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### **Introduction**

[1] This is an appeal against a decision of the High Court (Miller J) dismissing an application for judicial review by the appellant, Pub Charity: *Pub Charity v The Attorney-General* HC WN CIV 2003-485-1106 25 May 2004. It requires us to consider what counsel for Pub Charity described as “four narrow but important issues which are of concern to all owners of gaming machines, and all owners of the venues in which those machines are located”.

### **High Court judgment**

[2] Counsel were agreed that the High Court Judge had accurately and fairly set out the factual background, described the statutory scheme and summarised the key points relating to the licence which are in issue in this case. Our summaries of those matters in the paragraphs which follow closely the relevant sections of the High Court judgment.

## **Factual background**

[3] In November 1987, the Minister of Internal Affairs (the Minister) decided to implement a licensing regime for gaming machines under s 8 of the Gaming and Lotteries Act 1977 (the Act). The licensing regime was introduced as a temporary measure pending review of the Act, and was a response to the introduction of gaming machines by entrepreneurs on an unlicensed basis. The purpose of the licensing regime was to provide an element of consumer protection and to ensure that money raised through the use of gaming machines was channelled back into the community. Licences are issued only to non-profit societies that operate gaming machines to raise money for a purpose authorised by the Act. Those purposes may be charitable, philanthropic, cultural, party political, or otherwise beneficial to the community.

[4] Despite several reviews of gaming and two draft Bills, it was not until 2003 that new legislation was enacted in the form of the Gambling Act 2003. Provisions of that statute governing the operation of gaming machines did not take effect until 1 July 2004, so this case is concerned only with the Act.

[5] There is provision in s 8 of the Act for regulations, but no regulations were made governing the operation of gaming machines. The Department of Internal Affairs (the Department), officers of which issue licences under delegation from the Minister, has filled the vacuum to some extent by promulgating standard licence conditions relating to matters such as purchasing of machines, banking of profits, payment of expenses, record keeping and distribution of profits. Licences also include conditions specific to a given society such as its statement of authorised purposes and its schedules of gaming machines, equipment and approved sites.

[6] A prominent feature of the licensing regime has been the Department's attempts to ensure that gaming machines can be operated only for the object of raising money for purposes authorised by the Act. It has done so partly by controlling expenses that may be claimed by a society or paid to the operator of a given site and requiring detailed financial reporting. Until 1996, the Department capped expenses at a fixed rate that was intended to cover space used and electricity

consumed by the machines. In 1997, the Department allowed societies to claim expenses on an actual and reasonable basis, and accepted a wider range of expenses. Societies were largely left to determine for themselves whether expenses were actual and reasonable.

[7] Site payments made by societies to site operators under the 1997 regime had two components. They were "site rental", being payment for the right to place the machine on the site, and the costs of labour to administer the machines. Site rental payments were intended to reflect the value to the society of a particular site.

[8] Pub Charity was the first non-profit society to receive a gaming machine licence, and it has around 3,000 gaming machines at approximately 335 approved sites. Beginning some time before 1997, however, competing societies were established. This created an opportunity for site operators to move their custom between societies, which in turn led to an increase in site payments being paid to some operators. In one case, more than \$800 per machine per week (pmpw) was being paid. This behaviour led to a 1997 complaint from Pub Charity in which its Chief Executive, Mr Bray, complained that high turnover sites were being poached by societies "less scrupulous" than Pub Charity. By inflating expenses in this way, operators reduced the profit available for authorised purposes.

[9] These developments led the Department to review its practice of allowing societies to determine whether expenses were actual and reasonable. In 2000, the Department undertook a survey of licensees. The results of that survey showed that expenses paid did not exceed \$150 pmpw at 70% of sites. For the remaining 30%, sums of \$250 or more were being paid. The survey results were shared with the industry. The Department subsequently learned that societies were under pressure to match \$250 pmpw to remain competitive. The survey return showed that up to \$250 pmpw was being paid for two of the sites that were the subject of the High Court proceeding. Pub Charity relied on this to support a claim that it had a legitimate expectation that payments could continue at that level.

[10] The Department's response was to implement a regime under which standard licence conditions were amended, effective 1 October 2001. Licences had provided

that not less than 33% of gaming profit must be returned to the community. The new conditions emphasised that all available funds must be returned to the community, not just the 33% minimum. Expenses of up to \$150 pmpw were authorised, but payments in excess of that required a dispensation. Applications for dispensation were to be supported by evidence verifying the expenses claimed. The Department proposed to base dispensations partly upon profit generated by a site. This approach appears to have been based on acceptance by the Department that site rental payments recognising the value to a society of a particular site were legitimate expenses.

[11] Pub Charity's licence was renewed on 17 January 2002, with effect from 1 October 2001. The new conditions applied.

[12] On 6 September 2002 Pub Charity sought dispensations in relation to 22 sites. Dispensations of \$250 pmpw were sought in relation to certain sites. Two of those, Robbie's Bar and Bistro and the Duke of Gloucester were referred to in argument. They did not include any element of site rental.

[13] The applications were supported by a review of expenses undertaken by Mr Warwick Hodder, a consultant and former Department employee of considerable experience. Mr Hodder had prepared a template that listed the expenses a site operator might claim and invited the site operators to complete it. Those expenses included a share of general overheads such as electricity, insurance, rates, bank and eftpos fees, security, and rubbish collection. For labour costs he asked the site operators to undertake a time and motion study to support the hours claimed in relation to gaming operations. He also included a category for 'subjective' costs such as time spent by bar staff and management supervising machines, in addition to the hours justified by the time and motion study for specific tasks. Invoices and documentation for a typical month's expenses were produced for his inspection. He then visited each site and interviewed staff. He reported to Pub Charity that the expenses claimed were actual, reasonable, and necessary in each case.

[14] The dispensations were declined, partly because none of the sites achieved gaming machine profit of \$1M (exclusive of GST) per year. That was the amount of

profit needed, under the Department's licence conditions, to justify expenses of \$250 pmpw.

[15] Pub Charity brought an application for judicial review. On 6 March 2003, Durie J quashed the decision to refuse dispensations: *Pub Charity v Attorney-General* [2003] NZAR 512. The decision turned on the practice of allowing dispensations based in part on the value that the applicant placed on the site as a generator of profit. Durie J held that the Department had dealt with dispensations not according to the merits but rather on the basis of its formula related to site turnover. In the result, the Department failed to take into account the actual, reasonable and necessary costs associated with the gaming machine operation on each site. He also found that insofar as site payments were determined by reference to turnover they took on the character of commission, which is contrary to the intention of the Act.

[16] Following Durie J's decision, Pub Charity asked the Department to reconsider the applications for dispensation in relation to three sites: two, Robbie's Bar & Bistro and the Duke of Gloucester remain in contention. This was followed up with a letter annexing applications that were supported by documents detailing the expenses claimed for each site. The applications were said to include 'modest' site rentals, Pub Charity having taken the view that site rentals were not prohibited by Durie J's decision provided they were not based on turnover.

[17] The Department had granted a dispensation to Pub Charity in respect of the Kaitaia Hotel on 19 November 2002, allowing a site payment of \$200 pmpw. Pub Charity now sought to increase the site payment, and it also sought a dispensation in relation to the Onerahi Tavern. Actual expenses at Kaitaia were said to be \$215 pmpw, and Pub Charity wanted to make a site rental payment to bring the payment up to \$250. The reasoning was that the site operator considered it could make better use of the space occupied by the machines. Turnover was low. Miller J inferred that the machines may not have been a significant attraction for hotel and restaurant patrons. Mr Cotching, who gave evidence for the site operator in the High Court, considered that the hotel was subsidising the gaming operation. Pub Charity's position was that it would have to remove the machines unless the operator received

a site rental. In that case it would no longer be able to distribute profits to community purposes in the Kaitaia area.

[18] The Department initially advised that it was required to develop a new policy for dispensations in light of the judgment. It had not yet done so. The application for dispensation would be considered in light of the policy that was eventually put in place. Pub Charity was understandably dissatisfied with this response. It pointed out that it was not open to the Department to impose a licence condition that provided for dispensations and then to refuse to consider applications for dispensation.

[19] The Department then agreed to consider the applications. It advised that it would require details of the actual costs incurred by the site operator "directly arising from the gaming machine operation". It would consider, on a case by case basis, whether those costs were reasonable and necessary. This might involve a comparison with costs incurred by other operators to decide whether or not the amounts claimed were reasonable. It explained that there were certain types of costs that it would consider necessary. They were labour costs relating to the operation of gaming machines, 'direct' costs resulting from the operation of gaming machines (such as electricity, stationery, bank fees etc, but not a proportion of all general business costs), and floor rental being the rental value of floor space occupied by gaming machines. Site payments should be limited to costs that arise due to the gaming operation. The Department also advised that it could no longer see how site rental could be part of a legitimate site payment. It acknowledged that this was a change of position, and explained that it understood Durie J's decision to mean that site payments based on turnover bore the character of commission, which is contrary to the intention of the Act. It reasoned that it was difficult to see how any form of site rental that was designed to reflect the value that the licensee placed on a site could be permissible. It invited comments. It also invited Pub Charity to reconsider and amend its application.

[20] This letter was followed up with a circular to all licensees setting out the Department's new approach to dispensations.

[21] Pub Charity took the view that it had already established that any payments sought in relation to the three sites that were the subject of Durie J's decision were reasonable, and it required that the application for dispensation be reconsidered immediately. It said there was sufficient evidence in the original application and Mr Hodder's evidence before Durie J.

[22] Pub Charity's solicitors took issue with the Department's proposed approach with respect to site rentals. It accepted that commission payments or payments linked to profit or turnover were prohibited, but contended that payments intended to reflect the value to Pub Charity of a particular site were permissible. It pointed out that, in the case of Kaitaia, the value of the site was not the profit or turnover of the machines, but rather the existence of a Pub Charity site in the Kaitaia region. The existence of the site allowed Pub Charity to distribute funds for authorised purposes in the Kaitaia community (as the licence requires funds to be distributed in the area in which they are raised).

[23] The High Court proceedings were issued on 6 June 2003.

[24] The Department by letter of 16 June 2003 advised Pub Charity of its intention to decline the applications for dispensation including those for Robbie's Bar and Bistro, the Duke of Gloucester, the Kaitaia Hotel and the Onerahi Tavern. The Department invited comments on the draft decision.

[25] The letter dealt with the applications in great detail. After rehearsing the background, the Department recorded that it was required to examine the site operators' actual costs. It did so on a case by case basis, considering whether it was reasonable and necessary for Pub Charity to reimburse those costs. In order to justify the costs societies were required to provide a "fully documented case". The Department noted that it was reasonable and necessary to pay floor rental recognising the floor space occupied by gaming machines. However, it was "unlikely" to be reasonable and necessary to pay site rental, being the value that a society places on a site. Because site rentals are not based on any clear service provided by the site operator, the amount can be driven by the 'commercial wants' of the site operator.

[26] The Department observed that the applications were inadequate because they were not fully documented. Invoices were supplied for some items but most claims were simple assertions. It was within Pub Charity's ability to provide more detailed evidence, such as the time and motion study that had been conducted at each of Robbie's Bar and Bistro and the Duke of Gloucester. The time and motion study would verify the amount of time spent by hotel staff in performing various operations in relation to gaming machines, or supervising machines. Other examples were given of evidence that might be supplied. Nonetheless the Department had dealt with the applications as best it could. It was willing to meet with Pub Charity to discuss further information that might be supplied.

[27] Each of the sites was dealt with in a separate appendix. The High Court Judge referred to the appendix dealing with Robbie's Bar and Bistro as an example. The Department's concerns regarding the costs claimed took two forms.

[28] The first related to the amount claimed for activities which were accepted as within the scope of those for which reimbursement could be claimed. The Department said that the amount of time claimed for many of the tasks undertaken seemed excessive. In addition, Pub Charity had claimed "subjective costs" of \$700 per week for supervision of the gaming machines. Hourly rates also seemed excessive. Miller J observed that the concerns seemed amply justified.

[29] Second, the Department was concerned that the cost claimed included general business costs that a site operator would incur regardless of whether or not gaming machines were operated on the site. While the Department was willing to accept a portion of electricity, insurance, interest, bank fees, security and some miscellaneous costs, such as phone rental, stationery, photo copying and postage, Pub Charity was claiming costs on the basis of what appeared to be a percentage of the floor space of the site.

[30] In relation to the Kaitaia Hotel, the Department advised that it proposed to reject the claim for site rental. It did not accept that a site rental was justified by the desire of Pub Charity to have a presence in the Kaitaia area

[31] Pub Charity's primary response was to attack the Department's approach to the application. Its solicitors contended that the Department had failed to look at the merits and had erred in law by taking the view that general business overheads could not be claimed as a proportion of the business as a whole. These costs were not claimed on a percentage of floor space as the Department had understood, but rather were based on an apportionment of costs among cost centres. In the case of Robbie's Bar and Bistro, there were three cost centres being bar, restaurant, and gaming machines. Accordingly, one third of direct costs had been assigned to gaming. Further, opportunity cost (the income that a site operator could gain were it to sell its premises and invest elsewhere) was a legitimate expense. The Department had also erred in law by failing to have regard to the evidence before Durie J. The solicitors also pointed out that for some years the Department had accepted site payments of up to \$250 pmpw being made by Pub Charity.

[32] The solicitors also responded to the Department's comments with respect to each site. Explanations were given, but Pub Charity did not supply the supporting evidence that the Department had requested. In some cases, the solicitors pointed out that there was no underlying evidence and that the explanation given was reasonable. Some cases were also modified.

[33] The Department declined the applications for dispensation by letter dated 28 July 2003.

[34] The Department pointed to a failure to supply evidence necessary to back up many of the claims. It stated that it was the obligation of Pub Charity to provide a fully documented case, and the onus was on Pub Charity to prove its case for a dispensation. Pub Charity had chosen not to supply available evidence, including the data upon which Mr Hodder had based his reports. Its failure to establish that the costs claimed were actual, reasonable and necessary was the primary factor in the Department's decision.

[35] The Department also advised that it considered Mr Hodder was in error in dividing general business costs between cost centres. It noted that Mr Hodder was not a qualified accountant or business analyst. The Department itself had taken

advice from professional accountants on this point. Basic accounting practice in relation to activity-based costing was to use some appropriate basis on which to attribute costs to different activities. The basis that was appropriate depended on the particular costs concerned. The appropriate approach for calculating direct costs that could be deducted under the relevant condition of the licence was to allow only costs that arise directly from the operation of the gaming machines. This included existing costs where and to the extent that they were increased by the presence of gaming machines, such as cleaning, electricity, and security. Opportunity cost was not an expense to a site operator. In reviewing claimed costs the Department was entitled to have regard to industry averages.

[36] The Department also responded in detail to the points made by Pub Charity in responding to the draft decision of 16 June 2003. Apart from the point already referred regarding apportionment of general business costs, the Department also responded to the claims made regarding the time required to undertake operations relating to gaming machines, and the claim for "subjective costs". Some of the points made by Pub Charity in responding to the draft decision were accepted but for the most part the Department took the view that evidence could have been supplied but had not been. It also affirmed its draft decision in relation to site rental at Kaitaia.

[37] The decision required that Pub Charity implement site payments of no more than \$150 pmpw at the relevant sites without delay. In response to the decision, Pub Charity sought interim relief in the High Court. In a judgment dated 21 August 2003, Wild J granted interim declarations, the effect of which was to suspend the decision. Pub Charity continued to pay up to \$250 pmpw at the affected sites up to the time of the decision in the High Court in the present case. Miller J in his judgment of 25 May 2004 refused to make orders obviating the need for Pub Charity to recover from site operators the amounts overpaid to them while the interim declaration was in force.

## **The Statutory Scheme**

[38] The long title of the Act states that it is an Act to make better provision for the conduct of games of chance, instant games, prize competitions, and lotteries for amusement and for the raising of funds for certain purposes while continuing to prohibit the conduct of such activities for commercial gain.

[39] The Act prohibits illegal games of chance unless they are authorised by licence issued under s 8 of the Act. It was common ground that gaming machines are games of chance.

[40] Section 8(1) provides:

The Minister may from time to time, at his discretion, on the application in writing of any society, grant to that society, in respect of any game or games of chance that would otherwise be illegal, a licence authorising it to conduct the game or games of chance specified in the licence if he is satisfied that the society's object in doing so will be to raise money for an authorised purpose.

[41] "Authorised purpose" is defined to mean any charitable, philanthropic, cultural, or party political purpose, or any other purpose that is beneficial to the community or any section of it.

[42] Accordingly, the Minister may grant a licence only where he or she is satisfied that the sole object of the society in conducting a game of chance is to raise money for an authorised purpose. Although authorised purposes are diverse, they do not include commercial exploitation of the game of chance for the benefit of the society or its members.

[43] Further, the object must be to "raise money for" an authorised purpose. The Judge said he considered that the object of raising money is to generate revenue that exceeds the expenses of earning it. It is the surplus that is applied to the authorised purpose.

[44] Section 8(2) provides:

Every such licence shall be subject to the condition that no money shall be paid to or received by any person (other than an authorised employee of the society) whether directly or indirectly, by way of remuneration or commission for conducting or helping to conduct the game or games of chance, and that no remuneration by way of commission shall be paid to or received by any such authorised employee for conducting or helping to conduct the game or games of chance.

[45] Remuneration is not defined in the Act. We will consider its meaning later in this judgment.

[46] Section 8(3) provides that, subject to subsection (2) and any regulations made under subsection (5), the Minister may grant a licence to conduct any game of chance either unconditionally or subject to such conditions as he may specify. The Minister may also at any time amend a licence and may at any time add to, vary, or amend any conditions that have been imposed on the licence.

[47] Under s 8(5) the Governor-General may by Order in Council make regulations for specified purposes which include:

(d) Prescribing the conditions to be complied with by persons conducting games of chance, and by those playing them:

...

(k) Providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this section, and for its due administration.

[48] Regulations have never been made under s 8. Rather, gaming machines have been regulated pursuant to detailed licence conditions imposed under s 8(3). We will consider later the lawfulness of this practice.

### **The Licence**

[49] The licence granted on 17 January 2002 authorised Pub Charity to conduct games of chance by way of gaming machines for the sole objective of applying and distributing at least 33% of gaming machine profit for the following purposes:

Any charitable, philanthropic, cultural or party political purpose, or any other purpose that is beneficial to the community or any section of it. This

shall include, but not be limited to: the provision, or the assistance in the provision of facilities, equipment, or playing or training uniforms for sporting clubs and amateur sporting teams playing in recognised, published leagues or competitions. Grants for charitable purposes including the relief of poverty or welfare assistance through donations to recognised social service or welfare agencies. Grants to educational or training organisations through the provision of scholarships or equipment which is administered by the recipient educational organisation. Grants for recognised cultural or philanthropic activities or groups within the local community.

[50] The licence also provided that with the exception of any funds retained for distribution to national societies or agencies, funds must be distributed in the general community area in which they were raised. Further, the licensee must at all times comply with the provisions of the Act and the licence conditions with the licence. Any serious breach of the licence conditions might result in cancellation of the licence. The licence conditions referred to are standard conditions that the Department has applied to all gaming machine licences since 1 October 2001.

[51] Four licence conditions are relevant for present purposes. Condition 47 provided that the applicant shall pay out at least 33% of the total gaming machine profit, for each financial year, for the authorised purposes shown on the face of the licence. Gaming machine profit is defined as metered turnover less metered total wins, so it excludes taxes and expenses.

[52] Condition 56 provides:

Interpretation of "expenses"

(1) The society shall apply gaming machine funds only to expenses that are actual, reasonable and necessary to the society's gaming machine operations.

(2) The society shall not make payments to any site operator that exceed \$150 per machine per week (excluding GST) in total, unless the society has applied for and received approval from the department for dispensation to make higher payments. Any such application must be made in writing and must be substantiated by a fully documented case. While the department will consider each application on its merits, there is no presumption that any dispensation will be granted.

(3) The society shall not pay a service provider to perform duties listed in the site agreement as duties to be performed by the site operator.

(4) Payment of expenses shall be made by fully auditable electronic lodgement, or by cheque. Where payments are made by cheque, the cheque

must be made out in the name of the service provided and crossed 'Account Payee Only' or 'Not Transferable'. All such payments must be made from the society's gaming machine account.

[53] Condition 56 previously referred to expenses that were "lawfully incurred and necessary" to the gaming machine operations. Nothing turns on the difference between the two versions of condition 56. Pub Charity accepted that it could apply gaming machine funds only to expenses that are actual, reasonable and necessary. One of the issues in the High Court was whether the expenses claimed meet this test. That is also an issue in this appeal.

[54] Condition 57 requires the society to maintain full and complete records of all expense payments and of the providers of goods and services for which expenses are claimed. Condition 18 requires the society to enter into a site agreement showing the amount and nature of expenses payable and total payments to the site operator.

[55] The Department also issued guidelines, which although not part of the licence clarified the Department's policy with respect to expenses. The guidelines provide that "actual" expenses are based on actual, rather than projected, expenses and are able to be substantiated. "Reasonable" expenses take into account the size of the operation and normal market values for the goods or services provided. "Necessary" means necessary to the gaming operations. The society must exercise good business practice and due care to ensure that expenses are clearly related to the society's function of raising funds for authorised purposes.

[56] The guidelines illustrate expenses that may be deducted, including levies and taxes, depreciation where a society owns the equipment, cost of credit, insurance, installation costs, servicing, and administration costs.

### **Findings in the High Court**

[57] Pub Charity pursued three causes of action in the High Court.

### *Condition 56*

[58] The first contention was that Condition 56 of the licence was ultra vires because standard conditions could not be imposed under s 8(3): they had to be imposed by regulations under s 8(5). In essence, the argument on behalf of Pub Charity was that, where the Minister had a power to make a regulation under s 8(5) he could not also have an identical power to impose a condition having the same effect under s 8(3). Section 8(3) dealt with individual licenses, rather than with uniform conditions. This contention was rejected by Miller J. He said there was nothing to suggest that the discretion in s 8(3) was to be read down, simply because an alternative means of achieving the same outcome existed under s 8(5).

### *Unlawful fetter of discretion*

[59] Pub Charity argued that Condition 56 operated as a fetter on the Department's discretion, to the extent that it set a maximum of \$150 pmpw and the Department dealt with applications for dispensation extremely conservatively. Pub Charity accepted that the Department was entitled to establish a general policy, but said that it had not appropriately reserved to itself the power to give dispensations where individual cases did not fit the policy. Miller J rejected this. He said that the figure of \$150 pmpw was a reasonable figure at which to set a threshold. He said Condition 56 did not establish a policy of capping expenses at \$150 pmpw and the Department's requirement that applicants substantiate expenses above that figure was not a fetter on the Department's discretion. He accepted that there may be a fetter on the Department's discretion if the Department was taking an "unduly conservative approach to dispensations", but said that the evidence did not establish that that was happening.

### *Refusal to grant dispensations*

[60] The third cause of action (an alternative to the first two) was that the Department's decision to decline dispensations was unlawful. Four reasons were given. All were rejected by the Judge.

[61] The first was that the decision of the Department to refuse to accept Mr Hodder's expert opinion as to the expenses of the applicants was unreasonable in the *Wednesbury* sense: *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. The second was that the Department had taken account of an irrelevant consideration (the view of an official of the Department, Mr Duffy, as to what constituted actual reasonable and necessary costs of running a gaming machine operation). The third was that the Department had failed to take into account or give sufficient weight to material relevant considerations, which essentially related to the Department's refusal to accept at face value the evidence of expenses provided to it in the form of the analysis and opinion of Mr Hodder.

[62] Miller J rejected all of these grounds. He undertook a thorough analysis of the expenses which were appropriately recoverable under the legislation, and concluded that the costs which could be claimed by site operators were limited to costs of a kind that would not have been incurred but for the gaming operation or costs that are common to the gambling operation and the principal business of the site operator, to the extent that those costs have increased as a result of the gaming operation. He said that if an operator were allowed to recover a cost that was not caused by a gaming operation, that would amount to remuneration in the hands of the operator, which would be prohibited under s 8 of the Act. He found that it was not permissible to pay a site rental which effectively compensated the operator for the loss of profit which the operator might have earned from better use of the space occupied by the gaming machine. He also found that the Department's insistence on evidence of expenses incurred was not unreasonable. Accordingly, these three grounds of challenge to the Department's decision to refuse to grant dispensations failed.

[63] The fourth ground was an argument that the Department breached Pub Charity's legitimate expectation that, in the absence of changed circumstances, it would be entitled to continue making the same level of site payments to each site operator as had been previously approved by the Department. Miller J said that this claim faced insuperable difficulties where the substantive outcome sought by Pub Charity was beyond the Department's power to give. In any event, he said that if judicial review based on legitimate expectation as to a substantive outcome was

available in New Zealand, Pub Charity would still need to show that the Department's conduct was so unfair as to amount to an abuse of process. He said that it was unable to do so. Accordingly, he dismissed the judicial review application.

### **Issues on appeal**

[64] Pub Charity raised four points on appeal, alleging that Miller J was in error in one or more of the following respects:

(a) His finding that the only expenses which can lawfully be reimbursed to a site operator by Pub Charity are those which would not have been incurred but for the operation of gaming machines. Pub Charity says that, as a matter of law, it is permitted to reimburse site operators for a reasonable proportion of expenses which relate both to the operation of gaming machines and to other activities carried out by the site operator;

(b) His finding that expenses sought to be reimbursed by Pub Charity were not "actual, reasonable and necessary" expenses. Pub Charity contends that they are;

(c) His upholding the refusal of the Department to grant any dispensations from a maximum payment to a site operator of \$150 pmpw. Pub Charity says that this refusal was unlawful;

(d) His holding that the Department could impose standard conditions on all gaming machine licences other than by regulation. Pub Charity said that this meant that the constitutional safeguards on the making of regulations had been bypassed. It said that imposing standard conditions amounted to a fetter on the discretion of the Department to impose individual conditions on each licence it issued.

[65] We will deal with each of these points in the above order.

**(a) Expenses which may be reimbursed**

[66] There is no dispute that, in order to be reimbursed expenses, the site operator must establish that they are actual, reasonable and necessary. This is what is required by Condition 56(1) of the licence, the terms of which are intended to reflect the requirements of s 8(2) of the Act.

[67] There is also no dispute that expenses incurred by the site operator which are attributable to the gaming operation (i.e. which would not have been incurred if the gaming machines had not been on site) are reimbursable.

[68] The area of difference relates to fixed costs of a site operator, which are not affected (increased) by the presence of the gaming machines i.e. they would be incurred whether or not the gaming operation was present. Pub Charity says that it is legitimate to apportion these costs so that those which can fairly be attributed to the presence of gaming machines on site can be reimbursed by Pub Charity to the site operator.

[69] Miller J took the view that reimbursement of a proportion of these fixed costs would contravene s 8(2), in that they would amount to the receipt by the site operator of an indirect form of remuneration for conducting or helping to conduct the game of chance made available by the gaming machine. Counsel for Pub Charity, Mr Wilson QC said the Judge was in error in doing so.

[70] Neither remuneration nor commission is defined in the Act. Both counsel referred us to the decision in *R v Postmaster-General* (1876) 1 QBD 658, where the Court was required to consider whether travel expenses paid to an employee could be classed as remuneration to the extent that those expenses exceeded his actual travel costs. In that case, Blackburn J said that remuneration extended not only to money payments but also to any payment given as a remuneration for his services in office. Quain J referred to the term “emolument”, and to a dictionary definition of that term as “profit or advantage”. He said he thought that emolument had a wider meaning than the word “remuneration”.

[71] Mr Wilson said that this indicated that, in order to be remuneration, the payment needed to be made in exchange for work undertaken. He drew support for that proposition from the definition of “monetary remuneration” in s OB 1 of the Income Tax Act 1994, which refers to “salary...emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer”.

[72] Mr Wilson said that these definitions could not sensibly be applied to expenses which have been incurred partly because of the gaming machine operation and partly because of other business operations of the site operator. In particular, he emphasised the requirement of the above definitions that remuneration be in consideration for work undertaken or in relation to employment.

[73] Mr Parker, for the Attorney-General, also relied on *R v Postmaster-General*: he said that remuneration was equated with emolument in that case, and the latter term is defined in the Oxford English Dictionary as “profit”. He also relied on the definition of remuneration in that dictionary (“reward, recompense, repayment; payment, pay.”)

[74] We do not derive a lot of assistance from the *Postmaster-General* case. As with most exercises of statutory interpretation, context is crucial. In the present case, the term remuneration, where used in s 8(2), is used in the context of a regime allowing a limited exception to a prohibition on the conduct of gambling, which limits such operations to those which are not commercial in nature. Given that context, we consider that Miller J was entitled to proceed on the basis that gaming would be treated as a marginal activity (i.e. one which is subsidiary to the main activity carried on at a site (normally a bar operation or other entertainment operation)) and that reimbursement of fixed costs incurred for the purposes of the main operation would, in effect, amount to a profit for the site operator.

[75] In our view, the Department is entitled to limit the actual reasonable and necessary costs referred to in Condition 56 of the licence to costs which are caused by the gaming operation. That means the Department is justified in excluding costs which are incurred by the site operator whether or not the game operation is present

on site, and are common to the activities undertaken on the site (including the gaming operation). Such costs will include rates, rents and the like.

[76] An example illustrates the point. A is a bar owner. The costs of operating his business are \$1,000 a week. He agrees to the installation of gaming machines on his premises. Pub Charity reimburses him for all of the additional costs that he incurs as a result of having the gambling machines on his premises, and as a result of having to operate those machines and account to Pub Charity for the money taken from the machines. In addition, he is reimbursed for a proportion of his rent, rates and similar costs which can be attributed to the gaming machines. The reimbursement for these latter costs is \$100. The net effect is that the costs which the bar owner must meet from his bar takings have reduced from \$1,000 to \$900. By definition that means that the profit from his bar operation will have increased by \$100. The bar owner will have \$100 in his pocket, which otherwise would not have been there. In our view that can fairly be characterised as remuneration in the present context.

[77] Pub Charity has not established any error in Miller J's approach to this issue or in his conclusion. Accordingly this ground of appeal fails.

**(b) "Actual, reasonable and necessary" expenses**

[78] Mr Wilson argued that Miller J was wrong to conclude that the Department was entitled to call for further evidence in relation to expenses, and not to act on the expert opinion of Mr Hodder. He said that the Department's decision to reject the claims made for expenses on the basis of Mr Hodder's advice was irrational in administrative law terms and should be set aside. He drew attention to Mr Hodder's considerable experience in the gaming industry, both as an officer of the Department and as an independent consultant, and pointed out that Mr Hodder's brief was to determine the level of expenses without any particular agenda favouring one view or the other.

[79] Mr Wilson said that no reasonable decision-maker would refuse to accept an expert opinion going to the heart of its decision without making any independent

inquiries and without any basis for its refusal. He said the Department did not attempt to justify its refusal to give any weight to Mr Hodder's report, other than to claim that Mr Hodder had not supplied the Department with all the information used in his assessments. Mr Wilson said the Department was requiring societies "forensically to prove every element of their sites' assessed claims for costs" which effectively prevented the issue of any dispensations from the \$150 pmpw standard payment. He also said that the Department's assessment conflicted with the evidence before it in a number of respects.

[80] Mr Parker said the Department's decision was based on a careful consideration of Mr Hodder's opinions and after it had taken independent advice. He said the Department was entitled to view Mr Hodder's method of allocating indirect costs to "cost centres" as one deficiency. Another was his failure to provide evidence in the form of time sheets or diary records to justify claims. He said the Department simply asked for documentary evidence supporting the figures in Mr Hodder's assessment, which should have been readily available, but which Pub Charity declined to provide. He pointed out that the figures in relation to one of the examples before the Court, Robbie's Bar and Bistro, showed some claims for costs which, on their face, appeared excessive.

[81] Mr Parker also challenged Mr Hodder's expertise. He said Mr Hodder's background was an official of the Department, but he was not an accountant and had not qualified himself as an expert in the type of accounting or business management exercise that he had undertaken. He contrasted this with the Department's adviser, who is a chartered accountant with expertise in cost allocation. He criticised Mr Hodder's use of a cost centre approach, which attributed costs equally to each cost centre regardless of the respective size of the cost centres. He said that the accountant advising the Department had concluded on the material presented to the Department that the appropriate reimbursement for site operator costs for Robbie's Bar and Bistro was only about \$105 pmpw, and that for Duke of Gloucester was about \$150 pmpw. The amount for the Kaitaia Tavern was considerably less (about \$100 pmpw). That contrasts starkly with the \$250 pmpw claimed for those sites.

[82] In our view there is nothing irrational about the Department's request for information substantiating the expert opinion of Mr Hodder. An expert opinion is always only as good as the facts on which it is based, and the Department was entitled to seek evidence to verify the factual basis of Mr Hodder's assessments. The fact that Mr Hodder was a former officer of the Department did not necessarily make him appropriately qualified to make the cost allocations which he undertook, and the Department was entitled to go behind his opinions and obtain its own advice as to their appropriateness. Certainly, a cost allocation based on allocation of costs to each cost centre equally, regardless of the size of the cost centre, was inevitably going to require critical evaluation.

[83] In our view the Department's actions were justified and Miller J's conclusion to that effect was correct. We therefore reject this ground of appeal.

**(c) Dispensations: Fetter of discretion**

[84] Mr Wilson argued that, by refusing the applications for dispensations made by Pub Charity, the Department illegally fettered its discretion in Condition 56(1) to allow some dispensations. He said that the Department's policy of allowing dispensation only "where every element in the dispensation has been proved to a forensic standard by the applicant" was effectively a bar to any dispensations being granted.

[85] Mr Wilson referred us to the decision of Tipping J in *Practical Shooting Institute (NZ) Inc., v Commissioner of Police* [1992] 1 NZLR 709 on this issue. That case concerned a discretion given to the Commissioner of Police under the Arms Act to grant or refuse in Court permits for firearms. The Commissioner purported to place a ban on the importation into New Zealand of military style semi-automatic firearms. Tipping J found that the Commissioner had acted outside the scope of the discretion granted to him.

[86] Tipping J said (at 718):

The cases suggest that there are two, possibly three, categories into which discretionary powers of this kind can be put:

(1) First there are those powers which require an individual case by case examination without any predetermined fetter on the exercise of the discretion, other than what might be explicit or implicit in such criteria as may be set out in the enabling instrument.

(2) Second there are those powers which by dint of the nature of the subject-matter justify the establishment as a matter of discretion of a carefully formulated policy, but always with the reservation that no case is to be rejected automatically because it does not fit the policy. In this category all cases must be considered to see if they are sufficiently special to warrant a departure from the general policy.

(3) The third category, if it exists at all, represents cases where the discretionary decision-maker is implicitly authorised to exercise his discretion to establish for himself an immutable policy admitting of no exceptions.

[87] Mr Wilson said that the Department's discretion under Condition 56(1) fell into the second of these categories, as Durie J had found in *Pub Charity v Attorney-General* at [28]. Pub Charity did not dispute the Department's entitlement to develop a policy, but said it must retain sufficient room for the proper exercise of its discretion under the Condition, which it had failed to do in this case.

[88] Mr Wilson also referred to the decision of this Court in *Westhaven Shellfish Limited v Chief Executive of the Ministry of Fisheries* 2002 2NZLR 158. That case also considered a discretion which fell within the second of Tipping J's categories. This Court said [at 45] that the person in whom such a discretion is vested must indicate, or at least reserve, a power to depart from the policy and a willingness to exercise that power.

[89] Mr Wilson said that, in the present case, the Department has granted no dispensations since the decision of Durie J in March 2003. He said that this situation had arisen because the Department was requiring too rigorous a standard of proof of expenses incurred. He pointed to the detailed work undertaken by Mr Hodder and the assessments Mr Hodder had made as a result of that work. He said it would be unreasonably expensive and time consuming to require that societies provide exhaustive documentary evidence of all costs incurred at each site. He said that this would substantially detract from the funds available for societies to distribute for community purposes and discourage sites that were likely to incur costs in excess of \$150 pmpw from operating gaming machines.

[90] Mr Parker accepted, as Miller J had [at 74], that Condition 56 would have operated as a fetter if the Department had a policy that it would not grant dispensations, leaving no room for the exercise of the discretion. But he said that the Department had no such policy and, indeed, had carefully considered the applications for dispensation which had been made to it. He said the Department had carefully considered the applications, obtained expert accounting advice on them, and given Pub Charity a full opportunity to comment before making a final decision. He said that where dispensations had not been granted, the Department had given applicants an opportunity to provide further supporting evidence, but none had chosen to do so.

[91] There is some overlap between this aspect of the case and the second alleged error of law. As we have already concluded that the Department was entitled to go behind Mr Hodder's expert opinion and seek documentary proof of the items claimed, we do not think that the Department's requirement in that regard can be fairly characterised as a de facto policy to grant no dispensation at all. We see no error in Miller J's approach to this aspect of the case, and no error in his conclusion. Accordingly, this grant of appeal also fails.

**(d) Standard conditions of licence**

[92] Mr Wilson said that the imposition of standard conditions of licence was not authorised by s 8(3) of the Act, and that any standard conditions should have been set by regulations made under s 8(5) of the Act. These provisions are described in para [46] – [48] above.

[93] Mr Wilson said the scheme of s 8 was that general conditions were being prescribed by regulations made by Order in Council, while the individual conditions applied to particular licensees could be specified in the terms of the licence under s 8(3). He said that the focus of s 8(1), (2), (3), (3A) and (3C) was on individual licences, as is illustrated by the repeated reference to the term "a licence" in those sub-sections. He said when s 8(3) is read in that context, it is clear that it is providing only a limited power to the Minister to impose conditions which relate to an individual licence and an individual licensee, rather than blanket conditions which

will apply across the Board. He said that s 8(5)(d) should be read as authorising regulations prescribing conditions to be complied with by persons conducting games of chance only, as Pub Charity does, rather than as a provision dealing with both those conducting games of chance and those playing them. He said if this interpretation was not accepted, then regulations could be made in the present circumstances under the catch all provision, s 8(5)(k).

[94] Mr Wilson said it was significant that the power to make regulations had not been used in this case, because that power is subject to a number of constitutional safeguards, namely:

- (a) Regulations can be made only by the Governor-General by Order in Council;
- (b) Regulations must be laid on the table of the House of Representatives: s 4 of the Regulations (Disallowance) Act 1989;
- (c) The House of Representatives can disallow any Regulation: s 5 of the Regulations (Disallowance) Act;
- (d) All Regulations must be forwarded to the Chief Parliamentary Counsel for publication: ss 4 and 5 of the Act and Regulations Publication Act 1989.

[95] Mr Wilson said that these constitutional safeguards have been effectively circumvented by the use of the Minister's power under s 8(3) to set standard conditions.

[96] Mr Wilson drew support for this submission from the decision of this Court in *Official Assignee v The Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722. In that case, this Court struck down a regulation matter under s 297 of the Fisheries Act 1996 because the Regulation unlawfully transferred a power reserved to the Governor-General to the Chief Executive of the Ministry of Fisheries. Mr Wilson said that the present case was similar, because Parliament intended that,

where standard conditions were to be imposed on all societies, the decision to do so would be subject to constitutional safeguards attendant on the making of a regulation, and that this had been circumvented in this case. He said that this contention was supported by the new legislation, the Gambling Act 2003, where Parliament has explicitly distinguished between conditions, which must be tailored to each licence, and regulations which can be imposed on all licenses: ss 53 and 116 of the Gambling Act. Mr Wilson said that by imposing standard conditions, the Department had fettered its discretion to impose individual conditions for individual licensees.

[97] Mr Parker said that one of the purposes for which regulations could be made under s 8(5)(a)-(j) related to matters in issue in this case (site licences or site operator's costs). He said it was not immediately clear that licence conditions such as that contained in Condition 56 could be the subject of regulation, though he accepted that the catch-all provision, s 8(5)(k) may assist in that regard. He said that s 8(5)(d) did not apply, because it dealt with regulations affecting both the person conducting the game of chance and the person playing it, whereas Condition 56 dealt only with the person conducting the game.

[98] Mr Parker said there was nothing in s 8 which indicated any intention on the part of Parliament to require that standard conditions be imposed only by regulation. He said that Mr Wilson was wrong to rely on *Official Assignee v Chief Executive of the Ministry of Fisheries* because that case was distinguishable. He said the reason the Regulation was struck down in that case was because the relevant provisions in the Regulations did not comply with the regulation making power. It was not because there were two alternative methods of imposing a regulatory outcome, only one of which had been constitutional safeguards dependent on the making of a regulation.

[99] Mr Parker said that the constitutional safeguards were not as significant as Mr Wilson said, because the decision to impose a condition under s 8(3) was, itself, subject to constitutional safeguards. In particular, he said that the Minister's power is amenable to judicial review and, if the licence condition is not authorised by s 8, the condition can be set aside.

[100] Mr Parker said there was no basis for saying that the Department had fettered its discretion to impose individual conditions: the evidence is that there had been consultation with individual licensees and the fact that there had been dispensations provided for within the standard conditions showed that the Department was aware of the possibility that individual circumstances might require individual solutions. Such individual solutions can be achieved just as effectively by allowing a dispensation from the standard conditions as by prescribing an individual condition.

[101] We agree with Miller J that there is no basis for reading into s 8(3) a prohibition on the use of standard conditions to deal with matters that are common to all licences. While it is true that standard conditions could be imposed by regulation, there is nothing in s 8 which indicates that Parliament stipulated that one method of achieving that objective (by regulation) had to be used to the exclusion of any other method. Nor do we believe that there is any general principle that a regulation making power must be used in preference to an alternative statutory power where an Act provides for alternative methods of achieving the same objective. The fact that there are certain constitutional safeguards which follow from the making of Regulations but not from the use of the s 8(3) process does not alter that view.

[102] We do not accept that s 8(3) needs to be read down, so that it authorises only the imposition individual conditions in individual licences. In our view the wording captures both individual conditions for individual licences and general conditions for all licences.

[103] In our view, *Official Assignee v Chief Executive of the Ministry of Fisheries* has no application to the present situation. That case involved an invalid delegation of power by a Minister to a Chief Executive. There is no resemblance to the present case, where two alternative methods of regulation are provided for in the Act, and one has been chosen.

[104] Accordingly, we agree with Miller J on this point and reject Pub Charity's contention that he was in error.

## **Result**

[105] As all grounds of appeal fail, we dismiss the appeal.

## **Costs**

[106] We award costs to the respondent of \$6,000, together with reasonable disbursements to be agreed by counsel or, failing agreement, to be fixed by the Registrar.

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