Neutral Citation Number: [2008] EWCA Civ 428

Case No: C1/2007/2708

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**ADMINISTRATIVE COURT**
**Mr Justice Stanley Burnton**
**[2007] EWHC 2917 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2008

**Before :**

**SIR ANTHONY CLARKE MR**
**LADY JUSTICE SMITH**
and
**LORD JUSTICE RICHARDS**

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**Between :**

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| **The Queen (on the application of TC Projects Limited)** | **Claimant/ Appellant** |
| **- and -** | |
| **Newcastle Licensing Justices** | **Defendant/ Respondent** |
| **- and -** | |
| **(1) Grosvenor Casinos Limited** | |
| **(2) Stanley Casinos Limited** | |
| **(3) Clermont Leisure Limited** | **Interested Parties** |
| **(4) The Gambling Commission** | |

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**John Howell QC and Ben Jaffey** (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
The **Defendant** did not appear and was not represented
**James Dingemans QC and Stephen Walsh** (instructed by **Joelson Wilson & Co**) for the **First and Second Interested Parties**
**Michael Fordham QC and Jessica Simor** (instructed by **Walker Morris Solicitors**) for the **Third Interested Party**
**Alexander Gunning** (instructed by **Gregory Rowcliffe Milners**) for the **Fourth Interested Party**

Hearing dates : 7 and 8 April 2008

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# Judgment

**Lord Justice Richards :**

1. This case concerns an application for a casino licence under Part II of the Gaming Act 1968 ("the 1968 Act"). In summary, the licensing authority has a discretion to refuse to grant such a licence if it is not shown to the authority's satisfaction that there is an existing unmet demand for gaming facilities of the kind proposed. The issue in the appeal is the correct approach in law to the exercise of that discretion.

2. The 1968 Act has been replaced for the future by the Gambling Act 2005 which makes provision for new types of casino and introduces a new system of licensing. But casino licences granted under the 1968 Act remain in effect and the licensing provisions of the 1968 Act continue to apply in relation to licence applications made before 27 April 2007. We were told that there are numerous outstanding applications awaiting final determination. Accordingly, the issue raised in the appeal remains of relevance even though it has been raised so late in the effective life of the 1968 Act.

3. The claimant, TC Projects Limited, applied under the 1968 Act for a casino licence for premises in Newcastle upon Tyne. The application was heard by justices constituting the Betting and Gaming Licensing Committee for the city. The licensing justices refused the application in a decision dated 16 January 2007. The claimant lodged an appeal to the Crown Court, where it is entitled to a full re-hearing of the application. It also lodged, however, an application for permission to apply for judicial review of the licensing justices' decision; and the hearing of the appeal to the Crown Court has been adjourned pending the conclusion of the judicial review proceedings. Permission to apply was refused by Stanley Burnton J on an oral renewal on 23 November 2007. Permission was subsequently granted by Sir Henry Brooke, who directed that the application for judicial review be retained in the Court of Appeal. We are therefore concerned with the substantive determination of the judicial review claim.

4. Although, quite properly, the licensing justices have played no part in the judicial review proceedings, there has been no shortage of representation before us. In addition to the claimant, three other operators of casinos have appeared as interested parties. One of them, Clermont Leisure Limited, supported the claim. The other two, Grosvenor Casinos Limited and Stanley Casinos Limited, opposed the claim: they were jointly represented before us though they had had separate representation before Stanley Burnton J. The Gambling Commission, which has relevant statutory functions under the 1968 Act, also intervened in opposition to the claimant's case.

*The statutory framework*

5. Part II of the 1968 Act applies to gaming on premises licensed or registered under that part of the Act. By s.11, the provisions of schedule 2 have effect with respect to the licensing of premises.

6. The broad structure of schedule 2 is as follows. The "licensing authority" is a committee of licensing justices for the relevant petty sessions area. A precondition to an application for the grant of a licence is the issue of a certificate of consent by "the Board", which was originally a reference to the Gaming Board for Great Britain but is now to be read as a reference to the Gambling Commission, which has taken over the functions of the Gaming Board. There are detailed provisions as to the making of an

application for the grant or renewal of a licence and as to the proceedings on such an application. The grounds for refusal to grant or renew a licence are central to the case and are set out below. On granting or renewing a licence, the licensing authority may impose restrictions. Where the licensing authority refuses to grant or renew a licence, or where it imposes restrictions, the applicant may appeal to the Crown Court. In certain circumstances the Board also has a right of appeal to the Crown Court against the grant or renewal of a licence or in respect of the imposition of restrictions.

7. The key provision is para 18, under which the relevant discretion arises, but it is also necessary to set out other provisions in the same section of schedule 2 which bear on the construction of para 18:

> "*Grounds for refusal to grant or renew licence*
>
> 18.(1) The licensing authority may refuse to grant a licence under this Act if it is not shown to their satisfaction that, in the area of the authority, a substantial demand already exists on the part of prospective players for gaming facilities of the kind proposed to be provided on the relevant premises.
>
> (2) Where it is shown to the satisfaction of the licensing authority that such a demand already exists, the licensing authority may refuse to grant a licence if it is not shown to their satisfaction –
>
> (a) that no gaming facilities of the kind in question are available in that area or in any locality outside that area which is reasonably accessible to the prospective players in question, or
>
> (b) where such facilities are available, that they are insufficient to meet the demand.
>
> 19.(1) For the purposes of the last preceding paragraph, the Board may from time to time give advice to any licensing authority as to the extent of the demand on the part of prospective players for gaming facilities of any particular kind, either generally in Great Britain or in any particular part of Great Britain, and as to the extent to which, and the places in which, gaming facilities of any particular kind are available.
>
> (2) In determining whether, on an application for the grant of a licence under this Act, a licence should be refused on the grounds specified in the last preceding paragraph, the licensing authority shall take into account any advice given to them by the Board in pursuance of this paragraph, as well as any representations which, at the time when the application is being considered by the licensing authority, are made to the authority by or on behalf of the Board or any other person entitled to be heard on the consideration of the application.

> 20.(1) Without prejudice to paragraph 18 of this Schedule, the licensing authority may refuse to grant or renew a licence under this Act on any one or more of the following grounds, that is to say –
>
> (a) that the relevant premises are unsuitable by reason of their lay-out, character, condition or location;
>
> (b) that the applicant is not a fit and proper person to be the holder of a licence under this Act;
>
> ….
>
> 21.(1) The licensing authority may refuse to renew a licence under this Act on any one or more of the following grounds, in addition to those specified in paragraph 20 of this Schedule, that is to say –
>
> (a) that it is not shown to their satisfaction that, in the area of the authority, a substantial demand exists on the part of players or prospective players for gaming facilities of the kind proposed to be provided on the relevant premises;
>
> (b) that a person has been convicted of an offence under this Act in respect of contravention, in connection with the relevant premises, of any of the provisions of this Act, or of any regulations made thereunder;
>
> ….
>
> 22.(1) The licensing authority shall refuse to grant or renew a licence under this Act if, by virtue of a disqualification order made under section 24 of this Act, such a licence is for the time being prohibited from being held in respect of the relevant premises.
>
> (2) The licensing authority shall refuse to renew a licence under this Act if they are satisfied that, while the licence has been in force, the relevant premises have been habitually used for an unlawful purpose or as a resort of criminals or prostitutes."

8. In quoting paras 20 and 21 I have included in each case, as being sufficiently illustrative, only the first two of a lengthy list of grounds on which the grant or renewal of a licence may be refused.

9. There is also a provision, in para 27, that notwithstanding anything in paras 18 to 26 of the schedule, the licensing authority, in dealing with any application for the grant or renewal of a licence, shall comply with any regulations under s.22(3) of the 1968 Act which are in force for the time being. That subsection empowers the Secretary of State by regulations to add to the grounds on which a licensing authority shall or (as the case may be) may refuse to grant or renew a licence.

*The decision under challenge*

10. In their decision on the claimant's application for a licence, the licensing justices directed themselves by reference to the principles set out in a judgment handed down by His Honour Judge Gilbart QC in the Preston Crown Court on 17 December 2004 in an appeal by Oasis Casino Limited against a decision of the Blackpool Licensing Justices ("the *Oasis Casino* case"). In the *Oasis Casino* case the court proceeded on the basis that, if no unmet demand was proved, there was a "residual discretion to grant the application" and that other factors were capable of outweighing the absence of unmet demand. It held that the following tests were to be applied under para 18: (i) has the appellant shown that there is a substantial demand for the type of gaming facilities proposed? (ii) if so, has the appellant shown that there is an unmet such demand? (iii) if no, has the appellant shown that there are other material considerations such that the licence should be granted? (iv) if yes, are there any reasons unrelated to demand such as to justify refusal?

11. In this case the licensing justices, applying those tests, concluded that (i) there was substantial demand for the type of gaming facilities proposed, but (ii) there was no unmet demand at the present time. They said that the central issue in the case was (iii) whether the applicant had shown that there were other material considerations such that a licence should be granted. They referred to various matters but found "no reason to exercise our discretion to grant a further Part II gaming licence". In view of their findings, question (iv) did not fall to be considered.

*The claimant's case*

12. Mr Howell QC for the claimant, supported by Mr Fordham QC for Clermont, submits that the approach in the *Oasis Casino* case and followed by the licensing justices is misconceived in law. It wrongly assumes that a licensing authority has a discretion to *grant* a licence when there is no unmet demand, whereas the discretion under para 18 is a discretion to *refuse* a licence in those circumstances; and the relevant question is whether such a refusal is required in the public interest, yet the licensing justices failed to identify any reason why a licence should be refused in the public interest. The purpose of the 1968 Act is to regulate the provision of gaming facilities in the public interest. There is no requirement on an applicant to justify the grant of a licence; a licence falls to be granted unless it is shown that it should be refused in the public interest. It is a basic principle that statutory powers are to be exercised to promote the purpose for which they are conferred and on relevant grounds of public interest: *R v Tower Hamlets LBC, ex p Chetnik Developments Ltd* [1998] AC 858, per Lord Bridge at 872. Such an approach also accords with the basic principle that the freedom to provide and receive services should only be restricted where there is a sufficient reason in the public interest to do so.

13. Mr Howell suggested that para 18 has two functions. The first is to ensure that demand is met: a licence must be granted if there is existing unmet demand (subject, of course, to the separate grounds of refusal in para 20). The second is to confer a discretion to refuse a licence if there is no existing unmet demand. The absence of unmet demand is not itself, however, a factor in favour of the exercise of discretion to refuse. As Mr Fordham put it in his skeleton argument: "the discretion is not the *function* – but rather the *consequence* – of the absence of unmet demand …. In the absence of an unmet demand, the *consequence* is that the authority has a discretion. It

cannot be the case that the absence of unmet demand is itself then the reason to exercise the discretion adversely to the applicant. The discretion is at large and needs to be exercised in the light of the relevant circumstances."

14. The further point is made that the provision of additional facilities in circumstances where no unmet demand has been shown cannot rationally be assumed to be an adverse factor weighing against the grant of a licence. Since 2002 the Gambling Commission has objected to applications on grounds of demand only if this raises real regulatory concerns relating to the individual application: that is to say, the absence of unmet demand is not regarded as necessarily giving rise in itself to any regulatory concerns. Nor will the competition arising from an additional casino necessarily be harmful even where there are already sufficient facilities to meet existing demand. Competition may be beneficial or neutral in its effects, rather than harmful: its likely effects need to be assessed by reference to the specific facts. Thus, to attribute weight to the absence of unmet demand is to proceed on the basis of a false assumption and is an arbitrary and irrational approach.

15. Those are the main features of the positive case advanced by the claimant and the fourth interested party. More detailed submissions directed at the positions adopted by the other parties are more conveniently considered in the context of the discussion that follows.

*Discussion*

16. On the approach advocated by the claimant, the absence of unmet demand can be viewed as being simply a condition precedent to the discretion to refuse a licence, with para 18 telling one nothing about the criteria or principles on which the discretion should be exercised. On the approach followed by the licensing justices in this case, the absence of unmet demand is a reason in itself for exercising the discretion so as to refuse the licence and can be expected to lead to the refusal of a licence unless that reason is outweighed by other material considerations. Which of those two approaches is correct depends upon the true construction of para 18.

17. I am in no doubt that para 18 is to be construed in accordance with the approach followed by the licensing justices. Far from telling one nothing about the criteria or principles on which the discretion is to be exercised in the absence of an unmet demand, it identifies the absence of unmet demand as *a ground for refusal*. If something is a ground for refusal, it must inform the exercise of the discretion and it provides in itself a reason for exercising the discretion so as to refuse a licence.

18. That para 18 contains grounds for refusal of a licence was conceded by Mr Howell in his reply and is clear from the terms of the paragraph and its context. It is the first paragraph in a section headed "Grounds for refusal to grant or renew licence". Para 19(2) makes provision for the licensing authority to take into account the Board's advice in determining whether a licence should be refused "on the grounds specified in the last preceding paragraph" (i.e. in para 18). Para 20(1) lists numerous further grounds on which the licensing authority may refuse to grant or renew a licence, including matters such as unsuitability of the premises, or that the applicant is not a fit and proper person, which must on any view be intended to be reasons for the refusal of a licence in the absence of countervailing considerations of public interest. Although para 18 makes separate and more detailed provision in relation to issues of

demand (in part, no doubt, because of the need to cater for the role of the Board in advising on demand, as set out in para 19), it seems to me to have the same essential function as para 20 in setting out grounds for refusal. This is further supported by the fact that in para 21(1)(a) the absence of a substantial demand is expressed as a ground on which the licensing authority may refuse to renew a licence.

19. I think it plain that, if the absence of unmet demand is a statutory ground for refusal, it can and should be taken into account in the exercise of discretion as a consideration telling in favour of refusal. It is, of course, capable of being outweighed by other considerations; but if no other relevant considerations are placed before the licensing authority (which is highly improbable in practice, but worth considering in principle in order to test the point), then the absence of unmet demand provides a good and sufficient reason for refusal of a licence and there will indeed be no basis for exercising the discretion otherwise than to refuse the licence. And once it is seen that the absence of unmet demand is a reason for refusal, the fact that the discretion is expressed as a discretion to refuse rather than a discretion to grant, on which Mr Howell placed such stress, does not help the claimant's case.

20. It follows that in my judgment an applicant who fails to show an unmet demand does need to put forward a positive case if he is to persuade the licensing authority that a licence should be granted notwithstanding the absence of unmet demand. He has to identify material considerations justifying the grant of a licence. He cannot sit back and assert that a licence must be granted unless an objector or the licensing authority itself identifies a reason apart from the absence of unmet demand why a licence should be refused.

21. That approach seems to me to give effect to the natural reading of the statutory provisions. I also consider it to be consistent with the policy of the 1968 Act. Mr Howell submitted that the policy of the Act was simply to *regulate* gaming and that, whilst regulation might involve the restriction of gaming where that was in the public interest, there was no separate policy to *restrict demand* for gaming and in particular no intention to limit gaming facilities to the minimum required to meet existing (unstimulated) demand. In my view, however, the policy of the Act goes further than submitted by Mr Howell and includes an element of restriction of demand for gaming: in particular, the Act was intended not only to enable existing demand to be met but also to inhibit the stimulation of fresh demand by the provision of additional facilities or by other means.

22. The clearest such indication, of course, is para 18 itself, together with the related ground for refusal to renew a licence in para 21(1)(a). I would attach weight to them as indicating the legislative policy despite the element of circularity that this might be said to involve. In his submissions for the Gambling Commission, Mr Gunning relied on a number of other matters as reflecting a policy that the facilities offered for gaming should respond only to unstimulated demand. Of those matters, three seem to me to be particularly pertinent. First, s.12 requires those participating in gaming to be members of the club specified in the licence or bona fide guests of a member: as originally enacted, the membership requirements included a 48 hour waiting period, but that period was reduced to 24 hours in 1997 and was removed altogether in 2005. Secondly, s.42 prevented the issue of advertisements informing the public that gaming took place on premises, inviting the public to take part as players or inviting the public to subscribe any money to be used in gaming; though that provision has now

been repealed by the Gambling Act 2005. Thirdly, regulations made by the Secretary of State in 1969 pursuant to the power in s.22(3) of the 1968 Act prevented the provision of live music and entertainment at premises used for gaming; though that ban was lifted in 2004. The 1970 Report of the Gaming Board listed those matters among the factors which "have all had the effect which Parliament intended of damping down the demand for gaming" (paragraph 15). It is true that the regulations preventing live music and entertainment, as secondary legislation, cannot provide direct evidence of the policy of the Act, but they were plainly considered by the Board in 1970 to be very much in line with the legislative intention.

23. I would accept that, apart from paras 18 and 21(1)(a) themselves, those various indicators are of only modest significance. But to the extent that they cast light on the policy of the Act as originally enacted, they run counter to the claimant's case; and the focus should in my view be on the Act as originally enacted since it is directly relevant to the true construction of para 18, which cannot have changed by reason of the later modification or repeal of other provisions.

24. The Gambling Commission also seeks to derive support from the views repeatedly expressed in official reports over the life of the 1968 Act. A document produced by the Home Office in 1968, "Introduction to the Gaming Act 1968", described the policy of the Act in these terms (para 1):

> "The main purpose of the Act is to curb all forms of gaming which are liable to be commercially exploited and abused. It recognises that commercial gaming cannot now be suppressed, but seeks to bring it under strict controls. The principle on which it proceeds is that no one can claim a right to provide commercial gaming; it is a privilege to be conceded subject to the most searching scrutiny, and only in response to public demand."

Mr Howell took issue with the language of "privilege" and, more importantly, contended that the words "only in response to public demand" reflected a basic error in para 14 of Appendix 1 to the same document, where it was stated that "[b]efore it can *grant* a licence the licensing authority must first be satisfied that a substantial demand already exists … for the facilities proposed, which cannot be adequately met by facilities already available …" (original emphasis). Para 14 was undoubtedly in error in suggesting that refusal was mandatory in the absence of unmet demand. But even if that error was reflected in the use of "only" in para 1, it would be surprising if the Home Office was entirely mistaken in its understanding that the Act proceeded on the principle of responding to (as opposed to stimulating) public demand.

25. The 1972 report of the Gaming Board stated that "[t]he object of [para 18] is that only sufficient clubs should be licensed to meet the unstimulated demand for gaming facilities" (para 48). In similar vein, the 1978 Report of the Royal Commission on Gambling stated that "[t]he philosophy of the Act was that commercial gaming facilities could be provided under appropriate supervision but only on the scale needed to meet the unstimulated demand for them" (para 16.10). The report went on to refer to the Home Office's 1968 document, without noting the error to which I have already referred. Again, however, I do not accept that the Royal Commission's understanding of the legislation can have been wholly distorted by that error. A later

passage in the report is also highly relevant; and although it, too, reflects in part the error in the Home Office document, once more I take the view that the error does not invalidate the thrust of the observations:

> "18.18 We have said that the characteristic features which distinguish British casinos from those on the continent are the result of specific policies embodied in the Gaming Act 1968. The underlying principle is that casino facilities in Britain should be sufficient, but no more than sufficient, to satisfy an unstimulated demand for gaming which might otherwise seek an illegal outlet.
>
> 18.19 The principle of satisfying unstimulated demand is the connecting thread which runs through the fabric of gaming control. Licensing authorities considering applications for casino licences ordinarily require to be satisfied that a substantial demand exists for the kind of facilities proposed and that such demand is not already satisfied by available facilities reasonably accessible to prospective players in the area. The prohibition of advertising prevents the artificial stimulation of demand. The ban on other entertainments is meant to stop proprietors from baiting the hook with free cabaret or dancing. The 48-hour rule … excludes people who have no strong desire to gamble in casinos but might be tempted to enter one simply because it was there."

26. A Gambling Review Report in 2001, commissioned by the Home Office, likewise referred to the "demand test" underlying the 1968 Act and to the endorsement of that test by the Royal Commission in 1978. The report favoured the abolition of the test, and the recommendations in the report led in due course to the Gambling Act 2005 and the new system introduced by that Act. As regards the report's survey of the existing position, Mr Howell was again constrained to contend that it was vitiated by reliance on the erroneous Home Office document of 1968 (which was quoted in the report's description of the historical background). Again I do not accept that that led to a fundamental flaw in the report's general analysis of the position.

27. The same broad theme is continued in the Gambling Commission's own advice to licensing justices, at para 14:

> "It is implicit in the 1968 Act that gaming facilities should be sufficient, but no more than sufficient, to satisfy the demand for them. Paragraph 18 of Schedule 2 to the Act envisages that a broad balance be kept between the demand for gaming and the provision of gaming facilities."

That passage was in fact the starting-point for Mr Howell's sustained criticisms of the position adopted by the Gambling Commission, but I think it fair to say that he castigated it as the culmination of an erroneous line of reasoning, stemming from the error in the Home Office document in 1968 and having no foundation in the 1968 Act. This aspect of the Gambling Commission's advice was also criticised in the decision in the *Oasis Casino* case, which in this respect Mr Howell was able to deploy to his

advantage even though the court's construction of para 18(2) in that case was against him.

28. There is some force in Mr Howell's criticisms of the Gambling Commission's advice and of the historical materials to similar effect. The advice does seem to me significantly to overstate the position. The 1968 Act does not envisage either a precise or a broad balance between the demand for gaming facilities and the provision of those facilities. That is inherent in the very fact that a licence may be granted in the exercise of the discretion under para 18 even where no unmet demand is shown. Thus the Act allows for the grant of licences for facilities going beyond those needed to meet existing demand, even if that has the effect of stimulating further demand. But that is not to say that the Act is neutral on the relationship between demand and supply. As I have said, the Act is intended to inhibit the provision of facilities beyond those required to meet existing demand, as part of a policy of discouraging the stimulation of fresh demand; and para 18 is the prime manifestation of that policy. Accordingly, although I do not go so far as the Gambling Commission in my assessment of the policy of the Act, I go in the same direction, which is consistent with my construction of para 18 and inconsistent with the case advanced by the claimant.

29. If para 18 is construed in the way I favour, it disposes of the argument advanced by Mr Howell by reference to *R v Tower Hamlets LBC, ex p Chetnik Developments Ltd*. To treat the absence of unmet demand as a reason for refusal of a licence is to exercise the discretion in line with the legislative purpose and on a relevant ground of public interest: by the very terms of para 18, Parliament itself has provided that the absence of unmet demand is such a ground, amounting to a reason for refusal of a licence. Parliament has in a sense provided a starting point, whilst leaving it open for other considerations of public interest to be taken into account in the exercise of the licensing authority's discretion.

30. I have dealt with the matter so far without reference to authorities on the 1968 Act; but those authorities support the conclusion I have reached.

31. In *R v Manchester Crown Court, ex parte Cambos Enterprises Ltd* (judgment of 2 March 1973), the Divisional Court was considering a challenge to a decision of the Crown Court in which the absence of unmet demand had been treated as determinative of the refusal of a licence. Lord Widgery CJ, with whom Ashworth J and Bridge J agreed, referred to the discretion conferred by para 18(1) in these terms:

> "… I think for myself that one really has got to solve this problem primarily on the wording of para 18. It is in a somewhat odd form, because it does not at any point provide in concrete terms for the decision which the committee has to reach. It does not say it may not grant a licence in any particular situation, or that it shall grant a licence in any particular situation. It starts with what I find slightly odd phraseology, that the licensing authority may refuse in the absence of proof of a substantial demand. I think that must mean that the intention of Parliament was in general that if a substantial demand was not proved, a refusal of the application was to be expected. The discretion remains … but to make

> sense of it at all, it seems to me that a licensing authority would be well advised to approach these problems on the footing that if the demand referred to in para 18(1) was not proved to its satisfaction, then prima facie the application should be refused …."

32. Later in his judgment Lord Widgery stated that there was no mandatory obligation to refuse an application simply because a substantial existing demand was not proved: there remained a discretion. He continued:

> "Obviously Parliament intended that there should be an opportunity for considerations other than the existence of a demand to be taken into account, and I think what is really contemplated here is that in the absence of proof of a substantial demand, the licensing committee may in its wisdom and with its knowledge of the area, still think it right to grant a second bingo licence for the district, and I think it would be perfectly entitled if it thought it right, to be influenced in favour of granting further facilities to a competitor, by the fact that the competitor was prepared to supply the gaming facilities in question on a more lavish scale, with greater comfort, and in circumstances which the patrons would find more attractive than the existing establishment.
>
> That in my judgment, is the kind of legitimate consideration which might move the committee to make its decision in favour of the applicants even though no existing substantial demand had been proved."

33. The court remitted the case to the Crown Court with a view to its being reconsidered in the light of the terms of the legislation as so interpreted.

34. Lord Widgery's observations about the discretion under para 18(1) are in my view equally applicable, *mutatis mutandis*, to the discretion under para 18(2): indeed, although Lord Widgery concentrated on para 18(1), *Cambos* was in substance a case under para 18(2), since the Crown Court found that there was a demand but existing facilities were sufficient to meet it. Applying his words to para 18(2), Lord Widgery was clearly of the view that in the absence of an unmet demand, taken by itself, "a refusal of the application was to be expected", or "prima facie the application should be refused". These were considered observations, intended to guide the Crown Court in its redetermination of the case. They have stood as guidance for much of the life of the 1968 Act. They informed the test in the *Oasis Casino* case which was followed by the licensing justices in the present case. The guidance was relied on by Stanley Burnton J as a reason why it was not necessary to grant permission to apply for judicial review of the licensing justices' decision. Even if I had doubts about the guidance, I would hesitate about departing from it now. As it is, however, I have no such doubts, but regard the approach taken by Lord Widgery as supporting my conclusion on the construction of para 18.

35. A few years later, in *R v Licensing Justices of the Brighton Crown Court, ex parte Sergeant Yorke Casino Limited* (judgment of 19 June 1979), Lord Widgery had to

consider para 18 again. One ground of challenge in that case was that the Crown Court had erred in exercising its discretion under para 18(2) by considering the desirability of competition. The argument was that, if one were seeking to equate demand and supply of a service such as bingo, the introduction of any element of competition meant that the scales were out of balance (since the existence of competition meant that there was excessive demand or supply) and defeated the object of para 18. That argument was rejected. It was held that "the question of whether the competition is desirable" was amongst the many matters that the licensing justices or Crown Court might have to consider; and that "[t]hese are powers intended to go to local men, to consider local solutions to local problems, and we should not interfere unless it is quite clear that a wrong principle has been applied or some element of law has been overlooked". The decision did not (and did not need to) refer to the guidance in *Cambos* but was consistent with it.

36. We were also referred to a decision of the Court of Session in *Patmor Ltd v City of Edinburgh District Licensing Board* [1988] SLT 850 in which an argument that a licensing authority had no discretion to grant a licence in the absence of an unmet demand was firmly rejected. One aspect of the argument, rejected as unrealistic and outwith the contemplation of the 1968 Act, was that the system provided by the Act was designed to ensure perfect equilibrium between the supply of gaming facilities and the demand for them in a particular area at any one time; but the court's analysis did not touch on the wider issue of the policy of the Act considered above. The court referred to the decision in *Cambos* as supporting its opinion as to the existence of a discretion. It quoted a lengthy passage from the latter part of Lord Widgery's judgment (including the part set out at para 32 above), expressed agreement with it and stated that "it is eminently desirable that the same construction should be placed on the provisions of a United Kingdom statute both north and south of the border" (page 854).

37. We were also referred to a number of decisions under para 19(b) of schedule 1 to the Betting, Gaming and Lotteries Act 1963, which concerns applications for betting office licences and provides that the appropriate authority "may refuse the application on the ground … that the grant or renewal … would be inexpedient having regard to the demand for the time being in the locality for the facilities afforded by licensed betting offices and to the number of such offices for the time being available to meet that demand". The main cases were *R v Essex Quarter Sessions, ex parte Thomas* [1966] 1 WLR 359, *R (Hestview Ltd) v Snaresbrook Crown Court* [2001] EWHC Admin 144 and *William Hill Organisation Ltd v City of Glasgow Licensing Board* [2005] 1 SC 102. Although there are obvious similarities in statutory context and language, there are also differences; and there is also a question whether, as Mr Howell submitted, the later decisions were based at least to some extent on a misreading of the decision in *ex parte Thomas*. In the circumstances I think it unnecessary and unhelpful to engage in a detailed examination of the cases, but their general tenor, and in particular the observations at paras 22-25 of the judgment in the *William Hill* case, tend to support the conclusion I have reached in relation to para 18 of schedule 2 to the 1968 Act and certainly provide no assistance to the claimant's case.

38. Mr Howell put forward, as a practical advantage of the position contended for by the claimant, that it would lead to the saving of a great deal of time and expense in licence

applications, since it would not then be necessary to adduce detailed expert evidence on the issue of unmet demand: an applicant could concede the absence of unmet demand but advance his case on the basis that there was no reason in the public interest for refusal of a licence. For the reasons I have given, however, it is not possible for the issue of unmet demand to be treated as an irrelevance or put on one side in the manner suggested. It constitutes a reason for refusal of a licence; and if an applicant concedes the absence of unmet demand, he needs then to identify reasons of public interest why a licence should nonetheless be granted. He cannot succeed simply on the basis that, despite the absence of unmet demand, there is no reason in the public interest for refusal of a licence. The *prima facie* position, as Lord Widgery made clear in *Cambos*, is that the application should be refused: some positive reason must therefore be shown why the application should be granted.

39. A reason in favour of the grant of a licence may lie in the competition created by additional facilities, provided that it is shown that competition might be expected to have beneficial effects rather than being harmful or merely neutral in its impact. Thus Lord Widgery said in *Cambos* that the licensing justices were entitled to be influenced in favour of granting a licence for further facilities to a competitor by the fact that the competitor was prepared to supply them "on a more lavish scale, with greater comfort, and in circumstances which the patrons would find more attractive than the existing establishment"; and he made clear in *Sergeant Yorke* that the question whether competition was desirable was amongst the many matters that the licensing justices might have to consider. As appears strongly in the authorities, such matters have to be assessed not as a matter of abstract principle but by reference to the particular circumstances in the locality, by licensing justices using their local knowledge.

40. It is for the licensing justices to decide what weight to attach to the various factors against or for the application and to decide where the overall balance lies. This is not a mathematical exercise but a matter of judgment, to be exercised in the light of all the material considerations. The justices must take all such considerations into account and reach a rational decision whether to refuse or grant a licence. The same, of course, applies to the Crown Court rehearing the matter on an appeal.

41. Mr Fordham showed us a decision of the Bristol Crown Court dated 24 January 2008 on an application by Clermont in respect of a casino licence for the Grand Hotel, Bristol. Since, as we were told, there is a pending judicial review challenge to that decision and I do not know whether we have heard argument on it from all interested parties, I am reluctant to express any concluded view about the decision. There are, however, certain points that I would note about it. The court purported to be guided in large measure by the judgment of Lord Widgery in *Cambos*, in relation to which there can be no objection in principle. On the other hand, the court used language suggesting that in its view the applicant had a heavy burden to discharge in order to justify the grant of a licence in the absence of unmet demand. Having cited Lord Widgery's observation that under para 18(1) a refusal was "to be expected" in the absence of a substantial demand, the court referred to "[t]he same considerations of expectation or presumption" applying to para 18(2). It then said that the thrust of Lord Widgery's judgment was that if the applicant failed in the primary issues, "the expectation would normally be that the application would be refused, absent intervening special considerations". Having considered points for and against the

grant, it concluded that the applicant "has not established sufficiently powerful reasons to overcome the expectation of refusal". By its reference to a "presumption", the need for "intervening special considerations" and the failure to establish "sufficiently powerful reasons to overcome the expectation of refusal", the court was arguably erecting an unjustified hurdle for the applicant to get over. What it was required to do, as I have indicated, was simply to take all material considerations into account and decide where the overall balance lay.

42. It is possible that the reference to a "residual discretion to grant a licence" in the *Oasis Casino* case and also in para 16 of the Gambling Commission's advice to licensing justices encourages a restrictive approach towards the grant of licences. If so, I think that that is a mistake. The fact that the absence of unmet demand is a reason for refusal does not convert the exercise into one in which there is merely a "residual" discretion to grant a licence. The exercise of the discretion conferred by para 18 involves taking the absence of unmet demand into account together with all other material considerations and it may lead to the refusal or to the grant of a licence.

43. I do not think that the reference to a residual discretion affected the legal test actually formulated in the *Oasis Casino* case. In that test, set out at para 10 above, the court said that, in the absence of unmet demand, it was necessary to ask whether the applicant had shown that there were other material considerations such that the licence should be granted and, if so, whether there were any reasons advanced unrelated to demand such as to justify refusal. Such an approach, in looking for reasons why a licence should be granted despite the absence of unmet demand, is in line with my construction of para 18; but by posing two separate and sequential questions relating respectively to reasons justifying grant and reasons justifying refusal, it is in my view over-elaborate. I repeat that what is required is a single exercise of judgment, taking all material considerations into account (whether they constitute reasons in favour of grant or reasons in favour of refusal) and deciding where the overall balance lies.

44. The licensing justices in the present case applied the test in *Oasis Casino* but got no further than the question whether the claimant had shown that there were other material considerations such that the licence should be granted. They answered that question in the negative and therefore refused the licence. There was no error in their looking for reasons why the licence should be granted despite the absence of unmet demand; and the fact that they approached the matter on the basis of the over-elaborate sequence of questions in *Oasis Casino* gave rise in the circumstances to no material error. They evidently considered that there was nothing to outweigh the reason for refusal constituted by the absence of unmet demand. There has been no criticism of their detailed assessment of the reasons relied on as justifying the grant of a licence: the claimant's case has been advanced before us solely as one of legal principle. Accordingly there is no basis for interfering with the licensing justices' decision. The claimant should be left to pursue an appeal to the Crown Court on the factual merits of its licence application.

45. I would therefore dismiss the claim for judicial review.

**Smith LJ :**

46. I agree.

**Sir Anthony Clarke MR:**

47. I agree that the claim for judicial review should be dismissed. I do so for essentially the same reasons as Richards LJ, although I add some comments of my own because there are some aspects of the matters he discusses which I see somewhat differently.

48. Richards LJ has set out the relevant statutory provisions, the facts and Mr Howell's submissions in some detail. So I do not repeat them. They raise a question of construction of paragraph 18 of schedule 2 to the 1968 Act. I was at one time attracted by Mr Howell's submissions but, once he correctly conceded that paragraph 18 contains grounds for refusal of a licence, just like paragraph 20, it became clear to me that the licensing authority was entitled to refuse a licence on the ground that the applicant had failed to show that there was an unmet demand. It follows, as I see it, that the authority can refuse a licence on that ground, just as it can (for example) refuse a licence on the ground that the applicant is not a fit and proper person to be the holder of a licence under paragraph 20(1)(b).

49. It further follows that, in the almost inconceivable event that there were no evidence before the authority, it would have no real alternative but to refuse the application on the ground that the applicant had failed to show that there was an unmet demand. Essentially for this reason, I agree with Richard LJ's analysis in paragraphs 1 to 21 and the first sentence of paragraph 22 above.

50. In the remainder of paragraph 22 and in paragraph 23 Richards LJ ascribes modest significance to certain other sections of the Act. I agree that, at best, they have modest significance. While I would not disagree that the focus should be on the Act as originally drafted, I am not persuaded that later modifications to the Act are irrelevant. It seems to me that, in principle an Act falls to be construed in its present form because provisions of an Act must be construed in the context of the Act as a whole and, if parts of an Act are amended or repealed, that context will change and may affect the construction of particular provisions of it. I make this point only by way of reservation for the future, not because it affects the construction of paragraph 18 in this case.

51. In paragraphs 24 to 28, Richards LJ considers various subsequent statements as pointing to the policy of the Act. I am doubtful of the extent to which these really assist, especially given the fact that some of them contain errors. In particular I am doubtful of the extent to which subsequent statements by the Home Office setting out its view of the purpose of the Act are of any real assistance. However, this again is of no real importance here because the question is one of construction of paragraph 18, which is to be construed in the context of the Act as a whole having regard to the statutory purpose. I accept that one of the purposes was to restrict gaming but my conclusion as to the meaning of paragraph 18 depends principally upon its language.

52. None of the aids to construction referred to seems to me to restrict the discretion conferred by paragraph 18 beyond the fact that, as I said earlier, absent any other evidence the authority would have no real alternative but to refuse to grant an application unless it shows an unmet demand. I agree with Richards LJ (at paragraph 38) that some positive reason must be shown why the application should not be refused. However, as I think Richards LJ makes clear at paragraphs 39 to 43, the authority must have regard to all relevant circumstances in the local area, whether

they point one way or another and decide where the overall balance lies. As I see it, this is a broad discretion to be decided in the circumstances as they are today, not as they were in 1968.

53. In my opinion this approach is consistent with the relevant authorities. In particular, it seems to me that the part of Lord Widgery's judgment in the *Cambos* case quoted by Richards LJ at paragraph 32 demonstrates a broad approach based on all the circumstances. The instances to which he refers are, as I see it, only examples of the kind of consideration which the authority might think relevant. Lord Widgery's approach in the later *Sergeant Yorke Casino* case (referred to at paragraph 35 above) is to much the same effect. As Richards LJ explains, Lord Widgery said that "the question of whether the competition is desirable" was amongst the many matters that the licensing justices or Crown Court might have to consider; and that "[t]hese are powers intended to go to local men, to consider local solutions to local problems". This again indicates a broad approach to the discretion. Moreover there is nothing in the *Patmor* case to lead to any other conclusion and I agree that the cases on the Betting, Gaming and Lotteries Act 1963 are of very little help.

54. In short all depends upon the local circumstances, which should be looked at broadly. However that may be, I agree that Mr Howell's construction of paragraph 18 cannot be accepted and that the appeal must be dismissed.+