



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Gambling**

Tribunal Reference: GA/2014/0001
GA/2014/0002

Appellant: Greene King Brewing and Retailing Ltd
Greene King Retailing Ltd

Respondent: The Gambling Commission

Judge: NJ Warren

DECISION NOTICE

A. Introduction

1. These appeals are brought under the Gambling Act 2005 (“the Act”). References to section numbers are references to the Act.
2. The Appellants are two companies within the Greene King Group. I shall refer to them both as “Greene King”. The group intends to develop bingo in the pubs which they own. They therefore applied to the Gambling Commission (“the Commission”) for bingo operating licences.
3. The applications presented a challenge for the Commission. On the one hand, most if not all bingo halls have an alcohol licence. Greene King could plausibly argue that if you can get a drink in a bingo hall, there is no reason why you should not be able to get a game of bingo in a pub. On the other hand, in the view of the Commission’s staff:-

“the applicants propose a new and potentially contentious premises environment by offering gaming in the form of bingo with its associated gaming machine entitlement in public houses/restaurants”.

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4. There followed a long process during which Commission staff tested the effectiveness of the Greene King proposals in detail. This culminated in a decision by a regulatory panel of the Commission refusing the applications on 12 March 2014. Greene King now appeals to the tribunal against the refusal.
5. At the hearing of this appeal Greene King were represented by Ms Fitzgerald QC and by Mr Draper. The Commission was represented by Mr Kolvin QC. I received supplementary written submissions after the hearing. I am grateful to both advocates and to those instructing them for the skilful and thoughtful submissions which I have received.

B. Background – the Licensing Objectives

6. Central to the Act and to any decision taken under the Act are the licensing objectives. These are to be found in s1 and are as follows:-
 - (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.

C. Background – the Licensing System

7. Typically, a person operating a bingo hall must have a “bingo operating licence”, described as “non remote” to distinguish it from bingo by phone, internet, etc. An ancillary remote licence will also be required to participate in “linked games”.
8. The decision maker on bingo operating licence applications is the Commission. The Commission, being the national regulator for gambling, has a general duty to pursue the licensing objectives and to permit gambling in so far as it thinks it reasonably consistent with pursuit of those objectives. The Commission prepares a statement setting out the principles upon which it will act (ss22-3).

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9. In dealing with applications for an operating licence the Commission must also follow some general principles (s70), it must have regard to the licensing objectives; form and have regard to an opinion of the applicant's suitability to carry on the licensed activities; and consider the suitability of any gaming machine to be used in connection with them. It may consider the suitability of any other equipment to be used: and may in particular have regard to the integrity of the applicant or of any person relevant to the application; the competence of the applicant or other relevant person to carry out the licensed activities in a manner consistent with pursuit of the licensing objectives; and financial or other circumstances.
10. The Commission may attach conditions to a licence. These are of two kinds. General conditions apply to all licences of a particular type. They are developed after a statutory consultation process and cannot be the subject of any appeal to the tribunal. Additionally, the Commission may attach a specific condition to a licence. The imposition of such a condition can be appealed to the tribunal. The Act imposes a number of restrictions on the power to impose conditions. See for example s84, s86-7, and s91(2).
11. When imposing conditions, the Commission is under a duty to provide for at least one person, in respect of each operating licence, to hold a personal licence. By s128, the process for operating licences applies also to personal licences. So the decision maker is again the Commission; the considerations set out in s70 apply; and there is a right of appeal to the tribunal.
12. Non remote gambling obviously needs premises and unless certain exemptions apply, the Act requires an operator to hold a premises licence, in this case a "bingo premises licence". Here the scheme is different. The decision makers are the licensing authorities, who are local authorities defined in s2. The principles to be applied by licensing authorities in taking their decisions are set out in s153. They must aim to permit the use of premises for gambling in so far as they think it to be in accordance with any code of practice or guidance issued by the Commission; reasonably consistent with the licensing objectives; and in accordance with the

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individual licensing authority's policy statement (see s349). Applicants do have a right of appeal but it is to the local magistrates' court, not to the tribunal.

13. The Act assigns a very different role to the Commission in respect of premises licences. They have a duty to give guidance to local authorities (s25). The Secretary of State has made regulations under s160 requiring any applicant for a premises licence to give notice of the application to, amongst others, the Commission. The Commission is entitled to make representations (s161); and effectively has the right to insist on the licensing authority holding an oral hearing (s162). The Commission is then given the right to appeal to the local magistrates if it disagrees with the grant of a premises licence (s206(2)).

D. Background – Bingo in Pubs

14. The Act has something to say about bingo in pubs; indeed, in accordance with the Act, quite a lot of bingo is already played in Greene King pubs when they are open for normal business.
15. Bingo is permitted, however, only within strict limits (s279). For example, there is a maximum stake of £5; the pub may not charge a fee for playing the game or make any deductions from stakes or winnings. Nor can there be any linking up with other premises to provide a bigger game with correspondingly larger prizes.
16. Additionally pubs must observe the "high turnover rule" (s281). If in any period of seven days the aggregate of stakes or prizes at bingo in a pub exceeds £2,000, the owner must notify the Commission. It is an offence to exceed that limit again in the next twelve months.

E. The Effect of a Bingo Operating Licence

17. What then would change if these applications were granted?
18. First, the high turnover rule would no longer apply – but the other restrictions on pub bingo would remain (s33(2)(a)). Second, Greene King could apply for a bingo

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premises licence. Only a holder of or an applicant for an operating licence can apply for a premises licence (s159(3)).

19. If an application for a premises licence were successful all of the restrictions on bingo in s279 would be removed in respect of those premises.
20. There would also be an effect on gaming machines. Gaming machines are lucrative. At present a pub has automatic entitlement to only two gaming machines of types restricted to a maximum £1 stake and maximum £100 prize; but a bingo premises licence brings with it the right to an unlimited number of machines in those categories together with other machines, not exceeding 20% of the total number, giving prizes of up to £400 or £500 (s172(7)). Neither the licensing authority nor the Commission can impose conditions in respect of the number or type of gaming machines – although the Secretary of State has power to change the general rules – s172(11).
21. (I observe that at one stage the possibility of accepting undertakings from Greene King limiting the number of gaming machines to be available was mooted. I agree with the panel that such undertakings are not appropriate).

F. The Decision of the Regulatory Panel

22. The panel gave these applications careful and anxious scrutiny and gave a fully reasoned decision. Of necessity, I can provide only a sketch of it here.
23. I have already indicated that Commission staff were concerned about the “new and potentially contentious premises environment”. They identified other issues which justified a referral to the regulatory panel. In the course of discussions, Greene King had agreed that each pub should have a personal licence holder. Commission staff wanted to see a list of the specific role or responsibilities of that individual. There was also concern that, if the primary purpose of the premises was that of a pub or restaurant, then managing the bingo and gaming machines would have a low priority and therefore potentially put at risk the licensing objectives. The original submission to the panel concluded by saying that the written policies and

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procedures proposed by Greene King met the Commission's standards but lacked an "indication how they will be put into practice in a busy commercial pub environment".

24. The first meeting of the panel was adjourned and by the time it reconvened these aspects had been resolved, subject to some agreed specific conditions being attached to the licence. The panel was therefore satisfied as to the suitability and competence of the applicants and persons relevant to the applications, to offer the proposed licensed gambling activities (para 65).
25. The panel rejected Greene King's argument that their proposals were not really any different from the way bingo halls with alcohol licences operate at the moment. They reasoned that pubs and bingo halls were different because of the different expectations of consumers frequenting them. Sale of alcohol in a bingo hall tended to be ancillary to the provision of bingo (para 49).
26. The panel accepted that the Act does not exclude pubs from the operating and premises licence regime (para 51). They found in the Act:-

"... an intention to create a graduated regulatory approach".

In their view:-

"... there must come a point within that escalating regulatory regime when an operator would have to decide what the primary purpose of their premises was; whether they were operating a pub or bingo premises", (Para 55).

27. The panel rejected a submission from Greene King that they should ignore the possibility that their decision would set a precedent. As national regulator of gambling, the wider implications of the decisions the Commission makes were a relevant consideration (para 56).
28. Notwithstanding Greene King's suitability and competence, the panel were concerned about the development of commercial bingo (and its accompanying gaming machines) in pubs and whether this had "a potential to impact adversely on

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the licensing objectives”. The panel stated that one of its core principles was to adopt “a precautionary approach” (para 66). They concluded that the provision of high stake bingo and higher category gaming machines in a pub environment had “the potential to jeopardise the second and third objectives”. Accordingly in the light of the “graduated regulatory regime” which they had found in the Act; and of “the different expectations of those frequenting pub or bingo premises as to their primary purpose”; and taking a precautionary approach, the panel refused the applications (para 69).

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 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.

G. The Flaw in the Panel’s Decision

31. Ms Fitzgerald QC made a number of criticisms of the panel’s reasoning and conclusions but I have decided that the panel’s decision must be set aside because of a more fundamental error. 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 their 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

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the applications, and indeed the only justification for doing so, is to prevent Greene King from applying for a premises licence.

32. Mr Kolvin QC submitted that there were many aspects of the Act, this being one of them, in which the respective responsibilities of the Commission and the licensing authorities overlap. He rightly reminded me of words I used in Luxury Leisure Limited v The Gambling Commission. There, in answer to a submission to the effect that only the local authority, not the Commission, could impose conditions in respect of gaming machines in a betting shop, I said:-

“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*. 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”.

*A trade term for gaming machines in betting shops.

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

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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.

34. At this point, however, the Commission runs straight up against s84(1) which provides as follows:-

“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 ...”.

35. In my judgment, s84(1) supports my interpretation of the structure in the Act for decision making. Parliament has concluded that questions about premises should be determined locally, having regard both to national guidance and to local criteria.

36. This territorial issue surfaced twice in the proceedings before the panel.

37. First, and this lends force to Ms Fitzgerald’s submission, Commission staff suggested to the reconvened panel that they should attach a condition to any operating licence preventing Greene King from applying for a premises licence. Such a condition would surely have run counter to s159(3) of the Act.

38. Second, at para 9 of their decision, the panel records Commission staff as expressing the following view:-

“Therefore, regretfully, officials recommended refusal of the application essentially for the reasons set out in para 17 of the further addendum namely that:-

- Whilst concern about whether any specific premises might create a risk to licensing objectives (for example as a result of detailed matters of layout etc.) might be argued to be matters that can properly be dealt with as part of the premises licence

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application, to which the Commission could object if it chose, the applications would set a national precedent that could not reasonably be managed by objecting to individual premises licence applications”.

39. I do not accept the implication in those submissions that licensing authorities are limited to considering details such as the layout of premises. As s153 demonstrates, they must, like the Commission, consider consistency with the licensing objectives. Staff may not relish the role of objector to premises licences but this, I have found, is the role carefully and specifically given to them by Parliament.

40. In my judgment, it is not open to the Commission to use s159(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.

H. Conclusion

41. For these reasons, these appeals succeed.

42. It seems to me, in terms of remedy, that the appropriate decision is for me to quash the Commission’s decision and to remit the matter to the Commission with a direction that the applications should be granted. The licences should have attached to them the usual general conditions as well as the specific conditions agreed between Greene King and the Commission. I do not foresee that this remedy will create any difficulty but should problems arise all parties have liberty to apply to the tribunal for the remedy to be more specifically defined.

NJ Warren

Chamber President

Dated 8 December 2014