[2018] AACR 6

GK v Gambling Commission
[2017] EWCA Civ 372

CA (Arden, Simon and Hickinbottom LJJ) **GG/281/2015**
25 May 2017 **GG/282/2015**

Gambling – extent of the Gambling Commission's powers in refusing an operating licence – relationship between operating licence and local authority premises licence

A brewery chain (GK) applied to the Gambling Commission under Part 5 of the Gambling Act 2005 for operating licences authorising them to provide facilities for playing unlimited stake and prize bingo in up to eight of their public houses as a pilot project. Under the Gambling Act an operator must hold both an operating licence and a premises licence to offer facilities for full commercial bingo other than remotely. GK would still have to apply to the relevant local licensing authority under Part 8 of the Act for the necessary premises licence authorising particular premises to provide that facility. Although the Commission's Regulatory Panel was satisfied as to the suitability and competence of GK and persons relevant to the applications to offer the proposed licensed gambling activities it nevertheless refused the operating licence applications because it was concerned about the development of commercial bingo in pub premises and considered that it would be harmful to the statutory licensing objectives to provide gambling in pubs as proposed. The statutory licensing objectives set out in section 1 of the 2005 Act are (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 conduced in a fair and open way and (c) protecting children and other vulnerable persons from being harmed or exploited by gambling. The First-tier Tribunal (F-tT) upheld GK's appeal, holding that once the Regulatory Panel had accepted that GK were suitable and competent to offer the proposed gambling activities it was not open to it to refuse the applications because of its concern about the premises and that in doing so the Panel was trespassing on territory which the Gambling Act assigned to local licensing authorities. The Commission successfully appealed to the Upper Tribunal (UT). GK appealed to the Court of Appeal arguing that the UT had erred in its interpretation of the Gambling Act, in finding that the F-tT's decision was wrong and had failed to address its alternative grounds for upholding the F-tT's decision.

Held, dismissing the appeal, that:

1. the UT Judge had not erred either in his interpretation of the Gambling Act or in finding that the decision of the F-tT was wrong in law (paragraph 56);

2. the Commission was the national gambling regulator and had a wide discretion in exercising its statutory function to determine an application for an operating licence under section 70 of the Gambling Act; in considering a novel operating model for gambling it was required to consider whether that model was or was not consistent with the licensing objectives (paragraph 44);

3. the Commission and local licensing authorities had discrete functions under the Gambling Act, local licensing authorities did not have procedural exclusivity in respect of premises and the Commission was bound to consider the operating environment in which the applicant for an operating licence proposed to offer gambling facilities: *Lethem v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1549*)* (paragraphs 46 to 47);

4. the Commission was required to, and did, consider the operating model proposed by GK. Operating models are of infinite variation and the Commission was not required to put the applications on hold whilst it developed and then consulted on a general policy in respect of gambling in premises where alcohol was readily available (paragraphs 68);

5. in the context of a proposal for full commercial bingo in a busy working pub, the Regulatory Panel could draw upon its own expertise and experience of the relationship between gambling and alcohol and historic data and reports such as the Budd Report. It was entitled to concur with, and place weight on, the view of the Commission's officers as to the "different expectations of those frequenting pub or bingo premises as to their primary purpose" upon which the recommendations of the Budd Report were based. It was clearly open to the

Panel to conclude that visitors to a pub, after consuming alcohol, might be vulnerable to available high stake gambling (paragraph 72);

6. the Regulatory Panel had considered the proposal in the light of the statutory licensing objectives and it was well within its discretion to consider that the novel operating model proposed by GK was not reasonably consistent with the pursuit of those licensing objectives (paragraph 71).

DECISION OF THE COURT OF APPEAL

Susanna Fitzgerald QC and Owain Draper, instructed by Fraser Brown Solicitors, appeared for the appellant

Philip Kolvin QC and Christopher Knight, instructed by Nicholas Hawkings Solicitor to the Gambling Commission, for the respondent

JUDGMENT (reserved)

LORD JUSTICE HICKINBOTTOM:

Introduction

1. The appellants ("Greene King") own and operate public houses.

2. They wish to provide facilities for playing unlimited stake and prize bingo in their pub premises; and so they applied to the respondent ("the Commission") under Part 5 of the Gambling Act 2005 ("the Act") for operating licences authorising them to provide such facilities ("operating licences"), in up to eight of their pubs, in what was intended to be a pilot project. Even with such licences, before providing bingo in any pub, Greene King would still have to apply to the relevant local licensing authority under Part 8 of the Act for the necessary licence authorising particular premises to provide that facility ("a premises licence").

3. On 12 March 2014, following an earlier hearing, the Regulatory Panel of the Commission ("the Panel") was "satisfied as to the suitability and competence of [Greene King], and persons relevant to the applications, to offer the proposed licensed gambling activities"; but, nevertheless, refused the licence applications, because it considered that it would be harmful to the statutory licensing objectives to provide gambling in pubs as proposed.

4. Greene King appealed to the First-tier Tribunal (General Regulatory Chamber), where, on 2 December 2014, the Chamber President, Judge Nicholas Warren, allowed the appeal.

5. However, on 29 January 2016, in the Upper Tribunal (Administrative Appeals Chamber), Upper Tribunal Judge Howard Levenson allowed the Commission's further appeal; but he later granted Greene King permission to appeal to this court.

6. Before us, Susanna Fitzgerald QC and Owain Draper appeared for the appellants, and Philip Kolvin QC and Christopher Knight appeared for the Commission. Ms Fitzgerald also appeared for Greene King before the Panel, the First-tier Tribunal and the Upper Tribunal. We

were grateful for the submissions of both parties; and, although this judgment focuses upon those of the appellant, we have been considerably assisted by those made on behalf of the respondent.

7. At the heart of this appeal is a short point of statutory construction. Ms Fitzgerald submits that, when exercising its discretion as to whether to grant an operating licence, the role of the Commission is limited by the Act to considering the suitability and competence of the operator. Whilst she accepts that that may involve some consideration of the proposed operating environment, she submits that the suitability of premises is essentially a matter for local licensing authorities when considering premises licenses. By refusing operating licences on the basis that Greene King proposed to provide bingo facilities in pubs, the Commission acted outside its powers.

The Law

8. The Act is at the centre of a statutory scheme which regulates all gambling in this country. It was enacted following lengthy consultation and consideration, notably in the Report of the Gaming Review Body (July 2001) chaired by Sir Alan Budd ("the Budd Report"), which set out the policy foundations for the new legislation; and a Government White Paper entitled "A Safe Bet for Success" (26 March 2002) ("the White Paper"). In this judgment, all statutory references are to the Act, except where otherwise appears.

9. Generally, under the Act, unless excepted or authorised by licence, it is a criminal offence to provide facilities for gambling, or to provide premises for such a purpose.

10. About the former, it is an offence for a person to provide facilities for gambling, unless an exception applies (section 33). Two exceptions are relevant to this appeal.

i) It is not an offence if the person holds an operating licence authorising the particular gambling activity, and the activity is carried on in accordance with the terms and conditions of the licence (section 33(2)). An operating licence may authorise gambling activity remotely, or non-remotely in premises.

ii) Where premises with a bar have a licence under Part 3 of the Licensing Act 2003 for the supply of alcohol for consumption on the licensed premises ("an on-premises alcohol licence", or simply "on-licence"), then, at times when it is permitted to serve alcohol under the licence, no offence is committed where facilities for equal chance gaming are provided, and (i) there is no participation fee, (ii) no amount is deducted or levied from the sums staked or won, (iii) a game played on one set of premises is not linked with a game played on another set of premises, (iv) children and young persons are excluded from participation, and (v) the gaming satisfies prescribed limits on the amount that may be staked and the amount or value of the prize (sections 277 to 279). Subject to exceptions irrelevant to this appeal, regulation 2 of the Gambling Act 2005 (Exempt Gaming in Alcohol-Licensed Premises) Regulations 2007 (SI 2007/1940) prescribes a limit on the amount that may be staked on any game of chance to £5. Unless the operator holds an operating licence, section 281 limits the application of these exceptions insofar as they would otherwise permit "high turnover bingo played during a high turnover period", essentially defined in terms of an aggregate of stakes or prizes of £2,000 over a seven-day

> period. The on-licence holder has an obligation – enforceable by criminal sanction – to notify the Commission as soon as reasonably practicable after a "high turnover period" commences, unless he is also the holder of a bingo operating licence (although he does not need also to hold a bingo premises licence: see below) (section 281(6)).

Consequently, a pub owner/operator may provide facilities for low-stake and low-value prize bingo merely by having an on-licence; but, if he wishes to offer facilities for full commercial bingo with higher, unlimited stakes and prizes ("full commercial bingo"), then he needs a bingo operating licence.

11. An operating licence authorises the licensee to provide facilities for full commercial bingo in a specified number of premises (sections 65(2)(b) and 84(1)(b)), but it does not permit the provision of such facilities in any particular premises (section 65(3)). For that, an application for a premises licence must be made to the local licensing authority under Part 8 of the Act. A person cannot apply for a premises licence unless he already holds (or has an undetermined application for) an operating licence (section 159(3)).

12. Therefore, to offer facilities for full commercial bingo other than remotely, the operator must hold both an operating licence and a premises licence. He also needs to ensure that relevant individuals hold a third type of licence, not relevant to this appeal, namely a personal licence issued in accordance with Part 6 of the Act.

13. Section 20 establishes the Commission as a national body with oversight over gambling policy and regulation. By section 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."

14. "The licensing objectives" are set out in section 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."

15. Section 22, read with section 1, clearly gives the Commission a wide – but not, of course, limitless – discretion in relation to the exercise of its functions, and particularly as to the types of gambling operations it permits as being, in its view, "consistent with pursuit of

the licensing objectives". That is unsurprising. Given the commercial interest and ingenuity of those who wish to operate gambling operations, the ever-evolving technological and business models, and the infinite potential variety of means and environments for gambling, it would be impossible for the statutory scheme to regulate expressly and specifically every possible gambling operation. The statutory scheme therefore sets out three licensing objectives, against which the Commission are required to measure any novel proposal, of which full commercial bingo operating in pubs is but one.

16. The Act assigns a number of functions to the Commission, by which, as national regulator, it pursues the licensing objectives. It has an enforcement role, involving the investigation and prosecution of offences under the Act (section 28). It has a duty to give advice to the Secretary of State in respect of matters related to gambling (section 26). After consultation, it is required to issue codes of practice about the manner in which facilities for gambling are to be provided (section 24), and guidance to local licensing authorities as to the manner in which they are to exercise their functions under the Act (section 25).

17. By section 23, the Commission is required to prepare and publish a statement setting out the principles to be applied by it in exercising its own functions ("the Statement of Principles"). The Statement of Principles in place at the time of the Panel's decision, namely "Statement of principles for licensing and regulation" (September 2009), included the following paragraphs, relevant to this appeal:

> "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.
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> …
>
> 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."

18. The Commission's "Licensing, compliance and enforcement policy statement" (September 2009), which, so far as material, was incorporated into the Statement of Principles, stated, at paragraph 3.8:

> "Each application is considered on merit and on the evidence available. In considering an application the Commission has regard to the licensing objectives and whether they are likely to be compromised, and the suitability of an applicant to carry out the licensed activities."

These two matters – suitability of the applicant and upholding the licensing objectives – are then dealt with separately, in paragraph 3.10 and paragraphs 3.11 to 3.12 respectively.

19. Importantly for the purposes of this appeal, the Commission is also responsible for receiving, and determining, applications for operating licences (sections 69 and 74). Amongst other things, the application must specify the activities to be authorised (section 69(2)(a)), and "contain or be accompanied by such other information or documents as the Commission may direct" (section 69(2)(f)). Section 73(1) expressly provides that, for the purposes of considering an application under section 69, the Commission "may require the applicant to provide information". Guidance Notes issued by the Commission, which accompanied the application form at the relevant time, required a "business plan" to be provided, which was to include details of the operating model such as the services it was proposed to deliver.

20. The Commission is bound to determine any application in accordance with section 70. So far as relevant, it provides:

> "(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
> >
> > (d) 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 on the licensed activities).
>
> (3) ….
>
> (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…".

21. The Commission has the power to impose conditions on each operating licence or each operating licence falling within a specified class (section 75); and, when it issues an operating licence, it has the express power to attach a condition to that particular licence (section 77). Expressly without prejudice to the generality of those powers, section 79 grants the Commission the power to impose conditions by reference to the nature of the licensed activities and "the circumstances in which they are carried on" (see section 79(2)(b) and (3)(b)), as well as providing for "the manner in which facilities are provided" (section 79(4)(b)). However, section 84(1)(a) provides that an operating licence:

> "… 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…".

22. Turning from facilities to premises, by section 37(1)(b) a person commits an offence if he uses, or causes or permits to be used, premises to provide facilities for the playing of bingo; but there are again exceptions. Notably, by section 37(2), that provision:

> "… does not apply in relation to the use of premises by a person if the use is authorised by a premises licence held by him."

23. Reflecting a similar obligation imposed upon the Commission by section 22(b), by section 153(1)(c), in exercising its functions, a local licensing authority "shall aim to permit the use of premises for gambling in so far as the authority think it… reasonably consistent with the licensing objectives…", as well as in accordance with any relevant code of practice or guidance issued by the Commission or statement of policy issued by itself under section 349 (section 153(1)(a), (b) and (d)).

24. In addition to being able to exercise a degree of influence and control over local licensing authorities through codes of practice and guidance, by virtue of section 157 the Commission is a "responsible authority" for the purposes of premises licence applications; and, as such, in respect of such applications, it (i) receives notice (section 160); (ii) may make written representations (section 161); (iii) may trigger an oral hearing (section 162(1)); (iv) may appeal the local licensing authority's decision (section 206(2)(a)); (v) may apply to the

local licensing authority for a review of a premises licence (section 197(1)); and (vi) may appeal against any decision on such a review (section 206(3)(d)).

25. Having the relevant licences to enable full commercial bingo to be facilitated in particular premises gives the operator additional opportunities to offer gambling facilities by way of gaming machines. Following the pattern of the Act, it is generally an offence to use premises for such facilities, but again subject to exceptions or authorisation. There is an exception in the case of premises with an on-licence: sections 242 and 282 allow gaming machines in a pub, but restricted to two (low-level) Category C or D machines. However, where the operator holds both a bingo operating licence and a premises licence, by section 172(7) (as amended by the Gambling Act 2005 (Gaming Machines in Adult Gaming Centres and Bingo Premises) Order 2011 (SI 2011/1710)) and regulation 6(3) of the Categories of Gaming Machine Regulations 2007 (SI 2007/2158), those premises may, in addition to providing facilities for full commercial bingo, provide any number of Category C and D gaming machines, and (higher level) Category B3 and B4 machines up to 20% of the total number of gaming machines available for use on the premises. Those categories are defined in those 2007 Regulations by reference to maximum stake and maximum prize. The highest level of machine in the identified categories is Category B3, with a maximum stake of £2 and a maximum prize of £500; which can be compared with Category C, with a maximum stake of £1 and a maximum prize of £100.

The Factual History

26. The applicants belong to the same Greene King group of companies which, at the relevant time, owned or operated 1,000 premises with on-licences, including pubs, bars and restaurants. I understand that that figure has now risen to 3,000.

27. In 2012, they each applied for an operating licence to enable up to eight Greene King pubs to pilot full commercial bingo with higher level gaming machines. The applications were accompanied by an "operational plan", which was not produced to this court, but which, we understand from Ms Fitzgerald, became a very substantial document during the course of the application. It made clear that it was proposed that the pubs would not be converted into bingo halls but would rather continue to operate as pubs, although with ancillary full commercial bingo together with gaming machines up to and including those falling within Category B3. It was central to Greene King's proposal that the gambling operations would be introduced into a busy pub environment: as Ms Fitzgerald put it in her oral submissions, that was the whole point. That proposal was novel: I understand that an operating licence has never before been granted for full commercial bingo in a trading pub and, indeed, this appears to have been the first application for an operating licence for such an operating model.

28. By the time of the Panel hearing in February 2014, and following substantial discussion between Greene King and the Commission's officers, the officers were satisfied as to the suitability and competence of Greene King, and the individuals who would carry out the proposal, to offer the proposed licensed activities; but had serious concerns about the operating model. In its decision dated 12 March 2014, the Panel agreed. The decision said:

> "65. The Panel was therefore satisfied as to the suitability and competence of [Greene King], and persons relevant to the applications, to offer the proposed licensed gambling activities.

> 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 jeopardise the second and third [licensing] objectives [i.e. those set out in section 1(b) and (c)]. 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."

29. Therefore, whilst accepting that Greene King and the individuals that would be involved were suitable and competent, the Panel concluded that the proposed operation – full commercial bingo as an ancillary activity in busy working pubs – was not reasonably consistent with pursuit of the licensing objectives; and, for that reason, it refused the applications.

30. On appeal to the First-tier Tribunal, in his determination dated 2 December 2014, Judge Warren noted that, despite Greene King's suitability and competence, the Panel were concerned about the development of full commercial bingo and accompanying gaming machines in pubs, and particularly the concern under the third objective in section 1(c) of the Act to protect the vulnerable who, having entered premises expecting them to be a pub, may thereafter have their judgment in relation to gambling impaired by drinking (paragraphs 28 to 29 of his determination). He acknowledged that these concerns had a reasonable foundation. He said (at paragraph 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."

Again, in paragraph 33, he acknowledged the "solid reasons" for the Commission's wish not to have full commercial bingo in premises the primary purpose of which is to be a pub.

31. The judge, here, appears to have had in mind the recommendations of the Budd Report. That Report was supportive of a premises-based approach to the regulation of gambling. It was averse to "ambient gambling" (ie the provision of gambling facilities on premises whose main purpose is not gambling); and so recommended that, as far as possible, gambling should only be available at places dedicated to it; and it expressed a wish to limit the extent to which gambling can be combined with the consumption of alcohol (paragraphs 1.20 and 22.50).

32. However, Judge Warren considered there was a flaw in the Panel's thinking, because, having accepted Greene King's suitability and competence to offer the proposed gambling activities, he continued:

> "31. … 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….
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> …
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> 33. … 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.
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> 34. At this point, however, the Commission runs straight up against section 84(1)…
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> 35. In my judgment, section 84(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."

He concluded:

> "40. In my judgment, it is not open to the Commission to use section 159(3) of the Act [which requires any applicant for a premises licence to hold an operating licence: see paragraph 11 above] 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."

33. Judge Warren therefore considered that the Panel overstepped the proper scope of their enquiry when they considered the suitability of the proposed premises (ie pubs), which, he considered, fell within the exclusive scope of local licensing authorities when considering a premises licence. As, in his view, this "jurisdictional" issue was determinative of the appeal, he did not consider either the merits of the appeal or any other arguments as to why the appeal ought to be allowed. He simply quashed the Panel's decision, and remitted the matter to the Commission with a direction that the applications should be granted.

34. The Commission appealed. Judge Levenson set out the relevant provisions of the regulatory scheme, the bones of the Panel's decision and Judge Warren's determination, and the contentions of the parties, before dealing with the relevant issue succinctly, as follows:

> "54. In essence I agree with the argument of the… Commission…. The combined effect of sections 1(c)…, 22… and 70(1)(a)… 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 [the judge then referred to the three paragraphs of the then-current section 23 Statement of Principles set out in [17] above]). The provisions of sections 159(3)… and 169(4)… 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 [*Gibraltar Betting and Gaming Association Limited v Secretary of State for Culture, Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28] and of not controlling betting activities in a 'consistent and systematic manner'.
>
> 55. Section 84… 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."

He thus allowed the appeal and remitted the matter to the First-tier Tribunal for redetermination on the merits.

35. On 9 March 2016, Judge Levenson granted permission to appeal to this court, having been persuaded that the relevant issue of statutory construction was not only arguable but raised an important point of principle which had not previously been considered by the higher courts.

The Appellant's Grounds of Appeal

36. Ms Fitzgerald for the Appellant relies upon three grounds, which, for the purposes of this judgment, can conveniently be reordered as follows:

Ground 2: Judge Levenson erred in his interpretation of the Act, and particularly section 70 which sets out the matters to which the Commission is required to have regard when determining an operating licence application. One of those matters is the suitability of the applicant; but the suitability of the premises is essentially a matter for the local licensing authority when it comes to consider whether a premises licence should be granted. In this case, having been duly satisfied that Greene King was suitable and competent with regard to the proposed operation, the Panel erred in proceeding to consider whether the premises were suitable, and determining that, in the light of the licensing objectives, they were not.

Ground 1: Judge Levenson erred in finding that the First-tier Tribunal determination was wrong. The main basis for that contention is the construction point that is Ground 2; but Ms Fitzgerald made two further submissions under this umbrella ground.

i) Judge Warren found that the Commission's "purpose" in, and "only justification" for, refusing the applications had been to prevent Greene King applying to local licensing authorities for premises licences. As I understand it, Ms Fitzgerald submitted that that was, in effect, an improper purpose, because, by proscribing pubs as a venue for full commercial bingo, it circumvented section 84(1)(a)(ii) (set out in [21] above).

ii) In the course of her oral submissions, Ms Fitzgerald developed a submission to the effect that, on a proper interpretation of his determination, Judge Warren *did* take into account the proposed operation and its environment, including the busy pub premises at which it was to take place; and concluded that it was reasonably consistent with the licensing objectives. She submitted that Judge Levenson was wrong to ignore or overrule that factual finding.

Ground 3: Judge Levenson erred in allowing the appeal without taking into account, and dealing with, Greene King's alternative grounds for upholding the First-tier Tribunal's decision, namely:

i) The Commission erred in law in purporting to create a blanket ban on full commercial bingo in pubs.

ii) There was no evidential basis for such a blanket ban.

iii) In allowing the appeal, the Commission failed to follow its own published policies, in the form of the Statement of Principles.

I will deal with those grounds in turn.

Ground 2: The Construction Ground

37. Ms Fitzgerald's primary ground was that Judge Levenson wrongly interpreted the Act. The argument evolved, both prior to and during the course of the hearing before us; but, as I understood it, her final submissions were broadly as follows.

38. The Panel were bound to consider the applications for an operating licence in accordance with section 70. In its decision, the Panel had, in effect, considered, first, section 70(1)(b), namely Greene King's suitability to carry on the proposed gambling activities. Having been satisfied as to that, it went on to consider section 70(1)(a), namely whether the proposed operations – full commercial bingo in a busy pub – were in accordance with the licensing objectives. It concluded that they were not; and refused the licences on that basis. Judge Levenson found that the Panel was entitled to proceed on that basis.

39. However, Ms Fitzgerald submitted that the Panel's analysis was based upon a misinterpretation of the Act, which established "a fundamental division of regulatory powers and responsibilities between, on the one hand, the Commission (as national regulator) and, on the other hand, licensing authorities (as local regulators)". The Commission is required to determine applications for operating licences in accordance with section 70 which is focused upon the suitability and competence of the person wishing to provide gambling facilities, and not upon the suitability of providing those facilities in a specified place which is the function of the local licensing authority when considering a premises licence. That is made clear by the terms of section 70(1)(b), under which the Commission is required to have regard to the applicant's suitability to carry on the licensed activities.

40. She submitted that the requirement in section 70(1)(a) is not freestanding, but imposes an obligation on the Commission merely to consider the applicant's suitability in the light of the licensing objectives; which, in this case, the Panel did, concluding (at [65] of its decision) that it was satisfied as to the suitability and competence of Greene King to offer the proposed licensed gambling activities.

41. The Panel erred in then going on to consider the premises in which these facilities were to be provided, namely pubs. That was a consideration for the local licensing authority when considering an application for a premises licence. By considering the class of premises proposed, the Commission trespassed upon the legitimate scope of the local licensing authorities under the regulatory scheme, by denying them any opportunity to consider the suitability of the premises and in effect unlawfully vetoing any application for a premises licence, as such an application cannot be made unless a prior operating licence has been granted.

42. In this regard, Ms Fitzgerald relied upon Judge Warren's finding in paragraph 31 of his determination that the Commission's purpose in, and only justification for, denying Greene King an operating licence was to prevent it from applying for a premises licence (see paragraph 32 above). She submitted that, on appeal, Judge Levenson was wrong to conclude that the Act gives "primacy" to the Commission in any way that might justify it using its powers to determine an application for an operating licence for the purpose of blocking applications to local licensing authorities for premises licences or otherwise to encroach upon the jurisdiction of such authorities in respect of the suitability of premises for the proposed licensing activities.

43. Despite Ms Fitzgerald's valiance, in my view her submissions fell very far short of being persuasive, for the following reasons.

44. The Commission is the national gambling regulator. For the reasons I have already given (see [15] above), in exercising its statutory functions (including those exercised in determining operating licence applications), it has a wide discretion. In considering a novel operating model for gambling, as well as section 70(1)(a), section 22(b) of the Act requires it to consider whether that model is or is not consistent with the licensing objectives.

45. As Ms Fitzgerald readily accepted, Parliament has entrusted the determination of operating licences to the Commission, which therefore has "primacy" in respect of such applications; but, she submitted, it could not use its power over operating licences to detract from the powers given by Parliament to local licensing authorities over premises used for gambling when determining premises licences. However, insofar as that might suggest that local licensing authorities have an interest in premises used for gambling which excludes any interest in such premises by the Commission, I consider that to be simplistic.

46. Whilst I accept that the Commission and local licensing authorities have discrete functions under the Act, in exercising those functions there are some common or overlapping relevant factors. Neither the Act nor the Statement of Principles expresses any principle of procedural exclusivity in favour of local licensing authorities in respect of premises. Indeed, paragraph 2.7 of the Commission's Licensing, Compliance and Enforcement Policy Statement (which, so far as material, is incorporated into the Statement of Principles, and has remained the same at all material times) indicates that, when considering an application for an operating licence, the Commission will assess not only the suitability of the proposed licensee but also the proposed operating model, including "the location and operating environment; consistency with the licensing objectives". Ms Fitzgerald properly accepted that, in determining an application for an operating licence, the Commission is able to consider the operating environment in which the applicant proposes to offer gambling facilities – indeed, it seems to me that it is bound to do so – hence an operating model must be (and, in this case, was in fact) provided with the application. So far as non-remote gambling facilities are concerned, premises are an inherent part of that environment. Therefore, whilst they play a different role, premises may be a relevant consideration in both an application for an operating licence, and an application for a premises licence.

47. There is nothing unusual in that. Statutory controls frequently overlap; and, where they do, a consideration which is material to one scheme (or part of a scheme) may well also be material to another. In the case of the Act with which we are concerned, Parliament has dictated that the Commission exercises its powers in respect of an operating licence before any local licensing authority exercises its powers in respect of any premises licence. Where there is overlap, the authority which considers matters first in time is required to exercise any discretion it has in a properly lawful way, taking into account all material factors relevant to the exercise of its particular powers and giving each of those factors the weight, if any, it considers appropriate. Inevitably, that means that that first authority may make a decision which may make a decision by the second authority unnecessary. Thus, in considering an application for planning permission for a café which intended to operate much like a pub, the local planning authority (or the Secretary of State in its shoes) is entitled to take into account factors that would otherwise be relevant in an application for an on-licence and, if persuaded,

refuse permission accordingly (*Lethem v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1549 (Admin); [2003] 1 P & CR 2 at [25]).

48. There is no force in the contention that section 70(1)(a) is anything less than a freestanding requirement, imposed upon the Commission when considering an application for an operating licence, to have regard to the licensing objectives. It is listed as a separate and unqualified requirement – not as a sub- or secondary requirement of section 70(1)(b) or other sub-sections – and, indeed, it is textually first. If it merely governed the opinion taken as to the applicant's suitability under section 70(1)(b), then, in the light of the Commission's duty under section 22(b), it seems difficult to see what it would add.

49. Whilst I consider section 70 is unambiguously clear on the face of its text alone, that clarity is emphasised when the section is seen in its context. For example, in paragraph 225 of the Explanatory Notes to section 70, having regard to the licensing objectives and having regard to the applicant's suitability are referred to as "the two main matters" which will govern the Commission's decision in relation to applications for operating licences. The Licensing, compliance and enforcement policy statement treats the two matters separately (see paragraph 18 above); and the courts have also recognised them as discrete (see, eg, *Gibraltar Betting* at [34], per Green J).

50. Looking at the context more broadly, it is, to say the least, a bold proposition to suggest that, in determining an application for an operating licence, given its statutory obligations in relation to pursuit of the licensing objectives and its wide discretion, the Commission has neither the obligation nor even the power to consider whether the proposed operating model is reasonably consistent with the licensing objectives. The construction which Ms Fitzgerald presses would mean that the Commission would be required to grant an operating licence in respect of an operating model for gambling which, as in this case, it considered inconsistent with the pursuit of the licensing objectives.

51. Therefore, I do not consider that the Panel (or, in his turn, Judge Levenson) erred in treating the requirements of section 70(1)(a) and (b) as discrete. It was at least open to the Panel to consider, first, the suitability of Greene King to carry on the proposed facilities, and conclude that the proposed management etc was suitable; and then to proceed to consider whether, no matter how managerially suitable and competent Greene King might be, the proposed operation of full commercial bingo in a busy pub environment was consistent with the licensing objectives set out in section 1 and to find the proposed operating model, as an operating model, to be wanting in that regard.

52. Whilst that two-stage approach was open to the Panel, I do not suggest that the statute requires any rigid approach. Section 70(1) simply sets out matters to which the Commission must (or, in respect of (d), may) have regard, when considering an operating licence application. The manner in which the Commission does so is a matter for it; but it does not have to be formulaic, or necessarily multi-staged.

53. Ms Fitzgerald submitted that Judge Levenson was influenced by a "floodgates" argument, ie that to grant these operating licences for full commercial bingo in pubs would result in huge numbers of similar applications that themselves would likely lead to even greater numbers of applications for premises licence applications to local licensing authorities. In [54] of his determination (quoted at [34] above), he said that it could not be the

case that "in pursuit of… national policy objectives the Commission is required to conduct some kind of guerrilla warfare in each separate locality". However, I am unconvinced that this is a true floodgate argument. In the early part of [54], the judge held – as I believe to be the case – that the words used in the statute make unambiguously clear that the requirements of section 70(1)(a) and (b) are discrete. In my view, in further support of the construction he favoured, he was entitled to conclude that it could not have been the intention of Parliament to require the enforcement of national policy in relation to bingo in pubs through local licensing authorities because, as emphasised in *Gibraltar Betting*, it is an object of the statutory scheme to control betting activities in a consistent and systematic manner.

54. Judge Warren was persuaded by Ms Fitzgerald that section 84 assisted in the construction of section 70, because it evidenced a Parliamentary intention that the Commission should not consider premises when determining an application for an operating licence. However, as Judge Levenson pointed out, section 84(1) is concerned with conditions that may or may not be included if an operating licence is granted; and, logically, that does not bear upon whether an operating licence should be granted at all. Indeed, in my view, the more compelling point is that section 84(1)(a)(ii) merely proscribes a condition in an operating licence preventing the authorised licensed activities from being carried on at a specific place or class of place: there is no statutory provision to the effect that all aspects of the premises from which the facilities are to be offered must be left out of account by the Commission in its consideration of an operating licence application, which, in my view, there could and would have been if that had indeed been the legislative intention. Where it was the legislative intention to prohibit the Commission from having regard to a particular matter, the Act makes that intention expressly clear (see, eg, section 72 under which, in determining whether to grant an operating licence, the Commission is prohibited from having regard to that area in which it is proposed to provide facilities and the expected demand for those facilities).

55. With regard to the submission that an adverse stance against gambling in pubs is unwarranted because many bingo halls have drink readily on offer, I do not consider that to be compelling. It is true that, unlike adult gaming centre premises, family entertainment premises and betting premises (see Schedule 3 paragraph 4(1), Schedule 4 paragraph 4(1) and Schedule 5 Part 1 paragraph 8 of the Gambling Act 2005 (Mandatory and Default Conditions) (England and Wales) Regulations 2007 (SI 2007 No 1409)), bingo halls are not prohibited from serving alcohol, and many have on-licences to do so. However, the Commission is clearly entitled to take the view that there is a difference between a bingo hall (where the primary function is gambling) and a pub (where gambling is likely to be an ancillary, occasional and usually ambient activity, conducted primarily for entertainment rather than financial gain). On this point, Ms Fitzgerald prayed in aid *Wolverhampton and Dudley Breweries Limited v Warley County Borough Council* [1970] 1 WLR 463 (DC); but I am unpersuaded that it assists the Appellant's cause in any way. It considered different statutory provisions, notably those under the Betting, Gaming and Lotteries Act 1964; and the conclusion drawn by the court, that, from those provisions, it was impossible to deduce a Parliamentary principle that "drinking and gambling did not mix", cannot be translated into a general proposition under the Act with which we are now concerned that Parliament considers that mixing drinking and gambling is, as a general proposition, a good idea.

56. Nor do I consider the proposition that "the Act manifests a fairly positive approach towards gambling in pubs and similar premises…" (paragraph 25 of Ms Fitzgerald's skeleton argument) has any force: in pubs, it is supportive of only low level, ancillary and occasional gambling, conducted primarily for incidental entertainment. That does not assist Ms Fitzgerald's arguments with regard to the construction of section 70, which concerns operating licences for high-level gambling.

57. For those reasons – which, with respect to Judge Warren's contrary view, I consider overwhelming – I consider Judge Levenson's construction of the statutory scheme was correct: in exercising their discretion as to whether to grant an operating licence, having determined that Greene King were suitable to offer the proposed licensed activities, the Panel were entitled to consider and find that the proposed gambling operation was inconsistent with the licensing objectives; conclude that the weight of that factor was determinative of the applications for operating licences; and refuse the applications on that ground.

58. Ground 2 therefore fails.

Ground 1

59. Having dealt with the construction issue under Ground 2, there remain two strands of Ground 1, which I can deal with shortly.

60. First, Judge Warren found that the Commission's "purpose" in, and "only justification" for, refusing the applications had been to prevent Greene King applying to local licensing authorities for premises licences. Ms Fitzgerald submitted that that was an improper purpose, because, by proscribing pubs as a venue for full commercial bingo, it circumvented section 84.

61. In my view, that ground has no force. The refusal of the licences did not arguably circumvent section 84 for the reason I have given (see [54] above); but, also, the prevention of Greene King applying for premises licence was not the purpose, but a consequence, of the refusal of the operating licence applications. The purpose of refusing those applications was clearly to prevent the licensing objectives being compromised, the Panel having come to the view that the operating model was not consistent with the pursuit of those objectives. Although Judge Warren could perhaps have chosen his words more carefully, I am unconvinced that he intended to suggest otherwise. Insofar as he did, then the finding Ms Fitzgerald submitted he made was not open to him on the evidence.

62. Second, Ms Fitzgerald submitted that, on his determination properly construed, Judge Warren *did* take into account the proposed operation and its environment, including the busy pub premises at which it was to take place; and concluded that it was reasonably consistent with the licensing objectives.

63. However, on any fair reading of the determination, Judge Warren did not analyse the matter in that way, or draw that conclusion. Had he done so, it would have been easy enough to have said so; but, rather, he accepted the submission Ms Fitzgerald made to him that, the Panel having concluded that Greene King were suitable and competent, they erred in considering the suitability of premises. He clearly considered this jurisdictional point to be determinative, and never considered the merits of the contention that the Panel erred in

finding that the operating model was not reasonably consistent with the licensing objectives. Indeed, from what he said in paragraphs 31 to 33 of the determination, it seems that the judge fully accepted that there was, at least, a sensible basis for such a finding by the Panel – which was not appealed before him.

64. For those reasons, each strand of Ground 1 fails.

Ground 3

65. Finally, Ms Fitzgerald submitted that Judge Levenson erred in allowing the appeal without taking into account, and dealing with, Greene King's alternative grounds for upholding the First-tier Tribunal's decision.

66. The simple answer to this ground is that, when the matter returns to the First-tier Tribunal, Greene King will be able to raise each of these matters and it will be for that tribunal to determine them on their merits. Without prejudice to that, I would make the following observations upon the three matters upon which Ms Fitzgerald relied.

67. It is said that the Commission's refusal of Greene King's applications "gave effect to a blanket prohibition on operators of 'pubs' (or 'alcohol-led premises') obtaining operating licences", which is an unpublished policy without scope for exceptions, which has not been the subject of consultation and which is inconsistent with both the general scheme of the Act and the particular statutory requirement of section 69 and 70 for a fact-specific assessment. In any event, Ms Fitzgerald submits that there was no evidential basis for such a blanket ban; and, consequently, the Panel failed to comply with the Commission's own Statement of Principles which requires it to come to an evidence-based and proportionate decision. The decision was not "the minimum burden necessary to promote the licensing objectives", as required by the Statement of Principles, because the Commission could have addressed its concerns about the operation of full commercial bingo in pubs by (eg) issuing appropriate guidance to local licensing authorities.

68. I am unpersuaded that the Commission erred in law in the manner suggested. The Panel were faced with a novel operating model – and so it is unsurprising that no policy had been devised or published – and considered the proposal, as required by the Act, in the light of the licensing objectives. It considered that the model was not reasonably consistent with the pursuit of those objectives. That was well within its discretion. The Commission was required to, and did, consider the operating model proposed. Operating models are of infinite variation. The Commission was not required to put the applications on hold, whilst it developed and then consulted on a general policy in respect of gambling in premises where alcohol was readily available.

69. Ms Fitzgerald submitted that, by a blanket ban, the Commission robbed on-licence holders of the opportunity of obtaining an operating licence, not only to go on and obtain premises licences, but also for the benefits the holder of an operating licence has in respect of high level bingo under section 281(6) (see [10(ii)] above). However, leaving aside the modest nature of those benefits, in this case Greene King did not seek operating licences for that purpose: its operating model made clear that it wished to obtain operating licences so that it could proceed to obtain premises licences in order to offer full commercial bingo and higher level gaming machine facilities in its pubs. In the unlikely circumstances of an applicant

seeking an operating licence merely to take advantage of the section 281(6) benefits, the Commission would have to deal with such an application on its merits. It has not suggested that it would not do so. Ms Fitzgerald was, in my view, wrong in her submission that, although couched in terms of operating models, the substance of the Commission's concern is the premises, namely a pub: the concern is the Greene King proposed operating model, which involves offering the facility of full commercial bingo in a busy working pub.

70. Similarly, I see no force in Ms Fitzgerald's submission that, if the construction favoured by the Commission and the Upper Tribunal is upheld, the Commission could not sensibly determine an application for an operating licence for "mixed" premises (eg pubs and bingo halls, owned and operated by the same individual). Its blanket ban on pubs would mean that the application would have to be turned down, even if, in doing so, it meant that, contrary to section 22(b), gambling would be denied in some venues where pursuit of the licensed objectives would not be threatened. However, that is not this case; and, for the reasons I have already given, the Commission has not suggested that there is a "blanket ban" on operating licences under which it might be possible to seek a premises licence for a pub. If an applicant applied for an operating licence for mixed premises, then the Commission would have to consider it on its merits. If the operating model included full commercial bingo in pubs to the concern of the Commission, then the Commission might refuse the application; but, on the facts of a particular case, it could alternatively grant an operating licence and leave the issue to be determined on the premises licence applications in which the Commission would be entitled to intervene.

71. Equally, the fact that Greene King consider that the risk to the licensing objectives identified by the Panel could have been dealt with by local licensing authorities with appropriate guidance from the Commission, is not to the point: the Panel concluded that the operating model proposed by Greene King, in itself, posed a risk to those objectives such that it was not reasonably consistent with the pursuit of those objectives.

72. In the context of a proposal for full commercial bingo in a busy working pub, the Panel were able to draw upon their own expertise and experience of the relationship between gambling and alcohol – and that of the Commission's officers – and the historic data and reports such as the Budd Report. They were entitled to concur with, and place weight on, the view of their own officers as to the "different expectations of those frequenting pub or bingo premises as to their primary purpose" (see paragraphs 49 and 69 of the Panel decision) upon which the recommendations of the Budd Report were based. It was clearly open to the Panel to conclude that visitors to a pub, after consuming alcohol, might be vulnerable to available high stake gambling. Whether, in this case, upon remittal, the First-tier Tribunal will agree with those conclusions on their merits will, of course, be a matter for the tribunal. I offer no view on the merits.

Conclusion

73. For those reasons, I do not consider any of the appellant's grounds have been made good; and I would refuse this appeal.

Lord Justice Simon:

74. I agree.

Lady Justice Arden:

75. I also agree.