

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **ROYAL OAK BOWLS INCORPORATED** against a decision to cancel its class 4 operator's licence

BEFORE THE GAMBLING COMMISSION

Members: S W Hughes KC (Chief Gambling Commissioner)
S C L Pearson
W A Acton
S T Shaw
C M Risk

Date of filing of appeal: 20 June 2023

Date of Decision: 3 November 2023

Date of Notification of Decision: 15 November 2023

**DECISION ON AN
APPEAL BY ROYAL OAK BOWLS INC AGAINST DECISION TO CANCEL CLASS 4
OPERATORS LICENCE**

Introduction

1. Royal Oak Bowls Incorporated ("**Club**") appealed, under section 61(a) of the Gambling Act 2003 ("**Act**", all references below to this Act, unless otherwise stated), against a decision by the Secretary for Internal Affairs ("**Secretary**") to cancel its class 4 operator's licence.
2. By letter dated 1 June 2023, the Secretary gave notice of cancellation of the Club's licence under section 58(1), with effect from 24 June 2023, on the grounds of the Club's repeated failure to comply with a condition of its class 4 operator's licence which required it to apply or distribute at least 25% of its GST exclusive gross proceeds per year to authorised purposes ("**Minimum Return Condition**"). As a result of the Club's failure to comply with the Minimum Return Condition, the Secretary advised that he could not be satisfied that the following grounds in section 52 continued to be met:
 - (a) the Club is able to comply with all applicable regulatory requirements (sections 52(1)(f) and section 53A(f));

- (b) the Club's purpose in conducting class 4 gambling is to raise money for authorised purposes (section 52(1)(b)); and
 - (c) the Club's gambling operation is financially viable (section 52(1)(c)).
3. On 20 June 2023, the Club filed an appeal under section 61(a) against the decision to cancel the licence on the grounds that it had been rebuilding after being affected by Covid-19, that it had experienced construction delays and flooding and that, since February 2023, its finances had improved significantly, such that it expected to be able to meet the Minimum Return Condition in the future.
 4. The notice of cancellation letter of 1 June 2023 referred to a letter of 20 March 2023 from the Secretary to the Club proposing to cancel the licence on the grounds set out above. In fact, the letter of 20 March 2023 referred to a proposal not to renew the Club's licence and to section 56(5), which concerns the Secretary's obligations following receipt of a licence renewal application, and not to cancellation (or section 58(1) which governs cancellation). It had referred to the Secretary not being satisfied that the Club is able to meet its obligations under the Act, specifically sections 52(1)(b), 52(1)(c) and section 52(1)(f). Under the heading "Reasons for Proposal", it referred to failure to comply with regulatory requirements (section 52(1)(f) and section 53A(f)), failure to be financially viable (section 52(1)(c)), and the purpose of gambling (section 52(1)(b)) and dissatisfaction that the identified grounds were met.

Relevant conditions and legislation

5. The text of Minimum Return Condition is as follows:
 - 1.1 Minimum Return to Authorised Purpose
 - (1) The minimum amount of net proceeds that a licence holder must apply and/or distribute for authorised purpose(s) is the proportion equivalent to 25% of its GST exclusive gross proceeds for each of its financial years, unless the Secretary has approved the accumulation of funds in accordance with licence condition 3 of these Class 4 Operator's Licence Conditions.
 - (2) For the purposes of this condition, "gross proceeds", in relation to class 4 gambling has the same meaning as defined in regulation 3 of the Gambling (Class 4 Net Proceeds) Regulations 2004.
6. Regulation 3 of the Gambling (Class 4 Net Proceeds) Regulations 2004 defines gross proceeds as, in relation to gambling, "the turnover of the gambling, less prizes, plus interest or other investment return on that turnover, plus any gain above the book value from the sale or disposal of gambling assets". The 2004 Regulations impose a minimum amount for distribution to authorised purposes which applies only to mainly or wholly distributing societies. They do not apply to the Club, which applies net proceeds to authorised

purposes¹. The Minimum Return Condition imposes a similar obligation by way of licence condition.

7. Section 52 of the Act sets out the grounds for granting a class 4 operator's licence, as follows:

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 applicant's purpose in conducting class 4 gambling is to raise money for authorised purposes; and
 - (b) the applicant's proposed gambling operation is financially viable; and
 - ...
 - (f) the applicant is able to comply with applicable regulatory requirements;
 - ...
- (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.

8. Section 53A sets out the continuing obligations of class 4 operators, including that "every corporate society that holds a class 4 operator's licence must, in relation to class 4 gambling conducted by the corporate society, ensure that, at all times, ... (f) all applicable regulatory requirements are complied with".

9. Section 56 provides for renewal of class 4 operator's licences, as follows:

56 Renewal of 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;
 - (b) the Secretary is not satisfied that the applicant complies with section 53A; or
 - (c) the Secretary is not satisfied that the applicant will comply with all applicable regulatory requirements of this Act, including the obligations set out in section 53A, minimum standards, game rules, *Gazette* notices and licence conditions.

...

¹ The authorised purposes include maintaining and developing the Club buildings and facilities, conference expenses, staff wages and salaries, the purchase and maintenance of a Club vehicle, and support for amateur games and sport.

10. Section 58 provides for suspension or cancellation of class 4 operator's licences, as follows:

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;
 - (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 53A, minimum standards, game rules, *Gazette* notices and licence conditions.
- ...
- (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.

11. Section 59 provides the procedure for cancelling or refusing to renew a class 4 operator's licences, as follows:

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.
-
- (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.

12. Section 61 of the Act provides for an appeal against a decision of the Secretary, as follows:

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

- (1) A corporate society may appeal to the Gambling Commission against a decision of the Secretary to-
- (a) refuse to grant a class 4 operator's licence to the corporate society; or
- ...
- (e) suspend or cancel a class 4 operator's licence held by the corporate society.
- ...
- (3) The Gambling Commission-

- (a) may request 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.

13. Section 62 of the Act provides the consequences of an appeal regarding a class 4 operator's licence, including the following:

62 Consequences 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 date that the Gambling Commission specified under section 61(5), 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).

Background

14. Prior to 4 February 2022, the Minimum Return Condition had required the Club to apply 37.12% of GST exclusive gross proceeds to authorised purposes. When the Club applied to renew its licence for 2020/21, it informed the Department of Internal Affairs (**DIA**) that it was in the middle of developing an all-weather bowling green, that it had acquired a resource consent, and that it expected completion by April 2022. As a result, the DIA amended the Minimum Return Condition, reducing the percentage of gross proceeds to be applied. Since 4 February 2022, the Minimum Return Condition has required the Club to apply an amount equivalent to 25% of its GST exclusive gross revenue to authorised purposes.
15. On 28 June 2022, the Secretary received a GC7 application for the renewal of the Club's class 4 gaming licence. The Club stated in its GC7 application that the percentage of GST exclusive gross proceeds which it had applied to authorised purposes in the 2021/22 year was 21.31%. The Club forecast that it would be able to apply 20.26% for the 2022/23 year.
16. The Secretary wrote to the Club on 20 March 2023 proposing, under section 56(5), to refuse the Club's renewal application as described in paragraph 4 above.

17. The proposal letter contained a table of financial information based on previous GC7 applications which showed failures to meet the Minimum Return Condition since 2018/19. The Secretary considered that the repeated failures to meet the Minimum Return Condition meant he could not be satisfied that the Club complied with all regulatory requirements under sections 52(1)(f) and 53A(f) of the Act.
18. The Secretary observed that efforts to improve the financial performance of the gambling operation, including the construction of an all-weather green which was expected to increase membership, had not increased the Club's application of proceeds to authorised purposes to the level required by the Minimum Return Condition. While the Club could meet expenses and rewards, as it had not improved financial performance to enable it to meet the Minimum Return Condition, he could not be satisfied that the Club was financially viable under section 52(c).
19. As a result of the failure to meet the authorised purpose percentage requirement, the Secretary also considered that he could not be satisfied that the purpose of gambling at the Club was to raise money for authorised purposes under section 52(1)(b).
20. On 31 March 2023, the Club responded to the Secretary as follows:
 - (a) There had been major delays in the construction of the all-weather green as a result of Covid-19, the resource and building consent processes and the 2023 Auckland floods. The new green had been nearing completion in January 2023, but the playing surface had been destroyed by severe flooding in Auckland on 27 January 2023. The replacement of the surface was completed in February 2023.
 - (b) As the grass on the proposed site for the new green had been removed in 2021, the Club's capacity to host games and tournaments had been reduced.
 - (c) Covid-19 and the loss of the green had resulted in the Club being unable to host "2 big prestigious international tournaments".
 - (d) Since January 2023, the Club had had 28 new members join because of the new green.
 - (e) The Club had also been awarded prestigious tournaments in the future and now has one of the best facilities in the country.
 - (f) The Club had discovered that it could make "at least a 15% reduction" in its expenses and had seen an increase in revenue for venue hire and social bowls of around 120%. However, most of the venue hire functions were wedding and

birthday celebrations where guests do not play the gaming machines. It was too soon to predict the full extent of the increase in gaming revenue as a result of the new green, but the Club was now able to operate all year round, instead of closing every season from May to October.

The Club attached to its response a forecast for April 2023 to March 2024, showing an estimated application to authorised purposes of 39.8% of gross proceeds.

21. On 1 June 2023, the Secretary gave notice of a decision to cancel the licence under section 58(1), rather than a decision to refuse to renew the licence as earlier proposed. The decision letter noted the Club's submission of 31 March 2023 but concluded that the Club would fail to meet the Minimum Return Condition for financial year 2022/23, and that he could not be satisfied that the Club would be able to meet the Minimum Return Condition in the future or that its gambling operation was financially viable. The express reasons given for the cancellation decision were failure to comply with regulatory requirements, failure of the gambling operation to be financially viable and lack of satisfaction that the gambling purpose was to raise money for authorised purposes, all by reference to section 52(1), and concluded that the Secretary could not be satisfied about the requirements of the identified subsections of section 52(1).
22. As the 20 March 2023 letter had proposed to refuse to renew the class 4 operator's licence under section 56(5), it did not include a date on which cancellation was proposed to take effect. The letter notifying the decision to cancel stated that the cancellation would take effect on 24 June 2023, unless an appeal were lodged with the Gambling Commission.
23. The Club lodged an appeal on 20 June 2023. Pursuant to section 62, the Club's licence has accordingly remained in effect pending the outcome of the appeal.

Club's initial submissions

24. On 2 August 2023, the Club filed submissions on the appeal to the following effect:
 - (a) New management discovered in 2022 that it was possible to reduce the costs of servicing the Club's gaming machines by servicing them quarterly rather than monthly.
 - (b) The attribution of wages in previous years to gambling revenue was incorrect because wages are a fixed cost regardless of gambling revenue. In future, the Club intends to attribute only \$1,200 of wages per annum to gambling revenue.
 - (c) The financial information reported in previous GC7 applications does not reflect the Club's current position. If the Club had reduced the frequency with which it

serviced the machines and attributed smaller amounts for wages to the gambling operation, it would have been able to apply more than 25% of GST exclusive gross revenue to approved purposes.

- (d) The opening of the new green has resulted in an increased membership of 63 or 28%, an increase in bar sales of \$49,922 or 146.7% and an increase in gaming income of \$9,778 or 180% in Q2 2023 compared to Q2 2022.
 - (e) The Club estimates that it will be able to apply 45.9% of GST exclusive gross proceeds to authorised purposes in the 2023-24 financial year. Its estimate is realistic because of the opening of the new green, the reduction in the frequency with which it services the gaming machines, and a change in the practice of attributing wages to gaming income.
 - (f) Gaming Authorised Purpose income is an important and irreplaceable part of the Club's budget.
25. The Club attached a spreadsheet which contained comparisons between the original financial data submitted with each application, and revised data including the proposed amended amounts relating to servicing. With Salaries and Wages revised down to \$1,200 and Service and Repair revised down to \$2,200, the comparison indicated that the Club would have been able to apply a proportion of GST exclusive gross income in excess of the 25% requirement and would be able to do the same in 2023/24.
26. The Club also appended to its submissions a letter of support from the Bowls New Zealand CEO, Mark Cameron, saying that the Club had been responsible in its attitude towards gambling, and that the gaming lounge was integral to the Club's operations.

Secretary's initial submissions

27. In response, the Secretary submitted, in summary, as follows:
- (a) The Secretary is required to refuse to renew a licence unless he can be satisfied that:
 - (i) the appellant's purpose in conducting class 4 gambling is to raise money for authorised purposes under section 52(1)(b);
 - (ii) the appellant's proposed gambling operation is financially viable under section 52(1)(c); and
 - (iii) the appellant is able to, and has complied with applicable regulatory requirements (section 52(1)(f)).

- (b) In addition, all class 4 operator's licence holders must ensure that all applicable regulatory requirements are complied with.
- (c) The Secretary *may* cancel a club's licence under section 58 if he is satisfied that any of the grounds in section 52 are no longer met, or if the corporate society is failing, or has failed, to comply with all applicable regulatory requirements.
- (d) Somewhat inconsistently with the foregoing, as the Secretary is not satisfied that the grounds in sections 52(1)(b), (c) and (f) and 53A(f) have been met, the Secretary *must* cancel the Club's licence under section 58.
- (e) There is overlap between the grounds in section 52. If the appellant is unable to comply consistently with the regulatory requirements relating to application of a minimum proportion of net proceeds, it creates doubt that the appellant is financially viable.
- (f) The inconsistency between the notified decision to cancel and the prior notified proposal to refuse to renew was acknowledged. It was suggested, however, that the resulting problem could be remedied by simply changing the title of the decision letter to "decision not to renew a class 4 operator's licence" and that the inconsistency was not fatal to the cancellation decision because the legal test for a refusal to renew is identical to the test for cancellation under section 58. Otherwise, the submissions referred to the decision to cancel rather than to refusal to renew.
- (g) The appellant has failed to comply with the Minimum Return Condition since the 2018/19 financial year.
- (h) The appellant's argument on appeal is retrospective and raised doubts about how previous figures had been calculated, how well the gambling operation had been run, and whether the appellant had been minimising the expenses of its gambling operation for many years and, as result, about the Club's ability to minimise the expenses of class 4 gambling in the future. In any event, as the money had already been spent, the retrospective argument was "redundant".
- (i) When assessing financial viability, the Secretary is required to adopt a longer-term perspective informed by past results (see Gambling Commission decision GC21/20). The appellant's continued failure to apply sufficient gambling net proceeds to authorised purposes over several years supported doubts that the appellant is financially viable. The appellant's claim that it could reduce gaming costs by at least 15% were not supported by evidence or business plans.

Further submissions on process and directions

28. On 26 September 2023, the Commission received a letter from Mr Halse, a solicitor, advising that he had just been instructed by the Club to act on the appeal. He referred to earlier email correspondence between the Commission and counsel for the Secretary inquiring whether further submissions were intended to be filed in relation to the procedural inconsistency referred to in paragraph 27(f) above. After observing that the process followed by the Secretary had not followed the statutory requirements and had confused the provisions of the Act, he asked the Commission to “grant the appeal on the papers” without the need for further submissions in order to avoid the Club incurring unnecessary costs by having to respond substantively to a flawed decision made in breach of natural justice and to allow the Club to address the substantive issues raised directly with the Secretary. Failing that, an extension of time to file more detailed submissions by 19 October 2023 was sought.
29. On 27 September 2023, the Commission referred Mr Halse’s letter to counsel for the Secretary, advised that the Commission had intended to consider the appeal at its November 2023 meeting and sought a response from the Secretary to the proposals made by the Club’s solicitor.
30. On 5 October 2023, counsel for the Secretary advised that obtaining instructions would be delayed until 9 October 2023 and that the Secretary’s initial submissions on the procedural issues required expansion.
31. On 13 October 2023, the Commission received a memorandum on behalf of the Secretary advising that the request for an extension of time for further submissions by the Club was not opposed and setting out further submissions on the procedural issues. In summary, counsel for the Secretary submitted as follows:
 - (a) The inconsistency in the letters of proposal and decision is not fatal because the section 52 grounds are relevant to both refusal to renew and cancellation decisions.
 - (b) The provisions relating to procedure (sections 59(1), (2) and (5)), consequences (section 60(1)) and appeals (section 61) are similar in both cases.
 - (c) The ultimate issue concerns financial viability, irrespective of whether the decision is to refuse to renew or to cancel.
 - (d) The Club had the opportunity to respond (“to the decision”, but presumably intended to be a reference to the proposal) before the decision to cancel was made.

- (e) The Club had notice of the Secretary's concerns and now had the further opportunity to address them in submissions, so there would be no breach of natural justice.
32. On 16 October 2023, the Commission wrote to the parties, advising that the matters raised in the letter of 26 September 2023 would be considered initially and separately at its November 2023 meeting, extending the time for further submissions by the Club (on those issues only) to 20 October 2023 and providing for reply submissions by the Secretary by 27 October 2023. The parties were advised that, if the matters raised were held not to be determinative of the appeal, further time for submissions on the substantive issues would be allowed.
33. A memorandum of counsel dated 19 October 2023 advanced the following arguments, in summary, on behalf of the Club:
- (a) While the Secretary had acknowledged the lack of consistency between the notified proposal and the subsequently notified decision, he maintained that the similarities between refusal to renew and cancellation meant that they could be treated in the same way.
- (b) A government entity must use the correct procedure and follow the principles of natural justice, as enshrined by the New Zealand Bill of Rights Act 1990 and the presumption that Parliament intends to legislate consistently with the fundamental right to observation of the principles of natural justice. That applies to administrative decisions affecting property rights as well as to judicial and quasi-judicial decisions.
- (c) The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard, and that the decision-maker be disinterested and unbiased. Although their extent depends on the circumstances and the statutory provisions, they should not be read down, as argued for the Secretary, but, as cancellation of a licence affects property rights, a higher standard should be required.
- (d) The argument that the Club had earlier, and now continues to have, the opportunity to address the substantive concerns raised by the Secretary is answered by the lack of legal representation until recently and the likelihood that earlier legal advice would have resulted in the procedural issues being raised earlier.

- (e) Despite acknowledging that the submissions were limited to procedural matters, they included limited argument that the basis for the Secretary's decision involved substantive error, specifically as indicated by reference to financial statements and an auditor's report attached to the memorandum².
 - (f) The Club sought that the cancellation decision be reversed by the Commission on appeal because the Secretary's advice to the Club had been incorrect by confusing different provisions of the Act. If the cancellation decision were reversed, the Club undertook to engage with the Secretary concerning the issues raised and, if it failed to convince the Secretary about those matters and a further cancellation decision were made, it would have a second appeal right, without disadvantage.
34. On 26 October 2023, counsel advised that no further submissions in reply on the procedural issues would be filed for the Secretary.

Analysis

Errors in the Secretary's communications and submissions

35. The statutory summary and the procedural submissions filed by each party demonstrate that the Secretary failed to follow the stipulated statutory process before issuing the decision to cancel the licence. The Secretary notified a proposal to refuse to renew the licence but, having received submissions in response to that proposal, then issued a decision to cancel the licence. From the material before the Commission, including the submissions received, the reason that the decision failed to follow the proposal appears to have been the erroneous view of the Secretary that refusal to renew a licence and cancellation of a licence are the same because both rest on identical grounds.
36. While the decisions have a common outcome (the lack of a class 4 licence), each decision is the result of the exercise of a different statutory power or obligation and, while both refer to the matters in section 52, the substantive question raised in each case is different and the results also differ by reference to whether the exercise of a discretion is applicable.
37. While the Secretary's correspondence often referred to breaches of section 52 by the Club, in fact section 52 imposes obligations only on the Secretary, not the licence holder. The obligation is similar to that imposed by section 56(5) in respect of decisions on renewal applications; namely, to refuse the application if the Secretary is *not satisfied* about the matters in section 52 (which are principally forward looking). Section 56(5) also *requires*

² Counsel later advised that the references were merely intended to be rebuttal of matters stated in the memorandum of 13 October 2023 for the Secretary.

refusal of an application to renew if the Secretary is *not satisfied* that the applicant is complying with section 53A (a current circumstance assessment) or will comply (a forward-looking assessment) with all applicable regulatory obligations, which include the licence conditions (but not section 52).

38. In contrast, cancellation of a licence involves the exercise of a discretionary statutory power (“may ... cancel”) if *satisfied* of one or more of four things. The first of those is that any of the section 52 grounds are *no longer met*; the second is that the applicant is failing or has failed to comply with all applicable regulatory obligations, including section 53A and the licence conditions.
39. Procedurally, section 59 provides for notification of a proposal, receipt and consideration of submissions from the licence holder in response to the proposal, and notification of a decision. While the provision does not expressly require consistency between the proposal and the decision, it is a reasonable implication as a matter of fair process that the notified proposal should be consistent with the subsequent decision. Decisions to refuse to renew a licence and to cancel a licence both require a statement of the reasons for each decision. In the present appeal, the decision notification letter mixed reasons to refuse to renew with reasons to cancel, including recording an assumption that, if the conditions for cancellation were established, cancellation was required (whereas the decision is discretionary).
40. In that regard, the submission for the Secretary that changing the title of the letter notifying the decision to cancel would fully address the difficulties created does not withstand close scrutiny of its contents, as the following illustrates:
- (a) The decision to cancel referred to a proposal to cancel the licence but used the language of section 56(5), which concerns refusals to renew licences, throughout.
 - (b) The reasoning uses the language of the Secretary’s obligation to refuse to renew a licence, as provided in section 56(5):
 - (i) At [1] the Secretary stated that the proposal to cancel (which was not, in fact, an accurate description of the earlier proposal to refuse to renew) was on the grounds that the Secretary “cannot be satisfied” that the Club is able to meet its obligations under the Gambling Act 2003.
 - (ii) At [9] the Secretary recorded the obligation to refuse to renew a licence in the first paragraph of the section “Reasons for Decision”.
 - (iii) At [18] the Secretary stated that he must refuse to renew the Club’s licence under sections 52(1)(f) and 53A(f).

- (iv) At [19] the Secretary stated that he must refuse to renew the Club's licence unless satisfied the gambling operation will be financially viable.
 - (v) At [23] the Secretary stated that he must refuse to renew the Club's licence under section 52(1)(c).
 - (vi) At [27] the Secretary stated that he must refuse to renew the Club's licence under section 52(1)(b).
 - (vii) At [29] the Secretary stated that he "cannot be satisfied" with the grounds under section 52.
- (c) At [24] of the decision letter, the Secretary stated that he must refuse to grant, rather than refuse to renew, or cancel, the class 4 licence.
 - (d) The decision letter concluded by referring to the right to appeal a decision to refuse to grant a class 4 licence under section 61(1)(a), rather than a decision to refuse to renew (section 61(1)(c)) or decision to cancel (section 61(1)(e)). As a result, the appeal filed referred to section 61(1)(a), apparently in reliance on the Secretary's advice.
41. The confusion, including whether the decision involved the exercise of a discretion or the performance of an obligation, persisted in the initial submissions for the Secretary:
- (a) It was submitted, at [6], that the Secretary *may* cancel a class 4 operator's licence unless satisfied that the grounds under section 52 are met (whereas cancellation requires satisfaction that the grounds are *not* met).
 - (b) It was submitted at [8] that the Secretary must be satisfied that the Club satisfies the requirements in sections 52(1)(b), (c), (f) and 53A(f). The submission combines the requirements for a grant (section 52) with operator's obligations (section 53A). The obligation contended for presumably arises from the reference at [7] to the obligation to refuse to grant a licence.
 - (c) It was submitted, correctly, at [21] that the Secretary may cancel a licence if satisfied that any of the grounds in section 52 are no longer met.
 - (d) In contrast, it was later submitted at [34] that the Secretary *must* cancel the Club's licence as he was not satisfied in relation to sections 52 and 53A (the section 56(5) refusal to renew test).

Natural justice and appeal powers

42. There is no question that the Gambling Commission is obliged to comply with the requirements of natural justice in discharging its functions. That was confirmed by the decision of the Court of Appeal in *The Secretary for Internal Affairs v Pub Charity*³. The issue is not the existence of such an obligation but rather whether proceeding to hear the substantive appeal, following the errors in the earlier proposal and decision letters, would involve a breach of natural justice and fairness.
43. The Commission does not have jurisdiction analogous (or limited) to that of the High Court in judicial review to set decisions aside on the basis of the recognised grounds of review. Its powers are statutory appeal powers, as set out in section 61; namely, to confirm, vary or reverse the Secretary's decision or to remit it to the Secretary to reconsider with directions. In reaching its decision on appeal, the Commission acts as a *de novo* decision-maker as it may obtain new information and must consider all information provided to it, not just the information originally before the Secretary. As a result, on an appeal, the Commission reaches its own conclusion on the matter which the Secretary decided, in light of the current information before it, and exercises its powers accordingly⁴. For those reasons, legal and procedural errors in the Secretary's process may be capable of effective rectification as a result of the broad scope of the appeal hearing and the range of possible outcomes⁵. Despite the statutory confusion apparent throughout the submissions, that is ultimately the position advanced on behalf of the Secretary.
44. The Commission has considered whether, despite the differences in the nature of the powers and obligations arising and the technical errors created by the failure on the part of the Secretary to distinguish between them properly in the prior notices and submissions, it is sufficiently confident that the Club would receive a fair hearing on the essential matters at issue by the conclusion of the appeal hearing, such that it should provide the opportunity to the Club to make further substantive submissions and then determine the appeal on its own assessment of the substantive merits.
45. It has concluded that, in all the circumstances, it is not confident that doing so would be fair to the Club and that, for the reasons set out below, the Secretary's processes concerning the Club's licence should be recommenced and should proceed in accordance with the statutory procedural requirements and the applicable tests, involving appropriately accurate communications with the licence holder.

³ [2013] NZCA 627, at [76].

⁴ *The Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, at [70].

⁵ The *Pub Charity* decision is an example of the Commission being held to have successfully rectified the effect of an error in the Secretary's original decision.

46. While technical in nature, the errors by the Secretary have been numerous, persistent and capable of causing genuine confusion on the part of the licence holder receiving an adverse decision. There are material differences between a decision which involves the exercise of a discretion and one which does not, and between failure to be satisfied about something and satisfaction about its opposite. These distinctions are matters about which the responsible regulatory decision-maker should be completely clear, both in the exercise of the decision-making role itself and in communications with the affected party.
47. In this case, the Secretary's errors contributed to an unusually protracted hearing process. Despite queries raised by the Commission initially and subsequently by the solicitor for the Club, submissions for the Secretary did not reflect the technical accuracy and clarity reasonably expected by the Commission. In the Commission's view, toleration of the degree of confusion apparent in the course of the decision-making and the subsequent appeal, and the consequent effect on the costs incurred by the affected licence holder, would not well serve the purpose of licensed class 4 gambling, being the application or distribution of maximised net proceeds for authorised purposes.

Disposal of the appeal

48. Having concluded that the appeal should not now continue to consideration of the substantive merits, the Commission turned to consider the preferable form of order available to it. The Commission is conscious that the decision to cancel the licence followed the receipt of a renewal application which remains to be determined by the Secretary if the cancellation decision is not confirmed on this appeal.
49. In addition to the power to confirm, reverse or vary the Secretary's decision to cancel the licence, the Commission has the power to remit the matter back to the Secretary with directions to reconsider the decision. It gave consideration to determining the appeal by making such an order, as doing so would allow matters to start again from the point which the Commission directed. However, the decision which would require reconsideration would be a decision to cancel as that was the decision which has been appealed.
50. Given that the decision-making process started with an application for renewal of the licence and the original proposal was to refuse to renew it, the Commission has decided that the appropriate course is simply to reverse the Secretary's decision to cancel the licence. It does so on the basis that reversal of the cancellation decision puts everything back to the beginning. The Secretary will have the option of dealing with the outstanding application to renew the licence or, if he prefers, to recommence the process for its cancellation. In that regard, the Commission wishes to make clear that the decision to

reverse is made solely on the basis of the concerns arising from the series of procedural errors made and without assessment of the substantive merits.

51. The Commission's usual practice is not to award costs against the unsuccessful party. If the Club wishes to seek costs, it is directed to file written submissions within 14 days of notification of this decision and the Secretary may file any submissions in reply within a further 14 days.

Decision

52. For the reasons outlined above, the Commission reverses the decision of the Secretary to cancel the class 4 operator's licence of the Club. Leave to apply for costs is reserved as set out in paragraph 51 above.



Susan Hughes KC
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

15 November 2023