A Provisional View

Introduction

This article deals with a matter of fundamental importance to gambling operators under the Gambling Act 2005, the answer to which will determine their approach to licensing requirements for new projects under the Act.

Few gambling operators will buy or take a lease of a building in which they propose to develop a gambling facility unless and until there is planning permission and a licence for that facility. There are exceptions among those who view property as at least as good an investment as a gambling facility. But no gambling operator would be so foolish as to fit out a new development without all the requisite consents in place – be they planning, licensing, building regulations or any others.

Instead, it is day to day practice for betting operators in particular to take an option for a lease or for purchase exercisable upon grant of the requisite consents, including licensing. Then, if the licence is refused, the operator may walk away, perhaps having paid an option rent in the meantime. If it is granted, the operator exercises the option and the development commences. In applying for the licence, the operator, though not obliged to do so, will refer to any planning consent he may have obtained for the project, and will refer to the fact that he has an option, exercisable on grant of the licence. But as to the fit out of the premises, the application is presented solely on the basis of a plan of the layout. It is unthinkable (and beyond the author's experience) that an applicant for a new licence would go to the trouble and expense of fitting out the entire scheme bringing a licence application before the committee.

The Commission's view

But as we move into the new regime, the Gambling Commission has advised that this practice must end. Their advice, contained in their first and main Guidance to Licensing Authorities[1] is that before a premises licence application can be considered:

- The building must be complete.
- The premises must be ready to be used for gambling, to the extent even that the machines must be in situ.[2]

It is the view of the author that this advice is wrong, and stems from a mis-reading of the Act.

What is the Commission's reasoning?

The Commission's view seems to be based upon two considerations. The first is that section 159(5) of the Act provides that an application for a premises licence may only be

[1] April 2006.
[2] Ibid paras 7.48 – 7.52.

made by a person who has a right to occupy the premises. The second is that section 204 permits a person to make an application for premises that he expects to be constructed or altered or that he expects to acquire a right to occupy. In its defence, the Commission does not say that **because** of this right, there is no right to apply for a premises licence for an undeveloped site. It does, however, suggest that when section 159(1) says that a person may apply for a premises licence in respect of premises, this means premises in which gambling may now take place.[3] This, it says, is why the provisional statement provisions were necessary, to enable a person with an uncompleted building to obtain a measure of assurance as to future treatment of a premises licence application.

Analysis of Commission's reasoning

What is wrong with the Commission's arguments? It is necessary to meet these arguments head on before proceeding to demonstrate the correct position.

As to the first argument based on "right to occupy", the simplest answer to that is that it is a wholly insufficient basis upon which to base the conclusion that the Commission reaches. The fact that somebody has a right to occupy premises does not by any means imply, and certainly does not express, that they have put the premises into a completed state preparatory to gambling. Thus, the requirement of a right to occupy cannot mean that the operator has to have developed the site, let alone fitted it out for gambling.

But in any event it is by no means clear that the expression "right to occupy" means that the operator needs to be in actual occupation. The meaning must be ascertained principally by a consideration of the statutory language, and of other parts of the statute which help to reveal the intention of Parliament. A plain reading of the statute shows that Parliament did not require that the applicant actually be **in** occupation, merely that the applicant needs to have a right to occupy. There is a clear contrast here with Schedule 14 para 3, which provides that an application for a family entertainment centre gaming machine permit may only be made by a person who occupies or proposes to occupy the premises, and with Schedule 14 para 14, which states that the permit will lapse if the holder ceases to occupy the premises. All section 159 requires is that at the point of the application, the applicant shall have a right to occupy the premises. The statutory purpose would seem to be to discourage speculators and to ensure that, if the licence is granted, the applicant will be able to assume proper control of his domain. This is not defeated by granting a licence to someone with a contingent right to occupy.

The applicant with a freehold may have put licensees or tenants at will into occupation pending his assumption of actual occupation. It is hard to imagine that that would defeat the application. Similarly, as stated above, it is rare for betting or casino operators to purchase and secure the vacant possession of commercial premises before obtaining a licence. Commercial prudence dictates that the operators take an option for lease or (less frequently) purchase conditional on the grant of licensing and planning. While that is in the nature of a contingent right to occupy rather than one immediately exercisable, it is difficult to see why Parliament should have wished to prevent a contingent right to

[3] Ibid para 7.49.

occupy being treated as a right to occupy within the meaning of the Act. Provided that the right to occupy lies in the applicant's hands, e.g. by a unilateral exercise of the option, it is submitted that this is a sufficient right within the meaning of the statute.

It is necessary to quote the Commission's second argument in full so as to meet it: *"The intention behind Part 8 of the Act is that the references to "the premises" are to the premises in which gambling may now take place."*[4] The problem with that proposition is that it is entirely unsupported by the Act. Section 159(1) explicitly permits a person to apply for a premises licence to be issued to him authorising the use of premises to carry on a licensable activity. Nothing in that section, or indeed any other section, states that the application may only be made where the premises are completed. Indeed, a momentary pause reveals the unfortunate consequences which may flow from the contention. What if the applicant does build and fit out the premises but when he makes his premises licence application the police object on the grounds that that the location of a structural wall harms the crime prevention objective by reducing surveillance? If the licensing authority agrees the premises may require reconstruction. That is why it is obviously more satisfactory, particularly for new developments, to apply on the basis of a plan.

However, while its predecessor, the Gaming Board considered plans of large developments, e.g. for casinos, for nigh on 40 years, and the Commission itself has been doing so for the last year, without any suggestion of difficulty, the Commission's apparent view is that under the new regime anything much more than a missing carpet would prevent its being able to handle its regulatory role:

> "It is a question of fact and degree whether premises are finished to a degree that they can be considered for a premises licence. For example, the fact that a wall needed painting would not stop a full assessment of the premises as gambling premises, and in such circumstances it would probably be wrong to insist that the applicant applied for a provisional statement rather than a premises licence."[5]

It is, perhaps, invidious to express surprise at that statement as one of policy, beyond pointing out that planning authorities consider enormous and sensitive applications on the basis of plans every day of the week. It is more compelling to consider the law.

The correct legal position

First, had Parliament intended that an application might only be made once the premises were fitted out, it would have set it out in the statute as a prerequisite. Parliament clearly understood how to do this, and did so in two ways. It stated that applications might only be made by those holding an operating licence or who had

[4] Ibid para 7.49.
[5] Ibid para 7.50.

made an application for one;[6] and it also provided that applicants needed to have a right to occupy the premises. But it did not set out any requirement as to the state of completion of the premises.

Second, section 204 of the Act is a permissive provision, enabling an operator to apply for a provisional statement for premises that he expects to be constructed or altered, or that he expects to acquire a right to occupy. There is no indication that it is intended to introduce, by a sidewind, strict requirements as to the circumstances in which a premises licence may be granted. It is, however, necessary to consider what the purpose of section 204 actually is. Because if none can be discerned, then it may lend weight to an argument that it can only be for those cases where premises have not been completed, as opposed to section 159 which is reserved for cases where they have been.

Provisional statements play a useful role in at least three ways. Unlike for premises licence applications, provisional statements can be applied for (a) without an operating licence; (b) even if there is an extant premises licence for the premises; and (c) without any right to occupy the premises.[7]

But why did Parliament specifically refers to premises that the applicant expects to be constructed or altered? Does that not imply that premises licence applications can only be made where the premises have been constructed or altered? I believe not, for section 204(3) states that the application shall include such plans and other information in relation to the construction or alteration as may be prescribed. Effectively, therefore, the purpose of the provisional statement procedure is to enable the applicant to apply for a provisional statement with a lower level of detail as to the proposal than would be necessary to obtain a full premises licence. If then the final plans, while consistent with the plans produced at the provisional stage, introduce details incompatible with the licensing objectives, then objections would still be admissible because *ex hypothesi* the objections would, within s 205(2)(a), address matters that could not have been addressed in representations in relation to the application for the provisional statement.

Third, the Act contemplates that a premises licence may be granted without planning consent or building regulations approval.[8] Indeed, the Act goes as far as to exclude from the licensing authority's consideration even the prospect of such approval. That is rendered meaningless if the premises have actually got to be fully built out before a licence may be granted. The Commission's interpretation of s 210 is that it means that "When dealing with a premises licence application for finished buildings, the licensing authority should not take into account whether those buildings have or comply with the necessary planning or building consents."[9] Thus, the Commission contemplates (or at least believes that Parliament contemplated) that an applicant

[6] S 159(3) GA05.
[7] S 204(4) GA05.
[8] S 210 GA05.
[9] Guidance para 7.52.

might build out an entire development without planning consent and then argue before the licensing authority that the authority may not take its flagrant disregard for a sister regulatory regime into account when considering the suitability of the applicant to hold a gambling licence. It is submitted that the rather more mundane reality of this is that Parliament contemplated that an applicant would not need to obtain planning permission or building regulations consent for a proposed project before obtaining a licence for it.

Fourth, it is instructive to cast the analytical net slightly wider and consider the Licensing Act 2003, which throws up a host of analogous concepts, including a provision for provisional statements.[10] The Secretary of State's Guidance under s 182 of that Act states

> *"It is open to any person falling within section 16 of the 2003 Act to apply for a premises licence before new premises are constructed or extended or changed. Nothing in the 2003 Act prevents such an application. This would be possible where clear plans of the proposed structure exist and an operating schedule is capable of being completed about the activities to take place there, the time at which such activities will take place, the proposed hours of opening, where the applicant wishes the licence to have effect for a limited period, that period, the steps to be taken to promote the licensing objectives, and where the sale of alcohol is involved, whether supplies are proposed to be for consumption on or off the premises (or both) and the name of the designated premises supervisor the applicant wishes to specify. On granting such an application, the authority of the licence would not have immediate effect but the licensing authority would include in the licence the date upon which it would have effect. A provisional statement will therefore normally only be required when the information described above is not available."*[11]

The above commentary is considered to be sensible, and capable of cross-application to these circumstances. Certainly, there is no sensible reason in policy or logic for a different approach.

Fifth while it is perhaps less helpful to interpret the Gambling Act 2005 by reference to the Gaming Act 1968, it is noteworthy that the Commission's 2006 Guidance is at odds with its own advice to Licensing Justices and Licensing Boards in respect of casinos and bingo clubs under the Gaming Act 1968:

> ***Greenfield sites***
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> *7. Applications may be received to establish gaming facilities on 'Greenfield sites' (i.e. locations where no building currently exists). It was*

[10] S 29 Licensing Act 2003.
[11] Para 5.85.

confirmed in the High Court in 1995 (case reference CO/3762/95) that absence of an actual building does not preclude the granting of an application, although the Commission will not issue a certificate of consent unless plans have been prepared and an application for planning permission submitted.

Certificates issued without planning approval

8. In cases where planning approval has been applied for but not granted, the Commission requires applicants to give an undertaking that they will relinquish the certificate of consent if they fail to obtain planning approval or the plans approved differ substantially from those submitted. The Commission considers however that gaming licences should not be granted unless outline planning permission at least has been granted and suggests that licensing authorities should ensure that every applicant before them has this before a gaming application is heard.[12]

Quite apart from the construction of the statute, it is not clear what regulatory goal Parliament may have thought would be served by delaying consideration of the licence until the premises are actually ready for gambling. A plan will need to be appended to the premises licence and therefore the extent of the premises will be quite clear. The licence will be granted in accordance with the plan and any necessary conditions will be attached. The applicant would not be able to trade except in accordance with the licence, the plan and the conditions. There is no reason to suppose that licensing sub-committees will be any less adept at tying the applicant down to a specific proposal under the Gambling Act than they are under the Licensing Act, or than are their colleagues on the planning committees granting planning applications, often for vast projects, on the basis of detailed plans.

Indeed, it was this consideration which so influenced Sedley J. in the High Court case mentioned in para 7 of the Commission's earlier Guidance just set out, R v North Hertfordshire Gaming Licensing Committee ex parte Gala Leisure Limited.[13] His analysis of why a licence application may be made on the basis of a plan is just as compelling under the 2005 Act as it was under that of 1968:

This construction does not appear to me to create any difficulty in the application of the important provisions of the statute which are there to ensure, through the justices, that inappropriate premises are not licensed for the playing of bingo. The first and most powerful reason which counsel have advanced, and which I accept, is that although all the justices will be considering is a plan, if they grant their licence and the building is then put up in nonconformity with the plan, it will not be licensed. This seems to me to be the most powerful possible sanction against

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12 http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/ADVICE%20TO%20LICENSING%20JUSTICES%202006.pdf

13 [2001] LLR 287.

any deviation from the plan and the most powerful possible reason why the justices can, and should, be expected to rely upon the plan as an adequate surrogate for an inspection of the building itself.

Why does it matter?

An interpretation which precludes a licence until the premises are finished is likely to cause unnecessary duplication, delay and uncertainty in the process, as operators apply for two consents – a provisional statement and a premises licence – where one would have done. There appears to be no practical, let alone legal, justification for this approach. For smaller operators, it may also be more difficult to obtain proper financing for a business plan based on a provisional statement than for one based on the certainty of a full licence.

It may be argued that in fact a provisional statement confers a high degree of certainty. It is true that it confers more certainty than its cousin under the Licensing Act 2003, under which a relevant person is allowed to bring forward representations about the premises licence application that could have been made about the provisional statement application provided that he has a reasonable excuse for the earlier failure.[14]

However, the Gambling Act provisions do leave the door open for further representations, either those that *"(a) address matters that could not have been addressed in representations in relation to the application for the provisional statement, or (b) reflect a change in the applicant's circumstances."*[15] Neither of these terms is further defined, and so it is hard to prophesy how they will be viewed by licensing authorities, and what factual scenarios might fit within them. Thus, no operator when pouring his money into a scheme backed only by a provisional statement can know whether he has left a narrow gap or a gaping hole.

Conclusion

For those reasons, it is respectfully submitted that the Gambling Commission's Guidance not only creates serious difficulties for operators, but is wrong in law. In short, a premises licence can be granted on the basis of a plan. While this article contains a view about provisional statements, no statement in it amount to a merely provisional view.

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[14] S 32(3)(a) Licensing Act 2003.
[15] S 205(2) Gambling Act 2005.