

IN THE MATTER of the Gambling Act 2003
AND on appeals by **EUREKA TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
P J Stanley
G L Reeves

Date of Decision: 19 July 2009

Date of Notification of Decision: **A** August 2009

**DECISION
ON APPEALS BY EUREKA TRUST**

Appeal

1 Eureka Trust ("Eureka" or the "Appellant") appealed, under section 77 of the Gambling Act 2003 (the "Act"), against five decisions by the Secretary for Internal Affairs (the "Secretary") to suspend the class 4 venue licences for the following venues for between 1 and 2 days:

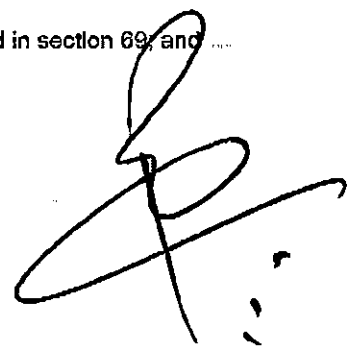
- Robbies Bar and Bistro, Belfast (two days);
- Robbies Bar and Bistro, Cranford (two days);
- Robbies Bar and Bistro, South Dunedin (one day);
- Robbies Bar and Bistro, Queenspark (two days); and
- Bar 25, New Brighton (one day).

2. By agreement, the five appeals were consolidated and heard together by the Commission.

The Gambling Act 2003

3. The relevant sections of the Act are as follows:

- 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 –
- ...
(j) the class 4 venue agreement (if required) –
- (i) enables the class 4 gambling conducted at the class 4 venue to comply with this Act and the proposed class 4 venue licence; and
 - (ii) includes the information specified in section 69, and ...



- 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) 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.

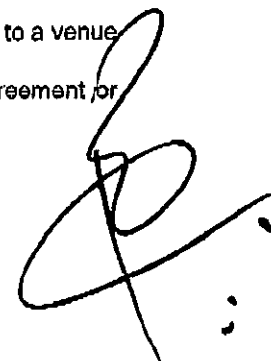
- 71 Significant changes in relation to class 4 venue licence must be notified**
- (1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur:
 - (d) the venue manager ceases to be the venue manager or is incapable of performing the duties of his or her position;
 - (e) the venue operator changes;
 - (2) Notification must be made before, or as soon as practicable after, an event listed in subsection (1) occurs.

- 74 Suspension or cancellation of class 4 venue licence**
- (1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that –
 - (b) the corporate society is failing, or has failed, to comply with any relevant requirement of this Act, licence conditions, game rules, and minimum standards; 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.

4. Licence condition 3 provides as follows:

Condition 3 – Change of details

- (1) The holder of a class 4 venue licence must, as soon as practicable, advise the Secretary, and provide new contact details, if there are changes to the postal address and/or telephone number of a venue operator and/or venue manager.
- (2) If the holder of a class 4 licence makes substantive changes to a venue agreement, the licence holder must, as soon as practicable:
 - a. Advise the Secretary that amendments have been made to a venue agreement; and
 - b. Provide the Secretary with a copy of the amended agreement or parts of the agreement that have been amended.



Submissions on behalf of Eureka

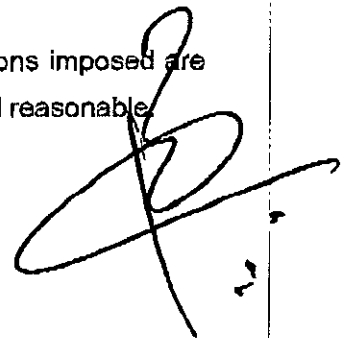
5. Eureka submitted, in summary, as follows:

- It has always understood that notifications to the Secretary under sections 71(1)(d) and 71(1)(e) of the Act would only be accepted once all supporting documentation was available and that, if a notification were incomplete, it would be returned unprocessed. It now understands that this is not the case and that notification can be made by way of email, telephone or letter with completed documentation following as soon as possible afterwards. It has put this new practice into place immediately.
- The alleged breaches do not warrant suspensions.
- It has a good previous record of compliance.
- As soon as it became aware of its failure to notify the Secretary, it took immediate steps to check all of its records and ensure that they were updated and that the Secretary was notified. Where notifications were found not to have been made, it took immediate voluntary action to remedy the problem.
- It has employed a fulltime person to assist the CEO, and will appoint another staff member to liaise with venues to ensure that future changes are not missed.
- The Secretary has not acted in accordance with its published policies in making his decision to suspend the venues. In the December 2008 "Gambits" magazine, the Department stated that it would take action on continued breaches. These breaches were one-offs in respect of each venue.
- A more suitable approach would have been for the Secretary to educate it and issue a formal warning.
- The suspension periods are not reasonable or proportionate.
- The suspensions should be overturned

Submissions by the Secretary

6. The Secretary submitted, in summary, as follows:

- The main question before the Commission is whether the sanctions imposed are appropriate. He says that they are appropriate, proportionate and reasonable.



- The decisions to suspend were made under section 74(1)(b) of the Act, which allows the Secretary to suspend class 4 venue licences for up to six months if satisfied that the society has failed to comply with any relevant requirement of the Act or the applicable subordinate legislation. The Appellant did not meet the necessary requirements, as summarised below:

Venue	Sections breached	Length of breach	Suspension
Robbies Belfast	<ul style="list-style-type: none"> 69 [approval] 71(1)(d) 71(1)(e) Licence condition 3 	11 months (13.12.07-13.11.08)	Two days
Robbies Queenspark	<ul style="list-style-type: none"> 69 [approval] 71(1)(d) 71(1)(e) Licence condition 3 	9 months (04.02.08-13.11.08)	Two days
Robbies Dunedin	<ul style="list-style-type: none"> 69 [approval] 71(1)(d) 71(1)(e) Licence condition 3 	3 months (13.08.08-19.11.08)	One day
Bar 25	<ul style="list-style-type: none"> 67(1)(j) 69 [approval] Licence condition 3 71(1)(d) 71(1)(e) 	4 months (27.03.08-22.07.08) 4½ months (22.07.08-08.12.08) 3½ months (22.07.08-07.12.08)	One day
Robbies Cranford	<ul style="list-style-type: none"> 69 [approval] 71(1)(d) Licence condition 3 	12 months (16.02.08-24.02.09) 7 months (15.04.08-13.11.08)	Two days

- The short suspension periods are warranted taking into account the wide scope of the breaches, the length of the breaches, the specific requests from him to notify any changes, the lack of an alternative sanction, Eureka's knowledge, the ease with which Eureka could have complied, general deterrence, unsuitability issues and the proportionality of the sanctions.

Submissions by the Appellant in reply

7. In reply, the Appellant submitted, in summary, as follows:

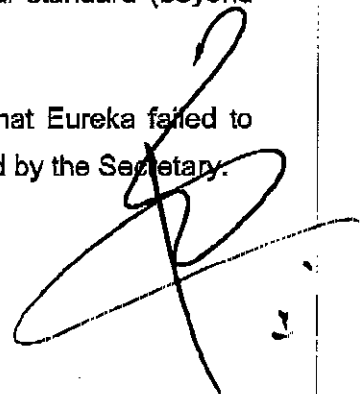
- Upon the expiry of the venue agreement for Bar 25, Eureka signed a new venue agreement with the same details as the previous (expired) agreement, but with a

new expiry date. As this change was not substantive under licence condition 3, it did not need to obtain the Secretary's approval of the new agreement.

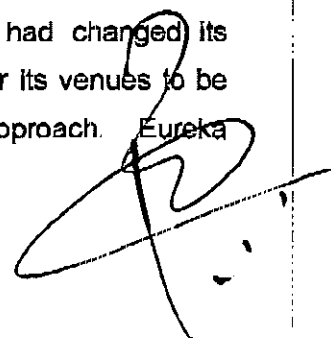
- It strongly denies the Secretary's allegation that there is a general culture of tardiness and negligence.
- The Secretary did have another sanction available to him, namely to issue a warning letter to the Trust stating that any further late notifications would result in suspensions.
- It is the community that will ultimately suffer by the imposition of the suspensions, rather than Eureka, which is a charitable entity.
- A declaration that the Secretary's policy has changed and that from now on any breach of sections 69 or 71 will automatically result in suspension would be as effective a deterrent to the gambling sector as would upholding the suspensions.

Analysis

8. The Secretary suspended five class 4 venue licences, under section 74(1)(b) of the Act, for the breaches of the Gambling Act and licence conditions outlined above. Eureka appealed the Secretary's decisions to the Commission.
9. As it has noted in previous decisions, the Commission conducts appeals on a *de novo* basis, meaning that it considers matters afresh, having regard to all the information before it, and irrespective of the Secretary's decisions.
10. Section 74(1)(b) provides that the Secretary, and the Commission on appeal, may suspend for up to six months, or cancel, a class 4 venue licence if satisfied that the corporate society is failing, or has failed, to comply with any relevant requirement of the Act, licence conditions, game rules, and minimum standards.
11. The Commission first considered whether it was satisfied that Eureka failed to comply with any of the relevant requirements under section 74(1)(b). As noted in decision GC29/07, the Commission considers that "satisfied" simply means that the Commission must consider the relevant evidence and make up its mind on the issue to the civil standard of proof (balance of probabilities), rather than the criminal standard (beyond reasonable doubt).
12. Based upon the material before it, the Commission was satisfied that Eureka failed to comply with requirements of the Act and licence conditions as outlined by the Secretary.



13. Although Eureka did not fully concur with the Secretary's position on all of the venues, it did not seriously dispute the substance of the allegations. Most of its submissions were directed at overturning, or reducing, the suspensions imposed by the Secretary on the basis that the breaches did not justify suspension, rather than persuading the Commission that no breaches whatever had occurred.
14. In relation to Bar 25, Eureka submitted in reply that it was not required to obtain the Secretary's approval of a new venue agreement in circumstances where this agreement was identical to an earlier, expired agreement (which the Secretary had approved) except for a new expiry date. The Commission disagrees. The previous agreement had expired and pursuant to section 69 of the Act, the Secretary's approval of the new agreement was required. Section 69(1)(c) specifically provides that the Secretary must approve the expiry date of a new venue agreement.
15. In relation to Robbies Cranford, the Agreed Statement of Facts stated that "The parties disagree on the facts relating to this Venue and will provide sworn evidence." However no inconsistency between the parties' evidence was apparent to the Commission. Eureka's evidence, set out in the affidavit of Graeme Parker, admitted that Eureka failed to notify the Secretary of a change in venue manager. The Secretary's evidence, set out in the affidavit of John Currie, was consistent with this and evidenced the further failure by Eureka to obtain the Secretary's approval of a venue agreement. Eureka did not dispute this in its evidence or submissions in reply.
16. The Commission took the view that any minor differences between the parties' accounts did not affect its overall assessment of Eureka's culpability.
17. As the Commission was satisfied that Eureka had failed to comply with relevant requirements of the Act and licence conditions, the Commission proceeded to consider whether it was appropriate to impose sanctions under section 74(1)(b) of the Act. The Commission noted that sanctions do not automatically follow once it is satisfied of failures under section 74(1) – the Act provides that the Commission *may* suspend or cancel a licence. Section 74(2) provides that, in deciding whether to suspend or cancel a class 4 venue licence, the Secretary (and Commission on appeal) must take into account matters in section 67. The Commission also confirms the view it expressed in decision GC07/06 – suspension has potential application for both remedial and penal purposes (and is not limited to the former only).
18. Eureka's main submission in mitigation was that the Department had changed its approach to enforcing breaches of these types, and that it is unfair for its venues to be suspended without being notified, in advance, of that change in approach. Eureka



submitted that a more appropriate outcome would be for it to receive a formal warning, particularly in circumstances where Eureka has since remedied the identified breaches.

19. The Commission has suspended licences on two previous occasions, once in respect of a casino and once in respect of a class 4 operator's licence. Those suspensions were the first in each class of gambling and, in addition to special circumstances in each case, were the subject of a degree of leniency which the Commission accorded to the first suspension case on the basis that operators of both casinos and class 4 gambling were thereafter on notice that breaches could be expected have consequences. It rejects the submission that operators subsequently in breach are entitled to further warnings, not punitive consequences, for their breaches.
20. In the previous class 4 suspension (Whitehouse Tavern Trust – decision GC38/06), the Commission suspended the operator's licence for four consecutive days for several breaches of the Act and licence conditions involving the inappropriate spending and granting of significant sums of community money. However the outcome on appeal was significantly affected by the Commission's concerns about communications between the Secretary and the appellant concerning the terms on which the suspension would be withdrawn completely.
21. The Secretary submitted that Eureka's breaches reflected a systematic disregard of sections 69 and 71 of the Act, and a general culture of tardiness and neglect. Based upon the material before it, the Commission agrees. Eureka failed to provide the Secretary with appropriate information for multiple venues over extended periods of time and in circumstances where the Secretary corresponded with Eureka specifically to remind it to do just that. The Commission does not agree that a Trust which operates numerous sites should be treated as having committed a series of unrelated one-off breaches in each of a number of sites, with no adverse conclusions about systemic issues being drawn from multiple failures extending over many months.
22. The Commission views these breaches seriously. The provision of information by a corporate society to the Secretary is essential if the Secretary is to maintain the expected level of regulatory oversight over class 4 gambling. In the Commission's view, such breaches should have punitive consequences to provide a deterrent to Eureka and other corporate societies to ensure the integrity of the control and supervision of Class 4 gambling. The Commission is concerned to see the Trust suggesting that class 4 licence holders had some expectation that non-compliance would have no real consequences unless preceded by general public statements about enforcement of policy changes, or a formal warning had been given in respect of current breaches.

23. The Secretary suspended Robbies Bar & Bistro Belfast, Robbies Bar & Bistro Queenspark, and Robbies Bar & Bistro Cranford for two days, and Robbies Bar & Bistro South Dunedin and Bar 25 for one day. In the Commission's view, having regard to the statutory maximum suspension of 6 months, the suspensions are inadequate to reflect its view of the seriousness of the breaches. The final suspension in GC38/06 was substantially affected by circumstances which have no parallel in this case and that suspension should not be treated as a general benchmark.

24. The Commission considered carefully whether it should simply confirm the Secretary's decision with comments that it expected to see longer suspensions in the future. It concluded that it should not do so and should instead impose suspensions which reflect what it regards as the minimum appropriate for the breaches, having regard to the Secretary's decision and the Trust's submissions. The Commission therefore suspends the class 4 venue licences for the five venues as follows:

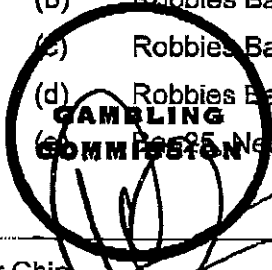
- Robbies Bar & Bistro, Belfast – 3 days;
- Robbies Bar & Bistro, Queenspark – 3 days;
- Robbies Bar & Bistro, Cranford – 3 days;
- Robbies Bar & Bistro, South Dunedin – 2 days;
- Bar 25 – 2 days.

25. The Commission wishes to make it clear that non-trivial breaches of statutory and licence requirements should have real consequences and that there should be no expectation that they will be imposed only after general or formal warnings. Operators should not be surprised if even longer suspensions are imposed in the future.

Decision of the Division

26. For the reasons already provided, the Division unanimously declines the appeals and suspends the class 4 venue licences, under section 74(1)(b) of the Act, for the five venue as follows:

- (a) Robbies Bar & Bistro, Belfast – 3 days;
- (b) Robbies Bar & Bistro, Queenspark – 3 days;
- (c) Robbies Bar & Bistro, Cranford – 3 days;
- (d) Robbies Bar & Bistro, South Dunedin – 2 days; and
- (e) Bar 25 New Brighton – 2 days.



Peter Chinn
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

4 August 2009