IN THE DISTRICT COURT
HELD AT AUCKLAND **MA 270/89**

IN THE MATTER of the Gaming & Lotteries Act 1977

AND

IN THE MATTER of an application for renewal of a promoter's licence pursuant to s.52 of the said Act by Gary Thomas Knapp and Michael Francis Roberson in partnership under the name of Knapp-Roberson & Partners

AND

IN THE MATTER of an objection thereto by Colin Edwards of Whangarei, secretary

Dates of Hearing : 26 February 1990 &
18 and 19 July 1990

Date of Decision : 20 August 1990

Counsel : Mr M Hine for the Applicants (succeeded by Mr B Henry with him Mr D Gates)
The Objector in Person

DECISION OF JUDGE R M ELLIOTT

BACKGROUND

The applicant firm, carrying on business as a partnership, is a promoter of Mystery Envelope Appeals run predominantly by schools throughout the North Island where such mystery envelope appeals are organised by the promoters for the benefit of both the school concerned and a designated charity. Such business requires a licence by

virtue of the s.35 of the Act and the carrying on of such business must also comply with the provisions of the Gaming and Lotteries Regulations 1978.

The promoter's licence must be sought pursuant to s.40 of the Act and such licence must be renewed annually pursuant to s.52 thereof.

In the event of an application for renewal resulting in an objection, as in this instance, the effect of s.52(10) of the Act is that this Court must hear and determine the application and sections 46 to 48 of this Act with any necessary modifications, apply as if the application were an application for the issue of first such licence.

The crux of the objection dated 5 March 1989is that the objector alleges various breaches of the Act and the Regulations relating to deductions and in particular expenses deducted from gross proceeds of such lotteries and failures to comply with the Act and the Regulations in respect of documentation relating thereto. The objection also alleges various other types of misconduct of a nature which brings into play the issue of compliance with the audit provisions of the regulations referred to.

ISSUES

The broad submission of Mr Hine for the applicant in opening was that as the applicants already had a licence and sought a renewal thereof, they should be entitled to the

same in the absence of sufficient misconduct proven against them. Normally one would expect that to be the principle applicable as a matter of commonsense but it must be noted that s.52(10) of the Act, referred to above is explicit and invokes the provisions for granting of a licence, referred to above, so that essentially I must treat the application for renewal by law as if it were an application for an original licence, and thus largely approach the matter de novo.

That being the case I cannot accept Mr Hine's submissions. Inasmuch as it is agreed by the parties that the challenge to compliance with audit regulations affects fitness, the objection must be treated as an objection by reason of the personal fitness of the applicant partners in relation to whether or not they are proper persons to be the holder of a licence, see s.52(6) of the Act which equates to s.48(1) of the Act.

In the course of the hearing I am entitled to receive as evidence any statement, document, information or matter which in my opinion may assist me to deal with the matter whether or not it would be admissible in the Court of law (see s.46(3)).

Furthermore s.48 requires that I shall not determine that an applicant is a proper person to be the holder of a licence unless I am satisfied by the production to me of sufficient evidence that the personal fitness of the applicant is such, having regard to the interests of the public, that the applicant is a proper person to be the holder of the licence.

Finally, s.48(3) provides that nothing shall limit my discretion to refuse the granting of the application if I am not satisfied that the applicant is a proper person to be the holder of the licence.

The short issue is that both partners must satisfy me that they are fit and proper persons to obtain the renewal of the licence in the light of the challenge to their fitness with the onus on them to so satisfy me on the balance of probabilities.

EVIDENCE OF NON-PARTIES

The evidence proceeded largely on the basis that the applicants called witnesses as to their general character, as to appeals which they had satisfactorily conducted for "customers", and also called an officer of the Internal Affairs Department responsible for the administration of the Act in respect of the type of business which the applicants conduct. They also gave evidence on their own behalf.

The objector largely conducted his case by introducing, or attempting in some cases, to introduce documents but in some cases it was necessary for me to rule that they could not be received despite the existence of the above discretion to receive evidence not strictly admissible, for reasons traversed below. He also gave evidence on his own behalf.

I should also record that an attempt was made by Mr Hine at one juncture to produce through a witness Mr Kerr a tape recording of a telephone discussion between Mr Kerr and the applicant alleged to indicate abuse of process on the part of the objector. It was alleged that the objector was using these proceedings to further his claim on behalf of Tikipunga High School wherein the applicants had a dispute with that school in relation to proceeds of a lottery. I ruled in line with Collector of Customs v Bryant that motive is irrelevant to these proceedings and inasmuch as they are civil proceedings, it cannot constitute an attempt to relitigate a point already covered before the Disputes Tribunal because the issue before me is not whether or not any moneys may be owing by the applicants to a body in which the objector is interested but whether there has been non compliance with relevant regulations to such an extent as to render the applicants unfit to obtain a renewal of their licence.

I thus rejected the application to dismiss the objection for abuse of process and further declined to receive the tape recording in evidence because the witness Mr Kerr was not specific in relation to the precise date or circumstances of the recording of the telephone conversation, nor more importantly could he account for possession of the tape since that conversation approximately one year ago so that in my view it would have been unsafe to receive it as evidence even within the discretionary powers available to me. Evidence relating to the telephone

discussion on an oral basis was neither relevant nor of assistance to the core issues.

Certain witnesses adduced by the applicant in relation to character included personal acquaintances such as Mr Wildey, and Mr Taylor (Headmaster of Mt Albert Grammar School) together with Ms Wilson (Headmistress of Auckland Girls' Grammar School). Each of these witnesses gave evidence either of good character of either one or both of the applicants and/or being a satisfied customer in respect of district and local appeals organised on their behalf by the applicant promoters. None of these witnesses had any expertise or knowledge of the regulations and so their evidence was of assistance only in a general way and did not focus on the issues central to the objection in this case, as set out above.

Messrs Wolstenholme and Kerr gave evidence as organisers of a charitable association dedicated to the assistance of epilepsy sufferers. They made it clear that in the cases of appeals organised by the promoters on behalf of that association, and there were 20-25, the epilepsy association was at all times a very satisfied customer. Furthemore, in terms of Regulation 17(1)(A) of the regulations the epilepsy association was quite satisfied that it should sign "dispensations" authorising the charging of expenses by the promoters beyond the prescribed 10% limit notwithstanding that the dispensation was sought by the applicants in some cases up to 8 months after the pay-out of the proceeds of such appeal.

Whether or not those "dispensations" were in breach of the regulations Messrs Kerr and Wolstenholme made it quite happy that they felt both on the explanation made to them on behalf of the promoters and their own judgment in the matter it was fair and appropriate to agree to such increase and they did so notwithstanding that it appears that up to 5 such dispensations were presented to them for signature en bloc and that refund of further moneys was directed by the Internal Affairs Department.

The evidence of Mr Fulford, an officer of the Internal Affairs Department indicated that he was the officer of that department dealing primarily with matters to be administered in relation to Gaming & Lotteries and in that capacity he knew the promoters and more particularly Mr Knapp very well. The Court was surprised to hear from his evidence that notwithstanding that amendments to the Regulations as to promotion expenses and dispensations were brought down in 1980 and 1981, the department did not seem to appreciate the force thereof until quite some time after the event and quite clearly this accounted for the late dispensations in relation to the epilepsy association in particular. It also appeared to the court's surprise that forms used by the department in connection with applications and administration of Gaming & Lotteries requirements were not brought into line in connection with amendments until well after the inception of amendment. Specifically the Departmental application form contained no provision for stating the maximum percentage for expenses for at least 5 years after the amendment.

On the date of the resumed hearing the examination of of Mr Fulford continued but by this stage Mr Henry and Mr Gates had replaced Mr Hine as counsel for the applicants and Mr Fulford was both examined and cross-examined in relation to specific matters of financial detail which will be traversed in the course of findings which set out below.

EVIDENCE OF PARTIES

Messrs Knapp and Roberson, and in that order then gave evidence on their own behalf followed by Mr Edwards who also gave evidence on his own behalf but he did not call any additional witnesses to give evidence. Whilst once again evidence given in relation to specific financial provisions will be traversed below when dealing with findings, the general background to the evidence of Messrs Knapp and Roberson was that while Mr Knapp had been involved with Mystery Envelope Appeals since 1973, the partnership between Messrs Knapp and Roberson commenced in 1984 and that for a large amount of time while Mr Knapp was engaged on other pursuits, Mr Roberson attended to the day to day detail of subsequent Mystery Envelope Appeals whereas Mr Knapp conducted most of the communications with the Internal Affairs Department and generally supplied advice and expertise. In dealing with specific financial evidence, the division of roles to some extent obviously accounted for

occasional gaps in knowledge in each of the applicants which surfaced after what initially appeared to be a contradiction between them e.g. in dealing with the basis of advice for quantum of average overheads received from Mr Leonard, their accountant. The apparent contradiction in my view also followed from the indication that the partners did not have a sound memory of some financial aspects perhaps going back up to three years in time which Mr Knapp actually conceded. Whilst answers to some questions by both Mr Knapp and Mr Roberson were on occasions circumlocutory I do not consider either witness was in anyway evasive.

Mr Edwards' involvement stemmed from his Chairmanship of the Swimming Pool Subcommittee of Tikipunga High School on behalf of which the applicants conducted a Mystery Envelope Appeal. That appeal has clearly been the subject of much litigation before the Disputes Tribunal, before the District Court on appeal from the Disputes Tribunal and before Sinclair J in the High Court where the applicants took proceedings to seek answers in connection with the interpretation in part of Regulations 17 previously referred to. The bulk of the cross-examination of Mr Edwards was directed towards an effort to show that he was obssessive and referred to the fact that he was involved in media publicity about that dispute and had approached other organisations with a suggestion that he investigate also on their behalf the activities of the applicants. Whilst accordingly much of the cross-examination of Mr Edwards did

deal with Tikipunga High School, nevertheless it did not overshadow the considerable research and time which he had devoted to producing statements and financial exhibits produced in this case which involved issues far wider than simply those relating to Tikipunga High School.

The parties all conducted themselves in Court with due decorum and I was considerably assisted by submissions both from Mr Henry and from Mr Edwards. I record that I am in no way influenced by any personal acrimony between the parties, nor by any resort to media publicity, nor by any comments made in any routine correspondence, and comments made therein received in the normal course of duty by the Registrar of this Court from either the parties, any solicitors representing them or the Internal Affairs Department received prior to the hearing. This I indicated to the parties on the penultimate date of hearing in Court.

REGULATION 17 OF THE GAMING AND LOTTERIES (LICENSED PROMOTERS) REGULATIONS 1978

This regulation as amended in 1981 was at the centre of argument concerning most of the alleged breaches. The history of that regulation was reviewed by Mr Henry in his submissions citing the judgment of Sinclair J (Knapp Roberson & ors v Tikipunga High School Community Swimming Pool Committee CP. 934/87 Auckland Registry High Court at 7). The comment was made by Sinclair J that it may well be that the present Regulation 17(1) is not appropriate for

dealing with the expenses when one appreciates that at best the parties are involved merely on acting on estimates which could be erroneous when the actual result of the lottery is known. In this respect I accept that Mystery Envelope Appeals which must be conducted within a 24 hour ambit are distinct from lotteries with a greater time frame but I also accept the comment that both weather and public reaction can be variable in respect of particular Mystery Envelope Appeals.

Nevertheless Sinclair J added the comment that difficulties with the regulation cannot concern the Court as it is concerned merely with the words of the regulation as they now stand and that remains the case despite the fact that I am now told that the regulation is to be the subject of yet further amendment obviously in recognition of difficulties which it causes.

The Regulation 17 as it presently stands is as follows:-

"17. **Expenses and Fees charged by Licensees-**

> "(1) The maximum amount that a licensee shall be entitled to deduct or receive in respect of expenses involved in conduction a prize competition or lottery (including any fees of the auditor of his trust account but excluding the purchase of prizes), being expressed as a percentage of the gross proceeds of the sale of tickets in the prize competition or lottery, shall be fixed before the society applies to the Minister under section 26 or section 35 of the Act for a licence to conduct the prize competition or lottery; and in the application the society shall state that percentage and detail the types of expenses that are to be met from it."

"(1A) Notwithstanding subsclause (1) of this Regulation, where a society on whose behalf a licensee is conducting or has conducted a prize competition or lottery is satisfied--

(a) That, after the licensee agreed to conduct the prize competition or lottery, there has been a change of circumstances, beyond the licensee's control, which resulted or will result in the licensee incurring additional expense in conducting the prize competition or lottery; and

(b) That the change of circumstances and the incurring of that additional expense could not reasonably have been foreseen by the licensee,--

the society may pay to the licensee, and the licensee may accept, the whole or any part of that additional expense; but the society shall not be under any obligation to make any such payment, and any contract or arrangement purporting to impose such an obligation upon the society shall be void."

"(2) Subject to substance (3) of this regulation, the fee that is to be paid to a licensed promoter by a society for conducing a prize competition or lottery shall be fixed before the society applies to the Minister under section 26 or section 35 of the Act for a licence to conduct the prize competition or lottery.

(3) In no case shall the fee actually paid to the promoter exceed 10 percent of the gross proceeds of the sale of tickets in the prize competition or lottery."

"(4) Every society commits an offence against these regulations which pays or offers to pay to a licensed promoter any sum by way of expenses or fees in excess of the maximum fixed under or permitted by subclause (1) or subclause (3) of this regulatioh.

(5) Every licensee commits an offence against these regulations who deducts or receives any sum by way of expenses or fees in excess of the maximum fixed under or permitted by subclause (1) or subclause (3) of this regulation."

ALLEGED BREACHES OF ACT OR REGULATIONS AND FINDINGS THEREON

1. **FAILING TO FIX MAXIMUM AMOUNT OF EXPENSES EXPRESSED AS A PERCENTAGE OF THE GROSS PROCEEDS OF SALE OF TICKETS BEFORE APPLICATION TO MINISTER FOR LICENCE TO CONDUCT THE LOTTERY -**

It will be observed that this item has been a requirement of Regulation 17 since the amendment of 1980 and it is accepted by the parties that neither the applicants nor the Internal Affairs Department seemed to be conversant with the amendment until at least 1986 and that the applicants in common with other promoters did not follow the requirement concerned (for which there was in all events no provision in the form utilised by the Internal Affairs Department) until after direction to that effect by a letter from the then secretary of the department in mid-1987. It is clear that the promoters in the present case had knowledge of the requirement in 1986 and that at least one further appeal therefore was conducted without compliance with the requirement in 1987 but it must be said that there was no insistence thereon by the department until the letter set out above and that thereafter the promoters in this case have complied with the requirement.

It is clear that the failure to state such percentage was a catalyst to the dispute between the promoters and the Swimming Pool Society connected with Tikipunga High School.

It is not clear and there is inadequate evidence before the Court to assess whether any noncompliance in this regard can be regarded as the source of the apparent

dispute between the promoters and at least two other societies connected with the Henderson High School and Huntly High School respectively.

Despite the apparent failure by the Internal Affairs Department, Mr Edwards submits that it was the duty of all promoters to be conversant with regulations, and to advise client societies in connection therewith, whereas Mr Henry submits that the requirement was "honoured in the breach" by all promoters and not simply the applicants and that this was a practice in which the department acquiesced so that no fault should be levelled at the present promoters for this breach.

Whilst not minimising the problems which non compliance with this requirement has engendered, and whilst not condoning the actions of the applicants in this case in relation to this particular requirement, I am of the view that it would be wrong in principle to bring this breach into the scales when assessing fitness and character in pursuance of the Act, for two reasons.

First, the practice was condoned by the department which had the responsibility for administering the Act and secondly, as Mr Henry correctly points out I must assess the fitness and character of the applicants on a de novo basis. In other words the events in relation to this particular breach go back three years, it was a problem for which the

department must take its share of responsibility and resulted in a breach committed by all promoters. It would be wrong to single out these particular promoters. The matter was rectified from 1987 onwards. For all of the above reasons these breaches should not affect fitness as at today which I am required to assess in terms of cases such as Police v Cottle [1986] 1 NZLR 268, and Tipple v Attorney-General (1982) 1 DCR 358, cited therein.

2. FAILURE TO FILE AUDIT STATEMENT IN CONNECTION WITH APPEAL ARRANGED FOR SOCIETY IN CONJUNCTION WITH HENDERSON HIGH SCHOOL.

It is common ground that this particular Mystery Envelope Appeal was conducted by the promoters in or about April 1987 and there still has not been filed any audit statement by or on behalf of the applicants as promoters which should have been filed within three months after the appeal pursuant to Regulation 25. This failure was also confirmed by Mr Fulford of the Internal Affairs Department in his evidence and is acknowledged by the promoters. However both Messrs Knapp and Roberson say that the society concerned is to blame because the gross proceeds were deposited in different accounts which cannot adequately be traced so that the society is to blame for the inability of the promoters to comply. It is clear also that there was once again a failure to establish expenses in advance by percentage. That aspect is already covered in paragraph (1) above and so far as the failure to file an audit statement

is concerned, Mr Edwards had no additional evidence to offer in respect of the cause of such failure. Although in terms of the onus and standard of proof referred to earlier in this judgment, it is for the applicants to prove character and fitness, I am of the view that there is no evidence before me which calls into question their explanation as to blame falling upon the society, and accordingly, I find that this breach on the part of the promoters likewise should not come to the scales in assessing fitness and character.

3. REQUIREMENTS AS TO SIGNATURES ON CHEQUES ON DISBURSEMENT OF PROCEEDS OF APPEAL

In his notice of objection and in his evidence Mr Edwards complained that during the course of still apparently fruitless discussions with Mr Roberson to resolve the Tikipunga High School Swimming Pool Appeal, Mr Roberson applied presure to Mr Edwards in an endeavour to force him to sign cheques in black to allow settlement of some accounts in connection with the appeal. In terms in which the allegation was made, Mr Roberson denied the accusation but it is clear that he suggested that certain commercial consequences could follow if accounts could not be settled and he considered that the signing of cheques in blank was acceptable as a business practice. I note that in terms of Regulation 25(7)(a) of the Regulations one item which an auditor must certify is whether a trust account of a licensed promoter has in the opinion of the auditor been kept regularly and properly written up. Whilst technically

the accusation concerns the account of the society rather than the promoter, I am of the view that it would have been most unwise for Mr Edwards to agree to this proposal which I find was advanced by Mr Roberson but having regard to the higher standard of proof required in civil matters where fraud is alleged (see Hornal v Neuberger) I do not consider that Mr Roberson's suggestion necessarily imputes fraudulent intention to him. Furthermore, it is clear also from an exhibit produced in evidence that Mr Edwards was endeavouring to shift certain of the held and frozen funds from one particular account to another and whilst again I do not consider that this imputes fraudulent intention, it appears that both parties were acting in an effort to resolve the matter, even if by unwise means, and both were therefore acting in pari delicto. In terms again of character and fitness I decline to bring this matter into the scales as essentially it is a case of the pot calling the kettle black.

4. WHETHER THE APPLICANTS HAVE UNLAWFULLY CHARGED SUMS OVER AND BEYOND THOSE WHICH MAY BE AGREED WITH CLIENT SOCIETIES BY "DISPENSATION" PURSUANT TO REGULATION 17(1)(A).

Principally by way of analysis of figures obtained from the Internal Affairs Department, Mr Edwards submitted as exhibits in this case financial calculations in Exhibits IX, X and XI in which he alleges overcharging by the applicants in appeals for the 1986 and 1988 years in particular.

Mr Fulford of the Internal Affairs Department was unable to comment on the accuracy of the figures in particular but he did say in evidence in relation to Exhibit X that for the 1988 year (with the exception of two items in that particular exhibit one being 1987 and the other 1989) he knew that 18 appeals were in issue and that his department had written seeking refunds of alleged overcharges to which no response was received. Both Messrs Knapp and Roberson were in some doubt and could not accurately say in what way the goods and services tax component in the schedules concerned should be resolved but on the morning of the final day of the hearing I was informed by Mr Henry that a large measure of agreement had been reached between the objector and the applicants as to the figures on the basis that in some instances a margin of 2% in either direction could be accepted as margin of error. In my view he correctly submitted that figures should be approached as indicative of trends rather than as items of arithmetical precision.

So far as the sums actually deducted by the promoters in respect of the appeals listed in Exhibit X are concerned, Mr Knapp claimed that all of the client societies had agreed to the margin of excess over and above the maximum percentage stated for the purposes of Regulation 17. I accept Mr Henry's submission in that regard that there is nothing in the wording of Regulation 17(1)(A) that requires any "dispensation" agreement to be reduced to writing notwithstanding that it became the open practice of the

applicants to do so on the basis of which the department was able to discern the amount which it considered represented an overcharge.

If the figures in Exhibit X were taken at face value, the total degree of excess over 18 appeals exceeds $52,000 although it is clear from the evidence of Mr Wolstenholme that so far as the 6 appeals conducted on behalf of Epilepsy Societies are concerned, the parties did agree to whatever excess is alleged. I accept also Mr Henry's submission that because of the wording of Regulations 17(4) and 17(5) which were referred back to subclause(1) rather than subclause(1)(a) of Regulation 17, any breach is not a penal offence. Whether or not this was a slip of the law draftsman, that is the express way in which the regulation reads. I also note that Sinclair J ruled (supra 6) that there does not appear to be provision for review of the percentage by anyone so that the licensee and the society on the face of it appear to have a free hand in this area.

Nevertheless it seems to me that absence of written agreement for Regulation 17(1)(a) and indeed agreement between promoter and society or not, and penal offence or not by either society or promoter, are not the issues in deciding whether the additional charges were lawfully deducted for the purposes of Regulation 17(1)(a). I do not overlook s.59 of the Act as amended and that no person with standing in pursuance of that section has lodged any complaint so far as is in evidence before the Court in connection with appeals listed in Exhibit X.

In my view only additional expenses (my emphasis added) may be deducted pursuant to Regulation 17(1)(a) by virtue of the very wording to which I have referred. There are other threshhold tests but nevertheless it is expenses only which may be the subject of the exercise of the rights in that particular provision. I accept Mr Edwards' submission in that regard which is supported bythe maxim of statutory interpretation expressio unius est exclusio alterius. I note that "expenses" means actual disbursements, see Jones v Carmarthen 10 L.J. Ex. 401. I also refer to the judgment of Sinclair J (supra 5 et Seq) where he compared the position of the promoters with the position of a manufacturer in being entitled to cover a proportion of overheads as an expense in the conducting of the lottery. He pointed out that when a manufacturer is considering how he used to charge for an article manufactured by him, obviously one of the items of expense to be taken into account in assessing the sale price of the article will be the general overheads of the manufacturer in the running of his business and Sinclair J did not see that promoters should be placed in any different position. In other words he stated that he considered that the overheads of the plaintiff are an item of expense which ought to be included in the calculation to be made pursuant to the provisions of Regulation 17(1).

Furthermore, it is to be noted that in his evidence Mr Knapp stated that the reason for the additional charges was the downturn in gross proceeds fetched in Mystery Envelope

Appeals for the relevant period which he considered to have been caused largely by the efforts of Mr Edwards and the adverse effect of publicity to which he was wont in respect of his complaints about the Tikipunga High School Swimming Pool Appeal.

Mr Henry's submission on this point correspondingly was that resort could be had to Regulation 17(1)(A) when there was either an unanticipated bill received or an unanticipated fall in gross sales. With respect, I reject the second head of that submission. While a fall in gross sales can adversely affect the percentage of overheads relative to gross profit as Sinclair J noted (supra page 6) it does not actually increase the expenses. It simply diminishes the profit. While expenses can include overheads, there must nevertheless be an increase in expenses in the widest sense and not a diminution in profit (which offends the "exclusio alterius principle) before recourse may properly be had to Regulation 17(1)(A). In other words I accept Mr Henry's submission so far as "the additional bill" is concerned but not in respect of any unexpected fall in sales. The only remedy is as Sinclair J noted (supra) is for the promoter to add a figure for contingencies with the resulting calculation being expressed as a percentage of what can only be an estimate of anticipated sales. He also commented that the present regulation may not be appropriate for this situation but that is a matter which cannot concern the Court as it must deal with the wording of the Regulations as they now stand.

I also note that although Mr Knapp claimed diminution in sales and the actual gross proceeds as a trend, a comparison of Exhibit IX with the 1986 figures and Exhibit XI with the 1988 figures does not show overall any real disparity at all even having a regard to the low Invercargill figure to which Mr Knapp referred in evidence. Thus I consider that the promoters cannot establish proper factual grounds for invocation of the "dispensation" power in Regulation 17(1)(A) even on their interpretation of the power which I hold to be erroneous. Although these breaches are not penal for the reasons stated above, the charges were nevertheless unjustified in fact and at law and in breach of those properly allowable pursuant to the regulation as amended.

Mr Henry further submitted, in the event that I rejected his initial submission as I have on this point, that breach nevertheless is not a matter which goes to fitness. As I have found nothing by way of exoneration of the promoters for this particular breach, as opposed to those earlier referred to, I will consider this alternative submission after dealing with other alleged breaches below.

5. THE CLAIMING OF SALARY PAYABLE INTER ALIA TO THE PROMOTERS THEMSELVES AS A CLAIMED EXPENSE IN ADDITION TO THE PROFESSIONAL FEE PAID PURSUANT TO REGULATION 17:-

Mr Knapp admitted in evidence that the applicants claimed as expenses, wages in addition to the professional

fee to which the applicants were entitled pursuant to Regulation 17. In cross-examination he indicated that this would involve 4 or 6 staff members but in the 6 concerned were included Mr Roberson and himself. The others were their respective wives and secretaries or other employed staff members. In my view there can be no question as to the propriety of payment to employees including working wives but when questioned in relation to the amount appropriated to Mr Roberson and himself as distinct from wives and employees, Mr Knapp's answer in cross-examination was that he was not sure whether the correct figure was $20,000 or $40,000 per annum.

This issue did not arise in the proceedings before Sinclair J. There is no indication from his judgment as to whether sums payable in this way to the promoters could legitimately be included within the wider definition of expenses inclusive of overhead. Mr Henry drew the analogy with costing by a solicitors firms where clearly in working out a budget solicitors would take account of what they could fairly project for their individual earnings. In my respectful view that analogy does not assist the applicants in endeavouring to establish the legality of their practice. Whilst a solicitor no doubt fixes his or her fees having regard to his or her ultimate projected return, such projection would be included in the professional fee and there could not be rendered separately to a client a disbursement in the normal term of expense to include salary for the partner as well as professional fees payable to the firm in which the solicitor is himself or herself a partner.

While by the well established principle of Lee v Lee's Air Farming Limited a company is a separate entity from its shareholders and a company is therefore a separate legal person in its own right, this is not so in the case of partners as a partnership it is not recognised as a separate legal person in the same way as a company.

For that reason I consider that the applicants have further breached Regulation 17 by claiming salary for themselves as distinct from their wives and employees as an expense when it is not a legitimate expense and that breach has the result that the professional fee is thereby artificially inflated. That would not be apparent to client societies. As an example I refer to Exhibit 5 and the provision of $5,500 for salaries and wages in respect of the Henderson High School Appeal.

Again I will reserve the question of whether these breaches affect character or fitness which I will deal with below.

6. THE QUANTUM OF THE MEAN AVERAGE OVERHEAD USED AS A BASIS FOR CHARGING EXPENSES ON ADVICE OF THE APPLICANTS' AUDITOR

It appears from certain financial exhibits before the Court that the promoters' auditor had recommended to his clients at one stage that a mean average figure of $5,446 should be allowed per appeal in relation to expenses in the

nature of overhead but that well prior to that date expenses that nature were charged out some instances at $7,000 or more (allowing a margin for error in relation to G.S.T. and other factors) for which neither Mr Knapp nor Mr Roberson could give an explanation in evidence except to say that they relied on their auditor in that regard.

Arithmetically as calculated by Mr Edwards the division of the total expenses and overheads historically derived from a number of appeals (wherein there was a dispute as to whether the division factor should be 20 or 24,) resulted in the figure actually charged through the relevant period being considerably greater and in fact at least $7,000 as distinct from the $5,446 recommended. That figure seemed also to have been charged well before the auditor's advice has received.

Further cause for concern apart from possible overcharge, arose from the fact that it is possible from a comparison of Exhibits V, IX and J that the same chartered accountant who was acting as accountant and auditor to the promoters, also acted as auditor inter alia to more than one of the client societies or associated schools. I am conscious of the fact that the chartered accountant concerned is not a party to the proceedings nor was he called by his clients to give evidence on their behalf and that accordingly he should not be condemned without being heard.

I approach the matter therefore from the obligation of the promoters to appoint an auditor to be nominated pursuant to Regulation 23 and to be approved by the Secretary of the Internal Affairs Department pursuant to Regulations 21 and 22. The latter regulation in subclause 2(d) thereof forbids the approval of a chartered accountant as auditor where such accountant has been engaged or concerned in keeping the books of the promoters otherwise then in the completion of the closing entries at the end of the financial year or other period or the preparation of the profit and loss account, balance sheet, or returns for taxation.

There is no evidence before the Court as to when the accountant concerned commenced advisory work to the promoters and certainly no indication that he was engaged in such work at the time of his actual approval by the secretary. Nevertheless the promoters ought to have been aware that if this is what occurred, then by virtue of Regulation 24, there was an obligation on the promoter to give notice to the Secretary of their auditor ceasing to be qualified to carry out the audit of their trust account by virtue of that advisory role. The resultant possible conflict of interest apart, the promoters in my view have in all events failed to satisfy the foregoing onus and standard of proof to allay the allegation of overcharging overheads on the basis that although the calculations for the figures made by the accountant on a mean average basis must have been based on historical research, the promoters were

charging overheads well above the advised figure well before receiving advice from their chartered accountant. Again character and fitness in that light is discussed below.

7. THE CALDER HOUSE PRIZE ISSUE

There is no dispute on the evidence that Messrs Knapp and Roberson wholly own a Retreat Lodge near Rotorua known as Calder House which has been offered as one of the major prizes e.g. in the Tikipunga High School Swimming Pool Appeal evidenced in Exhibit II. The basis of the prize is what Mr Knapp described as a "subsidized" holiday in the lodge and the lodge has been listed as a major prize for which the sums of $1,00 and $2,596 were claimed as an expense at different times.

In answer to cross-examination from Mr Edwards, Mr Knapp did not accept that he was ethically obliged to disclose the promoters' interest in the matter to society clients. Again it seems to me that possible conflict of interest arises and whilst expenses in the wider sense of overheads could nevertheless properly be claimed by the promoters, the use of the word "subsidized" by Mr Knapp set against charges of $1,100 and $2,596 has without any explanation in evidence for such differentiation, the result that the promoters have failed to satisfy the Court that this is not another expense which has been overcharged bearing in mind as I have already stressed that the onus lies on the promoters rather than the objector.

I now turn to the issue of assessing the four breaches in terms as to how they affect proper character and fitness as a necessary ingredient to obtain renewal of the promoters' licence:-

CHARACTER AND FITNESS

The Court must be slow to interfere with livelihood in part stemming from a business which must be conducted pursuant to regulations obviously deemed unsatisfactory even by the department which administers them. The Court is also obviously cognizant of the fact that the objector has an axe to grind. Whilst the promoters may have received at an unknown stage an opinion from counsel as to interpretation of regulations where even Mr Fulford admitted that the administering department has differing views within it, the Court nevertheless must scrutinise each of the four heads of default established above on the part of the promoters to see whether they should be excused or mitigated or not in the light of those difficulties.

Given that the procedure for the renewal of the licence is the same as that for the granting of the original licence the Court must bear in mind the provisions of s.48(1) of the Act which requires that it shall not determine that an applicant for a licence is a proper person to be the holder unless it is satisfied by the production of sufficient evidence that the personal character, fitness, and financial

position of the applicant is such that, having regard to the interests of the public, the applicant is a proper person to be the holder of the licence.

Subsection(3) thereof provides that nothing in the section shall limit my discretion to refuse to grant an application for a licence if I am not satisfied that the applicant is a proper person to be the holder of the licence.

The question of other promoters and the department all being equally to blame in participating and breaches of failing to establish the percentages until mid-1987 is not an issue on the basis of my rejecting that is a matter that should come into the scales for the purposes of s.48 in accordance with the first finding set out above. The same applies to the argument between the parties as to the failure to forward an audit statement in respect of the Henderson High School Appeal and also the argument between Messrs Edwards and Roberson about signature to cheques.

The major item obviously is the question of the increase in charges to the 18 societies set out in Exhibit X in accordance with the finding that I have made in issue 4 above. Whilst the Epilepsy Societies have accepted the increase, and whilst there is only evidence before the Court of three actual complaints against the promoters in total, throughout the history of the operation, nevertheless I have

found based on Exhibit X that on all 18 occasions listed between 7 August 1987 and 29 April 1989 the applicants have made additional charges of matters not properly within the ambit of Regulation 17(1)(A) even if accepted by the Epilepsy Society in respect of 6 of those 18 occasions.

The total sum concern is $52,000 (E.& O.E.)not overlooking Mr Henry's submission that I should look at the matter in terms of trend rather than arithmetical accuracy and likewise not overlooking argument as to G.S.T. complainant and a margin of error of 2%. Even allowing for the evidence that Mr Roberson may have transposed base figures of 32% and 39% for urban and rural areas, the degree of unjustified additional charges having regard to the number of occasions and the general sum involved is such that it cannot in my view be excused.

The degree of unjustified increase involved, is exacerbated by my finding as to the claiming of a salaries figure including salaries for both of the promoters over and above their professional fee which I consider to be misleading as well as unjustifiable in terms of the regulation concerned. On Mr Knapp's evidence the repetition of the practice was designed to produce an additional $20,000 or $40,000 per annum. Whichever of his two alternatives is correct, the partner component in the salaries figure was not separately specified, and one can but speculate whether client societies claimed to have agreed to increased charges, would have done so had they known of this practice.

Of similar magnitude is the financial result stemming from my finding number 6 that by using a base overhead figure in excess of that recommended by their own chartered accountant, the promoters' degree of excess above that figure multiplied by the number of appeals which the accountant took into account in his calculation would result in an excess of $60,000 even above the figure which the accountant's actual figure would produce.

Whilst the practice in respect of Calder House could be claimed as more misleading and undesirable than necessarily revenue producing, the degree and repetition of the foregoing practices, which I have found to be unlawful, is so disturbing in respect of the applicants who have held themselves out to be experts and upon whom some of the witnesses whom they called to give evidence clearly placed trust and reliance, that character and fitness is abundantly in issue.

I reiterate that even allowing for the argument about interpretation as a matter of law of Regulation 17(1)(A) the factual justification upon which the promoters relied even if they acted on legal advice, did not exist on the basis of the gross returns from relevant appeals even after the Tikipunga High School publicity, where no overall trend of drop in sales could be discerned. Thus in my view the degree of overcharging cannot be justified even on the promoters own claimed basis for increasing its charges.

It will be noted that the crucial findings which I have made almost entirely relate to matters which have occurred well after the completion of procedures relating to the organisation of the Tikipunga High School Swimming Pool Appeal in which the objector was involved and that the degree, magnitude and repitition of the breaches that have occurred on the part of the promoters is such that it cannot be excused.

A limited analogy may be drawn with the example perhaps of the New Zealand Law Society Disciplinary Tribunal dealing with a solicitor who has overcharged his or her clients. One or two such occasions may give rise to disciplinary consequences short of striking off. However in this case, having regard to s.48(3) I am bound to reiterate that the repeated and unjustified overcharging is the predominant reason which leads me to find that neither of the applicants has satisfied me that he is a fit and proper person to hold a promoter's licence pursuant to the Gaming and Lotteries Act 1977.

As the objector is a layman who has represented himself, no award of costs can be made in his favour despite the obvious time and effort he has put in to preparations of the matters which he had advanced to the Court. Despite his efforts, the law does not recognise any entitlement to costs in those circumstances, see the decision of the Court of Appeal in Re G J Mannix Limited [1984] 1 NZLR 309.

(R M Elliott)
DISTRICT COURT JUDGE

Reserved decision delivered pursuant R 212 District Court Rules 1948

R/R
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