[2016] UKUT 268 (TCC)

Appeal number UT/2016/0048

BINGO DUTY – whether charges levied by operator of bingo clubs were "bingo receipts" – deduction of a sum calculated purportedly in respect of admission charges – whether sums receipts within s 19 of the Betting, Gaming and Duties Act 1981 – yes – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THOMAS ESTATES LIMITED

(trading as BEACON BINGO)

Appellant

and

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: **Mr Justice Warren**

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 22 February 2016

Timothy Brown, counsel, instructed by Mazars LLP, for the Appellant

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The issue in this case is whether part of certain payments made by bingo players are bingo receipts within the scope of section 19 Betting and Gaming Duties Act 1981 ("**section 19**" and "**BGDA**") or whether parts of those payment are outside the scope of that section, properly being regarded as admission charges. In their decision dated 14 November 2013 ("**the Decision**"), the First-tier Tribunal, Judge Berner and Mr Gillett ("**the Tribunal**"), held that the entirety of the payments were bingo receipts subject to bingo duty. The Appellant ("**Beacon**") appeals from that decision. It is represented by Mr Timothy Brown. The Respondents ("**HMRC**") are represented by Mr Sarabjit Singh.
2. The nature of bingo duty is described in [2] of the Decision. It is an excise duty which is charged on the playing of bingo in the UK. The duty is computed as a percentage rate of a person's bingo promotion profits for an accounting period.
3. The question before the Tribunal was, therefore, the extent of Beacon's bingo promotion profits. That is the same question which is now before me. Beacon says that certain sums it receives are admission charges for the right to enter its premises and hence outside the scope of bingo duty. HMRC contend that the amounts said to be admission charges were properly attributable to the playing of bingo, and were not admission charges. HMRC raised an assessment on Beacon for under-declared bingo duty which is the subject matter of Beacon's appeal.

The statutory provisions

4. Section 17 BGDA is the charging section for bingo duty. It provides for the measure of the duty to be related to the bingo promotion profits. These, according to section 17(3), are the relevant person's bingo receipts minus the amount of expenditure on winnings. Bingo receipts are calculated in accordance with section 19 which provides:

> "(1) A person has bingo receipts for an accounting period if payments fall due in the period in respect of an entitlement to participate in bingo promoted by him.
> (2) The amount of the person's bingo receipts for the accounting period is the aggregate of those payments.

(3) For the purposes of subsections (1) and (2) –

(a) an amount in respect of entitlement to participate in a game of bingo is to be treated as falling due in the accounting period in which the game is played,

...

(c) it is immaterial whether an amount falls due to be paid to the promoter or to another person,

(d) it is immaterial whether an amount is described as a fee for participation, as a stake, or partly as one and partly as the other, and

(e) where a sum is paid partly in respect of entitlement to participate in a game of bingo and partly in respect of another matter –

(i) such part of the sum as is applied to, or properly attributable to, entitlement to participate in the game shall be treated as an amount falling due in respect of entitlement to participate in the game, and

(ii) the remainder shall be disregarded."

5. Section 20C(5) elaborates on what is meant by an entitlement to participate in a game of bingo for the purposes of a number of provisions including section 19:

> "In those provisions a reference to entitlement to participate in a game of bingo includes a reference to an opportunity to participate in a game of bingo in respect of which a charge is made (whether by way of a fee for participation, a stake, or both)."

"in respect of"

6. The Tribunal gave detailed consideration to the meaning of "in respect of" in section 19(1), concluding that it did not mean simply "for". The Tribunal declined to follow another decision of the First-tier Tribunal, Judge Tildesley and Mr Whitehead, in *Cosmo Leisure Limited v Revenue and Customs Commissioners* [2012] UKFTT 733 (TC) ("***Cosmo Leisure***"). They held that it was not correct to apply what they described as a causal test and that the words "in respect of" required only that there should be a relationship between the payment and the entitlement or opportunity to participate in bingo. The opportunity does not have to arise because of the payment: it may arise independently.
7. Since the decision in *Cosmo Leisure*, a similar issue has come before Lord Tyre, sitting in the Upper Tribunal, in *Carlton Clubs Ltd v RCC* [2015] UKUT 0682 (TCC) ("***Carlton Clubs***"). In that case, Lord Tyre agreed with the construction favoured by the tribunal in *Cosmo Leisure* and disagreed with the construction adopted by the Tribunal in the present case.
8. HMRC are currently considering whether to apply for permission to appeal

against Lord Tyre's decision to the Court of Session. However, in the present appeal, Mr Singh submits that there is no need for me to decide whether or not the Tribunal's construction of section 19(1) was correct. That is because, even if they are wrong and the tribunal in *Cosmo Leisure and* Lord Tyre are correct so that payments have to be "for" the entitlement or opportunity to participate in bingo, the Tribunal has found that the relevant payments in the present case were not "for" the right to enter premises, *ie* admission charges, but were, in effect, "for" the playing of bingo.

The facts

9. The Tribunal's findings of fact (an understanding of which is necessary for the resolution of this appeal) appear from [17] to [35] of the Decision much of which I now set out almost verbatim, with some comments as I go along, in [10] to **[**29] below.
10. Beacon operates a number of bingo halls. The present appeal concerns four of them. There was no material difference for present purposes between the four halls; the focus was on the Cricklewood club. The word club is used because the halls operate as proprietary clubs to which members belong.
11. The Crickelwood club operates as a members only club. Membership is free. To become a member it is necessary to complete an entry form, following which members are issued with a swipe card. All members who enter the club have to swipe their membership card prior to entry. Any non-members who wish to enter the club, for example as a guest of an existing member, also have to complete a membership form prior to entry.
12. The club's rules, or its terms and conditions, are displayed at the entrance to the club. The "Club Rules" make no reference to charges, and contain only the following in relation to admission:

> "**8. Admission**
>
> Membership of the club does not entitle a member to admission to the club premises or any part of them being full, and admission shall always be subject to such terms and conditions as the Proprietor shall from time to time determine."

13. The Tribunal were shown the terms and conditions applicable from 10 February 2010. The only reference in those terms and conditions to charges is at paragraph

3.3, under which it is stated that

> "Beacon Bingo will determine the admission and such other charges to take part in gaming in accordance with the regulations within the Gaming Act 2005."

14. No charge for admission to the club is made at the entrance. There is at the entrance only a machine at which members swipe their cards in order to gain entrance. Once members have swiped their cards they have access to the entire premises where, in addition to offering bingo, the club has approximately 200 gaming, amusement and SWP (slots with prizes) machines available.
15. Bingo games are organised into sessions. The Cricklewood club operates at least five bingo sessions per day. The doors to the club open at 10am, and the first session (the lunchtime session) begins at 12 noon, finishing at 12.15 pm. The last session (the evening session), which is the longest, starts at 6 pm and finishes at 9.30 pm, and there is some flexibility as to the timing of the other sessions. The club closes at 1 am on Fridays, Saturdays and Sundays, and at 12 midnight on other days.
16. The games played during these sessions are termed "main session bingo". That is distinct from other types of bingo games available, including mechanised bingo and prize bingo. Those games may be played at any time, and are not restricted to the bingo sessions.
17. The club does not simply offer bingo, but bingo in a social environment where members can take advantage of facilities and social opportunities. As well as the playing of bingo in its various forms mentioned, and the other gaming machines that can be played, the facilities of the club include a bar and a restaurant.
18. Within the foyer of the club, a short distance from the entrance, is the "book sales" desk. It is at that desk that members may pay to play the various bingo games on offer. A "charges to play" notice (which is to satisfy a regulatory requirement for a transparency notice) is displayed at this desk. That notice, which is headed "CHARGES TO PLAY`", sets out the charges, which vary according to whether it is a daytime or evening session, for each type of game. In relation to the charges for the games, the notice sets out both the costs per ticket (in one column) and the maximum charge by the club (in another column). Thus, against the entry for "Main Session" (*ie* main session bingo in the daytime session), the

cost per ticket is expressed as 175p, and the maximum charge as 100p. The difference of 75p effectively represents the prize fund. That is how the difference was understood by the Tribunal and was common ground before me.

19. The first entry in the charges to pay notice, for each of the daytime and evening sessions, is "Admission." For the daytime session this is set at 200p. In the column showing the maximum charge, the figure is also expressed to be 200p.

20. As to that, the Tribunal said this:

> "As would be expected, that price is expressed both as the cost and the maximum charge."

21. A note at the foot of the notice states: "Admission Charge is included in the Main Session Price". The admission charge is set at the price of the first set of main session bingo books. The difference between the stated 200p admission charge and the 175p cost of main session bingo is that the first main session bingo book is linked to something called a "link flyer", for which there is an additional cost of 25p; a link flyer enables participation in a game linking a number of sites, which enables a greater prize fund to be generated.

22. I confess to not understanding precisely what the Tribunal are saying about the 200p entry on the charges sheet or the effect of the footnote. In particular, I do not understand what they mean when they say that the admission charge is "set at the price of the first set of main session bingo books". If a member buys tickets for 350p, the admission charge is not 350p but 200p so that the charge is not set at the price of the first set of tickets. Further, if a member spends only 175p on a ticket (unlikely, but a theoretical possibility), the maximum which he can be seen as paying for admission is 175p. He then presumably plays bingo for nothing. I asked Mr Brown what the reader of the charges to pay notice was able to take away from reading it. He was not really able to provide a satisfactory explanation. For my part, I think a member trying to understand the charges to pay notice might be rather confused

23. The notice also includes a note stating: "All or part of any of the charges shown above may be waived at the discretion of the proprietor". Beacon thus reserves the right to waive the admission fee.

24. Prior to 2005 the club charged an admission fee at the door. Between 2005 and 2008 the club operated without an admission fee. The reason for the change in admissions charging to that operated at the book sales desk was due to the high

level of admissions, reducing staff levels, reducing the queuing required of members, and security.

25. Apart from the inclusion of the admission charge within the price for main session bingo, there is no other charge for admission levied, whether directly or by inclusion in any other price for playing bingo. Members who do not play main session bingo are not charged for admission. There is no requirement for members who enter the club to buy books for main session bingo, or indeed to play any of the bingo games.
26. Members who arrive for the afternoon session can stay on afterwards to play on the various entertainment machines or to use the refreshment facilities, and they are not required to leave before the evening session begins. If, as happens on occasions, Beacon offers promotions under which the first set of bingo books is supplied free, no additional or separate admission charge is levied.
27. The element of receipts recorded by Beacon as "admission charge" is calculated by reference to the total number of swipes of members' cards recorded for each playing session, up to 9pm. The total is recorded after the start of each session, and the charge is calculated by multiplying the total number of swipes by the relevant fee for that session. That amount is then deducted from the aggregate takings for all the bingo games to arrive at a net figure for bingo receipts.
28. There was some dispute over the number of members who play main session bingo. The Tribunal records that it had been asserted by Beacon in discussion with HMRC that 99.9% of customers come to play bingo; this was said to have been from Beacon's experience. The Tribunal state that they had no evidence on which an accurate estimate could be reached. However, in the absence of such evidence, their finding was that "a not insignificant number of members would enter the club and not pay for, or participate in main session bingo". They regarded the reference made by Beacon to 99.9% of its customers as simply a way of describing, in unscientific terms, an impression that the vast majority of its customers played bingo. But in their view that said nothing of the percentage that plays main session bingo.
29. The Tribunal considered that the layout of the club, its offer of other forms of bingo and prize machines, and its leisure facilities, made it likely, in the absence of evidence that would lead us to find to the contrary, that a not insignificant number of members enjoy those facilities without playing main session bingo.

That finding of fact is challenged by Beacon as I will explain.

The issues on the appeal and submission

30. The issues identified by Beacon are these:
    a. What is the correct interpretation of section 19, its contention being that an apportioned part of the payments made in the purchase of books of tickets and attributable to admission falls to be disregarded under section 19(3)(e)(ii)? Beacon's case is that the approach of the tribunal in *Cosmo Leisure* was correct. HMRC's case is that the Tribunal's interpretation of section 19 is correct although not for the reasons which they gave.
    b. Did the tribunals findings of fact amount to an error of law? Beacon contends that the answer to this question is Yes and HMRC contend that it is No.

Interpretation of section 19

31. HMRC consider that there is no need for me to resolve the different interpretations of section 19 found in the cases to which I have referred. According to them, the appeal should be dismissed because, even on Beacon's interpretation, the decision of the Tribunal is correct. I consider that, even if that is right, it is necessary for me to say something at this stage about the different interpretations in order to assess the arguments concerning the alleged error of law on findings of fact.
32. In *Cosmo Leisure*, the tribunal summarised their conclusions on the meaning of the statutory provisions at [42] of their decision. So far as relevant, they were as follows:
    a. "Payments in respect of entitlement or opportunity to participate in bingo are construed as payments just for the playing of bingo." [42(4)]
    b. "Section 19(3)(d) of the 1981 Act restricts bingo receipts to participation fees and stakes. Unlike section 344 of the Gambling Act 2005, section 19(3)(d) does not include admission charges within the definition of participation fees.": [43(5)]
    c. "The references to Parliamentary materials confirm the existence of a wider range of payments that have some connection with the playing of bingo. Parliament, however, chose to limit the scope of the tax to the money spent on cards for bingo, and the total amount spent playing mechanised cash and prize bingo. Admission fees and other charges, such as membership fees are excluded from the charge to tax" [42(6)]

33. The Tribunal took a different view. They saw force in the argument (accepted in *Cosmo Leisure*), that viewed on its own section 19(1) should be construed so that "in respect of" simply meant "for". The Tribunal recorded HMRC's argument in *Cosmo Leisure* (although not repeated before them) that bingo receipts included admission charges as being payment in respect of an entitlement or opportunity to play bingo. They considered that the tribunal had been right to reject that argument; but that was not for the reason which, according to them, the tribunal had given for that rejection, namely that there needed to be a causal connection between the act of payment and the playing of bingo. It is not at all easy to see why the Tribunal categorised the reasoning in *Cosmo Leisure* in that way. So far as I can see, the appellant in that case did not rely on a concept of causal connection. The only reference to causal connection in the decision in that case was in [25] where the tribunal said this:

> "Moreover HMRC considered incorrect the Appellant's construction of the phrase in respect of as conferring a causal connection between the act of payment and the playing of bingo."

34. It therefore appears to have been HMRC's description of the appellant's argument that a causal connection had to be found, rather that the appellant's own words. Notwithstanding the use of those same words by the Tribunal and by Lord Tyre (see [41] and [42] below), I confess that I do not understand what it means to say that there is a causal connection between the payment and the playing of bingo. Clearly the payment does not cause the playing of bingo in any ordinary sense of the word cause. The "but for" test mentioned by Lord Tyre is, in some cases, apposite where the question is whether a particular action caused identified loss and damage, although it is not always the correct test to apply.

35. But once one moves away from the ordinary use of words and asks what the tribunal in *Cosmo Leisure* and Lord Tyre meant by a causal connection, the answer is, it seems to me, that it adds nothing to the statutory words. The use of the words "causal connection" does nothing to <u>explain</u> the meaning of the words "in respect of". Those former words do not add anything to an understanding of what "in respect of" means in the context of section 19. That is not, I appreciate, the end of their explanations about what "in respect of" means. Each of them considered that the result of their test is that "in respect of" means "for". That is

the important conclusion.

36. The Tribunal, however, does not appear to have had the problem of understanding which I have, saying that section 19(1) should not be construed as requiring a causal connection: they, at least, must have understood what was meant by those words. To be fair, they may simply have understood them as meaning "for". They gave the words "in respect of" what they say as their "plain and unvarnished meaning" so as to require a relationship between the payment and entitlement or opportunity to participate in bingo. In reaching this conclusion, they relied heavily on section 19(3)(e). HMRC do not support this part of the Tribunal's reasoning and I consider that they are right not to do so. Section 19(3)(e) present no difficulties even on the construction adopted by the tribunal in *Cosmo Leisure*, which Beacon supports. On that construction, a single payment ("where a sum is paid…") could be made to cover admission and also something else, such as a cup of tea and some cake or the purchase of a book of tickets. The payment would be partly in respect of an entitlement to participate in bingo and partly in respect of that something else. Paragraph (i) then provides that where part of the payment ("such part of the sum..") is applied to or properly attributable to entitlement to participate in the game, that part shall be treated as the amount falling due (and thus within the scope of bingo duty) in respect of entitlement to participate in a game.
37. The Tribunal, adopting the approach which it did, rejected those parts of the conclusions of the tribunal in *Cosmo Leisure* which I have set out in [32] above.
38. As to the first of those, they rejected it because in their view the analysis failed to take account of section 19(3)(e). For the reasons already given, I do not consider that section 19(3)(e) provides a reason to reject the first conclusion.
39. As to the second of those, the Tribunal considered that section 19(3)(d) did not have the effect described. At [23] of his decision, Lord Tyre agreed with the Tribunal (*ie* the Tribunal in the present case, not the tribunal he there referred to) on this point; and so do I for the reasons he gave. I would add that the express inclusion of stakes was, it seems to me, to eliminate an argument that a "stake" was different from, and did not form part of, a "fee". A stake would, arguably, not be a payment for the right to pay bingo: only a participation fee would be for the acquisition of such a right.
40. As to the third of those, I do not consider that the tribunal in *Cosmo Leisure* were

entitled to refer to the Parliamentary material. It is perfectly possible to construe the legislation according to ordinary canons of construction; there is no ambiguity in the sense required by *Pepper v Hart*. But even if there were, the actual material relied on is of no assistance since it does not fall within the criteria relevant to establishing what material is then admissible. Even if it were accepted that it was clearly the intention of Parliament that admission charges properly so called were not to fall within the scope of bingo duty (a position which HMRC in any case accept), that does not begin to answer the question whether the allocation of part of the payments made for books of bingo tickets to a purported admission charge is an admission charge within the (assumed) intention of Parliament.

41. Lord Tyre, in *Carlton Clubs*, favoured the approach taken by the tribunal in *Cosmo Leisure*. That case did not concern admission fees. Nor did questions concerning the "reality" of the situation arise: it was clear that a payment was made for the use of the EHDs (hand-held devices) and the issue was how to apply the statutory provisions to the particular method of playing the game. Lord Tyre thus rejected the approach of the tribunal below that the critical question was what was the reality, although he did accept that that was the critical question in *Cosmo Leisure* and in the present case, where the issue is whether the payment is in reality made by way of an admission charge or not.

42. Lord Tyre addressed the construction of section 19 in [20] to [22] of his decision. He rejected a broad interpretation, effectively a "but for" test, under which payments within the section could cover not only admission charges but also other expenditure associated with an opportunity to participate in games, such as club membership fees. He thus rejected the idea that the test was whether there was a "relationship" which was what the Tribunal in the present case had identified in [12] of the Decision. He regarded such an interpretation as impossible to reconcile with section 17(1) which requires bingo duty to be charged "on the playing of bingo".

43. Having rejected an interpretation based on a "but for" test or a "relationship", he went on to decide in [22] of his decision that section 17(1), 19(1) and (3) and 20C(5) read together "require a causal connection between the payment and the entitlement of the opportunity to participate in a game of bingo". He agreed that the words "in respect of" entitlement or opportunity should be construed as meaning "for". This provided a clear distinction between those payments in

respect of such entitlement or opportunity which fall within the scope of "the playing of bingo" and those which do not.

44. As I have said, HMRC do not support the reasoning of the Tribunal insofar as it relies on section 19(3)(e). Nor do they suggest that "in respect of" means "related to". It must follow, it seems to me, that it is not enough that there is a "relationship" if there is an identity of concept between "relationship" and "related to". What they do say, however, is that since section 17(1)(a) imposes a duty on the playing of bingo there must be an immediate nexus between the playing of the game and the payment which is made. Accordingly, a genuine admission charge would not be caught because the relevant nexus between such a charge and the playing of bingo.

45. The problem with this approach is that there is no explanation by HMRC of what is necessary to establish this nexus. Unless the concept of "nexus" is the same, or virtually the same, as the concept of "causal connection" as used by Lord Tyre, (so that "in respect of" does indeed mean "for"), it is hard to know what the difference is.

46. I leave matters there, for the moment, since I have explained enough about the possible rival views to enable me to deal with Beacon's appeal based on an alleged error of law on the Tribunal's findings of fact.

Error of law on findings of fact – Beacon's submissions

47. Mr Brown's skeleton argument identifies the Tribunal's alleged error of law in this way:

> "The Tribunal's finding that the correct attribution of the fee was for the entitlement or opportunity to play bingo and that the admission charge "was not based on reality" (para. 37) was one which amounts to an error of law in that it was perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors (*Edwards v. Bairstow* [1956] AC 14)."

48. He refers in that skeleton argument, as he did in his oral submissions, to the following factors relied on by the Tribunal:

    a. Members who played main session bingo had already gained admission by swiping cards [38]. Mr Brown says that this is an irrelevant factor. It does not matter where the admission charge is made. The Tribunal ignored the fact that there was a risk of theft if monies were physically taken at the door due to its close location to the street.

b. The Tribunal concluded there were "a not insignificant number of members" who entered and did not play bingo [35]. They stated there was no evidence from which an accurate estimate of numbers could be reached and therefore based their finding on no evidence. Further they described as only "an impression" Beacon's evidence to the effect that its experience of running bingo clubs for over 40 years was that 99.9% of members who entered the clubs played bingo. They then appeared to ignore this evidence when they reached a conclusion "in the absence of evidence that would lead us to the contrary".

c. The figure for admission charges was wholly artificial [39]. Mr Brown submits that, even if only 50% of members who entered played main session bingo, then 50% of the figure for admission was correct. It cannot be said that the figure was "wholly artificial" *ie* entirely unreal. In any case, the Tribunal should have accepted that 99.9% of those entering the club did play main session bingo. On that footing – and even on the footing that a significant number of members did not play main session bingo – the allocation of part of the payments to admission charges by reference to the number of swipes (*ie* the number of people entering the club) did reflect reality.

d. The Tribunal ignored Beacon's stated policy that it charged admission charges at its premises and the undisputed fact (*ie* accepted by HMRC) that it did so at the two other bingo clubs which Beacon operated that were not subject of this appeal.

e. The Tribunal held that, even if they had considered that the main session charge could be treated as being both for the playing of bingo and for admission, the proper application of section 19(3)(e) meant that the whole payment must be attributed to the entitlement or opportunity to play bingo. If it is a finding of fact that an admission charge was made, even if it applied to some but not all of the members, that amount should not be included in the calculation for tax. Referring to section 19(3)(e)(ii), Mr Brown submits that the law therefore allows for an all-in-one fee to be charged and for that part of the fee attributable to admission to be disregarded from the calculation for excise duty. The payment actually made was, he says, an all-in price. A customer who looked at the "charges

to play" notice they would be aware that there was an admission charge and that part of what they were paying would be attributed to admission.

49. In that last context, Mr Brown refers to Rule 3 of the rules governing membership. Rule 3.3 provides that Beacon "will determine the admission and such other charges to take part in gaming in accordance with the regulations within the Gambling Act 2005".

50. The system in operations reflected a perfectly sensible business model. Beacon's policy, according to Mr Brown, was to make an admission charge. Since, on its case, 99.9% of members entering the club would pay main session bingo, to collect admission charges by allocating payment made by that 99.9% to admission charges avoided the security issues surrounding payment at the entrance and was an administratively effective and cost-effective way of collecting those admission charges. It is true that by carrying out the allocation exercise by reference to the number of swipes at the entrance door, Beacon would be collecting an admission charge in relation 100% of those members who entered the club (prior to the time when the swipes were counted) but would be collecting those admission charges from only the 99.9% who played main session bingo. This is of minor significance and has little, if any, impact on the 99.9% of members who actually pay an admission charge.

Error of law on findings of fact – HMRC's submissions

51. Mr Singh has referred me to the well-known authorities which discuss what has to be shown in order to establish a relevant error of law on an appeal relating to finding of fact. This in *Procter & Gamble v Commissioners for HMRC* [2009] EWCA Civ 407 at [7], [2009] STC 1990, it was emphasised that it is the F-tT which is the primary fact finder and the primary maker of a value judgment based on the primary fact. An appellate court will not interfere unless the F-tT has made a legal error (*eg* it has reached a perverse finding or failed to make a relevant finding) or has misconstrued the statutory test. As Briggs J put it in *Megtian Ltd v HMRC* [2010] EWHC 18 (Ch), at [11].

> "The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by

all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact."

52. Mr Singh submits that it cannot be said, on any sensible view, that the Tribunal's finding that Beacon's charges were attributable to the playing of bingo and were not for admission was based on no evidence, perverse or otherwise unreasonable in a way which would justify interference by me. As a matter of fact, no charge was made by Beacon to members for the right to enter its premises as they entered free of charge, by swiping their membership cards. As a further matter of fact, the charges in issue in the appeal were only ever levied on those who played bingo. In the light of those two facts alone, it was unsurprising that the Tribunal decided that the charges were for playing bingo and not for admission.
53. Mr Singh rejects each of Beacon's challenges set out above to the Tribunal's decision. I take them in turn.
54. **Members who played main session bingo had already gained admission by swiping cards [38]**. Beacon's statement that this is an irrelevant factor and that it does not matter where the admission charge is made misunderstands the Tribunal's finding. They were not suggesting that the physical location where the charge was levied was relevant, but were referring to the fact that members did not need to pay anything for the right to enter the club. This, it is submitted, was a highly relevant factor in determining whether the charges in issue could properly be characterised as "admission" charges.
55. As to the suggestion that the Tribunal ignored the risk of theft if monies were physically taken at the door due to its close location to the street, Mr Singh contends that the Tribunal did not ignore that risk. It is recorded in [31] that "security" was one of the reasons why Beacon had ceased to collect admission fees at the door. Moreover, Beacon's submission wrongly assumes that the physical location at which the charges were levied was of significance to the Tribunal, when what was of actual significance was that no charge was levied anywhere at all in the club for the right to enter the club, *ie* for admission.
56. **There was "a not insignificant number of members" who entered and did not play bingo [35]**. Mr Singh submits that the criticism made of the Tribunal under this heading is ill-founded. The Tribunal stated that it found that a "not insignificant number of members" entered the club and did not play bingo in the light of "the layout of the club, its offer of other forms of bingo and prize

machines, and its leisure facilities" [35]. There was, therefore, a reasoned basis for the Tribunal's finding.

57. Mr Singh also addressed, under this heading, Beacon's claim that, in stating at [35] that there was an "absence of evidence" that would lead it to find, in effect, that only an insignificant number of members would enjoy the club facilities without playing main session bingo, the Tribunal ignored Beacon's impressionistic evidence that 99.9% of members who entered the club played bingo. This criticism, he says, is misplaced. The Tribunal did not ignore Beacon's suggestion that 99.9% of its customers came to play bingo but stated that it regarded "the reference made by Beacon to 99.9% of its customers as simply a way of describing, in unscientific terms, an impression that the vast majority of its customers played bingo" [35]. They correctly noted that this "said nothing" about the precise percentage of customers who played main session bingo, particularly because Beacon itself had not put forward the 99.9% figure as an accurate estimate.

58. **The figure for admission charges was wholly artificial [39]**. Mr Singh notes Beacon's submission that the figure for admission charges could not have been wholly artificial because "even if only 50% of members who entered played main session bingo, then 50% of the figure for admission was correct". This submission, he submits, assumes that the Tribunal only regarded "the figure for admission charges" as "wholly artificial" because "not all members would play main session bingo, and there was no reliable evidence on the number of members who did" [39]. However, it is clear from [39] that the Tribunal regarded "the figure for admission charges" as artificial and not reflecting reality for a variety of reasons. He relies on this passage from [39]:

> "The allocation of the price of the first book of tickets for main session bingo was no more than an internal allocation by Beacon which did not reflect the substance of the payment, the reason it was made by the member, and what in reality the member received for the payment. The calculation of the admission price element of the overall bingo receipts, based as it was on the membership cards swiped up to 9pm, could not reflect any proper assessment of admission charges…".

59. In other words, the substance of the payment was, he submits, for playing bingo, the reason the payment was made by the member was in order to play bingo, and what in reality the member received for the payment was the ability to play bingo.

The member never paid anything to get into the club in the first place. It was for these reasons and the others referred to by at [39] that the Tribunal found that Beacon's figure for admission charges was "wholly artificial and did not reflect the substance or reality of what took place, even on the most favourable analysis of Beacon's charging structure".

60. Beacon's alleged policy was not ignored by the Tribunal as Beacon suggests but was expressly taken into account as were the club's rules. However, the Tribunal found, as it was entitled to, that the characterisation of the charges by the Appellant as "admission" charges did not reflect reality.

61. **The Tribunal ignored Beacon's stated policy that it charged admission charges**. Beacon says that the Tribunal "ignored…the undisputed fact" that Beacon charged "admission fees" at two other bingo clubs it operated which were not the subject of the appeal. There was no evidence before the Tribunal that it was an "undisputed fact" that what could properly be characterised as "admission fees" were charged at these clubs, but in any event the arrangements at those clubs were correctly not taken into account by the Tribunal because, as they noted, those clubs "operated differently, and are not within the assessment" [18].

62. **The proper application of section 19(3)(e) meant that the whole payment must be attributed to the entitlement or opportunity to play bingo**. Mr Brown refers to what the Tribunal stated at [42] and says that: "If it is a finding of fact that an admission charge was made, even if it applied to some but not all of the members", an apportionment would be necessary under section 19(3)(e) of the BGDA. Since the Tribunal did not in fact consider that "the main session price" was for admission at all, Mr Singh notes that their comments at [42] were *obiter* and formed no part of their decision. Further, as the Tribunal made no "finding of fact" in [42] that an admission charge was made, section 19(3)(e) BGDA is not engaged.

Error of law on findings of fact - discussion

63. Mr Singh says that it is undisputed fact that no-one had to pay to enter the club. He is wrong to say that his statement is not disputed because Mr Brown did, indeed, dispute it. I think that they are talking about slightly different things. It is certainly the case that a member who played main session bingo

had, before he made any payment, already gained admission to the premises by the swipe of a card. In that sense, no-one had to pay in order to obtain admission; that is, I think, what Mr Singh is saying. In contrast, what Mr Brown is saying when he says that there is a dispute is that the payment for the bingo tickets includes an admission charge so that the relevant members did have to pay to enter the club.

64. It is also certainly the case that a member who did not play main session bingo did not pay, and was not obliged to pay, any admission charge at any stage. And this is so notwithstanding that the total taken by Beacon by way of admission charges from the payments made by those who did play main session bingo was calculated by the number of swipes (that number including the swipe of the non-playing member).

65. Further, it would have been possible for a member to enter the premises and to enjoy the facilities (for instance having a drink, or enjoying a meal or simply chatting with some friends) before playing, or even deciding to play, main session bingo. It is clearly the case that he has been admitted to the club without having paid or come under an obligation to pay any admission charge; if he leaves without buying any bingo tickets, he will have enjoyed the facilities free of charge.

66. And yet if he decides to play main session bingo and buys a ticket, having already enjoyed the facilities of the club, it is, or logically it has to be, Beacon's case that such a member, when he buys a ticket, is not paying exclusively for an entitlement or opportunity to play bingo but is paying also for the admission to the club, notwithstanding that he has already enjoyed substantial benefits from that admission. And yet the member is not obtaining anything for his (purported or actual) admission charge in addition to that which he has already enjoyed. Indeed, even where the member buys his tickets and plays bingo before enjoying the general facilities of the club, he does not obtain, by virtue of his payment, anything which he did not already possess other than an entitlement or opportunity to play bingo.

67. In contrast, if, counterfactually, every member entering the club after swiping his card (whether or not he subsequently played main session bingo) is obliged to pay an admission charge at a reception desk in order to gain access to the bar and restaurant and the non-bingo gaming facilities, that charge would be

an admission charge notwithstanding that it is not paid at the entrance. It is obvious, and accepted by HMRC, that the physical location of the place of payment of an admission charge is not relevant. I think that the answer would be the same if members were allowed to enter the club and gain access to its facilities before having actually paid an admission charge but were obliged, nonetheless, to pay an admission charge to be collected by roving members of staff. The point here is that all members are obliged, in this scenario, to pay irrespective of whether they play main session bingo, an obligation which arises as a condition of entering the club and which has nothing to do with whether the member actual plays main session bingo or not. In such a case, there is no "causal connection" or "nexus" between the payment of the admission charge and the entitlement or opportunity to play bingo; and the payment is not "for" such an enticement or opportunity. Accordingly, HMRC do not suggest on the actual facts that, because the payment is not made at the entrance to the club but only where bingo tickets are purchased, Beacon's appeal should, for that reason alone, be dismissed.

68. On the actual facts of the case, however, there is no obligation to pay anything at all simply by reason of entering the club and thereby gaining access to its facilities. The only obligation to pay arises as the result of the purchase of bingo tickets. It is the very act of acquisition of the entitlement or opportunity to participate in a game of bingo by purchase of a ticket which gives rise to the purported admission charge in a situation where, without that purchase, the member would in already be able to enjoy the use of the club's facilities.

69. Before considering precisely what is to be drawn from those conclusions, I now turn to discuss the particular submissions recorded in [47] to [62] above.

70. **Members who played main session bingo had already gained admission by swiping cards [38]**. I agree with Mr Singh that this is a highly relevant factor, not in the sense, as he accepts, that it matters where the payment was made but in determining whether the charges in issue could properly be characterised as "admission" charges. I also agree with his submission that the Tribunal did not ignore the security risk and that what was of actual significance was that no charge was levied anywhere in the club for the right to enter the club, *ie* for admission.

71. **There was "a not insignificant number of members" who entered and did**

not play bingo [35]. In my view, the Tribunal were entitled to reach the conclusion which they did. Notwithstanding the evidence given on behalf of Beacon about the numbers of members who did play bingo, the Tribunal identified, in essence, the other facilities which were available to members and took the view – in my judgment within the range of reasonable views – that a significant number of members did not play main session bingo. The Tribunal took the view that Beacon's evidence did not establish the contrary. They said it was impressionistic. And they noted that Beacon itself had not put forward the figure of 99.9% as an actual estimate rather than a way of saying that the vast majority of members did play. So far as I aware, Beacon provided no evidence at all, let alone any substantial evidence, about the proportion of members entering the club who played main session bingo. In my view, the Tribunal were entitled to reach the conclusion that a not insignificant number of such members did not do so. Not insignificant means significant which, in the context of what the Tribunal were saying, means I think more than not *de minimis*.

72. **The figure for admission charges was wholly artificial [39]**. Mr Singh notes Beacon's submission that the figure for admission charges could not have been wholly artificial because "even if only 50% of members who entered played main session bingo, then 50% of the figure for admission was correct". This submission, he submits, assumes that the Tribunal only regarded "the figure for admission charges" as "wholly artificial" because "not all members would play main session bingo, and there was no reliable evidence on the number of members who did" [39]. However, he adds that it is clear from [39] that the Tribunal regarded "the figure for admission charges" as artificial and not reflecting reality for a variety of reasons. He relies on this passage from [39]:

> "The allocation of the price of the first book of tickets for main session bingo was no more than an internal allocation by Beacon which did not reflect the substance of the payment, the reason it was made by the member, and what in reality the member received for the payment. The calculation of the admission price element of the overall bingo receipts, based as it was on the membership cards swiped up to 9pm, could not reflect any proper assessment of admission charges…".

73. In other words, the substance of the payment was, he submits, for playing

bingo, the reason the payment was made by the member was in order to play bingo, and what in reality the member received for the payment was the ability to play bingo. The member never paid anything to get into the club in the first place. It was for these reasons and the others referred to by at [39] that the Tribunal found that Beacon's figure for admission charges was "wholly artificial and did not reflect the substance or reality of what took place, even on the most favourable analysis of Beacon's charging structure".

74. I need to deconstruct what the Tribunal was saying in the quoted passage. The last sentence quoted is a finding of fact that the number of swipes up to 9.00 pm could not reflect any proper assessment of admission charges. That conclusion is one which represents an evaluation by the Tribunal of the primary facts. It is, I consider, a conclusion which the Tribunal were entitled to reach if it is to be read, as I think it is, that there was no assessment of admission charges which was an accurate assessment of the full amount of admission charges. It was not accurate not only because it did not allow for admissions after 9.00 pm but also because, for those admitted up to 9.00 pm, a "not insignificant" number of members would not play main session bingo. The internal accounting for admission charges would include charges in respect of that not insignificant number, none of whom would in fact have paid a charge.

75. As to Beacon's suggestion that the Tribunal "ignored the Appellant's stated policy that it charged admission fees at its premises", Mr Brown has drawn my attention to (i) material which shows that charges were made at other premises not the subject matter of the present appeal and (ii) the charges which had historically been made at the relevant premises. Otherwise, he relies on the charges to play notice. In my view, the arrangements at other premises are not relevant to the legal effect of the arrangements actually put in place at the relevant premises even if, as a matter of Beacon's own internal arrangements, certain receipts were allocated to admission charges. Similarly, the charges historically made at the relevant premises are not relevant to the legal effect of the arrangements later put in place. Those arrangements, were, according to Beacon, implemented because of security concerns; but they went well beyond the steps necessary to meet those concerns (*ie* moving the place of collection to a more secure area) and changed the very basis of

charging for bingo tickets by introducing the charges set out in the charges to play notice, thereby restricting the purported admission charges to those members who played main session bingo.

76. As to the charges to play notice itself (and such policy as can properly be derived from it), I agree with Mr Singh that this was not ignored. It was expressly taken into account by the Tribunal at [28] to [30] as were the club's rules at [23].

77. **The Tribunal ignored Beacon's stated policy that it charged admission charges**. I accept Mr Singh's submissions in relation to this complaint. Thus he points out, correctly it seems to me, that there was no evidence before the Tribunal that it was an "undisputed fact" that what could properly be characterised as "admission fees" were charged at these clubs. I agree that the Tribunal was correct, in any case, not to taken the arrangements at those clubs into account because, as they noted, those clubs "operated differently, and are not within the assessment" [18].

78. **The proper application of section 19(3)(e) meant that the whole payment must be attributed to the entitlement or opportunity to play bingo**. I also agree with Mr Singh's submissions this point does not arise for the reasons he gives, namely that the Tribunal did not in fact consider that "the main session price" was for admission at all so that their comments at [42] were *obiter* and formed no part of their decision.

79. The Tribunal held at [37] that the reality was that no charge was made by Beacon for members to enter the club, for the reasons which they gave. This was underlined at [39] where they held that the internal allocation by Beacon did not reflect the substance of the payment (for the first book of tickets) and that even on the most favourable analysis of Beacon's charging structure, the figure for admission charges did not reflect the substance and reality of what took place. This was, in my judgement, an evaluative conclusion which the Tribunal were entitled to reach in the light of the evidence and their findings of fact.

80. But even if the Tribunal had been wrong to conclude that a significant number of members did not play main session bingo, that would not, in my judgement, lead to a different result. If they were wrong, and if that were sufficient to vitiate their conclusion, then it would be open to me, on this appeal, to decide

the case without having to remit it to the First-tier Tribunal. In my judgement, even if 99.9% of members entering the premises went on to play main session bingo, the reality is that they all obtained admission without having paid, or coming under an obligation to pay, an admission charge. It is only if a member went on to buy tickets to play main session bingo that it is even arguable that part of his payment was not only for admission to the club but also not "in respect of" playing bingo. In my judgment, the entirety of the payment was "in respect of" the entitlement or opportunity to pay bingo. I consider that the payment is "for" playing bingo within the approach of the tribunal in *Cosmo Leisure* and of Lord Tyre.

81. I thus agree with Mr Singh when he says that, even if Beacon had demonstrated that 99.9% of its members did, in fact, play main session bingo, this would not have changed the fact that no payment was taken from any member for the right to be admitted to the club and that the only benefit to members of paying the charges in issue was the ability to play bingo; and that, accordingly, the payments could only ever have been rationally characterised as being for the playing of bingo and not for admission to the club.

82. Although this is not necessary to my decision, for my part, rather than interpret "in respect of" as simply meaning "for", I prefer to say that there has to be established a nexus between the payment and the entitlement or opportunity to play bingo. Where the line is to be drawn is essentially a matter of policy. This is not to introduce a new complication since precisely the same policy decision has to be taken in judging where the line is to be drawn between what is and what is not "for" such an entitlement or opportunity. In my judgment, the line in the present case on either approach is to be drawn so as to bring the payments made by members for their tickets to play main session bingo within the scope of bingo duty.

83. I would only add that there is nothing in my conclusion which is inconsistent with the conclusion that an admission charge, properly so called, to a club such as the clubs in the present case is not within the scope of bingo duty. In such a case, no member has a right to enjoy the facilities of the club unless he pays (or is under a contractual obligation to pay) an admission charge: the charge is not conditional on his obtaining an entitlement or opportunity to play bingo. The necessary nexus is absent: or to use the words of the tribunal in

Cosmo Leisure and of Lord Tyre, the payment is not "for" the entitlement or opportunity to play bingo.

Disposition

84. Beacon's appeal is dismissed.

Mr Justice Warren

Release Date: 8 June 2016