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Court of Appeal rules that pub operator cannot have bingo licence

*Gambling Commission v. Greene King Brewing and
Retailing Limited and Green King Retailing Limited
[2017] EWCA Civ 372*

Article by David Bowden

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gambling in so far as they think it to be in accordance with any code of practice or guidance issued by the GC.

In relation to premises licences, the GC has a duty to give guidance to local authorities and the Secretary of State for Culture Media and Sport has made regulations requiring any applicant for a premises licence to give notice of that application to the GC. The GC is entitled to make representations and effectively has a right to insist on the licensing authority holding an oral hearing. The GC is given a right to appeal to the local magistrates if it disagrees with the grant of a premises licence.

Is bingo allowed in pubs or not?

Bingo is allowed in pubs but within these strict limits:

- there is a maximum stake of £5,
- the pub may not charge a fee for playing the game or make any deductions from stakes or winnings,
- there cannot be any linking up with other premises to provide a bigger game with correspondingly larger prizes,
- pubs must observe the '*high turnover rule*' (s281) which provides that if in any period of 7 days the aggregate of stakes or prizes at bingo in a pub exceeds £2,000, the owner must notify the GC. It is an offence to exceed that limit again in the next 12 months.

What is the effect of a pub operator obtaining a bingo operating licence?

The high turnover rule would no longer apply. Greene King could apply for a bingo premises licence. Only a holder of a bingo operating licence can apply for a bingo premises licence. If an application for a bingo premises licence is successful all of the restrictions on bingo in section 279 of GA 2005 would be removed in respect of those premises.

A pub has automatic entitlement to only 2 gaming machines of types restricted to a maximum £1 stake and maximum £100 prize. However a bingo premises licence brings with it the right to an **unlimited** number of machines not exceeding 20% of the total number giving prizes of up to £400 or £500. Neither the licensing authority nor the GC can impose conditions in respect of the number or type of gaming machines but the DCMS has power to change the rules.

What ruling did the Gambling Commission make on Green King's application for a bingo licence?

The GC was concerned about a '*new and potentially contentious premises environment*'. The GC identified other issues which justified a referral to its regulatory panel.

What happened on Green King's application to the Gambling Commission's Regulatory Panel?

By its decision dated 12 March 2014, the Regulatory Panel of the Gambling Commission refused Green King's applications for a bingo licence.

The panel was satisfied as to the suitability and competence of both Green King to offer the proposed licensed gambling activities. However the panel rejected Greene King's submission that their proposals were not really any different from the way bingo halls with alcohol licences operate at the moment. The panel reasoned that pubs and bingo halls were different because of the different expectations of consumers frequenting them. Sale of alcohol in a bingo hall tended to be ancillary to the provision of bingo. The panel accepted that GA 2005 does not exclude pubs from the operating and premises licence regime but it said that '*there must come a point within that escalating regulatory regime when an operator would have to decide what the primary purpose of their premises was; whether they were operating a pub or bingo premises*'.

The panel was concerned about the development of commercial bingo with accompanying gaming machines in pubs and whether this had '*a potential to impact adversely on the licensing objectives*'. The panel stated that it had to adopt '*a precautionary approach*' and concluded that the provision of high stake bingo and higher category gaming machines in a pub environment had '*the potential to jeopardise 2 of the GA 2015's statutory objectives*'.

In the light of '*the different expectations of those frequenting pub or bingo premises as to their primary purpose*' and taking a precautionary approach, the panel refused Green King's applications.

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What did the judge in the First Tier Tribunal rule?

Tribunal Judge Nicholas Warren sitting in the First Tier Tribunal handed down his reserved judgement on 2 appeals issued by Greene King Brewing and Retailing Limited and Greene King Retailing Limited. By his written judgment dated 2 December 2014 he allowed Green King's appeal from the refusal of the Regulatory Panel to refuse it a bingo licence for its pubs. These appeals have these FTT reference numbers: GA/2014/0001 and GA/2014/0002.

The FTT decided that the panel's decision had to be set aside because of a fundamental error. The FTT noted the panel's acceptance that Greene King was suitable and competent to offer the proposed gambling activities in a busy pub environment. However the FTT observed that Green King's applications were refused because of the panel's concern about premises but the FTT said that the panel was *'trespassing on territory which the Act assigns to licensing authorities'*. The FTT ruled that Parliament has concluded that questions about premises should be determined locally having regard both to national guidance and to local criteria.

Concluding on this, the FTT ruled

'In my judgment, it is not open to the Commission to use s159(3) of the Act to give them an effective right of veto on an application for a premises licence. Their role in respect of premises licences, as I have indicated, is to give guidance; make representations; even appeal against the licensing authority's decision – but not to usurp the role of decision maker.'

The FTT quashed the GC's decision and remitted the matter to it with a direction that Green King's applications should be granted.

What ruling did the Upper Tribunal make on the 1st appeal?

However this decision of the FTT was over-turned by the Administrative Appeals Chamber of the Upper Tribunal. By its reserved judgment dated 29 January 2016, which is very thin on analysis, Upper Tribunal Judge Levenson ruled in the Gambling Commission's favour - **[2016] UKUT 50 (AAC)**. The UT said that this appeal was not about Greene King's demonstrated competence nor was it about the GC's approach to the issue of whether additional forms of gambling should be allowed in premises with an alcohol licence. The UT said the appeal was about whether the GC had the power in law to make the decision it made.

The UT ruled that it agreed with the GC's submissions that the combined effect of sections 1(c), 22 and 70(1)(a) of GA 2005 is to place on the GC the *'main responsibility for ensuring compliance with the licensing objectives and, in particular, the protection of vulnerable persons'*. The UR ruled that the provisions of GA 2005 sections 159(3) and 169(4) made *'it clear that primacy is to be given to the decisions of the Commission on whether to grant an operating licence'*. The UT said that the legislation requires the GC 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'*. It went on to say that it could not be the case that in pursuit of national policy objectives the GC is *'required to conduct some kind of guerrilla warfare in each separate locality'* which it said would run the risk *'not controlling betting activities in a consistent and systematic matter'*.

The UT agreed that the GC's concern was *'fundamentally about the availability of high or higher stakes gambling to those whose better judgment might be affected by alcohol'*. The UT ruled that the FTT was in error in failing to approach the GC's decision in this way.

What were the issues the Court of Appeal had to decide?

Upper Tribunal Judge Howard Levenson in the UT granted Green King permission to appeal to the Court of Appeal. There were these 3 grounds of appeal:

- The UT erred in its interpretation of section 70 of GA 2005 which sets out the matters to which the GC 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,
- The UT erred in finding that the FTT determination was wrong because:
 - the FTT found the GC's purpose in and only justification for refusing the applications had been to prevent Greene King applying to local licensing authorities for premises licences, and

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- on a proper interpretation of the FTT's determination, it had taken into account the proposed operation and its environment including the busy pub premises at which it was to take place. The FTT correctly concluded that it was reasonably consistent with the licensing objectives. The UT was wrong to ignore the FTT's factual finding.
- The UT erred in allowing the appeal without taking into account of the alternative grounds for upholding the FTT's decision, namely:
 - The GC erred in law in purporting to create a blanket ban on full commercial bingo in pubs,
 - There was no evidential basis for such a blanket ban, and
 - In allowing the appeal, the GC failed to follow its own published Statement of Principles.

Are there any prior authorities on this point?

Yes. The Court of Appeal said that the first authority being on earlier legislation did not assist Green King.

Wolverhampton & Dudley Breweries Ltd v. Warley County Borough Council [1970] 1 WLR 463 (High Court, QBD, Lord Chief Justice Parker and Ashworth & Cantley JJ)

The brewery was refused permits for the provision of amusements with prizes at certain pubs on the general principle that drinking and gambling do not mix. The quarter sessions dismissed an appeal from the licensing decision of the local authority. The High Court allowed the appeal ruling that except in particular circumstances this was not a valid reason for refusing a permit.

Lethem v. SS for Transport, Local Government & the Regions [2002] EWHC 1549 (High Court, QBD, Administrative Court, Deputy Judge George Bartlett QC)

The fact that a proposal raised issues which could be dealt with under more than one statutory scheme did not mean that one scheme necessarily had to be applied to the exclusion of the other. A planning inspector's concerns had been material to the planning decision and were matters that he was required by policy to consider. Those concerns having been identified, it would have been counter to policy for him to grant planning permission.

Gibraltar Betting and Gaming Association Ltd v. DCMS [2014] EWHC 3236 (Admin) (High Court, QBD, Administrative Court, Green J)

The new gambling regime in Gibraltar was not unlawful. It served a number of legitimate objectives and was not disproportionate, discriminatory or irrational. In the context of gambling, the CJEU regarded free competition as tending to towards consumer harm, and it afforded member states a broad margin of appreciation. Relevant factors included the decision maker's status, the risks associated with the regulated activity, the extent to which regulatory perfection was achievable, the decision-maker's preparedness to keep the regime under review, the justification for the regime and whether it was based on a desire to curb future harm. Remote gambling was an area of high social and consumer-welfare concern. The court was to be slow to second guess Parliament's assessment of risk. The new regime served a number of legitimate objectives including enabling the Commission to better supervise operators and protect consumers. While a precautionary approach was justified there was sufficient evidence of existing concerns to justify the new regime.

What does Gambling Act 2005 say?

Section 70 of GA 2005 provides as follows:

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

- (a) shall have regard to the licensing objectives,*
- (b) shall form and have regard to an opinion of the applicant's suitability to carry on the licensed activities,*
- (c) shall consider the suitability of any gaming machine to be used in connection with the licensed activities, and*
- (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).*

....

(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...'

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What did the Court of Appeal rule on the interpretation of section 70 of GA 2005?

Green King submitted that the Regulatory Panel was bound to consider its application for an operating licence in accordance with GA 2005 section 70. Green King submitted that the Regulatory Panel's analysis had misinterpreted this because the GA 2005 had established a fundamental division of regulatory powers and responsibilities between the GC (as national regulator) and licensing authorities (as local regulators). Green King said that s70 did not contain a '*freestanding*' requirement and that the Regulatory Panel had 'erred in then going on to consider the premises in which these facilities were to be provided, namely pubs' because this was '*a consideration for the local licensing authority when considering an application for a premises licence*'.

Lord Justice Hickinbottom in giving the unanimous judgment of the Court of Appeal disagreed saying that despite the '*valiance*' of Green King's submissions they '*fell very far short of being persuasive*'. Hickinbottom LJ ruled that the GC was the national gambling regulator and had a '*wide discretion*' and when '*considering a novel operating model for gambling*', the GA 2005 required it to '*consider whether that model is or is not consistent with the licensing objectives*'. Hickinbottom LJ ruled that Parliament had 'entrusted the determination of operating licences' to the GC which therefore had '*primacy*' in respect of such applications. However Green King submitted that the GC could not use its power over operating licences to detract from the powers given by Parliament to local authorities over premises licensing.

Hickinbottom LJ disagreed saying that such an approach was '*simplistic*' and said that whilst the GC and local licensing authorities had '*discrete functions under the Act*' when exercising those functions there were '*some common or overlapping relevant factors*' and that neither GA 2005 nor the Statement of Principles 'expresses any principle of procedural exclusivity in favour of local licensing authorities in respect of premises'. He also noted that GC 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*'.

Although there was an overlap of powers, Hickinbottom LJ rejected Green King's submission that GA 2005 s70 was '*anything less than a freestanding requirement*' imposed upon GC. Going on he ruled that he considered s70 to be '*unambiguously clear on the face of its text alone*' he also noted that this '*clarity is emphasised when the section is seen in its context*' and drew support from *Gibraltar Betting* on this. Hickinbottom LJ said it was '*a bold proposition to suggest that*' in determining an application for an operating licence, the GC had '*neither the obligation nor even the power to consider whether the proposed operating model is reasonably consistent with the licensing objectives*'. For this reason Hickinbottom LJ ruled that he considered that neither the Regulatory Panel nor the UT had '*erred in treating the requirements*' of GA 2005 s70(1)(a) and (b) as '*discrete*'.

Hickinbottom LJ ruled that the GA 2005 did not require '*any rigid approach*'. He rejected Green King's submissions that the UT was unduly influenced by a '*floodgates*' argument and being concerned that granting 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. Hickinbottom LJ rejected this saying he was '*unconvinced that this is a true floodgate argument*'.

As to the point that an adverse stance against gambling in pubs is unwarranted because many bingo halls have drink readily on offer, Hickinbottom LJ said he did '*not consider that to be compelling*'. Although he noted that unlike adult gaming centre premises, family entertainment premises and betting premises bingo halls were '*not prohibited from serving alcohol, and many have on-licences to do so*' but he ruled that the GC was '*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)*'.

Concluding on this 1st issue Hickinbottom LJ said for all these reasons which he considered to be '*overwhelming*', he ruled that the UT's construction of the statutory scheme was correct. and the FTT's approach was not.

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What did the Court of Appeal rule on whether the only justification for refusing the applications had been to prevent Greene King applying for premises licences?

Hickinbottom LJ starts by noting that the FTT found that the Regulatory Panel of the GC's purpose in and 'only justification' for refusing Green King's applications had been to prevent it applying to local licensing authorities for premises licences. Green King said this was an improper purpose because, by banning pubs as a venue for full commercial bingo it circumvented GA 2005 section 84. Hickinbottom LJ roundly rejected this submission saying that it had 'no force'.

He ruled that 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*'. Hickinbottom LJ also noted that the FTT had taken into account the '*proposed operation and its environment, including the busy pub premises at which it was to take place*'. However he ruled that the FTT had not drawn the conclusion that Green King claimed. Instead Hickinbottom LJ rules that the FTT had '*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.*'

What did the Court of Appeal rule on the blanket ban point?

Hickinbottom LJ dealt with this quite shortly saying that when the matter returns to the FTT, Greene King 'will be able to raise each of these matters and it will be for that tribunal to determine them on their merits'. That being said, he went on to offer a number of comments that the FTT may take into account when this case goes back to it.

Firstly he said he was '*unpersuaded*' that the GC had erred in law by having an '*unpublished policy*' to prevent applications for gambling licences by pub operators being granted on a blanket basis. Rather Hickinbottom LJ ruled that the Regulatory Panel was '*faced with a novel operating model*' and so it was '*unsurprising that no policy had been devised or published*'. He ruled that the Regulatory Panel '*considered that the model was not reasonably consistent with the pursuit*' of the GC's licensing objectives and that this '*was well within its discretion*'. He ruled that the GC '*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*'.

Green King submitted that by operating a blanket ban, the GC had '*robbed on-licence holders of the opportunity of obtaining an operating licence*'. Hickinbottom LJ rejected this saying that Green King's 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*'. Going further he said that the GC had 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*'.

Concluding on this issue Hickinbottom LJ ruled that 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*'. He ruled that the GC was '*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*'. Finally Hickinbottom LJ said that 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*'.

What will happen next with this case?

There remains the possibility that Green King will seek permission from the Supreme Court for a final appeal. As the FTT has ruled in its favour, the Supreme Court may decide to take this case as it raised a point of law of general public importance.

Green King may decide instead it is better placed having its applications determined by the FTT and submitting the necessary evidence.

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It is disappointing that the GC has adopted such a tame approach. The pub environment has changed dramatically. Pubs are no longer smoky environments inhabited mainly by male drinkers. Instead they have evolved dramatically as they had to in order to survive with the majority now offering a food offering and catering to families. The question has to be asked whether the GC has kept up with evolving trends. It may be better to offer a bingo licence to a pub operator and see how it goes. If the concerns about disinhibitions about gambling being lowered after drinking alcohol, then that can be dealt with by the GC seeking to withdraw a licence.

Finally, the motivation in this case was also to obtain a licence to operate an unlimited number of slot machines with no limit on the prizes and this is inextricably coupled with the consequences of a bingo licence. These 2 markets and target audiences are different. It will be for a new government to decide if the GA 2005 needs amending to de-couple bingo from big money slot machines.

25 May 2017

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He has acted as a consultant to VisitBritain. If you need advice or assistance in relation to tourism, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.