

Raising the stakes—determining the suitability of gambling operating licences (Greene King v Gambling Commission)

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Local Government analysis: The Court of Appeal has ruled that the Gambling Commission (GC) was correct to refuse a pub operator an operating licence. Andy Danson, partner at Bird & Bird, and Melanie Ellis of Harris Hagan offer their insights on the lessons to be learnt from this case, while Brigid Simmons OBE, chief executive of the British Beer and Pub Association, offers a concluding comment on the potential impact of this decision.

Original news

Greene King Brewing and Retailing Limited and another v Gambling Commission [\[2017\] EWCA Civ 372](#), [\[2017\] All ER \(D\) 13 \(Jun\)](#)

The Court of Appeal, Civil Division, dismissed the appellant companies' appeal against the decision of the Upper Tribunal (Administrative Appeals Chamber), upholding the respondent Gambling Commission's decision, refusing them operating licences because it considered that it would be harmful to the statutory licensing objectives to provide gambling in pubs. The respondent had been entitled to find that the proposed gambling operation had been inconsistent with the licensing objectives and the decision had not been made for an improper purpose.

What is the background to this case?

Melanie Ellis (ME): The case began in 2012 when two companies in the Greene King pub group applied for operating licences from the GC which would give them permission to provide facilities for the playing of bingo in their pubs.

After a lengthy consideration and regulatory panel hearing, the GC rejected the application in March 2014 on the basis of concerns about the creation of a 'new and potentially contentious premises environment' where pub goers may become vulnerable to gambling more than they could afford after consuming alcohol. The GC felt that the proposal would present a risk to the licensing objectives of 'protecting children and other vulnerable persons from being harmed or exploited by gambling' and 'ensuring that gambling is conducted in a fair and open way'.

Andy Danson (AD): Under the [Gambling Act 2005 \(GA 2005\)](#) pub operators are automatically allowed to provide facilities for low-stakes, low-prize bingo in their pubs within strict limits. The pub operator is not allowed to charge a fee for playing, or make any deductions from stakes or winnings. They are also automatically permitted to have two Category C or D gaming machines being fruit machines with a maximum stake of £1 and maximum prize of £100 in each pub.

By contrast, the holder of a bingo operating licence from the GC is entitled (if it also obtains the relevant premises licences from a local licensing authority) to operate full commercial bingo. It can then have an unlimited number of Category C or D gaming machines on the premises, as well as up to eight (or, if less, 20% of the total number of machines) Category B3 or B4 machines, which have maximum stakes of up to £2 and maximum prizes of up to £500.

Greene King is a large pub operator. It applied for bingo operating licences from the GC for eight of its pubs, which was intended as a pilot project. The applications were refused by the GC's regulatory panel on the grounds that it would be inconsistent with the statutory licensing objectives in [GA 2005](#) (which include ensuring the fairness and openness of gambling and protecting the vulnerable from exploitation) to provide the proposed level of gambling in pubs, even though it was satisfied as to the suitability and competence of Greene King.

Greene King appealed the decision and was successful in the First-tier Tribunal (General Regulatory Chamber) (FTT) on the basis that the FTT considered that the GC's decision was based on concerns about the premises and that the competence for making decisions on the suitability of premises was reserved to local licensing authorities (with the GC having only an advisory role in premises licensing decisions). The GC then launched its own appeal against that decision and was successful in the Upper Tribunal (Administrative Appeals Chamber) (UT). Greene King was given permission to appeal to the Court of Appeal.

What did the court have to decide?

AD: There were these three grounds of appeal:

- the UT erred in its interpretation of [GA 2005, s 70](#), 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 of the [GA 2005, s 70](#) construction point described above, and also 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 which was, in effect, an improper purpose, because it circumvents [GA 2005, s 84\(1\)\(a\)](#), which provides that GC operating licences cannot include a condition preventing gambling being carried on at a specified place, and
 - 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, and concluded that it was reasonably consistent with the licensing objectives
- the UT erred in allowing the appeal without taking into account 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

Does this judgment clarify the respective responsibilities of the Gambling Commission and the licensing authority on how their decisions should be made?

AD: If this judgment is in effect the end of the matter, then it will have clarified that, when determining operating licence applications, the GC has the right to take into account not just the suitability of the applicant and the relevant equipment, but also the suitability of the proposed operating model, including the location and operating environment (which, in turn, includes the relevant premises).

The judgment makes it clear that local authorities do not have any procedural exclusivity in respect of premises. While local licensing authorities remain the only bodies capable of granting premises licences, the ability of the GC to consider the proposed location and operating environment's consistency with the licensing objectives means that there is an overlap in the competence of the GC and local authorities.

The case now returns to the FTT for determination, and the Court of Appeal judgment makes express reference to the FTT's freedom to consider the alternative grounds of appeal set out in the third bullet point above. Greene King has also been quoted as saying that it is 'considering its options'. That said, this was a unanimous judgment of the Court of Appeal with Lord Justice Hickinbottom describing the GC's arguments as 'overwhelming'.

ME: Had the GC granted Greene King's operating licence application, the licensing authority in each local area where Greene King wished to offer bingo in a pub would still have had a discretion as to whether to grant a premises licence authorising the activity. Greene King argued in the appeal that it is for the licensing authority to determine issues relating to the suitability of premises for the relevant gambling activity, whereas the GC's role is limited to assessing the suitability and competence of the operator. The Court of Appeal's decision clarifies that the GC's role goes further than a consideration of suitability and competence and it is within its remit to consider the proposed operating model against the licensing objectives.

However a licensing authority's role is not limited by the decision. Its role remains that of considering the suitability of individual premises for offering the gambling activities proposed. This involves consideration of local issues and representations of local stakeholders. For example, if particular premises are situated next to a school it is unlikely to be suitable to offer gambling facilities. The GC has a further role at this stage to make representations should it have

particular concerns about the use of the premises in question, notwithstanding its overall approval of the operating model, but it is within a licensing authority's discretion whether or not to grant a premises licence application.

What impact will this decision have?

AD: Following this judgment, it seems unlikely that we will see higher stakes gaming machines, or full commercial bingo, in pubs any time soon.

ME: This application was for a novel operating model and it may be that the same facts do not arise again. However, the decision confirms the GC's wide discretion in its consideration of operating licence applications. It is within the GC's remit to reject applications where the business plan reveals potential risks to the licensing objectives, even where the applicant's suitability and integrity is not in doubt. This is the basis upon which the GC has always considered applications, so it is unlikely that applicants will see any change to the GC's consideration processes in practice. From a policy perspective, the decision backs up the GC's position that higher stakes gambling should be confined to dedicated premises.

Brigid Simmons OBE: I understand that this matter is still ongoing and any operator is entitled to clarity over the legal position. Gaming is however very much an ancillary activity for pubs where it is both low-stake and low-prize.

Interviewed by David Bowden.

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