



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

GG 0281 & 0282/2015

Appellant: Gambling Commission
First Respondent: Greene King Brewing and Retailing Limited
Second Respondent: Greene King Retailing Limited

DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge H. Levenson

ON APPEAL FROM:

Tribunal: The First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No: GA/2014/0001 & 0002
Hearing Date: 8th December 2014

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Decision

1. **This appeal by the Gambling Commission (“the Commission) succeeds.** In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision(s) of the First-tier Tribunal made on 8th December 2014 under references GA/2014/0001 & 0002. I refer the matter(s) to a completely differently constituted panel in the General Regulatory Chamber of the First-tier Tribunal and direct that fresh decisions on the appeal(s) against the decision(s) of the Commission be made in accordance with the legal basis set out below and pursuant to further procedural directions to be given by or on behalf of the President of that Chamber.

2. Technically this appeal was brought in respect of two First-tier Tribunal decisions relating to the two limited companies named on the front sheet. However it is convenient to refer to the companies together as “Greene King” or “the company” and to proceed as though this were one case.

Hearing

3. I held an oral hearing of this appeal on 8th October 2015 at Field House (London). The Gambling Commission was represented by Philip Kolvin QC and Christopher Knight of counsel, instructed by the Solicitor to the Commission. Greene King was represented by Susanna Fitzgerald QC and Owain Draper of counsel, instructed by FraserBrown solicitors. I am grateful to them all for their assistance, notwithstanding the apparent inability of counsel on both sides to resist the occasional temptation to address me on the merits of the original licence applications and of the Commission’s decision.

Background and Procedure

4. I set out the background as I understand it to be and to the extent necessary to place my decision in context, but I am not to be taken as making any finding of fact on any disputed matter.

5. The Gambling Commission regulates all commercial gambling within the United Kingdom, other than spread betting. Local authorities which are licensing authorities have certain functions in relation to licensing premises for gambling. A gambling business must hold a relevant operating licence from the Commission. Holders of certain positions within a gambling business must hold a personal licence from the Commission. An application to a licensing authority for a premises licence may only be made by the holder of a relevant operating licence or a person who has applied for such a licence. I go into further detail below about the relevant legal provisions.

6. Greene King is a large business. It operates under various brand names over 1000 premises with alcohol licences. I am told by its representatives that it has never had any of these licences removed and neither it nor any member of its staff has ever been convicted of any regulatory offence in relation to alcohol. In many of its premises it has for some time provided bingo and other gambling facilities, including gaming machines. This has been done under statutory provisions allowing such operations to be carried out in premises with alcohol licences. I am told that Greene King has never been the subject of any regulatory action in relation to its provision of gambling facilities. However, under the Gambling Act 2005 there are limits on the types of gambling activities that can be carried out under those statutory provisions, and further licences are required for other gambling activities.

7. As explained in the decision of the First-tier Tribunal, under these provisions bingo is permitted only within strict limits. For example, there is a maximum stake of £5; no fee may be charged for playing the game; the operator may not make any deductions from the stake or winnings; there can be no linking with other premises to provide a bigger game with larger prizes and the "high turnover rule" must be observed. This is that if in any period of seven days the aggregate of stakes or prizes at bingo in premises exceeds £2000, the owner must notify the Gambling Commission. It is an offence to exceed that limit again in the next twelve months. If the Gambling Commission grants a bingo operating licence the high turnover rule does not apply, but the other restrictions remain in place unless a premises licence is also granted (by the local licensing authority) in respect of particular premises. In that case all of the restrictions referred to above are removed.

8. Similarly, a set of premises licensed for alcohol has automatic entitlement to only two gaming machines, of a type restricted to a maximum £1 stake and a maximum £100 prize. As I understand it these are labelled by regulations as category C and D machines. A bingo premises licence brings with it the right to have an unlimited number of machines in those categories together with a right to have other machines (not exceeding 20% of the total number of machines) limited to a maximum stake of £2 and a maximum prize of £400 (category B4) or £500 (category B3). Neither the Gambling Commission nor the licensing authorities can impose further conditions in respect of the number or type of gaming machines. As the First-tier Tribunal dryly commented (paragraph 20): "Gaming machines are lucrative".

9. There came a time when the company wished to provide more bingo and further gambling facilities, including higher stakes and additional gaming machines of a category not covered by the alcohol licence provisions. Its intention was to trial and monitor these further activities in a small number of premises to see, among other things, whether any regulatory difficulties were caused.

10. On 24th May 2012 Greene King applied to the Gambling Commission for the relevant bingo operating licences in respect of up to eight of its premises. If such licences were granted it would then apply to the local licensing authorities for the necessary premises licenses. After what Greene King's representatives describe as "a lengthy and exhaustive process of evaluation and assessment", and a hearing before its Regulatory Panel on 26th February 2014, the Commission's officials and the Panel

were “satisfied as to the suitability and competence of the [company], and persons relevant to the applications, to offer the proposed licensed gambling activities” (paragraph 65 of its decision of 12th March 2014). That conclusion is not challenged or in issue in the present appeal. However, the Panel refused to grant the licences which had been applied for.

11. The company appealed to the First-tier Tribunal against the decision(s) of the Panel. The appeal(s) was/were considered by Judge Warren, then the President of the General Regulatory Chamber of the First-tier Tribunal. On 8th December 2014 he allowed the appeal(s), quashed the decision(s) of the Gambling Commission and remitted the matter to the Commission with a direction that the applications be granted, anticipating that conditions of the grant would be agreed between the parties. In summary his reasoning was that, having accepted that Greene King was suitable and competent for the relevant purposes, the Commission refused the applications because of its concerns about premises. He stated in paragraph 31 of his decision:

“... but here in my judgment they were trespassing on territory which the Act assigns to licensing authorities ... the Commission’s purpose in refusing the applications, and indeed the only justification for doing so, is to prevent Greene King from applying for a premises licence”.

12. On 22nd December 2014 Judge Warren gave the Gambling Commission permission to appeal to the Upper Tribunal against that decision of the First-tier Tribunal and on 6th March 2015 I issued case management directions, including a direction under rule 5(3)(m) of The Tribunal Procedure (Upper Tribunal Rules) 2008 suspending immediately the effect of the decision of the First-tier Tribunal, such suspension to remain in force until the determination of the appeal or further direction. There has been no application to vary the suspension direction and it has remained in force but now lapses on the present decision being made.

The Legal Framework

13. The principal relevant statutory provision in the Gambling Act 2005 as amended. This is a massive piece of legislation containing over 360 provisions and 18 Schedules. Section 20 created the Gambling Commission (“the Commission”) to perform certain functions under the Act. It is not necessary to comment on all of these numerous functions but the following are particularly relevant. References are to sections of the 2005 Act unless otherwise indicated.

14. **Section 22** provides as follows:

22. In exercising its functions under this Act the Commission shall aim –

- (a) to pursue, and wherever appropriate to have regard to, the licensing objectives, and
- (b) to permit gambling, in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives.

15. **Section 1** provides as follows:

1. In this Act a reference to the licensing objectives is a reference to the objectives of -
- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
 - (b) ensuring that gambling is conducted in a fair and open way, and
 - (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

16. **Section 23** requires the Gambling Commission to prepare (after wide consultation) and publish a statement of principles to be applied by it in exercising its functions. The statement must in particular explain how the principles to be applied are expected to assist the Commission in its pursuit of the licensing objectives.

17. **Section 24** requires the Gambling Commission (after similar consultation) to issue one or more codes of practice about the manner in which facilities for gambling are provided, in particular describing arrangements that should be made by those providing facilities for gambling for the purpose of licensing objectives (b) and (c) and making assistance available to persons who are or may be affected by problems relating to gambling.

18. **Section 25** provides as follows:

25(1) The Commission shall from time to time issue guidance as to –

- (a) the manner in which local authorities are to exercise their functions under this Act, and
- (b) in particular the principles to be applied by local authorities in exercising functions under this Act.

(2) A local authority shall have regard to guidance issued under subsection (1).

(3) The Commission shall publish guidance issued under subsection (1).

Subsections (4) and (5) relate to consultation and subsection (6) lists the particular types of local authority which are local (licensing) authorities for the purposes of the Act.

19. **Section 33** provides that a person commits a criminal offence if he provides facilities for gambling unless one of a specified list of exceptions applies. Relevant for this case are (a) the exception referred to in section 33(1)(b)(iii) – limited facilities in premises with an alcohol licence, and (b) the exception referred to in section 33(3) – if

a person holds an operating licence authorising the activity and the activity is carried on in accordance with the terms and conditions of the licence.

20. **Section 37** provides that a person commits an offence if he uses premises or causes or permits premises to be used for certain activities, including providing facilities for playing the of bingo (37(1)(b)) or making a gaming machine available for use (37(1)(c)). Again there is a specified list of exceptions, including (a) the use of premises by a person if the use is authorised by a premises licence held by the person (37(2)) and (b) limited facilities in premises with an alcohol licence (37(7)(e)).

21. Part 5 of the Act (section 65 to 126) deals with operating licences. So far as is relevant sections 65 and 66 provide as follows:

65(1) The Commission may issue operating licences in accordance with the provisions of this Part.

(2) An operating licence is a licence which states that it authorises the licensee

- ...

(b) to provide facilities for playing bingo (“a bingo operating licence”)

...

(3) the issue of an operating licence does not affect the application of section 37.

66(1) An operating licence must specify –

(a) the person to whom it is issued,

(b) the period during which it is to have effect, and

(c) any condition attached by the Commission under section 75 or 77.

[These sections confer general powers on the Commissioner to attach conditions].

22. Applications are made under section 69, which specifies the details to be given. **Section 70** deals with the general principles to be applied to the Commission’s consideration of an application. So far as is relevant, it provides the following:

70(1) In considering an application under section 69 the Commission –

(a) shall have regard to the licensing objectives,

(b) shall form and have regard to an opinion of the applicant’s suitability to carry on the licensed activities,

(c) shall consider the suitability of any gaming machine to be used in connection with the licensed activities, and

(f) may consider the suitability of any other equipment to be used in connection with the licensed activities ...

(2) For the purpose of subsection (1)(b) the Commission may, in particular, have regard to –

(a) the integrity of the applicant or of a person relevant to the application;

(b) the competence of the applicant or of a person relevant to the application to carry on the licensed activities in a manner consistent with pursuit of the licensing objectives;

(c) the financial and other circumstances of the applicant or of a person relevant to the application (and, in particular, the resources likely to be available for the purpose of carrying out the licensed activities).

(3) [relates to casinos].

(4) The statement maintained by the Commission under section 23 must specify the principles to be applied by the Commission in considering applications under section 69.

...

23. Section 72 excludes consideration of the demand for relevant facilities:

72 In considering whether to grant an operating license the Commission may not have regard to –

(a) the area in Great Britain within which it is proposed to provide facilities, or

(b) the expected demand for facilities which it is proposed to provide.

24. There are various provisions, in particular section 79, allowing certain conditions to be attached to an operating licence. Section 79(4) provides (in part):

79(4) In regulating the licensed activities a condition may make provision about –

(a) the facilities that may or must be provided in connection with the licensed activities;

(b) the manner in which facilities are provided

(c) ...

(d) ...

(e) any other matter.

25. This is subject to **section 84**, which provides as follows:

84(1) An operating licence –

- (a) may not include a condition ... -
 - (i) requiring that the licensed activities be carried on at a specified place or class of place,
 - (ii) preventing the licensed activities from being carried on at a specified place or class of place, or
 - (iii) specifying premises on which the licensed activities may be carried on, but

- (b) may include a condition about –
 - (i) the number of sets of premises on which the licensed activities may be carried on;
 - (ii) the number of persons for whom facilities may be provided on any premises where the licensed activities are carried on.

(2) An operating licence of any kind may authorise activities carried on in more than one place.

26. Part 8 of the Act (sections 150 to 213) deals with premises licenses. The provisions that are mainly relevant for the purposes of this appeal are as follows.

150(1) A premises licence is a licence which states that it authorises premises to be used for –

- ...
- (b) the provision of facilities for the playing of bingo (“a bingo premises licence”),
- ...

153(1) In exercising their functions under this part [of the Act] a licensing authority shall aim to permit the use of premises for gambling in so far as the authority think it –

- (a) in accordance with any relevant code of practice under section 24,
- (b) in accordance with any relevant guidance issued by the Commission under section 25,
- (c) reasonably consistent with the licensing objectives (subject to paragraphs (a) and (b))

...

27. **Section 159** deals with the making of applications for a premises licence. An application is to be made to a licensing authority in whose area the premises are wholly or partly situated (159(2)). There is an important limitation in section 159(3):

159(3) An application may be made only by a person who –

(a) holds an operating licence which authorises him to carry on the activity in respect of which the premises licence is sought, or

(b) has made an application, which has not yet been determined, for an operating licence which authorises him to carry on the activity in respect of which the premises licence is sought.

The operating licence to which section 159(3) refers is the licence granted by (or applied for to) the Gambling Commission.

28. **Section 169** authorises a local licensing authority to attach conditions to a premises licence, but this is subject to section 169(4):

169(4) A licensing authority may not attach such a condition to a premises licence which prevents compliance with a condition of the operating licence which authorises the holder to carry out the activity in respect of which the premises licence is granted.

The Section 23 Statement

29. The contents of the Commission's "Statement of principles for licensing and regulation" of September 2009 are of the general kind that would be expected (or even obvious) but particularly relevant are the following paragraphs:

3.2 The Commission will regulate gambling in the public interest, having regard to, and in pursuit of the licensing objectives in the Act. In doing so the Commission will work with licensees and other stakeholders and will ensure that it takes into account:

- the need to protect the public
- the need to maintain public confidence in the gambling industry and the Commission
- the importance of declaring and upholding proper standards of conduct and competence by licence holders.

3.3 The Commission will adopt a precautionary approach when interpreting evidence, where this is appropriate, having regard to its duty to promote the licensing objectives in the Act.

4.25 With regard to 'vulnerable persons' the Commission considers that this group will include:

- people who gamble more than they want to

- people who gamble beyond their means; and/or
- people who may not be able to make informed or balanced decisions about gambling, for example because of mental health problems, learning disability, or substance misuse relating to alcohol or drugs.

The Gambling Commission Regulatory Panel Decision

30. References are to paragraph numbers of the Regulatory Panel’s decision. The Commission’s presenting officer at the Regulatory Panel hearing pointed out (paragraph 8) that:

“The application was novel and there were policy and legal questions arising from the environment in which the gambling would be offered) as to whether it was consistent with the Act and/or presented a risk to the licensing objectives”.

The panel’s findings run to three pages and it is not necessary to set them all out here, but they included accepting Greene King’s submission that the social side of bingo clubs lay at their heart (paragraph 48) but it “was not persuaded that there is no real difference between the way established bingo premises operate and what is being offered in the Applicant’s proposal” (paragraph 49). It endorsed the points made by the Commission’s officials “about the different expectations of consumers frequenting pubs and those frequenting bingo halls. In the latter case the sale of alcohol tends to be ancillary to the principal purpose of gambling, that is to say the provision of bingo” (also paragraph 48). The panel accepted that there was nothing in the 2005 Act which prevents the operator of premises which held an alcohol licence from applying for a bingo operating licence and a bingo premises licence (paragraph 50).

31. The substantive decision of the panel is in paragraphs 60 to 69 of the document. Having concluded that it was satisfied as to the financial and other circumstances of the appellants and as to their integrity, suitability and competence, the panel continued:

66. However, the Panel shares officials’ concerns about the development of commercial bingo in what have traditionally been pub premises (bringing with it, as it does, the availability, in that environment, of higher category gaming machines) and whether this has a potential to impact adversely on the licensing objectives. The Commission regulates gambling in the public interest and in that regard, the Panel is mindful that one of its core principles for licensing and regulation is to adopt a precautionary approach.

67. In carrying out its functions under the Act, the Commission must aim to pursue, and, wherever appropriate, have regard to the licensing objectives. The Commission must also permit gambling in so far as it thinks such permission reasonably consistent with the pursuit of those objectives

68. The Panel does not consider that granting these applications would be reasonably consistent with pursuit of the licensing objectives. In the Panel's judgment the provision of high stake bingo and category B gaming machines in a pub environment has the potential to jeopardize the second and third [licensing] objectives. So far as the second objective is concerned, the way in which, and environment in which, gambling opportunities are presented and advertised can impact on its fairness and openness. The third objective is that of protecting children and the vulnerable, who may attend such premises, from being harmed by gambling.

69. Accordingly, having had regard to the licensing objectives, to their findings first of an intention in the Act to create a graduated regulatory regime and secondly as to the different expectations of those frequenting pub or bingo premises as to their primary purpose, and taking a precautionary approach, the Panel has concluded that these applications should be refused.

The Luxury Leisure Case

32. Luxury Leisure Ltd v The Gambling Commission (GA/2013/0001) was an earlier decision of the First-tier Tribunal, made by Judge Warren on 13th May 2014. The appellant company held an operating licence from the Commission and also a betting premises licence from the local authority in respect of particular premises in Newcastle. The Commission found that in respect of those premises the appellant company was in breach of a particular condition of the operating licence and issued a written warning. The company appealed against the finding and the issue of the warning. Among other matters it argued that regulation of particular gaming machines in a betting shop was a matter for the local authority in connection with the premises licence. Allowing the appeal on other grounds, Judge Warren nevertheless said (paragraphs 23 and 24):

23. Reading the Act as a whole and taking special account of the Commission's responsibilities and the licensing objectives, I am not convinced that, apart from such express provisions as s86(1)(a), there are 'no go areas' for the Commission in respect of regulation. It seems to me to be in the nature of things that there might well be areas of overlap in which both local authorities and the Commission are empowered to impose conditions. It may be said that the statute itself contemplates such a result; see s169(4) which prohibits the local authority from attaching a condition to a premises licence which would interfere with the holder's duty to the Commission under an operating licence.

24. Turning to s86(1)(a), I agree that this prevents the Commission from attaching conditions about the number and categories of gaming machines to be made available under an operating licence; but this does not in my judgment exclude regulation by the Commission of any activity relating to FOBTs* (*A trade term for gaming machines in betting shops). Reading the statute as a whole it seems to me that it is open to the Commission to attach

conditions concerning what I might call the atmosphere in which various facilities, including gaming machines, are made available”.

The First-tier Tribunal Decision

33. The same leading counsel appeared before the First-tier Tribunal as appeared before me. Judge Warren noted (paragraphs 29 and 30):

29. I should add that Mr Kolvin QC at the hearing refined somewhat the arguments in relation to the licensing objectives. The Commission’s main concern is under the third objective to protect the vulnerable who, having entered the premises expecting them to be a pub, may then have their judgment affected by drinking.

30. I should add that these concerns reflect a well established strand of thinking in connection with gambling policy. There is a respectable school of thought which holds that there is merit in commercial gambling being restricted to what are obviously “gambling destinations” such as a betting shop, bingo hall or amusement arcade and that it should be discouraged as a casual attraction. It is true that there are still some gaming machines in pubs but it is in accordance with this line of argument that they are no longer permitted in, for example, taxi offices and chip shops

34. Before the First-tier Tribunal Greene King made a number of criticisms of the Commission’s reasoning and conclusions but Judge Warren “decided that the panel’s decision must be set aside because of a more fundamental error” (paragraph 31). He continued:

31 ... I take as a starting point the panel’s acceptance that Greene King were suitable and competent to offer the proposed gambling activities in a busy pub environment. On what basis then were the applications refused? The answer is the Commission’s concern about premises but here in my judgment they were trespassing on territory which the Act assigns to licensing authorities. I accept Ms Fitzgerald QC’s submission that the Commission’s purpose in refusing the applications, and indeed the only justification for doing so, is to prevent Greene King from applying for a premises licence.

35. Referring to the Luxury Leisure decision, the Commission argued that this was one of the many aspects of the Act in which the respective responsibilities of the Commission and the licensing authorities overlap. Judge Warren commented (paragraph 33):

33. I do not resile from those words but would test the proposition in this way. Here we have the Commission, wholly satisfied of Greene King’s suitability and of its competence to deliver on its proposals but, for solid reasons forming the view, as national regulator, that it does not want to see commercial bingo in pubs or in buildings whose primary purpose is a pub. It seems to me that the natural expression of those carefully held views would be to impose a

condition on the operating licence to the effect that the activity should not be carried out in pubs or in buildings whose primary purpose is that of a pub.

36. However, as he pointed out, section 84(1)(a) prevented the imposition of such a condition. He held that the appropriate course of action, if the Commissioner wanted to pursue such an objective, was to object to relevant applications to local licensing authorities on a case by case basis. In paragraph 40 Judge Warren summarised his decision:

40. In my judgment it is not open to the Commission to use section 159(3) of the Act to give them an effective right of veto on an application for a premises licence. Their role in respect of premises licences, as I have indicated, is to give guidance; make representations; even appeal against the licensing authority's decision – but not to usurp the role of decision maker.

37. The First-tier Tribunal quashed the Commission's decision and remitted the matter to the Commission with a direction that the applications should be granted with the usual general conditions as well as specific conditions agreed between the parties (with liberty to restore should difficulties arise).

The Commission's Arguments

38. References to paragraphs numbers under this heading are to paragraphs of the written "skeleton" argument from Mr Kolvin and Mr Knight. The basis of the Commission's case at the Upper Tribunal is encapsulated in paragraph 4:

"4. The Decision [of the First-tier Tribunal] is legally flawed in two ways:

(1) The [First-tier Tribunal] erred in law in finding that the Commission had taken into account matters which were exclusively for the licensing authorities on a premises licence application. This finding was contrary to the statutory scheme of the Act and the functions of the Commission as the national regulator;

(2) The [First-tier Tribunal] erred in law in requiring the Commission to issue an operating licence it had found to be inconsistent with the licensing objectives, in circumstances in which no factual finding had been made by the [First-tier Tribunal] which overturned that conclusion."

As I am allowing the appeal on the basis of (1) above, it is not necessary to consider separately the arguments about (2).

39. There was a certain amount of discussion about the policy behind the development of the legislation but, although very interesting, I do not find this particularly helpful for the purpose of the current decision. I do agree with them that (paragraph 39):

“The issue, however, was whether the proposal to provide high stake and prize commercial gambling as an ancillary attraction in alcohol-led non-bespoke gambling premises was consistent with the licensing objectives”.

40. They argued that the First-tier Tribunal did not seek to criticise or overturn the finding that the operational model was inconsistent with the licensing objectives but held that the Commission was obliged to grant the operating licence despite the Commission’s concerns because to do otherwise would be trespassing on the territory of the licensing authorities. This could not reflect the intended or actual meaning of the legislation, otherwise (paragraph 48):

“... when receiving applications ... for operating licences, including new business models, the Commission would be unable to consider the operating environment in which such provision would be made, however inconsistent it would be with the public interests to be protected by the Act”.

41. The Commission has an integral role as the national body with oversight over gambling policy and regulation, it issues statements of principles and codes of practice, it “acts as a gatekeeper” by issuing operating and personal licences, it provides guidance to local authorities and advice to government and its first duty is to have regard to the licensing objectives. Although local licensing authorities are empowered to consider matters relating to individual premises this does not mean that the Commission has no power to consider matters relating of the operating environment. Although the Act creates a dual regulatory structure “albeit one heavily balanced in favour of the Commission” and the functions overlap to some extent “In cases of overlapping statutory controls, the courts have consistently held that it is inappropriate to place a legal fetter on the discretion of either regulator by attempting to draw a clear bright line between their jurisdictions” (paragraph 52).

42. The Commission has the function of setting policy at a national level and where innovative applications are made which give rise to obvious issues of gambling as a matter of principle, regardless of the particular local areas to which they relate, it cannot be unlawful for the national regulator to express a view as to the wider issue of principle.

43. The Act “signifies the resolution of competing priorities” (paragraph 56). Section 159(3) gives priority to an operating licence and section 169(4) prevents a local licensing authority from attaching a condition that would defeat the purpose of the operating license. Section 84(1) “does not require the conclusion that the Commission is disabled from considering all questions about the environment in which it is proposed to provide gambling” (paragraph 57). Section 72 sets out the matters to which the Commission may not have regard and these do not include the operating environment. Where it was intended that particular matters be excluded from consideration, this was expressly provided and there are examples throughout the Act. Section 79(4) provides a broad power for the Commission to attach conditions to an operating licence, including the manner in which facilities are provided. This “inevitably includes consideration of the operating environment” (paragraph 60).

44. There is a need for consistency in gambling policy nationally and it would be contrary to the Commission's statutory duties under sections 22 and 70 to grant an operating licence if the Commission was of the view that an operational model cannot be delivered consistently with the licensing objectives. To do so would be to risk "important matters of policy being fought out on a local basis contrary to the aims contrary to the aims and objectives of the Act in creating a single national regulator" (paragraph 66). To suggest that the Commission refused the licences in order to prevent premises licence applications was to confuse the grounds for the refusal with the effects of the refusal.

Greene King's Arguments

45. Greene King supports the decision of the First-tier Tribunal and argues that the Commission has not shown any error of law in it. References in this section are to paragraphs of the company's written "skeleton" argument from Ms Fitzgerald and Mr Draper. The Commission should not be allowed to reopen the question of whether the company is suitable and competent to operate the relevant facilities consistently with the licensing objectives. (I observe here that that issue is only one of the factors to be considered under section 70 and is not in dispute at this stage of the present case.) In fact the company proposed to monitor closely the provision of further gambling facilities and discuss with the Commission any difficulties that it encountered. The 2005 Act "far from being set against gambling in places other than dedicated gambling destinations ... manifests a fairly permissive approach towards "pubs" and similar premises by granting them an automatic entitlement to provide gambling facilities and ... the right to apply to increase that entitlement" (paragraph 26). The problem with the Commission's decision was that the Commission had an unlawful reason and purpose for refusing the applications, which was to stop the company applying for premises licences. The power to determine premises licence applications is reserved to local licensing authorities and section 84(1) of the 2005 Act expressly prohibits the Commission from imposing conditions on operating licences that prevent the provision of gambling in a specified premises, place or class of place. The Act establishes a clear limit to the powers of the Commission and preserved a distinct role for the local licensing authorities. Had it been intended to grant the Commission a power to "pre-empt and effectively block a premises licence application" that power would have been set out expressly in the Act (paragraph 43.2).

46. The argument continued that the power to determine licence applications under section 70 of the 2005 Act is not one of the Commission's policy making functions. "The Commission must, as a rational and fair regulator, determine applications under section 70 on the particular facts of those applications and by reference to its published guidance (paragraph 46.2). The Commission was also wrong to rely on the concept of an "operating model" for the purposes of its analysis. It had to consider these particular applications rather than worry about setting a precedent. If similar licenses were required in respect of other establishments the whole process would have to start all over again. The general purpose of the regulatory scheme is to permit gambling.

Relevant Legal Authorities

47. This appeal is the first appeal in relation to the regulation of gambling that has come to the Upper Tribunal. I understand that, other than the First-tier Tribunal decisions, there is no direct authority on the point at issue. Several authorities were cited by the parties, not all of which have been very helpful in considering this appeal. A number relate to well established principles about the respect to be given to the judgment of an expert body, particularly an expert regulator. However, this approach is often self-cancelling and is of limited assistance when it comes to statutory interpretation. A number, in a variety of contexts, relate to well established principles about the right of a public body to adopt a policy and the fettering of discretion. I do not need to go through these in the present case. It is clear that the Commission was exercising rather than fettering its discretion.

48. The following other authorities seem relevant. I note them in chronological order. In Wolverhampton and Dudley Breweries Ltd v Warley County Borough Council [1970] 1 WLR 463 the recorder sitting at quarter sessions had dismissed an appeal against the decision of the local authority to refuse permits to place gaming machines in a number of pubs. The recorder's main reason was that alcohol and gambling did not mix. The Divisional Court (QBD) allowed the appeal by way of case stated. Mr Justice Ashworth said (at 468H) for the court (including the Lord Chief Justice):

“I need not refer in detail to the amending Act of 1964, but it seems to me that in the case of that legislation it is quite impossible to say that there is a parliamentary principle that drinking and gambling do not mix and to put that as the foundation of the refusal in the present case seems to me to be running completely counter to the view expressed by Parliament and recorded in the Act. Of course there are times when particular public houses may be so situated and so frequented that there is a particular menace in having drinking and gambling together, but ... it is noteworthy that the objections are not, as I see them, directed to these public houses at all; they are directed to public houses in general ...”.

49. However, that case arose under a different statutory regime and involved the decisions of a particular local authority. It cannot really be said to bind the exercise by the Gambling Commission over forty years later of its broad statutory responsibilities under the 2005 Act.

50. Gateshead MBC v Secretary of State and Northumbrian Water Group PLC [1994] Env LR 11 concerned the responsibilities of the Secretary of State and of HMIP in relation to planning permission for clinical waste incineration. Sir Jeremy Sullivan QC, then sitting as a Deputy High Court Judge said (page 23):

“Where two statutory controls overlap, it is not helpful, in my view, to try to define where one control ends and another begins in terms of some abstract principle.”

The decision in the case was upheld by the Court of Appeal at [1995] Env LR 35. The same approach was taken in Roger Lethem v Secretary of State and Worcester City

Council [2002] EWHC 1549 (Admin) by George Bartlett QC sitting in the Administrative Court as a Deputy Judge of the High Court (at paragraph 20).

51. R (ota of Westminster City Council) v Crown Court at Westminster [2002] All ER (D) 457 (May) concerned the decision by the local authority to adopt a policy with a presumption against the grant or extension of existing licences in areas which were already saturated with late night entertainment and refreshment uses. The owner of premises who had been refused a public entertainment licence on that basis appealed to the Crown Court, which found that the premises were adequately conducted with no recorded complaints against the premises or the owner or his company. The Crown Court allowed the owner's appeal, finding that it was not bound by the policy and could take account of all of the relevant evidence. The local authority applied for judicial review on the basis that the Crown Court had wrongly regarded the policy as no more than a factor to be weighed in the scales. The Administrative Court dismissed the application. Mr Justice Scott Baker said (at paragraphs 32 and 33):

32. In my judgment there is a considerable degree of ambiguity in the [local authority]'s policy guidance document. In these circumstances the Crown Court cannot be criticised for regarding the particular applicant's credentials and the fact that granting him a licence was not going significantly to affect the problem as overriding the policy presumption ...

33. It is both understandable and appropriate for the [local authority] to have a policy in the light of the problems it has identified in the West End. The policy needs to make it clear that it is not directed at the quality of the operation or the fitness of the licensee but on the global effect of these licences on the area as a whole. If the policy is not to be consistently overridden in individual cases it must be made clear within it that it will only be overridden in exceptional circumstances and that the impeccable credentials of the applicant will not ordinarily be regarded as exceptional circumstances ...

I see nothing in that case that is inconsistent with the decision that I have reached in this case.

52. More recently, Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28 concerned amendments in 2014 to the regulatory regime which extended the Commission's remit to cover not only operators based in the United Kingdom but also any operator which operated facilities which could be accessed in the United Kingdom. A trade association representing operators unsuccessfully sought judicial review of the new regulatory framework on a variety of grounds. In the Administrative Court Mr Justice Green referred to European Law jurisprudence to the effect that restrictions on gambling may be justified by overriding requirements in the public interest such as consumer protection, the prevention of fraud and "the prevention of incitements to squander money by gambling", such objectives being said to limit betting activities in a consistent and systematic manner (paragraph 89).

Conclusions

53. I emphasise that this appeal is not about the competence of Greene King as demonstrated hitherto. Nor is it about the Commission's approach to the issue of whether additional forms of gambling should be allowed in premises with an alcohol licence, although the arguments of the parties have strayed into these areas. The appeal is about whether the Gambling Commission had the power in law to make the decision it made or whether the First-tier Tribunal was correct in its conclusion that the Commission did not have that power. If the Commission did have the power to make that decision, then an appeal on the actual merits of the decision is to the First-tier Tribunal and not (at least, not directly) to the Upper Tribunal.

54. In essence I agree with the argument of the Gambling Commission as summarised in paragraphs 38 to 44 above. The combined effect of sections 1(c) (paragraph 15 above), 22 (paragraph 14 above) and 70(1)(a) (paragraph 22 above) is really to place on the Commission the main responsibility for ensuring compliance with the licensing objectives and, in particular, the protection of vulnerable persons (as referred to in the section 23 statement – see paragraph 29 above). The provisions of sections 159(3) (paragraph 27 above) and 169(4) (paragraph 28 above) make it clear that primacy is to be given to the decisions of the Commission on whether to grant an operating licence. In light of these provisions, it cannot really be the case that when such matters are at issue the legislation, having established the Commission and detailed its responsibilities, then requires the Commission to step back in individual applications and let the multitude of local licensing authorities deal with these national policy issues on a case by case basis. Neither can it be the case that in pursuit of such national policy objectives the Commission is required to conduct some kind of guerrilla warfare in each separate locality. That would run the risk of undermining the kind of approach approved in the Gibraltar case (paragraph 52 above) and of not controlling betting activities in a “consistent and systematic matter”.

55. Section 84 (paragraph 25 above) deals with the conditions that might or might not be included if an operating license is given. I do not see how, logically, the provisions of section 84 can determine whether an operating licence can be given.

56. The Commission's concern, although referring to pub premises because such premises were the subjects of the applications, was fundamentally about the availability of high or higher stakes gambling to those whose better judgment might be affected by alcohol. It seems to me that the First-tier Tribunal was in error in failing to approach the Commission's decision in this way.

57. On the basis of the above analysis, the reasoning set out in paragraphs 66 to 69 of the Regulatory Panel's decision (paragraph 31 above) is consistent with the powers of the Commission under the Gambling Act 2005 and this appeal by the Gambling Commission succeeds. Whether the decision was correct on its merits is an issue for another day in another tribunal.

H. Levenson
Judge of the Upper Tribunal
29th January 2016