IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2009
[2014] NZHC 1942

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of a decision pursuant to the Gambling Act 2003 refusing the applicant's appeal
BETWEEN	BLUEGRASS HOLDINGS LIMITED Applicant
AND	THE GAMBLING COMMISSION First Respondent
	THE SECRETARYOF INTERNAL AFFAIRS Second Respondent

Hearing: 14 and 15 August 2014

Counsel: DW Grove for applicant
SE Kuper for first respondent
AR Longdill for the second respondents

Judgment: 18 August 2014

JUDGMENT OF FAIRE J

This judgment was delivered by me on 18 August 2014 at 5pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: GCA Lawyers, Auckland
Wilson Harle, Auckland (CP Browne)
Meredith Connell, Auckland

Introduction

[1] Because of the urgency of the case, I delivered my decision at 4pm on 15 August 2014 and advised counsel that the reasons would follow. The decision announced and confirmed by these reasons is now set out.

[2] The applicant was granted a Class 4 Operators' Licence under the Gambling Act 2003. The Secretary of Internal Affairs cancelled the licence in reliance on s 58(1)(a), (b) and (d) of the Gambling Act 2003 on 3 July 2012. The applicant appealed the Secretary's decision to the Gambling Commission. The Gambling Commission issued its decision on 1 August 2014. The decision confirmed the decision to cancel the Class 4 Operators' Licence.

[3] The Commission found that there were three separate grounds for the cancellation of Bluegrass' licence, namely:

(a) That in terms of s 52(1)(h) the suitability of the applicant or any key persons is no longer met by Bluegrass;

(b) That Bluegrass had failed to comply with the requirements of either ss 51(a) or 57(1)(d) because it did not list Mike O'Brien as a key person in its application or, in the alternative, failed to subsequently apply to amend its licence to include that person; and

(c) That Blueglass supplied materially false or misleading information in its application for its Class 4 licence and thereby contravened s 58(1)(d).

[4] The Commissioner considered whether cancellation was the appropriate outcome. It noted that Bluegrass no longer met the requirements of s 52 and that that was a factor which justified cancellation.

[5] It further noted that had Bluegrass' application for renewal of its licence been determined it would have been declined for failure to meet the essential requirements

of s 52(1)(a) again dealing with suitability with the result that cancellation was appropriate.

[6] It further observed that Bluegrass had failed to list Mike O'Brien as a key person in its application and had failed to apply to amend its licence in that regard with the result that that was a sufficient reason to justify cancellation. It considered that the provision of false and misleading information about Mike O'Brien's role and the provision of Bluegrass' initial funding through him resulted in it being granted a licence in circumstances where the application was likely to have been refused if the true position had been known. It considered that serious deterrent consequences are appropriate to ensure that applicants are not tempted to deceive the Secretary in discharging his role under s 52. It considered that the nature of the deception was also a justification for cancellation in this case.

[7] It further said that it considered that cancellation was appropriate on any one of the grounds referred to, or in combination.

[8] It then went on to consider when cancellation should take effect and said:[1]

> The Commission recognises the force of many of the points which the Secretary makes. However, while it is not satisfied about the suitability of the Appellant and its key people, those concerns do not create such a level of risk or urgency as to affect materially the public interest if the cancellation were delayed for 10 working days. On balance, the Commission has decided to fix the date of cancellation at 10 working days after its decision is given, as sought.

[9] On 13 August 2014, the applicant filed this proceeding. It seeks a declaration that the Commission's decision be set aside.

The application

[10] In addition, the applicant filed an interlocutory application seeking orders pursuant to s 8 of the Judicature Amendment Act 1972. In effect, it seeks orders that the cancellation of the Class 4 Operators' Licence not take effect pending the determination of this judicial review proceeding.

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1 *Re Bluegrass Holdings Ltd* GC10/14, 13 June 2013 at [96].

[11] Section 8(1)(c) of the Judicature Amendment Act provides that at any time before the final determination of an application for review the Court may "if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant" make an interim order:

> Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

[12] Subsection (3) authorises the Court when making any order under s 8(1) to impose such terms and conditions as the Court thinks fit.

[13] The Supreme Court has confirmed that the principles outlined in *Carlton & United Breweries v Minister of Customs Ltd* are applicable.[2] In that case the Court said:

> … the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief- which must mean reasonably necessary. If that condition is satisfied, … the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[14] This judgment deals with the interlocutory application seeking orders pursuant to s 8 of the Judicature Amendment Act 1972.

[15] The first respondent abides the decision of the court. The second respondent opposed the application.

Does the applicant have a position to preserve?

[16] The first issue raised is whether an order is necessary for the purpose of preserving the position of the applicant pending the determination of the judicial review proceedings. This issue was keenly disputed. It led to my adjourning the application to enable the applicant to provide a further affidavit as to its specific intentions with respect to its licence and its continuing operation. That arose because of the first ground of opposition raised by the second respondent and because of

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2 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423.

material provided by the second respondent indicating a clear intention to dispose of the machines and the rights of access to venues – all of which, on counsel for the second respondent's submissions, indicated there was no real intention to pursue the judicial review and, if successful, to continue its operations.

[17] Two affidavits were filed on this issue, one on behalf of the second respondent and the other by a director of the applicant. The introduction of this further material was not entirely satisfactory. That is not a direct criticism of counsel because the position has come about because of the urgency of the application, which clearly requires a decision to be delivered no later than 12 noon on 18 August 2014.

[18] That applicant's position, in short, is that of the eight venues it is currently licensed to operate from two are in fact currently available although one is the subject of a cancellation order made by the Secretary and survives only because there is an unresolved appeal pending decision from the Gambling Commission.

[19] Ms Longdill presented a full and thorough argument in which she submitted that the applicant:

(a) Had no intention of pursuing its application for judicial review and therefore had no position to preserve; and

(b) Had no prospect whatsoever of succeeding with its application for judicial review.

[20] I consider the second of these matters when I discuss the matters relevant to the discretion.

[21] Ms Longdill submitted that I should accept that there was, in fact, no intention to carry on the business by the applicant having regard to an email from the applicant's solicitor of 4 August advising that the applicant was unlikely to seek further review. That advice, however, was couched on the basis that it applied "as

long as it can work constructively with the Department to arrange the final transfer of the remaining venues".

[22] While there is much to be said for the submission of the second respondent on this matter, I am not prepared to conclude, for the purpose of this application, that the applicant has no intention of pursuing its licensed operations, at least in respect of two venues if, in fact, its application for judicial review and any following outcome dependent upon that is in its favour.

[23] I was not, in the time available to me, able to do full justice to this submission but I have reached the position that at least there is an arguable case for the proposition. An interim order is necessary to preserve the position of the applicant. A failure to make the order would bring the judicial review proceedings to an end. The position would be irretrievable. It would have been otherwise had I been satisfied that there were no available venues for the operation of the applicant's licence. The evidence, however, does disclose that at least two venues are still available. Admittedly, one of those is subject to an appeal. However, there is at least a basis for preserving the position of the applicant.

[24] I have concluded that the applicant does have a position which is necessary to preserve. I have taken "necessary" as meaning "reasonably necessary", in accordance with the authorities.[3] That being the case, it is necessary for me to go on to consider the discretionary matters that apply in this case.

Discretionary matters

[25] I canvassed with counsel what delay applied if an order were made under s 8. Counsel were in agreement that the following steps and date of hearing were appropriate, namely:

(a) Statement of defence and any additional affidavits to be filed by 27 August 2014;

(b) affidavits in reply to be filed and served by 3 September 2014;

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3 *Carlton & United Breweries Ltd*, above n 2, at 430.

(c) the case adjourned for a one-day fixture to 10am on 22 September 2014;

(d) the appellant to file and serve a casebook by 8 September 2014, together with submissions and authorities, and a chronology; and

(e) the respondent to file and serve submissions by 15 September 2014, plus copies of authorities and responses to the applicant's chronology.

[26] That programme, together with the court's availability to determine the judicial review on 22 September 2014 indicates that a full consideration of the merits of the case can be determined in approximately twenty-five working days. That has some significance, having regard to the analysis that the Gambling Commission itself carried out and the conclusion it reached when it elected to postpone the effective cancellation for a period of ten working days following its decision so that it was operative on 18 August 2014.

[27] I deal with the challenges made by the applicant. The original decision of the Secretary and submissions relied upon before the Commission related to Bluegrass' operation during the time of Mr Patrick O'Brien's chairmanship of it. In particular, it dealt with misleading information in the application and alleged concealment of Mr Mike O'Brien's involvement as matters relating to the appellant's suitability.

[28] A further and later issue arose before the Commission regarding the applicant's suitability under the governance of a new board, whose chairman is Mr Gurr. With that change there came a shift in focus to some documents that were referred to as the s 113 documents. Of some importance is what those documents were interpreted as saying about the operation of the applicant under its new governance. I will not outline what happened before the Commission save to say, that initially Mr Gurr, who was to be cross-examined, exercised the privilege against self-incrimination.

[29] Subsequently, an affidavit was filed on his behalf. A contest arose as to whether it should be read. Its receipt was opposed by counsel for the Secretary.

Nevertheless, the Commission elected to receive it. No opportunity was provided to the Secretary to cross-examine or to file any material in reply, although the submissions that were advanced at the time indicated that had been sought by both the applicant and the second respondent.

[30] In the affidavit filed by Mr Gurr he denied any breach of s 113 of the Act as evidenced from the notes. He complained that no particulars were provided. Without traversing the matter further, if he was believed, it might well have removed the Commission's concern about the suitability of Mr Gurr as a key person as defined by the Act. The Commission concluded:[4]

> In the Commission's view, the section 113 Documents (both handwritten and typed) clearly indicate that the society, by its current chairman, was open to being influenced by its venue operators about grant allocation and took the view that allowing venue operators to exercise influence over grants was necessary to its survival. The note clearly links grant recipients to identified venue operator requests, contrary to section 113. The evidence suggesting non-compliance with section 113 is relevant to the Appellant's profile of past compliance with the Act, and therefore to its suitability under section 52(1)(h).
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> The Commission does not find Mr Gurr's evidence to be sufficiently credible and compelling to remove doubts about the suitability of the Appellant (and Mr Gurr, as its chairman) arising from the Section 113 Documents. The Commission weighs the subsequently offered explanation in the context of Mr Gurr's decision not to be examined orally in relation to the documents; the apparent history of dishonest dealing with the Secretary in relation to the funding of the society and the role of Mike O'Brien (albeit that these events pre-dated Mr Gurr's involvement); the documentary evidence indicating that Mike O'Brien covertly exercised influence over the society's grants and operation, through its current manager Ms Bak, even after Patrick O'Brien's departure and the appointment of new directors; and Mr Gurr's assumption of his current role (and the departure of the O'Brien's) only after the licence had been cancelled. Accordingly, the Commission is not satisfied that the Secretary's investigations do not cause it not to be satisfied about the suitability of the Appellant or its key persons.

[31] The Commission was concerned that Mr Gurr had invoked the privilege against self-incrimination to decline to answer questions on the documents which had been referred to as the s 113 documents.

[32] How a court should approach evidence given by a deponent in an affidavit that is not the subject of any direct challenge after it has been provided is governed

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4 *Re Bluegrass Holdings Ltd* above, n 1 at [65] & [66].

by s 92 of the Evidence Act 2006. Section 92 is the codification of what used to be the rule in *Browne v Dunn*.[5]

[33] Mr Gurr's affidavit must be taken as a waiver of the privilege originally claimed. The Commission's concern expressed in paragraph 61 was that it had no opportunity to hear him speak about the matter and the Secretary had no opportunity to cross-examine him. It led the Commission to say that its limited ability to assess his credibility on the matter affects the weight it is prepared to give to his later affidavit evidence and the plausibility of the explanation that he offered. That, however, seems to be a matter that was in the Commission's own hands to address as the material advanced by both sides made reference to the opportunity to cross-examine and to file affidavits in reply.

[34] Ms Longdill rightly pointed to the fact that there were three alternative bases by which the Commissioner could arrive at a decision to cancel to which I have made reference. I do not intend to review that in great depth here because that seems to me to be something that is the proper function of the judge determining the judicial review proceeding itself. Although the applicant's case may not be strong, that is only one of the matters that can be taken into account in exercising the overall discretion.

[35] The second broad challenge advanced by the applicant is that there was a failure to take account of current relevant considerations and, in particular, that the licence was operated within its terms by the current board. Save for the s 113 document issue, all the reasons for cancelling the licence relied on the historic defaults and breaches of this licensee. They of course, by themselves, may well be sufficient to justify the cancellation of the licence.

[36] The third challenge advanced by the applicant is that there was no finding that Mr Mike O'Brien was an unsuitable key person. There is, in fact, in the evidence and in prior decisions, a large volume of material on this matter. It does not seem to me to be directly relevant because the issue is that Mr Mike O'Brien's position was not revealed in the application first made and it was not subsequently

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5 *Browne v Dunn* (1893) 6 R 67 (HL).

brought to the Secretary's attention when he became directly involved, all of which are breaches of the Gambling Act.

[37] On the exercise of the discretion, Ms Longdill submitted that there were in fact no adverse financial effects from the refusal to delay to the effect of the cancellation. This is because the applicant exists to distribute profits to the community. It cannot, itself, make a profit. Even the evidence concerning a loss which might occur in relation to the sale of its equipment does not necessarily lead to a loss to the community. That is because the likely purchasers of the equipment are a Trust which would then return the benefit from the use of the equipment that they create. Ms Longdill pointed out there was no direct evidence of employment loss in relation to parties employed by the applicant itself.

[38] The applicant's case is not strong and I was not surprised that Ms Longdill mounted a thorough argument designed at effectively striking out the application at this stage. However, as I have mentioned, I do have some concerns as to how Mr Gurr's position in relation to the s 113 documents was handled by the Commission and whether, in fact, there was a breach of the principles of natural justice in the way the evidence was analysed.

[39] All of that needs to be measured against the fact that a short extension only is required to preserve the status quo pending the hearing of the application in full. I am mindful of the evidence that was adduced on the applicant's behalf which confirms:

(a) That there are no particulars of any ongoing breaches of the Gaming Act 2003;

(b) The operations of the applicant are one of the most successful distribution charities in the country;

(c) The applicant is the subject of two audits each year and has been for the last three years. The accounts are audited by external auditors and the Department of Internal Affairs. The auditors are not only dealing

with financial accounts, but also to ensure the operations are run safely, fairly and are well-regulated and that the proceeds generated through Class 4 gambling benefit the community.

Certainly, the officers of Bluegrass claim to have no knowledge that there has been any adverse findings by the Department of Internal Affairs following the audits. I have already mentioned that the Commission, itself, was persuaded to extend this licence for a ten day period. There appear to be no public and private issues that would be directly affected by an extension of the licence pending the determination of the judicial review proceedings.

[40] I order:

(a) That cancellation of the applicant's Class 4 Operators' Licence issued under the Gaming Act 2003 shall not take effect until determination of the judicial review application which shall be heard at 10am on 22 September 2014;

(b) One day shall be allowed for the hearing of the judicial review application;

(c) A statement of defence and any additional affidavits by the second respondent shall be filed and served by 27 August 2014;

(d) affidavits in reply by the applicant shall be filed and served by 3 September 2014;

(e) the applicant shall file and serve, by 8 September 2014, a casebook containing the pleadings, the affidavits and all exhibits, which is indexed and paginated plus submissions in support and copies of all authorities referred plus a chronology that complies in principle with r 9.9(2);

(f) the second respondent shall file and serve, by 15 September 2014, submissions in opposition plus copies of all authorities referred to,

plus a response to the applicant's chronology in accordance in principle with r 9.9(3);

(g) costs on the application are reserved.

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JA Faire J