GC17/19

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **NEW ZEALAND RACING BOARD**

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
D M A Matahaere-Atariki
W N Harvey
S C L Pearson

Date of Application: 4 June 2019

Date of Decision: 5 July 2019

Date of Notification of Decision: 17 July 2019

DECISION ON AN APPEAL BY NEW ZEALAND RACING BOARD

Summary

1. The New Zealand Racing Board ("**NZRB**") appeals, under section 77(1)(a) of the Gambling Act 2003 ("**Act**"), against what is said to be a decision made by the Secretary of Internal Affairs ("**Secretary**") declining NZRB's application for a new class 4 venue licence under section 67(2) of the Act for premises known as TAB Newtown at 225 Riddiford Street, Newtown Wellington.

2. NZRB alleges that, on 18 April 2019, the Secretary declined NZRB's application during a phone call between Stacey Hayward (Manager, Wellington Gambling Operations, Department of Internal Affairs) and NZRB's counsel, Jarrod True. On 4 June 2019, NZRB lodged an appeal against that alleged decision. A formal decision letter was issued by the Secretary on 18 June 2019, after the appeal had been filed.

3. The issue for determination is whether the Commission has jurisdiction to hear a purported appeal (arising from the notice of appeal dated 4 June 2019) under section 77 of the Act.

Background

4. On 25 January 2019, NZRB applied for a new class 4 venue licence for TAB Newtown.

5. On 18 April 2019, a telephone call occurred between Mr Hayward and Mr True. On the same day, Mr True emailed Mr Hayward and, referring to the apparent content of that phone call, stated, "I note your advice that the licence application will be declined" and asked for a "formal decision" to be immediately issued so that it could be appealed. Mr Hayward responded by acknowledging the email and stating: "I have noted your approach and urgency and we will respond formally as soon as possible".

6. On 1 May 2019, in another email to Mr Hayward, Mr True said, inter alia, "I note that a decision was made on 18 April to decline the TAB Newtown venue licence application, but I am still yet to receive the formal decision letter despite the request for urgency". He requested "a short letter confirming the decision and outlining the appeal right". He also stated that he intended to appeal and that he could appeal based on the 18 April 2019 oral advice alone.

7. NZRB acquired, pursuant to an Official Information Act 1982 request, internal email correspondence between members of the Secretary's staff during the period 26 - 30 April 2019, which recorded how a decision refusing the application ought to be drafted.

8. On 14 May 2019, it appears that a further telephone call occurred between Mr True and Mr Hayward. In an email of 15 May 2019, Mr True wrote:

> I spoke with [Mr Hayward] yesterday afternoon. My understanding following our conversation is that a decline decision is not going to be reconsidered and the three-week additional delay is due solely to the decline letter needing to go through a 'process'.

9. On 15 May 2019, Mr Hayward acknowledged receipt of Mr True's 14 May 2019 email.

10. On 4 June 2019, NZRB filed a notice of appeal with the Commission against a decision said to have been made on 18 April 2019.

11. On 11 June 2019, Charlotte Stanley (the deputy director of Gambling Operations) advised Mr True by email that a "decision has been made today to decline the above application. Decline letter to follow". A formal decline letter was provided to NZRB on 18 June 2019. A second appeal has since been lodged by NZRB against the decision recorded in the 18 June 2019 letter. This decision concerns the status of the first appeal only.

Relevant legislation

12. Section 67(1) of the Act provides that the Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that a list of factors is met.

13. Section 67(2) provides that if the Secretary decides to refuse to grant a class 4 venue licence, the Secretary must notify the applicant, or, if there is a venue agreement, the parties to the agreement, and the venue manager of:

(a) the reason for the decision; and

(b) the right to appeal the decision; and

(c) the process to be followed for an appeal under section 77.

14. Appeals against a refusal to grant a class 4 venue licence are governed by section 77. Section 77(1)(a) provides that a corporate society may appeal to the Commission against a decision of the Secretary to refuse to grant a class 4 venue licence to the corporate society.

15. Under section 77(2), an appeal against a refused application must be made, inter alia, within "15 working days after the date of the notice of the Secretary's decision".

16. Both NZRB and the Secretary also referred to section 235A of the Act in submissions. That section relevantly provides that a person who has a right to appeal against a decision to refuse a class 4 venue licence cannot judicially review or seek injunctive relief in relation to the decision unless that person exercises that right of appeal and the appeal is finally determined.

Submissions

17. NZRB submitted that the Commission has jurisdiction to hear the appeal. It submitted, in summary:

(a) Sections 67(2) and 77(1)(a) are independent of each other. The notification requirements of section 67(2) are not necessary elements of an appealable decision. Instead, they impose procedural obligations. A valid appeal under section 77 only requires a decision to refuse a licence.[1]

(d) The ability to appeal to the Commission is extremely important and should not be limited or inhibited because the section 67(2) procedural requirements have not been met. The Commission considers matters afresh and, in circumstances like the present, the appellant knows about its appeal rights, the appeal process and the reasons for the decision are clear from the Secretary's file.

[1] Relying on *Decision on an appeal by Southern Trust Incorporated and Te Wheke Holdings Ltd* GC 17/07, 11 September 2007.

(e) The ability to appeal promptly is important as section 235A prevents judicial review or other relief being sought until the Commission has made its decision. The Secretary should not be able to protect himself from challenge by failing to follow procedural requirements under section 67(2).

(f) An appealable decision was made on 18 April 2019, recorded in Mr True's follow up email and not refuted in the Secretary's follow-up reply. The decline decision is also evidenced by the information obtained by NZRB under the Official Information Act, and the further phone call on 14 May 2019.

(g) Alternatively, the Secretary's unreasonable delay of five months gave rise to an appealable decision, as it is reasonable to assume that the Secretary was not satisfied with the application. Applications that are not processed within three months should be deemed to be refused.

(h) The Secretary is tactically and deliberately delaying decisions to achieve its desired outcome while frustrating any challenge.

18. The Secretary submits that the Commission does not have jurisdiction. It submitted, in summary, that:

(a) The Secretary made a final decision on 11 June 2019, but the decision was not appealable under section 77 until notification had been made in accordance with section 67(2) on 18 June 2019.

(i) Delay cannot be deemed to be a refusal under law, and the appropriate remedy for delay is judicial review. Section 235A does not prevent judicial review prior to a decision being made by the Secretary.

(j) The delay in this case was not unreasonable as it was a complex class 4 application which was actively managed. A detailed timeline was provided.

(k) The Secretary is not delaying making decisions in order to achieve a desired outcome and treats all applications on an individual basis.

Analysis

19. The issue raised by the notice of appeal dated 4 June 2019 is: at what point is there a decision which may be appealed pursuant to section 77(1)(a)? More specifically, is a decision made only when notice of it is given and, if so, what sort of notice?

20. At common law, in the absence of guidance in the empowering legislation, a decision is usually made in the exercise of a statutory power only when it is 'perfected'. A perfected decision is one that has been formally communicated to an affected person in a way that makes it clear that the decision is not of a preliminary or provisional kind, or that it is final. Until perfected in that sense, a decision can be reconsidered or substituted with a fresh decision.[2]

21. The Act does not expressly define what constitutes an appealable decision. However, in the Commission's view, the relevant legislative text reinforces the common law position that a decision is made by the Secretary only when formally communicated to the applicant in a way indicating finality. Section 67(2) requires the Secretary to notify the applicant of the reasons for the decision to refuse the application, the right to appeal the decision, and the process to be followed for an appeal under section 77. Section 77(2) requires that an appeal must be made, inter alia, in writing within "15 working days after the date of the notice of the Secretary's decision". The two provisions create a framework, and resulting expectation, for how appealable decisions should be formally communicated and when appeal rights arise.

22. The Commission does not accept NZRB's submission that sections 67 and 77 should be considered independent of one another. The provisions suggest that notice of decisions should be given in accordance with section 67(2), because they comprise the express requirements set out by the Act for how final decisions are to be formally communicated. In the circumstances, it would be unusual for an appealable decision not to be notified in accordance with section 67(2). Notice in conformity with section 67(2) provides an element of certainty for applicants, as the appeal period in section 77(2) runs from the date of notification of the decision.

23. On the other hand, the Commission agrees with NZRB that the section 67(2) requirements are procedural requirements for the Secretary, rather than necessary elements for an appealable decision. In the Commission's view, it is possible for the Secretary to perfect a decision (which will then be appealable) by giving notice which is not fully compliant with section 67(2). What is required is formal communication of an outcome with an indication of finality. The Secretary may commit error in not complying fully with section 67(2) in doing so, but a failure to comply fully does not mean that no appealable decision has been made.

24. In the Commission's view, a decision on an application is appealable once it has been formally communicated in a way indicating that it is not provisional or preliminary, or

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[2] *Goulding v Chief Executive Ministry of Fisheries* [2004] 3 NZLR 173 (CA) at [43]; *Decision on an appeal by Pub Charity Inc* GC09/14, 11 July 2014 at [39]-[41].

otherwise indicating that it is final. While that will usually take the form of a notice complying with section 67(2), full compliance with section 67(2) is not essential for an appealable decision and a defective notice otherwise given in final terms will suffice.

25. The decision in *Southern Trust Incorporated and Te Wheke Holdings Ltd* illustrates the position. The Commission held that a decision had been made to refuse an application when the Secretary returned a valid application on the basis (held by the Commission to be incorrect) that insufficient information had been provided.[3] The Commission considered that, although notice in terms of section 67(2) had not been given, the return of the application amounted to an appealable decision because the decision to return the application unprocessed had been formally notified and indicated clearly and finally that the application as made would not be granted.

26. In this case, the contents of the 18 April 2019 phone call cannot be considered a formal and final communication. The subsequent email of that date refers to a future decision. At most, it can be considered a tentative and informal indication of a decision that will be communicated finally and formally at a later date. Subsequent emails from Mr True indicate that a decision letter was expected, although he also asserted that an appeal could be filed relying only on the oral communication of 18 April 2019.

27. The Commission similarly does not consider that a notified decision can be derived from the emails obtained pursuant to the Official Information Act. Those emails are internal communications which related to the drafting process for the section 67(2) notice and, while they suggest that a decision to decline had been made internally, they also made clear that a formal decision communication would be issued.

28. The Commission also does not consider that a final appealable decision arose with the email of 11 June 2019 to Mr True, in which Ms Stanley stated that a decision had been made that day to decline the application, and that a decline letter would follow. The email made clear that the formal and final communication was yet to come. There was no decision against which an appeal could be lodged until 18 June 2019.

29. The Commission agrees with the Secretary that the passage of time following an application cannot be considered to amount to a decision to refuse an application. A decision requires formal communication. Delay, in and of itself, is not a formal communication of a decision. The Commission notes that, if there is inordinate delay, relief may be available to the applicant by way of judicial review or injunctive relief. Section 235A of the Act only prevents judicial review or other relief once a decision has

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[3] *Southern Trust Incorporated and Te Wheke Holdings Ltd*, above n 1.

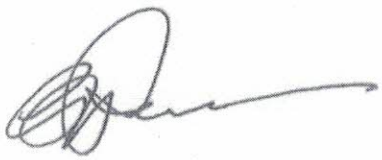
been made and is capable of appeal. It does not prevent a review application seeking to have a decision made in the first place.

30. In the Commission's view, no decision was made, and there was nothing capable of appeal, until the formal decline notice was given on 18 June 2019. That communication notified a decision formally and made clear that the notice was final. All previous indications of the Secretary's position, including the 18 April 2019 phone call, were provisional and made on the basis that final notification would follow.

Conclusion

31. The Commission's jurisdiction to hear an appeal under section 77 relying on the notice of appeal of 4 June 2019 has not been engaged. There was no decision which could be appealed against as at that date. The appeal is dismissed on the basis that the Commission does not have jurisdiction to hear it. The Commission will proceed to consider the second appeal filed after the letter of 18 June 2019.

32. As a concluding comment, the practice of frequent informal communications that apparently took place between members of the Secretary's staff and counsel for NZRB, regarding the potential outcome of NZRB's application while the assessment process was ongoing, are likely to create the kind of procedural confusion which has arisen in this case. As the circumstances of this case have shown, informal communication can lead to uncertainty about whether a decision has been made, when it will be made, and the basis upon which it will be made.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

17 July 2019

GAMBLING COMMISSION