FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Gambling

Tribunal Reference:	GA/2013/0001
Appellant:	Luxury Leisure Ltd
Respondent:	The Gambling Commission
Judge:	NJ Warren

DECISION NOTICE

A. Introduction

1. On 12 June 2013 Luxury Leisure Ltd ("Luxury Leisure") attended a hearing of the regulatory panel of the Gambling Commission ("the Commission"). The purpose of the hearing was a review of the company's non-remote operating licence. That licence authorises Luxury Leisure to provide facilities for, amongst other things, betting other than pool betting. The review concerned premises at Clayton Street, Newcastle, in respect of which Luxury Leisure had held a betting premises licence issued by the local council.

2. On 1 July 2013 the Commission notified Luxury Leisure that the panel had found them in breach of Condition 16 of their operating licence in respect of their business at Clayton Street. The panel had decided to issue a written warning. Luxury Leisure now appeal to the Tribunal against the finding and against the warning. There was a hearing of the appeal. Mr John Howell QC appeared for Luxury Leisure. Ms Jemima Stratford QC, with Mr Christopher Knight, appeared for the Commission. I express my thanks to all those who have been engaged in the preparation of the argument.

3. I should add by way of introduction that the licence for the Clayton Street premises was originally held by another company forming part of the same group as Luxury

Leisure. On the view I have taken of this case, nothing turns on this and I shall refer to Luxury Leisure as if they had been the holders of the betting premises licence from the beginning.

B. Fixed Odds Betting Terminals (FOBTSs)

4. The trade still uses the term FOBTs to refer to the gaming machines which are to be found in betting shops.

5. By virtue of Section 68(5) Gambling Act 2005 ("the Act") the holder of a non-remote general betting operating licence is authorised to make gaming machines available for use in addition to providing facilities for betting. Similar provision is made for holders of Non-Remote Casino and Bingo Operating Licences.

6. The types of gaming machine which can be used are stipulated in regulations made by the Secretary of State. Machines known as "Type B2" are particularly relevant here. Stakes of up to £100 a play are permitted. This type of machine is available in betting shops but not in bingo halls or in adult gaming centres.

7. By Section 172(8) a Betting Premises Licence authorises the holder to make up to four gaming machines, each of which must be of category B, C or D available for use. There are similar provisions involving different types of machine for other premises licences.

8. The Commission, which issues operating licences, has wide powers to attach conditions to them; but it cannot include a condition about the number or categories of gaming machine that may be made available for use. See Section 86(1)(a).

9. Local Authorities, who issue premises licences, may not attach any condition about the number or categories of gaming machine that contradicts the authority given by the statute. See Section 172(10).

10. When the Gambling Act came into force, there was a widely held view that it was permissible to obtain a premises licence with the intention of using the premises only for making FBOTs available. Indeed, the licence for Clayton Street was

obtained from the Licensing Justices on the basis of an undertaking that the only gambling activity would be FOBTs. Some still hold that view. The Commission, after some deliberation, has taken the opposite view and now attaches a standard condition, known as Condition 16, to operating licences.

C. Condition 16 – Meaning

11. Condition 16 bears the heading "primary gambling activity". This phrase, it seems to me, has been used ambiguously. The right to make FOBTs available attaches, as I have described, to operating licences. Sometimes "primary gambling activity" is used to describe the "prime purpose" of that licence. So for a bingo operating licence it means bingo and for a betting operating licence it means betting.

12. Sometimes, the phrase seems to require not merely consideration of the "parent" licence but a factual assessment of what actually goes on in any one set of premises. When used in this sense, whether or not betting is "the primary gambling activity" requires a judgement on the facts; it might vary from time to time; and there is of course scope for argument as to the test or criteria to be adopted.

13. After correcting a typo, the wording of Condition 16 attached to the betting operating licence in this case is as follows:-

> "Gaming machines may be made available for use in licensed betting premises only at times when there are also sufficient facilities for betting available.
>
> "Such facilities for betting must include the provision of information that enables the customer to access details of the events on which bets can be made and to be able to place those bets, obtain details of the outcome of the events, calculate the outcome of their bets and be paid or credited with any winnings.
>
> "Where licensees provide facilities for betting only by means of betting machines (machines which are designed or adapted for the purpose of making or accepting bets on future real events) the licensee must ensure that the number of betting machines is greater than the number of gaming machines which are made available for use in reliance on the premises licence."

14. The panel found Luxury Leisure to be in breach of para 1 of the condition; this raises the question of what the requirement to make "sufficient facilities for betting available" means.

15. Ms Stratford QC submitted on behalf of the Commission that the test is whether there are sufficient facilities for betting available such as to indicate that betting is the primary gambling activity on the premises. For Luxury Leisure, Mr Howell QC offered four possible constructions, the narrowest of which was that betting facilities should be more than a token presence on the premises.

16. I have concluded that I cannot accept the submission made on behalf of the Commission. The first and simplest reason for this conclusion is that the construction inserts into the condition, without justification, words which are simply not there. It seems to me that the words to be applied are the plain words of the condition.

17. A supporting reason is to be derived from the consultation conducted before Condition 16 was introduced. The Commission's power to impose general conditions is subject to a duty to consult. In my judgement, the consultation process here, supports the view that the Commission consulted on a proposed condition concerning the existence of facilities rather than the dominance of facilities. Indeed, the meaning for which the Commission now contends, is consistent with an earlier draft condition to the effect that facilities for betting "must be sufficient in range and capacity to ensure that betting constitutes the primary activity on the premises". This draft, however, was abandoned and the Commission issued a new consultation, leading to the present wording. See Appendix 1 for more details.

18. I conclude therefore that Condition 16 does not require a contest between betting and the FOBTs as to which is or could be the primary activity at any given time. My reading of the condition is thus much closer to Mr Howell's submission of "more than a token presence" although, whilst recognising the origin of that phrase in the consultation, I prefer to stick to the plain ordinary words of the condition.

D. Condition 16 – Validity

19. I turn to consider whether Condition 16, as I have construed it, is invalid.

20. Mr Howell submitted first that the condition is inconsistent with the Act and therefore ultra vires. As I understand it there are two aspects to this argument.

21. First, he relies on Section 86(1)(a) of the Act which prohibits the Commission from imposing a condition "about the number or categories of gaming machine that may be made available for use in accordance with the licence". He points out that the condition, in particular paragraph 3, does just that. It seeks to limit the number of gaming machines which may be available at any particular time by introducing a relationship to the facilities for betting then available.

22. Second, he submits that the Act, having ring fenced the right to four FOBTs in a betting shop, contemplated that any other regulation of the machines should be by the local authority in connection with the premises licence. He pointed to the specific provision in respect of betting machines in Section 181(1) and the implication in Section 172(10) that some conditions in respect of gaming machines can be imposed by the local authority.

23. Reading the Act as a whole, and taking special account of the Commission's responsibilities and the licensing objectives, I am not convinced that, apart from such express provisions as Section 86(1)(a), there are "no go areas" for the Commission in respect of regulation. It seems to me to be in the nature of things that there might well be areas of overlap in which both local authorities and the commission are empowered to impose conditions. It may be said that the statute itself contemplates such a result: see Section 169(4) which prohibits the local authority from attaching a condition to a premises licence which would interfere with a holder's duty to the Commission under an operating licence.

24. Turning to Section 86(1)(a), I agree that this prevents the Commission from attaching conditions about the number and categories of gaming machines to be made available under an operating licence; but this does not in my judgement

exclude regulation by the Commission of any activity relating to FOBTs. Reading the statute, as a whole, it seems to me that it is open to the Commission to attach conditions concerning what I might call the atmosphere in which various facilities, including gaming machines, are made available.

25. In construing Condition 16 I have ruled out any idea of a contest as to whether betting or gaming dominates. On that basis, in my judgement, the condition as drafted does not trespass into the forbidden territory of Section 86(1)(a) and the condition is intra vires.

26. Mr Howell also argues that Condition 16 is void for uncertainty. In this connection, Mr Howell made some powerful criticisms of the Condition as interpreted by the Commission. He rightly referred to cases under Article 7 ECHR and to the context that breach of a condition is a criminal offence.

27. In my judgement, however, the force of these criticisms is at its strongest if the condition requires a judgement on which activity is dominant. This is true particularly when considering the uncertainty of the criteria by which the two activities might be compared and the inevitably retrospective nature of any measurement of the use of facilities. By contrast, on the construction of Condition 16 which I have adopted its terms seem to me to be reasonably plain and certain. It is true that the words "sufficient facilities" in paragraph 1 require a judgement to be made, but so do many parts of the criminal law. Moreover, paragraph 2 contains a helpful definition of what those facilities must as a minimum include. Written advice is easily available in the form of codes and other guidance issued by the Commission. All this leads me to conclude that Condition 16 is not void for uncertainty.

28. Before leaving the question of validity, I should perhaps comment that my conclusions on this might have been different had I adopted the Commission's submission on the meaning of Condition 16. This may be a third ground for preferring the construction I have adopted.

E. The Code of Practice

29. The Act empowers the Commission to issue codes of practice and provides that a code must be taken into account by the Tribunal in any case in which it appears to be relevant. See Section 24(9)(b).

30. The Commission's code of practice in relation to primary gambling activity is at appendix 2.

31. I have not found it easy to take into account the provisions of the code.

32. In part, this is because of the ambiguity in the use of the phrase "primary gambling activity". The opening words give some general factors common also to bingo licences, to be taken into account. The purpose of doing so, it is said, is

> "to demonstrate that the primary gambling activity for which an operating licence has been issued is being offered in each licensed premises….".

So far, it seems plain that the code is addressing the construction of Condition 16 which I have adopted and looking at the existence of facilities.

33. The code, however, concludes with the statement that the combination present of the various factors described "should be sufficient to indicate that the activity is the primary one in any given premises". This is to adopt the second meaning of "primary gambling activity" which depends on measuring rival activities.

34. Nor do the consultation documents help. The reference in the code to the primary gambling activity being "offered" is said to be included to avoid the suggestion that it is related to the usage of the facility. One of the three general factors intended to be taken into account is then described as:-

> "The use, either expected or actual, to be made of the different gambling facilities."

35. I take from the code that, when assessing whether sufficient facilities for betting are available I should have regard, amongst other things, to the amount of space available to betting customers; the promotion of betting; the expected use to be

made of the facilities; and the range and frequency of events on which bets can be made. I do not consider that I should enter into direct comparison with the FOBT facilities which are available. Such comparison is, in my judgement, not likely to be relevant to the application of Condition 16.

36. I have been referred to a number of other papers prepared by the Commission on this issue. In particular, in November 2011 the Commission introduced a "compliance framework" headed "indicators of betting as primary gambling activity". The document provides a good description of what a typical modern betting shop looks like. It records a trend towards gaming machines and away from over-the-counter betting. The gross gambling yield ratio in the most recent data is betting 48.9% and gaming 51.1%. Gross gambling yield refers to the sum left after payouts had been deducted from receipts. If one were to take receipts as a more accurate assessment of activity the figures would be very different. It was common ground at the hearing, for example, that in the betting shops of one large high street chain gaming machines account for 85% of the receipts. These figures indicate again the difficulty and uncertainty which arise when trying to establish which activity is dominant.

37. The purpose of the compliance framework is to describe what a typical betting shop said to offer betting as a primary gambling activity offers. Whilst I accept that it does just that, I have not found it of further use in deciding whether Condition 16 has been met on the facts of this case.

F. The Panel Decision

38. The panel found, by majority, that Luxury Leisure was in breach of Condition 16.

39. It seems to me that the panel's decision also reflects the confusion between whether primary gambling activity should be in existence or whether it should be dominant.

40. At para 95 the panel states that Luxury Leisure had not had proper regard to:-

> "… the underlying purpose of Condition 16 which is, by requiring sufficient facilities for betting to be made available, to ensure that an

> operator who has applied for a licence to provide betting facilities (bringing with it the ancillary right to make available four B2 gaming machines) does in truth operate a betting business."

That would seem to be directed at the existence of betting as an activity.

41. Earlier, however, at para 83, the panel had accepted the last paragraph of the code of practice and its requirement, that betting should be the primary activity in any given premises, as "the acid test". Here, the panel is clearly using the phrase in its dominant sense. I have found the latter approach to be erroneous and the panel decision therefore cannot stand.

G. Was there a breach of Condition 16?

42. There is no doubt that Luxury Leisure's premises licence was originally obtained with a view to installing only FOBTs. Indeed, the then regulator, the Licensing Justices, made that, in practical terms, a condition of the licence. Over time, Luxury Leisure claim to have tried to meet the new requirements introduced by the Commission. They point, in my view fairly, to the difficulty of a small operator matching the facilities offered by the big chains who, in practice, have their own private TV channels supplying information to their shops. The question is have they done enough to meet Condition 16?

43. It is not suggested that the facilities do not meet any of the minimum requirements of Condition 16 para 2. The premises are named "A1 Roulette" a reference to the roulette games which are available on the gaming machines. I have received in evidence and accept plans and photographs showing the layout of the premises. A substantial area is devoted to betting. There are chairs, a table, TV screens and a copy of the Racing Post available. The betting business is promoted in displays. For actual betting, Luxury Leisure installed on 19 November 2012 a machine linked to Betfair, the largest betting exchange. To use this machine, a punter would need his or her own Betfair account to which winnings could be credited. The machine is unlikely to offer such a punter much more than they can already obtain

using a mobile phone app. Betfair is a very large exchange offering odds on a vast range of events.

44. Before the Betfair machine was installed Luxury Leisure relied on other machines linked to the Betfair system but operated by a different provider. These would consistently offer odds slightly worse than those available on the exchange in order to provide profit for Luxury Leisure and the betting system company as intermediaries.

45. Punters could use the machines themselves or handover cash to a counter clerk who would use the machines to place the bets. The overall betting use was low. I accept the figures in the returns made by Luxury Leisure to the Commission showing an average, according to the Commission, of about 72 betting slips a week from April 2012.

46. The Commission criticises the betting system available. Some of the criticisms have more force than others. An example of hopelessly competitive odds was produced in evidence but it was accepted that this was in respect of a very obscure market and I regard this as a red herring. I am not prepared to find that the odds provided by the system are generally uncompetitive. There was no dissent at the hearing when I suggested that 90% of race course book makers operate such a system. I do not attach any importance to Luxury Leisure's inability to change the odds available. This is because, whilst the Commission are right to say that Betfair odds <u>can be</u> wholly uncompetitive, it is very rare for that to be so when the betting market is active. Otherwise, how could they have become so successful?

47. One limitation of the system which I do accept is in connection with multiple bets. Although the Betfair machine, when it was installed, would allow Betfair account holders to place doubles trebles and accumulators on events of their own choosing, the system generally in use would have allowed multiple bets only on a small number of football matches, preselected by the machine.

48. There was a disagreement between the parties as to whether the Betfair machine required a different type of operating licence. I am not entirely clear that it did. I

do not consider this issue material to the question of any breach of Condition 16. On any view there was a genuine legal disagreement on the point with Luxury Leisure offering to exchange leading counsel's opinion with the Gambling Commission.

49. I have had regard to all the material before me. I take into account that one of the Commission's experienced compliance managers has visited the premises; but he was clearly applying the "dominant" test when he concluded that "the primary gambling activity at Clayton Street was gaming and not betting". I also take into account that another inspector at an unannounced visit in July 2011, when the facilities were not really much different, judged the facilities to be compliant. So did one of the three members of the regulatory panel.

50. I conclude that, especially given the range of betting opportunities available through the machines linked to Betfair, the counter service, and the space and facilities available, that the premises made available sufficient facilities for betting and that accordingly Luxury Leisure were not in breach of Condition 16.

51. I therefore allow the appeal and set aside the decision of the Commission.

NJ Warren
Chamber President
Dated 13 May 2014

APPENDIX ONE

A note on the consultation in respect of Condition 16

1. It seems to me that the consultation was bedevilled by the use of the phrase "primary gambling activity" (PGA) in the two separate senses identified at paras 11-12. This produced a parallel confusion as to whether Condition 16 is concerned with the existence of betting facilities; or the dominance of betting facilities over gaming facilities.

2. It can fairly be said that the consultation started, in June 2008, on the basis that PGA should be dominant. It referred at para 1.1 to :-

> "The need for holders of different categories of premises licences to ensure that the gambling activity appropriate to the licence type is actually offered as the primary activity at those premises; and not simply as an adjunct to, or sometimes wholly replaced by, the making available of gaming machines as permitted by virtue of the licence."

3. The proposed new draft condition stated that facilities for betting must be available and must be:-

> "sufficient in range and capacity to ensure that betting constitutes the primary activity on the premises."

4. That consultation proved controversial and in October 2008 a further consultation proposed a very different condition. The new draft para 1 read as follows:-

> "On any premises for which the licensee holds a premises licence, facilities for betting on real or virtual events must be genuinely available at all times when gaming machines are made available for use."

5. This, in my view, marks a shift to the new condition dealing with existence rather than dominance.

6. The language is by no means consistent but a number of references in the January 2009 document which is contained in the Tribunal bundle, support this interpretation. (The underlining is mine throughout.)

7. At para 1.7 it is said that as a result of the January 2008 consultation the Commission decided that an additional condition should be attached to operating licences to ensure that operators did offer the primary gambling activity authorised by their licences.

8. At para 2.2, the Commission expressed its view of the law as being that "there must be at least some provision of the primary activity authorised by the operating licence and premises licence before gaming machines are made available for use on premises"

9. At para 3.2 the purpose of the proposed new condition is said to be to ensure that the "PGA associated with each licence type must be provided before gaming machines are made available on the operator's premises".

10. There were objections in the course of the October 2008 consultation to the phrase "genuinely available". At paras 3.26 and 3.37 the Commission responded by acknowledging those objections but insisting that :-

> "….the form of words should adequately reflect that the offer should be more than a token one. The word 'usual' to describe facilities has been deleted as has the phrase 'genuinely available' and they are replaced by the phrase 'sufficient facilities are (also) available for use.'"

11. Finally, at para 3.41 the Commission considered particularly the plight of those operators such as Luxury Leisure who had obtained their premises licences on the basis of an undertaking given to Licensing Justices that they would provide only FOBTs on their premises. The Commission decided that they should have a longer transitional period (up till March 2010):-

> "…to ensure that the PGA is being offered on their premises."

12. I conclude therefore that the Commission's statutory consultation in June 2008 was on the footing that the PGA should be dominant. The Commission, however, abandoned that draft. They instead consulted again on a different draft which focussed on the existence, not dominance, of betting facilities; and this was the provision which the statute then empowered them to make.

NOTE

Although the papers before the Tribunal referred to a change in the draft from June 2008 to October 2008 the precise wording of the June 2008 version was not included. I have considered whether it is necessary to delay issuing this decision in order to allow the parties to comment. I have decided against doing so because:-

(a) I had reached my conclusion in respect of the consultation before seeing the June 2008 draft.

(b) The Commission could fairly be taken to have had knowledge of their own document.

(c) No disadvantage had accrued to Luxury Leisure

APPENDIX TWO

Primary gambling activity

Ordinary code provision

In order to demonstrate that the primary gambling activity for which an operating licence has been issued is being offered in each licensed premises, licensees should have regard to the following general factors:

- the ratio of the space available to customers allocated to the primary gambling activity, to that allocated to other gambling activities
- the extent to which the primary gambling activity is promoted on the premises and by way of external advertising compared to other gambling activities
- the use, either expected or actual, to be made of the different gambling facilities

Licensees should also have regard to the following additional sector specific factors:

Ordinary code provision

- the range and frequency of events on which bets can be made.

Not all the indicators would need to be present in a particular case, nor do they preclude others, but the combination of those factors that are present should be sufficient to indicate that the activity is the primary one in any given premises.