JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00042

APPLICATION NO CA2020APP00097

BETWEEN	**PRIME SPORTS JAMAICA LIMITED**	**APPLICANT**
AND	**BETTING GAMING & LOTTERIES COMMISSION**	**RESPONDENT**

Ms M Georgia Gibson-Henlin QC and Ms Stephanie Williams instructed by Henlin Gibson Henlin for the applicant

Ransford Braham QC and Ms Carissa Mears instructed by Braham Legal for the respondent

23 June, 1 and 15 July 2020

IN CHAMBERS (BY TELECONFERENCE)

V HARRIS JA (AG)

[1] This is an application by Prime Sports Jamaica Limited ('the applicant') for the grant of an injunction pending an appeal from the decision of Evan Brown J ('the learned judge') made on 12 June 2020. The learned judge refused an application for leave to apply for judicial review brought by the applicant against the Betting Gaming and Lotteries Commission ('the BGLC'), discharged an interim injunction that he had granted on 27 May 2020 pending the hearing of the application for leave, and refused

to grant an injunction pending appeal. The learned judge, however, granted the applicant leave to appeal.

[2] The applicant filed notice and grounds of appeal on 12 June 2020. An amended notice and grounds of appeal was filed on 19 June 2020, which was followed by a further amended notice and grounds of appeal filed on 22 June 2020. The applicant has raised numerous grounds challenging the learned judge's findings of fact and law.

The proceedings in the court below

[3] The application for leave to apply for judicial review commenced on 3 April 2020. On 14 April 2020, the applicant filed an amended notice of application for court orders seeking the following orders:

> "1. Leave to Apply for Judicial Review by way of an Order of Prohibition to prevent the Respondent from granting any new lottery licence including to Mahoe Gaming Limited pending the conduct of a feasibility study on the operation of lotteries in Jamaica.
>
> 2. Leave to Apply for Judicial Review by way of an Order of Prohibition to prevent the Respondent from granting any new lottery licence including to Mahoe Gaming Limited for the same games that are being offered by the Applicant.
>
> 3. An Order of Mandamus to compel the Respondent to commission a feasibility study into the viability of granting a new lottery licence in Jamaica and/or to observe its policies that licences will not be granted for the same games being offered by an existing licensee.
>
> 4. An injunction to restrain the Respondent from granting, issuing, considering or continuing consideration of the grant of a lottery licence to Mahoe Gaming & Entertainment Limited or any new lottery licence pending the outcome of the Application for Judicial Review.

5. In the alternative, a stay of the consideration of the grant of the said or any new lottery licence pending the outcome of the Application for Judicial Review.

6. Such Further and/or other relief as this Honourable Court deems just."

[4] The applicant put forward 29 grounds on which it sought the orders. These, which I have summarised, included, *inter alia*, that:

1. By sections 5(1)(a) and 5(1)(c) of the Betting Gaming & Lotteries Act, the respondent is required to or tasked with the duty to examine, in consultation with such organisations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the island (grounds 6 and 7).

2. There are problems and/or issues that have arisen that are associated with the operation of the lotteries market in Jamaica which affect the applicant's legitimate expectations, rights and interests (ground 8).

3. The respondent has or had a policy that new applicants to the market cannot offer the same game types as existing licensees, a policy which was strictly applied to the applicant at the time it applied for and was granted its lottery licence in 2000. The applicant was specifically directed by the respondent that it could not engage in the same game types that were being

offered by the Jamaica Lottery Company which was the existing lottery operator at the time. As a result, the applicant was forced to acquire Jamaica Lottery Company so that it could expand its game types. However, the intended licence to Mahoe Gaming and Entertainment Ltd ('MGE') will be for the same game types as are being offered by the applicant, in breach of the respondent's policy and/or practice. This situation (that of having multiple lottery providers offering the same game types) does not exist anywhere else in the world and will lead to market confusion and cannibalisation. The applicant will also suffer significant and inestimable losses as a result (grounds 9, 10, 11, 12, 15 and 16).

4. The applicant has unsuccessfully tried to engage the respondent on the problems since 2011 when it granted a licence to Goodwill Gaming to operate lottery games in Jamaica, and while Goodwill Gaming is not offering lottery games at this time in the Island, the respondent, without engaging with the applicant on these problems, is now considering a third application from MGE without reference to the applicant's legitimate expectations and concerns (grounds 13 and 14).

5. The applicant has a legitimate expectation that the respondent will abide by its policy, and where the respondent intends to change that policy, that the respondent will examine and investigate the issue in consultation with the applicant. This is based on the applicant's experience and the practice of the respondent. The existing policy for game types was strictly maintained in relation to the applicant and should be observed and/or not be departed from without the applicant having the opportunity to he heard on the matter. The respondent has refused to hear the applicant and its refusal is a breach of natural justice and the rules of procedural fairness (grounds 17, 19 and 20).

6. The applicant has failed to indicate if it has abided or will abide by its stringent multi-jurisdictional due diligence in relation to MGE which is crucial to the country maintaining a credible anti-money laundering and regulatory environment for gaming. This is important to the applicant's risk profile which will be assessed based on that of the country (ground 21).

7. The applicant has written several letters to the respondent (including in 2018 and 2019). It again wrote to the respondent on 6 November and 4 December 2019, for confirmation that it is

abiding to its policies and will be fair and transparent. However, the answers that were given by the respondent to the applicant's enquiries have been unsatisfactory, lacking in transparency and do not address the concerns raised (grounds 22 and 25).

8. The respondent is a public body whose decisions are amenable to judicial review. The applicant is directly affected by the decision of the respondent and has made its application promptly. There is no alternative form of redress available to the applicant (grounds 23, 24, 27 and 28).

9. If a stay of proceedings or an interim injunction is not granted the respondent will likely proceed to grant or issue the new licence to MGE without regard to the applicant's legitimate expectations, rights and interests (ground 29).

[5] At paragraph [34] of the learned judge's judgment, he identified the issues that were to be determined as follows:

> "[34] The first issue which arises for determination is whether this application for leave to apply for judicial review should be debarred for undue delay. Secondly, if the answer to the first issue is in the negative, whether the Respondent failed to act within its statutory remit in the consideration of a grant of a lottery licence to Mahoe Gaming and Entertainment Limited? Thirdly, whatever the answer to the second issue, did the Applicant have a legitimate expectation which the Respondent unjustifiably breached?"

[6] In relation to the issue of delay the learned judge concluded that the application for judicial review was not made promptly and found there was a delay of some nine years. He came to this decision on the basis of his finding that what was being challenged was the BGLC's policy as it relates to the grant of lottery licences. He found that between 2001 and 2008 the BGLC had granted licences to a number of entities without requiring feasibility or market studies, or engaging in any publicity of the applications. He also concluded that in 2011 when the BGLC granted a licence to Goodwill Gaming and Entertainment Limited ('Goodwill Gaming'), again without commissioning a study, and allowing that organisation to offer the same game types as those of the applicant, it "effectively ended its policy in all the areas about which the applicant complains" and introduced a new policy. This new policy, the learned judge indicated, has been in place since 2011 and it is this new policy that the BGLC is now seeking to apply to MGE. Therefore, the challenge that was mounted by the applicant was not in relation to an existing policy, the learned judge found. Consequently, the applicant's failure to seek judicial review in 2011 at the time when the BGLC's policy was being altered, was, as the learned judge described it, "the superlative example of a lack of promptitude". He went on to contemplate if there was good reason to grant the applicant an extension of time to make the application for leave and found that none existed. The learned judge, although recognising that this decision was dispositive of the matter, nevertheless went on to consider the merits of the application.

[7] Concerning the second issue (BGLC's statutory mandate when considering the grant of a lottery licence), the learned judge stated that sections 5 and 7 of the Betting

Gaming and Lotteries Act ('the BGLA') are free standing provisions, while section 8 is subject to section 7. He found that section 5, which sets out the functions of the BGLC, does not apply to applications for lottery licences. The learned judge concluded that the "statutory scheme which binds the BGLC in consideration of an application for a lottery licence is set out under sections 7 and 8 of the Act [BGLA]", and that, as was contended by the applicant before him, "[t]he licensing regime does not require the BGLC to, as a condition precedent to a grant of a lottery licence, to [sic] consult an existing lottery licensee or make investigations and surveys under section 5, before it grants the licence".

[8] The final issue, which the learned judge addressed, was that of the applicant's alleged legitimate expectations. He found that, based on the circumstances, the burden was on the applicant to show the existence of a regular practice which the applicant reasonably expected to continue. He identified two features to this claim. These were "the restrictions of game types and a precedent study combined with transparency".

[9] On the issue of the BGLC's restriction of game types, the learned judge concluded that it did in fact have a practice or policy that restricted new entrants to the lottery market from engaging in the same game types as existing lottery providers. He, however, then went on to consider the "ubiquity" of this practice. He found that there was "no direct evidence capable of returning either an affirmative or negative answer to the question" of whether this practice was "so unambiguous, so widespread, so well-established and so well-recognised as to carry with it a commitment...to existing lottery

providers including the Applicant of the treatment in accordance with it". The learned judge reasoned that since there was no established policy, the applicant had failed to show that it had a legitimate expectation that "it would have been permitted to enjoy whatever benefit or advantage accrued to it by virtue of the restriction on game types for new entrants to the lottery market", and the BGLC was "free to exercise its statutory discretion to abandon the policy without reference to the Applicant". He concluded that, in any event, any such policy had ended in 2011 with the grant of the licence to Goodwill Gaming, and the applicant's claim to a legitimate expectation, that had as its premise the practice of restricting game types, would have ended at that time. The learned judge noted further that the new policy had been in existence for nine years and could be considered as settled, and that at the time that the application for leave was filed, the practice and/or policy upon which the applicant had based its legitimate expectation was no longer extant.

[10] On the issue of the practice requiring a study and transparency, the learned judge indicated that the applicant's position was that any decision to permit another lottery provider into the Jamaican lottery marketplace ought to await the results of a feasibility study to provide information to justify the viability of multiplayers in the market and the feasibility of open competition in game types. The learned judge found that, assuming he accepted that the applicant was required by the respondent to submit a study with its application, there was no evidence presented that this was a requirement of any of the candidates who had entered the market after the applicant. He accepted the evidence presented on behalf of the BGLC that it did not routinely

require a formal study to accompany applications for licences, and rejected the applicant's claim to a legitimate expectation that a formal study is a statutory prerequisite to the grant of a licence. The learned judge also found that the BGLC had no policy or practice of facilitating public hearings when considering applications for lottery licences and therefore, any claim to a legitimate expectation under this rubric, was not made out.

[11] In respect of the applicant's claim for legitimate expectation which was said to arise from the BGLC's statutory mandate under section 5, it was the learned judge's finding that "the legitimacy of the Applicant's expectation to be consulted in the examination of problems affecting the lotteries market is firmly guaranteed by the BGLA". In so finding, he reasoned that since the BGLA mandates the BGLC to consult with organizations and persons it considers appropriate, on problems relating to betting and gaming and the conduct of lotteries, it would have been inconceivable, as the only promoter of lotteries in Jamaica at the time of the hearing, that such an examination could take place without the active involvement of the applicant. However, he went on to illustrate what he described as the "difficulty with the Applicant's position", which was that it had conflated "that legitimate expectation with the licensing process under the [BGLA]".

[12] The learned judge noted that it seemed that "the driving force behind the conflation of the applicant's legitimate expectations under the statute to be consulted in the examinations of problems of gaming with the consideration for the issue of a lottery

licence", in light of the materials that were before him on the application, was the applicant's major concern to protect the monopoly it currently enjoys in the market. The learned judge was not persuaded, on the evidence, that if another active lottery promoter were permitted to enter the market, offering the same game types as the applicant, that this would lead to "market confusion and cannibalisation".

[13] After a thorough examination of the evidence, law and submissions, the learned judge concluded that the applicant had failed to sustain its claim to legitimate expectation by virtue the BGLA or the policy of the respondent, and that the application before him, "had not met the standard of an arguable case with a realistic prospect of success".

The appeal

[14] By way of a further amended notice and grounds of appeal filed in this court on 22 June 2020, the applicant delineated nine grounds of appeal, in addition to its challenge of several of the learned judge's findings of fact and law.

[15] The grounds of appeal are:

> "I. The learned judge erred as a matter of fact and/or law in the exercise of his discretion when he found that the Appellant does not have an arguable case with a realistic prospect of success in that he failed to appreciate the substance of the section 5 challenges as expressed in grounds in grounds 6, 7, and 8, relate to the manner in which problems in the lottery and gaming industry were to be resolved and not as he framed them – 'the statutory scheme by which the BGLC should abide when considering the grant [or award] of a lottery licence.'

II. The learned judge erred as a matter of fact and/or law in concluding that the Application is about the licensing process without regard for the fact that this was a separate and distinct challenge from the one relating to the Respondent's failure to follow the procedure in section 5 of the Act which, as he found, firmly guarantees the Applicant a right to be consulted in the resolution of problems in the gaming and lotteries market:

(a) The Appellant's challenge is subsumed under two broad headings – process and game types:

i. Process as grounded in section 5 of the Act which relates to the procedure by which the Respondent should abide when considering the resolution of problems in the gaming and lottery market/industry.

ii. Alternatively, process as grounded in the policies and/or practices of the Respondent.

iii. Game Types: as it relates to not permitting new entrants to offer the same game types as existing licensees.

(b) The consideration to issue a licence arose as a result of the Respondent's failure to consider and act in accordance with its duty under section 5. This is a separate question from what is required when licences are being considered under section 7.

III. The learned judge erred as a matter of fact of [sic]/or law in failing to accept and/or appreciate that there is no dispute between the Applicant and the Respondent on the whole of the evidence that there is a problem in the lotteries and gaming market, relating to the absence or presence of competition or the existence of monopoly in the market and its impact on revenues.

IV. The learned judge erred as a matter of fact and/or law in failing to appreciate that it was not open to the Respondent to resolve the problem by proceeding to consider and/or issue a new licence whether to Mahoe Gaming Enterprises Limited or any new licencee [sic] without regard for its

duties under section 5 of the BGLA which includes a duty to consult.

V. The learned judge erred as a matter of fact and/or law in finding that the Appellant conflated its duties under section 5 with those of the licensing procedure under the Act such that a legitimate expectation in its favour does not arise, without regard for the fact that the issue is not about the licensing process under section 7, but the decision to consider the grant and/or issue of a licence to solve a problem in the market having regard to the requirements of section 5 of the Act.

VI. The learned judge erred as a matter of fact and/or law in conflating the challenge grounded in section 5 of the Act being the duty to consult and conduct investigations and/or surveys therein to resolve problems in the industry with the challenge relating to the policy as to game types or to conduct studies or assessments prior to the launch of a new product or licence that date back to 2001:

a. The challenge under section 5 of the Act concerns the Respondent's duty to investigate and/or consult in order to resolve problems in the lottery and gaming industry. It is this statutory obligation that the Appellant argues is still in subsistence giving rise to continuing obligation to observe it [65], [67]. And [68] and which submissions the learned judge misinterpreted or understood as relating to the policy in relation to the game types.

b. The challenge relating to the policy of or obligation to act transparently, conduct studies or assessments arise under section 5 of the Act such that the Appellant is not time-barred as alleged in relation to the issue arising as it does in the context of the determination that a new license [sic] should be granted to resolve problems arising in the lottery market.

c. So far as Goodwill is concerned, the primary matter raised was in relation to game types as distinct from the section 5 obligations, which

would in any event remain applicable as section 5 imposes a continuing or subsisting obligation.

d. There was no evidence before the judge apart from mere assertion as to whether Goodwill was in fact licensed to offer the same game types as the Appellant.

VII. The learned judge erred as a matter of fact and/or law in holding that there is delay in making the application dating back to the grant of a licence to Goodwill Gaming & Entertainment Limited in 2011 in that the issue relating to problems arising from the presence or absence of competition in the lottery market arose in 2019 resulting in the considerations for the issue of a new licence to Mahoe Gaming and/or other entrants to resolve the problem.

VIII. The learned judge erred as a matter of fact and/or law on the question of delay insofar as the issue relating to Goodwill Gaming is about whether it was granted a license [sic] to offer the same games as the Appellant however, there was no or no cogent evidence either way before the learned judge as to the nature or substance of the licence of Goodwill Gaming such as to give rise to a discretionary bar on this occasion or in this matter.

IX. The learned judge erred as a matter of fact and/or law insofar as he determined the application on the merits as distinct from what is arguable taking into account that all of the material that would have been deployed at the hearing, if leave is granted, is not necessarily before him."

[16] Based on these grounds, the applicant, is seeking on appeal, orders that the judgment of the learned judge be set aside, permission to apply for judicial review be granted, and that costs, both of the appeal and in the court below, be awarded to it.

The application

[17] By notice of application filed on 12 June 2020, the applicant seeks an injunction pending the outcome of the appeal in the following terms:

"1. An injunction restraining the Respondent from granting, issuing, considering or continuing consideration of the grant of a lottery licence to Mahoe Gaming & Entertainment Limited or any new lottery licence pending the hearing of this appeal;

2. Costs of this application be costs in the Appeal.

3. Such further and/or other relief as this Honourable Court deems fit."

[18] The following grounds are relied on by the applicant, in support of the application:

"1. Pursuant to the Judicature Appellate Jurisdiction Act, Parts 1.7, 2.11, and 2.15 of the Court of Appeal Rules 2002 and **Part 17** of the **Civil Procedure Rules 2002**.

2. The application is extremely urgent.

3. By section 5(1)(a) of the Betting Gaming & Lotteries Act, the Respondent is required to or tasked with the duty to examine, in consultation with such organisations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island.

4. By section 5(1)(c) of the of the Betting Gaming & Lotteries Act, the Respondent is required to or tasked with the duty to examine, in consultation with such organisations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island.

5. The Appellant and the Respondent have identified problems and/or issues associated with the operations of the lotteries market in Jamaica.

6. These problems and/or issues affect the legitimate expectations, rights and interests of the Applicant.

7. The Respondent is now considering an application from Mahoe Gaming & Entertainment Limited and intends unless

restrained to grant that licence without reference to the legitimate expectations and concerns of the Applicant.

8. The Applicant has a legitimate expectation that the Respondent will abide by its policy of conducting market study and restriction on game types and in the event of an intention to change, that the issue will be examined and investigated in consultation with the Applicant. This expectation is based on their experience and the practice of the Respondent.

9. The Applicant's legitimate expectations, rights and interests are directly impacted by this approach and the intended decision.

10. The Applicant's Application for leave and for an interim injunction was heard by the Honourable Mr Justice Brown on [sic]

11. Pending the hearing of the application, the status quo was maintained by the Respondent undertaking not to proceed with the granting, issuing, considering or continuing consideration of the grant of a lottery licence to Mahoe Gaming & Entertaining Limited or any new lottery licence pending the outcome of the Application or Permission to Apply for Judicial Review.

12. After the arguments were completed on the…[sic] the status quo was maintained by the learned judge who ordered that The [sic] Respondent is restrained from granting, issuing, considering or continuing consideration of the grant of a lottery licence to Mahoe Gaming & Entertaining Limited or any new lottery licence pending the outcome of the Application or Permission to Apply for Judicial Review.

13. The learned judge delivered his reasons on the 12th June 2020 whereby he refused to grant the orders sought. He also discharged an injunction that he granted on the 27th May 2020.

14. The Appellant is able to fulfil its undertaking as to damages.

15. The Appellant has a good and arguable case for appeal with a real chance of success. The reasons for judgment were

just made available such that the Applicant's attorney is unable to fully appreciate and/or study its terms.

15. If the Application is not granted the Appeal will be rendered nugatory."

[19] On 17 June 2020, Brooks JA granted an ex-parte injunction on terms and ordered that the matter be set for inter parties hearing on 23 June 2020. The hearing of the application took place before me, on 23 June and 1 July 2020, by way of teleconference.

[20] The application is supported by affidavits from Mr Ian Kent Levy, a company director, filed on 12 June 2020. The applicant is also relying on several other affidavits that formed part of the evidence in the proceedings in the court below. In similar fashion, the BGLC is relying on several affidavits sworn to by Mr Vitus Evans, its executive director, that were before the learned judge. Needless to say, these affidavits that are being relied on, except for that of 12 June 2020 which was deposed by Mr. Levy in support of the current application, relate to the respective cases of the parties, as they were advanced in the court below. Given their numbers and length, they will be referred to whenever this becomes necessary.

Submissions of the applicant

[21] Learned Queen's Counsel, Mrs Gibson-Henlin has submitted that the application is made in accordance with rule 2.11(i)(b) and (c) of the Court of Appeal Rules 2002 (CAR) which permits a single judge of the court to grant injunctions restraining any party from dealing with the subject matter of an appeal pending the determination of the appeal.

[22] The court was reminded that the refusal or discharge of an injunction in the court below was not a bar to a grant of an injunction pending appeal, as the test is different from an application for an injunction pending trial. Subject to there being a real chance of success on the appeal, the test is whether the successful respondent should be allowed to act while the appeal is pending, since an important consideration is that the judgment may be reversed or varied. She relied on **Erinford Properties Limited and Another v Cheshire County Council** [1974] 1 Ch 261 in support of this submission.

[23] It was also submitted that the underlying principle on the grant of injunctions pending appeals, after ensuring that the appeal has a real chance of success or that there is an arguable appeal, is that the court ought to ensure that the appeal, if successful, is not rendered nugatory. The authority of **Wilson v Church (No. 2)**(1879) 12 Ch D 454, was cited in support of this submission. Reference was also made to **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16 and **Rona Thompson v City of Kingston Sodality Co-operative Credit Union Limited** [2015] JMCA App 12.

[24] Queen's Counsel further submitted that it was not unusual for the considerations applicable to a grant of stay to be taken into account in applications of this nature. She argued that the court should take the course that would result in the least injustice between the parties. In support of this argument, the case of **Watersports Enterprises Ltd v Jamaica Grande Limited, Grand Resort Limited and Urban**

Development Corporation (unreported), Court of Appeal, Jamaica Supreme Court Civil Appeal No 10/2008, judgment delivered on 4 February 2009, which applied **Combi (Singapore Pte Limited v Ramanath Sriram and Sun Limited FC** [1997] EWCA 2164.

[25] Recognising that the proposed appeal in this matter will be an appeal from the learned judge's exercise of his discretion refusing leave to apply for judicial review, Queen's Counsel for the applicant directed the court's attention to the well-known principles enunciated in the leading authority of **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, which were applied by this court in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, as the proper approach to be taken in the circumstances.

[26] Mrs Gibson-Henlin then went on to argue that the applicant has an arguable appeal, a strong indication of which is the fact that the learned judge granted permission to appeal. She submitted that the substance of the application for judicial review and the appeal is two-fold. The applicant is seeking relief, firstly, in relation to a process governed by the BGLC's statutory mandate and a policy. These are the process that relates to how it exercises its discretion and/or executing its duty in "carrying on" of its functions under section 5 of the BGLA, and the applicant's experiences and legitimate expectations particularly as it relates to the licensing process and game types, respectively.

[27] It was argued, by Queen's Counsel for the applicant, that the learned judge fell into error when he concluded that the application before him was about the licensing process as distinct from the BGLC's failure to follow the procedure in section 5 of the BLGA. In other words, the issue before the learned judge was not about the statutory scheme by which the BGLC should abide when considering a lottery licence, but rather, whether the applicant was entitled to be consulted prior to the resolution of problems relating to the operation of betting and gaming and the conduct of lotteries in the Island. The argument continued that the licence that was being considered by the BGLC to be granted to MGE was "mentioned because it is part of the fix identified by the Respondent to the problems," which were identified by both parties as being the lack of competition in the betting, gaming and lottery market. Had the learned judge correctly understood this particular issue before him, it was submitted, he would have granted the application. This was evident, it was advanced, from the findings of the learned judge at paragraphs [134] to [135] and [200] of his judgment.

[28] It was further submitted, by Mrs Gibson-Henlin that the learned judge fell into error when he found that the applicant had conflated the section 5 duties with the section 7 licensing procedure, when it was he who had conflated the two, having been invited to do so by the respondent.

[29] Mrs Gibson-Henlin posited that the interest of justice (or the balance of convenience, as it is traditionally called) favours the grant of the injunction pending appeal, because should the applicant succeed, the appeal would be rendered nugatory

if it is not granted. This would be so, it was submitted, because the BGLC could consider and grant licences to MGE and other entities, without carrying out their duties to consult or commission a study under section 5 of the BGLA, and the effects of acting without the study or consultation would be "deleterious". As a result, damages would not be an adequate remedy in the circumstances. No similar prejudice would be caused to the BGLC and there are no third party rights that have intervened, it was contended.

[30] Queen's Counsel maintained that the applicant has provided sufficient evidence that it is able to fulfil its undertaking as to damages, because it is a wholly owned subsidiary of Supreme Ventures Limited ('SVL'). SVL underwrites the applicant's obligations and is required to be listed on the stock exchange. In its last financial year, SVL posted substantial profits of approximately $2.5 billion and, consequently, would be able to satisfy any undertaking for damages that is given by the applicant.

The submissions on behalf of the BGLC

[31] Learned Queen's Counsel for the BGLC, Mr Braham, strongly urged the court to refuse the applicant's application for interim relief on the basis that the applicant does not have an arguable case for permission, nor does it have an appeal with a real chance of success. He submitted that the applicant has failed to reach the threshold that is required for the grant of an injunction pending appeal.

[32] The court was directed to general principles that were expressed in the oft-cited case of **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, which, it was submitted, are to guide the court in the exercise of its discretion in granting interim

injunctions, but instead of considering whether there is a serious issue to be tried, the court must consider whether there is an arguable appeal.

[33] It was also submitted that in "instances where the restraint of a public body is sought through an injunction in judicial review proceedings the principles emanating from **American Cyanamid** must be modified to take into consideration the public law element". The authorities of **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and another** [2003] UKPC 63, **Regina v Secretary of State for Transport, *Ex parte* Factortame Ltd and Others (No 2)** [1991] 1 AC 603 and **Telecommunications Regulatory Commission v Caribbean Cellular Telephone Limited**, (unreported), Court of Appeal of the Eastern Caribbean Supreme Court, British Virgin Islands, Claim no BVIHCVAP2015/0015, judgment delivered on 15 December 2015, were relied on in support of this submission.

[34] Mr Braham, further submitted on this point, that in public law cases the court should consider, firstly, whether there is an arguable case or appeal, and secondly, the balance of convenience. The court, it was urged, should take into account the public interest when considering both limbs.

[35] In respect of the submission that the applicant does not have an arguable case on appeal, Queen's Counsel for the BGLC submitted that in considering the grounds of appeal delineated at 1, 2, 4, 5 and 6, the court ought to take into account the context in which the application for leave was placed before the learned judge. The applicant, it

was argued, had contended in the court below that in considering the grant of the licence to MGE or any new entrant, the BGLC was required to cause a study to be done, submit the application process to public scrutiny and prohibit MGE or the new licensees from offering the same game types as the applicant. This was in keeping with the BGLC's policy which, the applicant said, it was entitled to rely on, and, its duty to consult and carry out investigations and/or surveys under section 5 of the BGLA.

[36] Mr Braham stoutly asserted that this was the case before the learned judge and it cannot now be properly suggested that the questions raised by the applicant under section 5 of the BGLA ought to have been treated separately from the consideration of the issue of the grant or refusal of a lottery licence (the licensing process). Thus, it was argued, the grounds of appeal represented a departure from the case that was before the learned judge. Mr Braham opined that the criticism levelled at the learned judge that it was he who conflated the provisions of section 5 with the licensing process set out under section 7 of the BGLA, is unfair in the circumstances.

[37] Also in considering whether there is an arguable appeal, Mr Braham further examined the grounds of appeal and made the following submissions:

a. The learned judge was correct in his conclusion that the BGLC in considering the application for a licence from MGE was not required to take account of the provisions of section 5 based on the case that was before him;

b. The applicant has not challenged the learned judge's analysis of the BGLA and therefore, there is no arguable appeal on these issues;

c. There is no evidence to support the applicant's contention that the respondent accepted that 'there is a problem in the lotteries and gaming market relating to the absence or presence of competition or the existence of monopoly in the market and its impact on revenue'". Whilst Mr. Evans gave evidence that the fact that the applicant is the only lottery operator responsible for the generation of tax revenues for the government is unsafe, and that to exclude other parties from the market will serve to continue the applicant's monopoly position and that competition in the market is beneficial, he has not averred in any affidavit that these are issues that require investigation or survey. These are issues, in any event, to be properly studied under section 5 of the BGLA, which the learned judge correctly found was not applicable to the licensing process;

d. Even if section 5 of the BGLA was applicable to the licensing process, it was for the BGLC to decide if there is a problem affecting the control of lotteries and if this were so, to

determine the organisation it wishes to consult to examine the problem. It was also for the BGLC to determine whether its functions require information which can only be gathered by an investigation or survey. The learned judge so found at paragraph [136] of his judgment and this finding has not been challenged by the applicant;

e. The learned judge was correct in finding that even if the BGLC had a policy which required the applicant to carry out a study in the market, this policy had changed in 2011 when it granted a licence to Goodwill Gaming. Therefore, the applicant had no basis to support its claim for legitimate expectation of the said policy;

f. The challenge to the learned judge's finding that the licence to Goodwill Gaming allowed it to offer the same game types as the applicant was not supported by any "cogent evidence" is without merit as this was asserted by the applicant in the affidavits of Mr. Levy and Mr. Evans on behalf of BGLC agreed; and

g. Where there are issues of statutory interpretation, the learned judge is permitted to examine authorities and interpret provisions of the relevant legislation when

considering an application for leave. His interpretation of the BGLA was comprehensive, well-reasoned and sound and the criticism of his industry was misconceived.

[38] Addressing the balance of convenience, Mr Braham relied heavily on **Regina v Secretary of State for Transport** for the applicable principles that are to the guide the court when considering the grant of interim injunctions in public law cases. He submitted that the balance of convenience favours refusing the injunction because:

i. The applicant is seeking to restrain the BGLC from exercising its functions and performing its duties ascribed to it by statute;

ii. The consideration by the BGLC to grant a licence is a public function that is being carried out in the interest of the public;

iii. The applicant does not have a direct interest in the grant or refusal of the licence;

iv. Members of the public who apply to the BGLC for licences are entitled to have their applications considered;

v. There is a risk to proper administration if the BGLC were to be prevented from considering an application on the basis of

challenge to a change in policy which took place nine years ago;

vi. The applicant would not suffer any prejudice if the licence is considered and granted or refused;

vii. If the applicant is successful at appeal but is afforded no interim relief, it would not suffer any severe and irrecoverable damages or obvious and immediate damage; and

viii. The BGLC, being a public authority acting in the public interest, cannot be adequately protected by damages if it succeeds at the appeal.

[39] Mr Braham also referred the court to the decision of **Brilliant Investments Limited v Rory Chin** [2020] JMCA App 6, as being instructive to the analysis that is required to be undertaken in an application of this kind.

The relevant legal principles

[40] By virtue of rule 2.11(1)(c) of the CAR, a single judge of appeal is permitted to consider and grant applications for injunctions pending appeal.

[41] Phillips JA, in the decision of **Kingston Armature & Dynamo Works Limited v Jamaica Redevelopment Foundation Inc and Kenneth Tomlinson** (unreported) Court of Appeal, Jamaica, Application No 121/2012, judgment delivered 20

December 2010, which was applied in **Brilliant Investments Ltd**, stated the applicable principles that were to be considered in respect of a grant or refusal of an injunction pending appeal. At paragraph [34] of that judgment, the learned judge of appeal stated:

> "[34] The questions one must ask at this stage are: Does the applicant have a good arguable appeal, or are there serious issues to be canvassed on appeal? Is the applicant entitled to an injunction and if so, on what terms, if any?"

[42] At paragraph [38] of the judgment in **Brilliant Investments Ltd** Foster-Pusey JA made reference to the test whether the applicant has "reasonable grounds of appeal", which was the preferred threshold test expressed by Morrison JA (as he then was) in **Michael Levy v Jamaica Re-Development Inc. Fund and Kenneth Tomlinson** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 26/2008, Application No 47/2008, judgment delivered 11 July 2008. She concluded that both tests, although worded differently, "required the application of the same principles". I agree.

[43] In analysing whether there is a good arguable appeal, the single judge must be cognisant of the fact that this court, based on the principles enunciated in **Hadmor Productions v Hamilton**, in determining the appeal, "will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis" (per Brooks JA in **Thompson v COK** at paragraph [14] of the judgment).

[44] The single judge, therefore, at this stage, is required to consider, whether "it is arguable that the learned judge in the court below was in error in a significant way in the decision handed down at first instance" (per Brooks JA in **Thompson v COK** at paragraph [15] of the judgment).

[45] The other principles that must occupy the mind of the single judge in considering the grant or refusal of an injunction at this point in the proceedings are whether damages are an adequate remedy, and whether the requirements of the balance of convenience or the interest of justice lies in favour of the grant or refusal of the injunction (see **American Cyanamid** and **NCB v Olint**).

Discussion and analysis
Does the applicant have a good arguable appeal?

[46] To determine if the applicant has an arguable appeal an assessment of the grounds of appeal is relevant. This assessment will be limited to what is necessary to determine whether it is appropriate to impose an injunction pending appeal and not to arrogate the course that the full court will undertake at the hearing of the appeal. I will commence with the issue of delay, for which the applicant's challenge can be found at grounds VII and VIII of the further amended notice and grounds of appeal.

Delay (grounds VII and VIII)

[47] The findings of the learned judge in respect of delay are set out at paragraph [6] above. Grounds VII and VIII challenge both the time that the learned judge found that the claim for an application for judicial review first arose and the lack of "cogent evidence", as to the nature and substance of the licence granted to Goodwill Gaming,

which could support such a finding. What the learned judge ought to have considered, it was averred, was that the problems arising from the presence or absence of competition in the lottery market arose in 2019, which resulted in the consideration of a new licence to MGE and/or other entrants to resolve those problems.

[48] The evidence before the learned judge was that between 2001 and 2008, a number of licences were granted to several organisations. While he accepted that none of these licensees engaged in similar game types as the applicant, and there was no evidence furnished by the BGLC that there was no restriction to the game types that they were allowed to offer, the learned judge found, on the evidence, that they were not required to undertake a feasibility or market study as a prerequisite to the grant of their licences.

[49] Concerning whether or not there was "cogent evidence" before the learned judge which could support his finding that the licence issued to Goodwill Gaming did not restrict the game types that they could offer, there was a letter written to the BGLC, on 22 February 2018, from then president and chief executive officer ('CEO') of SVL (the parent company of the applicant), Ms Ann-Dawn Young Sang, exhibited to Mr. Levy's affidavit of 3 April 2020, captioned, "Re: Concerns – New Entrant in the Lottery Space" (which the learned judge demonstrated that he considered at paragraph [147] of his judgment). In that letter, she again reminded the BGLC of the rigorous process that SVL was required to undergo when it applied for a lottery licence (these concerns having been raised previously in letters by two of her predecessors, one from the

former chairman in April 2013 and another from a previous president and CEO in April 2016). She also made the following observation:

> "We further note with great concern that Goodwill Gaming is permitted to not only offer games of similar design to our most profitable suite Cash Pot and Money Time, a direct violation of the terms that we were subjected, but also be allowed to mimic or what appears to be an attempt to replicate our most successful brand Cash Pot with 'Big Pot' for which there exists trademark protection."

[50] In his affidavit, in response to the affidavit of Vitus Evans, filed on 20 April 2020, Mr Levy, at paragraph 6, also makes reference to the licence that was issued to Goodwill Gaming for the same products offered by the applicant when he stated "only one licence was issued for the same products offered by the Applicant. The licensee is not operating". This was confirmed by Mr Evans.

[51] Therefore, there was cogent evidence before the learned judge, from which he could find that, when the BGLC granted Goodwill Gaming its licence in 2011, it did not require that licensee to commission a feasibility or market study and Goodwill Gaming was permitted to offer the same game types as the applicant. It was, therefore, reasonable for the learned judge to find that the BGLC had introduced a new policy in 2011 and that time had started to run against the applicant from then.

<u>Learned judge's findings as to whether there were arguable grounds with a realistic prospect of success (grounds I, II, IV, V to VI, and IX)</u>

[52] It has been agreed by the parties, in submissions before me, that sections 5 and 7 of the BGLA are free standing provisions. In other words, the provisions in section 5

are not applicable to the licensing process contained in section 7. This was also a finding that was made by the learned judge.

[53] However, the learned judge went on to conclude that since the applicant, was the only promoter of lotteries in Jamaica at the time of the application for leave, "it [was] inconceivable that such an examination [concerning problems affecting the lotteries market] could take place without the active involvement of the Applicant" and that "the legitimacy of the Applicant's expectation to be consulted in the examination of problems affecting the lotteries market is firmly guaranteed by the BGLA" (see paragraph [200] of the judgment).

[54] As a result, the applicant has challenged his findings in grounds I, II, IV to VI, on the basis that he fell into error when he failed to recognise that the section 5 challenge was a separate and distinct challenge to the licensing process contained in section 7. In other words, as I understand the argument, the learned judge misunderstood the case that was placed before him, when he concluded that the applicant had conflated their legitimate expectation to be consulted in relation to problems relating to the operation of betting and gaming and the conduct of lotteries under section 5 with the licencing process under section 7, and neither did he appreciate that the consideration of the grant of a licence to MGE was a manoeuvre by the BGLC to "fix the problems" in the lotteries market without prior consultation with the applicants, as required by section 5(1)(a) of the BGLA. Mr Braham, on the other

hand, has strongly asserted that this was not the way in which the applicant developed their case before the learned judge.

[55] To determine if this is an arguable issue to be raised on appeal, in light of the positions of counsel on this matter, it is necessary to examine the orders sought on the application, and the grounds and evidence that were before the learned judge.

[56] I start with the amended notice of application for leave and note that the first order sought by the applicant seeks to prevent the BGLC from granting any new lottery licences pending the conduct of a feasibility study on the operation of lotteries in Jamaica. The second order seeks to prohibit the BGLC from granting any new licence for the same game types that are being offered by the applicant. The third order seeks to compel the respondent to commission a feasibility study into the viability of granting a new lottery licence in Jamaica. The BGLA only provides for the commission of investigations and surveys in section 5(1)(c).

[57] It would seem, in my view, that the main purpose of the application was to prevent the BGLC from granting any new licence without first conducting a feasibility study, and restricting new entrants in the lottery market from engaging in the same game types as the applicant.

[58] Certain aspects of the evidence presented on behalf of the applicant also seems to make reference to the requirement of the BGLC to commission a feasibility study and consult with the applicant as part of the process for considering and granting a new

licence. Mr Levy, for example, at paragraphs 5 and 7 of his affidavit filed on 20 April 2020 states:

> "5. …The Applicant was the second lottery licensee in Jamaica. Its case is that at the time of its application it was a condition and part and parcel of its application that it conducts an independent study. Its application was also mandated to be transparent and it was publicised in the Jamaica Observer, Gleaner, Jamaica Herald and the Star. Finally, the Applicant and its technical service provider were the subject of extensive due diligence. It was also mandated and directed that it could not offer the same lottery product as the existing licensee – Jamaica Lottery Company. Based on its experience and the stringency of the approach, the Applicant understood and had come to expect that this was and will be the procedure going forward for any new entrant. There is therefore no implication – it was the Applicant's understanding based on its experience that there is a policy resulting in an expectation that all new applicants would be subjected in a similar manner. **This expectation is also based on a true construction of section 5 of the BGLA** and the several letters sent to the Respondent
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> …
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> 7. …It underscores the Applicant's concern that **it ought to have been, in addition to the policy and expectations, consulted as part of the process of considering and the granting of the new licence and that a study ought to have been conducted**…" (Emphasis added)

[59] The learned judge, at paragraphs [17] to [23], [81] to [87] and [140] of his judgment, summarised the grounds and submissions that were made on behalf of the applicant on this point. He also made several references, during the course of his judgment, to the argument of the applicant that the BGLC could not award a licence without reference to section 5. It would appear, therefore, that these were the material and arguments before the learned judge on which he would have exercised his discretion.

[60] The learned judge found, *inter alia*, at paragraph [139] of his judgment that "…The licensing regime does not require the BGLC to, as a condition precedent to a grant of a lottery licence, to [sic] consult an existing licensee or make investigations and surveys under section 5, before it grants the licence". Having examined the application and grounds, the evidence and the learned judge's decision, it would seem to me that this finding was reasonable, given the way the case was put before him.

Problems in the lotteries and gaming market (ground III)

[61] The applicant has averred, in ground III, that the learned judge failed to accept or appreciate that there was no dispute between the applicant and the respondent that there was a problem in the lotteries and gaming market relating to the absence or presence of competition, or the existence of monopoly in the market and its impact on revenues. The evidence before the learned judge, on behalf of BGLC, seems to dispute this assertion. Whilst Mr Evans gave evidence that the lack of competition in the market was a concern, particularly as it relates to income tax revenues, it was not agreed that this was a problem that required the BGLC to exercise its functions under section 5 of the BGLA.

[62] The learned judge addressed this issue at paragraphs [200] to [204] of his judgment. He again referred to the applicant's position of conflating its 'legitimate expectation to be consulted in the examination of problems affecting the lotteries market' (by virtue of section 5(1)(a)), with the licensing procedure under section 7 of the BGLA. He concluded that BGLC's "general power or discretion to examine problems

in the sector is not a part of the licensing procedure under the Act". This was a fair conclusion, in the circumstances.

Substantive hearing rather than arguability (ground IX)

[63] The applicant has complained, in ground IX, that the learned judge conducted a hearing on the merits of the case rather than considering what was arguable, having regard to the fact that all the material that would have been available at the hearing, if leave had been granted, was not before him. In other words, the learned judge treated the application for leave as the substantive hearing.

[64] However, it does not appear that the applicant has an arguable case on this ground. The learned judge, in making the determination of whether leave is to be granted, is required to consider whether the applicant has met the threshold of having an arguable case with a realistic prospect of success. This necessitates an examination of the law and evidence before him. As was stated by the Board in **Sharma v Browne-Antoine & Ors** [2006] UKPC 57 at paragraph [14](4):

> "[14](4) …arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:
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> > '… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of

> probability but in the strength or quality of the evidence that will in practice be required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities…'
>
> It is not enough that a case is potentially arguable; an applicant cannot plead potentially arguability 'to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'."

[65] A similar point was raised on appeal and addressed by this court in **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24. In that case, Sykes J (as he then was) had refused the appellant bank's permission to apply for judicial review of a decision of the Industrial Disputes Tribunal. One of the grounds advanced on appeal was that he had conducted a full hearing on the merits and in doing so had failed to properly apply the test of arguability. Sinclair-Haynes JA, delivering the unanimous decision of the court, found that Sykes J, having demonstrated that he was mindful of the test of arguability, as enunciated in **Sharma**, was required to examine and analyse the evidence and the law in order to determine if the appellant had met the required standard.

[66] In the case at bar, the learned judge was reminded by both counsel for the applicant and the BGLC, in their submissions, that the issue before him was whether the applicant had an arguable case with a realistic prospect of success. Given the nature and gravity of the issues that were canvassed before him, it was reasonable and necessary for the learned judge to embark upon a detailed review of the provisions of

the BGLA, the relevant cases, as well as, the evidence, in order to determine if the applicant had met the required threshold. Having done so, he concluded:

> "[206] Notwithstanding the Applicant's disentitlement to the grant of leave for reason of undue delay, the application has not met the standard of an arguable case with a realistic prospect of success."

[67] Having reviewed the learned judge's decision and the proposed grounds of appeal, I have formed the view that the applicant does not have a good arguable appeal. It also seems to me that the applicant's task of convincing the court that the learned judge exercised his discretion on an incorrect basis, will be particularly difficult. Although this would be depositive of the matter, I have, nonetheless, gone further to consider if damages would be an adequate remedy and the balance of convenience.

Are damages an adequate remedy?

[68] Having found that the applicant has no good arguable appeal, I will nonetheless consider whether damages is an adequate remedy.

[69] I am persuaded that the applicant, being a subsidiary of SVL, is in a position to satisfy any undertaking that it gives in relation to damages. However, the BGLC is a public authority tasked with the responsibility of acting in the interests of the public in matters concerning betting, gaming and the conduct of lotteries in Jamaica. In light of this fact, I am doubtful as to how the BGLC could be protected by any undertaking as to damages, if the applicant obtains an injunction and is unsuccessful at the appeal.

[70] I am fortified in my view by the authority of **Regina v Secretary of State for Transport**, a decision of the House of Lords, which was relied on by the BGLC. Lord

Goff of Chieveley, who delivered the unanimous decision of the court, at page 673A of the judgment opined:

> "…an authority acting in the public interest, cannot normally be protected by a remedy in damages because it will itself have suffered none. It follows, that as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage [whether damages are an adequate remedy] and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience."

[71] In the instant case, in any event, it would be reasonable to say that damages would not be an adequate remedy for the BGLC.

The balance of convenience

[72] The issue affecting the balance of convenience is whether the BGLC, being a public authority, mandated to act in the public's interests, should be restrained from carrying out its statutory duties and functions, to consider and grant lottery licences. Therefore, the applicant would need to satisfy me, that it is just or convenient to restrain the BGLC, until the appeal is determined.

[73] The law in relation to circumstances warranting an injunction to restrain a public authority from carrying out its statutory mandate was discussed in **Regina v Secretary of State for Transport**. The court in that case was considering whether an injunction should be granted to restrain the Secretary of State from applying a law to the applicant companies, pending their challenge, by way of judicial review, to the validity of that law. The result of the application of that law, the Merchant Shipping Act

1988, and its accompanying regulations, was that 95 of the fishing vessels owned by the companies would no longer qualify to register as British vessels, so that they would no longer be permitted to engage in fishing in the United Kingdom. Lord Goff delivering the judgment of the court, observed at page 673:

> "Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" see *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, 422, *per* Browne L.J., and see also *Sierbien v. Westminster City Council* (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law. This was expressed in a number of different ways by members of the Appellate Committee in the Hoffmann-La Roche case [1975] A.C. 295. Lord Reid said, at p. 341, that
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> > 'it is for the person against whom the interim injunction is sought to show special reason why justice requires that the injunction should not be granted or should only be granted on terms.'
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> Lord Morris of Borth-y-Gest, at pp. 352-353, stressed that all considerations appertaining to the justice of the matter become within the purview of the court; but he also stated that, in a case where the defendant attacks the validity of what appears to be an

> authentic law, the measure of the strength of this attack must inevitably call for some consideration. Lord Diplock, at p. 367, asserted that prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to the law; and that
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> > 'To displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires'."

[74] He then concluded, at page 674:

> > "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim objection restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. **Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken**." (Emphasis added)

[75] Although the court in that case was concerned with the issue of whether an injunction should be granted to halt the applicability of a law pending a challenge as to its validity, and although interim relief was ultimately granted, I find the learning to be apt.

[76] In **Telecommunications Regulatory Commission v Caribbean Cellular Telephone Limited**, Pereira CJ, having considered the cases of **Belize Alliance** and **Regina v Secretary of State for Transport**, opined at paragraph 25 of the judgment of the court, that there was no "qualitative difference" in seeking to restrain a public authority from enforcing the law on the one hand, and exercising its functions and performing its duty on the other.

[77] Therefore, applying the principles gleaned from these authorities, it would seem to me that, to warrant the grant of an injunction to restrain a public authority from exercising its functions and performing its duties, the applicant is required to demonstrate that it has a prima facie case strong enough to justify the imposition of such an exceptional remedy as against the interests of the public, and that the interests of justice so require. In other words, in the circumstances of this case, there ought to be proper evidence of an apprehended harm, that could affect not only the applicant's commercial activities and well-being, but also the interests of the wider public which the BGLC serves.

[78] I have considered that the applicant has submitted that if it fails to obtain an injunction, and succeeds, the appeal would be rendered nugatory, and it will suffer "deleterious and irremediable effects". I have taken into account that one of the consequences of the applicant failing to obtain an injunction is that the BGLC could consider and grant lottery licences to pending and new applicants, which would introduce competition in the lotteries market, without commissioning a feasibility study

or restricting them from offering the same game types as the applicant. This may, in the short or long term, have implications for the applicant's profit margin. However, when this is balanced against the considerations advanced by Mr Braham, delineated at paragraph [38], with which I agree, it is my view that the interests of justice favours the refusal of the injunction pending appeal.

[79] My decision is also influenced by the fact that there is an innocent third party (MGE), whose application for a lottery licence is before the BGLC for consideration. It would be fair to say that MGE, or any other prospective applicant, has a right to expect that its application will be considered and possibly approved, if that applicant satisfies the required criteria. Should the injunction be granted on terms, and this matter is tied up in litigation for an extended period of time, the rights and interests of pending and prospective applicants would be negatively impacted.

[80] Further, the grant of a licence to MGE or any new licensees does not act as a bar to the BGLC consulting with the applicant, or any organisations or persons, which it considers appropriate, about problems, if any, relating to the operation of betting and gaming and conduct of lotteries in the island.

Conclusion

[81] For the reasons stated above, the application for the grant of an injunction pending appeal is refused.

Order

(1) The application for injunction pending appeal is refused.

(2) Costs of this application to be costs in the appeal.