusual feature of the appeal, however, that the venue owner has neither participated directly in the appeal, nor even provided supporting material to the Appellant. The long term grandparented rights attach to the venue, not to the present licenceholder.
- 5.5 That feature may be explicable when regard is had to the evidence presented by DIA indicating that the primary activity of the Venue has been in operation whenever Alert Level 1 has applied, and that the cessation of class 4 gambling at the Venue is not because it has remained closed by reason of the venue operator's uncertainty about future Covid-19 restrictions but because the venue operator in fact had made a decision to cease hosting class 4 gambling at the Venue for sound commercial reasons. On the material before the Commission, it has concluded that the venue owner had assessed its business and decided to cease class 4 gambling well before the appeal was lodged. That is consistent with class 4 gambling still not having recommenced at the Venue despite the appeal and section 78.
- 5.6 The Commission rejects, as factually unsupportable, the submissions on the appeal by the Appellant that the Venue remained closed whenever Alert Level 1 came into operation and that its continued operation remains in doubt. It also notes a lack of any factual support for earlier submissions made by the Appellant that the Venue was in the process of being converted from a night club to a tavern or that its viability was threatened by the absence of students or personnel at the local military base. The Appellant's case fails on the Commission's findings of fact alone.
- 5.7 In the circumstances, an attempt by the Commission to address the merits of the particular application of the DIA policy would be based on hypothesis, not established facts. While the Commission does not reject the possibility that future unpredictability of restrictions might reasonably provide a proper basis for agreement to extend time for non-activity, it would have been as concerned as the Secretary was with the lack of detail in the proffered reason for the request in this case, especially in the light of the extent of the additional operational

requirements to conduct class 4 gambling over and above the primary activity and the ease of avoiding the need to give section 71(1)(g) notice if the primary activity were in operation.

## 6. DECISION

- 6.1 For the foregoing reasons, in terms of section 77(4), the Commission confirms the decision of the Secretary to cancel the class 4 venue licence held by the Appellant for the Venue. In terms of section 77(5)(b), the Commission directs that the date on which its decision takes effect shall be the day following the giving of notice of this decision to the parties.
- 6.2 The Secretary indicated an intention to seek costs if the appeal did not succeed. The Commission's Practice Notice records that, while it is not the usual practice to award costs, the Commission retains a discretion to do so in appropriate cases, which expressly includes bad faith or procedural misconduct by a party.
- 6.3 The Commission directs that, if costs are to be pursued, the Secretary should file and serve a memorandum, seeking an award of costs against the Appellant, within 14 days of notice of this decision, that the Appellant should file a memorandum in response within a further 7 days after service of the Secretary's memorandum and that the Secretary may file a further memorandum, strictly in reply, within a further 7 days.



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**Lisa Hansen**  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

14 April 2021

