# DAVID CLIFTON, LICENSING EXPERT: GAMBLING CANT HIDE FROM ITS SPOTLIGHT

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*David Clifton*

Since my last "*Licensing Expert*" article for SBC News, the stand-out issues in UK gambling regulatory terms have been (a) the circumstances giving rise to the UK Government's 20 April announcement of an independent review into the collapse of Football Index and (b) the sudden unexpected departure of Neil McArthur from his position as Chief Executive of the Gambling Commission within just a few days after the Football Index operating licence was suspended. You can read here the full details on what led up to that suspension and all that has happened since then.

The above announcement states that an 'independent expert' (a) will lead the review and (b) in addition to establishing how Football Index collapsed and identifying lessons to be learned from that, will look at the decisions and actions of the Gambling Commission with a view to the findings being made public in the summer. Those findings will also form part of the evidence for the purposes of the government's review of the Gambling Act 2005, in relation which a White Paper setting out findings and proposals for reform of the Act will be published by the end of this year.

The official line appears to be that Neil McArthur's resignation with immediate effect was 'unrelated' to suspension of the Football Index operating licence, despite there being just three days elapsing between those two events and the regulator having to hurriedly promote two of its officers to the positions of Acting Chief Executive.

In fact, the hunt for a replacement CEO has only recently commenced and, even then, it will only be for an 'interim' holder of that position under a fixed term contact of just 18 months. That's because the appointment of a permanent replacement will not take place until after a new Gambling Commission Chair takes over from the current incumbent, Bill Moyes, later this year. As a result, the hunt for a replacement Chair has also now commenced. All in all, that's not a happy position for the regulator to find itself in whilst it faces calls from Parliamentarians and others for its abolition altogether on the ground that, according to the Gambling Related Harm APPG it is "not fit for purpose" or, as the House of Commons Public Accounts Committee described it, it is "a torpid, toothless regulator that doesn't seem terribly interested in either the harms it exists to reduce or the means it might use to achieve that".

Personally, I dispute any suggestion that the Commission or its leadership are not interested in gambling harms. From my own dealings with McArthur throughout his time at the Commission, I firmly believe he possessed a genuine desire to reduce gambling-related harm and, to quote him, enable British consumers to "enjoy the fairest and safest gambling in the world".

In terms of achievements during his three years as CEO, the various measures to tighten consumer protection introduced by the Commission whilst he was in charge are too numerous to list, but I greatly fear that the careful balance required between (a) protecting vulnerable people and their families from gambling-related harm and (b) giving individuals the freedom to choose how they spend their own money has now shifted too far in favour of the former to the detriment of the latter. The current 'affordability' debate is an obvious case in point.

I also can't help but feel that the Commission and, with it, its Chief Executive seem to have become more 'distanced' from the industry than was the case before. To an extent, that may be a consequence of the pandemic or the fact that the Commission has had a lot on its plate to deal with but, whatever the cause, it would be good to see in the future a closer working relationship develop between regulator and regulated in the same spirit of 'collaboration' that McArthur espoused throughout his tenure as CEO.

Whilst the independent review into the collapse of Football Index will quite correctly focus on its business model (that was self-described as both 'a real money virtual stockmarket' and 'a betting platform' that 'should not be viewed as an investment vehicle'), it is worth noting that, in an 'update' statement published on 19 March, the Commission said that it had "identified that the product contains elements that are betting in nature, and therefore regulated by us as gambling, as well as elements [that] are not considered gambling and therefore not subject to our regulatory remit".

It's not yet clear whether identification of a question mark over the appropriate regulatory framework occurred as long ago as 20 May last year, when the formal operating licence review commenced. The 'independent expert' conducting the review will no doubt want to investigate that, together with the advice the Commission received since then from betting specialists, a 'forensic financial accountant' and a 'specialist external QC'.

Complaints have also been made with regard to the fairness of the Football Index terms and conditions. That is a relevant consideration, not least because of the second of the three licensing objectives under the Gambling Act 2005, namely "ensuring that gambling is conducted in a fair and open way". In support of this objective, the LCCP requires that UK licence-holders Ts&Cs must not be unfair under the Consumer Rights Act 2015. Similarly, changes to their Ts&Cs must comply with the fairness and transparency requirements under that same legislation. So were the Football Index Ts&Cs unfair?

Those Ts&Cs certainly listed key risks that its customers would face when gambling. Those risls included warnings that the Football Index Dividend Table would change from time to time, that any change in the dividend was likely to impact share prices, that the basis on which dividends were awarded might change, and that there was no guarantee of winning any particular amount of dividends in respect of bets. Whilst the Ts&Cs referred to reductions in the level of dividends only being permitted in January and June each year, Football Index's right to do so at other times was expressly reserved, including "in exceptional circumstances to protect [its] business". On the facts available, Football Index appears to have given to its customers the required advance notice of its dividend restructuring plan that was intended "to ensure the long-term sustainability of the platform". Unfortunately, that had the very same detrimental impact on share prices that customers had been expressly warned about.

From a contractual perspective, whether or not customers of Football Index have any right to compensation for any losses in all of the above circumstances may be academic now that the business is in administration. Time will tell.

On a separate point, what must be borne in mind in relation to complaints from some that the Commission should have done more from the outset to protect the funds of customers is that the Commission (a) will have considered at the licence application stage the overall viability of what was then the proposed Football Index business and (b) will have been able to make further enquiries at that stage if it appeared that the applicant's available resources were inadequate or not properly secured. However, after that time it will not have had any responsibility under the Gambling Act 2005 to conduct an ongoing assessment of the solvency of BetIndex Limited, the company that operated the Football Index business.

Instead, once an operator has been granted its operating licence, the Gambling Commission's Licence

Conditions and Codes of Practice (LCCP) require it to report as a 'key event' certain prescribed indicators that could potentially point to financial problems mounting; that may then give rise to some intervention by the regulator. The LCCP also require operators' Ts&Cs to include information about their arrangements for protecting the customer funds they hold in the event of the operator's insolvency, the level of that protection and the method by which that is achieved. In addition, remote licence-holders must hold customer funds in a separate account and report to the Commission about customer funds as part of their overall quarterly regulatory returns.

Putting it bluntly, that's as far as protection of customer funds presently goes from a UK gambling regulatory perspective and no greater onus exists on the Gambling Commission than to ensure that its licence-holders comply with those rules.

It remains to be seen whether the Football Index controversy (or 'scandal' as Carolyn Harris, Chair of the Gambling Related Harm APPG, has called it) will result in a tightening of restrictions requiring operators to provide greater customer funds protection in future. I won't be surprised if that happens.

In the absence of Neil McArthur, it fell to Tim Miller, Executive Director at the Commission to deliver a conference speech on 30 March. Entitled '*The moment for momentum*', the speech made no specific reference to Football Index, but it did serve to confirm that "in the coming business year" the Commission would be "looking at" the protection of customer funds "both from the perspective of our own rules but also to inform any advice we may give on the wider statutory framework, through the Gambling Act review".

It also appeared from Miller's speech that, notwithstanding McArthur's departure, it will remain very much a case of 'business as normal' at the Gambling Commission. His exact words (which may or may not have had thoughts of Football Index buried beneath them) were: "We will continue to look for ways we can collaborate with others, including operators, to make progress, as we have done successfully over the last couple of years. And we continue to focus on prevention as our default, seeking to ensure that things go well in the first place. But we will also intervene if things go wrong and where operators don't meet the standards that we, their customers or the wider public expect. We will not move at the pace of the slowest. We won't use some positive data to take our foot off the accelerator. We won't be distracted from the immediate challenges and risks by the longer-term policy debate. We will keep building momentum".

**But that's not all**

The past month or so has not been devoid of other very important developments. In brief they have included the following.

Despite concerns expressed about its enforcement responsibilities in the case of Football Index, the Commission has imposed hefty sanctions on both online and land-based operators for AML and social responsibility failings. Fines of *£6million* and *£3.4million* were imposed on two online operators and financial penalties exceeding £1.3million were imposed on five land-based casino operators. The Commission has also published its three-year Corporate Strategy and annual Business Plan and urged online operators to continue extra vigilance.

With compliance requirements still in mind, I draw attention to the 8 April High Court judgment in the case of Andrew Green v Petfre (Gibraltar) Limited t/a Betfred, as a result of which all UK licensed remote gambling operators should carefully consider whether they need to review their terms of business as a matter of urgency.

GambleAware and YGAM have each published the evidence they have submitted in response to the government's Call for evidence in relation to the Review of the Gambling Act, the former calling for a mandatory RET levy and the latter for the industry to "do much more to protect consumers".

GambleAware has also (a) published new interim findings from research conducted between July 2018 and June 2019 by the National Centre for Social Research in relation to the gambling habits of close to 140,000 online gambling account holders in Great Britain, (b) published a report entitled "*Lifting the Lid on Loot-Boxes Chance-Based Purchases in Video Games and the Convergence of Gaming and Gambling*" exploring links between video game 'loot boxes' and problem gambling and (c) released its annual GB Treatment and Support report on a survey conducted on its behalf by YouGov exploring the usage of treatment and support services among gamblers, and those affected by another person's gambling.

In terms of other academic studies, (a) a study – entitled "*Identifying Research Priorities on Gaming-Related Harms*" – carried out by the Policy Institute at King's College London for Action Against Gambling Harms, has found that, compared with other nations such as the US, Canada and Australia, there is relatively little research into the damage caused by gambling in the UK and (b) a study entitled "*Nudge versus sludge in gambling warning labels*" has concluded that the manner in which online gambling operators present information about the risk of play in accordance with the Gambling Commission's Remote Gambling and Software Technical Standards is "ineffective and too difficult to find".

The Betting and Gaming Council has had a firm eye on the Review of the Gambling Act 2005, (a) publishing an economic impact assessment report by EY entitled "*The economic contribution of the betting and gaming sector*" and (b) producing a video on the work the UK-licensed industry is doing to protect under-18 year olds.

Still on the topic of UK gambling reform, very differing views have been advanced by (a) Christopher Snowdon, the Head of Lifestyle Economics at the Institute of Economic Affairs, in an IEA 'Current Controversies' paper entitled "*A Safer Bet – Gambling and the risks of over-regulation*" and (b) the Social Market Foundation in its recently published report entitled "*Double or nothing? Assessing the economic impact of gambling*".

Finally, Camelot has implemented six months ahead of schedule the government's decision to raise from 16 to 18 the minimum age for playing the National Lottery.

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**David Clifton – Director – Clifton Davies Consultancy Limited**

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