

MR. DEREK WEBB

RE: FIXED ODDS BETTING TERMINALS

OPINION

1. I am asked to advise Mr. Derek Webb as to whether gambling machines of the type known under the Gambling Act 2005 as B2 machines when operated in Northern Ireland are gaming machines under the relevant Northern Ireland legislation. The machines are gambling machines situated in licensed betting offices (“LBOs”) in Northern Ireland in the same manner as in Great Britain. I am therefore asked further to advise whether the operation of B2 machines, if they are gaming machines, in Northern Ireland would result in the commission of any offences under Northern Ireland law.

Summary

2. In my view, there are strong arguments that the B2 machines currently used in LBOs in Northern Ireland playing roulette, black jack, poker or used as well known “fruit machines” are “gaming machines” within the definition of gaming and a gaming machine in Art. 2 of The Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 No. 1204.

3. “Gaming” in gaming legislation is used in an unusually wide sense. See Rosenbaum v. Burgoyne [1965] AC 430 at page 439G (a House of Lords decision), recently quoted with approval in the Court of Appeal in IFX Investment Company

Limited v. The Commissioners for Revenue and Customs [2016] EWCA Civ. 436 (“IFX”).

4. In general whether what is happening is a “game” in gambling legislation is a question of fact: see R v. Kelly [2009] 1 WLR 701.

5. The First Tier Tribunal in IFX considered that a “game” in gambling legislation can mean “amusement, fun, sport”, “amusement, diversion”, “a diversion in the nature of a contest, played according to rules, and decided by superior skill, strength or good fortune” and decided that Spot the Ball amounted to gaming. The Court of Appeal decision in IFX decided that there was no legal requirement for there to be inter-player interaction nor that the competitors must respond to each other’s moves, although those matters can be relevant in deciding whether a game of chance is being played.

6. In fact most of the indicators of playing a “game” and “gaming”, as mentioned by various cases over the years, are to be seen in these machines.

7. Even if the players are carrying on “betting” using the machines, as may be argued, if “gaming” is taking place as well, then the NI law treats the transaction as gaming not betting (Art. 2), and the legal restrictions on gaming apply to the use of the machines.

8. If the B2 machines are gaming machines then various offences are or may be being committed.

B2 Machines

9. Before the Gambling Act 2005 came into force in GB, there was considerable controversy about the machines now called B2 machines and their legality. The law then in force under the Gaming Act 1968 (s.26) merely referred to gaming machines as any machine which:-

- (a) is constructed or adapted for playing a game of chance by means of the machine, and
- (b) has a slot or other aperture for the insertion of money or money's in the form of cash or tokens.

10. This issue was resolved under the Gambling Act 2005 ("GA05") which provided a definition of a gaming machine as:-

"A machine which is designed or adapted for use by individuals to gamble..." (Section 235).

"Gambling" in that Act, includes betting, gaming and participating in a lottery. The bookmakers had maintained, before the GA05 came into force, that B2s were betting machines and not gaming machines and so outside the definition of a gaming machine in the Gaming Act 1968, and that they were therefore able to have them in their LBOs in excess of the permitted number of gaming machines. That was certainly not agreed and the matter was never tested in court. The new definition, encompassing betting as well as gaming, makes that difference irrelevant.

11. The controversy however continues. New restrictions on amounts to be staked have recently been instituted in Great Britain, and research is ongoing into the effects of the machines.

Northern Irish Law

12. The law in Northern Ireland currently is very similar and frequently identical to the law that was in force before the Gambling Act 2005 came into force in GB. The Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 No. 1204, together with some other statutory instruments, essentially contains Northern Irish gambling law. Article 2 is the definition section:-

“Bet” does not include any bet made or stake hazarded in the course of, or incidentally to, any gaming.”

“Betting transaction” includes the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a bookmaker.”

13. The definitions in respect of gaming in Art. 2 are:-

““Game of Chance” does not include any athletic game or sport but, with that exception, and subject to paragraph (6) includes a game of chance and skill combined and a pretended game of chance or of chance and skill combined;

“Gaming” (subject to paragraphs (3) to (5)) means the playing of a game of chance for winnings in money or money’s worth, whether any person playing the game is at risk of losing any money or money’s worth or not. ...

(5) ... a machine shall be taken not to be used for gaming if it is used in such a way that no game played by means of the machine can result in a player or a person claiming under a player, receiving or being entitled to receive, any article, benefit or advantage other than 1 (but not both) of the following, that is to say –

(a) an opportunity afforded by the automatic action of the machine, to play 1 or more further games at the insertion of any cash;

(b) the delivery by means of the machine of 1 or more coins or tokens as a prize in respect of a game where 1 or more coins of an equal or greater value or aggregate value were inserted into the machine by or on behalf of the player in order to play that game.

(6) In determining...whether a game which is played otherwise than against 1 or more other players is a game of chance and skill combined, the possibility of superlative skill eliminating the element of chance shall be disregarded.

...

“Gaming machine” means any machine which –

(a) is constructed or adapted for playing a game of chance by means of it; and

(b) has slot or other aperture for the insertion of money in the form of cash or tokens.

...

“Machine” includes any apparatus.

...

“Player”, in relation to a game of chance, includes any person taking part in the game against whom other persons taking part in the game stake play or bet. (emphasis added)

...

“Winnings” includes any prize or other winnings of any kind and any reference to the amount or to the payment of winnings shall be construed accordingly.

14. Other relevant provisions of the same Order include the following:

“Conduct of licensed offices

Art. 32(1)(5) Subject to ... Article 95(1)(b) (*which by Art. 108 permits the use of a limited number of gaming machines subject limitations in licensed betting offices*) A licensed office shall not be used for any purpose other than the effecting of betting transactions and no music, dancing or other entertainment, except any entertainment which complies with the provisions of paragraph (3A), shall be provided or allowed, and no refreshment of any kind shall be served, in such an office.

Art. 39(9) If any provision of paragraphs (1) to (8) is contravened, the licensed bookmaker and any servant or agent of his by whom the contravention was committed shall be guilty of an offence.

Consequently, providing or permitting gaming in an LBO in Northern Ireland is illegal except where gaming machines are used in accordance with the permission set out in Article 95(1)(b).

Prohibition of certain gaming

Art. 55(1) ... no gaming shall take place where any one or more than one of the following conditions is fulfilled –

.....

... (b) the nature of the game is such that the chances in the game are not equally favourable to all the players ...

Art. 59(1) If any gaming (*to which Article 55 applies*) takes place in contravention of any of the provisions of Article 55 ..., every person concerned in the organisation or management of the gaming shall be guilty of an offence. “

15. The permission for the use of certain gaming machines in an LBO in Article 95(1)(b) is subject to the following restrictions:

“Art. 108(1) The conditions specified in the following provisions of this Article shall be observed where, in pursuance of the exception in Article 95(1)(b) a gaming machine is used for gaming -

...

(ba) on any licensed office;

(4A) Not more than 2 gaming machines (or such other number as the Department may specify by order subject to affirmative resolution) shall be made available for gaming on any licensed office.

(11) Where any of the provisions of this Article or of any regulations made under this Article is contravened, -

(a) in a case falling within paragraph (1) ... (ba), ... a licensed bookmaker ...

(b) ...

shall be guilty of an offence.”

16. By Article 108(6), the charge for playing a game once by means of the gaming machine should not exceed 30p and, by Art. 108(7), the maximum money prize is £8.

17. The language used in the definitions also shows that a transaction can be both betting and gaming. A game of chance is played for “winnings”, and a “player” in a game of chance can “stake, play or bet” against another player for those “winnings”, which includes any prize or “other winnings of any kind”, which can include a payout on a bet.

18. As may be seen from the definition of “bet” above, if a transaction is both betting and gaming then it is not considered to be betting, but is treated as gaming, so that the provisions on gaming prevail over the provisions on betting. Therefore, if a machine is both a betting and gaming machine, it would be treated as if it were only a gaming machine. Generally, normal fruit machines are not considered to be betting (Seay v. Eastwood [1976] 1 WLR 1117) and there are special provisions in the Order which permit the use of certain gaming machines in LBOs, subject to a restriction on numbers. (see Arts 95(1)(b) and 108 above)

The Operation of the B2 Machines

19. I have been given a high level description of B2s, and recently I have viewed machines in two betting shops in central London, operated by different operators. I understand that each B2 is linked to a central server, and RNGs located off-site determine the outcome of each spin. There are also internal RNGs in each machine, but these are only active if there are server or network problems i.e. rarely. Coins and notes can be used for play by inserting them into the machine, or payment can be made at a service counter by cash or debit card. Winnings are dispensed by a bar coded receipt from the B2, and then processed at the service counter where payment is made. The games played on B2s include Roulette, Black Jack, Poker, Virtual Racing and multi-bingo, and traditional reel type games as in fruit machines. Some machines can play both B2 and B3 game content, sometimes within the same game. There is a communication link between each machine in the LBO and the central RNG.

20. Typically RNGs generate a constant stream of numbers, and the time that the start button is pressed on the machine in the LBO effectively decides which of those numbers that has been generated is allocated to the particular transaction underway at that particular second. Therefore if the customer were to press the button a moment earlier or later a different number is likely to be chosen, and so can affect whether the customer wins or loses.

Gaming

21. For hundreds of years there have been statutory restrictions on gaming and wagering. The difference between those two concepts is not always clear and what is considered to be 'gaming' has not always been obvious. In Smith v. Wyles 1959 1 QB 164 Ashworth J. stated (page 171):-

"The first of the submissions made on behalf of the appellants involves the problem of what is meant by gaming. There appears to be no statutory definition of the word, and although there are many reported cases in which the meaning of the word has been considered, I am not for my part satisfied that there is to be found in any of them a definition which can be applied generally. (The appellants ...) contended that gaming involves something in the nature of a game in which the players not only participate but participate continuously ... In my judgment, this contention places too restricted a meaning upon the word "gaming". Undoubtedly some games involve gaming, but it does not follow that gaming involves a game. ... It was conceded that persons who play roulette are gaming; they are staking their money in a proceeding the outcome of which is dependent merely upon chance. ..."

(At that time there was no statutory definition of "gaming".)

22. There is now a statutory definition of gaming but what is meant by it nowadays and in particular a “game”, as may be seen in casinos and in machine gaming, has an extended meaning. For example, typical gaming machines of the fruit machine type (where there may only be one button that has to be pressed after the money has been put into the slot), are considered to be gaming, and so games of chance are being played. By Art. 2, a gaming machine is a machine “constructed or adapted for playing a game of chance by means of it”. In Rosenbaum v. Burgoyne 1965 AC 430 at page 440A, Lord Reid considered the game in a gaming machine consisted solely in pulling the lever (this is likely to be because the definition contained in Section 17(3) of the Betting and Gaming Act 1960 (now repealed) read as follows:

“the expression “gaming machine” means a machine for playing a game of chance, being a game which requires no action by any player other than the actuation or manipulation of the machine”

23. The machine allowed the player to increase his stake, and so his prize money. Lord Reid rejected the argument that that meant that different games were played, depending on the stake. Therefore, even although there may be different stakes and commensurate prizes, it is still one game, and just because there may be different stakes permitted with different prizes, does not mean that gaming is not taking place.

24. He also considered that the word “game” in the context of gaming legislation, which is regulatory, is used “in an unusually wide sense” (see page 439G). This was quoted with approval by Arden L.J. in IFX Investment Company Ltd v. The

Commissioners for Revenue and Customs 2016 EWCA Civ 436 (“IFX”) (judgment given on 4.5.16).

25. In Seay v. Eastwood [1976] 1 WLR 1117, Lord Wilberforce (page 1121C) pointed out that gambling legislation contained a number of expressions which are not precisely defined including bets and gaming:-

“As to these, while sections appears in various Acts saying that a particular activity is, or is deemed to be, within the word, the general meaning is left to be decided by the courts as cases arise under the common law. The process, and I think it a very sound one, is then for magistrates, using their local knowledge, experience of the world and common sense, to give a sensible interpretation of the expressions used, subject to control of their decision by a court itself experienced in deciding this type of question. When, as should rarely occur, higher appellate courts are required to review these cases, they should, in my opinion, endorse decisions which they can see have been reached and confirmed in this way. Refined analytical tools are not suitable instruments in this context”

26. Seay v. Eastwood was a case where a bookmaker was convicted of carrying on a business other than bookmaking on licensed premises contrary to the provisions of the Betting and Lotteries Act (Northern Ireland) 1957. There were two machines on the Defendant’s premises which he alleged were betting machines. They were operated by the insertion of a coin and by pulling a lever. He was convicted and the case eventually arrived in the House of Lords. The definition of bookmaker was almost identical to that in Art 2 paragraphs (a) and (b). The House of Lords unanimously dismissed his appeal, considering that the machines were gaming machines. Lord Russell of Killowen said that, although the machines each had a statement on it of the payout to be expected, which

could be described as odds, the bookmaker was not carrying on the business of receiving bets:

“When a customer inserts his coin it is a matter of absolute and complete indifference to the owner of the machine whether that customer is lucky or unlucky. It cannot make the slightest difference to the owner, who will get his 27% of the total input in any event, no more and no less. Assuming the insertion of the coin to be in some sense a transaction between the customer and the owner, in my opinion a transaction under which by its very nature one party cannot be affected in any way by the outcome cannot be properly described as a bet.”

27. He also concluded that there was no “bet” because the person playing the machine made no forecast or estimate:

“I would also say that that the action of inserting a coin, taken by itself, cannot properly be described as the making of a bet by the person inserting it. He is not forecasting an event or series of events: he is not backing his estimate of any outcome: he is simply hoping that some paying combination may turn up: he is gambling but not in any ordinary sense of the word betting.” (pages 1124-1125).

28. He held that the owner was providing his customers merely with a means of gambling in exchange for a percentage of the money inserted in the machines. The operation of each machine was geared to ensure a profit of 27% and so automatically yielded a steady fixed profit to its owner.

29. Useful guidance was given in the DPP v. Regional Pool Promotions Limited 1964 2 QB 244 and Armstrong v. DPP 1965 Appeal Cases 1262 (House of Lords). Both of these cases involved postal lotteries where the organisers were trying to dress them up as

being gaming in the form of bingo. In DPP v. Regional Pool Promotions, Park C.J. commented (page 252):-

“no member had to go to a certain place or do anything; the activities did not have to take place, certainly in the case of “Goals Bingo” and “Scores Bingo”, at a particular place, where people assembled, or could assemble, and all the members had to do was to pay their 1s a week for the membership of the club and then sit back and do nothing.”

30. He considered that it was “impossible for a player to play a game without doing something, either something by way of some degree of skill or by some physical act or by exercising some choice”. Wynn J. considered that there must be “some active participation in the game before it can be said that a game is being played which constitutes “gaming”, and made the point that the statutory definition (which was for these purposes the same in that case as it is now) is narrower than the meaning that the word has at common law.

31. In Armstrong v. DPP, Lord Parker C.J. at first instance repeated the ratio in DPP v. Regional Pool Promotions and considered further that:-

“One must look at the whole circumstances in any particular case to say whether some activity is not only a lottery but is also a game of chance. There is, I venture to think, no conclusive test of the matter; but I have no doubt in my own mind on which side this case falls. It certainly is not the playing of a game. ... if it is a game it is certainly a very curious game. When does it begin? Where is it played? When does it end? And the participants are not there.” (page 1272G-1273A)

32. He made the point that even though there was some degree of participation in the case it was not enough to make the activity the playing of a game. The customers had to apply by post for membership of a club. Membership numbers would be allotted to each customer. Members could, and some did, ask for their numbers to be changed. They could obtain further forms and numbers without extra charge. A member could choose to play all or only some of his cards, but he had to pay for each card played. A draw of the membership numbers, dressed up as bingo, decided the winners.

33. In the House of Lords, Lord Pearson went through what the members of the Club had been asked to do or could do and set out that the only choice made by a member in relation to the weekly operation would be to enter the lottery with one or more of his cards or to choose whether to enter for a sweepstake. He took no part in the drawing of the numbers, was not present when it happened and was not informed about it until later. The announcements on Radio Luxembourg were only a dramatic form of announcing the sequence of numbers which had been drawn on a previous day. Whether he heard that announcement or not made no difference to whether or not he was a winner. None of those things involved sufficient participation to amount to the playing of a game. He did not consider it necessary for there to be an assembly of players for there to be a game, but:-

“the facts that there is no assembly of players, and that the alleged players are not in each other’s presence nor in communication with each other, may well have considerable weight in any case as evidence in favour of a more general argument that there is no playing of a game.” (page 1284E)

34. Neither of these cases were gaming machine cases and both were decided before technology made B2s, in their present form, a possibility. As is clear from Fielding v. Turner 1903 1KB 867 and Art. 2(6), there does not have to be even one other player and one can play with a machine.

35. Therefore, the authorities so far show that the indications of a game are that there is a beginning and an end, there is communication between the players or (if it is done with a machine) between the player and the machine, it is relevant if the players are present at a certain time in a certain place, and if they have some part in e.g. the drawing of the numbers. It seems to be accepted that there must be participation by the player either by exercising skill or choice or by some physical action, although pulling a lever or pushing a button may be enough.

36. Most recently there has been the IFX case. This was a VAT case concerning Spot The Ball (“STB”). Operators of STB wished to reclaim the VAT that they had paid on their STB “Competitions” for various periods starting in 1979, on the basis that STB was in fact gaming and therefore exempt from the tax. The operators won in front of the First Tier Tribunal, lost before the Upper Tribunal and won before the Court of Appeal very recently.

37. The First Tier Tribunal found as a fact that STB as described to the Tribunal, was gaming for the purposes of the VAT legislation which utilised, up until the end of October 2006, the same definition of a “game of chance” as is in Art. 2 and thereafter the definition that is in Section 6 of the GA05 (which is similar). The Tribunal found that STB was in fact a game of chance. It considered the authorities I have set out above but

declared that those cases did not provide them with much assistance. It also considered that it was “simply unsustainable” to argue that an activity cannot be a game within the meaning of the legislation “unless it includes the features of identifying, interacting with and/or monitoring the progress of other participants” (para. 111). The Tribunal therefore fell back on general principles of construction stating that the word “game” is a “chameleon”, which takes its colour from the context in which it is used. It referred to a definition in the Shorter Oxford English Dictionary which stated that “game” can mean “amusement, fun, sport”, “amusement, diversion”, “a diversion in the nature of a contest, played according to rules, and decided by superior skill, strength or good fortune”. It appears to have decided on that basis, as a matter of fact, that STB was a game and in the circumstances was a game of chance.

38. The case was appealed to the Upper Tier Tribunal, where Mr. Justice Norris allowed the appeal in favour of Revenue & Customs. In the further appeal to the Court of Appeal (judgment being given in early May 2016 as I have said) Norris J.’s decision was overturned, the Court of Appeal finding that there was no legal requirement that there had to be inter-player interaction, and there was no legal requirement that the competitors must respond to each other’s moves. It was accepted by both sides that there had to be participation by the player. In STB, this took the form of the participants deciding where the ball was and to place a cross on the coupon. Arden L.J. stated:-

“There is no requirement that the competitors must respond to each other’s moves. I consider that the explanation that I have given above of the authorities shows no more than that the relationship between competitors is a relevant factor.

“Games after all are about winning something either from the operator or other people.” (para. 41)

“The question whether there is a game depends on the nature of the arrangements between the actors, contractual or otherwise.” (para. 46)

“There is no inter-player interaction rule or requirement for inter-player interaction in the ordinary case.” (para. 69)

“The FTT found that STB was a game of chance and made no error of law in making that finding.” (para. 69)

39. Mr. Justice Morgan agreed. He also stated:-

“(The) authorities did not go so far as to require there to be interaction between players in order for there to be a “game” or “playing a game”. Nonetheless the presence or absence of interaction between players was recognised as a potentially relevant factor, where it was for the fact finding court or tribunal to decide whether that factor should be given any weight and, if so, how much weight.” (para. 76)

40. He did comment that:-

“It follows that in so far as the UT held that there was a legal requirement in this context there had to be interaction between players or interaction by a player with changed circumstances, the UT was itself wrong in law. Alternatively, in so far as the UT held that interaction between players or interaction by a player with changed circumstances was a matter to be given weight, the FTT did not commit any error of law in that respect. The weight to be given to that factor was a matter for them and it was not right for the UT to substitute its own view for that of the FTT.” (para. 78)

Emphasis added.

41. However, Norris J's judgment is most helpful in that it pulls together the leading authorities and makes various useful comments. It is, however, about gambling activities other than STB, obiter, and insofar as it requires inter-action between players or by a player with changed circumstances, it is wrong. However, those may still be relevant factors.

42. Typically, he said, a game is an activity which is an end in itself and which has rules, where part of the objective is to win according to the rules and it is also some form of contest (Para. 21). When "playing a game", a player is doing something which causes a change in circumstances, with which he then interacts (in Norris J's opinion, not upheld by the CA as a necessity). If the game has more than one player, there may be move and counter move but there are still games with only one move or round (para. 22). A game with only one player can involve a "move and response".

43. He considered that the "true task" was to construe the phrase "the playing of any games of chance" as one (para. 19). In a typical game of chance (but he makes it clear that that is not a definition), the rules provide for some random event to influence the outcome of the game to a significant degree, and the effect produced by that outcome is one of the purposes of the game. He stated that in a game with only one move or round, "the point of the game" will be "the effect produced by the action, such as excitement or suspense awaiting the outcome (as the drums on a fruit machine spin, or a roulette wheel turns after bets are placed, or as each player in turn throws the dice)." "Playing" involves some sort of engagement with, inter alia, a machine if there are no other players (para. 23), although this is not, in view of the CA decision, an essential element.

44. Norris J. drew attention to the dictum of Lord Reid in the House of Lords case of Rosenbaum v. Burgoyne which I have mentioned above, who observed that “gaming” was often used to denote gambling activities where there was no “game” in any ordinary sense, and that within the Act then in force “game” was used in an unusually wide sense. (Arden LJ in the Court of Appeal quoted that dictum with approval). The fact that by common usage a particular activity has come to be regarded as “gaming” and so involving a “game” does not mean that similar activities not commonly so regarded must henceforth be regarded as involving “a game” simply because they are similar.

45. The Court of Appeal decision, allowing the FTT decision to stand and saying that it is a question of fact, has had the effect of widening the possible scope of gaming.

Roulette

46. Roulette in a casino has long been considered to be gaming. In a casino, the players have to be actually present, they actually place money on their chosen numbers and/or combinations on the roulette table, the roulette wheel is present in front of them, and they watch as the ball goes round the spinning wheel, having been set in motion by the actions of the croupier. There are also automated roulette machines. The essence of Roulette is that a number or combination is chosen. The roulette wheel is merely the method by which that happens; it is in effect a RNG.

Roulette and B2s

47. To play Roulette on a B2 machine, the player has to be present on the premises. He has to put his money in the machine or pay at the service desk. He has to choose his stake, he has to touch the screen to indicate which numbers and/or combinations he wishes to stake on and he has to decide when to press the start button. He has to be there and present at the machine to do all of that, and to collect his winning slip. It cannot be done by any other means apart from a human agent. Effectively, he takes as much active part as he would in a Roulette game played in a casino or in a game played on any other gaming machine. He is also part of the process of the winning combination being chosen, in the sense that, although the RNG chooses from a stream of numbers which are being put out all the time, it is only when the customer presses the start button that it is determined which of those outcomes is allocated to his particular transaction. If he presses the button a fraction of a second earlier or later, which outcome is allocated to his particular transaction running at that time will change. Therefore arguably the outcome of the uncertain event depends on two matters: (i) the number put out by the RNG and (ii) the moment when the customer presses the button. It is also, essentially, a numbers game. To this should be added “the baggage” that comes with the scheme being roulette, which has always been considered to be gaming. It is highly likely that the customer considers he is playing a form of mechanised Roulette.

48. The player is therefore communicating with the machine, is actively participating, in that he is deciding on his stake, choosing which numbers he wishes to stake on, believing he is using some strategy in the numbers chosen to bet on, touching the screen

and then pressing the start button. There is a beginning and an end to the process. That is the only “round”, but while he is waiting for the result (which in Great Britain and, I assume, in Northern Ireland takes 20 seconds), it is likely that he is experiencing the excitement and the anticipation that Norris J. spoke about. Therefore all the matters are present that Norris J. and the other cases stated would make the activity into the playing of a game of chance are present.

49. I understand that that over many games (ten thousand or so), a specific margin will be produced for the bookmaker, of 2.7%, and so for him, he just takes his profit, no matter whether a particular customer wins or loses, and, over time, cannot lose. This is not quite the same as a 27% share of the stake of every game as in Seay v. Eastwood, but, over time it is arguable that it has the same effect.

50. Typically these machines do have a zero. This means that the odds between the player and the machine operator are not equal. If, therefore, gaming is taking place and the machine does not qualify as a “gaming machine” because e.g. it does not have a slot or other aperture for the insertion of cash or tokens, then gaming is taking place in contravention both of Article 32(1) and Article 55(1).

51. If the machines do come within the definition of “gaming machine”, then B2 machines do not comply with the limits on stakes and prizes, and, in any LBO, if there are more than 2 gaming machines including B2s, the statutory limits are contravened. In both cases offences are being committed.

Blackjack and Baccarat and card games

52. With the Blackjack and Baccarat games that I played, there is far more participation by the player. In some games it is correct that the stakes were put on, the “cards” appeared and it is an instant win or loss. In others, the player chooses the amount he wants to bet and after he has seen the cards, he has a choice of keeping the cards he has or changing some of them in order to try to get a better hand. The Blackjack game I played was essentially very similar to Blackjack in a casino. The player sees his cards and can choose more cards, depending on his judgment as to whether he should go on or stick. Blackjack is after all just a numbers game, and it makes no difference whether the numbers appear on real cards or virtual ones. In some Poker games, the player can choose to change some of his cards. Although all the “cards” are merely random numbers that had already been chosen by the RNG when the button is pressed by the player, I do not see that there is really a difference between that, and a deck of cards which has been shuffled and is waiting to be dealt, and so the order of the cards has already been decided before the game starts. In both cases, which “card” will appear is predetermined before the game starts, but it is the decisions of the player during the game that may influence whether he wins or loses.

53. In those type of games, and there were a raft of variations of them, there is an even stronger case than with Roulette, that what is happening is the playing of a game of chance. The consequence of this in law is as set out at Paragraph 46.

Fruit Machines

54. With the fruit machine type of machine, I understand that the RNG is genuinely random and that there is unlikely to be a compensator. However, it would be very surprising if the operators did not always win in the long run because otherwise, why would they do it? With these machines all the player has to do, typically, is to put his money in the machine, choose his stake, and wait for the result. That generates the excitement or suspense referred to by Norris. J. as the mechanism “works” to make it appear to be a typical “fruit machine”.

Gaming Machines

55. The fact that the element of chance is not provided by the machine but by a remote RNG does not prevent it from being a gaming machine (see Commissioners for Revenue and Customs v. The Rank Group Plc 2015 UKSC 48 (Judgment given 8th July 2015 in the Supreme Court)). The element of chance is provided “by means of” the action of the particular player in pressing the button and so interrupting that ever-changing sequence at a particular moment. The terminal ... is “the active means by which the winning or losing combination is generated”. Therefore the element of chance is “provided “by means of” the terminal”. (para. 31). However, those machines which do not have a slot or other aperture for the insertion of money in the form of cash or tokens, are not gaming machines.

Conclusion

56. Bearing all this in mind, there are strong arguments that what is happening here in relation to all the B2 machines I have described, is, in reality, gaming. It may be that counter arguments might be put forward that they are betting machines but if they are gaming machines as well the machines will therefore, following the definition of a “bet” in Art 2, not be treated as betting but as gaming machines.

57. In that case, any B2 machines that are used in Northern Ireland are being used in breach of Northern Irish law, either because the amounts staked, and the prizes exceed the permitted maxima, or the numbers of B2 machines in LBOs exceed the maximum permitted number for gaming machines. As a result, if this analysis is correct, offences are being committed.

Dated 15th June 2016

MR. DEREK WEBB

RE: FIXED ODDS BETTING TERMINALS

ADVICE
