**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-395**
**[2022] NZHC 767**

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| UNDER | the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules 2016 |
| IN THE MATTER | of an application for a declaratory judgment |
| BETWEEN | FOUR WINDS FOUNDATION LIMITED<br>Applicant |
| AND | NEW ZEALAND COMMUNITY TRUST<br>Respondent |

Hearing: 8 February 2022

Appearances: M S Smith and R J Lynn for the Applicant
N M Blomfield and J M Marshall-Mead for the Respondent

Judgment: 12 April 2022

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**JUDGMENT OF COOKE J**

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[1] The applicant (Four Winds) and the respondent (NZCT) are both corporate societies authorised to undertake class 4 gambling under the Gambling Act 2003 (the Act). They do so using gaming machines, colloquially known as "pokies". These are operated at venues such as taverns in accordance with licences issued under the Act. Each venue enters an agreement with a licenced corporate society allowing gaming machines to be operated at the venue.

[2] Venues can, and do move between licensed societies. Four Winds and NZCT are in dispute. NZCT is declining to relinquish particular venues from its licence when those venues wish to move from NZCT to Four Winds. Four Winds brings these declaratory judgment proceedings seeking declarations that NZCT's approach is inappropriate, and not consistent with the proper application of the Act.

[3] The application is supported by affidavits from the General Manager of Four Winds, Randal Godfrey, a Director of Four Winds, David Stones and an affidavit from the Chief Executive Officer of another corporate society Air Rescue Services Ltd, Barry Steans. Affidavits in reply have been provided by Messrs Godfrey and Stones and from James Joyce, another Director of Four Winds. NZCT's position is supported by an affidavit from the Chief Executive Officer of NZCT, Michael Knell.

[4] The proceedings were served on the Department of Internal Affairs (DIA) who administers the Act. The Secretary of Internal Affairs is the formal decision-maker under the Act. The DIA has decided not to participate in these proceedings.

**Relevant factual background**

[5] David Stones and Kelly Comrie were both employees of NZCT. Mr Stones resigned from NZCT with effect from 13 March 2020, and Ms Comrie from 20 November 2020. Both then joined Four Winds.

[6] NZCT says that beginning in 2019 Mr Stones had been preparing to leave NZCT to move to Four Winds. From that time he is said to have encouraged NZCT's contracted venues to sign shorter agreements with NZCT so that when he moved to Four Winds he could facilitate their moving to it. NZCT says this was inappropriate.

[7] In the year from December 2020 to November 2021 NZCT gave the DIA notice that it was surrendering 24 venue licences to facilitate the movement of the venues to other corporate societies. In the 12 months between March 2020 and February 2021 NZCT received eight requests from Four Winds for NZCT to so surrender licences for venues so that they could become venues licensed to Four Winds. NZCT did not agree to requests to surrender four of these venue licences — Cheers Tavern, Judea Tavern, Kilala Bar and Phoenix Tavern.

[8] On 19 March 2021 NZCT made a complaint to the Secretary of Internal Affairs under s 81 of the Act about the conduct of Four Winds, and in particular Mr Stones. NZCT says it was no longer appropriate for NZCT to surrender new licences to Four Winds until the DIA had considered information it had provided and its complaint. For its part Four Winds says there is nothing inappropriate in Mr Stones' conduct, or

its conduct, and that the NZCT's decisions not to release the venues is inconsistent with the Act and it is anti-competitive.

[9] It is not the Court's role to make any findings on the criticisms that NZCT and Four Winds have of each other or the individuals involved. They simply provide the background to the current dispute.

[10] The regime established by the Act creates a degree of competition between corporate societies for securing venues to operate their machines. It is accepted that within that competitive framework there is an industry practice for a corporate society to give the DIA notice that it will surrender the venue licences held for a venue when the period of the agreement between the society and the venue is coming to an end and the venue wants to move to a different society. This allows the new society to obtain a new venue licence in a timely way. As Mr Knell says in his affidavit this "… process of cooperation between societies allows venues to continue operating their gaming machines without interruption". But NZCT says that it was not appropriate to follow that practice in relation to venues wishing to move to Four Winds.

**Relevant legislative provisions**

[11] The Act authorises some forms of gambling, and prohibits the rest. Class 4 gambling is one of the types of gambling the Act authorises. It is dealt with in Subpart 4 of Part 2. In order for such gambling to be undertaken two forms of licence must be held:

(a) an operator's licence issued under s 52 authorising a corporate society to undertake class 4 gambling so that the profits can be distributed for authorised purposes; and

(b) a venue licence issued under s 67 in relation to each venue which has agreed to house a licenced corporate society's gaming machines at the venue.

[12] A society holding an operator's licence may apply for a venue licence on the standard form. Under s 65(3) the application must be accompanied by a "class 4 venue agreement" which is defined in s 4(1) in the following terms:

> **class 4 venue agreement** means an agreement or agreements between the holder of, or applicant for, a class 4 operator's licence or a class 4 venue licence and the venue operator that sets out their respective rights and responsibilities.

[13] Section 69 of the Act also provides:

> **69 Form and content of class 4 venue agreement**
>
> (1) The form and content of a class 4 venue agreement must be approved by the Secretary and must include—
>
> (a) a schedule signed by the venue manager and the venue operator setting out—
>
> (i) the full name, date of birth, and contact details of the venue manager; and
>
> (ii) the gambling-related duties and responsibilities of the venue manager; and
>
> (b) the payments to be made by the holder of the class 4 venue licence to the venue operator, which must be payments that comply with regulations made under section 371(1)(dd) or, if no such regulations are in force, payments in respect of an itemised list of costs associated with the operation of class 4 gambling at the venue; and
>
> (c) the expiry date of the venue agreement.
>
> (2) A class 4 venue agreement must be signed by the holder of, or applicant for, the class 4 venue licence and the venue operator.
>
> (3) The expiry date of a class 4 venue agreement may be overridden by anything to the contrary in this Act, game rules, minimum standards, or licence conditions but, in any case, must not be later than 3 years after the date of the venue agreement.
>
> (4) Approval of a class 4 venue agreement lapses if the corporate society ceases to hold a class 4 operator's licence or a class 4 venue licence for that venue.

[14] When applying for a licence for a venue under s 65(2) the application must be accompanied by a series of matters, including:

…

(g) if the application relates to a venue that is licensed to another corporate society, notice from the other corporate society that it is surrendering its venue licence for the venue;

…

[15] This makes sense as it would not be appropriate for a venue to be licenced to two societies. Amongst the pre-requisites the Secretary of Internal Affairs issuing a venue licence under s 67(1) is the following:

(e) if the application relates to a class 4 venue that is licensed to another corporate society, the other corporate society has surrendered its class 4 venue licence for the venue;

…

[16] In accordance with s 80 venue licences are not transferable. But the Act contemplates the surrender of venue licences. It provides:

**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.

…

[17] Section 71 indicates when significant changes about the venue must be notified to the Secretary. It provides:

**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:

(da) the venue manager changes:

(e) the venue operator changes:

(f) 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.

(emphasis added)

[18] The effect of NZCT's stance with respect to venues seeking to move to Four Winds is that s 65(2)(g) cannot be satisfied as NZCT continues to hold the licence. Such venues then need to cease gaming operations under s 71(1)(g) for more than four weeks. This leads to an obligation for NZCT to surrender the licence so that ss 65(2)(g) and 67(1)(e) can be satisfied as the venue is no longer "licensed to another society".

## The arguments

[19] Four Winds contends that NZCT's approach is unlawful as it involves a misuse of discretionary powers given by the Act. Mr Smith argued that the key statutory provision is s 65(2)(g) which he argued creates a power that must be exercised to promote the policy and objects of the Act. He argued that NZCT's decisions here were unlawful as they frustrated the policy of the Act. It is the DIA that has the regulatory authority to determine whether there has been any illegitimate conduct under the Act,

and it is not for NZCT to usurp the Secretary's position by imposing a mandatory period of four weeks when gaming must cease before a transfer can occur. This also involved NZCT claiming an inappropriate competitive advantage by penalising the departing venue, thereby inhibiting such transfers. Mr Smith further argued that the apparent discretion in relation to the surrender of licences contained in s 79(1)(a) did no more than recognise that there were a series of reasons why a licence might be surrendered. It did not create a power for NZCT to use the discretion in the way that it sought to here.

[20] NZCT argued that there was no legal obligation on it to surrender venue licences. Ms Blomfield argued that the Act expressly provided that a society "may" surrender its licence under s 79(1)(b) but this was not the exercise of a statutory power of decision, and that it was legitimate for NZCT to decide not to do so in the cases here given the concerns that it had about potentially illegitimate behaviour. The Act also contemplated how transfer between societies could occur, and if a society elected not to surrender its licence it contemplated that the venue would stand down for four weeks in accordance with s 71(1)(g). She argued that Four Winds was illegitimately seeking to elevate an industry practice into a legal obligation. Neither the text, or any of the purposes of the Act imposed an obligation on an outgoing society to surrender its licence under s 65(2)(g).

[21] Ms Blomfield also submitted that even if the Four Winds interpretation of the Act was correct the Court should decline relief in its discretion as any formal orders should await the outcome of the Secretary's investigations relying on *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd*[1] and *Kung v Country Section New Zealand Indian Association Inc*.[2]

**Assessment**

[22] I do not accept Mr Smith's argument that s 65(2)(g) of the Act establishes a discretionary power to be exercised by corporate societies within public law limits. Rather the sub-section merely creates a pre-requisite that must be satisfied before a Secretary may issue a new venue licence for a particular venue — that the Secretary

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1 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.
2 *Kung v Country Section New Zealand Indian Association Inc* [1996] 1 NZLR 663 at 665–666.

receive notice that any pre-existing licence with another society will first be surrendered. It does no more than establish this statutory requirement. It does not establish a discretionary power.

[23] But equally I do not accept the submission made by Ms Blomfield that the Act establishes two pathways by which a venue can move from one society to another — the first through the society voluntarily surrendering its licence, and the second when the venue stands down for four weeks under s 71(1)(g). The circumstances contemplated by s 71(1)(g) do not form part of a statutory scheme for transfer. Rather s 71(1) lists a series of situations that would give rise to a need to notify the Secretary of significant changes at a venue, including if there has been a cessation of gaming for more than four weeks. That situation also gives rise to a requirement for the society to surrender its licence under s 79(1)(a). These provisions do no more than that. If anything, rather than creating a transfer pathway the four week period is indicative of an adverse situation that requires the Secretary's attention, and also the surrender of the relevant licence.

[24] The relevant legal mechanisms for the transfer of approved venues from one licensed society to another are not to be found solely within these statutory provisions. The Act sets up a regime where the participants obligations are contractual as well as statutory. Contractual requirements are established by the venue agreements entered between venues and corporate societies. The Secretary must approve such agreements under s 69. There are accordingly a combination of legal obligations contemplated by the Act, some are statutory, and some are contractual.

[25] One of the important limitations on the terms of the contractual obligations arises under s 69(3). A venue agreement must have an expiry date no later than three years after the date of the agreement. This means that a licenced corporate society cannot "lock in" a venue for more than three years. A corporate society cannot assert a contractual right extending beyond three years, including for the four week period after the end of a three year term.

[26] The Act also thereby contemplates transfer of venues between societies. In addition, in accordance with ss 89–97 of the Act the number of gaming machines at

each venue are limited, and under ss 98–103 territorial authorities may adopt relevant policies, including what are called "sinking lid" policies. These provisions have the effect of capping, and potentially reducing the number of active gaming machines in New Zealand. Together these provisions have the effect of creating competition between societies for securing the relevant agreements with venues.[3]

[27] That statutory scheme strongly influences, and at times directly controls the agreements entered between corporate societies and venues. The express terms of the agreements between venues and societies could legitimately address the obligation of a corporate society to give notice of its surrender of a licence contemplated by a venue agreement at the end of its term. But sometimes the written terms of contracts do not spell out each and every relevant obligation or matter of detail. These can also arise as a matter of implication. Given the industry practice, and that giving notice of the surrender of a licence for a venue at the end of a contractual period would normally be seen as routine, the potential for implied terms arises.

[28] Two types of implied terms are potentially relevant. First the parties are in agreement that there is an industry practice under which societies give notice of the surrender of licences at the end of the period covered by the relevant agreement. So there is clearly room for terms implied by custom. The requirements for such a term were summarised by the Court of Appeal in *Forivermor Ltd v ANZ New Zealand Ltd* in the following terms:[4]

> The circumstances in which a court may imply a term in a commercial context are governed by the question of what a reasonable person would consider both parties must have meant to happen in circumstances not expressly addressed by the contract.[5] The importation of terms by usage or custom rests on the assumption that it represents the intention of the parties, unless they expressly depart from it.[6] A term will be implied by custom if the alleged custom:[7]
>
> (a) has acquired such notoriety that the parties must be taken to have known of it and intended that it form part of the contract;
>
> (b) is certain and reasonable;

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3 See *Secretary for Internal Affairs v Administration Management Services* [2013] NZHC 3898 at [8] and [127].

4 *Forivermor Ltd v ANZ New Zealand Ltd* [2014] NZCA 129 at [42].

5 *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 at [42].

6 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at [6.3.1].

7 *Woods v N J Ellingham & Co Ltd* [1977] 1 NZLR 218 (SC) at 220 and *Everist v McEvedy* [1996] 3 NZLR 348 (HC) at 360.

(c) is proved by clear and convincing evidence; and

(d) is not inconsistent with any other terms of the contract.

[29] The second type of implied term are those necessary for efficacy of the contract. That also potentially arises here given that the notice of a licence surrender can be seen as a purely administrative step following the end of the period the parties have contracted for. Traditionally the test for such terms has been taken to be set out by the Privy Council in *BP Refinery (Westonport) Pty Ltd v Shire of Hastings* in the following terms:[8]

> … for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[30] The position was recently reviewed by the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* who said:[9]

> To conclude, the principal points that govern the implication of terms are as follows:
>
> (a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.
>
> (b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.
>
> …
>
> (f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.

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8 *BP Refinery (Westonport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376.

9 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85 at [116](footnotes excluded).

[31] In assessing whether an implied term arises here it needs to be remembered that the obligation contended for is of confined scope. Towards the end of the period that a society and venue have contracted for, or when the contract is being ended under its terms, it is necessary for any new society to make an application to the Secretary that can be processed and granted in time for the venue to be licensed with the new society and thereby continue gaming operations. Under s 65(2)(g) that requires the outgoing society to have given notice that it is surrendering the venue licence at the end of the contractual period. In other words it is simply notification to the Secretary of the end of the licence period that the society has agreed with the venue. This notification can be characterised as a consequential administrative step flowing from the terms of the agreement. Such notice is necessary to allow the contract to work within the statutory framework.

[32] There is also a well-established industry practice which involves corporate societies duly doing so. It is agreed between the parties that this practice exists. It is also widespread. NZCT describes in its evidence that it gave notice that it was surrendering its licenses on 24 occasions in the 12 month period to November 2021. This industry practice is a natural consequence of the statutory scheme.

[33] Given that background the tests for implying a term as a matter of industry practice, and as a matter of business efficacy, are both satisfied. In particular:

(a) in terms of industry practice it is something that the parties to the contracts know about, and will have contemplated would apply in their contract. It is clear and reasonable and established by clear and convincing evidence. There are also no express terms that are inconsistent with it based on the standard form agreements;

(b) in terms of terms implied for business efficacy it is necessary in order to give effect to what the parties have agreed in the contract, it "goes without saying" that a society does not have power to impose a four week standdown when a venue is moving to a new society, it is capable of clear expression, and it does not contradict the express terms.

[34] Such an implied term is also consistent with the Act. Here Ms Blomfield emphasised that corporate societies had a discretion under s 79(1)(b). But there is no legitimate statutory purpose that is being advanced by a corporate society declining to agree to give notice that the licence is being surrendered. All that this achieves is the consequential four week standdown. Requiring a venue to cease operation for four weeks is not part of a legislative scheme for transfer. Neither does it achieve any benefit in terms of the scheme and purpose of the Act. Under s 71 such a cessation is an adverse matter that leads to a requirement for a corporate society to notify the Secretary of the event, and an automatic surrender of the licence.

[35] I also accept Mr Smith's argument that a society cannot act as the effective regulator by imposing a form of punishment on the departing venue, or the new corporate society that has secured it, by suspending gaming for four weeks.

[36] Both tests for an implied term also have a requirement that the term is not inconsistent with the express terms of the contract. Based on the materials I have been provided there are no such inconsistent terms. If a corporate society wished to secure a contractual right to prevent societies leaving it without going through the four week stand down it would, at the very least, need to expressly agree upon that suggested power with the venue, particularly in light of the well-established industry practice. But even if a corporate society sought to secure such a contractual power it may be that the Secretary would need to consider whether such a term was consistent with the scheme and purpose of the Act when giving approval under s 39.

[37] As to the precise nature of the obligation, it would be that the corporate society would give the Secretary notice that it was surrendering its licence at the end of the contracted period with a venue within a reasonable time following request made by the venue/new society. It is not possible to be more precise on what a reasonable time would be. It will be contextual. In the usual course it is unlikely to be an issue.

[38] For the avoidance of doubt, these conclusions do not address the complications that sometimes emerge which result in a society entering a further agreement for a short period before a venue moves to a new society. I doubt whether that could be

required by the implied terms of an existing agreement between a corporate society and a venue.

**Conclusion**

[39] The consequence of my findings are that Four Winds is substantively successful in terms of its contentions, albeit for different reasons from those advanced. The obligation of NZCT to give notice of the surrender of a licence arises by implication within the agreements approved under s 39 rather than as a public law limit on the exercise of a statutory power under s 65(2)(g). But that implication arises from the administrative requirements arising from the statutory scheme, and the industry practices that have naturally followed. There is no procedural unfairness in reaching conclusions based on that analysis. That is because it is closely associated with the applicant's contentions, and were addressed in the course of oral argument.

[40] This proceeding is between two corporate societies. It is not between any particular venues and corporate societies as contractual parties. So this proceeding does not determine any particular issue about any particular contract. Rather it is limited to resolving the dispute between the applicant and respondent on how the regime contemplated by the Act controls the circumstances they are in dispute about.

[41] Whether there is any need for formal declarations following on from this judgment should be considered by the parties. It may be that a formal declaration is not necessary as the terms of the judgment are sufficient. I do not accept Ms Blomfield's arguments that a declaration should not be given for discretionary reasons. If the parties wish for the Court to formalise declarations memoranda may be filed.

[42] If there are any issues as to costs I will also receive memoranda from the parties (no more than five pages plus a schedule for each side). My preliminary view is that the applicant is entitled to costs on a 2B basis.

**Cooke J**

Solicitors:
GCA Lawyers, Christchurch for the Applicant
Simpson Grierson, Auckland for the Respondent