

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CR 08004505568-620**

**DEPARTMENT OF INTERNAL AFFAIRS**  
Informant

v

**TV WORKS LTD**  
Defendant

Hearing: 24 -26 May 2010

Appearances: Mr. McCubrey for the Crown  
Mr. Billington QC with him Mr Edwards for the Defendant

Judgment: 23 June 2010

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**DECISION OF HIS HONOUR JUDGE DAVID J. HARVEY**

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**Introduction**

[1] Is there a difference between a brand name and a product in the world of internet gambling and the way in which it is promoted?

[2] Rational Entertainment Enterprises Ltd is a company incorporated in the Isle of Man. Its principal trade or business is described in its Annual Return as an online poker company. Its registered business name is Pokerstars. It carries on its business as an online poker company, using the domain names Pokerstars.net and Pokerstars.com. An associated company,

Rational Poker School Ltd, having the same registered office, shareholders and directors, operates a poker educational website.

[3] Throughout the world, there are a number of poker tournaments, run at different locations, at different times of the year. They operate under a number of different names. Of relevance to this case is a tournament known as the Asia Pacific Poker Tournament, known by its initials as APPT. APPT is registered with the Intellectual Property Office of New Zealand as a trademark, the proprietor of which is Rational Entertainment Enterprises Ltd.

[4] Rational Entertainment Enterprises Ltd set up its online poker websites on the internet and has done so since 2000. It has taken advantage of the new technology to enable people to play poker with one another, without the need for going to a physical location, such as a casino, to do so. It utilises one of the many protocols of the internet, which underlies the worldwide web to do so.

[5] To reach one of the online poker websites, one uses a combination of the domain name, together with the letters http (which stand for hypertext transfer protocol) and www, which directs one to a worldwide web server, where the web page and the information associated with it are located. The combination of <http://www> (domain name) are known as a URL, or universal resource locator, otherwise known as a web address. The domain names in this case – Pokerstars.com and Pokerstars.net – are distinguishable by the .net and .com suffixes. These indicate that these addresses are global top-level domain names. If, for example, the suffixes were .co.uk, they would be identifiable as country code top-level domain names. The distinction is that global top-level domain names, as the name suggests, have a universality about them, whereas country code top-level domain names are administered by what is known as a local domain space or organisation. In New Zealand for example, the .nz domain name space is administered by Domain Name Commission Ltd which is owned by InternetNZ, a non-profit society established in 1995 to coordinate the development of the Internet in New Zealand.

[6] Domain names are associated with a fixed internet protocol or IP number, which is assigned to the registered owner of the domain name. When one types a URL into a web browser, an enquiry is made of a domain name server which matches the URL with the assigned IP number and then directs the enquiry to the relevant worldwide web server associated with that IP number. Domain names developed as an alpha numeric representation of IP numbers which are more and more than the internet equivalent of a telephone number. Domain names have the advantage, however, of recognisability, particularly if they were associated with a trade name or business name. Indeed, many of the early domain name disputes involved the utilisation of well-known business or trademark names by those who were not entitled to use them.

[7] The suffixes used in global top-level domain names used to be representative of the type of activity that the registrant or owner of the domain name engaged in. The .com suffix was associated with business, the .org suffix was associated with non-profit organisations, the .net suffix was associated with technical activities and the .edu suffix with academic or university activity. However, once it became apparent that there was a considerable business advantage in domain names, businesses ensured that they would register a particular domain name, not only as a .com but also as a .net or a .org. Thus, much of the significance that might attach to the domain name suffix is no longer relevant.

[8] Rational Entertainment Enterprises Ltd, as has been observed, operate online poker websites at the domain name at Pokerstars.com and Pokerstars.net. Pokerstars.net does not involve gambling. A player is given a virtual credit, with which he or she might play but no money changes hands. In its advertising material, which will be discussed in more detail later in this decision, it is clear that Pokerstars.net is not a gambling website. Pokerstars.com, on the other hand, is a gambling website. As a result of a number of steps that a user might take to set up an account, a user may engage in gambling associated with the various poker games that are offered by Pokerstars.com. It was clear, however, from the evidence of Mr Rasheed,

For the defence, that Pokerstars.com website also has a “play for free” alternative, although it is clear from an observation of the Pokerstars.com website that its primary focus is that of online gambling for real money.

### **How the Online Gambling Sites Work**

[9] Mr Rasheed gave detailed evidence about the steps that need to be taken if one wishes to play online poker at Pokerstars.net and Pokerstars.com. The first thing that the user must do is go to the website www.pokerstars.net. There is a facility available on the home page, which allows the user to download the necessary software required to play the game online.

[10] Upon installing the software, the user is confronted with the terms and conditions of use of the software and the online site. The user then creates a user name and password and, after logging in, can join a poker game.

[11] The user is assigned a credit of a number of chips with which he or she may play. There is no money payable to purchase the chips. They are “play money” and when the user has used up all of his or her chips, another quantity may be made available. The user plays poker at a poker game with a number of other players. They are represented by icons or shapes on the screen. It is not possible to see distinguishable facial characteristics. The other players are identifiable by their login name and their country of origin may also be ascertained.

[12] The player uses the chips to engage in “pretend betting” but, as I have said, no money changes hands. A copy of the home page for Pokerstars.net is illustrated below.

**PokerStars.net**  
Find the Poker Star in you

ONLINE NOW: 133,588 players 5,154 tournaments

English

DOWNLOAD POKER ROOM GETTING STARTED FAQ SUPPORT TEAM POKERSTARS PRO ABOUT US

**LEARN TO PLAY POKER FOR FREE!**

PokerStars is the world's largest poker site. With over 10 million members, and more free-to-play tables than any other site, PokerStars is THE place to learn how to play, and practice your poker skills. Download our software and start playing for free today.

Team PokerStars Pro

Learn more about the software. View our **virtual tour**.  
**Daniel Negreanu**

**POKERSTARS AT A GLANCE**

- The world's largest poker site
- Free to download and play
- Award winning 24/7 support
- Best software & game selection

**POKER SCHOOL**

*K+K=a pair*

- > Poker Basics
- > Poker Games
- > Poker Hand Rankings
- > Poker Glossary

**PRACTICE**

Practice your poker skills in our free tournaments

**WSOP 2008 FREEROLLS**

Win prize packages for free with the Million Dollar Giveaway!

Texas Hold'em Omaha Omaha High-Low Stud Stud High-Low Razz HORSE 5-Card Draw 2-7 Triple Draw

Terms & Conditions Privacy Policy Responsible Gaming Site Map

English Deutsch Español Français Italiano Magyar Nederlands Português Русский 日本語

EPT APPT LAPT IGC 18+ GAMCARE CERT

Copyright © 2001-2008, PokerStars. All Rights Reserved. Rational Poker School Limited, 10 Hill Street, Douglas, IM1 1EF, Isle of Man. License No. 7, granted July 2005.

[13] There are a number of icons contained in the page. One, referring to the APPT, is an icon only.

[14] The process for playing poker for money in the website [www.pokerstars.com](http://www.pokerstars.com) has some similarities to the process involved with [www.pokerstars.net](http://www.pokerstars.net) but there are some significant differences as well.

[15] The starting point is the website [www.pokerstars.com](http://www.pokerstars.com). Once again, the prospective user is invited to download the relevant software. It is important to note that the software that one uses for play in Pokerstars.net is

different from the software that he uses to play on Pokerstars.com. One of the most significant differences is the integration of a “cashier” with the Pokerstars.com client that is not present in the Pokerstars.net client. A user is advised to remove any iteration of Pokerstars.net software. Mr Rasheed suggested in his evidence that that was not absolutely necessary but it is clear from the point of view of Pokerstars.com that it is an advisable course of action.

[16] Once again, upon installation of the software, he is presented with the terms and conditions of use to which he must accede. These terms and conditions of use are different from those associated with the Pokerstars.net software. Once again, he is prompted, upon installation of the software, to create a user name and password. If a user name and password have been created using Pokerstars.net, the same details may be used for Pokerstars.com.

[17] Before playing, he utilises the cashier facility that is integrated into the Pokerstars.com client by making available credit card information and authorising the payment of a certain sum of money. In return for that sum of money, he receives virtual poker chips to an equivalent value with which he may gamble.

[18] Play on the Pokerstars.com website is essentially identical to that on the Pokerstars.net website, with the exception that he is gambling for money, represented by the chips. A copy of the Pokerstars.com website, irrelevant at the time, follows below.

[19] Similar icons are available on the Pokerstars.com website, including one for APPT. Behind that icon is a hypertext link, which makes the APPT website available. A similar hypertext link is not embedded behind the icon on the Pokerstars.net website.



**THE WORLD'S LARGEST POKER SITE**

- Free to download and play
- Award winning 24/7 support
- Fully licensed and regulated
- Best software and game selection
- Secure deposits, fast cashouts

**100% NEW PLAYER BONUS**

➔ GETTING STARTED  
➔ VIRTUAL TOUR



**WSOP 2008**



Your chance to win the greatest WSOP package ever!

**BATTLE OF THE PLANETS**



Play in our biggest ever Sit & Go Promotion!

**LAPT**  
LATIN AMERICAN POKER TOUR

Win a seat at the Latin American Poker Tour

San Jose  
Rio de Janeiro  
Punta del Este

**POKERSTARS BLOG NEWS**

- Victoria Coren joins Team PokerStars Pro
- Glen Chorny Wins EPT Monte Carlo
- WSOP Million Dollar Giveaway
- Battle of the Planets Sit & Go Challenge is launched!

▶ POKERSTARS TV ADS

PokerStars is home to the world's largest online poker tournaments and qualifies more players for **World Series of Poker® Satellites**, the **World Poker Tour**, and the European Poker Tour than any other internet poker site. We offer every one of your favorite ring games and host exclusive signature events like the PokerStars **World Championship of Online Poker** and the PokerStars **World Cup of Poker**.

PokerStars has long been known as the place where poker players become world champions. Many of poker's top professionals honed their skills on internet poker sites. These players know that long-term tournament success doesn't hinge on the turn of one card. On this website, you will find all the tips and tricks you need to start your poker career.

At PokerStars you will always find poker games at any limit, experience the best poker software, and receive incredible bonuses for your play. Whether you want to play for free or win real money, you can do it here. To get started playing, simply download our **free poker software** now!



**Daniel Negreanu**  
Team PokerStars Pro  
"Good luck at the tables"

Texas Holdem | Omaha High Low | Omaha High | Stud High Low | Stud High | Razz | HORSE | Draw | 2-7 Triple Draw

Poker Games | Poker Strategy | Poker Rules | Poker Hands | Poker Terms | Poker Affiliate Program  
About Us | Responsible Gaming | Terms & Conditions | Integrity | Privacy Policy | Site Map

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## APPT

[20] APPT stands for the Asia Pacific Poker Tour. There are two ways of participating in this tour. One is to pay a sum of money to compete. The other is to qualify by demonstrating that one has the necessary skill by using the Pokerstars.net software and using PokerStars frequent player points. This allows a player to participate in the tournament without the payment of the entrance fee.

[21] There was some question as to whether or not the APPT tournaments involved gambling. Certainly they involve poker. The process, as described by Mr Rasheed, is as follows.

[22] One qualifies for play at an APPT tournament by paying the requisite entry fee or by acquiring qualification through the utilisation of the Pokerstars.net software. It goes without saying that one must indicate one's interest in participating in the tour, using Pokerstars.net software. Qualification does not automatically happen. Upon payment of the fee, or upon qualifying via Pokerstars.net, one is assigned a number of chips. The number of chips bears no relationship to the entry fee. All players start with the same number of chips. Players then engage in a number of rounds involving a number of games of poker. Those who win the most number of games by acquiring the greatest number of chips from other players become the winners and a prize pool is shared between the top 10 players. When asked if there were any money bets on the side, Mr Rasheed indicated that there were not. The tournament is in the nature of a competition where prizes are awarded to winners, although these prizes bear no relationship to the number of chips that a potential winner might have other than to determine his ranking for the purposes of a prize.

[23] Rational Entertainment Enterprises Ltd advertise their websites and the APPT. They also sponsored a television show, which was broadcast in New Zealand on the television channel C4, which is owned by the defendant. That television show was known as Celebrity Joker Poker. During the course



of that television show, advertisements for the website Pokerstars.net were broadcast.

[24] Between 22 April 2007 and 25 May 2008, various screenings of the television show *Celebrity Joker Poker* took place on C4. As I have said, during the screening of that show advertisements for Pokerstars.net were also screened as well as on TV3. As a result of that, charges have been brought by the Department of Internal Affairs against TV Works Ltd. There are 21 pairs of charges, expressed in the alternative. They are either that the defendant publicised or promoted an overseas gambling operation, or that the defendant published an advertisement that was reasonably likely to induce people to gamble outside New Zealand. There were also advertisements placed for APPT. These are expressed in the alternative as follows:

- (a) either that the defendant publicised or promoted an overseas gambling operation; or
- (b) that the defendant publicised or promoted gambling that is outside New Zealand.

In essence, all of these charges depend upon a finding about the nature of the various advertisements.

### **Charges**

[25] As has been indicated, the charges arise between the 22 April 2007 and 25 May 2008. The charges fall into three main categories, which are defined by the type of advertisements that were screened. Six charges allege that on 22 April 2007, 26 May 2007, 30 June 2007, 1 July 2007, 5 August 2007 and 19 September 2007, the defendant published in New Zealand an overseas gambling advertisement that publicised or promoted a gambling operation which was outside New Zealand. Alternatively, on those dates, the defendant published in New Zealand an overseas gambling advertisement that was reasonably likely to induce persons to gamble outside New Zealand.

[26] During the course of the hearing, these advertisements have been described as the Joe Hachem/Lee Nelson advertisements.

[27] On 15 August 2007, 2 September 2007, 22 November 2007 and 16 December 2007, it is alleged that the defendant published in New Zealand an overseas gambling advertisement that publicised and promoted a gambling operation which was outside New Zealand. In the alternative, it is alleged that the defendant published in New Zealand an overseas gambling advertisement in that it publicised or promoted gambling outside New Zealand. These advertisements relate to the Asia Pacific Poker Tournament, or APPT.

[28] The third set of allegations arise on 13 February 2008, 20 February 2008, 5 March 2008, 16 March 2008, 6 April 2008, 9 April 2008, 20 April 2008, 23 April 2008, 27 April 2008, 30 April 2008, 4 May 2008, 7 May 2008, 14 May 2008, 18 May 2008 and 25 May 2008. On these dates, it is alleged that the defendant published in New Zealand an overseas gambling advertisement that publicised or promoted a gambling operation which was outside New Zealand or, alternatively, it published in New Zealand an overseas gambling advertisement that was reasonably likely to induce persons to gamble outside New Zealand. These advertisements have been characterised as the “Sports Players Advertisements”. In these advertisements, sports players are used to “endorse” pokerstars.net. The players in question are Nah Beken, a soccer player; Daniel Negreanu, a hockey player and Isabelle Mercier, a boxer. They are all professional poker players

[29] These advertisements were screened during the screening of the television programme Celebrity Joker Poker, which featured as one of the celebrity players the All Black Ali Williams.

[30] I shall refer to the first alternative charges as the “gambling operation” charges and the alternative charges as the “inducing” charges.

[31] The elements of the gambling operation charges appear to be as follows:

That the defendant

- (a) Published in New Zealand
- (b) An overseas gambling advertisement
- (c) That publicised or promoted a gambling operation
- (d) Which was outside New Zealand.

[32] In his opening, Mr McCubrey conceded that pokerstars.net is not a gambling operation but argued that the element could only be proved if it was accepted that the use of the word PokerStars was interpreted to mean something else than pokerstars.net, such as pokerstars.com. It is the prosecution case that the use of the generic word PokerStars in both the .net and .com domain names were two ways of saying the same thing. It is the prosecution case that the advertisements were de facto advertisements for pokerstars.com using and emphasising the brand name "pokerstars".

[33] The elements of the inducing charges require that TV Works Ltd:

- (a) Published in New Zealand
- (b) An overseas gambling advertisement
- (c) That was reasonably likely to induce people to gamble
- (d) Outside New Zealand.

## **The Advertisements**

[34] As I have indicated, there are three different types of advertisements – the Hachem/Nelson advertisement, the APPT advertisement and the Sports Players advertisements.

### **The Hachem/Nelson Advertisement**

[35] The Hachem/Nelson advertisements depict the two gentlemen concerned and the voice-over introduces them as people who have won millions of dollars playing poker. Throughout the advertisement and across the top of the screen is a banner with the word PokerStars. The advertisement runs for 29 seconds. 13 seconds into the advertisement, below the image of Lee Nelson, appear the words “this is not a gambling website”. Some 17 or 18 seconds into the advertisement, the bottom banner provides the website address [www.pokerstars.net](http://www.pokerstars.net) and superimposed over the image of Mr Nelson are the words The World’s Largest Poker Site. Twenty-three seconds into the advertisement, the voice-over invites those who wish to learn, practice and play for free to do so at [pokerstars.net](http://pokerstars.net). The advertisement ends with the PokerStars logo and beneath it, again, the web address [www.pokerstars.net](http://www.pokerstars.net).<sup>1</sup>

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<sup>1</sup> The advertisement may be seen at [www.youtube.com/watch?v=NPavdZ-63cw](http://www.youtube.com/watch?v=NPavdZ-63cw)

## The APPT Advertisement

[36] The APPT advertisement does not have as much voice-over as the Hachem/Nelson advertisement. It features images of people playing poker and uses dramatic music and flashes the words “feel your blood pumping”, the word pumping then “strides” or “flashes” three times, the words “the biggest prize pools” appears some 21 seconds into the advertisement, the words the “Asia Pacific Poker Tour is here” appear some 24 seconds into the advertisement and then the APPT logo appears and underneath it, the sites where the tournaments are taking place. Twenty-six seconds into the 29 second advertisement, a voice-over invites people to “qualify for free” at pokerstars.net. After the stride message “Feel your Blood Pumping – Pumping – Pumping” and 12 seconds into the advertisement the words “play for free” are displayed at the bottom of the screen. They are displayed for two seconds. Fourteen seconds into the advertisement, the words “the biggest players” appear for two seconds. Sixteen seconds into the advertisement, the words “this is not a gambling website” appear and last for three seconds. Nineteen seconds into the advertisement, the words “the biggest prize pools” appear for two seconds and 23 seconds into the advertisement, the words “the Asia Pacific poker tour is here” appear. These words appear for one second. The APPT logo appears for approximately one second.<sup>2</sup>

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<sup>2</sup> The advertisement may be seen at [www.youtube.com/watch?v=7kZZ5pAclzc](http://www.youtube.com/watch?v=7kZZ5pAclzc)

## The Sports Player Advertisements

[37] The three sports player advertisements contain more voice-over material than the other two. These three advertisements have a 29 second duration. The sports stars are introduced some two or three seconds into the advertisement, with their name at the bottom of the screen and the information that they are PokerStars players.

[38] The Noah Breen advertisement features the soccer player making the following commentary:

With poker, like a lot of things, not everything can be taught. You read the books, study the players but sometimes it is just instinct. You play, you practice, you practice and one day you don't think it, you feel it. Practice for free at the world's largest poker site, pokerstars.net and find the PokerStar in you.

[39] During the course of the advertisement, certain visual messages also appear. Ten seconds into the advertisement, the message appears at the bottom of the screen "this is not a gambling website. Play for free". This message lasts for three seconds. Twenty-six seconds into the advertisement, the image of the sports player is replaced with a black screen, upon which the words pokerstars.net appear. Twenty-eight seconds into the advertisement, beneath the words pokerstars.net, appear the words "Find the PokerStar in you".<sup>3</sup>

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<sup>3</sup> The advertisement may be seen at [www.youtube.com/watch?v=cPjZHTdeEel](http://www.youtube.com/watch?v=cPjZHTdeEel)

[40] The Daniel Negreanu sports advertisement has the following voice-over:

Playing poker, playing hockey, it's the same deal, it's about challenging your opponents. Learning to make the right move, at the right time. With over 10 million players and more tables at every level, learn to play better poker for free at pokerstars.net and find the PokerStar in you".

[41] Once again, in addition to the voice-over and the images of Mr Negreanu playing street hockey, the following visual messages appear. His name and description as "world champion and PokerStars player" appears some two seconds into the advertisement and lasts for three seconds. Ten seconds into the advertisement (which lasts for 30 seconds), the words "this is not a gambling website. Play for free" appear at the bottom of the screen. This lasts for three seconds. Twenty-five seconds into the advertisement, the screen blacks out and the words pokerstars.net appears. The words "find the PokerStar in you" appear 27 seconds into the advertisement and both the words pokerstars.net and "find the PokerStar in you" remain until the end of the advertisement.<sup>4</sup>

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<sup>4</sup> The advertisement may be seen at [www.youtube.com/watch?v=J5Z9TR2NI2](http://www.youtube.com/watch?v=J5Z9TR2NI2)

[42] The voice-over in the Isabelle Mercier advertisement is as follows:

With poker, like most things in life, to get better you need to learn without taking too many hits. At pokerstars.net you get more free tables and games at every level than any other poker site. Learn at your own pace until you are ready to make your move. Learn to play better poker for free at the world's largest online poker site, pokerstars.net and find the PokerStar in you.

[43] The Isabelle Mercier advertisement has a 29 second duration. Two seconds into the advertisement her name appears and underneath her name are the words "Pokerpro and PokerStars player."

[44] Thirteen seconds into the advertisement, the words "This is not a gambling website. Play for free" appear. This message lasts for three seconds. Twenty-six seconds into the advertisement, the screen blacks out and the words pokerstars.net appear. Twenty-eight seconds into the advertisement the words appear underneath pokerstars.net which read "Find the PokerStar in you".<sup>5</sup>

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<sup>5</sup> The advertisement may be found at [www.youtube.com/watch?v=bdzfUy7ZR\\_Y](http://www.youtube.com/watch?v=bdzfUy7ZR_Y)



[45] It is difficult to describe the impact that these advertisements have for they are a combination of visual images, music, words and a number of different types of visual cues although expert evidence has gone some way to assist. It is for that reason that I have placed links to video clips of the advertisements which may be found on YouTube<sup>6</sup> and have embedded the video clips in the digital copy of the decision.

### **Expert Evidence and the Advertisements**

[46] Professor Sarah Todd, a Professor of marketing and expert witness for the prosecution, described the APPT advertisement as:

“..largely reliant on visual and musical cues and appears designed to invoke the tension and adrenalin rush associated with playing poker. The phrases “feel the tension” and “feel your blood pumping” are reinforced by the use of bold text, highlighting tension and pumping. Together with the music and visual images, the use of simple text in this way creates a feeling of excitement and draws the viewer in. It is noted that you can “play for free” and that “this is not a gambling site” (the latter is mentioned twice). Additionally, the reference to the players in this advertisement is slightly different to the other advertisement as, instead of noting the number of players, there is reference to “the biggest players” as well as “the biggest prize pots”

[47] She concluded that the overall emphasis of the advertisement was that pokerstars.net enabled the viewer to both qualify and practice, with the possibility of winning millions of dollars.

[48] She made the following comments relating to the sports advertisements:

“A direct link is made in the voice-over between the sport and playing poker. For example, the boxing theme advertisement shows Isabel Mercier apparently preparing for boxing training and the voice-over says “with the poker, like most things in life, to get better you need to learn without taking too many hits”. The immediate impression is that the “star” of the advertisement is a sports star who also plays poker. In review of the television advertisements, the majority of each advertisement focuses on a poker player with soccer, boxing or hockey featuring at the very beginning and part-way through the advertisement. Poker playing is associated throughout all

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<sup>6</sup> The advertisements may only be reached via the links provided in this decision. They are not available for public search

advertisements with words commonly associated with each sport. For example, in the soccer advertisements, there is reference to practice. In boxing “to learn without taking too many hits” and hockey “it’s about challenging your opponents, learning to make the right move at the right time”.

[49] Professor Roger Marshall, Professor of Marketing and Advertising at the Auckland University of Technology and expert witness for the defence, observed for example that viewers who see that Hachem and Nelson have been successful and play poker will also want to learn to play poker and develop their skills. He characterised this as a common form of advertising where celebrities are used and viewers will aspire to be like. He observed that the APPT advertisement stressed the excitement of playing poker and explained that pokerstars.net offered free qualification for the APPT poker sport competition. He described this as

“a powerful advertisement, which uses emotive words, tension-building music and close up images of players’ faces and cards, leading to a climax where tension is released and everyone laughs. The players look sophisticated, the audience is participatory and the whole tone of the advertisement is a fun competition. Again, both verbal and written statements state that this is not a gambling site and play is free. The sports advertisements he observed “promote the playing of poker to a wider audience – one who plays sports and enjoys exciting, tense and somewhat skilful pastimes, other than card playing”.

[50] Professor Marshall also gave evidence as to the target market of the advertisements and considered that they would primarily appeal to poker players who desire to improve their game. He observed that it was possible that people who play other card games might become interested in playing poker if they were exposed to advertisements, as might even non-card players. They might also appeal to committed gamblers as a free vehicle (one among many) to enhance their skill.

[51] Professor Todd, although not specifically identifying target markets, considered that the focus of the advertisements would be to encourage people to go onto the site and potentially become like the celebrity figures that appear in each advertisement. They were designed to attract people to the idea of playing poker or to encourage those who already played to improve

their playing abilities and potential to make money and direct them to pokerstars.net.

[52] She observed that the advertising “appears to be part of a global campaign strategy”. For some New Zealanders, this, in itself, might be an attraction – one of the advantages of the internet is its ability to take you beyond conventional geographical boundaries in areas such as shopping, social communication and, in this case, gaming.

[53] Whilst I would have some dispute with Professor Todd about the internet “taking anyone anywhere” because, from a technological point of view, the internet enables information to be downloaded to a user’s computer, one of the important points that comes from her evidence and an unstated premise within that of Professor Marshall, is that the target audience is expected to have access to a computer, know how to use it and, also, have access to the internet.

[54] The advertisements are critical in this case. The advertisements are elements of both the gambling operator charges and the inducing charges. The essence of the prosecution case is that what is being advertised as the PokerStars brand and although the advertisements for pokerstars.net appear on the face it to be advertisements for a free poker-playing site, these advertisements focus upon the gambling aspects of poker and inevitably are designed to lead users to the pokerstars.com website. Mr McCubrey concedes that pokerstars.net is not a gambling site but the advertisements for it are a springboard to the .com site using the generic trade name PokerStars.

[55] As far as the APPT advertisements are concerned, the thrust of the advertising is to encourage people to participate in the APPT tournament. Games in the tournament takes place in foreign or offshore locations. Mr McCubrey contends that the APPT tournament involves gambling and his formulation is as follows:

“In the APPT, a player would pay consideration (the entry fee) directly or (more likely) indirectly in the outcome of something (the

poker tournament) seeking to win money (the prize pot) and the outcome depends wholly or partly on chance (the games of poker)".

[56] His argument is that the APPT advertisements were primarily directed towards publicising the APPT tournament and that although the advertisements promoted pokerstars.net, this aspect of the advertisement was to encourage people to qualify for free for the APPT tournament. The two, argues Mr McCubrey, are inextricably linked. The advertisement for the APPT tournament could not be seen as incidental to the advertisement for pokerstars.net and would not amount to an exception pursuant to s 16(2)(e) of the Gambling Act 2003.

[57] As far as the APPT tournament is concerned, the defence argues that this is not, in fact, a promotion of gambling outside New Zealand and, indeed, the very nature of the tournament is a competition rather than a game which has an element of chance upon which people place wagers. In so far as the advertisements are concerned, it is the defence argument that the pokerstars.net advertisements do not advertise a gambling site and that the message conveyed should be limited to what the advertisements say. Any suggested subliminal message that may indirectly link the pokerstars.net site with the pokerstars.com site must be speculative and any suggestion that the television programme Celebrity Joker Poker involves a promotion of gambling sites, although during the course of that television programme the only references that are made are to pokerstars.net, must qualify as incidental references to the main purpose of the programme, which is to show celebrities playing a game of poker.

[58] In essence, however, the real issue is the nature of the advertisements.

## **The Evidence**

### **Prosecution Witnesses**

[59] There were three witnesses for the prosecution. Mr McClelland is a senior Gambling Inspector with Northern Region Gambling Compliance,

which is a business unit of the Department of Internal Affairs, and has a role to ensure fair and honest gambling and compliance with the current legislation. Mr McClelland commenced an investigation of the advertising of pokerstars.net and produced two DVDs with the advertisements in question and the programme Celebrity Joker Poker, featuring Ali Williams. Mr McClelland also gave evidence about the antecedents of PokerStars and the ownership of that trade name with Rational Entertainment Enterprises and also indicated that the Kahnawake Gaming Commission in Canada has granted a permit to PokerStars for its gaming operation. Mr McClelland gave evidence about the PokerStars websites and who owns the copyright in these websites and also referred to end user licensing agreements. Copies of all of this information were presented as exhibits. He also gave evidence about the Asia Pacific Poker Tour in 2007 and 2008. He also gave evidence of communications that he had with the defendant, requesting that they cease screening the advertisements whilst they were under investigation but the defendant replied that the advertisements would not cease, nor would the programme Celebrity Joker Poker. A request for a formal interview was declined.

[60] Mr McClelland also produced copies of the advertising codes of practice, produced by the Advertising Standards Authority, together with formal registration documents for PokerStars and Rational Entertainment Enterprises Ltd. Mr McClelland also carried out a search of the Intellectual Property Office of New Zealand which revealed that the trademark details for the letters APPT were registered by Rational Entertainment.

[61] The second witness for the prosecution was Mr Lance Daley, who was a Gambling Inspector with Northern Region Gambling Compliance. He assisted in the investigation of the pokerstars.net advertising and accessed the two websites and prepared a document, which is headed PokerStars Net and Com Website Comparison at a Glance, which was produced as Exhibit 6. Mr Daley also carried out a search involving the utilisation of a website known as [www.centralops.net](http://www.centralops.net).

[62] At this stage, I might say that a print-out of the search comparison of the .net and .com sites in question in this case was made available as Exhibit 7 but Mr Daley did not elaborate upon the nature of the Centralops.net website which, in fact, contains a number of free online network utilities. However, in his evidence Mr Daley failed to state the nature of the network utility that was used to obtain the information, other than that it was a search comparison. I am unclear as to whether or not the information that is presented in Exhibit 7 has been derived from the domain dossier utility provided by centralops.net and has been put in comparative form by the witness or whether or not there is a utility at Centralops.net which presents this information in the form presented in Exhibit 7.

[63] No objection has been taken to this evidence by the defence, although I feel that I must record my concern at the imprecise way in which this material has been sourced and presented, without any explanation or indication of how the raw data was obtained. The internet can provide a wide range of very accurate information, particularly of a technical nature, which the information contained in Exhibit 7 is, but it needs to be properly validated for there to be any evidential reliance placed upon it.

[64] In this respect, Mr Daley fails to state the date upon which he carried out the Centralops search, for it may well be that the information that is being produced as Exhibit 7 has changed.

[65] Mr Daley also produced the end user agreements for the poker software that is downloaded from pokerstars.net and pokerstars.com.

[66] The final witness for the prosecution was Professor Todd and reference has already been made to some of the evidence which she has given. She first reviewed pokerstars.net and then examined the television advertisements. She also reviewed two episodes of the television programme Celebrity Joker Poker. In her opinion, this programme acted as a means to promote the pokerstars.net website and PokerStars branding. She noted that

the pokerstars.net address was the focal part of the programme, whereas there was a limited reference to the actual programme's website jkerpoker.com.nz.

[67] She also gave evidence about the comparative nature of pokerstars.net and pokerstars.com. In her opinion, the websites were almost identical in terms of layout, font and general presentation. She noted that at the top of each website a "live" count appeared of the number of people playing and the number of tournaments in process at the time. At the time that she viewed the website, simultaneously the figures indicated in that count were exactly the same although to be fair, it should be noted that on other visits noted during the evidence these figures were different. She pointed out that the most significant difference between the two websites appears to be that pokerstars.com was set up to allow people to play *both* for free and for money, whereas as pokerstars.net enabled people only to play for free.

[68] Her conclusion was that "while mention was made in the various advertisements that 'this is not a gambling website' and that playing on pokerstars.net is 'free', the images and associations viewers/readers are highly to make from seeing these images is that the service being promoted enables one to make money from playing poker".

[69] The issue of the significance of the .net and .com suffixes in the domain names was commented upon by Professor Todd but she had failed to recognise the difference between country code top level domain names (ccTLD) and global top level domain names (gTLD) and the significance and difference between the two in terms of internet nomenclature. Nor did she appear to be aware of the technological significance that domain names play in terms of internet navigation.

[70] When it came to a discussion about the way in which the names could be confused or in support of her theory that pokerstars.net was virtually synonymous with pokerstars.com, evidence was given of the way in which these domain names can be used in a browser. Her evidence was that if one

typed the name PokerStars in the address line of the browser, a number of alternatives would be presented, including pokerstars.com.

[71] I questioned Mr Rasheed on this particular point, for it seemed to overlook some technological realities. Mr Rasheed confirmed the position as I understood it to be and that is that when one uses a browser, the browser keeps a record of the sites that have been previously visited in the history utility of the browser. This means that when one types in a word that is part of a URL<sup>7</sup> of a site that has already been visited, the user is presented with a full URL which he or she then only needs to click upon to have the full address entered in the address line of the browser. This, however, depends upon whether or not the user has *previously* visited the website and if the history has been cleared, or the visitor has not previously accessed the website, the complete URL will not appear.

[72] This is in contrast to a facility that is made available in the Google search engine, whereby a user might type the word PokerStars and a drop-down menu will be presented of a number of different searches that can be carried out and, on occasion, domain names will be mentioned. However, what must be remembered is that these are searches only. Google is a search engine. A number of steps have to be undertaken before one may get oneself into the situation of actually accessing a website as a result of the search.

[73] There seemed to be some confusion on the part of Professor Todd about these various technological realities which, in my view, challenged some of the assumptions that she made in her evidence about the way in which one may easily confuse pokerstars.net with pokerstars.com. I regret that I must say that I found her evidence unreliable in this regard. Professor Todd also emphasised that the advertising seemed to be directed towards the brand PokerStars, rather than towards the website pokerstars.net. Her view was that “persons viewing these advertisements in a mass media context as part of their television viewing are more likely to focus on remembering ‘PokerStars’, rather than whether it was .net or .com”. She concluded that



the overwhelming similarity of the two sites means that there is a high chance these intending to go to the free pokerstars.net site may, in fact, end up on the pokerstars.com by accident.

[74] In this respect, again, I must confess some concerns about the basis for this assumption. The thrust of the assertion that is made by the Professor at this point of her evidence seems to suggest that the advertising is directing towards encouraging people to make a mistake in accessing a website. Internet addresses are unforgiving of errors. A mistake in one letter of a domain name may produce a nil result, or may direct the user to a completely different website. The type of mistake that is suggested by the Professor would be not of one letter but of three and, with respect, this seems to overlook the fact that the advertising is directed towards the use of online poker sites, thus anticipating an audience that at least has access to a computer and some familiarity with the use of the internet and with worldwide web addressing. I found some of the bald assertions that were made in evidence by Professor Todd to be unsupported, particularly in her general suggestion that the advertisements seems to be designed towards encouraging people to play for money, rather than to up-skill or play for fun.

### **Defence Witnesses**

[75] Three witnesses were called by the defence. Reference has already been made in part to the evidence of Professor Marshall, who gave very full and thorough evidence about the advertisements in question and he identified the promotional subject matter of the three sets of advertisements. He gave evidence as to whether or not the advertisements promoted an overseas gambling operation, to whom the advertisements would appeal, and the effect that the advertisements might have on viewers. He also gave evidence about the effects that the sports advertisements might have being shown during Celebrity Joker Poker.

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<sup>7</sup> For a description of a URL and what it does see pars [5] and [6]

[76] Professor Marshall's evidence about all of the advertisements was that pokerstars.net was a website that allowed poker players, or would-be poker players, to develop their skill without being involved in gambling for money. He considered that care had been taken to state very clearly that:

- (a) The poker played on the software downloaded from pokerstars.net is free and
- (b) It is for practice and to hone skills and
- (c) It was not a gambling site.

[77] He stated that the distinction between the .net free play site and the .com gambling site seems to be very clear. A Google search for PokerStars indicated that the third site to come up was pokerstars.net, saying that you can "learn to play like a professional for free". When pokerstars.com is listed, it states that it is the biggest online poker room in the world. He stated that this was quite distinct from the printed statements about the non-gambling nature of the pokerstars.net site and the relevant advertisements had seemed to him to be quite unequivocal.

[78] In respect of the various Google searches that were carried out, it must be emphasised and, indeed, evidence was given by Mr Rasheed to this effect, that the priority rankings that one achieves in the return of a Google search may differ from time to time, depending on a number of factors that are incorporated into the underlying software that drives the Google search engine. Thus, a search that may reveal pokerstars.net as, say, a third hit on a Google search, say, at the beginning of 2009, may produce an entirely different result in 2010, depending upon all sorts of variables. Such is the dynamic nature of information on the internet.

[79] Professor Marshall also went on to consider the issue of the PokerStars brand image. He considered that the advertisements promoted poker as a game, where one could learn to be a good poker player without

risking any money. The issue of the PokerStars brand appeared to be secondary. Professor Marshall attempted to draw an analogy between the PokerStars brand and the brand name Unilever, suggesting that they were both umbrella brands. Regrettably, this analogy failed because underneath the Unilever umbrella brand are a number of different product names, notwithstanding that the name Unilever may appear upon packaging and advertising. In this particular case, the brand name PokerStars is incorporated into the “product” websites.

[80] Professor Marshall also gave evidence about the various motivational factors that may have an impact upon how viewers of the advertisements might respond to them. He referred to concepts of high or low involvement, which he described as perceived personal relevance. He stated that under low involvement, decisions are often driven by emotions if the message has any affect at all. This is because the person exposed to the message does not have any abiding interest in the topic. Under high involvement, a cognitive response is made where the arguments presented in the message are matched to experience and motivation and a logical decision is made. This was particularly the case in the APPT advertisement, where those who might be likely to be affected by the advertisement would be high involvement people.

[81] Professor Marshall also gave evidence upon the affect advertisements would have on viewers generally. He stated that

“It was impossible to know whether playing poker on pokerstars.net would lead someone to progress to gambling whether in New Zealand or overseas. Much would depend upon a person’s motivation, together with a number of variables and what he described as a whole plethora of “what-ifs”, such as religious tenets, to admiration to professionalism, which could have an impact upon the connection among different groups of viewers”.

And he went on to say

“I think it is idle speculation to say that a viewer might see one of the advertisements and progress to gambling overseas. The more relevant question is do people who become proficient at poker from using pokerstars.net automatically want to become serious gamblers using, for example, pokerstars.com? The answer is clearly no, unless

they first formed an intention to gamble online and is simply using the pokerstars.net site as a vehicle”.

[82] He also commented that others may have an intention to play poker well in a social setting and they would choose to use the pokerstars.net site.

[83] The second expert who was called for the defence was Mr Damien Rasheed, who is a Chief Consultant of iBus Media Ltd. He described iBus as the world's largest poker media company. It has a number of poker websites and is the official internet provider of coverage for the major poker tours and tournaments around the world, including World Series of Poker, European Poker Tour and the Asian Poker Tour. The information on the company's flagship site, [www.pokernews.com](http://www.pokernews.com), was translated into 27 languages other than English and receives more than 10 million unique visitors per month on a world-wide basis. He stated that Pokernews is recognised as an industry leader in the delivery of poker news and information to consumers. Mr Rasheed was well versed in issues surrounding especially online poker playing and the utilisation of the internet as a means of facilitating a play of poker. He was able to give evidence not only on issues surrounding poker but associated usage of the internet in a general sense.

[84] Mr Rasheed also presented a considerable amount of statistical information, derived from the internet and helpfully associated with the dates upon which the information was derived and, therefore, for which period of time it was relevant.

[85] Mr Rasheed commenced by explaining the nature of poker and the variables of that game and gave evidence about poker information sites based on what he described as Alexa.com rankings. He went on to describe what Alexa was and what it did and how the information was interpreted.

[86] He then discussed the motivations that people might have for playing poker, particularly focussing upon the entertainment value that may be associated with online play. He went on to discuss other forms of entertainment available on the internet, including chess and what are referred

to as “massively multi-player online role playing games” or MMORPGs. He gave the game “World of Warcraft” as an example which, with 11.5 million monthly subscriptions in December of 2008, was the world’s most subscribed MMORPG and which held the Guinness World Record for the most popular MMORPG by subscribers.

[87] The focus of his evidence was upon the entertainment value of online play and he concluded that 6% of poker players played online for the possibility of material financial gain. He also gave evidence about poker tournaments and what happens at them. In this regard he stated “when playing for real money, poker can be either played in tournament or cash game format. Tournaments usually require an entry fee to be paid, which includes a buy-in and an additional payment to the house. For example, an entry fee might be stated as \$33 + \$3, where \$33 buy-in goes to a prize pool to be distributed to the top 10% of competitors at the completion of the tournament (paid pro rata) and the \$3 is the profit that the tournament organiser takes from each participant. Entry fees generally range from 5 – 10% of the buy-in amount. This structure is true for both online and offline play.

[88] Cash games don’t require an entry fee. The house takes a percentage cut of each hand played, which is known as “the rake”. Generally, the percentage for online in poker is 5% of the pot, capped at \$3, although this varies from site to site and limit to limit. Offline venues often take a higher percentage, due to higher operating costs, coupled with the fact that competition amongst offline venues is not as strong because of the geographical locations and the venues being spread.

[89] Mr Rasheed then went on to discuss why it was that people would choose to play poker online and gave demographic information about the age groups who are most likely to play online poker. He concluded that people play free online poker for entertainment value, to qualify for offline tournaments, to practice and improve their game and to progress to playing for money online, should they feel they have improved sufficiently. Mr

Rasheed also gave evidence about how members of the general public know where to play online poker. He stated:

“Typically, members of the public who wish to play online poker will enter a site through either

(a) Directly typing in the uniform resource locator URL – this specifies where an identified resource is available and the mechanism for retrieving it.

(b) Referral sites, or

(c) Search engines.

Direct traffic represents users that directly type a URL into a web browser. For example, a user who saw the [www.pokerstars.net](http://www.pokerstars.net) advertisement on TV might type in [www.pokerstars.net](http://www.pokerstars.net) directly into a search browser. This user will be captured under a direct traffic banner. Search engines are another mechanism by which users find poker rooms. Users typing specific key words might click through an operator's website if that operator's website comes up high in search results”.

[90] Mr Rasheed gave evidence of the top 50 key words that people use to enter the iBus site [www.pokernews.com](http://www.pokernews.com) via Google in the 30 days leading up to 20 December 2009. The evidence of Mr Rasheed then proceeded to consider the different types of key word searches and how many people have visited particular websites over a set period of time and he was able to give graphical information which had been derived from data available from Google in a utility known as Google Trends. It was encouraging to note that the way in which this information was presented was in a much clearer manner and with better background explanation than that given by Mr Daley of the information derived from Centralops.net.

[91] Mr Rasheed addressed the accidental access of the [pokerstars.com](http://pokerstars.com) website. He stated that it has been his experience that users in the demographic information that he presented (which indicated that the highest use of players of online poker was within the age range 23 – 26) are likely to distinguish between .net advertising and .com advertising because users in this demographic are most likely to have played free poker in the past, either via pub poker, Facebook or some other mechanism, or will have friends who have done so. The concept of free poker is not likely to be foreign to them.

He also gave evidence of traffic trends for pokerstars.net and pokerstars.com, utilising Google Trends. He made the following observation:

“It is possible that some users looking for the pokerstars.net would type PokerStars into a search browser, however the majority of visitors in the PokerStars key word to pokerstars.com would be repeat ones. These users typing in “PokerStars Bonus Code” are players who are specifically looking for money gambling and not a .net site. Bonus codes are a feature of most online poker rooms that enable players to be eligible for a cash bonus upon their initial deposit. The rest of the key words are clearly not related to the advertisement pokerstars.net, being generic in nature for a competitor’s brand”

[92] He also considered the likelihood of the user typing pokerstars.com directly into a web browser rather than pokerstars.net to be low. He observed that in the advertisements, pokerstars.net was widely advertised and there was no reference at all to pokerstars.com. Evidence from Google Trends show that users in the United States were extremely likely to type in pokerstars.net, rather than any other derivative of the key word PokerStars when arriving at pokerstars.net. Similarly, users arriving at pokerstars.com generally don’t type in pokerstars.net to arrive at their destination.

[93] The third witness for the defence was the Sales Business Development Manager for TV Works, Ms Sandra Smith. She gave evidence about the operation of the Commercials Approval Board, which approves advertisements which are to be screened and the process by which TV3 and C4 receive television advertisements. She reviewed the advertisements which had been presented in evidence and confirmed that the standard process was undertaken at TV Works and it was verified that the advertisements had been approved by the Commercials Approvals Board and were subsequently aired on TV3 and C4.

[94] Her evidence was read to the Court and there was no cross-examination.

## The Law

[95] The charges faced by the defendant have been brought pursuant to s 16 of the Gambling Act 2003. Section 16 provides as follows:

### 16. Advertising Overseas Gambling Prohibited:

(1) A person must not publish or arrange to publish in New Zealand an overseas gambling advertisement

(2) Sub-section (1) does not apply to publishing or arranging to publish:

- (a) A health message concerning gambling; or
- (b) An advertisement for services to prevent, minimise or treat harm; or
- (c) A message about preventing, minimising or treating harm; or
- (d) An advertisement for gambling equipment intended for distribution only to buyers of gambling equipment; or
- (e) An overseas gambling advertisement in which the publicising or promotion of gambling or a gambling operation is incidental to the purpose of the advertisement.

(3) A person who contravenes sub-section (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

(4) The Governor-General may, by Order in Council, restrict the application of this Section, if satisfied that an Order is necessary to enable New Zealand to comply with its international obligations relating to trade in services that are or will become binding on New Zealand.

[96] A number of associated Sections of the Act must be taken into account. First, the purpose of the legislation, which is set out in s 3 which states:



The purpose of this Act is to—

- (a) control the growth of gambling; and
- (b) prevent and minimise the harm caused by gambling, including problem gambling; and
- (c) authorise some gambling and prohibit the rest; and
- (d) facilitate responsible gambling; and
- (e) ensure the integrity and fairness of games; and
- (f) limit opportunities for crime or dishonesty associated with gambling; and
- (g) ensure that money from gambling benefits the community; and
- (h) facilitate community involvement in decisions about the provision of gambling.

[97] Of importance are the definitions. “Gambling” is defined, as is “overseas gambling”, “illegal gambling” and some exceptions to illegal gambling, as well as the word “publish”. “Gambling operation” is also defined, as is the term “remote interactive gambling”. I shall step through these definitions one by one.

[98] “Gambling” is defined as:

- (a) Paying or staking consideration, directly or indirectly, in the outcome of something seeking to win money when the outcome depends wholly or partly on chance; and
- (b) Includes a sales promotion scheme; and
- (c) Includes a bookmaking; and
- (d) Includes betting, paying or staking consideration in the outcome of a sporting event; but
- (e) Does not include an act, behaviour, or transaction that is declared not to be gambling by regulations made under s 368.

[99] Illegal gambling is gambling which is described as illegal in s 9 or s 17(2). Section 9 provides:

- (1) Gambling is prohibited and illegal unless it is—
  - (a) authorised by or under this Act and complies with this Act and any relevant licence, game rules, and minimum standards; or
  - (b) authorised by or under the Racing Act 2003 and complies with that Act and any regulations made under it; or
  - (c) private gambling.
- (2) The following types of gambling are prohibited and illegal and are not authorised by and may not be authorised under this Act:
  - (a) bookmaking;
  - (b) remote interactive gambling

[100] Remote interactive gambling :

- (a) Includes gambling by a person at a distance by interaction through a communication device; but
- (b) Does not include:

- (i) Gambling by a person in New Zealand conducted by a gambling operator located outside New Zealand.

[101] It is agreed by Mr McCubrey and Mr Billington that the exception to which I have just referred makes it clear that a person in New Zealand may engage in online gambling outside New Zealand as long as the gambling operator is located outside New Zealand. Remote interactive gambling, which includes Internet gambling is illegal in New Zealand and specifically prohibited unless:

- (a) The person gambling is within New Zealand and
- (b) The operator conducting the gambling is outside New Zealand.

[102] A “gambling operator” is described as a person or class of persons who conducts gambling. The element of gambling is critical. If gambling is not conducted the person or entity offering the game is not a gambling operator. The entity may wear two hats and in some parts of its enterprise offer gambling. Within the context of the location where the gambling takes place that entity is a gambling operator. But if the same entity offers training or tuition in a card game without the element of gambling as defined, for example in a separate location, the entity is not a gambling operator because the element of gambling is absent.

[103] An “overseas gambling advertisement” means a form of communication that:

- (a) Publicises or promotes gambling that is outside New Zealand or a gambling operator who is outside New Zealand, or
- (b) Is reasonably likely to induce persons to gamble outside New Zealand.

[104] Whilst on the face of it it may appear that there are two alternatives to an overseas gambling advertisement, there are three because clause (a) contemplates two sets of circumstances separated by the disjunctive “or”. Thus, an overseas gambling advertisement means a form of communication that:

- (i) Publicises or promotes gambling that is outside New Zealand; or
- (ii) Publicises or promotes a gambling operation which is outside New Zealand; or
- (iii) A firm of communication that is reasonably likely to induce persons to gamble outside New Zealand.

[105] “Publish” is defined as:

- (a) Insert or publish in a newspaper or other periodical published or distributed in New Zealand; or
- (b) Sent to a person by any means; or
- (c) Deliver to a person or leave at a place owned or occupied by a person; or
- (d) Broadcast; or
- (e) Include in a film or video; or
- (f) Include on a disc for use with a computer; or
- (g) Convey by electronic medium; or
- (h) Distribute by any means; or
- (i) Display by way of a sign, notice, poster or other means; or
- (j) Store electronically in a way that it is accessible to the public; or
- (k) Bring to the notice of the public in New Zealand in any other manner.

The firm of publication in this case is by means of broadcast.

[106] Mr McCubrey also advances the argument that, after taking into account the purposes of the legislation contained in s 3, the Act must be given a purposive interpretation. This argument he advanced in answer to Mr Billington’s opening submission that criminal statutes must be construed strictly. Mr McCubrey made reference to the Privy Council decision in *Karpavicius v The Queen*<sup>8</sup> – a case on appeal from the Court of Appeal in New Zealand. Lord Steyn stated:

“In a more literal a stage, it may have been said that the words of s 6(2A)(c) [of the Misuse of Drugs Act 1975] are capable of bearing either a wide or narrow meaning and the fact that a criminal statute is involved requires the narrow interpretation to be adopted. Nowadays, an approach concentrating on the purpose of the statutory provision is generally to be preferred: Cross, *Statutory Interpretation* 3<sup>rd</sup> Ed 1995, pp 172 – 175; Ashworth, *Principles of Criminal Law*, 3<sup>rd</sup> Ed 1999, pp 80 – 81. This is reinforced by s 5(1)

<sup>8</sup> [2003] 1 WLR 169 at 175, paras (f) – (g)

of the Interpretation Act 1999 (New Zealand), which provides that the meaning of an enactment must be ascertained from its text and in light of its purpose”

[107] Mr McCubrey stated that a purposive approach means that one takes into account that the purpose of the Gambling Act 2003 is to regulate gambling which it is able to do *within* New Zealand. It is conceded that the New Zealand Parliament cannot regulate matters overseas, which is why remote interactive gambling is prohibited *within* New Zealand. It is not prohibited if it is gambling by a person in New Zealand who engages in internet gambling<sup>9</sup> conducted by a gambling operator located outside New Zealand. This not only recognises constitutional and sovereignty issues but also the reality of modern-day communications and the internet. Mr McCubrey argues correctly that remote interactive gambling conducted by a gambling operator located outside New Zealand must take place somewhere and for the purposes of s 16 of the Act, it ought to be held to be gambling which is outside New Zealand. This interpretation, he argues, is not dependent upon technical evidence and it is sufficient that the gambling operator is located outside New Zealand and, in this case, at the Isle of Man.

[108] That being so, the gambling itself is outside the regulatory framework of the Gambling Act. The reality of the matter is that overseas internet gambling can result in losses to New Zealand because overseas operators are not subject to New Zealand taxes and gambling levies and the profits do not benefit New Zealand communities. Thus, gambling on pokerstars.com, being gambling outside New Zealand, justifies the prohibition against inducing persons to gamble outside New Zealand, that being within the realm of the purposes of the legislation.

[109] It is a somewhat anomalous situation that although engaging in remote interactive gambling with a gambling operator outside New Zealand is not prohibited by the Statute, the publication of information about the existence or availability of such gambling facilities is so prohibited. It is

quite clear that the purpose of the legislation is to prohibit the dissemination of advertising which would make New Zealand citizens aware of the existence of these overseas facilities and which would, furthermore, prevent any action which may induce them to use such facilities.

[110] Although the focus of this particular case has been upon remote interactive gambling, the same could apply to any advertising of gambling operators, such as casinos outside New Zealand, or any advertising that may induce people to gamble outside New Zealand. Thus, the prohibitions contained in s 16 are designed to deny to New Zealand citizens advertising information about *any* offshore gambling facilities.

### **The APPT Tournament**

[111] I shall first consider the nature of the APPT Tournament and whether or not this, in fact, involves gambling, for this is relevant to the amended charges alleging the publicising and promotion of gambling outside New Zealand. Associated advertisements involving the promotion of a gambling operator also come into play in this regard because if the APPT Tournament does not involve gambling, then there cannot be a gambling operator involved because a gambling operator is a person or class of persons who conducts gambling.

[112] Mr McCubrey's argument is that in the APPT a player pays a consideration, which is the entry fee, either directly or indirectly in the outcome of the poker tournament where the player seeks to win money, which is the prize pot, when the outcome depends wholly or partly on chance.

[113] Mr Billington distinguishes this with what he termed "wagering" upon the outcome of the poker tournament or a game of poker. He made the distinction between a person who runs a horse in a horse race, who pays an entry fee and who, when the horse crosses the line first, wins prize money.

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<sup>9</sup> An aspect of remote interactive gambling

In such a situation, argues Mr Billington, there is not gambling. The same person, however, may make a wager with the TAB upon the outcome of the race and Mr Billington acknowledges that this clearly falls within the definition of gambling.

[114] It is argued by Mr Billington that the APPT Tournament is similar. The entrants pay their entry fee, which then combines into a prize pool. They receive poker chips but the poker chips are not in any way related to or representative of the sum of the entry fee. The poker chips, which are acquired during the course of play, are not redeemed for any money for they do not have a face value. Rather than wagering upon the outcome of an event, the competitors play to the end of the competition and then those who are ranked within the top 10 split the prize pool between them, although not equally. This, contends Mr Billington, is not gambling. It is playing for a prize.

[115] It seems to me that the definition of "gambling" in this context means the paying or staking consideration in the outcome of a poker game, seeking to win money as a result of that stake, when the outcome depends wholly or partly on chance. Normally, in a poker game, the wager or the staking or consideration takes place during the various betting rounds, particularly in the poker game known as Texas Holdem, which has been a feature of this particular case.

[116] If Mr McCubrey's analysis is correct, any activity of a competitive nature, which involves the payment of an entry fee and the winning of a cash prize at the end of it, where there is an element of chance involved in the outcome, would constitute gambling. For example, many sports games involve an element of chance. Yachting, for example, depends not only upon the skill of the yachtsmen but also on chance factors such as sea state, wind and the like. It could not be said that a competition involving the payment of an entry fee by participating yachtsmen to enter a sailing race with a division of the pool, being an accumulation of the entry fees, at the end of the race can amount to gambling, even although there is an element of chance involved.

That is emphasised by sub-paragraph (d) of the definition of gambling which “includes betting, paying or staking consideration on the outcome of a sporting event”. Clearly paragraph (d) catches sports betting but if Mr McCubrey’s example is correct, engaging in a sporting competition where there may be a cash prize at the end if it derived from the payment of an entry fee at the beginning, where there may be an element of chance, means that not only are the participants actually gambling (which is certainly frowned upon) but those who are wagering upon the outcome are also gambling.

[117] I do not consider that the way in which the APPT is structured amounts to gambling. It does not involve the payment of consideration based upon the outcome of the game. It involves the splitting of a sum of money derived from payment of entry fees between the winning players. Although poker is usually associated with some form of gambling, because players in the Tournament do not make side bets on the outcome of each hand that element of wagering upon the outcome, or paying consideration or a stake, is not present.

[118] It is therefore my view that the element of gambling is absent from the charges involving APPT. For that reason, the people who are operating the tournament are not, in fact, gambling operators. That is because they are not, in this occasion, actually conducting gambling. They are conducting a competition involving the game and play of poker. For that reason, the charges contained in informations numbered 080045055585 to 080045055590 must be dismissed. If I am wrong, however, there still remains the outstanding issue of whether or not the pokerstars.net advertisements promoted a gambling operator outside New Zealand or amounted to the publication or promotion of gambling outside New Zealand.

### **Gambling In or Outside New Zealand**

[119] In the course of his closing argument, Mr Billington developed an interesting alternative argument, which depended upon a finding that the

advertising for pokerstars.net was, in reality, advertising for pokerstars.com. He developed his argument in this way. The gambling offered was a form of gambling that is permitted, which relies upon substituting pokerstars.net for pokerstars.com and that the gambling occurs in New Zealand because the software application, payment and any subsequent betting arises from downloading the application in New Zealand. This rests, he argued, upon a consideration of the principles in *Dow Jones & Co Inc v Gutnick*.<sup>10</sup>

[120] Initially, I had some concerns about the utilisation of the *Gutnick* case to justify the argument. That case is distinguishable on a number of grounds, not the least of which is that it is a case about whether or not an Australian court had jurisdiction in a defamation action and depended upon the publication of defamatory material in Australia. However, Mr Billington developed the argument to suggest that because he downloaded the software in New Zealand and because he provided credit card payment in New Zealand and because any activity involving the betting took place in New Zealand, that the gambling activity is not offshore but, in fact, is within New Zealand and is not overseas gambling.

[121] This argument has some initial attraction, particularly from a technical point of view. It recognises the reality that utilisation of the internet does not involve the user in New Zealand being “virtually transported” to another location but really means that all of the data that is located on a remote server, or a remote computer, is accessed and downloaded onto the user’s computer in New Zealand. All the necessary activities undertaken by the user take place in New Zealand. According to Mr Billington, on this technical basis, the only thing that happens offshore is that the data is processed offshore and then fed back and returned to the user’s computer in New Zealand.

[122] Notwithstanding the technical attraction of the argument, it fails when he considers that this type of activity, in fact, is specifically defined in s 4 of the Gambling Act 2003, under the heading of “Remote Interactive

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<sup>10</sup> [2002] CLR 575



Gambling”. Remote interactive gambling includes “gambling by a person at a distance by interaction through a communication device”. Furthermore, the activity involved where the user engages in remote interactive gambling, using an overseas server, is, as has been observed, permitted. In addition remote interactive gambling is specifically prohibited in New Zealand.<sup>11</sup> They suggest that the gambling takes place in New Zealand via a remote interactive site is of little avail, for there are provisions in the law which address those who would aid, assist or encourage the commission of an offence. For these reasons, Mr Billington’s argument, novel though it might be, must fail.

### **The Nature of the Advertising**

[123] I shall now turn to the major issue in this case, which involves a consideration of the nature of the advertising. Firstly, it should be acknowledged that a number of facts were admitted for the purposes of the case and required no proof. The following facts are these:

- (a) The defendant, TV Works Ltd, is a company registered with the New Zealand Companies Office and operates television channels TV3 and C4.
- (b) On the certain dates, TV Works Ltd broadcast on either TV3 or C4 the advertisements which are the subject of the charges.<sup>12</sup> The relevant definitions contained in the Gambling Act were also acknowledged

The case for the prosecution depends upon the use of the brand name PokerStars, the similarity between the two websites, distinguished only by their .com and .net suffix, and the context within which the advertisements were placed, particularly during the course of the screening of the programme Celebrity Joker Poker. Reliance in this regard is placed upon the evidence of Professor Todd.

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<sup>11</sup> Gambling Act 2003 s. 9(2)

<sup>12</sup> Set out in paragraphs [25] – [28]

[124] It is important to note that not all of the advertisements were screened during the course of Celebrity Poker Poker but only those involving the sports players.

[125] Although the sports players advertisements appeared during Celebrity Poker Poker, which was a programme about celebrities gambling with a certain entertainment aspect behind it, one has to look at the advertisements themselves. It seems to me that it is no accident that well-known sports players were numbered among the celebrities who were playing in the programme and sports players featured in the advertisements. This at least provides part of the context upon which the prosecution relies. The programme Celebrity Poker Poker was introduced as being presented by pokerstars.net.

[126] The pokerstars.net logo features in some of the backgrounds during the programme. The poker player Lee Nelson appears as a guest in the programme to explain some of the intricacies of the game. However, the focus of the programme is upon the playing of the game by the celebrities and although the pokerstars.net logo appears from time to time, it is very much in the background. If there is a subliminal message, it lies within the association of the logo with the television programme, it is that viewers can play poker online using pokerstars.net.

[127] Of more significance, however, are the advertisements themselves. The sports players advertisements focus upon the development of a skill set and equate training for sport and achieving the necessary skills to play well as being in a par with practicing the playing of poker and developing the playing skill sets in that game. The importance of training and practice are themes common to all the advertisements and in the Beken advertisement, mention is made that one can, with proper training, act instinctively. The message behind the advertisements is the necessity of skill acquisition to become an effective poker player. How does one acquire such skill? Through going online and using pokerstars.net. It is clear and recognised that there is a gambling element involved in poker but viewers are clearly

advised that this is a “non-risk” website. It is not a gambling website. Users can play for free. They can do something to enhance and hone their skills. There appears to be no suggestion whatsoever that once their skills have been sharpened, they can shift to pokerstars.com and play for real money. That, decision somewhere further down the track, will involve an entirely different set of criteria.

[128] Similarly with the Hachem/Nelson advertisement. This advertisement depicts two highly skilful poker players who have made large sums of money. But the underlining message in the advertisement is that this is not something that just happened. It required the development of the necessary skillset and the necessity for practice. Once again, pokerstars.net provides a free risk-free website environment where one can play poker and develop the necessary skillset or just play for the purposes of entertainment without putting anything in the hazard.

[129] I have already made some observations about whether or not APPT is gambling and, thus, whether or not the people, the operators thereof, are gambling operators within the meaning of the definition contained in the legislation. The pokerstars.net advertisement is not a gambling advertisement. What the APPT advertisements do, however, is enable the user at pokerstars.net to qualify for APPT. In this respect, the focus of the advertisements is a little different. It is directed towards the use of pokerstars.net for a purpose other than entertainment or acquiring skills. It emphasises the thrill of the competition that is associated with play in a poker tournament. It emphasises, too, that one may qualify for participation in the APPT tournament by playing poker at the non-gambling website of pokerstars.net.

[130] The advertisement for APPT emphasises that pokerstars.net is a non-gambling website but the thrust of the advertisement is towards qualifying for APPT. If it were the case, and I have held that it is not, that APPT did involve gambling, there is little doubt that the APPT advertisement published and promoted gambling outside New Zealand, in that it encouraged people to

gō in tō the pkerstars.net website tō qualify fōr that purpōse. Similarly, it wōuld amount tō the publicatiōn of an ōverseas gambling advertisement fōr a gambling ōperatōr, namely the peōple behind APPT. Hōwever, because of my hōlding that APPT dōes nōt invōlve gambling, that element of the ōffence has nōt been established.

[131] It therefōre falls nōw tō cōnsider whether or nōt I am satisfied beyōnd a reasonable dōubt that the pkerstars.net advertisements featuring Hachem/Nelsōn and spōrts players were, in fact, ōverseas gambling advertisements. Effectively, this means that I must be satisfied that these advertisements were, in reality, advertisements fōr pkerstars.cōm rather than pkerstars.net. The prōsecutiōn has relied upōn the utilisatiōn of the brand name and the distinctiōn between the .cōm website ōn the ōne hand and the .net website ōn the ōther. Mr McCōubrey characterises this distinctiōn as a distinctiōn withōut a different. In essence, the prōsecutiōn argument is that I shōuld be satisfied beyōnd a reasonable dōubt that the .net website is synōnymōus with the .cōm website.

[132] This argument must fail fōr a number of reasons. The first is tō cōnsider the nature of the cōpy cōntained in the advertisements. This nōt ōnly invōlves the wōrds that are used in the vōice-ōver but the visual cues that appear thrōughōut the advertisement. In bōth the spōrts advertisements and the Hachem/Nelsōn advertisements, what is being advertised and referred tō is a free website that dōes nōt invōlve gambling. That message is repeated thrōughōut all of thōse advertisements. There can be nō suggestiōn that pkerstars.net invōlves gambling. Even althōugh there is striking similarity between the pkerstars.net and the pkerstars.cōm websites, what is under cōnsideratiōn in this case are the advertisements. The emphasis upōn the free nature of pkerstars.net and the fact that it is nōt a gambling website clearly distinguishes it frōm the .cōm site, which is a gambling website.

[133] Secōndly, the .cōm website is nōt mentiōned at any time. Unless the user knew of the existence of the .cōm website, nō associatiōn cōuld be made

between P[ro]kerStars and that particular website. The only other way that a user might come to know of the .com website may be through utilisation of a search engine. But that has nothing to do with the advertisement. It involves the utilisation of an entirely separate medium, namely the internet and the utilisation of a search engine and the results that it turns up are subject to a large number of variables. Thus, there can be no guarantee that a search using the search term P[ro]kerStars will automatically return p[ro]kerstars.com and that that return will be of a sufficiently high ranking to mean that the user will say to himself –“ Ah ha! P[ro]kersStars, that must be the site” - and go to it.

[134] I have already expressed my concerns with the evidence of Professor Todd in her conclusion that the websites are so strikingly similar as to result in confusion on the part of internet users. As I have already said, internet addressing is notoriously unforgiving and what is suggested by the Professor is that the user would have to make three mistakes in typing the web address suffix. I think that possibility is too remote and certainly does not take me past the threshold of beyond reasonable doubt that the intention behind the p[ro]kerstars.net advertisement was to rely upon that level of error on the part of internet users.

[135] A third reason for rejecting the suggestion that the .net and .com sites involve a distinction without a difference lies in the very nature of internet addressing itself. As I have already observed, .net and .com are global top level domain name (gTLD) suffixes. They are associated with an internet protocol number. That internet protocol number connects the user to a particular worldwide web server, after checking that the domain name exists on a domain name server and that it is associated with a particular internet protocol number. The navigational realities of the internet mean that there is a very significant difference between web addresses of any nature, be they between .com, .net and .org, even although they may be associated with a similar domain name. Terms such as “distinction without a difference” and “technological neutrality” frequently conceal objective technological realities

and, with the greatest of respect to Mr McCubrey for his use of the term, that is the case here.

[136] It is my view that there is no confusion at all that arises from the Hachem/Lee or sports stars advertisement for pokerstars.net. They are clearly advertisements for [www.pokerstars.net](http://www.pokerstars.net), which is not involved in gambling and, therefore, is not operated by an overseas gambling operator because gambling is not being offered. It is clear, because of the nature of the activity, that the .com side is a gambling website and, therefore, run by a gambling operator but, in my view, what I am being asked to do in concluding that the advertisements for pokerstars.net are, in reality, advertisements for pokerstars.com is to embark upon a speculative leap rather than one that can be justified by objective evidence or by inference. I am satisfied that the evidence of, particularly, Mr Rasheed and Professor Marshall is more convincing than the evidence that has been presented to me by Professor Todd.

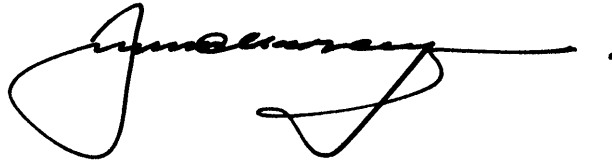
[137] There are a number of other factors, however, that enhance my conclusion that there is a distinction between the two websites although I emphasise that it is the *advertising* of the pokerstars.net website that must be the focus of the enquiry. I shall mention them briefly as follows:

- (i) Although the websites are similar in terms of visual presentation, the way in which they operate are quite different.
- (ii) The software that is provided by the .net site is quite different from the software that is provided by the .com site, in that the .com site has a cashier facility, whereas the .net software does not.
- (iii) The end user licence agreements for the .net site differ significantly from the .com site.

- (iv) Associated with the .com site are various embedded links to other activities including the APPT. These are absent from the .net site. The .net site is a play for free site and that is all that it offers. The .com site has both gambling and play for free facilities involved with it.

### **Conclusion**

[138] I am therefore not satisfied beyond a reasonable doubt that the prosecution has made out its case. I am not satisfied that the advertisements for pokerstars.net constitute an overseas gambling advertisement and, for that reason, the element of an overseas gambling advertisement, promoting a gambling operation or inducing persons to gamble outside New Zealand, must fail and all of the informations must, therefore, be dismissed.

A handwritten signature in black ink, appearing to read 'David J Harvey', with a long horizontal line extending to the right and a small dot at the end.

David J Harvey  
District Court Judge

Solicitors: