

IN THE MATTER of the Gambling Act 2003
AND of an appeal by KTJ
INVESTMENTS LIMITED

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
A K Foote

Date of Decision: 14 September 2012

Date of Notification
of Decision: 19 September 2012

DECISION
ON AN APPEAL BY KTJ INVESTMENTS LIMITED

Background

1. KTJ Investments Limited (the "Appellant") appealed against a decision by the Secretary for Internal Affairs (the "Secretary") to cancel its class 4 venue licence for the Galaxy Function Centre (the "Venue" or "Galaxy"). The Secretary cancelled the licence under section 74(1)(a) of the Gambling Act 2003 (the "Act") because he was satisfied that one of the grounds in section 67 of the Act was no longer met, namely the ground in section 67(1)(k), which required him to be satisfied that the Venue was not used mainly for the purpose of operating gaming machines.

Relevant law

2. The relevant law is as follows:

Gambling Act 2003

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—
 - (a) any of the grounds in section 67 are no longer met; 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.

67 Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that

...

- (k) the class 4 venue is not used mainly for operating gaming machines; and

...

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—

...

- (e) suspend or cancel a class 4 venue licence held by the corporate society.

- (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 its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

Submissions by the Appellant

- 3. The Appellant submitted that the Venue, which is located in the Rosa Pasifika complex in Otara, was mainly used as a bar and restaurant, but that construction going on around the Venue had limited its ability to market itself as a bar and restaurant. It said that two sets of construction, one by the building owner of the complex, and one by Auckland Transport on the bus exchange outside the Venue, had had the following effects:

- (a) It had not been able to install permanent signs at its front entrance or around the complex.
- (b) It had not been able to carry out larger scale marketing campaigns in local publications, radio, on the internet and other media (although it did not explain how construction prevented such marketing).
- (c) It had not been able to set up outdoor seating.

MA

- (d) The bus exchange meant metal fences were up (in various positions) directly in front of the Venue for several months, fencing off a large area, and making access difficult.
 - (e) Bar sales reduced by 75% within a month of the road works commencing.
 - (f) The Venue and its surrounds appeared uninviting owing to, amongst other things: muddy, wet footpaths; construction noise and machinery work; trespass signs; large Auckland Transport signs saying "[Bus stop] closed"; and rubble, red cones and taped cardboard boxes by the entrance to the Venue.
4. The Appellant submitted that the Secretary had not properly considered how the construction affected the bar and restaurant side of the business, as opposed to the gaming side. In the Appellant's submission, shop frontage and signs were not necessary to maintain gaming patronage, but were necessary to maintain patronage of the bar and restaurant facilities.
5. The Appellant also submitted that the Secretary's head count observations (which generally found that most, if not all, of the patrons at any given time were gambling) should be considered in light of the following:
- (a) The Secretary had failed to take into account factors that could affect patronage such as time of day and length of visit.
 - (b) One of the Appellant's representatives visited (as part of the Appellant's own investigation) bars and restaurants with gaming machines around Auckland and recorded similar head count results, even though those venues all had large, prominent signs and no heavy construction outside.
 - (c) Head counts did not take into account the fact that gambling patrons tended to spend several hours at a time at a venue, whereas other customers tended to come and go more frequently. Therefore the fact that there were more customers gambling than other customers at any given time did not necessarily mean that the majority of customers were gaming customers.
6. The Appellant also relied on the following factors as demonstrating that its main function was as a bar and restaurant:
- (a) Only 34% of total floor space was used for gambling.
 - (b) The gambling area was not visible outside the Venue.

- (c) Gambling was not promoted inside or outside the Venue, but other activities (food, wine, karaoke nights) were advertised in the shop window, on the wall and on temporary "directional advertising" placed in entry pathways. The Appellant also referred to its food menus, which it distributed to nearby MIT, its food deal advertised on the wall, and bar and wine lists on all its tables.
- (d) In addition to gaming machines, the Venue offered karaoke, pool, sports nights, food and other features.
- (e) 80% - 90% of staff hours were assigned to bar and restaurant duties.

7. Finally, the Appellant submitted that the Secretary should have considered either imposing conditions or suspending the licence for one or two months to give it the opportunity to re-build its bar and restaurant facilities.

Submissions by the Secretary

8. The Secretary submitted that there were two issues for the Commission:

- (a) Was Galaxy mainly used for the operation of gaming machines?
- (b) If so, should the licence be cancelled or suspended, or should conditions be imposed?

9. The Secretary submitted that the following factors (which the Commission identified as relevant to assessing the main use of a venue in the *Southern Trust* decision, GC 22/06) made it apparent that the main use of Galaxy by the public was to operate gaming machines:

- (a) *Floor area* – The bar area was only slightly larger than the gaming floor area.
- (b) *Prominence* – There were 18 gaming machines in a separate room, which was not visible from the street.
- (c) *Staffing* – In response to the Appellant's submission that only one of the three staff members spent time related to the gaming machines, the Secretary observed that the other two staff members appeared to be employed primarily in the separate fast food business.
- (d) *Venue visits* – In January, February, April and May 2012, on visits by inspectors for the Department of Internal Affairs (the "Department"), almost all customers were gambling, apart from one occasion on which three customers were playing pool (although the Secretary noted that, on some of these occasions, there was used crockery on the tables). In July 2012, a Department

M

inspector observed, on each of his visits, five to eight customers playing gaming machines and two to four drinking, eating or playing pool. In July 2012, a police constable also visited and observed 18 people playing gaming machines and no one else in the Venue. An affidavit provided in support of the Secretary's submissions records that on a second visit the police constable found 17 people in the gaming room, but no other customers.

- (e) *Revenue streams* – The Secretary submitted that gaming turnover greatly exceeded bar sales and that bar sales were also small compared to the maximum weekly venue payment, under its venue agreement with the Lion Foundation, to the extent that, in the Secretary's view, Galaxy would not be sustainable without the revenue from venue payments.
- (f) *Availability and promotion of other activities* – The gambling inspector observed minimal promotion of the bar, pool table and karaoke and DJ equipment.
- (g) *Construction work* – The Secretary accepted that the construction work could be expected to cause a drop-off in patronage, but submitted that a drop in customers using gaming machines would also be expected. However, there was only a slight drop in gaming machine profits between January/February 2012 and April/May 2012. The Secretary accepted that Galaxy had been subject to renovations and construction of some description for 19 months, saying that the lack of non-gaming customers was also a problem in 2011. He submitted that there was no strong evidence linking the lack of non-gaming customers to the effects of the construction, as it appeared to have been an issue for Galaxy for some time.

10. The Secretary submitted that there were no conditions which would ensure that Galaxy was not mainly used for gaming purposes and that cancellation was the most appropriate response.

Appellant's submissions in reply

11. In reply, the Appellant submitted that:
- (a) The majority of the Otara mall community viewed Galaxy as a food and drink venue (this being based on an informal survey one of the Appellant's staff members took of 44 members of the public in Otara).
 - (b) The Secretary's revenue analysis was based primarily on January 2012 figures. Revenue from the restaurant and bar had already increased since

Auckland Transport finished work, and could be expected to increase to \$900 per week by mid-September.

- (c) Revenue would increase further once the landlord had appointed a body corporate and allowed tenants to install permanent signage (expected to be in early October).
 - (d) The Secretary did not assess the effects the Auckland Transport works would have had on residents, pedestrians, and traffic around the Venue.
 - (e) The Secretary had consistently overlooked the fact that such construction affected a bar and restaurant differently to a gaming operation.
12. For these reasons, the Secretary should either reassess the Venue in October 2012 or suspend the licence until normal business operations resumed in August 2012. Alternatively, the Commission should refer the decision back to the Secretary for the Secretary to take into account all the relevant circumstances.

Decision

Approach under section 67(1)(k)

13. The Commission has considered section 67(1)(k) previously, in relation to an appeal against the imposition of licence conditions by the Southern Trust at the Windsock Tavern, (decision GC 22/06). In that decision, the Commission considered whether the main use of the venue should be considered from the perspective of the venue operator or the public. It concluded that, although it was not determinative in that case, the perspective of the public was the appropriate one. The issue under section 67(1)(k) was whether the use of the class 4 venue by the public was mainly for the use of operating gaming machines.
14. In the *Southern Trust* decision, the Commission also considered the meaning of "used mainly". It held that it meant the extent to which the venue was used for operating gaming machines, relative to its use for other activities. The Commission considered that section 67(1)(k) referred to actual activity, not to what could potentially occur, and that the assessment of relative extent of activity was to be made as a matter of overall factual impression across the whole of the class 4 venue, not just the part that was used for operating gaming machines. In passing, the Commission observed that "used mainly" was not the same as "primary activity" (the test under the previous Act). Primary activity was simply the leading activity of all of the activities at the premises; if there were more than two activities, the primary activity may not amount to "used mainly". Neither the Appellant nor the Secretary took issue with these principles.

15. The Commission considered that there were two issues on appeal:
- (a) Was it satisfied that the Venue was not mainly used for the purpose of operating gaming machines; and
 - (b) If so, what consequences should follow.

Was the Venue used mainly for the purpose of operating gaming machines

16. The Commission noted that the Appellant did not seriously argue that the Venue had not been mainly used for the purpose of operating gaming machines when the decision was made. Rather, its main argument was that the then current use was an anomaly, following a change of location and construction work. The Appellant submitted that, when the construction work finished, it would be able to market itself and all of the other activities it offered, or intended to offer.
17. The Venue had relocated within the mall. In the course of relocating, the class 4 gambling had initially been combined with a previously separate takeaway business. The Appellant was shortly afterwards required to separate the two businesses because harm minimisation regulations deem takeaway food businesses to be incompatible with class 4 gambling. On separation, the Secretary raised the issue of the likelihood of consequential breach of the requirements of section 67(1)(k), and has monitored the Venue ever since.
18. The Commission was of the view that the reason that the Venue was used mainly for the purpose of operating gaming machines was of limited relevance. It was not relevant to whether the requirement at section 67(1)(k) was met and was only relevant to consequence (whether the failure to meet the requirement would continue, for how long and in what circumstances).
19. The Commission observed that, even if revenue increased to \$900 per week by mid-September (noting that there was no evidence to support this projection), if GMP remained the same as that in the Secretary's evidence, bar and food turnover would still be less than 1% of gaming turnover and less than 10% of GMP. It would also be approximately half of the weekly maximum venue payment for Galaxy.
20. The Commission acknowledged that revenue figures in isolation may not necessarily be representative of how patrons use premises (if, for example, many members of the public used the premises for non-gambling activities which generated little revenue). However, in this case, the disproportion in turnover and income was enormous and the inference that the Secretary had drawn from the revenue figures was supported by the evidence regarding site visits. On each site visit undertaken by the Department or

Police, gaming machine patrons outnumbered other patrons, often considerably. Although the Appellant submitted that site visits did not take into account the fact that non-gambling customers tend to come and go from a venue more frequently than gambling customers, the Appellant did not provide any evidence (other than an affidavit asserting that gambling customers tend to stay longer than other customers) to support a submission that there were significant numbers of non-gaming customers who used the Venue (but did not stay for long).

21. The Commission was not satisfied, in terms of section 67(1)(k) that, even now, the Venue was not used mainly for the purpose of operating gaming machines.

Consequences of failure to meet section 67(1)(k)

22. Under section 77, in dealing with an appeal, the Commission may:
- (a) confirm, vary or reverse the decision of the Secretary; or
 - (b) refer the matter back to the Secretary with direction to reconsider the decision.
23. In considering the appropriate consequence, the Commission had regard to the evidence regarding construction work around the Venue and submissions on the effect of the construction work on patronage. Because neither party provided evidence of gaming revenue and non-gaming revenue prior to the construction work beginning, the Commission was reluctant to conclude that the substantial imbalance in gambling and non-gambling use was the result of the construction work and that non-gaming patronage was affected differently from gaming patronage. In the light of the extent of the disproportion between gambling and non-gambling revenue and income, it doubted that the main use would change as a result of the construction work finishing and some marketing.
24. The Commission considered whether conditions could be imposed, but concluded that there were no conditions that would ensure that the Venue complied with section 67(1)(k). The Appellant's case was distinguishable from the *Southern Trust* decision (relied upon by the Appellant). In the *Southern Trust* case, by virtue of a major renovation and re-marketing exercise, the operator had successfully moved the venue from one which had been mainly used for gambling to one in which gambling was no longer the main use, but there was concern lest the venue slip back into its old pattern of use. The conditions imposed were aimed at ensuring that future relative levels of activity were monitored to ensure ongoing compliance and to motivate the operator to continue to concentrate on promoting non-gambling activity. In this case, Galaxy had not achieved anything close to compliance with section 67(1)(k) and there was no compelling evidence to suggest that it would manage to do so in the near future, even if

conditions were imposed. If the Appellant had wished to argue seriously that conditions should be imposed to ensure compliance, it was incumbent on the Appellant to suggest what they should be and to show how they would ensure compliance with section 67(1)(k), but it did not do so.

25. The Commission also rejected suspension for a limited period as an appropriate response. Suspension may be appropriate when a venue is not currently compliant, but is capable of becoming compliant in the near future. The Commission did not consider that this was such a case. Although the Appellant suggested a one to two month suspension, it gave no indication of the matters to be addressed, the compliance milestones to be met or the basis for assessing whether they had been met. The remedial steps impliedly proposed by the Appellant were little more than a hope that other aspects of the business would increase sufficiently following an end to construction, more promotion of other activities and the temporary removal of class 4 gambling from the Venue.
26. In the Commission's view, following the cessation of gambling for one or two months, the Commission (or Secretary, if the matter were referred back to the Secretary to consider) was unlikely to be in any better position to assess what would happen if 18 machines were permitted to operate in the Venue again. The Commission considered that suspension was not a practical remedy in circumstances where the degree of non-compliance was substantial, the standard to be met was a relative one and the Appellant had given no clear outline of how remedial steps would correct the situation within a month or two.
27. The Commission considered that cancellation was the appropriate response to its conclusion that section 67(1)(k) was not being met.

Decision of the Commission

28. For the reasons set out above, the Commission confirms the decision of the Secretary to cancel the class 4 venue licence. Pursuant to section 78(2)(b) of the Act, the class 4 venue licence for the Venue no longer remains in force.


Graeme Reeves
 Chief Gambling Commissioner

for and on behalf of the
 Gambling Commission

19 September 2012

**GAMBLING
 COMMISSION**