



Neutral Citation Number: [2017] EWHC 165 (Admin)

Case No: CO/3081/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2017

Before:

MR JUSTICE JEREMY BAKER

Between:

Global Gaming Ventures (Southampton) Limited	<u>Claimant</u>
- and -	
Southampton City Council	<u>Defendant</u>
- and -	
Aspers Universal Limited	<u>Interested Party</u>

Mr Hanif Mussa (instructed by Charles Russell Speechlys) for the Claimant
Mr Philip Kolvin QC (instructed by Southampton City Council Legal Department) for the Defendant

The Interested Party was not represented and did not attend

Hearing date: 31 January 2017

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

<p>If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.</p>

Mr Justice Jeremy Baker:

1. The Gambling Act 2005, (“the 2005 Act”), provides, *inter alia*, for the licensing of up to 8 large casinos within England and Wales, and the licensing authority, entitled to grant such a licence, is the Licensing Committee of the relevant Local Authority in which the casino is to be operated. Parliament was concerned to ensure that these casinos benefited the local community, and the 2005 Act seeks to achieve this aim by requiring the Licensing Committees to hold a 2 stage competition for those wishing to operate a large casino.
2. The criterion to be satisfied at the first stage is set out in schedule 9 paragraph 4 to the 2005 Act, whilst the criterion relevant to the second stage is set out in schedule 9 paragraph 5, which provides, at subparagraph 3(a), that the relevant Licensing Committee,

“(a) shall determine which of the competing applications would, in the authority’s opinion, be likely to result in the greatest benefit to the authority’s area.

.....”

3. The 2005 Act is supplemented by a Code of Practice to which the Licensing Committee is obliged to adhere when operating any such competition, and granting such a licence. This provides for equality of opportunity between those wishing to apply for a large casino licence, together with the application of a fair procedure by the Licensing Committee when making their determination. The Code of Practice also deals with the type of benefits to be taken into account by the Licensing Committee when determining which of the applications would be likely to result in the greatest benefit to the authority’s area, and states at paragraph 5.7.4, that the Licensing Committee,

“may wish to pay particular regard to the following:

.....

(d) the likely effects of an application on employment and regeneration within the authority’s area,

(e) the design and location of the development proposed in the application,

(f) the range and nature of non-gambling facilities to be offered as part of the development proposed in the application.....

.....”

4. The geographical areas within which the large casinos are to be situated is provided for by the Gambling (Geographical Distribution of Large and Small Casino Premises Licenses) Order 2008, and one such area is that over which the Licensing Committee of the Southampton City Council, (“the defendant”), has authority to grant gaming licenses.

5. Section 349 of the 2005 Act provides that, every 3 years, each licensing authority is to prepare a Statement of Principles that it proposes to apply in exercising its functions under the Act. The relevant Statement of Principles published by the defendant states, *inter alia*, that,

“15.13 Southampton City Council intends to enter into a contract with the development partners for the Royal Pier development and a casino element is intended to be part of the Royal Pier development with an application of a large casino licence forthcoming in relation to the site. The information is set out here so as to ensure that potential applicants are aware of this likelihood so as to ensure transparency. As a consequence, there can be no reason for the procedure to be or be perceived as unfair in any way or perceived to be unfair to any applicant.

.....

15.28 The Council and the Licensing Authority does have a preferred specific location for a large casino as part of the Royal Pier and Mayflower Park redevelopment project. This site was previously identified (amongst others) as part of the Council’s submission to the Casino Advisory Panel. However, all proposals will be judged on their own individual merits regardless of their location. Nevertheless, given the importance placed on the ability of the proposal to deliver large scale physical regeneration and tourism potential, areas of Southampton that already have substantial visitor/tourists would be most likely to be at a disadvantage when judged against a proposal which anchors a new infrastructure project.”

6. The Statement of Principles also informs interested parties that the Licensing Authority may set up an Advisory Panel to assist in the second stage of the large casino competition, in order to ensure the independence and fairness of the decision-making process.
7. Prior to the commencement of the defendant’s large casino competition, it published a document entitled, “Evaluation Criteria & Scoring Matrix for a Large Casino in Southampton.” This states that at the second stage of the competition,

“Up to 750 points is available to applicants whose proposal demonstrates the greatest potential Gross Value Added (GVA) by promoting physical regeneration, tourism, employment opportunities, and through financial contributions directed specifically to achieve regeneration while also having regard to the need to demonstrate deliverability of that proposal.

The assessment of deliverability will take into account all relevant factors including but not limited to: the practicability of the scheme; the applicant’s standing and track record of delivery; any legal agreement offered; and any guarantor willing to guarantee delivery of the proposals. The best

proposal will be awarded 750 points, with points awarded to the remaining applications dependant on their respective merits.”

8. The defendant has also published a Competition Procedure Note, paragraph 7.2 of which echoed paragraphs 15.3 and 15.28 of its previous Statement of Principles. It has also published Terms of Reference for the Licensing Committee and Advisory Panel, which states on page 4 that,

“Following completion of the bid documentation, the Advisory Panel will evaluate each bid.

The evaluation will consist of:

(1) A qualitative appraisal.

(2) A quantitative appraisal against each of the headings in the Evaluation Criteria and Scoring Matrix document. The Panel will make a recommendation as to the overall score that show (sic) be attributed to each application.

In reaching a unified score for each application, the Panel may choose its own method, for example by taking an average or median score, rounding up or down, or some other method, provided that the same method is used consistently for all applicants.”

9. After the commencement of the defendant’s large casino competition, 7 applications were made for the grant of a provisional statement, all of which successfully completed the first stage; 5 of these, (including that made by the interested party, and another company operated by the same individuals who operate the claimant), applied for the grant of a provisional statement in respect of a large casino licence at the Royal Pier development site; 1 applicant applied for the grant of a provisional statement in respect of a large casino licence at a site at Leisureworld, West Quay Road; whilst the claimant applied for the grant of a provisional statement in respect of a large casino licence at a site at Watermark West Quay. In due course, 3 of the applications in respect of the Royal Pier site were abandoned, (including that by the company operated by the same individuals who operate the claimant), leaving 4 applications to be considered by the Licensing Committee at stage 2 of the competition.
10. The interested party’s application relates to a site within the Royal Pier development. This is a 35 acre, £450million development, and includes a mixture of residential, office, retail and leisure facilities. Once completed, it is estimated that it will provide employment for around 4,400 individuals, and a Conditional Landowner Development Agreement relating to the development is in place dated 28th February 2014. The claimant’s application relates to a site within the Watermark West Quay development. This is a development which has already commenced. Indeed, Phase 1 has already been completed. The claimant’s application relates to a site within Phase 2 of the development, which will also provide mixed facilities, and, unlike the Royal Pier development, has already been granted outline planning permission.

11. On 19th January 2016 and 2nd March 2016 two draft reports were prepared by the Advisory Panel, which were the subject matter of further submissions by the claimant, and in fact resulted in the claimant being awarded a lower numerical score. On 17th March 2016, following further submissions by the claimant, the defendant provided a final report prepared by the Advisory Panel. It explained, *inter alia*, that in determining the number of points to be awarded to the respective applications, the panel had chosen to distinguish between the likely benefits to be provided by the casino itself, as opposed to the benefits from regeneration, and to limit the available points from the former to 250 out of the available 750. It then explained how the points themselves would be calculated, and stated, that,

“In terms of the evaluation of the GVA of each scheme, although the Panel sought GVA information from each applicant, the applicant’s response varied in their methodological approach to assessment of GVA. Further, the Panel considered that a very broad range of considerations both mathematically verifiable and subjective had to be taken into account. Therefore, rather than trying to evaluate the GVA of each scheme mathematically, the Panel has taken a broad, evaluative view of the tangible and intangible benefits brought by each scheme.”

12. The result of the competition was the defendant’s Licensing Committee determined to grant the interested party’s application. The consequential decision to reject the claimant’s application was notified to the claimant on 24th March 2016. I note that although the claimant notified the defendant of its intention to challenge the legality of the decision on 30th March 2016, it was not until 16th June 2016 that the defendant issued an application for permission to judicially review the decision, which was not served until 21st June 2016. This being almost at the 3-month threshold for such applications, I have scrutinised the explanation for the delay, and, in view of the history of the exchanges between the parties leading up to the decision, consider it to be unsatisfactory. Nevertheless, I have gone on to consider the merits of the present applications.

13. The grounds upon which the claimant initially sought permission to judicially review the defendant’s decision were as follows: firstly, that the decision failed to take into account relevant considerations; secondly, that the decision-making process gave rise to an appearance of bias, and; thirdly, that the decision failed to apply the appropriate criteria. Edis J. refused permission on the first two grounds, but adjourned consideration of the third ground to an inter-parties hearing. This is the adjourned hearing, and, in addition to seeking permission on the third ground, the claimant also seeks to renew its application on the first ground.

14. Before turning to consider the grounds in more detail, it is perhaps pertinent to observe, that there has been no challenge either to the defendant’s Statement of Principles, nor to its Competition Procedure Note, both of which made it clear, that whilst full and fair consideration would be given to an application for a large casino at any site within their area, the defendant favoured the Royal Pier site because the granting of a large casino licence at the site would provide an anchor for the large scale regeneration of the area.

15. Furthermore, in view of both the statutory criteria contained in schedule 9 paragraph 5, subparagraph 3(a) to the 2005 Act, and paragraph 5.7.4 of the statutory Code of Practice, it seems to me that when considering the merits of the applications, the defendant was entitled to consider that the most important factor to take into account was not the benefit which may be provided by the casino itself, but its likely impact upon the provision of other non-gambling facilities, and the regeneration of the surrounding area.
16. In view of these matters, it is apparent, given the fact that the claimant's application was for the provision of a large casino at a site which, apart from the casino, had already been partly developed, the claimant was always going to be facing an uphill task in seeking to persuade the defendant that its application ought to be granted in preference to one at a site, like the Royal Pier, which was yet to be the subject of a significantly larger multipurpose development.
17. The main complaints under the first ground are firstly, that the defendant was not entitled to determine that the siting of a large casino at the Royal Pier site was necessary to the realisation of the wider aspects of the Royal Pier development, and secondly, that the defendant was not entitled to determine that the wider aspects of that development would be likely to be delivered. Although the claimant still pursues this latter aspect of the ground in writing, it was not pursued orally at the hearing, as it was recognised that if the former aspect lacked sufficient merit, the addition of the latter would be unlikely to justify the granting of permission. The complaint under the third ground is that the defendant was restricted to a consideration of a monetary assessment of the GVAs relating to the factors identified within the Evaluation Criteria & Scoring Matrix, and that the defendant failed to do so.

Ground 1

18. As the Advisory Panel recognised, under the first criterion in the Evaluation Criteria & Scoring Matrix, the first matter which was required to be considered was the extent to which the granting of a large casino licence would have the effect of, ".....promoting physical regeneration, tourism, employment opportunities....". Indeed, the fifth factor which the Advisory Panel took into account, was "The causative significance of the casino to the wider scheme", in relation to which the panel said, at paragraph 9.6.9 of the interested party's Stage 2 evaluation report,

"Factor 5 was also scored 1 – 10, with 10 reflecting that the wider scheme is effectively dependent on the casino, so that it would certainly not be developed unless the casino is developed, with 1 reflecting that the casino had no influence whatsoever on the wider scheme. The interstitial points were a matter of broad evaluative judgment."

19. In the event, the Advisory Panel awarded the interested party's application 8 points under this factor, in contrast to the award of 2 points to the claimant's application. The claimant challenges the lawfulness of this assessment. It points out that the interested party's casino would only occupy 2.69% of the total area of the proposed Royal Pier development, would provide only 3.98% of its total employees, and suggests that some aspects of the development, including residential apartments and offices, had no substantive connection with the provision of a casino. In these circumstances, it could not be said that development of the casino was necessary for

the larger development. In this regard it submits that the defendant was not entitled to rely upon the Conditional Landowner Development Agreement, which, according to the Advisory Panel, had made the wider development contingent upon the casino. It is pointed out that such agreements may alter, and that the agreement has not been disclosed to the claimant. It is also suggested that the defendant failed to consider whether a non-casino development on the casino site could equally have performed the same catalytic function.

20. At an earlier stage of the proceedings, the claimant also sought to rely upon the fact that whereas the original proposal was for the interested party's casino to be built on reclaimed land, there came a point when this was sought to be altered to a site on existing land, and, although it acknowledges that the defendant refused such an amendment, the claimant suggested that this was evidence that the large scale development of the Royal Pier site was not contingent upon the development of the casino. However, this point is no longer pursued, as it is recognised that the use of the casino as an anchor to provide funds for the wider development of the Royal Pier development, including the cost of the 14 acres of land reclamation, would if anything be likely to be enhanced by its development on existing land, as it would be likely to be constructed, and therefore able to generate funds for the wider development, at an earlier stage, than if it was built on land which required to be reclaimed prior to commencement of the construction work.
21. It is clear that both the Advisory Panel and the defendant's Licensing Committee gave careful consideration to the issue of the causative link between the provision of the interested party's casino, and its impact upon any wider development. The Advisory Panel noted that the Conditional Landowner Agreement required the casino to be completed prior to other parts of the development being occupied, and concluded that, "...the evidence suggests that the awarding of the licence to the site is key to unlocking its wider deliverability..." The Licensing Committee recognised that, "It must also consider the causal influence of the grant of the casino licence on the wider scheme...", and stated that, "It also accepts, for the reasons given by the Panel, that the casino licence will in and of itself catalyse the wider development."
22. The claimant contends that the Conditional Landowner Agreement will, "almost certainly", have provided for its amendment, and given the nature and extent of the Royal Pier development, it is very unlikely that it would not proceed in the event that the casino was not constructed. The claimant points to a passage in the Advisory Panel's report which suggests that without the casino development the wider project might be delayed or restricted at best, and suggests that this detracts from the Advisory Panel's conclusion. Furthermore, that if the casino was such an important factor, then one would have expected those responsible for the wider development to have taken more of an interest in the interested party's application.
23. It is necessary to consider this application on the basis of the available evidence, and, absent bad faith, which has not been alleged, there can be no doubt that both the Advisory Panel and the Licensing Committee were entitled to conclude that the development of the casino was a necessary prerequisite to the wider Royal Pier development. It may well be that agreements, such as the Conditional Landowner Agreement, may be subject to amendment. However, there is no evidence that such a fundamental amendment, as suggested by the claimant, would be countenanced, and that the wider development would go ahead as originally envisaged without the prior

construction of the casino development. In these circumstances, I am satisfied that there is no merit in this aspect of the claimant's submissions.

24. The claimant also contends that the defendant should have considered whether an alternative development, on the site where the casino was to be constructed, could equally well have acted as an anchor for the wider aspects of the Royal Pier development. It points out that the defendant's Licensing Committee had regard to this point in relation to the claimant's development, and contends that the defendant's failure to do so in relation to the interested party's application has produced unfairness. However, this contention ignores the fact that, in contrast to the application by the interested party, the claimant acknowledged that those responsible for the construction of Phase 2 of the Watermark West Quay development already had contingency plans in place, and that if the claimant was not granted a large casino licence, the development would still proceed as planned, with at worst a delay of up to 12 months. There is no such evidence in relation to the Royal Pier development, and in its absence I do not consider that there can be any valid criticism of the defendant in not specifically referring to this matter as part of its decision-making process.
25. In its written grounds the claimant also seeks to criticise the conclusions which the defendant reached in relation to the interested party's application, concerning the second matter which was required to be considered under the first criterion in the Evaluation Criteria & Scoring Matrix, namely the deliverability of the Royal Pier development. In this regard, it is to be noted that the Licensing Committee awarded 6 points, reflecting its conclusion that it was "more than likely" that the development would be delivered. The claimant contends that there was insufficient evidence upon which this conclusion could be reached. In particular, absent any specific reference to the terms of the Conditional Landowner Agreement, the Advisory Panel was not entitled to rely upon it as a source of supporting evidence. It contends that the Advisory Panel did not specify what work had been done on the planning of the development, nor why it believed finance would be available for the development, and points to the lack of information emanating from the developer during the course of the competition.
26. Once again it is clear that this factor was considered with care by both the Advisory Panel and the defendant's Licensing Committee. The Panel stated in terms that it had taken into account, ".....the degree to which the plans for the RPW site are already progressed, the investment that has been made to date, the CLDA and Heads of Terms that have been entered into, and the established co-operation and support of the landowner, developer and contractor parties....." It noted that whilst the Royal Pier development had not yet obtained planning permission, "The overarching principle of the RPW development is strongly supported by the Southampton City Centre Masterplan.", and that, "The land is identified for development within the local plan....." The Panel acknowledged that, as with any development of such size, cost and complexity, there is always a level of risk associated with deliverability. However, the Panel stated that it had taken into account the risk factor, when concluding that the development was more likely than not to take place, and that in addition to the matters already taken into account, it also took into account ".....the work done to date on the planning of the development, and the track record and standing of those behind the financing and delivery of the development." In that regard, it is of note that the Panel had, between paragraphs 9.3.1. – 9.3.5 of its report, reached justifiably favourable conclusions upon those involved in the development,

which included not only the interested party and its joint venture partner, but more particularly those involved in the Royal Pier development, including the landowning partners, and those responsible for its financing and delivery, all of which were considered to have, “.....strong track records in delivering significant regeneration and development projects.”

27. The defendant’s Licensing Committee accepted this analysis, and said that it too was, impressed, “.....with the track record of the main players in the wider scheme.....”, and endorsed the Panel’s decision to, “.....take account of the state of progression of the scheme, the level of investment which has already been made to date, the existence of the CLDA and the heads of terms.....” Moreover, the Licensing Committee made a specific reference to a submission which had been made on behalf of the claimant, that the Royal Pier scheme was unbuilt and unfinanced, and concluded that it had already taken these matters into account when it awarded the interested party only 6 points under this factor, when otherwise it might have been appropriate to award a greater number of points. Overall in relation to both this issue and that of causative significance of the Casino, it expressed confidence that it had done so, fairly and accurately, and concluded that, “.....the Committee considered this to be a very impressive scheme, and was particularly impressed with the regeneration aspects of the proposal. It was glad to see the proposal for up to 730 residential apartments. It strongly endorses Asper’s proposal in respect of the employment of disadvantaged people. It considered that Aspers’ engagement with Southampton institutions demonstrates not only a real commitment to weave itself into the business, welfare and protective network in Southampton, but a commitment to deliver the scheme itself.”
28. In my judgment, both the Advisory Panel and the Licensing Committee were entitled to conclude that the Royal Pier development was more than likely to be delivered, and therefore award them 6 points under this factor. In providing their reasons for their respective recommendations and determinations, it was not beholden upon either the Panel or the Committee to specify every last detail of the evidence which they had considered, as opposed to providing a clear indication of its nature and content. It is apparent that both the Panel and the Committee approached their respective tasks in a conscientious manner. Not only did they provide sufficient detail of the evidence which they had considered, but that evidence entitled them to reach the recommendations and determinations which each of them made. They provided reasons which betrayed no error in law, and accordingly, there is no arguable basis upon which their findings can be properly challenged.

Ground 3

29. In relation to the third ground, the claimant contends that GVA is a term of art, and that its use within the Evaluation Criteria & Scoring Matrix, required the defendant to calculate the GVA in relation to each of the applications. It also points out that in response to a request for such information, dated 5th August 2015, the claimant provided details of its calculations to the defendant on 5th September 2015, by way of a report from Remit Consulting LLP.

30. It is apparent that in making its recommendations, the Advisory Panel did not calculate the GVA of each of the applications. However, it provided its reasons for not having done so at paragraph 9.6.13 of the interested party's report,

“9.6.13 In terms of the evaluation of the GVA of each scheme, although the Panel sought GVA information from each applicant, the applicants' responses varied in their methodological approach to the assessment of GVA. Further, the Panel considered that a very broad range of considerations both mathematically verifiable and subjective have had to be taken into account. Therefore, rather than trying to value the GVA of each scheme mathematically, the Panel has taken a broad, evaluative view of the tangible and intangible benefits brought by each scheme, using the scale described above”

31. The claimant contends that the defendant's failure to calculate the GVA of each of the applications was a material error, in that it failed to comply with its own criteria, and that this has prejudiced the claimant. Moreover, that it was not entitled to take into account matters beyond those which were listed in the Evaluation Criteria & Scoring Matrix, namely physical regeneration, tourism, and employment opportunities.

32. The chairman of the Advisory Panel, Stuart Baillie, in a witness statement dated 6th January 2017, has provided a further explanation of the Panel's approach to this matter, at paragraph 32,

“32.....The panel did not understand Criterion 1 as requiring a precise mathematical cross-comparison. Had it done so, it would have gone about its work very differently and even then it would have failed to reflect less quantifiable benefits, the differentials in deliverability of each casino and each wider scheme, and the different causative influences of the development of the casinos on the wider schemes of which they formed part. The approach was necessarily one of broad evaluation.”

33. Although I accept that GVA is usually expressed as a monetary value, I consider that, in the context of the broad evaluation exercise which it was required to carry out, the Advisory Panel was entitled to take the view that it was not required to make a mathematical calculation of the GVA of each of the applications. If it had been required to do so, then undoubtedly it would have been necessary for the defendant to have set out the methodology by which the GVA was to be calculated in the Evaluation Criteria & Scoring Matrix, and it did not do so. In contrast, the defendant did set out the methodology for the Gross Gaming Value, “GGV”, which it used as the basis for the scoring of the financial contribution to regeneration, in its Evaluation Criteria & Scoring Matrix.

34. I consider that in determining the regenerative impact of the granting of a large casino licence, it was inevitable that, as explained by the Panel, a wide range of matters would be required to be taken into account in relation to each of the schemes, some of which would not, by reason of their nature, have been susceptible to mathematical evaluation. In these circumstances I am satisfied that the claimant's criticisms relating to the defendant's approach to its assessment of the criteria under the Evaluation

Criteria & Scoring Matrix is unarguable. In any event, it is apparent that the Advisory Panel applied the same criteria to each of the applications, and there is, in reality, no prospect that the claimant would otherwise have won the competition. Indeed, I note that the report from Remit Consulting LLP limited its assessment to the GVA from employment opportunities.

Conclusion

35. In the circumstances, and for the reasons I have sought to explain, I do not consider that either of the matters relied upon by the claimant give rise to an arguable ground upon which to judicially review the defendant's decisions, either to grant a provisional statement to the interested party in respect of a large casino, or to refuse to grant such a statement to the claimant. Accordingly, I refuse the renewed application for permission in relation to ground 1, and refuse the adjourned application for permission in relation to ground 3.