NCN: [2022] UKFTT 00429 (GRC)
Case Reference: GA/2021/0003

First-tier Tribunal
General Regulatory Chamber
Gambling

Heard: CVP Hearing

Heard on: 20 April 2022
Decision given on: 01 December 2022
Amended on: 03 January 2023
Amended Decision given on:04/01/2023

Before

TRIBUNAL JUDGE J FINDLAY

Between

DAUB ALDERNEY LTD

Appellant

and

THE GAMBLING COMMISSION

Respondent

Representation:
For the Appellant: Lord K MacDonald of River Glaven Kt QC
For the Respondent: Mr P Kolvin QC

Observers with the Appellant
Mr D Tench (CMS) Partner, Solicitor
Ms E Sheard (CMS) Associate Solicitor
Ms J Maddox (CMS) Associate Solicitor
Mr T James-Matthews Counsel
Mr J O'Reilly CEO of the Rank Group
Ms L Wright Internal Counsel of the Rank Group
Md D Williams Director of Public Affairs for the Rank Group
Ms A Farrell Director of Compliance for the Rank Group

Observers with the Respondent
Mr N Hawkings Senior Solicitor
Mr S Vowles Senior Manager
Mr M Frain Caseworker Investigator

REASONS

Decision

1. The appeal is dismissed. I affirm the Respondent's decision pursuant to s. 144(1)(a)of the Gambling Act 2005 ("the Act"). The Financial Penalty ("FP") of £5,850,000 made under s.121(1) of the Act is affirmed. The formal warning under s.117(1)(a) of the Act is affirmed.

Background

1. The operating licence holder, Daub Alderney Limited, is the Appellant. The Gambling Commission, the Respondent is the statutory national regulator of gambling pursuant to the Act.

2. On 1 November 2014 the Appellant was granted an operating licence with the usual conditions relating to anti-money laundering and terrorist financing ("AML") and social responsibility ("SR").

3. In 2018 the Respondent took regulatory action against the Appellant and undertook a Licence Review ("LR") in 2018 when it was found on 6 November 2018 by the Respondent's Regulatory Panel ("the Panel") that the Appellant was sanctioned for serious regulatory failings relating to AML and SR. In applying the Statement of Principles for determining FPs the Panel considered that a FP of £12,500,000 reflected the seriousness of the breaches but reduced it to £7.1 million to reflect aggravating and mitigating factors and overall proportionality.

4. On 4 October 2019 the Rank Group ("Rank") acquired ownership of the Appellant via an acquisition of the Appellant's parent company Stride Gaming Plc ("Stride") by means of a public purchase of shares ("the Acquisition").

5. The Respondent undertook a LR in 2020 and the Appellant admitted breaches of conditions 12.1.1, 12.1.2, and 16.1.1 of the Respondent's Licence Conditions and Codes of Practice operating licence conditions, and of paragraphs 1.1.2, 3.4.1, and 5.1.6 of the Respondent's Social Responsibility Code.

6. On 15 December 2020 the Respondent proposed a FP of £3,000,000.

7. At a hearing on 21 June 2021 before a Panel comprising Commissioners of the Respondent (two of whom had also sat at the 2018 Panel hearing), full submissions regarding the new breaches were made by the Respondent and the Appellant.

8. On 2 July 2021 the Panel issued a detailed 32 page statement of its decision, imposing a penalty of £5,850,000. The Panel remarked that the FP imposed in 2018 had not been an effective deterrent.

9. Following representation from the Appellant the Panel confirmed the decision on 22 July 2021.

10. The Appellant appeals pursuant to s.141 of the Act.

Legislation

11. S.144 of the Act sets out the powers of the tribunal as follows:

> (1)On an appeal under section 141 against a decision or action taken by the Commission the Tribunal may—
>
> (a)affirm the Commission's decision or action;
>
> (b)quash the Commission's decision or action in whole or in part;
>
> (c)substitute for all or part of the Commission's decision or action another decision or action of a kind that the Commission could have taken;
>
> (d)add to the Commission's decision or action a decision or action of a kind that the Commission could have taken;
>
> (e)remit a matter to the Commission (generally, or for determination in accordance with a finding made or direction given by the Tribunal);
>
> (3)In determining an appeal the Tribunal shall have regard to any relevant provision of a code of practice issued by the Commission under section 24.
>
> (4)In determining an appeal the Tribunal may take account of evidence which was not available to the Commission.

The Appellant's Case

12. The Appellant appeals pursuant to ss 141(6) and (9) of the Act.

13. The Appellant submits that the FP fails to take account of all the circumstances of the case and in the light of those circumstances the FP is excessive, unfair and disproportionate. The decision of the Panel failed to take account of the mitigation and have proper regard to the public interest. The decision failed to take account of the financial position of the Appellant at the point of the imposition of the FP. The FP is unaffordable.

14. The Appellant submits that the Panel and the Respondent failed properly to take account of the preacquisition assurances given by the Respondent to Rank in respect of the Appellant's regulatory compliance as a factor relevant in mitigation of the FP.

15. The Panel and the Respondent failed properly to take account of the fact of the Acquisition as a factor relevant in mitigation of the FP. That is a relevant factor because, inter alia: (i) it is relevant to the culpability of the present management of the Appellant, in circumstances in which they had only a limited time post-acquisition to improve regulatory compliance; (ii) it is relevant to the culpability of the present management of the Appellant, in the sense that the burden of the penalty is not borne by those responsible for the breaches (the previous management of the Appellant), or those who have benefited as a result of those breaches (the previous shareholders of the Appellant); and (iii) it is relevant to the public interest considerations triggered by the imposition of a severe financial penalty, because it serves to discourage the acquisition of smaller operators by larger operators with demonstrated commitment to adherence to licence conditions.

16. The approach of the Panel in increasing the FP proposed by the Respondent in its final determination was misconceived and unfair.

17. The Panel and the Respondent failed properly to take account of the financial position of the Appellant (as distinct from the financial position of Rank) as at the point of the imposition of the FP, which resulted in the imposition of a FP which was both disproportionate and unaffordable for the Appellant.

18. Prior to the Acquisition Rank conducted due diligence including in relation to the Appellant's compliance with its regulatory obligations. In the course of the due diligence exercise the Respondent expressly told Rank that the Respondent was *"very satisfied with the progress being made by Daub."* The Respondent also stated that it was *"very content with where [Daub were] on compliance"* and was *"not aware of anything which would threaten Daub's licence."*

19. These above statements provided considerable comfort to Rank in relation to proceeding with the Acquisition.

20. Following the regulatory action in 2018, steps were taken to improve the AML and SR measures. A new governance structure was implemented including new AML and SR controls. The policies and procedures were reviewed and re-designed. Additional AML and SR staff were recruited. New training programmes for all levels of seniority were implemented and there was engagement with the Respondent and, with input from Deloitte LLP ("Deloitte"), the Respondent was kept informed of the steps being taken to alleviate the concerns of the Respondent including meetings with the Respondent in December 2018, January, April, July and November 2019.

21. After the meetings in April and July 2019 the officials of the Respondent noted their thanks for a *'very positive meeting'* and *'a very informative meeting.'* The materials from these meetings together with the reflections from the officials of the Respondent were reviewed by Rank in the course of its acquisition of the Appellant. After the meeting in November 2019 the Appellant's CEO noted that *'the meeting went well'* and the Respondent *'was impressed'* with the progress of the Appellant's compliance improvements. The Respondent had confirmed that it had 'no specific reasons for concern' and there was *'a collaborative approach and positive feeling towards Daub.'*

22. Confirmation that the Appellant had implemented significant improvements in its AML/SR compliance is provided by the fact that the 2018 failings did not reappear as adverse findings in the 2020 licence review, namely:

    - No risk assessment in place to identify and monitor risk.
    - No regular AML training for staff.
    - No record of reviews and updates to AML policies and procedures.
    - Inadequate staff resource in customer due diligence teams.
    - No mitigation of the risk of staff shortages.
    - Delays in processing information about customer activity.
    - SR policies gave examples of issues rather than detailing action to mitigate risk.

- No specific provision for VIP customers in SR policy.
- Failure to put into effect procedures for self-exclusion, refusing services or preventing self-excluded customers from gambling.
- No written procedure for handling customer complaints and disputes.

23. On 31 May 2019, Rank announced its offer to acquire the Appellant's parent company, Stride, and on 4 October 2019, Rank completed the Acquisition. Prior to announcing the offer, it undertook due diligence (which was as substantial as reasonably possible in the circumstances, bearing in mind it was acquiring a listed company), including in relation to the Appellant's compliance with its regulatory obligations. This due diligence included communications with the Respondent about its view as regulator of the current state of regulatory compliance at the Appellant.

24. The due diligence enquiries that Rank made of, and in relation to the relationship with, the Respondent were particularly important:

    a. Firstly, because the Appellant formed part of a listed business which had put itself up for sale. This meant that there existed a competitive bid process which necessarily limited the amount of due diligence that potential bidders could do, in particular, at individual customer level. It was fully to be expected that the Appellant would be reluctant to disclose customer level data to businesses who, if they did not acquire the Appellant, would remain its competitors.

    b. Secondly, because as the purchaser of a listed company, in the event of regulatory problems later being revealed, Rank would have no post-acquisition legal recourse against the shareholders from whom Stride (and the Appellant) was acquired.

25. The Appellant placed heavy reliance on the views of the Respondent's officers. Any company proposing to purchase a regulated concern in 'special measures' is bound to set great store by a clean bill of health provided by the regulatory officials.

26. In fact, following the Acquisition, and despite the pre-acquisition reassurances provided by the Respondent, Rank quickly became dissatisfied with the Appellant's regulatory compliance. It repeatedly made attempts to arrange meetings with the Respondent to discuss the Appellant's progress and Rank's plans. The Respondent did not respond positively to these attempts for a couple of months, and a meeting only finally took place in February 2020.

27. In March 2020, the Respondent undertook a compliance assessment of the Appellant.

28. On 18 March 2020, the Respondent wrote to the Appellant setting out concerns relating to AML/ and SR controls. On 30 March 2020, the Appellant provided provide an outline remediation plan with actions and timescales.

29. On 2 April 2020, the Respondent wrote to the Appellant to confirm that it would be commencing a LR.

30. On 9 April 2020, the Appellant replied to the Respondent setting out a detailed remediation plan which was implemented within the timeframe by 30 July 2020.

31. The Respondent continued with the LR which found that the Appellant was in breach of a number of conditions attaching to its operating licence as follows:

    a. Finding 1: breach of paras 2 and 3 of licence condition 12.1.1 relating to the prevention of money laundering and financing. The licensee's policies, procedures and controls were inadequate.
    b. Finding 2: breach of licence condition 12.1.2 relating to AML measures for operators based overseas. The licensee had failed to thoroughly implement the measures described by MLR 2017, and failings in regard to MLTFTF Regulations 2017.
    c. Finding 3: breach of para 1(e) of SRCP 3.4.1 relating to customer interaction, and from 31 October 2019 paras 1 and 2 of SRCP 3.4.1.
    d. Finding 4: breach of SRCP 1.1.2, relating to responsibility for third parties and the licensee's failure to bind affiliates to the terms of the LCCP.
    e. Finding 5: breach of LC 16.1.1 relating to the responsible placement of digital advertising.
    f. Finding 6: breach of SRCP 5.1.6 relating to compliance with advertising codes.

32. These breaches are not contested. These failings did not represent a repetition of the failings identified in the 2018 LR. The compliance issues were of a lesser order and demonstrated that unmistakable progress had been made since the 2018 LR**.**

33. On 4 December 2020, the Appellant calculated its net gaming revenue since Rank's acquisition of Stride at £1,067,695.35.

34. On 15 December 2020, the Respondent notified the Appellant that it assessed the relevant Gross Gambling Yield ("GGY") at £1,350,477.38 and invited representations on a financial penalty of £3,000,000. There was no clear basis for how the £3,000,000 FP was calculated.

35. The Appellant relies on two points of principle arising from the circumstances of Rank's acquisition of the Appellant. One point relates to the Appellant's compliance journey since the 2018 LR, and one point relates to the question of benefit.

36. It is in the public interest that takeovers should occur because new and more responsible ownership promotes the Licensing Objectives, cements AML and SR objectives, increases the incidence of socially responsible gambling and provides strong protection for individual gamblers and society as a whole. Takeovers significantly reduce social harms and are strongly to be encouraged in the public interest.

37. The Appellant acknowledges the principle that a FP is aimed at the offending company rather than the acquiring company. However, the Appellant submits that some balance must be struck between this principle and the strong public interest that lies in the Respondent avoiding a penalty regime that actively discourages companies like Rank from acquiring companies like the Appellant after it has undertaken due diligence and received reassurances from the regulator. Such an

outcome would leave society and individuals at greater risk and would therefore be inconsistent with the Licensing Objectives. It would be irrational and perverse.

38. The Appellant submits that there should be some mitigation of the FP to mark the public good that flows from acquisitions such as the one in this case. Such mitigation recognises the public interest without doing violence to the principle that the penalty is aimed at the miscreant. This balance means that its effect cannot be to diminish the penalty entirely. In this case the Respondent has unreasonably declined to apply any such mitigation as a matter of principle.

39. The steps taken by Rank since the Acquisition should be recognised.

40. The impact of the changes introduced by Rank into the Appellant's business has been significant, reducing the Appellant's GGY between March 2019 to May 2020 by 31% and between July 2020 to March 2021 by 63%. The Respondent observes that this figure indicates the value to the Appellant of its non-compliance and indicates the value to the public interest of Rank's intervention.

41. The Appellant submits that the FP is to be borne neither by the party responsible for the breaches (the Appellant's departed senior management), nor the party benefiting from those breaches (the Appellant's shareholders).

42. The responsibility for the Appellant's operations that were found to be in breach lay with the former managers of the Appellant, who were answerable to the former shareholders, and replaced following completion of the Acquisition.

43. The amount paid to the shareholders of Stride by Rank on the Acquisition, reflected the trading position of the Appellant including revenue arising from operations which the Respondent has now found to be in breach. Rank has not only paid for the benefit that went to the former shareholders from these breaches, but also did so on a multiple basis given that it paid over a capital sum.

44. Rank had no benefit from the breaches and the breaches have actually caused very substantial losses to Rank because of the consequent overpayment to the Appellant's shareholders.

45. Rank is committed to upholding the three licensing objectives of the Act, to ensuring that gambling is conducted in a fair and open way, is delivered in such a way as to protect children and other vulnerable people from being harmed or exploited and is kept crime free. Mr O'Reilly, Chief Executive Officer at Rank, stated that the Rank Group treats each of the three Licensing Objectives with equal importance which sit central to the strategy and approach of the company. The Board operates a Safer Gambling Committee which is focussed on driving cultural change across the organisation with principal oversight of gambling regulation and a very strong focus on gambling initiatives.

46. Rank takes compliance with the Licence Conditions and Codes of Practice very seriously and strives to ensure that the business is consistent with AML and SR obligations. Rank views compliance as an ongoing process and with the support of the compliance team and internal and audit team and continually working to develop policies, procedures and controls to advance the Licensing Objectives.

47. Mr O'Reilly stated that it is recognised that compliance is a continual process, requiring ongoing development and Rank seeks to keep abreast of new and emerging risks, taking onboard feedback from the Respondent and commits resources to develop controls. This approach puts Rank at a competitive disadvantage against most UK licensed operators.

48. Rank recognised in acquiring Stride in October 2019 that work would have to be done to bring the business of the Appellant into line with the Rank's approach to compliance and safer gambling. Rank was aware that the Appellant had been subject to a significant £7.1 million FP following a LR in 2018 for breaches of AML and SR obligations. Rank consulted with the Respondent at the time of the Acquisition and took the view that that acquiring a company and improving the quality and compliance of its operations would be welcomed by the Respondent.

49. The Appellant submits that Rank's Acquisition has resulted in improved compliance within the industry with the Appellant benefiting from Rank's experience, resources and technical capabilities, developments in the Appellant's AML and SR controls and ensuring a safer gambling environment for the Appellant's customer base.

The Respondent's Case

50. On 6 November 2018 the Respondent's Regulatory Panel imposed a FP of £7,100,000 on the Appellant for serious breaches of AML and SR requirements. It also imposed a statutory warning and further conditions on the operating licence. The Panel's expectation was that the breaches identified would not be repeated.

51. A compliance assessment by the Commission in March 2020 revealed that further, similar breaches had occurred between January 2019, almost immediately following the first review decision, and March 2020, the date of the assessment.

52. The Respondent commenced new review proceedings against the Appellant. At a hearing on 21 June 2021 before an experienced Regulatory Panel comprising Commissioners of the Gambling Commission (two of whom had also sat at the 2018 Panel hearing), full submissions regarding the new breaches were made by the Commission and the Appellant.

53. On 2 July 2021 the Panel issued a detailed 32 page statement of its decision, imposing a penalty of £5,850,000. The Panel remarked that the penalty imposed in 2018 had not been an effective deterrent.

54. As is required by the Act, a notice of the proposed FP was sent to the Appellant giving the Appellant an opportunity to respond which it did. The response was considered by the Panel, but the Panel decided not to alter the penalty.

55. The facts found by the Panel are set out in its decision with its reasons for the FP including the aggravation and mitigation. The breaches found by the Panel are not challenged in this appeal.

56. Section 121(6) of the Act requires the Respondent to prepare a statement setting out the principles to be applied by it in exercising its power to impose a FP. The

Respondent has done this. The Panel duly applied the principles in the Statement of Principles in fixing the FP.

57. As has been repeatedly recognised in appellate case law, decisions of statutory regulators are not to be lightly reversed. They are only to be overturned if they are wrong. The burden of proving that they are wrong lies on the Appellant. Furthermore, the courts have recognised that regulatory decisions are not of the "heads or tails" variety. They are evaluative – which is to say that they are matters of judgment rather than pure fact.

58. In *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 it was recognised that in some cases, for example because of some new evidence, a decision may now be wrong even though it was not wrong at the time when it was made. However, in this case that does not apply. The Appellant has recently filed one short witness statement in this appeal but its contents are not new. They largely replicate material already before the Panel, contained in the Appellant's solicitors' letter to the Panel at, which did not cause the Panel to alter its decision.

59. Mr O'Reilly's second witness statement is dealt with briefly as follows:

    a. Although the Statement of Principles makes it clear that the licensee's financial resources are a key matter, the Appellant had failed to give an account of its own financial resources in its evidence.

    b. Therefore, at the Regulatory Panel hearing, the Respondent questioned Mr. O'Reilly about this matter. Mr O'Reilly stated that at the point of Rank's Acquisition of the Appellant the price paid was c. £115m, and the net price was £85m because the Appellant's business had around £30m on its balance sheet. That was reflected in the Panel's decision.

    c. In his witness statement Mr O'Reilly says that £30m was in fact the cash position of Stride plc rather than the Appellant which was Stride's wholly owned subsidiary. (In fact, both were acquired by Rank Group plc.) Furthermore, he says that Daub's balance sheet assets were not £30m but £22.9m. The same information was given to and accepted by the Panel but it did not cause the Panel to revise the FP.

    d. Mr O'Reilly opines that one ought not to look at the balance sheet when considering the means of a company. This is an untenable proposition. The balance sheet assets of a company are obviously part of its financial resources.

    e. Mr O'Reilly states that at the time of the hearing, the Appellant had £12.1m available in cash. This was also noted and rightly taken into account by the Panel.

    f. Mr O'Reilly suggests that at the time of the Acquisition, Stride and the Appellant's profitability was £11m per annum. That provides yet further justification for the level of the FP.

g. Mr O'Reilly stated that the business started to make losses due to the compliance measures put in place by Rank following the Respondent's assessment in March 2020. The same points were made to the Panel, which did not consider that the FP should be revised in the light of that information, including because the Appellant had sufficient resources to pay the proposed penalty.

h. Furthermore, and without prejudice to the foregoing, the reason given to the Panel for the loss of profitability was *"the measures put in place to improve processes and procedures in respect of AML and social responsibility."* This tends to demonstrate that the business was making substantial unlawful profits by engaging in non-compliant conduct. It is reasonable to reflect such profit-taking in the FP imposed.

60. The Appellant had previously been found guilty of serious breaches of AML and SR requirements, for which it had received a FP designed to deter it from further breaches.

61. The Appellant was then found guilty of further serious breaches of AML and SR requirements which continued over a long period of time commencing almost immediately following the imposition of the FP.

62. The Appellant received a full hearing before an experienced Regulatory Panel.

63. The Panel issued detailed reasons for its decision, including full exegesis of aggravating and mitigating factors, applying the principles in its Statement of Principles, which has a statutory status.

64. The decision was an evaluative decision of a statutory regulator which is not to be lightly reversed and must not be reversed unless the Appellant satisfies the Tribunal that it is wrong.

65. The Appellant has brought no new matters to the attention of this Tribunal.

66. It is submitted that the decision is not wrong. It represents a fair and reasonable regulatory response to the Appellant's serious and long-lasting breaches, which were committed in defiance of an earlier warning and deterrent financial penalty.

67. In deciding to impose a FP under s. 121 of the Act the Panel had regard to the key considerations of the principles for determining financial penalties).

68. The Panel considered the seriousness of the breaches of conditions in respect of which the FP was imposed. The Panel considered that the breaches were serious because there were failures to effectively identify and mitigate money laundering risk. The breaches were serious as to scale in that ten customer accounts had been reviewed by the Respondent during its licence review and anti-money laundering failings had been identified in nine of them. The Panel considered that this suggested that breaches may have been widespread. The Panel considered that the failures were serious because they involved failures to comply with SR obligations and, as a

result, involved failures to protect vulnerable customers at risk of harm. Breaches of the social responsibility code were found in all 10 of the accounts sampled. The breaches were serious as to duration and took place between October 2018 and March 2020.

69. The Panel considered that the Appellant knew or ought to have known about the breaches. It accepted the Respondent's conclusion that middle and senior managers who held a personal management licence should have been aware of the breaches and failings.

70. The Panel was satisfied there was repeat behaviour in that although certain breaches identified in the 2018 review of the Licensee's licence had not been repeated, those breaches that were the subject of the current review were of a similar nature to those identified in the previous review and in respect of which a FP had been imposed. The Panel was of the view that the Appellant had again failed to put into effect policies and procedures to address responsible gambling issues and anti money laundering failings in relation to establishing source of funds and ongoing monitoring of its customer base. The Panel therefore concluded that the FP imposed in 2018 had not been an effective deterrent of further, similar breaches.

71. The Panel considered whether the breaches arose in circumstances that were similar to previous cases dealt with which resulted in the publication of lessons to be learned for the wider industry. The Panel was satisfied that the breaches arose in circumstances that were similar to previous cases that the Respondent had dealt with including the Appellant's own previous case which resulted in the publication of lessons to be learned for the wider industry.

72. In relation to the quantum of the FP, the Panel agreed that, reflecting Statement of Principles for financial sanctions, the FP should be made up of (i) an amount to reflect any detriment suffered by consumers and/or remove any financial gain to the Licensee as a result of the contravention or failure; and (ii) an amount to reflect the seriousness of the contravention or failure, the impact on the licensing objectives and the need for deterrence.

73. The Panel calculated that the total GGY from the 10 customer accounts of £1,350,477.33 (rounded down to £1,350,000) represented the financial gain to the Appellant and the immediate financial detriment to the ten customers whose accounts were reviewed. The Panel accepted the Respondent's view that the GGY figure was indicative of funds that came into the Appellant's business in breach of the licence conditions. The Panel did not accept the representation from the Appellant and Rank that matters should be looked at from Rank's perspective and that there was therefore no relevant gain.

74. The Panel considered the seriousness of the breach to determine the appropriate penal element of the fine. The Panel considered it relevant that the Appellant had been subject to a previous and recent sanction for similar breaches and the duration of the breaches was significant. The Panel took into account that the breach arose in circumstances that were similar to previous cases which resulted in the publication of lessons to be learned for the wider industry which were relevant in this case.

75. In the light of all the factors the Panel decided that the penal element should be £5,000000.

76. In relation to aggravating and mitigating factors the Panel considered that the opinions expressed by the Respondent's officials could be a mitigating factor but not in this case because the Respondent's official was answering questions *'as best she could'* and that an audit was still to take place and that the Respondent was *'not aware'* of anything that would threaten the Licensee's licence.

77. The Panel considered it was not a mitigating factor that the FP would not be paid by those who were in place at the time of the breach. The Panel inferred that Rank was well aware of the risks they were undertaking in completing the acquisition of the Appellant. Rank made a business decision to acquire the Appellant. Rank was not compelled to do so and Rank was aware of the Appellant history. Rank were aware of the risks and entered into the acquisition with their eyes open. Rank identified three types of compliance risk including the risk of non-compliance post acquisition.

78. The Panel did not consider it a mitigating factor that the former managers of the Appellant had been replaced following completion of Rank's acquisition.

79. The Panel considered the following factors aggravated the penal element of the FP as follows:
    - Seriousness of the breaches.
    - The impact on the licensing objectives.
    - Whether the breach arose in circumstances that were similar to previous cases the Commission has dealt with which resulted in the publication of lessons to be learned for the wider industry.
    - Whether the breach continued after the Licensee became aware of it.
    - The scale of the breach of a licence condition across the licensed entity.
    - The involvement of middle and senior management.
    - The level of any financial gain from the breach.
    - The absence of internal controls or procedures intended to prevent the breach.
    - The duration of the breach.

80. The Panel considered that the following were mitigating factors in relation to the penal elements of the FP:
    - The extent of steps taken to remedy the breach.
    - Timely co-operation with any investigation undertaken by the Respondent.

81. Taking into account the aggravating factors the Panel considered it appropriate to increase the penal element by £2,000,000 and to decrease the penal element by £4,000,000 on the basis of the mitigating factors.

82. The Panel rightly considered the need for a deterrence uplift to the penal element, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance.

83. The Panel considered a deterrence uplift of £1,500,000 was appropriate taking into account that no previous deterrence uplift was applied in 2018 and the previous FP

had not deterred or prevented a reoccurrence of further serious breaches within a short period of time. The Panel considered that a deterrence uplift is to ensure that the Appellant and others understand that repeated non-compliance will incur a cost.

84. The Panel took into account the extent and speed of the remedial action and the degree of co-operation and this is reflected in the final figure.

85. The Panel considered that a FP of £5,850,000 was fair and proportionate. The Panel having taken legal advice considered it was entitled to consider the resources of the parent company in deciding on the FP.

Conclusions

86. I find that the breaches found by the Panel are not in issue. The issue before me is the level of the FP.

87. In reaching my decision I have borne in mind that Stride and the Appellant are now owned by Rank and any FP imposed on the Appellant is a FP imposed on Rank. However, the focus of the reasons for the imposition of the FP is on the Appellant and relate to the history and behaviour of the Appellant.

88. My role is to determine whether the decision of the Panel was 'wrong', and to consider de novo the penalty to be imposed upon the licensee. I am required to take a fresh decision based on the information before me. In approaching this task it is necessary to attach weight as appropriate to the decision of the Panel.

89. On an appeal under section 141 against a decision or action taken by the Respondent I have wide reaching powers. I may affirm the Respondent's decision or action; quash the decision or action in whole or in part; substitute for all or part of the decision or action another decision or action of a kind that the Respondent could have taken; add to the decision or action a decision or action of a kind that the Respondent could have taken; remit a matter to the Respondent (generally, or for determination in accordance with a finding made or direction given by the Tribunal); reinstate a lapsed or revoked licence. In determining the appeal I may take account of evidence which was not available to the Respondent.

90. I am satisfied that my approach is consistent with the decision in *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 which was an appeal from a decision of a licensing authority under the Licensing Act 2003. The Court of Appeal approved the formulation of Burton J as follows:

> What the appellate court will have to do is to be satisfied that the judgment below "is wrong", that is to reach its conclusion on the basis of the evidence put before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time. That is what this district judge was prepared to do by allowing fresh evidence in, on both sides.

91. I agree with the Respondent's submission that it has been repeatedly recognised in appellate case law, that decisions of statutory regulators are not to be lightly reversed and the burden of proving that they are wrong lies on the Appellant. Furthermore, the courts have recognised that regulatory decisions are not of the "heads or tails" variety and are matters of judgment rather than pure fact.

92. S.121(6) of the Act requires the Respondent to prepare a statement setting out the principles to be applied by it in exercising its power to impose a FP. I find that the Respondent has complied with this statutory obligation and applied the principles in the Statement of Principles for Determining Financial Penalties in deciding the level of the FP.

93. I found that the Panel issued detailed reasons for its decision, including the details of aggravating and mitigating factors, and how the Statement of Principles had been applied.

94. I found that the Panel reached its decision after a full hearing where the Parties were represented.

95. I found that the Panel and the Respondent took into account that the Appellant had previously been found guilty of serious breaches of AML and SR requirements, for which it had received a FP at a level intended to deter further breaches.

96. I found that the Panel and the Respondent took into account that the Appellant was guilty of further serious breaches of AML and SR requirements which had continued over a long period of time commencing almost immediately following the imposition of the first FP.

97. There is evidence before me that was not available to the Panel and the Respondent but it is not sufficiently different in nature to persuade me that the decision was wrong.

98. I find that the FP was a fair and reasonable regulatory response to the Appellant's serious breaches, taking into account the previous FP.

99. I find that the FP of £7,100,000 was imposed on 6 November 2018 for serious breaches of the AML and SR requirements in the Money Laundering Regulations and Licence Conditions and Codes of Practice including the following:

- failure to have an appropriate risk assessment in place;
- failure to conduct ongoing monitoring of a business relationship;
- failure to apply enhanced customer due diligence;
- failure to keep appropriate records of evidence and documents as part of due diligence checks;
- failure to have appropriate policies and procedures to prevent money laundering and terrorist financing;
- failure to provide relevant staff with appropriate training to recognise and deal with activities which may relate to money laundering or terrorist financing;
- failure to put into effect policies and procedures for customer interaction in order to protect vulnerable people;
- failure to put into effect procedures for self-exclusion so as to protect vulnerable people;
- failure to put into effect a written procedure for handling customer complaints.

100. The Panel decided in 2018 that it was appropriate also to issue a warning under s. 117(1)(a) of the Act and impose additional licence conditions to secure compliance with AML and SR policies.

101. I find that the breaches leading to the present FP were similar in nature to the previous breaches and were serious. I find that the breaches were the responsibility of the Appellant and the Appellant fell to be penalised. I find it likely that the Appellant concealed from the Respondent that its breaches were continuing, which aggravates its own conduct.

102. I reject the Appellant's submission that the FP failed to take account of the Acquisition as relevant mitigation because the burden of the FP is not borne by the outgoing managers and shareholders but the new ones and this discourages large companies from taking over non-compliant small ones.

103. I find that it is expected that all licence operators should be compliant and it is not a relevant mitigating factor that larger companies should not be discouraged from acquiring smaller companies.

104. Rank is a sophisticated business. The Acquisition meant that Rank was responsible for any profits or losses flowing from the Acquisition. Any anticipated risk should have been factored into the terms of Acquisition.

105. I find that the Panel gave mitigation for the steps taken to remedy the breaches and timely co-operation with the investigation by decreasing the penal element by £4m. This was twice the uplift imposed by way of aggravation for the seriousness of the breaches, the impact on the licensing objectives, the similarity of the breaches to the previous breaches, the sale of the breaches, the involvement of middle and senior management, the level of financial gain, the absence of internal controls and the duration of the breaches.

106. I find that credit was given for the Appellant's improved performance following the Acquisition.

107. I find that the Panel correctly applied a deterrence uplift of £1,500,000 taking into account that there was no deterrence uplift in the previous FP.

108. Regarding the submission that the Appellant was not given the opportunity to address the increase in the FP from £3,000,000 to £5,850,000 without raising this in advance and without explaining the reasons for the difference, I find that the Appellant was given the opportunity to make representation. As is required by the Act, a notice of the proposed FP was sent to the Appellant giving the Appellant an opportunity to respond which it did. The response was considered by the Panel, but the Panel decided not to alter the penalty. I find that the Panel made a reasonable decision on the basis of the evidence before it.

109. I find that the Panel was entitled to accept or reject any submission made by either Party and was entitled to depart from the figure of £3m suggested by the Respondent. The Panel gave reasons for the FP and that is sufficient.

110. I find that the Panel had a duty to consider a deterrent. It is stated in the Statement of Principles that:

"The total amount payable by a licensee will normally be made up of two elements:

i. an amount to reflect any detriment suffered by consumers and/or remove any financial gain made by the licensee as a result of the contravention or failure (where these can reasonably be calculated or estimated);

ii. an amount that reflects the seriousness of the contravention or failure, the impact on the licensing objectives and the need for deterrence ('the penal element')."

111. I find that the FP is made up of two elements. The first is intended to divest the licensee of its gains from the breaches and the second is to penalise for the conduct. I find that the Panel and Respondent followed the principles.

112. I find that the amount of £1,350,000 representing the financial gain was not unreasonable.

113. The Panel in calculating the detriment to consumers and/or gain to the Appellant used the figure of the total GGY to the Appellant from the sampled customer accounts (including in the pre-acquisition period). In my view this was the correct approach and on the basis of the best evidence available. I reject the Appellant's submission on this point that the reasons for using this figure was not adequately explained.

114. I accept Mr O'Reilly's estimate of the Appellant's operating profit and loss figures in relation to the Appellant's licensed activity on the basis that he reviewed the Appellant's unaudited management accounts and the audited accounts with Rank's finance team including Rank's Interim Chief Financial Officer.

115. I find on the basis of Mr O'Reilly's statement that as at 31 December 2020 there was a £5.5 million loss over six months. As at 30 June 2021 there was a £12.3 million loss for the 12-month period and as at 30 January 2022 there was a £6.9 million loss over seven months. However, I do not consider that these figures are relevant because it was likely that the loss of profitability was due to the cost of the measures that had been put in place to improve the processes and procedures in relation to AML and SR. I do not consider it appropriate to offset the losses in these circumstances against the financial gain.

116. The Appellant submitted that during its communications with the Respondent, Rank repeatedly received assurances from the Respondent's officials about the Appellant's 'compliance journey' in the run up to the Acquisition. The Appellant submitted that although the Respondent accepted that assurances were given no mitigation was given in deciding on the level of the FP and this is misconceived.

117. I find that Rank was told that the Respondent was *"very satisfied with the progress being made by Daub"*, the Respondent *was "very content with where [Daub were] on compliance"* and the Commission was *"not aware of anything which would threaten Daub's licence."*

118. The Appellant submitted that on 20 May 2019, at a pre-acquisition meeting between Rank and the Respondent's officials, Rank specifically sought reassurance from the Respondent as to the Appellant's compliance position. It was known to the officials that this reassurance was sought in respect of a company that had previously been sanctioned, was currently under close surveillance and which Rank was contemplating acquiring.

119. The Appellant submitted that the officials must have been aware that if Rank was advised that the Appellant was making good compliance progress, this would contribute significantly to the likelihood that Rank would make a bid to acquire the business.

120. The Appellant submitted these statements provided '*considerable comfort'* to Rank and were presented to the directors of Rank's Board on 29 and 30 May 2019, following which Rank made a binding offer to the Appellant's shareholders. The Appellant submitted that on the basis of the assurances Rank did not consider that it was acquiring a company in a poor state in terms of regulatory compliance.

121. I found that the statements given by the Respondent's officials were given on the basis of the information provided by the Appellant. The assurances were because the Appellant had misled the Respondent about the true compliance position.

122. I found the Appellant misled the Appellant and the Respondent about the true compliance position.

123. I found that Rank was aware of the Appellant's previous behaviour and took a risk when acquiring the Appellant, particularly, taking into account the limited information it was entitled to acquire.

124. In my view the situation is not altered by the fact that a meeting with officials of the Respondent was unusual.

125. I reject the Appellant's submission that it is unreasonable and unfair to fail to take into account the relevance of the assurances when fixing on the level of the FP notwithstanding that the reassurances were on the basis of the Appellant's misleading information, particularly as Rank is responsible for paying the FP.

126. Rank was aware of the previous breaches and there was a high risk that there had been further breaches and this should have factored this into the terms of the Acquisition.

127. I find that any assurances given by the Respondent's officials were provided on the basis of misinformation from the Appellant and accordingly were correctly excluded by the Panel as a mitigating factor.

128. I reject the Appellant's submission that it should be a mitigating factor that Rank suffered significant financial loss as a result of the Acquisition and the processes it had to set up to achieve full compliance. This was a matter that Rank should have factored into the terms of the Acquisition knowing the previous history of the Appellant in relation to compliance.

129. I found that Rank made a business decision to proceed with the Acquisition taking into account the risk in acquiring the Appellant and any profits and costs arising from the Acquisition are righty borne by Rank.

130. In relation to proportionality of the FP the commercial consequences of the Acquisition and the costs incurred by Rank to achieve compliance are not relevant when deciding the appropriate level of the FP for the breaches by the Appellant.

131. I accept the submission that Rank is an operator with a strong commitment to adherence to licence conditions including the maintenance of socially responsible gambling. Rank's Board made the decision to acquire a smaller company that turned out to be in breach of licence conditions undermining AML and SR objectives and placing individual gamblers at risk. This was a financially costly decision made in the course of business and it was for Rank to weigh the commercial and financial costs of the Acquisition.

132. The statements made by the Respondent's officials do not amount to mitigation and were of no greater importance in the overall process than the fact that Deloitte had been appointed as an independent external auditor following the LR of 2018 and had kept the Respondent informed of its work. Deloitte was appointed to provide reassurance as to the findings of internal reviews into the effectiveness of the Appellant's AML and SR policies and procedures. The true position of the Appellant's compliance was unknown because the Appellant gave misleading information.

133. In relation to the submission that the FP is not proportionate as it was based on incorrect information I find that s. 117 and s.121 can be read to permit the resources of a parent company to be taken into account. However, even if the financial resources of Rank are ignored, on the basis of the financial information before me about the Appellant, the FP was proportionate when the costs incurred in bringing the business to compliance are factored out.

134. I found that the new evidence namely the evidence from Mr O'Reilly, in the witness statement dated 11 March 2022, provided more detail but was not significantly new evidence.

135. The Statement of Principles make it clear that the Appellant's financial resources are a key matter in determining an appropriate FP. The Appellant submitted that financial information about the Appellant taken into account by the Panel was incorrect. Mr O'Reilly stated that during the hearing he was asked what the Appellant's financial resources were at the point of the Acquisition and, in particular, what was on the Appellant's balance sheet. Mr O'Reilly was unprepared and stated that the Appellant had about £30m on its balance sheet. The Appellant submits that this figure was not indicative of the financial position of the Appellant because that figure was the cash position of Stride and not the position of the Appellant. Mr O'Reilly stated that balance sheet assets were £22.9m and that at the time of the hearing, the Appellant had £12.1m available in cash. Mr. O'Reilly stated that at the time of the acquisition, Stride and Appellant's profitability was £11m per annum.

136. The Appellant has submitted that the operating profit and loss figures give a more accurate and appropriate indication of the Appellant's financial position and resources at the time of the decision under appeal.

137. As previously stated I find it would not be appropriate when assessing the Appellant's resources to take into account the reduction in profits arising as a consequence of the costs required to implement the necessary procedures to comply with the AML and SR requirements.

138. I accept that the losses were significant but the Panel and Respondent correctly decided that the impact of the losses were not a mitigating factor.

139. The financial information provided by Mr O'Reilly does not persuade me that the FP was not proportionate, unfair or unreasonable because whatever method is used to calculate and estimate the financial position of the Appellant the resources of Rank can be taken into account when considering this point.

140. In summary I find that there were serious breaches which were similar to the breaches for which a substantial FP was imposed in 2018 and there are no new facts which persuade me that the decision was wrong. I find that the Panel did not err in law and complied with its statutory obligations. I find the Appellant was given the opportunity of a full and fair hearing. The Appellant was given the opportunity to challenge the Panel's decision before it was finalised. The Panel correctly applied the principles in its own Statement of Principles. The Panel made an evaluative decision which it was entitled to do. The facts of the case are not in dispute. The decision of the Panel is a decision of a regulator put in place by Parliament to make decision of this nature and such a decision should not be lightly reversed. I attach weight to the decision because it is detailed and gives extensive reasons and there are no new facts for consideration. I find that the Panel provided adequate reasons to explain its departure from the position adopted by the Respondent, when it was plainly incumbent upon the Panel to do so.

141. In reaching my decision I have borne in mind the approach approved in the Supreme Court in *Ali v Secretary of State for the Home Department* [2016] UKSC 60 that the weight to be attached to the Respondent's reasons must take into account the fullness and clarity of the reasons given and the evidence now before me.

142. The burden is on the Appellant to satisfy me that the decision was wrong and the Appellant has not discharged that burden.

143. Accordingly, the appeal is dismissed.

Signed: J R Findlay **Date: 20 April 2022**

Amended: 03 January 2023