GC09/20

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **GRASSROOTS TRUST LIMITED** in respect of premises known as Lucky's Barcade and Social

BEFORE THE GAMBLING COMMISSION

Members: D C Matahaere-Atariki
W N Harvey
S C L Pearson

Date of Application: 3 December 2019

Date of Decision: 13 March 2020

Date of Notification of Decision: 9 April 2020

DECISION ON AN APPEAL BY GRASSROOTS TRUST LIMITED

Introduction

1. Grassroots Trust Limited ("**Grassroots**") appealed against a decision by the Secretary for Internal Affairs ("**Secretary**") to issue a class 4 venue licence for Lucky's Barcade and Social at 125 Elliot Street, Howick, Auckland ("**premises**") allowing only nine gaming machines to be operated. Grassroots appealed on the basis that the licence should have been backdated to allow it to operate 18 gaming machines, pursuant to the "grandparenting" provision in section 92 of the Gambling Act 2003 ("**Act**").

2. The sole issue on appeal is whether the Secretary should have exercised his discretion to backdate the licence so that it retrospectively commenced within six months from when the prior licence was surrendered. If he had done so, an entitlement by Grassroots to operate 18 gaming machines under section 92 would have been retained.

Background

3. A class 4 venue licence was held by the Howick Sports and Social Club at the premises from before 17 October 2001 until 11 December 2017 when it was surrendered. The venue operated as a darts club.

4. In March 2018, the Social Group Limited entered into a lease of the premises and took possession on 15 March 2018. The Social Group Limited appears to be an entity associated with Parminder Singh, the venue manager named in the application. Stark Hospitality Limited,

the venue operator, was incorporated on 2 May 2018. It became the lessee around 23 May 2018.

5. On 25 May 2018, Grassroots Trust lodged with the Secretary a class 4 venue licence application. The licence application:

   (a) provided that the name of the venue was BK's Bar & Kitchen;

   (b) named Stark Hospitality Ltd as the venue operator;

   (c) named Parminder Singh as the venue manager, with Mr Bhopinder Sharma also listed as a key individual;

   (d) attached a venue agreement which was due to commence on 25 June 2018 and due to expire on 24 June 2019;

   (e) attached a copy of a floor plan dated 15 May 2018; and

   (f) did not include a liquor licence (as none had yet been granted).

6. A lease agreement for the premises dated 16 March 2018 was provided on 28 May 2018.

7. The application was accepted by the Secretary and not returned as incomplete. The period of six months after the prior licence was surrendered ended on 11 June 2018.

8. Bhopinder Sharma, now the sole director and shareholder of Stark Hospitality Limited, deposed that, after the application was filed, his number one priority was to get the venue trading (and producing income) as soon as possible. Stark Hospitality engaged specialist lawyers and planners to prepare consent applications and to liaise with Auckland Council.

9. Mr Sharma deposed that there were significant delays with the Auckland Council consenting process. It required both a resource consent and a building consent before a liquor licence could be applied for, as well as a formal traffic assessment, consultation with the Howick Local Board, limited notification and various technical reports. The liquor licence took five and a half months to be processed and granted. The suggestion from Mr Sharma and Grassroots was that the Council processes had been mismanaged and excessive. The correspondence annexed to Mr Sharma's affidavit indicates that the Council accepted that much of the delay arose from internal capacity issues, but it also indicates that the Council required numerous changes to the applications over time because of deficiencies in the applications. On the evidence before the Commission, it is not possible to assess with any confidence the extent to which the delays were the fault of the Council or the result of deficiencies in Stark Hospitality's applications.

10. A Grassroots representative, Karmen McGrath, sent the following email dated 29 August 2018 to Lisa Vuong, a Senior Gambling Regulator:

> Good Afternoon Lisa,
>
> ...
>
> This venue is changing from a club licence to a tavern licence and therefore is now subject to Resource Consent approval which is holding up the Liquor Licence. It may be some time still until the Liquor Licence is received.
>
> I am aware that this venue is past the 6 month timeframe therefore can you confirm that the Department are happy to retain the GC3 Application and will backdate the venue licence accordingly once the Resource Consent and Liquor Licence is approved.

11. Ms Vuong responded on the same day as follows:

> Good Afternoon Karmen,
>
> We will retain the application and in the event that we do approve the licence we will backdate this accordingly.
>
> Do you have an approximate timeframe for how long it could take for the Liquor licence to be approved?

12. Mr Sharma deposed that he took the email to be written confirmation that the venue licence would be backdated if it was approved. In reliance on that confirmation, Stark Hospitality spent around $500,000 on Council consent processes and in undertaking an internal refurbishment of the premises. He deposed that the fit out, including the floor plan, included a large area portioned off to accommodate 18 gaming machines. The venue was also wired to accommodate 18 machines and their bases installed.

13. Martin Bradley, the Chairperson of Grassroots, deposed that, in reliance on the alleged assurance from Ms Vuong, Grassroots arranged for the Gaming Room to be fitted out to accommodate 18 gaming machines. Those machines were purchased, transported to the venue, and installed on 16 October 2019.

14. Sarah McKenzie, the decision-maker under the Secretary's delegated authority, deposed that Grassroots had misunderstood Ms Vuong's advice, saying that Ms Vuong had thought that the concern was simply the risk that the application might be returned as incomplete and thereafter regarded as not having been made within 6 months for the purposes of section 98 of the Act.[1] Ms McKenzie said that Ms Vuong had not considered the implications of section 92 when sending the email. She concluded by saying:

> While Ms Vuong had indicated the licence would be backdated, by the time the complete application was received and advice was taken, I considered that backdating the licence and granting an 18 machine licence would not be appropriate.

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1 If the application had been filed after a six months gap, territorial local authority consent would have been an additional licence requirement; Gambling Act 2003, section 98.

15. On 24 October 2018, Ms Vuong contacted Ms McGrath requesting an update in relation to the liquor licence. Ms McGrath advised that Stark Hospitality was expecting to receive the liquor licence within four to six weeks but that the venue was about two months away from opening.

16. Following receipt of the application, the Secretary conducted an investigation into the suitability of Parminder Singh as the venue manager. The Secretary's staff found that he had failed to declare convictions and had provided unclear information in the Key Person Information Form.

17. The application was updated on 4 July 2019. In that application, Grassroots:

    (a) advised that the venue name was now to be Lucky's Barcade & Social;

    (b) advised that the venue manager was to be Bhopinder Sharma and that Parminder Singh had been removed as a Shareholder and Director of the venue operator; and

    (c) provided an updated venue agreement.

18. On 2 October 2019, the liquor licence was issued by Auckland Council. On the same day it was provided to the Secretary. After the liquor licence was issued and an inspection was undertaken, a new floor plan was requested by the Secretary and provided on 10 October 2019.

19. On 31 October 2019, Ms Vuong emailed Ms McGrath to advise that the section 92 requirementrs were no longer met and that the venue could no longer operate 18 machines.

20. On 22 November 2019, the Secretary issued a venue licence with a commencement date of 22 November 2019 and an expiry date of 30 June 2021. The venue licence provided that no more than nine gaming machines could be operated at the venue.

21. On 3 December 2019, Grassroots appealed to the Commission.

22. The licence issued did not record why the licence had not been backdated. However, Ms McKenzie deposed that the Secretary's reasons were as follows:

    (a) The venue had spent a very lengthy period unlicensed. The prior licence was surrendered on 11 December 2017, and the decision to grant the licence was made on 22 November 2019, once all relevant information had been provided, a duration of nearly two years.

    (b) The delay was not caused by the Secretary or the Department, as documents required for a grant of the licence were outstanding throughout.

(c) In the circumstances, the application was dealt with in a timely manner by the Secretary. During the time that the Secretary had had the application on the file:

(i) there were changes made to the venue name, the directors and shareholders of Stark Hospitality and the venue manager,

(ii) the venue agreement that was provided with the application expired and an updated agreement was required,

(iii) the floor plan required updating after a visit to the venue indicated that the floor plan provided was out of date,

(iv) the lease required amendment because of director and shareholder changes in the company,

(v) the application form itself was amended, and

(vi) the liquor licence was not obtained until nearly 18 months after the application was made.

(d) There was very limited continuity. The only element of continuity was the venue location. It had previously been operated as a darts club and is now operated as an entertainment venue with a tavern licence. There were extensive renovations. There was no continuity of the people involved in the operation. Within the time that the Secretary had the application, there were major changes to the venue operator company, with a director and shareholder being removed.

23. Ms McKenzie also deposed that the Secretary's decision was consistent with other applications in similar situations.

Relevant legislation

24. The key provision is section 92 of the Act:

> **92 Limit on number of gaming machines for which class 4 venue licence held on 17 October 2001**
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> (1) This section applies to a class 4 venue for which—
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> (a) a class 4 venue licence was held on 17 October 2001; and
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> (b) there has not been a period of 6 months or more since 17 October 2001 when no class 4 venue licence was held.
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> (2) A corporate society must not operate more than 18 gaming machines at a class 4 venue.
>
> (3) The number of gaming machines notified to the Secretary under section 89(1), and the models and serial numbers of the gaming machines, must be treated as a condition of the class 4 venue licence and the corporate society must not change the gaming machines, or operate more than that number of gaming machines at the venue, unless—

(a) a new class 4 venue licence is obtained that allows the change; or

(b) the licence is amended to allow the change.

(4) The limit in subsection (2) and the condition as to number imposed under subsection (3) may be overridden under section 95 or reduced by regulations made under section 314(1)(a).

25. In contrast, section 94 applies to venues to which section 92 does not apply and for which a class 4 licence is granted after the commencement of the section:

94 Limit on number of gaming machines for venue with venue licence granted after commencement

(1) This section applies to a class 4 venue—

(a) to which section 92 does not apply; and

(b) for which a class 4 venue licence is granted after the commencement of this section.

(2) A corporate society must not operate at a class 4 venue more than the greater of—

(a) 9 gaming machines; or

(b) the number of gaming machines approved by the Minister under section 96.

(3) The limits in subsection (2) may be reduced by regulations made under section 314(1)(a).

Submissions

26. In summary, Grassroots submitted as follows:

(a) The Secretary must consider backdating in all cases in which the six-month section 92 period has passed. Backdating can be done whenever appropriate, not only when delay has been caused by the Secretary or an appeal to the Commission.

(b) The delay was outside the control of Grassroots or Stark Hospitality. Grassroots and Stark Hospitality were motivated to get the premises up and running, and earning income, as quickly as possible. Delays were caused by the resource and building consent process, and the liquor licencing process, as well as the time required to undertake internal renovation work. The delays were caused by the Council which imposed significant requirements and changed its mind about what liquor licence was required. Internal capacity issues at the Council also contributed. The applications to the Council were professionally prepared, of high quality, and were timely.

(c) The delay was also caused the Secretary's decision to require an issued liquor licence before the venue licence was issued, despite the possibility of other evidence being provided regarding the primary activity.[2]

(d) There had been a degree of continuity. Rent had been paid since 15 March 2018 (three months after the surrender of the prior licence). The applications were first lodged with the Council three and a half months after the surrender and, throughout the entire period, there had been building and development work undertaken on the site, as well as ongoing dealings with the Council.

(e) The passage of time was not dissimilar to that in the Commission's decision in *Air Rescue Services*,[3] where the venue had ceased trading for two years and two months but was still granted a backdated licence.

(f) The Secretary's advice that the application would be backdated in August 2018 created a substantive legitimate expectation about the exercise of a discretion, to which it should be held. In reliance on that expectation, Stark Hospitality committed significant resources in money and energy obtaining the various consents and undertaking the refurbishment work. The building layout was designed to allow for 18 gaming machines.

(g) The approach taken to granting exemptions to periods of inactivity under section 71(1)(g) should apply to the backdating discretion as it has the same effect. Section 71(1)(g) allows venues with premises that are being renovated to keep the existing venue licence in place by applying to enable the venue to remain inactive during the consenting and refurbishment process. Inactivity applications are routinely granted by the Secretary, enabling periods of inactivity far greater than the inactivity period in the current case.

(h) The Commission should direct the Secretary to issue a backdated venue licence commencing on 10 June 2018, with an expiry date of 30 June 2020. The expiry date requires amendment because otherwise the licence would extend beyond the three year operator's licence held by Grassroots.

27. In summary, the Secretary submitted as follows:

(a) The delay was not caused by the Secretary.

(b) The application was submitted only two and a half weeks before the end of the six month period under section 92. There was never a realistic timeframe to meet the statutory requirements; the application could not possibly have been granted until

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2 *Decision on an appeal by the Southern Trust Incorporated and Te Wheke Holdings Ltd* GC17/07, 24 August 2007.

3 *Decision on an appeal by Air Rescue Services Ltd* GC26/10, 5 October 2010.

all the required information was provided, which occurred well into 2019. The application could not be assessed until there was proof of a liquor licence in order to establish the venue's primary activity. When an incomplete application is held up, the result is not procedural delay justifying backdating.

(c) The length of the Council's processes was inherent in the applicant's decision to replace the prior business with a new business quite unlike the predecessor and were, accordingly, not outside the applicant's control. The applications to the Council had to be substantially amended. Delays by the Council were not a material contributor to the period of nearly two unlicensed years.

(d) There has been insufficient continuity. The prior operation was a darts club. The new operation is a tavern with a new fitout, different staff and expected clientele and an entertainment focus. $500,000 was spent on renovations. Material changes in management were made after the application was submitted.

(e) Parliament did not intend that rights protected under the "grandparenting" provisions would apply to a new venture which commenced trading nearly 20 years after the last 18 machine licence was meant to be granted.

(f) There is no legitimate expectation based on a vague and unclear statement that was given at a time when the application had not yet been assessed. Legitimate expectation cannot be relied upon if it would be inconsistent with the duties imposed under the Act.

(g) The inactivity exemption periods are irrelevant. Such exemptions are only granted to allow for situations outside the applicant's control (for example refurbishment following a natural disaster), rather than to allow for the commencement of a new business in the same physical location as a former club following its cessation.

28. In reply, Grassroots submitted as follows, in summary:

(a) The fact that the licence could not have been granted within six months is not fatal. It was not fatal in the *Air Rescue Services* appeal. It could have been granted, with a further application made under section 77 to extend the period of inactivity, pending the renovation work being completed and the liquor licence being issued. Such a time period is required whenever renovations and liquor licencing are involved.

(b) The situation is similar, and in many respects more favourable to the appellant, to the circumstances in *Air Rescue Services*, where a backdated application was granted. In that case, the venue was demolished and rebuilt with a change in primary activity, ownership and management. The present case is not as extreme; it involved only a change in internal fitout, business ownership, business name and

a change in style of liquor licence. All that is required for continuity is that the venue be physically located in the same place.

(c) Parliament did not expressly provide that the 18 machine entitlement should be lost when the venue changed ownership, or the primary activity changed.

(d) The Secretary could have been satisfied that alcohol sales would be the venue's primary activity by reference to the lease and floorplan which made it obvious that it would be used as a large tavern and restaurant. The lease contained a large 320 square metre footprint and recorded the business use as "bar, food and entertainment."

(e) The licensing or consent process at Auckland Council is outside the applicant's control and depends on the workload of Council officers and Council resource allocation. It also includes the right for public objections, which can be frivolous.

(f) The representation by Ms Vuong was clear. While legitimate expectation is not relevant if the decision making power leaves the Secretary with no discretion, in this case, the Secretary has a discretion and backdating the licence in the present circumstances would not have been an improper exercise of his discretion.

Analysis

Approach to appeal

29. The Commission's established approach to determining appeals of this nature is that it reconsiders and re-makes the Secretary's original decision on the basis of the information then before it. The Commission therefore approaches the appeal by deciding whether it would backdate the licence in the circumstances as it finds them.

Principles for backdating applications

30. The existence of a discretion to backdate licences in order to preserve an 18 machine entitlement under section 92, and the principles relating to its exercise, were addressed in some detail by the Commission in *Air Rescue Services Ltd.*[4] The Commission held that the Secretary, and Commission on appeal, can specify a licence commencement date prior to the date of its issue and that the effect of doing so would be retrospective. Doing so would allow the condition in section 92(1)(b) to be satisfied by backdating the commencement date of the licence. The Commission observed that an obvious situation where this would be appropriate would be in the case of a successful appeal. In such a case, it would be odd to impose by implication a restriction on the Commission's powers such that it could not restore a successful appellant to the position in which it ought to have been originally. [5]

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4 *Decision on an appeal by Air Rescue Services Ltd* GC26/10, 5 October 2010.
5 At [33](c).

31. The Commission set out the relevant principles for exercise of the discretion as follows:[6]

(a) Section 92 is a "grandfathering" provision. It provides for those who had an existing right to continue to enjoy it in the future if certain conditions are met, although no similar new rights would be conferred in the future.

(b) The preserved position is therefore aberrant, not the general or current rule. It is difficult to discern an intention to see such aberrations preserved at all costs.

(c) On the other hand, Parliament clearly intended that those rights should continue to be enjoyed by those who were qualified to hold them. There is no discernible intention that they should casually be lost, especially by delay or error on the part of the Secretary.

(d) The continuity requirement is maintaining a venue licence with a gap of no more than 6 months. Difficulties may arise with delay in dealing with an application (and any appeal), whether this is the result of unwarranted delay by the Secretary or the sort of difficulties which are inevitably created when a venue undergoes redevelopment. These concerns were noted by the High Court in the *First Sovereign* decision and the Court was prepared to grant relief against them to preserve the statutory opportunity.

(e) It would be reasonable for backdating powers to be exercised to protect the applicant against loss of statutory opportunity arising from unwarranted delay or error by the Secretary **in appropriate cases.**

(f) The Secretary should consider whether and how an application made with a view to preserving a section 92 position can be dealt with so as to preserve the opportunity. This includes such possibilities as granting a licence for a day (to restart the calendar) as the High Court did in *First Sovereign,* granting the licence subject to extensive conditions (a possibility suggested in *First Sovereign)* or backdating the commencement date.

(g) This does not mean that the Secretary should necessarily conclude that preservation is appropriate in all cases but, in this case, he appears to have started from the dubious position that all applications that seek to preserve the statutory opportunity are wrong in principle.

(h) In the circumstances, there is nothing objectionable in principle in seeking a one-machine licence in order to preserve continuity (although doing so may bring section 98 into effect) or to seek a licence for premises which are undergoing renovation.

(i) On the other hand, the history of the Venue is relevant and the Secretary has a valid point, so far as the exercise of a discretion goes, that the Venue should have been without a licence for a much longer period, the effective end date being the result of a breach by the former licence holder of a statutory obligation to surrender the licence, and a procedurally cynical appeal which preserved an unlawful position and was then abandoned. The present circumstances are very different from those before the High Court in *First Sovereign.*

32. The *First Sovereign* decision, referred to in *Air Rescue Services,* concerned an application made the day after the previous licence was surrendered or expired but, towards the end of the six month period, the Secretary had proposed to decline the application.[7] The 20 day period following the Secretary's proposal, within which the applicant was entitled to make submissions, would have brought the process beyond the six month period. The High Court

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6 At [37].

7 *First Sovereign Trust v Tauranga Hotels Ltd* HC Wellington CIV-2005-485-512. 22 March 2005.

made interim orders that the Secretary grant the licence for a day before the end of the six month period (in order to restart the calendar), noting, in doing so, that "process should not dominate or compromise the applicant's statutory opportunity [to be granted a licence for 18 gaming machines]...Applicants should have the chance to obtain such licence on the merits and not lose the opportunity by delay by the very body charged with considering the application".[8]

33. As the appellant submits, in *Air Rescue Services*, the Commission did indeed direct the Secretary to grant a backdated licence in the following circumstances:

(a) The venue licence was filed four days prior to the expiry of the six month period.

(b) The application form was incomplete. It gave details of one gaming machine that it proposed to operate, even though it intended to operate 18. The venue did not hold a liquor licence at the time of the application and no venue expense claim was provided with the application.

(c) The liquor licence and the itemised list of costs were provided only after the expiry of the six month period.

(d) The original application filed was subsequently amended to include 18 machines after the expiry of the six month period.

(e) The venue was not completed and available for inspection until three months after the expiry of the six month period. By the time of the inspection, the staff had not yet been trained on harm prevention and minimisation.

(f) The ultimate date on which the prior licence was surrendered was in itself the product of a failure to surrender the licence promptly after four weeks of inactivity as required by section 71(1)(g) and the licence was extended further by an appeal lodged by the previous gaming trust[9], which was described by the Gambling Commission as "cynical" and "meritless".

(g) The original venue, which operated as a hotel, was demolished and replaced by a newly built tavern (as well as other newly constructed separate businesses). The primary activity therefore changed, as did the ownership and management.

34. However, in doing so, the Commission was very clear that the circumstances in that case should not be regarded as creating a precedent for future appeals:

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8 At [22].

9 As the result of an automatic statutory stay of the appealed decision.

> 39. Section 92 aims to permit retention of a grandfathered position at venues which have maintained reasonable continuity of licensed operations. While the Commission does not think that section 92 needs to be applied strictly, without relief against delay or error by the Secretary and possibly taking into account events outside the applicant's control, the Secretary may also conclude that the discretion to backdate should not extend to venues which in reality lack the intended continuity in other than a technical sense, especially when the technical continuity has arisen from a breach and a meritless appeal.
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> 40. The Commission has decided that, in this case, the licence commencement should be backdated to the date of application, namely 23 October 2009. The effect of doing so will preserve the status of the venue under section 92. The decision to do so has not been easily reached. Normally the sorts of concerns raised by the Secretary about the venue's history would result in a view that the intended continuity had not been maintained in substance and, generally speaking, applications made at the very end of the six month period could not necessarily expect the exercise of a backdating discretion as a matter of course (especially if they lack sufficient detail to be granted). The following matters however have tipped the balance in favour of backdating:
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> (a) The Appellant appears to have proceeded on the basis of a misunderstanding of what was required to satisfy the continuity requirements of section 92,[10], a matter on which the Commission has now ruled. The Appellant may well have made commercial arrangements on the basis of its erroneous assumption. Following this decision clarifying the effect of section 92, future applicants will not be able to claim to be in a similar position.
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> (b) The licence issued contained critical errors as to the commencement and expiry dates which the Commission has rectified in this appeal. Again, these circumstances would not be expected to recur.
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> (c) The Secretary appears to have proceeded on the basis that an application brought for the purpose of preserving the position under section 92 was objectionable in principle and therefore gave no consideration to whether steps should be taken to preserve the position under section 92.
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> The Commission considers that, by a small margin, the position of the Appellant, whose appeal has resulted in clarification of the position, should be preserved. In future cases, the Secretary will need to make his own assessment of whether, in all the circumstances, discretion should be exercised to preserve section 92 status. The answer will not necessarily be positive, especially in cases where reasonable continuity of licensed operation has not been maintained in substance, including for reasons of reconstruction.
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> [footnote added]

35. The Commission's decision on the facts in that case was expressly exceptional. The Commission indicated clearly that the decision to backdate on the facts of that case should not be regarded as setting a precedent for future backdating. While the Commission, and Secretary, will apply the *principles* discussed in *Air Rescue Services*, applicants should have no expectation that licences will be backdated in circumstances similar to those in that case. The Commission was therefore not persuaded by the appellant's submissions regarding the similarities between the present case and the facts in *Air Rescue Services*. If anything, factual

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10 The appellant claimed to have thought that the expiry period would be stopped by a mere application, not an issued licence.

similarity with *Air Rescue Services* may indicate that continuity is unlikely to have been maintained and that the discretion should not be exercised in favour of backdating.

36. The Commission addresses the other submissions by parties on the relevant principles as follows:

(a) Without going as far as Grassroots has suggested (that the Secretary is strictly required to consider backdating without being expressly asked to do so), as indicated in decision GC26/10[11], the Commission would generally expect the Secretary to consider doing so in the case of all applications in respect of venues which have preserved section 92 rights. Any application which appears to rely on section 92 continuity should certainly be treated as incorporating an implied request to backdate the licence issued. A request was made in this case in any event.

(b) As the principles set out in *Air Rescue Services* were derived from the Commission's considered view of Parliamentary intent as it appears from the statutory language, the Commission does not consider that new claims by the parties as to Parliament's alleged intent with regard to section 92 merit reconsideration of those principles.

(c) The Secretary's power, under section 71(1)(g), to allow a venue to remain inactive for a specified period, is not similar (nor relevant) to the exercise of Secretary's discretion regarding backdating. Section 71(1)(g) is an unrelated provision concerning relief against standard obligations of continuity of operation under all existing class 4 venue licences; it has no application to the exercise of a discretion to backdate a new venue licence in order to maintain a "grandparented" entitlement to 18 machines, an aberrant state of affairs. The relevant principles were set out in *Air Rescue Services*. The Commission sees no reason to amend them by reference to considerations relevant to assessment under a different statutory provision.

(d) The Secretary's view that only delays attributable to the Secretary are relevant is too narrow an approach. The concerns underpinning prior decisions by the Commission and the High Court related to prevention of substantive entitlements to retain 18 machines being lost purely as a result of procedural delays, outside the applicant's control, occurring in the course of meritorious applications. In principle, there is no reason why such considerations should not extend to unwarranted delays in processes outside of those of the Secretary and the Gambling Commission, including territorial consent processes.

(e) Excessive concern about the length of the potential "grandparented" rights would be an error. It would be wrong in principle to assume that all such rights should have come to an end by now. While its exercise would continue an aberrant state of

[11] See paragraph 45(c)

affairs, the discretion should not be exercised on the basis of wholly negative assumptions about its potential exercise.

(f) On the other hand, there is similarly no presumption that the discretion should always be exercised, in order to preserve "grandparented" rights at all costs. Some recognition of the aberrant result is appropriate. There is a need for a proper balance to be achieved.

Application to this case

37. In the light of the approach outlined above, the Commission would not have concluded that the venue in this case had maintained the necessary continuity in substance to justify the exercise of the discretion to backdate the licence for the following reasons:

(a) The application was filed only two and a half weeks prior to the six months period expiring. In *Air Rescue Services,* the Commission made it clear that applicants should not expect that successful applications made towards the end of the six month period would be backdated. While the appellant acted reasonably timeously once the application was filed, to obtain the required documentation and to commence refurbishments, there was no prospect, even if there had been no delays, of the licence ever being granted prior to the expiry of the six month period.

(b) There were significant changes made to the licence after the application, including a change in venue manager, apparently resulting from the unsuitability of the original venue manager (who failed to disclose relevant convictions). Substantive deficiencies in the original application resulted in the need to make changes to the directors and shareholders of Stark Hospitality Ltd.

(c) There was no prospect of the venue ever being ready to operate by the end of the six month period, or anywhere close to it, even if there had not been delays and even if the application had been filed at the beginning of the six month period. The decision to undertake a substantial change to the premises and business meant that various Council consents would be required for it to operate. While Grassroots suggested that it might have obtained an inactivity extension under section 71 of the Act, it did not choose to proceed in that manner. Whether such an exemption would have been granted is a matter of speculation. In all likelihood, an inactivity exemption would have been required for many months, possibly in excess of a year.

(d) While the conceded internal delays in Auckland Council's processing were outside of the appellant's control, the Commission concurs with the Secretary's view that the usual time required to obtain territorial authority consents are an inherent part of setting up and operating establishments and should not be considered outside of the appellant's control.

(e) Significant building and redevelopment work was undertaken throughout the entire material period. The prior operation was a darts club and the new operation is a tavern. A completely new fitout, staff, operators and business, coupled with a gap of almost two year between the venue last operating as a class 4 venue and re-opening would generally suggest a lack of continuity.

38. The Commission considers, however, that the outcome in this case should be affected by another matter which has no factual common ground with the *Air Rescue* decision. The email exchange of 29 August 2018 contained a plain, unambiguous and unconditional representation by the Secretary that the application would be backdated if granted.

39. Nothing in the language of the exchange supports the Secretary's submission that it related to concern about the application being assessed as incomplete and returned and the complete application being treated as received only when resubmitted, with consequences under section 98. Section 98 concerns receipt of applications, not the date on which a licence is issued. Confusion between those two provisions was addressed comprehensively in the *Air Rescue Services* decision. In the Commission's view, backdating could only sensibly refer to the preservation of an 18 machine entitlement; it was not conceivably required in order to avoid a territorial local authority consent being required. If the licence application were received within 6 months (and not returned as incomplete), for the purposes of section 98, no territorial consent would have been required.[12] Backdating the resulting licence would never have been effective to avoid that consequence.

40. Ms Vuong was asked directly to confirm that the Department would backdate the venue licence and responded: "in the event we do approve the licence we will backdate this accordingly". The representation is clear and the Secretary's submission that it should be construed other than on its terms is rejected.

41. Grassroots, and Stark Hospitality Ltd, in reliance on that assurance, designed the venue to be capable of holding 18 machines and spent considerable resources and effort in redeveloping and fitting out the premises.

42. The Commission considers that it is appropriate, in the particular circumstances, to exercise the discretion to backdate the venue licence, in order to keep faith with the promise made to the appellant by Ms Vuong. To be clear, in reaching that view, the Commission is exercising its powers of decision on appeal, aware that it cannot set aside decisions on the basis of substantive legitimate expectation, as if it were engaged in some form of judicial review. In its view, a freely given assurance by the Secretary that, if issued, the licence would be backdated, accompanied by an applicant's obvious detrimental reliance on the assurance, is highly material to the exercise of the discretion to backdate.

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12 *Southern Trust and Te Wheke Holdings*, above n 2, at [27]-[29].

43. While the concept of "legitimate expectation" cannot override statutory obligations, the matter at issue here is an available discretion, involving no failure to discharge a statutory obligation.[13] Although an assurance by the Secretary should be a significant consideration in the exercise of the discretion to backdate a licence, the exercise is not automatic and remains a matter of evaluation in the circumstances of each case by reference to the principles in *Air Rescue Services* and the guidance in this decision.

44. In addition, the Commission has concluded that the delay was at least partly the result of the Secretary imposing a requirement, as a matter of policy, for an issued liquor licence to be a prerequisite for the grant of a venue licence, without regard to whether there is other evidence that gaming would not be the primary activity at the venue, including floor plans and the lease, and without, for that matter, consideration of the possibility of imposing appropriate conditions. The Commission has previously held that an issued liquor licence is not a precondition to an application being considered or approved, where other evidence is available to satisfy the requirement that the class 4 venue is not to be used mainly for operating gaming machines.[14] To the extent that the delay in granting a licence is the result of an operational decision by the Secretary to require an issued liquor licence before considering a class 4 venue licence application, the Commission considers that also to be an additional positive consideration for the exercise of the discretion.

45. For the reasons set out above, the Commission considers that it should exercise the discretion to backdate the licence. While it is doubtful that the exercise of the discretion to backdate would otherwise have been justified in the circumstances, because of lack of substantive continuity, the Commission considers that the Secretary should be required to operate with regulatory integrity and, generally speaking, to keep faith with assurances given, if possible. The need to exercise discretion for similar reasons in the future is reasonably avoidable if appropriate care is exercised in dealing with applicants.

Decision

46. The Commission reverses the decision of the Secretary to issue a licence dated 22 November 2019, permitting the operation of only 9 gaming machines.

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13 In contrast to the situation in *Decision on an appeal by New Zealand Racing Board* GC24/19, 28 August 2019 at [5.3].

14 *Southern Trust and Te Wheke Holdings*, above n 2, at [21]-[23].

47. In its place, the Commission directs the Secretary to issue a backdated licence, commencing on 10 June 2018, with a condition allowing 18 gaming machines to be operated, and expiring on 30 June 2020. The expiry date is to align with the expiry of the class 4 operator's licence held by Grassroots.

Wendie Harvey
Gambling Commissioner

for and on behalf of the
Gambling Commission

9 April 2020

GAMBLING COMMISSION