

Neutral Citation Number: [2008] EWHC 105 (Admin)

CO/9266/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL
14 January 2008

Before:

Andrew Nicol QC
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF BETTING SHOP SERVICES LIMITED	Claimant
v	
SOUTHEND-ON-SEA BOROUGH COUNCIL	Defendant
DONE BROTHERS (CASH BETTING) LIMITED	1st Interested Party
CORAL RACING LIMITED	2nd Interested Party

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**Mr Gerald Gouriet QC (instructed by Eversheds) appeared on behalf of the Claimant
Mr Matthew Butt (instructed by Southend-on-Sea Borough Council) appeared on behalf of the
Defendant**

HTML VERSION OF JUDGMENT

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1. THE DEPUTY JUDGE: This is an application for judicial review that is brought by Betting Shop Services Limited against Southend-on-Sea Borough Council. Permission to apply for judicial review was granted by Sullivan J on 30 November 2007.
2. The claimant owns premises at Unit G3, Victoria Place, 35 Southchurch Road, Southend-on-Sea. It applied to the Southend-on-Sea Borough Council ("the Council") for a "Premises Licence" to use their premises for gambling. On 25 September 2007, Licensing Sub-Committee B at the Council made this

decision:

"We have before us today an application from Betting Shop Services Limited for the grant of a Betting Premises Licence.

As a result of representations received on this application we have been asked to decide on a preliminary issue:

'Whether the premises are finished to an extent that they can be considered for a Premises Licence rather than a Provisional Statement.'

We have listened to submissions and read all the documentation as they related to the preliminary issue.

We have had regard to the Gambling Act 2005 and the Gambling Commission's Guidance Notes and the Licensing Authority's Statement of Gambling Licensing Policy.

We have decided that we are unable to consider the application primarily because of the Guidance given by paragraph 7.55 and 7.57 in the Guidance Notes.

In our opinion, to consider the application for a Betting Premises Licence would not be in accordance with the guidance issued by the Gambling Commission."

3. The claimant seeks to quash that decision, to have the matter remitted to the Council for a determination of its application for a Premises Licence, and for that application to be granted or refused. The defendant Council is prepared to consent to the quashing of the decision, and is neutral as to what declaratory relief the court should make as to the approach it is required to take on such a remittal.
4. The application for a Premises Licence was opposed by two companies which themselves run other betting shops. Although notice of the claim was given to both of those interested parties, that is Done Brothers (Cash Betting) Limited (t/a as Betfred) and Coral Racing, neither of them contest the claim. Neither of the interested parties therefore have appeared today. The Gambling Commission was invited by the court to submit observations and has done so in written form. I have taken those into account. They are dated 17 December 2007.
5. The application made to the Council by the claimant was, as I have said, for a Premises Licence under the Gambling Act 2005. Section 159 of the Act is headed "Making of application" (an application for a Premises Licence). It says this:

"(1) A person may apply to a licensing authority for a premises licence to be issued to him authorising the use of premises to carry on an activity listed in section 37(1).

(2) An application must be made to a licensing authority in whose area the premises are wholly or partly situated.

(3) An application may be made only by a person who—

(a) holds an operating licence which authorises him to carry on the activity in respect of which the premises licence is sought, or

(b) has made an application, which has not yet been determined, for an operating licence which authorises him to carry on the activity in respect of which the premises licence is sought.

(4) But subsection (3) does not apply to an application for a premises licence which authorises a track to be used for accepting bets (and which does not also, otherwise than by virtue of section 172, authorise it to be used for another purpose).

(5) An application may be made only by a person who has a right to occupy the premises

to which the application relates.

(6) An application must—

- (a) be made in the prescribed form and manner,
- (b) contain or be accompanied by the prescribed information or documents, and
- (c) be accompanied by the prescribed fee.

(7) Regulations prescribing a matter for the purposes of this section may, in particular, make different provision for—

- (a) applications in respect of different classes of activity, or
- (b) different circumstances.

(8) In this section 'prescribed' means—

- (a) in relation to applications to authorities in England and Wales, prescribed by regulations made by the Secretary of State, and
- (b) in relation to applications to authorities in Scotland, prescribed by regulations made by the Scottish Ministers."

6. In this case, the claimant did hold an operating licence and did have a right to occupy the premises to which the application related. Regulations have been made under section 159(6) concerning the prescribed form, manner, information, documents and fee, but it has not been suggested that the application made by the claimant was in any way deficient when measured against those regulations.
7. The decision of the Committee was, as I have indicated, made by reference to the Gambling Commission's guidance to licensing authorities. The guidance in question was issued in June 2007 and the passages to which the Council's Committee referred are under a sub-heading which says "Relationship between planning permission, building regulations and granting of a premises licence". 7.55 within that section and following say this:

"7.55 An applicant cannot obtain a premises licence until the premises in which it is Proposed to offer the gambling are constructed. 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. Thus a licence to use premises for gambling should only be issued in relation to premises that are ready to be used for gambling. This is why the Act allows an operator to apply for a provisional statement if the building is not yet complete, needs alteration, or he does not yet have a right to occupy it. See Part 11 of this guidance for more information about provisional statements.

7.56 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.

7.57 Once an operator has a completed building, the licensing authority will be able to consider a premises licence application for it. Requiring the building to be complete ensures that the authority could, if necessary, inspect it fully, as could other responsible authorities with inspection rights under part 15 of the Act. Inspection will allow authorities to check that gambling facilities comply with all necessary legal requirements. For example, category C and D machines in a licensed family entertainment centre must be situated so that people under 18 do not have access to the category C machines. The physical location of the machines will be an important part of this, and inspection will allow the authority to check that the layout complies with the operator's proposals and the

legal requirements."

8. The Gambling Commission there refers to a provisional statement as the appropriate authorisation which should be sought by a person who does not yet have premises that are completed and ready to be used for the gambling for which licensing is wanted. The reference to a provisional statement is a reference to section 204 and following of the Gambling Act 2005. Section 204 says this under the heading "Application":

"(1) A person may make an application for a provisional statement in respect of premises—

- (a) that he expects to be constructed,
- (b) that he expects to be altered, or
- (c) that he expects to acquire a right to occupy.

(2) The provisions of this Part shall apply in relation to an application for a provisional statement as they apply in relation to an application for a premises licence—

- (a) subject to the provisions of this section and section 205, and
- (b) with any other necessary modifications.

(3) An application for a provisional statement shall include such plans and other information in relation to the construction, alteration or acquisition as may be prescribed.

(4) Sections 152(1)(b) and 159(3) and (5) shall not apply in relation to an application for a provisional statement."

9. If a provisional statement is made, it has the effect set out in section 205 of the Gambling Act 2005. That says this:

"(1) This section applies where—

- (a) a licensing authority issue a provisional statement in respect of premises, and
- (b) an application is made under section 159 for a premises licence in respect of the premises.

(2) The licensing authority shall disregard any representations made in relation to the application for the premises licence unless they think that the representations—

- (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.

(3) The licensing authority may refuse the application, or grant it on terms or conditions not included in the provisional statement, only by reference to matters which—

- (a) the authority have considered in reliance on subsection (2)(a), or
- (b) in the authority's opinion reflect a change in the applicant's circumstances.

(4) But subsections (2) and (3) do not apply in the case of a provisional statement issued in response to an application under section 204(1)(a) or (b) if the licensing authority think

that the premises have been constructed or altered otherwise than in accordance with the plans and information included with the application for the provisional statement in accordance with section 204(3)."

10. The advantages of a provisional statement are that they give some comfort to the person who wishes to acquire or develop premises that a Premises Licence might in due course be forthcoming. However, the comfort which a provisional statement gives is considerably less than that which the future operator of such premises would have if they had a full Premises Licence. So it comes about that the claimant in this case wished to pursue the application for a Premises Licence even though it would have been possible for it to obtain a provisional statement. Indeed I was told by Mr Gouriet on behalf of the claimant today that the claimant does indeed already have a provisional statement for these premises, but nonetheless wishes to pursue the application, or have the opportunity at least to pursue the application, for the full Premises Licence.
11. It can be seen from the quotation of the Gambling Commission's guidance that I have set out above why the Council considered that it was debarred from even considering the application for a full Premises Licence. Paragraph 7.55 of the Commission's guidance says in terms that an applicant cannot obtain a Premises Licence until the premises in which it is proposed to offer the gambling are constructed. Although the premises in question in this case had walls and a certain amount of the outer structure, they are certainly not -- or were not at the time when the Council was considering the application -- fully kitted out for the purpose of being gambling premises.
12. The 2005 Act speaks of the role of the Commission's guidance in two places material to the present application. In section 25, the Act says this:

"(1) The Commission shall from time to time issue guidance as to—

(a) the manner in which local authorities are to exercise their functions under this Act, and

(b) in particular, the principles to be applied by local authorities in exercising functions under this Act.

(2) A local authority shall have regard to guidance issued under subsection (1)."
13. The role of the Commission's Guidance is addressed secondly in section 153. This is one of the early sections in Part 8 of the Act entitled "Premises Licences". It also includes sections 204 and 205 concerning provisional statements which I have mentioned earlier. Section 153, under the heading "Principles to be applied" and under the more general heading "Licensing Authorities' Functions" says this:

"(1) In exercising their functions under this Part [Part 8] a licensing authority shall aim to permit the use of premises for gambling in so far as the authority think it—

...

(b) in accordance with any relevant guidance issued by the Commission under section 25

..."
14. Sub-section (3) of section 153 says that this section is subject to section 166. Section 166 deals with casino licences and is not relevant to the present claim.
15. Thus, the obligation under section 25 to have regard to the Commission's guidance, in the context of functions under Part 8, becomes the stronger obligation that a licensing authority shall aim to permit the use of premises for gambling insofar as the authority think it in accordance with the relevant guidance issued by the Commission.
16. The reasoning of the Council therefore was as follows. The Commission's guidance says that an applicant cannot obtain a Premises Licence until the premises in which it is proposed to offer gambling are constructed, and that the licensing authority will be able to consider a Premises Licence application

only once an operator has a completed building. Since the authority was obliged to abide by the terms of section 153 in exercising its functions under Part 8, it considered that it had no choice but to refuse to consider the application made by the claimant.

17. I propose to consider the matter in two stages. The first is by looking at the statute and legislation, setting aside, but for the moment only, the guidance issued by the Commission. In my judgment, it is plain that if an application for a Premises Licence is made in a manner that complies with section 159, the local authority must consider the application. There must be a hearing if the requirements of section 162 of the 2005 Act are in play, and as section 163 provides, on considering an application for a Premises Licence, whether at a hearing or not, a licensing authority must grant it or reject it.
18. I have already mentioned that there is no question in the present case as to whether the claimant fulfilled the requirements of section 159. It did have the right to occupy the premises; it did hold an operating licence; it had fulfilled such requirements as had been made by the regulations. It is not therefore necessary for me to consider what the position would be if, for instance, an applicant for a Premises Licence had not paid the prescribed fee. In those circumstances, it may be, though it is not necessary for me to rule on the matter, appropriate for a local authority to say: we will not even consider the application until, on the example I have given, the fee has been paid. Those are matters which may be needed to be decided on another occasion; they are not necessary for decision this afternoon. But in the circumstances which I have described as prevailed in the current case, it does seem to me plain that the authority was obliged to consider and determine the application.
19. One of the means by which a local authority can determine an application is to grant it but subject to conditions. The topic of conditions is dealt with by the 2005 Act in section 167, which deals with mandatory conditions; section 168, which deal with default conditions; and section 169, which deals more generally with conditions which may be imposed or excluded by the licensing authority. Section 169 says that where a licensing authority issue a Premises Licence, they may attach a condition to the licence or exclude a condition which would otherwise be attached by virtue of section 168. Sub-section (2) of section 169 says:

"(2) A condition attached to the licence under subsection (1)(a) may, in particular, address a matter addressed by a condition excluded under subsection (1)(b)."

Sub-section (3) provides:

"(3) A condition attached to the licence under subsection (1)(a) may apply in relation to the premises generally or only in relation to a specified part of the premises."

And sub-section (4) provides:

"(4) A licensing authority may not attach a condition to a premises licence which prevents compliance with a condition of the operating licence which authorises the holder to carry out the activity in respect of which the premises licence is granted."

20. Mr Gouriet submits that, where an application for a Premises Licence is made, in circumstances where the premises are owned by the applicant but are not yet in a completed physical state, the licensing authority can satisfy itself about the state that the premises will be in before gambling takes place by attaching a suitable condition to the issue of a Premises Licence. He says that that may be a satisfactory way of dealing with the application for the Premises Licence while acknowledging that the premises themselves are still incomplete. I will return to the point about conditions in a moment.
21. The second stage of my consideration must be to see whether the Commission's Guidance makes a difference to my conclusion as to the authority's obligation to consider and determine the application for a Premises Licence.
22. The Commission's written observations to the court say this:

"The dispute which appears to have arisen in the present case ('the issue') concerns the physical extent required of premises which are the subject of an application for a premises licence. The issue is one with which the Commission is familiar, having raised the matter at an early stage with officials of the Department of Culture, Media and Sport (the government department having primary responsibility for legislation relating to

gambling in Great Britain). It was the Commission's understanding that the form of words contained within the Guidance (in particular in paragraphs 7.55 to 7.57 of the second edition published in June 2007) reflected in general terms government policy concerning the issue and that section 204(1), which applies to premises which the applicant 'expects to be' 'constructed', 'altered', or in a position to 'acquire a right to occupy', was intended to prescribe that all applicants in such a position *should be obliged* to proceed by way of an application for a provisional statement. However, having considered the position further in the context of this application, the Commission now consider the Act's provisions may not support this interpretation."

23. The Commission goes on to say that it is in the process of consulting about (amongst other things) those paragraphs in its guidance to consider whether that guidance ought to be changed. The Commission was agreeable, so far as its agreement was necessary, to the decision of the Council being quashed and the matter remitted to them. As I indicated when this matter came on for hearing today, in itself that is insufficient. If the matter went back to the Council and they adopted the view of the law which they did on the previous occasion, namely that they were obliged to follow the guidance of the Commission, and that guidance said that an application could not be considered if the premises were incomplete, the whole process would simply go around the same circle again.
24. The Commission, in its written observations, accepted that it was arguable that its views of the law were incorrect. It stopped short of accepting that they were. It therefore seemed to me that it was incumbent on the court to grasp this nettle and to consider the appropriateness of a declaration as sought by the claimant, effectively that on this particular matter the Council was not obliged to follow the guidance of the Commission.
25. In my judgment, the minimum conditions which need to be satisfied for an application for a Premises Licence are those which have been prescribed by the legislation. The section which deals with those is section 159. It clearly requires the applicant for a Premises Licence to have a right to occupy the premises. That is said in terms in section 159(5). A person who does not have a right to occupy the premises could make an application for a provisional statement (see section 204(1)(c)). An application for a provisional statement, however, can also be made by a person in respect of premises that he expects to be constructed (see paragraph (a)) or expects to be altered (see paragraph (b)). Those paragraphs have no equivalent provisions in section 159. Somebody therefore who does have a right to occupy a premises but which are not yet constructed or which are to be altered may, it appears to me, apply either for a provisional statement or for a Premises Licence, or indeed for both. The legislation does not preclude somebody who satisfies section 159 but who wishes to make the application for a Premises Licence in respect of premises not yet constructed or not yet altered from making such an application.
26. Furthermore, and relevant to the second stage of the investigation to which I have referred, it is Parliament that has set down the minimum conditions for an applicant for a Premises Licence. The views of the Commission as to the interpretation of the legislation on that matter may no doubt be of interest, but at the end of the day the true interpretation of legislation on this issue is a matter for the court rather than for the Commission, and I do not read the provisions of the legislation that confer responsibilities on the Commission any role that detracts from the obligation on the court to determine what those minimum conditions are for an applicant for a Premises Licence.
27. Accordingly, in my judgment, the Council is obliged to consider and determine the claimant's application for a Premises Licence, notwithstanding that the premises are not yet complete or not entirely constructed and notwithstanding the present wording of paragraph 7.55 to 7.57 of the Commission's guidance.
28. I would add only this. I have been concerned with what the Council is obliged to do, namely determine the application for the licence. It would be entitled to grant the licence subject to appropriate conditions. It will of course be for the Council hearing the application to decide in the first place whether as a matter of substance the application ought to be successful.
29. Secondly, it would be for the Council to consider whether appropriate conditions can be crafted to cater for the situation that the premises are not yet in the state in which they ought to be before gambling takes place. The Council is entitled to decide that it is appropriate to grant a licence subject to conditions; it is not obliged to grant a licence subject to conditions. It would be for the Council to decide whether that is the right way to proceed.

30. Mr Gouriet, before I make the orders that we have discussed, is there anything else that you wished me to deal with in terms of the judgment?
31. MR GOURIET: My Lord, there is just one tiny matter for the sake of the transcript. I think your Lordship earlier in the judgment referred to Done Brothers trading as Betfile; they are in fact trading as Betfred, which is one word.
32. THE DEPUTY JUDGE: Thank you very much. Mr Butt, was there anything that you wished me to add?
33. MR BUTT: Apart from that point, my Lord, no.
34. THE DEPUTY JUDGE: Very well. Let me make these orders in consequence of the judgment which I have just given. Firstly, the decision of the defendant of 25 September 2007 will be quashed. Second, the claimant's application for a Betting Premises Licence in respect of premises at Unit G3, Victoria Place, 35 Southchurch Road, Southend-on-Sea, Essex shall be remitted to the defendant to hear and determine according to law and in accordance with the judgment that I have given. Thirdly, it is declared that notwithstanding paragraph 7.55, 7.56 and 7.57 of the Gambling Commission's Guidance to Licensing Authorities, Second Edition, June 2007, a Premises Licence under the Gambling Act 2005 may lawfully be granted in respect of premises that are not ready to be used for gambling, the premises being about to be or in the course of construction or alteration, and they being premises which the applicant has a right to occupy and in respect of which he holds an operating licence which authorises him to carry on the activity in respect of which the Premises Licence is sought.
35. MR GOURIET: My Lord, an operating licence is not, with respect, to a particular premises as your Lordship may think. It might be right to re-word the last part of that.
36. THE DEPUTY JUDGE: Yes, I am going to read again the declaration that I make.
37. It is declared that notwithstanding paragraph 7.55, 7.56 and 7.57 of the Gambling Commission's Guidance to Licensing Authorities, Second Edition, June 2007, a Premises Licence under the Gambling Act 2005 may lawfully be granted in respect of premises that are not ready to be used for gambling, the premises being about to be or in the course of construction or alteration, and they being premises which the applicant has a right to occupy, and the claimant being a person holding an operating licence which authorises him to carry on the activity in respect of which the Premises Licence is sought.
38. MR GOURIET: My Lord, yes. I am looking at (b) of sub-section (3) to section 159 "... or has made an application" et cetera.
39. THE DEPUTY JUDGE: I will continue then. The declaration will continue ... or the applicant being a person who has made an application which has not yet been determined for an operating licence which authorises him to carry on the activity in respect of which the Premises Licence is sought.
40. Anything else?
41. MR GOURIET: There are no applications. Thank you very much.
42. THE DEPUTY JUDGE: Mr Butt, anything from you?
43. MR BUTT: My Lord, no.
44. THE DEPUTY JUDGE: Thank you both very much.