[2020] JMSC Civ.113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV01183

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

Mrs M. Georgia Gibson Henlin, QC and Ms Stephanie Williams instructed by HENLIN GIBSON HENLIN for the Applicant

Mr Ransford Braham, QC and Ms Carissa Mears instructed by BRAHAMLEGAL for the Respondent

HEARD: 18, 19, 22 May and 12 June 2020

Judicial Review– Application for leave to apply for judicial review – Undue delay – Legitimate expectation – Change in policy of lottery licence consideration - Betting Gaming and Lotteries Act, Civil Procedure Rules 2002, Part 56.

EVAN BROWN J.

Introduction and Background

[1] This is the *inter partes* hearing of an application for leave to apply for judicial review. The applicant is a limited liability company duly incorporated under the laws of Jamaica and the sole promoter of lottery games in Jamaica. It is a wholly owned

subsidiary of Supreme Ventures Limited (SVL). The lottery products are managed, marketed and brandèd on its behalf by its parent company SVL and branded as Supreme Ventures. This is a notorious fact, as seen in all advertising, television lottery draws and communications with the Respondent.

[2] The Respondent is a body corporate established by section 4 of the ***Betting Gaming and Lotteries Act*** (***BGLA***). The Respondent will also be variously referred to as the BGLC and the Commission. The overarching function of the Respondent is to regulate and control the operation of betting and gaming and the conduct of lotteries. Some of its other functions are, dealing with problems in the conduct of lotteries in the island and to investigate and conduct surveys for the purpose of obtaining information in the discharge of its functions. It is a division of the Ministry of Finance. The Respondent is therefore a public authority and/or its functions have the necessary public law element.

[3] The initial lottery licence was granted to SVL on or about 13 February 2001. Subsequently, SVL caused Supreme Ventures Lotteries Limited (SVLL) to be incorporated as a wholly owned subsidiary and the Jamaica lottery licence was vested in SVLL. This licence spanned the period 1 August 2010 to 10 January 2026.

[4] On transfer to the Applicant, the licence conditions were amended and a new expiration date substituted, being 10 January 2033. The licence and its condition has its source in the SVL group, under its brand and management and were continued with each successive subsidiary which was each branded as Supreme Ventures (SV). The applicant is the second lottery licensee in Jamaica. It was a new entrant at the time of its application in the 1990s.

The Application

[5] The Applicant seeks the following orders:

(i) 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.

(ii) Leave to apply for judicial review by way of an order of Prohibition to prevent the Respondent from granting any new lottery licences including to Mahoe Gaming Limited for the same games that are offered by the Applicant.

(iii) 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.

(iv) 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.

(v) 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.

Submissions on behalf of the Applicant

[6] Mrs Gibson Henlin QC, made wide ranging submissions which the court found helpful but does not propose to repeat verbatim. I will provide a summary. Learned Queen's Counsel submitted that the Applicant is a body with sufficient interest in the subject matter of the application. Rules 56.2 (1) and 56.2 (2) (a) were cited. The submission was anchored in ***DYC Fishing Ltd v Minister of Agriculture*** (2003) 67 WIR 154, at page 166, in which Downer JA accepted the dictum of Lord Wilberforce in ***Inland Revenue Commissioner v National Federation of Self-Employed Businesses*** Ltd [1981] 2 All ER 93. At page 96 Lord Wilberforce declared:

> *"the question of sufficient interest cannot be considered in abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates.*

[7] To demonstrate the sufficiency of the Applicant's interest, it was submitted that the Applicant is the holder of a lottery licence which was granted by the Respondent. It was contended that the grant of the new lottery licence will directly affect the Applicant. The Applicant has been participating in the lottery market in accordance with the terms of its licence and complied with the terms of its grant. The Applicant was required to comply with the conditions as to process and game type. It was required, at great expense, to commission an independent feasibility study to demonstrate that it would add value to or expand and not cannibalise the lottery market. It was also forbidden to offer the same lottery types as the existing player.

[8] The submission continued. The Applicant is therefore adversely affected by the Respondent's steadfast intention to grant a lottery licence to Mahoe Gaming & Entertainment Limited without regard for the process, procedures and fairness. The Respondent, although accepting in February 2020 that it intended to conduct a study, now says in its response that it is not obliged to do so. The refusal to conduct the feasibility study is an abuse of power.

[9] Leaned Queen's Counsel also submitted on the question of amenability to judicial review and mentioned the two tests. However, Learned Queen's Counsel for the Respondent, Mr Braham, did not join issue on this question. Neither did Queen's Counsel Mr Braham dispute that the Applicant has a sufficient interest in the subject matter of the application. The relevance of the submissions on the question of sufficient interest will become clear in my discussion below.

Delay

[10] In the submissions filed on 21 April 2020, two points were raised. Firstly, counsel for the Applicant argued that time started to run on 2 April 2020 when it became apparent to the Applicant that the grant of the licence was imminent. That revelation came to the

Applicant through the medium of Nationwide News Network (NNN) during an interview with Mr Clovis Metcalfe, the Respondent's Chief Executive Officer. Secondly, to the extent that delay arises, the court is entitled to consider the matter as a whole in the context of hardship, prejudice to third parties and the proper administration of justice. There is no averment of any of these matters, learned counsel concluded.

The threshold test

[11] Learned Queen's Counsel submitted that it has now been firmly set in our jurisprudence that the test is that there must be arguable grounds with a realistic prospect of success. ***Digicel (Jamaica) Limited v The Office of Utilities Regulation*** [2012] JMSC Civ 91 was cited. The court in that case adopted the ruling in ***Sharma v Brown-Antoine*** [2007] 1 WLR 780, that while the court was not required to delve into the merits of the matter, it must ensure that the grounds are not frivolous or fanciful.

[12] In seeking to bring this application under the rubric of an arguable case with a realistic prospect of success, it was argued that the application derives from the exercise of the Respondent's statutory power to grant licences under the **BGLA**. In carrying out its regulatory functions the Respondent is required to have regard to the matters set out in section 5 of the **BGLA**.

[13] The Applicant expected that it would have been contacted or consulted as an interested or affected party. However, the Applicant was not consulted as an affected stakeholder and verily belied that it was entitled to rely on the policy, its experience and also the statutory remit of the Respondent in relation to the consideration for the grant of a new licence to Mahoe Gaming & Entertainment Limited. These policies and principles as to new game types and the process for considering the grant of the new licence are not being observed in the present circumstances.

[14] The Respondent, it was said, ignored the applicant's concerns regarding the processes and its expectations. The NNN interview made it clear to the Applicant that the Respondent intended to proceed with the grant of the licence unless restrained and the

court reviews its action and procedures. The Respondent, it was submitted, was abusing its statutory powers and its acknowledged duty to act fairly, reasonably and transparently.

Procedural Fairness, Unreasonableness and Legitimate Expectation

[15] Modern public law jurisprudence revolves around the link between fairness, unreasonableness and legitimate expectation, was the opening salvo. Learned Queen's Counsel for the claimant submitted that the scope of legitimate expectation was discussed at length in ***The Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and Anor (unreported), Jamaica Supreme Court 2005 HCV 3022*** judgment delivered 16 May 2006. At paragraph [28] Sykes J (as he then was) cited with approval the dicta of Lord Woolf in ***Regina v North and East Devon Health Authority, ex parte Coughlan*** [2001] QB 213:

> *"in considering the correctness of this part of the judge's decision it is necessary to begin by examining the role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest".*

[16] The evolution of the concept of legitimate expectation includes not only the principles of natural justice, but more importantly the duty to be fair. Reliance was placed on a quotation from the judgment of Lord Roskill in ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 (***CCSU***), where he opined that the phrase "natural justice" should be discarded in favour of the duty to act fairly. Reference was also made to the judgment of McDonald Bishop J (as she then was) in ***Legal Officers' Staff Association and Others v The Attorney General and Others*** [2015] JMFC FC 3 (***LOSA v Attorney General***), in which the relevant principles were summarized.

[17] It was submitted that the Respondent failed to have regard to section 5 of the **BGLA**, in particular section 5 (1)(a) and 5 (1)(c). These sections require the Respondent to do two things, respectively. One, to examine in consultation with such persons as it considers appropriate, problems relating to the operation of betting, gaming and the

conduct of lotteries in the island. Two, to make investigations and surveys for the purpose of obtaining information of use to it in the exercise of its functions.

[18] Learned Queen's Counsel argued that these sections contemplate that fairness, reasonableness and equity will be observed. The respondent is required to treat with problems arising in respect of the conduct of lotteries in Jamaica. The matters raised by the Applicant relate to problems it has or that will arise if the course intended by the Respondent is pursued. These concerns were brought to the attention of both the Respondent and the Minister of Finance. The Minister did not respond. Although the Respondent confirmed that it had a duty to act fairly, and was minded to act accordingly, the Applicant's concerns with policy, process and fairness were not otherwise acknowledged.

[19] It was contended that the Respondent's position of simply advising stakeholders to trust it, falls outside the statutory requirements. Modern governance contemplates consultation of citizens by public bodies and authorities.

[20] The Applicant's experience with the Respondent was such that it held a legitimate expectation that the Respondent would have adhered to these procedural requirements. Alternatively, it had a legitimate expectation that the Respondent would have consulted with it before it changed its policy.

[21] The Applicant's experience with the Respondent was one which required it to fulfil certain conditions before it was granted a licence. To that end, the Applicant was required to conduct its own feasibility study at its own expense and forbidden from offering the same game types as the existing provider.

[22] The Applicant alleged that the Respondent confirmed in writing that the study was to be done. However, in its affidavit evidence it now says it does not have to do a study and repudiates that it had such a practice. The Applicant insisted that the Respondent consulted in the past and the **BGLA** contemplates that it will do so. Queen's Counsel concluded the point by saying in the absence of notification of the change in policy, the

Applicant has an arguable case on the basis that the Respondent has failed to follow its own procedure.

[23] Quite apart from procedure, it was contended that the Applicant had a legitimate expectation, based on experience and the Applicant's functions, which may be itemised as follows. Firstly, it had a legitimate expectation that the Respondent would commission a feasibility study to determine the market appetite for another player. To this end it was said that there is no historical data on the market's response to multiple operators offering the same product. Secondly, the Applicant had a legitimate expectation that the Respondent would not cause the new player to offer the same game types as the Applicant. Lastly, the Applicant had a legitimate expectation that if the policy or approach is to be changed, the Respondent must advise and/or consult with the Applicant. These submissions were grounded in the judgment of McDonald Bishop in ***LOSA v Attorney General***, *supra*. ***Kent Garment Factory v The Attorney General and Anor*** (1991) 46 WIR 177 was also said to support the Applicant's contention that legitimate expectation can arise by reason of its own experience and also the practice of the Respondent.

Submissions on behalf of the Respondent

[24] Learned Queen's Counsel for the Respondent also made helpful submissions which, again, will not be repeated in full. Mr Braham agreed that the test to be applied on an application for leave to apply for judicial review is that laid down by the Privy Council in ***Sharma v Browne Antoine et al*** [2006] UKPC 57. The applicant is required to place before the court sufficient and credible evidence to ground the application for leave. He too cited the decision of Mangatal J (as she then was) in ***Digicel v OUR***, *supra*. Crucially, learned Queen's Counsel laid stress on Her Ladyship's view that where the application is contested, it called for a more rigorous examination of the evidence or arguments. Neither should the court shy away from issues of statutory interpretation.

[25] Queen's Counsel Braham then summarized the Applicant's factual contentions for legitimate expectation. First, the Commission would not allow new entrants into the lottery market to offer the same game types as an incumbent operator in the lottery market.

Second, the Commission would require a comprehensive due diligence form in relation to new applicants seeking licences to operate in the lottery market. Third, the application of new entrants would be public, transparent and/or involve feasibility studies.

[26] Learned Queen's Counsel then referred to the dictum of Lord Fraser of Tullybelton in ***CCSU***, *supra* where he said (and here I paraphrase, hopefully without violence to His Lordship's meaning) although a person claiming a benefit or privilege may be unable to support it in private law, that person may have a legitimate expectation of receiving the benefit or privilege. If he does, he may obtain the protection of the court through judicial review in public law. The Law Lord went on to declare that legitimate, or reasonable, expectation may arise in any of two circumstances. One, it may be instanced by a promise. Two, it may arise from a course of conduct or practice which the claimant can reasonably expect to continue.

[27] From there, learned Queen's Counsel submitted that in the instant case the Applicant has not established that either the Commission or its representatives made any expressed promise or representation that the matters relating to game types and process, relied on by the Applicant, was a continuing policy of the Commission, to be applied to subsequent applicants indefinitely in the future. Queen's Counsel's position was this, even if those were the requirements to which the Applicant was subjected 20 years ago, that is not evidence of an express declaration by the Commission of a policy in perpetuity.

[28] Furthermore, it was argued, for a practice to amount to legitimate expectation, it must be settled, unambiguous, widespread and well-recognized. ***R (on the application of Davies and Another) v The Commissioners for Her Majesty's Revenue and Customs*** [2011] UKSC 47 was cited as the underpinning of this proposition. Queen's Counsel submitted that when this definition is applied, the Applicant has failed to establish that it is entitled to the legitimate expectation for which it contends.

[29] Learned Queen's Counsel for the Respondent sought to destroy the evidential basis for the Applicant's claim to legitimate expectation by reference to the licences issued in the interval between the Applicant's and the proposed licence to Mahoe Gaming

& Entertainment Limited. In 2001, 2006, 2008 and 2011, licences were issued to Telefun International Limited, Best Promotions Limited, Bingo Investments Limited and Goodwill Gaming respectively. Entities one and two are not operational. Bingo Promotions Limited is controlled by the Applicant. According to Vitus Evans, these licences were granted without requiring formal surveys, studies or investigations. Neither did the Respondent impose a condition preventing these licensees from promoting games similar to the games of the existing licensee. Contrary to contention of the Applicant, Vitus Evans deponed that these licensees were entitled to offer any lottery type games as approved by the Respondent from time to time. Specifically, they were not barred from introducing games similar to those of any incumbent operator in the lottery market. Queen's Counsel advanced that the Applicant's assertion to the contrary lacks foundation.

[30] Learned Queen's Counsel went on to observe that in relation to these licences Prime Sport (the Applicant) does not assert that they were occasioned by surveys, investigation or study. Neither is Prime Sport asserting that there was publicity or advertisement prior to their grant. Accordingly, it was submitted, the evidence does not in fact support any contention that the policies contended for by Prime Sport were in fact applied in relation to these licences. In any event, Goodwill Gaming was granted a licence in 2011. Prime Sports admits that the policies for which it contends were not applied to the licence granted to Goodwill Gaming.

[31] The submission continued, in so far as the Respondent's policy of allowing rival entities to conduct similar lottery games goes, this was set out in a letter dated 18 February 2020 to the Applicant. In that letter the Respondent made clear its preference for competition and to permit rival entities to offer similar lottery games. The upshot of this is that the alleged policies were not well-established or well recognized or widespread or unambiguous.

[32] Learned Queen's Counsel Mr Braham submitted that even if the Applicant establishes the existence of a promise or representation, the argument on legitimate expectation ought to fail for the following additional reasons. Firstly, the Applicant has failed to establish that it relied on the alleged representation to its detriment. ***Gokool and***

others v Permanent Secretary of the Ministry of Health and Quality of Life [2008] UKPC 54 para 21 was cited in support of this proposition.

[33] Secondly, for the Commission (the Respondent) by legitimate expectation to estop itself from granting licences for certain specific lottery games is to prevent the Commission from carrying out its statutory mandate. Similarly, to restrict the Commission to one procedure (that for which the Applicant contends) in the consideration of applications for lottery licences, would fetter the Commission in the carrying out of its duties. (**Michael Fordham *Judicial Review Handbook*** 6th ed para 41.1.12 at p 461-2 was relied on)

Issues for determination

[34] The first issue which rises 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 its 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?

Issue #1: Is the application for leave to apply for judicial review time barred?

[35] Applications for leave to apply for judicial review fall under Part 56 of the ***Civil Procedure Rules 2002***. I will therefore quote *in extenso* r. 56.6 which is sub-headed "Delay":

> *(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.*
>
> *(2) However the court may extend the time if good reason for doing so is shown.*
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*

(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.

(5) When considering whether to refuse to leave grant or refuse relief because of delay the judge must consider whether the granting of leave or relief would be likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration.

[36] Learned Queen's Counsel for the Respondent submitted that there were three issues for the court's consideration on the question of delay. The first issue is whether the application was made promptly. Queen's Counsel argued that the application for leave to apply for judicial review was not made promptly. Prompt filing of the application is the principal consideration in deciding whether the application is characterized by delay. This stricture is amply demonstrated by the approach of the court is deeming some applications filed within the three months as falling short of the prompt threshold and consequently guilty of delay. These submissions were said to rest on the decision of ***Randean Raymond v The Principal Ruel Reid and the Board of Management of Jamaica College*** [2015] JMCA Civ 59. F Williams JA (Ag) was quoted as saying, at para [37]:

> *"Additionally, where the question of delay is concerned, there have been cases in which applications were dismissed for reason of delay even where the applications were made within the period limited by the rules for making such applications. One such case is that of* ***Andrew Finn-Kelscey v Milton Keynes Council & MK windfarms Limited*** *[2008] EWCA Civ 1067, in which Lord Justice Keene (with whom the other members of the Court of Appeal agreed), considered the provision – CPR 54.5 (1) – in the English rules (which is in pari material with rule 56.6 (1) of the CPR – the Jamaican provision). Keene LJ observed as follows at paragraph 21 of the judgment:*
>
> > *"As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraphs (a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see* ***R v Independent Television Commission, ex parte TV Northern Ireland Limited [1996] J.R. 60, [1991] TLR 606 and R v Cotswold District Council, ex parte Barrington Parish Council*** *[1997] 75 P. and C.R. 515"*

[37] The respondent's position was that the application was filed in excess of three months and that the Applicant is guilty of delay spanning at least nine (9) years. This contention, in the Respondent's submissions, is based on the grounds of the application that there are problems in the lotteries market and that the Applicant has been trying to engage the Respondent on the problems since 2011 when it granted a licence to Goodwill Gaming to operate a lottery; notwithstanding, the Respondent is now considering a third 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.

[38] In the view of the Respondent, it is clear that the Applicant is dissatisfied with the policies of the Respondent or lack thereof. Paragraph 13 of the Amended Application for Court Orders provides the answer to the important question of what is the focus of the challenge. That is, the Applicant has been trying to engage the Respondent on the problems since 2011 when it granted a licence to Goodwill Gaming to operate lottery games in Jamaica.

[39] The Respondent accused the Applicant of committing a volte-face when Ian Levy later claimed not to know when the licences, ad interim, were being processed, either when they were granted or issued. Emphasis was laid on Ian Levy's affidavit evidence that the Applicant's claim that there should be consultation neither relates to nor is limited by considerations of whether to grant or refuse a lottery licence. The claim relates to the change in policy commitment to transparency and competition in the licensing process from 2001. The Respondent, it was said "changed this policy without consulting the Applicant or any member of the public".

[40] The Respondent therefore urged that the Applicant's delay ought to be reckoned from the date of the decision which deviates from the policy which the Applicant says existed. Time therefore started to run from the date of the decision and not when the Applicant became aware of the decision. The following three cases were cited in support of this submission.

[41] Sykes J (as he then was) considered the question of delay in the context of an application to set aside the *ex parte* grant of leave to apply for judicial review in ***City of Kingston Co-operative Credit Union Limited v Registrar of Co-operatives Societies and Friendly Societies and Yvette Reid (unreported), Jamaica Supreme ++Court*** 2010 HCV 2004 judgment delivered 8 October 2010 (***COK v Registrar CSFS***). The brief facts, in so far as are relevant for present purposes, are that Yvette Reid, a member of COK, used a registered title to secure the grant of two loans from COK. The title was never returned notwithstanding the amortization of the loans. The matter was referred to arbitration. The Registrar twice ruled in favour of Yvette Reid. The first decision was litigated all the way to the Court of Appeal. The lower court's ruling which overturned the decision of the Registrar was upheld and the matter remitted to the Registrar.

[42] It was this second decision of the Registrar in favour of Yvette Reid and for which leave to apply for judicial review was granted, that came before Sykes J. The tribunal's award was handed down on 21 January 2010. COK contended that it received notice of the award on 8 February 2010 and, by inadvertence, only forwarded it to their attorneys-at-law by letter dated 25 February 2010, which was received on 1 March 2010. From the submissions, the application for leave was made on 26 April 2010.

[43] Before Sykes J, the grant of leave was challenged on two bases: the application was out of time and there ought to have been an application for extension of time within which to apply for leave. The submissions were that the application is to be made promptly; the three-months period is really an outer boundary and not the time limit for applications for leave to apply for judicial review. For COK it was submitted that time began to run on 8 February 2010 and so there was no need to apply for an extension of time. The court was urged to say that the expression "from the date when grounds for the application first arose" in r. 56 (1) means the date on which the decision was known to the affected party.

[44] That argument was rejected by Sykes J. He held, at para [18], that "the date of the decision (and not the date the applicant acquires subjective or actual knowledge of the decision) is the date from which time begins to run against the applicant". Accordingly,

time began to run from 21 January 2010 and not 8 February 2010. The applicant's recourse was to apply for an extension of time. In the words of the learned judge, "[t]he solution for the out-of-time applicant is to apply for an extension of time to apply for judicial review", at para [26]. He opined, at para [28], "[i]f the applicant for leave makes a formidable case that the application could not be made before the time it was, then he is well on his way to persuade the court to exercise its discretion in his favour".

[45] Also cited for my consideration was the case of ***George Anthony Levy v The General Legal Council*** [2013] JMSC Civ 1 (***Levy v GLC***), a decision of McDonald Bishop J (as she then was). That was an application for extension of time within which to file an application for judicial review. Briefly, the application concerned an extant but stayed disciplinary hearing before the General Legal Council in pursuance of a complaint by one of the applicant's clients. The hearing commenced in his absence and, after a couple of hearing dates, was adjourned for continuation on 10 May 2008.

[46] On that date the applicant appeared before the panel with his counsel. The applicant's counsel objected to the continuation of the hearing before the panel as constituted on the ground of bias and also raised the issue of abuse of process in relation to concurrent proceedings against the applicant by the complainant/client. During the response of counsel for the complainant the applicant and his counsel walked out of the hearing. There were several adjournments and, ad interim, a stay of the disciplinary proceedings was granted pending the outcome of the challenges filed in the Supreme Court. The application challenged the decision on 10 May 2008 to proceed with the hearing as also subsequent decisions to proceed with the matter in light of the irregularities highlighted on 10 May 2008. The application was made on 29 January 2010.

[47] Although McDonald Bishop found that there was no decision which was amenable to judicial review, she went on to consider the question of delay, using the 10 May 2008 as the operative date. The learned judge accepted as settled law that the timeline within which the application is to be made has as its originating point the date of the judgment, order or decision and not the date when the applicant became aware of the decision. The decision in ***COK v Registrar CSFS***, *supra*, was cited as authority. That court did not

accept as plausible, the applicant's contention that there was a belief, or misapprehension, that each time the GLC set the matter for hearing that constituted a decision for the purpose of the application, so that, the application was filed within the three months.

[48] Her Ladyship also considered the question of whether there was good reason for the application to be allowed, having been filed out of time. She observed that public law remedies must be pursued in a timeous manner, citing ***Civil Procedure, 2010, Volume 1,*** at para 54.5.1, as well as the oft-cited dictum of Lord Diplock in ***O'Reilly v Mackman*** [1983] 2 AC 237, at 280-281. In the former, it was said that the courts have always required strict adherence to time limits laid down by the rules concerning judicial review, as opposed to the position in private law. The effect of Lord Diplock's dictum is that it is inimical to good administration to have the public authorities and third parties kept in suspense longer than is reasonably necessary. This was how Lord Diplock expressed himself:

> *"The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision".*

[49] On the question of good reason for the delay, I quote from the judgment McDonald Bishop J, at para [61]:

> *"The authorities have established that the critical consideration on this issue is not so much whether there is good reason for the delay but rather whether there is good reason for the time to be extended. In R.* ***(Young) v Oxford City Council*** *[2002] EWCA Civil 240, June 27, 2001, the court indicated that good reason to extend time is not synonymous with good reason for the delay. It is established that leave may be refused even where the delay is "perfectly explicable". The question as to whether there is a good reason is also an objective one".*

The court went on to find that it was neither good nor sufficient simply say that he had met the three months' stipulation based on a belief that the operative date was when the matter was last fixed for hearing.

[50] Dewayne ***Thomas v Commissioner of Police*** [2015] JMSC Civ.26 was also a case in which there was an application to extend time within which to make an application for leave to apply for judicial review. Both the application for an extension of time and the application to apply for leave to apply for judicial review were filed on 15 August 2014. The applicant sought to impugn the 2010 decision of the Commissioner of Police, dismissing him from the Jamaica Constabulary Force.

[51] For Shelly Williams J, the starting point was that oft-quoted dictum of Lord Diplock in ***O'Reilly v Mackman***, *supra*, cited by McDonald Bishop J in ***Levy v GLC***, *supra.* In Her Ladyship's view, this case emphasises that undue delay may yet be found even where the application was made within three months. After citing r.56.6 (1) she opined that time periods should be strictly adhered to, since even an application filed within a three-month period may still be deemed delayed. The decision of Sykes in ***COK v Registrar CSFS***, *supra*, was relied on to fix the relevant date of the decision as 4 March 2010.

[52] Shelly Williams J accepted and applied the test laid down in ***R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd*** All England official Transcript (1997-2008) when considering an application for extension of time. The three issue are:

> a. *"Is there a reasonable objective excuse for applying late?*
>
> b. *What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were not granted?*
>
> c. *In any event, does the public interest require that the application be permitted to proceed?"*

The conclusion was that the applicant, who sought to rely on his impecuniosity, had not placed before the court a reasonable objective excuse for the delay.

[53] Alternatively, it was submitted that the grant of the licence to Goodwill Gaming became a matter of public knowledge by way of publication in the print media. So that, in any event knowledge of the decision of the grant of the licence would have come to the

Applicant. At the very least, the Applicant would have known that the licence had not been the subject of public consultation.

[54] The second issue is whether there is a good reason for an extension of time. It was learned counsel's position that there is no checklist for determining what amounts to a good reason. The circumstances of the case are the collective arbiter of what amounts to good reason. ***Randean Raymond***, *supra*, at paragraph 55, was cited. The Applicant, however, has not given any evidence of a good reason to extend time, counsel concluded.

[55] Notwithstanding the absence of evidence of a good reason for the delay, the Respondent advanced two reasons for refusing an extension of time. Firstly, an extension of time would not be in the public interest as the Applicant's motivation is the retention of its market share whereas the Respondent has been promoting competition through its policy objectives. Secondly, an extension of time would be detrimental to good administration. The essence of the submission here was that the inordinate delay of nine (9) years, compounded with the time it would take to adjudicate on the present matter, would raise the question of detriment to good administration. In fine, to delay the grant of the licence until this matter is litigated would be inimical to good administration as good administration requires that matters are dealt with expeditiously.

Discussion and analysis

[56] It is perhaps too trite to bear repeating that an application for leave to apply for judicial review must be made promptly and, in any event within three months from the date when grounds for judicial review first arose (see r. 56.6 (1) extracted at paragraph [35]). Judicial review, it has been said, is the means by which judicial control is exercised over administrative action, per Lord Diplock in ***CCSU***, *supra*, at page 408. Lord Diplock went on to say that "the subject matter of every judicial review is a decision made by person (or body of persons) ... or else a refusal by him to make a decision".

[57] In seeking to answer the question of whether the application for leave to apply for judicial review was made promptly, the first subordinate issue to be settled is, what is the decision that is being challenged? If that question yields a reviewable answer then the

inquiry moves to the next question. The next subordinate question would be, when was the decision that is to be the subject of the review made? According to the learned authors of ***Judicial Review Principles and Procedures***, at paragraph 26.33, the date on which the grounds to make a claim first arise is usually the date on which the decision under challenge was taken.

[58] This was the view taken by Sykes J in ***COK v Registrar CSFS,*** *supra,* in rejecting the submission that the expression, "from the date when grounds for the application first arose" meant when the applicant first became aware of the decision. In point of fact, r. 56.6 (3) says explicitly that where certiorari is the object of the leave in respect of "any judgment, order, conviction or other proceeding", the date of the judgment, order, conviction or proceedings is the date when grounds for the application first arose. The ***CPR*** is therefore very clear concerning when grounds first arose in the case of a quashing order.

[59] Certiorari or a quashing order is, however, not the only remedy available by judicial review. The remedies of a prohibiting and mandatory orders are also available through judicial review. Rule 56.1 (3) is cited below:

> *"Judicial Review" includes the remedies (whether by way or writ or order) of –*
>
> *(a) certiorari, for quashing unlawful acts;*
>
> *(b) prohibition, for prohibiting unlawful acts; and*
>
> *(c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case".*

[60] This application does not seek the remedy of certiorari. The Applicant seeks orders under paragraphs (a) and (b); that is, for prohibiting and mandatory orders. And so I come to the first subordinate question, what is the decision that is being challenged? A reading of the grounds of the application makes it plain that this application is pre-emptive, telegraphed by the prohibiting orders being sought, in particular. What is being challenged is the policy of the Respondent in the grant of lottery licences.

[61] As I understand learned Queen's Counsel for the Respondent, the relevant date, or the date when grounds for review first arose ought properly to be the date when the policy the Applicant asserts to be extant, was first departed from. That date would be coterminous with the issue of the lottery licence to Goodwill Gaming in 2011. The Applicant's challenge by way of judicial review should therefore have been made timeously in relation to that date in 2011. To run the submission to its logical end, it would mean all subsequent expressions of the policy would remain beyond the reach of a challenge by judicial review.

[62] Queen's Counsel appearing for the Applicant contended that the application was made promptly. Meaning, the operative date ought to be the date of the interview with Clovis Metcalfe on NNN. However, she gave a subtle nod to the force in Mr Braham's argument that grounds for the application first arose in 2011 with the grant of the licence to Goodwill Gaming when she made the following submission.

[63] According to Mrs Gibson Henlin, in respect of the Respondent's statutory obligation, the present situation triggers a fresh exercise of the Respondent's discretion and execution of its duties. This, she countered, is quite unlike the cases being relied on by the Respondent. Learned Queen's Counsel submitted that the best analogy is the distinction between a continuing cause of action such as trespass and an act giving rise to a single breach in negligence or contract. In this case, as with trespass, there is a continuing statutory obligation on the Respondent as regards the exercise of its discretion or execution of its duty. Therefore, every exercise or attempted exercise of the Respondent's discretion or execution of its duty gives rise to a new right to require the Respondent to act in accordance with its statutory mandate or to invoke the court's jurisdiction if there is a failure to do so.

[64] While I agree with Mrs Gibson Henlin that the case at bar is distinguishable on its facts from those cited by Mr. Braham, they are relevant for the principle they established. I will demonstrate their relevance below. In both ***COK v Registrar CSFS*** and ***Thomas v Commissioner of Police*** there was a single identifiable decision which was challenged; while in ***Levy v GLC***, there was one 'decision' which was adjudged not to be a decision,

properly so called for the purposes of judicial review. None of those cases dealt with a challenge to a policy or practice.

[65] So then, none of the cases on delay cited by the Respondent were factually on point. On the other hand, Mrs Gibson Henlin's position was not supported by any authority. However, the following passage from ***Judicial Review Principles and Procedures***, at paragraph 26.44 is of some assistance. I quote:

> *"Where there is a free-standing challenge to a policy which is still in force, it is unlikely that the court will conclude that a challenge is out of time simply because the challenge was not brought promptly, or in any event within three months of the date on which the policy was introduced. In such cases, the court is likely to analyse the challenge as being a challenge to a continuing act rather than a challenge to a 'one-off' decision to introduce the policy".*

The situation described above is to be contrasted with a challenge to a particular decision which was taken pursuant to a particular policy. In this latter case the application must be made promptly, and in any event within the backstop three-month period (see paragraph 26.45 in ***Judicial Review Principles and Procedures***). The fact that the alleged unlawfulness arose out of an extant policy is unlikely to be of any relevance: ***R (H) v Essex County Council*** [2009] EWCA Civ 1504, [2010] FLR 1781.

[66] The court must of course be wary of any sleight of hand, designed to sidestep the problem of delay. In ***R v Inland Revenue Commissioners, ex parte Allen*** [1997] BTC 487, the applicant for judicial review structured his application to make it appear as a challenge to existing criminal proceedings. The proceedings were commenced on 7 June 1996, whereas the applicant had been aware of the decision to take criminal proceedings from 3 August 1995.

[67] I wish to make it clear that I do not accuse learned Queen's Counsel Mrs Gibson Henlin, who enjoys this court's respect and professional admiration, of sleight of hand. That said, I frankly admit that at first blush there was an intellectual appeal in her submissions on the question of delay. However, on closer analysis I am compelled to reject it. In my thinking, the analogy of a continuing cause of action may serve the

Applicant well only so far but no further. Beyond that, the Applicant will find itself in the perilous waters of delay. These are my reasons.

[68] The major premise of paragraph 26.44 in ***Judicial Review Principles and Procedure*** is the subsistence of the policy at the time the application for judicial review is made. So that, the inference is, once the policy ends the normal rules concerning when an application for judicial review is to be made would apply. There are two timelines in the present application. The first runs from 2001 (the year the applicant's licence was issued) to 2011 (the year the Goodwill Gaming licence was granted). The second timeline runs from 2011 (after the issue of the Goodwill Gaming licence) to 3 April 2020 (when this application was filed).

[69] In applying the learning from ***Judicial Review Principles and Procedure***, the Applicant could have brought its challenge when any one of the grant of licences to entities other than itself was made, certainly insofar as its complaints of lack of study and absence of transparency are concerned. That is so as between 2001 and 2008 the Respondent's policy or practice was the consistent grant of licences without first commissioning a study or engaging in any publicity of the applications. As I will further explain below, in 2011 the Respondent effectively ended its policy in all the areas about which the Applicant complains. A new policy in the grant of lottery licences was inaugurated by the grant to Goodwill Gaming. As the new policy was being inaugurated, the old was being ushered out. Although only one licence was issued, the policy remained in place from 2011 to the present challenge. It is this new policy that the Respondent seeks to apply to Mahoe Gaming &Entertainment Limited.

[70] With a new policy in place, the Applicant's challenge can no longer be seen as one of an existing policy. If that is correct, then the time for the Applicant's application for leave to apply for judicial review ought properly to originate in 2011 when the new policy came into being. The effect of accepting that timeline is that the application for leave was filed nine years after grounds to apply first arose.

[71] This is where the relevance of the cases cited by learned Queen's Counsel Mr Braham may be shown. In its evidence, the Applicant said that it was unaware of when the licence to Goodwill Gaming was granted. Indeed, in argument before me doubt was cast on actual knowledge of the grant of a licence to Goodwill Gaming. Is this purported absence of knowledge of the time of the grant relevant? It is now settled that for the purposes of establishing the timeline to make an application for judicial review, time starts to run from the date of the decision, not when the applicant became aware of the decision (see ***COK v Registrar CSFS***, *supra*). ***COK v Registrar CSFS*** was applied in ***Levy v GLC***.

[72] So then, was the application made promptly? The resounding answer to that question must be in the negative. Mr Ian Levy in his affidavit in support of the application swore that although this is an ongoing issue, matters only came to a head when it became apparent that the Respondent intended to proceed with the issue of a licence to Mahoe Gaming. That disclosure was made by the Respondent's Chairman, Clovis Metcalfe, in an interview on NNN on 2 April 2020. Mr Levy's affidavit in support, as well as the Notice of Application for Court Orders was filed on 3 April 2020. Viewed as an ongoing issue, this would have been a superlative example of promptitude. However, with the timelines established it becomes the superlative example of a lack of promptitude.

[73] Under the ***CPR***, the court may extend time if good reason for doing so is shown (r.56.6 (2)). There was no formal application for an extension of time within which to make the application for leave. Consequently, no reason has been advanced for the delay. An Applicant for leave to apply for judicial review who is guilty of undue delay is taken to know that a failure to provide an explanation for the delay puts the application in peril of summary dismissal: ***R v Criminal Injuries Board, ex p. A***. [1998] QB 659, at page 682. Be that as it may, I accept the guidance offered in ***Levy v GLC***, *supra*, quoted at paragraph [49] above. It was there said that the pivotal question is not whether there is a good reason for the delay but rather whether there is good reason for extending time.

[74] I have considered two possible reasons for extending time. The first is the disavowal of knowledge of when the BGLC granted the licence to Goodwill Gaming.

Ground 13 of the application makes it clear that the Applicant became aware of the grant of a licence to Goodwill Gaming in 2011, even if it did not know the exact date of the grant. It would therefore still have been dilatory in not making the application then. A delay of nine (9) years, however generously it is viewed, cannot be described as anything but inordinate. This protracted delay is reason enough not to extend time. In my view, the extension of time within which to apply in the face of such protracted delay would have to be counter-balanced by the presence of substantial merits.

[75] That takes me to my second point. Good reason for extending time for an application to apply for leave for judicial review may also be found in the strength of its merits. It is therefore axiomatic that the stronger the merits of a case, the more compelling it will be for a court to say there is good reason for extending time. The converse is also true. I have considered the application on its merits and have formed the view that it has failed the Sharma ***v Browne Antoine*** test of an arguable case with a realistic prospect of success. Accordingly, I would refuse leave. But I go on to consider the r. 56.6 (5).

[76] The Applicant addressed the question of delay in its evidence. In the 3rd Levy affidavit, he said he was advised and verily believed that no substantial hardship or prejudice will be caused to the rights of any person and neither will the grant of leave be detrimental to good administration if the court finds that there was delay but grants leave to apply for judicial review. How do those beliefs square with the evidence? The starting point is the rule itself.

[77] The court is required by r. 56.6 (5) to consider the questions of substantial hardship or substantial prejudice to personal rights or detriment to good administration when considering whether to grant or refuse leave. R. 56.6 (5) is set hereunder:

> *"When considering whether to refuse or grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –*
>
> *(a) cause substantial hardship to or substantial prejudice to the rights of any person; or*
>
> *(b) be detrimental to good administration".*

Some general observations. The requirements of the rule are disjunctive. Therefore, the court need not consider both (a) and (b) although it may do so, if the situation warrants: ***Randean Raymond v The Principal Ruel Reid and the Board of Management of Jamaica College*** [2015] JMCA Civ 59 at para [34]. Secondly, the importance of the leave requirement is always to be kept in mind. One of the protections offered to public bodies by the requirement to obtain leave to apply for judicial review is the filtering out of unmeritorious cases.

[78] According to the learned authors of ***De Smith's Judicial Review*** 6th edition, at para 18-053, courts have shied away from formulating any precise definition of what constitutes detriment to good administration. This reluctance is anchored in the infinite circumstances from which judicial review may arise, with varying need for finality. While a detriment to good administration may be self-evident in some cases, it may not be in others. A detriment to good administration is said to be inherent in a late challenge: ***R v Newbury District Council ex p Chieveley Parish Council*** (1988) 10 Admin LR 676. At the permission stage the view may be taken that it is self-evident that the delay has caused a detriment without requiring positive proof: ***De Smith's Judicial Review***, *supra*.

[79] In the instant case I would say that the delay of nine (9) years is presumptively detrimental to good administration. A decision, which the Applicant considers a breach of policy, was left to stand for that length of time. Interestingly, that decision in and of itself is not being challenged in this application. Never mind that it stands as the watershed of the Respondent's licensing policy. This late challenge which seeks to reset the clock on the BGLC's policy to a time before the grant and issue of the licence to Goodwill Gaming is likely to throw uncertainty upon the administration at the BGLC. Further, there is much force in the submission of Mr Braham that the inordinate delay raises the question of whether the delay, compounded by the time for adjudication, would be detrimental to good administration. I agree that it is.

[80] For this reason, also, I would refuse leave. But, as earlier indicated, I considered the application on its merits. That appears below.

Issue # 2: What is the statutory scheme by which the BGLC should abide when considering the grant of a lottery licence?

[81] I will now turn my attention to the second issue. What is the statutory scheme by which the BGLC should abide when considering the grant of a lottery licence? This question is raised by grounds 5, 6, 7, and 8 of the grounds upon which the application is made. While ground 7 intended to rely on section 5 (1) (c), it merely repeats ground 6. Collectively, as was submitted by Mrs Gibson Henlin, they touch and concern procedural fairness. I will first set out the grounds listed above before examining the relevant statutory provisions. The grounds are:

> *5. "The applicant has a right to be heard or consulted in relation to any change in policy or conditions for the grant of lottery licences".*
>
> *6. "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 organizations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island".*
>
> *7. "By section 5 (1) (c) of the Betting Gaming and Lotteries Act, the Respondent is required or tasked with the duty to [make investigations and surveys for the purpose of obtaining information of use to it in the exercise of its functions]".*
>
> *8. "There are problems and/or issues associated with the operation of the lotteries market in Jamaica which affect the legitimate expectations, rights and interests of the Applicant".*

Applicant's submission on the BGLC's statutory mandate

[82] In the submission of Mrs Gibson Henlin, the process relates to the manner of exercising its discretion, and/or executing its duty in the carrying on of its functions under the **BGLA**. This regulatory framework raises issues relating to the ***Fair Competition Act***. She therefore commenced by looking at the regulatory framework within which the challenge is being made.

[83] Learned Queen's Counsel drew the court's attention to sections 2, 4, 5 (1) (a) and 5 (1) (c), 7, 9 (b), 10 (a) and 10 (c). She said it was against this background that the Applicant makes the application in relation to the process that the Respondent is required to follow and a policy relating to game types. Counsel urged that based on the natural and ordinary meaning of these provisions, the Applicant has an arguable case.

[84] The Respondent, she said, asserted that section 5 confers on it a discretion and not a duty. Any order on the application sought, it (the Respondent) argues, will be a fetter on that jurisdiction. In her submissions the **BGLA** is clear that functions equal powers and duties. This means, the submission ran, that the exercise of its powers is so closely connected to its duty that it cannot act without regard for its duties, for example, to consult. Additionally, the exercise of discretion cannot be so broadly stated. The exercise of the Respondent's discretion must have regard to the policy objectives of the **BGLA**. It was the Applicant's submission that the Respondent routinely acted in accordance with the **BGLA** by commissioning studies prior to approving new games or lotteries by applicants and confirmed it intended to conduct a study in relation to the facts of this matter, as late as 28 February 2020.

[85] The Applicant argued that section 5 speaks in mandatory terms. The section, learned counsel said, speaks to the general conduct of the Respondent in what it "shall" do having regard to the problems that it has identified in relation to the issuing of licences or in relation to the conduct of lottery and whether it will enure to the benefit of the industry or enhance consumers' choice. The Respondent, the Applicant insisted, must act in consultation with such organizations as it considers appropriate. In this case, an appropriate organization would be the Fair Trading Commission. These submissions were grounded in a number of paragraphs in Helen Fenwick ***Judicial Review*** 5th ed.

[86] On the question of discretion, the Applicant placed great stress on paragraphs 7.10.1 and 7.10.2. in of Judicial Review as answers to the Respondent's position that it was open to it to decide whether to conduct a survey. The Respondent, it was submitted, has decidedly set its face against the inquiries and requests of the Applicant particularly when one looks at the request to consult and/or make investigations, studies or surveys

to adhere to policy that it had made or implemented in the past or explaining if, when or why the policy has changed.

[87] In these circumstances, the submission continued, the Respondent cannot allege that the Applicant is a monopolist because it is the only player in the market. This means that the court should consider the basis on which the Respondent is required to make a decision to issue a new licence, taking into account the fact that there is no evidence of what Goodwill was authorised to offer, Goodwill is not operating and the Respondent's concern about the Applicant's dominance in the lottery market. The BGLC has the option of considering the non-operational status of that licensee and its impact on the market, including whether to suspend or revoke that licence in lieu of issuing a third licence. There is also its duty under section 5 to examine, investigate or consult with appropriate organizations. The Respondent, Queens Counsel said, cannot throw around words such as monopoly, competition and consumer choice without acknowledging that these conclusions require consultation, investigation and analysis as contemplated by the policy objectives of the **BGLA** and now being requested by the Applicant.

Respondent's submissions on the BGLC's statutory mandate

[88] Learned Queen's Counsel Mr Braham submitted that section 5 does not apply to applications for lottery licences. Section 5 (1) authorises the BGLC to regulate and control betting and gaming. If section 5 applies to lottery licences, a study would have to be done in respect of all other licences issued by the Commission. In his view, on the face of the provision, it's a reference to persons who are already licensed. Section 5 (1) (a) lends support to this view, he argued. Section 5 (1) (c) is to be limited to the purposes set out in the section, not to the licensing process.

[89] Turning to section 7 (2) (b), he observed that it makes reference to an investigation. This, he said, was the only reference in relation to an application. This investigation, he submitted, is to determine whether an applicant is a fit and proper person. There is no provision in this section for the type of study or survey being urged by the Applicant. In Queen's Counsel's submission, section 8 makes it abundantly clear that section 7 is the

appropriate section for consideration. Section 9 also affirms that the application is to be considered under section 7. In Queen's Counsel's view, the investigation mentioned in section 10 refers to when the BGLC is exercising its powers. If the foregoing is correct, then it would be wrong for the Applicant to seek to compel or mandate the BGLC to commission or carry out any of the functions under section 5, for example to consult.

[90] The submission continued, even if section 5 is applicable, subsections (a) and (c) are discretionary, although the word "shall" is used. In his submission, the first part of section 5 is mandatory. However, subsections (a) and (c) are discretionary. If the Applicant is correct, then for every application for gaming, betting or lotteries, the BGLC would be obliged to undertake the study urged. This would result in an administrative impossibility and an interpretation which hobbles the BGLC would be an absurd interpretation.

[91] While section 5 (a) speaks of "problems", the evidence for the Applicant does not support the existence of any problems. In respect of section 5 (c), it was submitted that the evidence does not show that the BGLC lacked any information in respect of the things listed in the section.

Discussion and analysis

The statutory background: general/survey

[92] The Betting, Gaming and Lotteries Commission (BGLC) is a body corporate which was established under section 4 of the ***BGLA***. As a body corporate, it is vested with the right to regulate its own procedure and business (see ***Interpretation Act*** section 28 (1) (a) (v). Notwithstanding its corporate character, the Minister has statutory authority to give policy directions to the BGLC of a general character, after consultation with the Chairman of the BGLC. These general policy directions must relate to policy to be followed in the exercise or discharge of its functions in relation to any matter appearing to have a public interest component (**BGLA** s. 6).

[93] The functions of the BGLC are set out under section 5 of the **BGLA**. The section is reproduced below:

> *5. "(1) The functions of the Commission shall be to regulate and control the operation of betting and gaming and the conduct of lotteries in the Island; and to carry out such other functions as are assigned to it by or in pursuance of the provisions of this Act or any other enactment, and, in particular, but without prejudice to the generality of the foregoing –*
>
> *(a) to examine, in consultation with such organizations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island.*
>
> *(b) to furnish information and advice to and to make recommendations to the Minister with respect to the exercise by him of his functions under Part IV, Part V and Part VI;*
>
> *(c) to make investigations and surveys for the purpose of obtaining information of use to it in the exercise of its functions.*
>
> *(2) The Commission shall, subject to the provisions of this Act, have power to do all such things as are in its opinion necessary for, or conducive to, the proper discharge of its functions".*

[94] Section 7 deals with the licensing of persons and premises. It sets out the steps the Commission is to take in each case. In relation to the former, the Commission "shall satisfy itself that the applicant is a fit and proper person". To that end, the Commission "may, in order to satisfy itself that the application is in order, make or cause to be made such investigations as it considers to be necessary in connection with the application" (see s. 7(1), 7(2)). Subsection 7(2B) then lists a number of criteria of a "fit and proper person". Subsection 7 (2A) addresses the question of recouping the Commission's expenses for the conduct of an investigation.

[95] Subsections 7(3), 7(4) and 7(5) deal with an application for a licence, permit, approval or authority for any premises. If satisfied that the application is in order, the Commission shall direct an authorised person to visit and inspect the premises concerned and inform the applicant of its direction (subsection 3). The Commission is required to furnish every authorized person with a certificate (section 8D). Subsection (4) says what the authorized person may do for the purpose of carrying out the inspection and makes it mandatory for him to produce his certificate of appointment to any person on the premises

who reasonably requires him to do so. Under subsection (5) the authorized person shall make a written report to the Commission upon completion of his inspection.

[96] Under section 8(1) the Commission may, in respect of any application under section 7, "grant or refuse the licence, permit, approval or authority" if satisfied of the desirability so to do "(and subject to that section)". Subsection 8(2) speaks to the form, content/conditions and life of the licence, permit, approval or authority. Section 8A (1) requires the conspicuous placement the of current licence, permit, approval or authority as regards any premises. Section 8A (2) makes it an offence not to have the licence, permit, approval or authority conspicuously displayed. Section 8B authorizes any authorized person or constable to enter any premises licensed by the Commission at all reasonable times to ascertain whether there is compliance with the **BGLA** and makes the obstruction of the authorized person or constable an offence. Under section 8C the holder of a licence, permit, approval or authority, when required to do so, must produce his licence, permit, approval or authority upon pain of committing an offence for his refusal or unreasonable failure so to do. Sections 8E and 8F concern the management of premises licensed or otherwise approved by the Commission.

[97] Section 9 is in the following terms:

> *The Commission may –*
>
> *(a) refuse to grant a licence, permit, approval or authority if the applicant does not satisfy the criteria specified in section 7(2A); or*
>
> *(b) suspend, vary or revoke any licence permit, approval or authority after holding an investigation under section 10.*

As was pointed out by Queen's Counsel Mr Braham, the reference to section 7 (2A) appears to be a drafting error as that section does not speak to any criteria of an applicant for a licence, permit, approval or authority. The correct reference ought to have been to section 7 (2) (a), which list one criterion, namely "fit and proper person".

[98] Section 10 sets up what was correctly characterized as quasi-judicial investigation regime. The person or persons holding the investigation is styled as "the tribunal" and endowed with the powers of a Resident Magistrate (now Parish Court Judge) to summon

witnesses, require the production of documents and take evidence on oath. The persons summoned to appear or produce books or documents are compellable to do so, save where the issue of self-incrimination arises. A failure to answer questions or produce the required book or document, for reasons other than self-incrimination exposes the person to summary conviction before a Resident Magistrate.

[99] I agree with the submission of Mr Braham that the investigation contemplated here appears to be concerned with when the Commission is exercising its powers. More particularly, the investigation appears to bear down on suspected breaches of the conditions attaching to licences, permits, approval or authority and breaches of its regulations. It is clear that the investigation contemplated is not that which is envisaged under section 7 (2) (b). The investigation there concerns the proposed person or premises to receive a licence, permit, approval or authority.

[100] Section 11 deals with the power of the Commission to delegate its functions while section 12 provides for an appeal in relation to the discharge of those delegated functions. Section 13 speaks to the finality of the Commission's decision on appeal. These sections do not impact the licensing or to use a more omnibus phrase, the permission function of the Commission.

[101] Section 14 creates a version of the traffic ticketing system for offences specified in the Seventh Schedule. Under this section the BGLC is empowered to issue a notice to the person whom it has reason to believe has committed the Scheduled offence. The person is given the option of paying a fixed penaly within a specified time. Failure to pay the fixed penalty will result in the institution of criminal proceedings after the expiry of the time limited for payment at the Collector of Taxes.

[102] Section 15 creates three offences in relation to the grant or renewal of any licence, permit, approval or authority. It is an offence to obtain the grant or renewal of any licence, permit, approval or authority under section 8 by wilful misrepresentation (subs.(a)). Either the making of a false or misleading statement or the wilful or reckless giving of any false or misleading information in relation to any application for the grant or renewal is made

an offence (subsection (b)). Subsection (c) makes it an offence for every person who refuses to permit an authorized person to enter or inspect the premises or obstructs him in the execution of his duties in relation to subsections (3) and (4) of section 7. That concludes my examination of Part II of the **BGLA**.

[103] Part III of the BGLA deals with matters concerning betting and bookmaking. Sections 16 through 27 appear under this Part. Matters such as restriction on the use of premises for betting transactions, pool betting, bookmaker's permit including special provisions for bookmaker's and betting agency permit, the licensing and management of betting offices are here addressed. Section 8 is not specifically mentioned in relation to the consideration of a betting office licences and betting agency permits. However, the relevant provisions of Part II, under which section 8 falls, shall have effect for the purpose of betting office licences and betting agency permits (see section 21 (4)).

[104] Part IV (sections 28-30) speaks to contributions by bookmakers for the benefit of horse-racing. Part V looks at issues relating to pool betting duty and bet winnings tax (sections 31-37).

[105] Part VI is dedicated to gaming. Unlawful gaming is defined (section 38). Club exemptions are addressed for members and their bona fide guests (section 40). The operation of gaming machines is dealt with in sections 44A, 44B, 44C, 44D, 44E, 44F, 45, 46, 46A and 46B. Every person desiring to operate a gaming machine is required to have a licence under section 44A (1). That licence is, however, granted in accordance with section 8. If the licence is granted, the Commission must issue the licensee with an identification disc in respect of each gaming machine under the licence (section 44D). If the Commission decides not to grant the licence, it must advise the applicant in writing and bring to the applicant's attention his right of appeal under section 44B. Section 44E empowers the Commission to grant a licence to operate gaming machines on prescribed premise licensed under the ***Tourist Board Act***. It is assumed that section 44A (1) would apply as to licence under section 44E.

[106] Section 46B addresses the licensing of a gaming lounge. The operator of a gaming lounge which existed prior to 2010 may apply to the Commission, no later than 31 March 2019, for a licence to increase its number of gaming machines to a maximum of 225 (see subsections (1) and (2)). The Commission considers the licence in accordance with section 8. There is no reason to suppose that licences to operate gaming lounges which came into existence after 2010, would be considered under any section other than section 8.

[107] The subject of lotteries is dealt with under Part VII of the **BGLA**. The conduct of lotteries in Jamaica is unlawful, save under the provisions of the **BGLA** (section 47). Therefore, all activities in connection with the promotion or proposed promotion of lotteries are made offences under the Act (section 48). The lawful way to conduct lotteries in Jamaica is therefore under licences issued by the Commission. The Commission, in accordance with Part II, may grant a licence to any person to promote a lottery according to the terms and conditions of the licence (section 49 (1)).

[108] There are three exceptions to the requirement to be licensed. The first is where the lottery is promoted as an incident of entertainment in which all the proceeds, less named expenses, are devoted to purposes other than private gain (see section 50). The second exception is where three or more persons organize a lottery for the purpose of raising funds for any religious, charitable or educational purpose, or the promotion of athletic sports or games or cultural activities or the welfare of the community. In all these cases ministerial approval is needed (see section 51). The third exception is a private lottery. That is, a lottery in Jamaica which is promoted for either the members of a society that is not established and conducted with gaming, betting or lotteries or persons who all work on the same premises. In either case, all the sale of tickets or chances must be confined to the group. Similar conditions apply here as with the second exception (see section 54).

[109] The premises to be used by the lottery promoter as a regional office or head office must also be the subject of the grant of a licence, described as a "lottery prescribed premises licence". This lottery prescribed premises licence is granted under Part II of the

Act (see section 49B (1)). Furthermore, all media (that is, any premises or other type of location or conveyance) used for the purposes of receiving or negotiating bets by a licensed lottery agent must be licensed under Part II (see section 49C (1)).

[110] The Commission is endowed with the statutory authority to make regulations, with the Minister's approval, for the better carrying out of the objects and purposes of the **BGLA**. In particular, among other things, it may make regulations prescribing the form and manner in which applications shall be made for any permit or licence, as well as the forms of such permits and licences (see section 65 (1) (a)).

[111] So then, the ***Betting, Gaming and Lotteries Act*** is legislation that is designed to make lawful, betting, gaming and lotteries activities which would otherwise be unlawful. The Parliament accomplishes this aim of legitimacy by a system of State permission, to employ an omnibus phrase for licence, permit, approval or authority. The intention of Parliament appears to be to accommodate betting, gaming and lotteries within the law in controlled circumstances. So that, by the criteria which go into the profile of a fit and proper person, Parliament was at pains to demonstrate that central to the licensing regime is the insulation of the betting, gaming and lotteries from persons of ill-repute, whether personally or by association. The law therefore requires that both prospective persons and places are investigated as part of this blanket of righteousness, which is its obvious intention to cast upon the players and by extension, the conduct of lotteries.

[112] In so far as operation of lotteries is concerned, the objective the BGLA is intended to achieve is the promotion of a sanitized lottery market. To achieve this objective, not only is there antecedent vetting of applicants and proposed premises or medium for the conduct of lotteries, there are facilities in place to ensure that once admitted, operators continue their walk along a straight and narrow road. To this end, the BGLC, the sector gatekeeper and watchdog, is endowed with powers to conduct quasi-judicial hearings, exercising the powers of a Parish Court Judge to call for documents and examine witnesses.

[113] In this application for leave to apply for judicial review, there is dispute concerning which provisions of the **BGLA** should guide the BGLC in its consideration of a grant of a lottery licence. I will now set out the principles by which I will be guided in determining this issue.

[114] What was described as a reasonably brief and accurate statement of the rules of English statutory interpretation appears in ***Cross Statutory Interpretation*** 3rd edition at page 49. I quote the first four of the five rules:

> 1. *"The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to the context.*
>
> 2. *If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in a secondary meaning which they are capable of bearing.*
>
> 3. *The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.*
>
> 4. *In applying the above rules the judge may resort to aids to construction and presumptions ..."*

[115] Rules 1 and 2 are perspicuously encapsulated in the speech of Lord Simon of ***Glaisdale in Maunsell v Olins*** [1975] AC 373, at page 391:

> *" in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art)".*

[116] The first rule therefore enjoins the court to ascertain the grammatical and ordinary meaning of the provisions in dispute, within the context of the legislation as a whole. This contextual approach requires the court to have regard to the purpose of the provision. It has been said that:

> *"[t]he purpose of a provision is the objective it is intended to achieve, while its meaning governs its application to the specific circumstances of individual cases". (See* **Principles of Legislative and Regulatory Drafting** *Ian McLeod at page16)*

Accordingly:

> *"[t]he purposive approach to interpretation, therefore, requires that regard must be had to both the purpose behind the words and the meaning of the words, with the relationship between the two being that the purpose may inform (but not supplant) the meaning". (***Principles of Legislative and Regulatory Drafting***, supra, page 16)*

[117] A close reading of the ***BGLA*** makes it clear that all grants or refusals of applications for licences, permits, approvals or authority are made under section 8. This point may be reinforced by a consideration of section 15. Section 15 (a) makes it an offence to obtain the grant or renewal of any licence, permit, approval or authority from the Commission under section 8 by wilful misrepresentation. It is therefore clear from the legislative scheme that the grant (including renewal) or refusal of any licence, permit, approval or authority is made under section 8.

[118] Section 8, however, is not a free standing section, its operation is made subject to section 7. Section 7 appears to be of general relevance to applications for all licences, permits, approvals or authority. That conclusion is based on the grammatical and ordinary meaning of section 7 (1) where it says "[a] person requiring a licence, permit, approval or authority under this Act shall make an application to the Commission...". Therefore, the expression "[t]he Commission may in respect of any application under section 7" which appears in section 8, is understood to mean that all applications for whatever licence, permit, approval or authority must be made according to the procedure laid down under section 7.

[119] One point that may be disposed of at this juncture is the draftsman's inconsistent references to the licencing regime. For example, whereas for betting office licences and betting agency permits "Part II shall have effect" (section 21 (4)), a gaming machine licence is granted "in accordance with section 8" (section 44A (2)). At first blush, the impression may be given that more is required of the Commission when the usage is "Part II" than when the language is confined to "section 8".

[120] The first point to note is that both sections appear under Part II. Secondly, section 8 refers to applications made under section 7. Thirdly, the satisfaction of the Commission under section 8 that it is desirable to grant the licence, permit, approval or authority is made subject to section 7. Therefore, it seems logical to conclude that a reference to in "accordance with Part II" is synonymous with "in accordance with section 8".

[121] The exception to the synonymity of the phrases is the licence to an operator of a gaming lounge which existed prior to 2010, to increase the number of gaming machines. The distinction is explained by two facts. This gaming lounge operator would be an existing licensee and the application would have been made under section 44B (1) and not section 7. Therefore, there be no need to subject that application to the strictures of section 7, which, presumably, he would have endured initially.

[122] If that is correct, then this means the Commission is also constrained to consider all applications (barring the gaming lounge exception) for licence, permit, approval or authority under section 7, whichever phrase is used, and make the grant or refusal, as the case might be, under section 8. More to the issue at hand, where it says in section 49 (1) that the "Commission in accordance with Part II may grant a licence to any person to promote a lottery", it is a reference to both sections 7 and 8.

[123] It is perhaps convenient that I set out the procedural parts of section 7 at this time. The section reads:

> *"7. (1) A person requiring a licence, permit, approval or authority under this Act shall make an application to the Commission in writing in the prescribed form and manner, which shall be accompanied by the prescribed fee.*

(2) Where the Commission receives an application pursuant to subsection (1), the Commission –

(a) shall satisfy itself that the applicant is a fit and proper person having regards to subsection (2A); and

(b) may, in order to satisfy itself that the application is in order, make or cause to be made such investigations as it considers necessary in connection with the application.

(2A) Where an investigation under subsection 2 is conducted by the Commission, the Commission may charge the applicant such fees as are necessary for the recovery of the expenditure, having regard to the nature and the effort required in its conduct.

(2B) ....

(3) As respects an application for a licence, permit, approval or authority for any premises, if the commission is satisfied that the application is in order, it shall –

(a) direct an authorized person to visit and inspect the premises in relation to which the application is made; and

(b) inform the applicant of such directions.

(4) Where directed under paragraph (a) of subsection (3) an authorized person may, for the purpose of carrying out an inspection under this section-

(a) enter upon and examine the premises in respect of which the application is made;

(b) put to any person upon the premises any question relating to the application if he reasonably believes that any information can be obtained which will assist the Commission in arriving at a decision as to whether or not a licence or approval should be granted; and ...

(5) Upon the completion of the inspection as aforesaid the authorized person shall make his report thereon in writing to the Commission".

[124] The question arises, what are the Commission's duties upon the receipt of an application for a licence, specifically, a licence to promote a lottery, within the meaning of section 49 (1)? Before examining the duties, it is perhaps instructive that it is recalled that the grant of a licence to promote a lottery necessarily contemplates also the grant of a lottery prescribed premises licence. The duties of the Commission may therefore be compartmentalised into what is required for the promoter and what is required for the

premises. It is unnecessary for present purposes to consider the lottery prescribed licence. Only the licence to promote a lottery will be considered.

[125] Before doing so, it is appropriate that I reflect on the distinction between a power and a duty. According to the ***Shorter Oxford Dictionary*** 6th edition, power is the "ability (to do), capacity (of doing, to do)". ***Black's Law Dictionary*** 8th edition, says power is "the legal right or authorization to act or not act". Duty, on the other hand, is "a legal obligation that is owed or due to another and that needs to be satisfied" (***Black's Law Dictionary*** 8 edition). The fourth meaning of the word duty supplied by the ***Shorter Oxford Dictionary*** 6th edition, appears to be most apt; duty is "the action or behaviour due by moral or legal obligation".

[126] The definitions above appear to reflect the thinking of the legislature as expressed in the ***Interpretation Act***. Section 34 (1) of the ***Interpretation Act*** reads:

> *"Where any Act confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires".*

It is against this background that the word "may" is said to be permissive or directory, whereas the word "shall" is said to be imperative or mandatory. So that, the general understanding is that where the draftsman uses the word "may", a power is intended to be conferred. On the other hand, where the draftsman's usage is "shall", a duty is imposed. (See also ***Judicial Review Principles and Procedure*** at paragraph 11.04)

[127] The authorities make it evident that the "may"/"shall" distinction is more nuanced than appears on the face of the argument. The learned authors of ***Judicial Review Principles and Procedure***, at paragraph 11.05 caution against an over reliance on the usual signification of the use of terms such as "may" and "shall". The correct approach they say is to construe the relevant provision in the light of the legislative scheme as a whole. As Cotton LJ said in ***Re Baker*** (1890) 44 Ch D 262, at page 270:

> *"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It can never mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a*

> *question in what cases, where a Judge has power given him by the word 'may', it becomes his duty to exercise it".*

The pivotal question then is not whether 'may' creates a power but rather, when is there a duty to exercise a power.

[128] Returning now to section 7 (2) (a), it says the Commission "shall' satisfy itself that the applicant is a fit and proper person having regards to subsection (2A). An excursus before going any further. The reference to subsection (2A) in section 7 (2) (a) is clearly an error, whether the draftsman's or printer's. Subsection (2A) merely empowers the BGLC to recoup expenditure associated with an investigation. On the other hand, subsection (2B) elaborates on the criteria of a fit and proper person. Therefore, the reference in subsection (2) (a) to subsection (2A) is understood to be a reference to subsection (2B).

[129] Having said that, I interpret subsection 7 (2) (a) to mean the Commission has a duty to satisfy itself that the applicant is a fit and proper person, having regards to section 7 (2B). In the discharge of its overarching or substantive duty, the BGLC has the power or duty to either itself make investigations, or cause investigations to be made in connection with the application (subsection (2) (b)). The first point to note is that the word "and" appears at the end of subsection (2) (a), signifying that the subsections are to be read conjunctively and not disjunctively.

[130] Subsection 7 (2) (b) is introduced by the term 'may' in contradistinction to 'shall' in subsection 7 (2) (a). It is patent that the draftsman wished to convey a different meaning in so far as the licencing regime is concerned. It seems clear that the intention is to empower the Commission to effectuate its duty to satisfy itself that the applicant is a fit and proper person. I would therefore conclude that subsection 7 (2) (b) bestows a power of investigation upon the Commission. This, I think, is in keeping with the underlying legislative policy, reading the statute as a whole. In the vein of the legislative policy, I would hold also that the Commission has a duty to exercise the power to investigate the applicant when considering an application for a licence to promote a lottery.

[131] A perusal of section 7 (2B) leads inexorably to the view that the process leading to the conclusion that an applicant is a fit and proper person is as intensive as it is extensive, invasive and exhaustive. Subsection 7 (2B) is quoted below to demonstrate the point:

> *"For the purposes of this section, a person is a fit and proper person if he is a person –*
>
> *(a) who, whether in Jamaica or elsewhere –*
>
> *(i) has not been convicted of an offence involving dishonesty or moral turpitude; or*
>
> *(ii) is an undischarged bankrupt;*
>
> *(b) whose employment record does not give the Commission reasonable cause to believe that he carried out any act involving impropriety in the handling of money;*
>
> *(c) who, in the opinion of the Commission, is a person of probity, who is able to exercise competence, diligence and sound judgment in fulfilling his responsibilities in relation to the business of betting, gaming, lotteries, prize promotions or other games of chance permitted under the Act and whose relationship with such business will not threaten the interests of the general public nor other persons who are in that business, and for the purpose of this paragraph the Commission shall have regard to any evidence that he has –*
>
> *(i) engaged in any business practice appearing to the Commission to be deceitful or oppressive or otherwise improper, which reflects discredit on his method of doing business; or*
>
> *(ii) contravened any provision of any enactment for the protection of the public against financial loss to dishonesty, incompetence or malpractice by persons concerned in the provision of commercial services or in the management of companies due to bankruptcy;*
>
> *(d) who has knowledge of and competence in the business of betting, gaming, lotteries, promotion or other games of chance;*
>
> *(e) who is not incapacitated by reason of mental disability; and*
>
> *(f) who is not connected to any person who does not satisfy the criteria specified in the preceding paragraphs.*

The matters raised in this subsection makes it pellucid that the statutory duty of the Commission is to ensure that the applicant is beyond reproach and has not walked with persons of ill repute.

[132] The burden of the investigation under section 7 is the applicant. As I intimated above, this is not the same as a section 10 investigation. When sections 9 and 10 are read together it becomes clear that the quasi-judicial investigation under section 10 is unrelated to a new application for a licence. Firstly, although section 9 repeats the power of the Commission to grant or refuse a licence, permit, approval or authority, as is said in subsection 8 (1), subsection 9 (1) makes no reference to section 7. Secondly, there is a conspicuous omission of the expression 'refuse to grant' from subsection 9 (b). So then, it is the alternative exercise of the power to suspend, vary or revoke a licence, permit, approval or authority that may be predicated on the results of this quasi-judicial investigation, not the 'refusal to grant'. I conclude, therefore, that sections 9 and 10 are not a part of the legislative scheme by which the Commission is bound in its consideration of a new application for a licence to promote a lottery under subsection 49 (1).

[133] And so I come to the Applicant's contention that the Respondent cannot award a licence without regard to section 5. There is no dispute that the *raison d'etre* of the BGLC is the regulation and control of betting and gaming and the conduct of lotteries in Jamaica. This is the declared legislative purpose in subsection 5 (1), "[t]he functions of the Commission shall be to regulate and control the operation of betting and gaming and the conduct of lotteries in the Island". Without prejudice to the generality of that overarching function the BGLC has three other functions: (a) to examine problems relating to the operation of betting and gaming and the conduct of lotteries (in consultation with appropriate persons and organizations); (b) to furnish information and advice and make recommendations to the Minister pertinent to his exercise of his functions under Parts IV, V and VI; (c) to make investigations and surveys to obtain information useful to the exercise of its functions. The second function (b) does not concern the application for leave to apply for judicial review.

[134] I agree with Mrs Gibson Henlin, that section 5 is expressed in mandatory terms. That, however, is not dispositive of the issue raised by the Applicant. As learned Queen's Counsel rightly pointed out, section 2 of the **BGLA** says "functions" includes powers and duties therefore, the court must decide which is a power and which is a duty. The second function, which is not under consideration, is clearly a duty. In respect of (a) and (c),

having regard to the legislative policy and in the context of the legislation as a whole, I adjudge both to be powers. In so far as (c) is concerned, I am fortified in this view by the treatment of 'investigation' under subsection 7 (2) (b). There it is expressed in the permissive language of a power. Furthermore, the same legislative intention is reflected in the investigation apparatus under section 10.

[135] Even if I am wrong in so holding and the Commission's functions here are duties that it must discharge, the fulcrum of the issue is the trigger that sets the duties in motion. This is based on a recognition that, as duties, their spectrum is very broad. According to the ***Interpretation Act***, a duty "shall be performed from time to time as occasion requires". Under subsection 5 (1) (a) the trigger would be "problems relating to betting and gaming and the conduct of lotteries". While under subsection 5 (1) (c) it is obtaining information useful in the discharge of its functions.

[136] Surely it must lie within the sole discretion of the BGLC, the regulatory and control authority, to decide if there is a problem affecting betting and gaming and the control of lottery. However, once it has so decided, it again exercises its' discretion in the choice of persons or organizations it consults, to examine the problem. I would venture to say that the discretion is the Commission's as to whether the better performance of any of its functions requires information which can only be gathered by an investigation or survey.

[137] Learned Queen's Counsel Mr Braham submitted that subsection 5 (1) (c) is limited to the purposes in the subsection and should not be extended to the licensing process. His submission resonates with me for the following reason. An interpretation which requires investigations and surveys for the consideration of every lottery licence would result in two conflicts. The first conflict is as follows. The interpretation of section 5 (1) (c) advocated by the Applicant makes investigation and survey mandatory as opposed to section 7 (2) (b) which is drafted in permissive language. The second way in which that interpretation conflicts with subsection 7 (2) (b) is this. Whereas the investigation under the latter subsection is directed at the applicant, the investigation and survey under subsection 5 (1) (c) is directed at the entire betting and gaming and lotteries sector. If

section 5 (1) (c) is understood in the way the Applicant urged, section 7 (2) (b) would be rendered mere surplusage.

[138] An apparent grey area concerning whether section 5 is applicable to the licencing regime under the ***BGLA*** stems, I think, from the language of subsection 49 (1) where the reference to the grant of the licence is "in accordance with Part II". I have already decided that 'in accordance with Part II' is synonymous with 'in accordance with section 8'. However, for the sake of argument I will accept that 'in accordance with Part II' is ambit wide enough to include section 5. The effect of that would be the BGLC would have to consult and conduct investigations and surveys every time it considers the grant of betting office licences and betting agency licences (subsection 21 (4)). This stricture would also apply to lottery prescribed premises licences (subsection 49B (1)) and licences for all premises, location, conveyance or other medium used for the purposes of receiving and negotiating bets by a licensed lottery promoter (subsection 49C (1)). That is a result that would be at once "absurd or unreasonable, unworkable, or totally irreconcilable with the rest of the statute". (See ***Cross Statutory Interpretation***, *supra*)

[139] So, I conclude 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. The BGLC is thereby required to be satisfied that the applicant is a fit and proper person, according to the statutory profile in subsection 7 (2B). The licensing regime does not require the BGLC to, as a condition precedent to a grant of a lottery licence, to consult an existing lottery licensee or make investigations and surveys under section 5, before it grants the licence.

Issue # 3: What, if anything, the BGLC has committed itself to and whether it said or did anything that could legitimately have generated the expectations relied on?

[140] The Applicant's claim to legitimate expectation rests on grounds 9 – 22, which I will alphabetize for the sake of convenience. They appear immediately below:

> *(a) The Respondent has or had a policy that new applicants to the market cannot offer the same game types as existing licensees.*

(b) This policy was strictly applied to the Applicant when it applied for and was granted its lottery licence in early 2000.

(c) Specifically, the Respondent directed and advised the Applicant that it could not offer the same game types as the Jamaica Lottery Company (JLC), the then existing lottery provider. The Applicant abided and was in any event required to abide by this directive from the Respondent.

(d) The Applicant was forced to acquire Jamaica Lottery Company in order to expand its game types.

(e) The Applicant has been trying to engage the Respondent on the problems since 2011 when it granted a licence to Goodwill Gaming to operate lottery games in Jamaica. Goodwill Gaming is not now offering lottery games in Jamaica.

(f) Notwithstanding the Respondent is now considering a third application from Mahoe Gaming & Entertainment Limited and intends unless restrained to grant that licence without reference to the legitimate expectations and the concerns of the Applicant.

(g) The intended licence to Mahoe Gaming & Entertainment Limited will be for the same game types as are being offered by the Applicant.

(h) This does not exist anywhere else in the world. It will lead to market cannibalisation and significant and inestimable losses to the Applicant.

(i) The Applicant has a legitimate expectation that the Respondent would abide by its policy and in the event of an intention to change, that the issue would be examined and investigated in consultation with the Applicant. This expectation is based on their experience and the practice of the Respondent.

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

(k) The applicant has a right to be heard on the matter. The Respondent has refused to hear the Applicant. This refusal is a breach of natural justice and the rules of procedural fairness.

(l) 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's input.

(m) The Applicant (sic) has failed to indicate whether it had abided or will abide by its stringent multi-jurisdictional due diligence in relation to Mahoe Gaming & Entertainment Limited. The maintenance of the due diligence process is critical to the country maintaining a credible Anti-Money Laundering and regulatory environment for gaming. This is of great benefit to the existing stakeholders such as the Applicant insofar as its risk profile will also be adjudged by that of the country.

(n) The Applicant wrote to the Respondent for confirmation that it is adhering to the policies and that it will be fair and transparent on the 6th November and 4th December 2020 (sic). The answers are unsatisfactory, lacking in transparency and do not treat with the issues.

History of the licencing policy of the BGLC

[141] The first grant of a lottery licence by the BGLC was to the JLC, dated 1 July 1999. The licence was granted "for the conduct of Instant Games, Lotto, Catch 3 and Pick 1 of 36", therein described as the permitted activities.

[142] A lottery licence was granted initially to the Applicant's parent company, SVL, dated 30 March 2011. The life of this licence was slated to run from I August 2010 to 10 January 2026 (15 years). The preamble to the numbered clauses declared that "this Lottery Licence is granted ... to **SUPREME VENTURES LOTTERIES LIMITED** for the conduct of the National Lotto, Instant Lotto, Pick 3, Drop Pan/Cash Pot, Keno/Dollaz, Cash Lotto/Lucky 5, Jackpot Bingo and Daily Bingo, Pick 2, Pick 4 and the sale of tickets for the multi-jurisdictional Super Lotto games". The games are listed in Schedule 1 of the licence under Items 1. The Super Lotto appears under Item 2.

[143] In his further affidavit (6 April 2020) Mr Levy exhibited a copy of the lottery licence granted to SVL dated 9 February 2001. The permitted activities under that licence were Drop Pan, Keno and Cash Lotto games. This accords with the affidavit evidence of Vitus Evans that the Applicant was first granted a licence in 2001 although it had applied from the 1990s. The licence to Goodwill Gaming Enterprises Ltd was said to be "in place and existing".

[144] The licence to SVLL was transferred to the Applicant and the conditions amended in a document headed 'AMENDED CONDITIONS ATTACHED TO THE LICENCE GRANTED TO PRIME SPORTS (JAMAICA) LIMITED TO CONDUCT LOTTERY-TYPE GAMES', and dated 28 February 2013. The permitted activities were unchanged.

[145] The BGLC also granted lottery licences to Telefun International Ltd in 2001, Best Promotions Ltd (subsequently renamed Sports Bet Games Ltd) in 2006, Bingo Investments Ltd in 2008, Goodwill Gaming Enterprises Ltd in 2011. Neither Telefun Ltd

nor Best Promotions Ltd were operational at the time of this application. Bingo Investments Ltd is now controlled by the Applicant.

Alleged policy applied to the Applicant

[146] Kent levy in his affidavit filed 3 April 2020 alleged that the Respondent had and/or maintained a policy that new applicants to the market cannot offer the same game types as existing licensees. That was the policy applied to SVL vis-à-vis JLC. SVL was only able to expand its game types through the acquisition of the JLC. The Respondent established a very comprehensive due diligence process for new applicants to follow. This extended to the directors, controlling shareholders and technology providers. The backbone of this process was said to be the Multi-Jurisdictional Due Diligence Form used by member regulators of the International Association of Gaming Regulators (IAGR).

[147] The following are taken from a letter dated 22 February 2018 to Vitus Evans, Executive Director of the BGLC, under the hand of Ann Dawn Young Sang, President and CEO of SVL (exhibited to Levy affidavit dated 3 April 2020):

> 1. *January 2001 Supreme Ventures Limited was ultimately granted a second lottery licence to operate games that were dissimilar to those of the then competition. The Jamaica Lottery Company, were licensed and operating a Jackpot Lotto (Pick 6) and a Pick 3 game. Supreme Ventures was granted and licensed to sell Cash Pot (Pick 1), Lucky 5 (Pick 5) and Dollaz (Keno type game).*
>
> 2. *As a prerequisite to the granting of the licence SVL was mandated to conduct extensive research with a view to establish that the new operations would provide growth in the lottery segment and not cannibalise the existing lottery.*
>
> 3. *SVL Directors and Technology Partners, were subjected to an extensive multi-jurisdictional fit and proper investigation to include the involvement of Interpol. The licence was considered only on the basis of a successful outcome.*
>
> 4. *SVL was mandated by the Commission to become a public listed company which was completed in February 2006. This led to enhanced regulatory oversight by BGLC, JSE and the investing Public at large.*

5. *At the point of application and out of a desire for transparency the Commission required that SVL's application, the names of all directors and shareholders be published in the daily print media and invited public comments for a period of thirty (30) days. This process led to ultimate creation of the Chase Fund as it now exists.*

6. *The Commission required that SVL maintained in cash or near cash deposit 150% of all liabilities due for government taxes, Chase Fund, BGLC fees, prize liabilities and statutory payments.*

7. *The Commission mandated that all Standard Operating Procedures to include Draw Operations, Game Design and Specification, Prize Payouts and Structured Reports had to be defined, drafted and approved by the Commission prior to the licences being granted.*

Respondent's reply to allegations of policy requirements

[148] Vitus Evans, in his response to Levy affidavits of 3 and 6 April 2020 said the following. The BGLC carries out its' due diligence after receipt of the completed application form. He acknowledged the regulatory and control functions under section 5 of the **BGLA** but said it is entirely within the discretion of the Respondent whether it carries out a formal investigation, survey and or study and the timing of such investigation, survey and or study. Specifically, the Respondent is not obliged to carry out or cause to be carried out a formal survey, investigation or study, although it maintains the discretion to do so if circumstances warrant. Importantly, the Respondent does not as a matter of course require a formal survey, investigation or study to be carried out in respect of an application for a licence under the ***BGLA***. Any implication by Mr Levy to the contrary is false.

[149] While admitting that the Applicant carried out a study, which it submitted with its' application, Vitus Evans asserted that the Respondent did not require the Applicant to carry out a formal study (understood to mean study, survey or investigations undertaken by third parties) prior to the grant of its licence. Mahoe Gaming is being similarly treated. Formal studies are not the only methodologies by which the Respondent receives or obtains information. In that regard, reference was made to the corpus of in-house knowledge built up by the Respondent over the many decades of regulating the gaming

industry. Gaps in this body of knowledge are filled through contacts with overseas regulators and other relevant entities. He himself is a trustee of the IAGR.

[150] He admitted that the Applicant was not permitted to offer the same game types as the existing licensee (JLC). However, it was not the Respondent's policy to impose this condition on a successful applicant. Consequently, that condition has not been imposed since the grant of the licence to the Applicant.

[151] Vitus Evans proffered an explanation for the Applicant providing a study as part of its' application. As at the 1990s and 2001 there was an absence of recent history of operations of lottery in Jamaica, and therefore no historical information. That situation was contrasted with the present in which the Respondent has available to it information, material and experience garnered over the last 20 years. This has informed the present policy position of the Respondent namely; it has sufficient information or material to consider applications for lottery licences. This was the policy applied to both Goodwill Gaming and Mahoe Gaming.

[152] Indeed, all the licences granted to entities, since 2001 and up to 2011, other than the Applicant, were granted without requiring formal surveys, studies or investigation. Neither was there a condition prohibiting the new licensees from promoting similar games as the then existing licensee. Neither was there any public hearings or other formal involvement of the public in connection to the grant of the licences.

[153] Dennis Chung (former BGLC Commissioner between 1998 and 2002; now Chief Financial Officer of SVL) had something to say about this. His rejoinder on the reason for the study was as follows. The study was conducted to satisfy the Commission that there was a viable market for both licensees. That, he said, accorded with their statutory duty as they understood it. Mr Chung stated that it was the BGLC which required a formal study to be conducted by the Applicant to be submitted with its application.

[154] Mr Levy, for his part, contended that there is no historical information relating to multiple operators offering the same product. Goodwill Gaming is not operational and has not operated or operated for any extensive period to allow the Respondent to say it now

has available to it information, materials and experience acquired over the last 20 years. This is similar to the situation when the Applicant entered the market. He charged that the Respondent knows that a study is required, evidenced by its reply to the Applicant's in-house counsel.

[155] The assertions of Vitus Evans concerning the other licences granted between 2001 and 2011 were challenged by Ian Levy in affidavit filed 20 April 2020 (3rd Levy affidavit). According to him, only one licence was issued for the same products as the Applicant; that is, the licence to Goodwill Gaming, which was done without the Applicant's knowledge.

[156] The Telefun licence was not for the same lottery product. It was for telephone betting via SMS, a product not offered by either the Applicant or JLC. The licence issued to Best Promotions Ltd was for a product not offered by the Applicant. However, by 2005 the other provider had exited the market. Further, the licence issued to Bingo Investments was for a bingo licence, a product not being offered by the Applicant.

Breach of policy allegations

[157] Mr Levy alleged a lack of transparency and fairness since the Applicant's licence was issued and a subsequent licence issued to Goodwill Gaming which, "thankfully is not now gaming". He charged that the Applicant's risks and legitimate interests will likely be increased and further eroded respectively if another licence is issued without due process, fairness or acting in accordance with its policies and statutory functions.

[158] Ms Young Sang's letter (referred to above) alleged that Goodwill Gaming had been "permitted to not only offer games of a similar design to our most profitable suite Cash Pot and Money Time ... but also ... allowed to mimic ... our most successful brand Cash Pot with 'Big Pot". These observations of Ms Young Sang followed concerns expressed by SVL in its letter of 18 April 2016 to Clovis Metcalf, Chairman of the BGLC. Among the concerns expressed was the circumstances relating to the issuance of a licence to Goodwill Gaming Enterprises Ltd to operate a lottery in Jamaica. SVL complained of a lack of transparency in the process.

[159] In respect of number 2 in Ms Young Sang's letter, Mr Levy in that same affidavit alleged that no such study in relation to Mahoe Gaming & Entertainment Limited was conducted. This he said was confirmed in a letter from Vitus Evans dated 28 February 2020. In that letter, exhibited to the Levy affidavit, the Executive Director "advised that whilst it is the Commission's intent to conduct such a study, this however has not commenced". This letter was in response to the BGLC's missive of the previous day requesting a copy of the BGLC's market survey to support the existence of multi-operator lotteries in Jamaica. This study was alleged to be critical to the survival of the Applicant in light of the anticipated grant to Mahoe Gaming or any other new licence.

Respondent's reply to allegations of breach

[160] Vitus Evans asserted that the BGLC carried out the same due diligence in respect of the Applicant and all subsequent applicants for a lottery licence. The due diligence process included the use of the Multi-Jurisdictional Due Diligence Forms adopted and used by regulators of IAGR. The IAGR-adopted due diligence is designed to categorise and capture all the requisite personal data of an applicant, including data pertinent to Ant-Money Laundering (AML) requirements of the Financial Task Force. The information in the due diligence form is verified by third party agencies such as Spectrum Gaming Group and Thompson Reuters. The former was used to conduct the due diligence investigations for the Goodwill Gaming application.

[161] In an apparent response to the allegation of lack of transparency, Vitus Evans said the Respondent does not have a requirement for the application to be subject to publicity or public scrutiny as part of the consideration for the grant of a lottery licence.

Alleged consequences of the Respondent's change in policy

[162] The Levy affidavit of 3 April 2020 alleged the harm to the Applicant will be "irreparable and irremediable" if the market survey is not done. The following matters were listed by Mr Levy for the court's consideration:

> *(a) during the period that both SVL and JLC were operating, there was a marked reduction in the Gross Gaming Revenue (GGR) resulting in*

both companies losing revenue and Government of Jamaica (GOJ) losing taxes. This is (sic) because with two operators both record (sic) net losses with the consequential loss to the GOJ tax revenue. This will continue until one of the licensees incurs unsustainable losses and withdraws from the industry as was the case with JLC;

(b) between 2005 to October 2019 SVL paid to the GOJ and its agencies J$57.315 billion in taxes, fees, licence payments and social causes (thereby fulfilling its corporate responsibilities);

(c) in 2018, SVL paid J$6.833 billion in taxes, fees et cetera to the GOJ and its agencies;

(d) year to date in 2019, SVL has paid approximately J$6.308 billion in taxes, fees et cetera. This is approximately seventy (70%) of the GGR. This sum will be substantially reduced if the cannibalisation of the market is permitted;

(e) over the last two (2) years SVL injected a further J2.2 billion into the insolvent operations of Caymanas Park. The source of these funds is from its lottery operations. The continuing capital investments in Caymanas Park will be jeopardised if cannibalisation of the sector is allowed by the GOJ;

(f) SVL is a publicly listed company currently owned by thousands of Jamaican shareholders. The JSE is the mechanism by which potential investors may, if they wish, invest in the lottery sector. The financial degradation of SVL does not enure to the benefit of the anyone, least of all the GOJ; and

(g) a review of the Caribbean lottery market indicates that only one lottery provider in each jurisdiction. Jamaica has experimented with two lottery providers in the past and as explained above, one of them [suffered] such unsustainable losses that it has (sic) to withdraw from the industry. The other survived by acquiring the insolvent licensee".

The foregoing concerns were conveyed in a letter (dated 4 December 2019) to the Minister of Finance from SVL's lawyers. In his further affidavit of 6 April 2020, Mr Levy sought to "correct" paragraph (g) above. The new assertion was that the majority of Caribbean jurisdictions have one lottery provider.

Respondent's response to the alleged consequences of the change in policy

[163] According to Vitus Evans, the records of the BGLC show the following. For the years 2000 and 2001 the JLC was the only operator in the lottery market. Total lottery ticket sales for 2000 and 2001 were $1.97B and $2.21B respectively. From 2002 to 2004

both the JLC and the Applicant operated together in the lottery market. The total ticket sales for each year were $6.82B, $12.97B and $12.46B respectively. The JLC exited the market in 2005. As at 2018, total sales were $40.74B, representing an over 201% increase over a 12-year period. There were consequential increases in government tax revenue and contributions to good causes such as the CHASE Fund. The evidence for 2000 to 2018, presented in tabular form, showed an increase in ticket sales for each succeeding year over the previous year except the years 2004, 2013 and 2016. For 2019, lottery ticket sales totalled $46.99B.

[164] Based on the performance history of the lottery market, the Respondent expects continued growth. This view, Vitus Evans alleged, is shared by the Applicant evidenced by its letter of 1 June 2000. In that letter the Applicant expressed extreme optimism at both the growth potential of the lottery market and the increase in government revenue. The Applicant's own research had convinced it that market potential was in excess of US$200M. In 2018 the total lottery market was valued at US$290M, according to Vitus Evans.

[165] Both Dennis Chung and Ian Levy (3rd Levy affidavit) challenged Vitus Evans' contentions about growth of the lottery market. Dennis Chung attributed the growth in the lottery market when the JLC and SVL coexisted to the diversification in the games offered. That is, the new games offered by SVL did not compete with those offered by the JLC. It was his evidence that a review of the Applicant's records showed that for 2019 gross ticket sales for the Lotto product was about $1.6B, which was the main revenue driver of the JLC. When that is compared with the total revenue for the JLC ($1.7B), in its last year of operation, the industry is not increasing as the Respondent suggests.

[166] Vitus Evans disputed the reasons advanced by Ian Levy for the failure of the JLC. In Evans' evidence, it had more to do with the business operations of the JLC. He asserted that there is no reason to believe that an additional lottery provider would precipitate either market cannibalisation or a fall in government tax revenues. The historical evidence points in the opposite direction, said Mr Evans.

[167] The Applicant's investment in Caymanas Park was said to be an irrelevant consideration. In much the same vein Vitus Evans said it falls outside the BGLC's statutory remit to direct an applicant for a lottery licence to purchase shares in the Applicant's business.

[168] Notwithstanding Ian Levy's retraction of his earlier statement that only one lottery provider was accommodated in each Caribbean jurisdiction, Vitus Evans confronted it. In Aruba, Dominican Republic and St. Maarten there is more than one lottery provider. In St. Maarten the operators are from the private sector. In Aruba and the Dominican Republic, the lotteries are operated by the State and private entities.

Discussion and analysis

[169] The doctrine of legitimate expectation is said to have its roots in the historical preparedness of the courts to hold that a public body has a duty to act in a particular way where it either made a clear representation that it would act in a certain way in the future or, telegraphed that intention by its established past practice: ***Judicial Review Principles and Procedure*** at paragraph 19.01. However, formal judicial acceptance of the doctrine has been attributed to the Privy Council decision in ***Attorney-General of Hong Kong v Ng Yuen Shiu*** [1983] 2 AC 629 (***AG of Hong Kong v Ng***) and the House of Lords decision in ***Council of the Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 (***CCSU***). Both decisions credited Lord Denning with the introduction of the phrase 'legitimate expectation' into the judicial lexicon, when he used it in ***Schmidt v Secretary of State for Home Affairs*** [1969] 2 Ch. 149, at page 170.

[170] Legitimate expectation typically arises in circumstances where a public authority changes, or, as is being alleged in the instant case, proposes to change, an existing policy or practice. The doctrine or principle will be applicable in circumstances where the change or intended change is adjudged unfair or an abuse of power: ***R (Bhatt Murphy) v Independent Assessor*** [2008] EWCA Civ 755, at paragraph [28] (***Bhatt Murphy***).

[171] In ***AG of Hong Kong v Ng***, up to 23 October 1980, the government of Hong Kong had a policy of not repatriating illegal immigrants from mainland China once they had

reached the urban areas of Hong Kong without being arrested (the "reached base" policy). On 23 October 1980, the government announced that this policy would be discontinued forthwith, in favour of a liability to repatriation. A group of immigrants of Chinese origin from Macau, requested clarification from the government. They were told that they would each be interviewed in due course, and that each case would be treated on its merits. However, three days later a deportation order was issued against the claimant. His challenge of the deportation order was couched in the doctrine of legitimate expectation.

[172] The question which occupied their Lordships was whether a person is entitled to a fair hearing before a decision adversely affecting his interest is made by a public official or body, if he has "a legitimate expectation" of being accorded such a hearing. According to Lord Fraser of Tullybelton at page 637:

> *"the expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry".*

His Lordship went on to say t page 638:

> *"The justification for it [applying the principle equally to aliens as British subjects] is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise. So long as implementation does not interfere with its statutory duty".*

[173] Legitimate expectations may arise even where the persons claiming to be so entitled have no corresponding right in private law. Even so, the expectations will be protected by judicial review as a matter of public law (see ***CCSU*** at page 401). A legitimate expectation may arise in one of two ways: either from an express promise, given on behalf of a public authority, or from the existence of a regular practice which the claimant expected to continue: ***CCSU***, at page 401. The principle has been authoritatively said to be a near cousin or closely aligned to right to be heard and may find expression in an expectation of prior consultation or opportunity to make representation: ***CCSU***, at page 415.

[174] Perhaps the most celebrated articulation of the principle is that of Lord Diplock in ***CCSU***, at pages 408-409:

> *"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*
>
> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*
>
> *(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; (ii) he has received assurance from the decision-maker will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision to for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences".*

[175] Notwithstanding legitimate expectation's affinity to the basic rules of natural justice, as a head of judicial review, Lord Diplock preferred the sobriquet, "procedural impropriety", rather than a failure to observe basic rules of natural justice: ***CCSU***, at page411. Lord Roskill would permanently inter the phrase, "principles of natural justice" and speak only of a duty to act fairly. He, however, acknowledged that the nomenclature, procedural impropriety, had the great advantage of distinguishing it from the other grounds of judicial review: ***CCSU***, at page 414-415.

[176] Legitimate expectation has been subdivided into two categories namely, procedural and substantive: ***Bhatt Murphy***, *supra*. The "paradigm case" of procedural legitimate expectation occurs where a public authority has given an assurance, either by an express promise or an established practice, that it will give notice or embark upon consultation before changing an existing policy: ***Bhatt Murphy*** at paragraph 29. ***CCSU*** and ***ex parte Baker*** were given as examples. The public authority will be barred from

changing the policy without resort to giving notice or engaging in consultation unless the failure to do so is explainable by an overriding statutory duty or other public interest imperative such as national security in ***CCSU***. "Good administration", it is said, "generally requires that where a public authority has given a plain assurance, it should be held to it", per Laws LJ, in ***Bhatt Murphy***, at paragraph [30]. Procedural legitimate expectation is exemplified by the promise or practice of notice or consultation (***Bhatt Murphy*** at para [33]). This is in contradistinction to the presence of a promise or practice of present and future substantive policy in substantive legitimate expectation.

[177] Substantive legitimate expectation, to be distinguished from procedural legitimate expectation, arises where the court allows a claim to enforce the continued enjoyment of the content (the substance) of an existing practice or policy, notwithstanding the public authority's desire to change or abolish it. This is addressed in the first of Simon Brown's LJ categorization below.

[178] In ***R v Devon Country Council, ex p Baker*** [1995] 1 All ER 73, at pages 88-89, Simon Brown LJ sought to identify broad categories the various senses in which legitimate expectation is used. He identified four but felt the third to be superfluous and unhelpful. I will therefore make reference only to the three categories which he gave legitimacy.

> *(i) "Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. [Several authorities were cited as examples] These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it.... In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not.*
>
> *(ii) Perhaps more conveniently the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here,*

> *therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law hold protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. [**O'Reilly v Mackman** [1982] 3 All ER 1124 was among the cases cited as examples].*
>
> *(iii) ....*
>
> *(iv) Legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by the assurance, whether expressly given by way of a promise or implied by way of established practice. [**CCSU**, supra, was instanced as legitimate expectation founded upon practice]."*

[179] The source of the Applicant's legitimate expectations, in the submission of Mrs Gibson Henlin, is derived from the statutory scheme as well as the Respondent's prior conduct in relation to the granting of lottery licence and its operations generally. Leaving aside the statutory scheme for the moment, the policy alleged, in brief, is that the new licensees to the lottery market would be prohibited from offering the same game type as existing licensees. Put another way, the Applicant must show that the Respondent represented to it, by its practice, that new entrants to the lottery market cannot offer the same "permitted activities" and it therefore held the legitimate expectation that all its subsequent licensees would be similarly mandated.

[180] From the evidence and submission made on behalf the Applicant, its concern appears to be the likely adverse financial impact a competitive lottery provider will have upon it. That is to say, the Applicant fears that the presence of another lottery provider in the Jamaican lottery market, who is able to offer the same game types, will likely spell its economic doom. The Applicant has operated in a marketplace in which there was no competition in game types, up to 2011. So that, the decision which the Applicant seeks to forestall by the prohibiting and mandatory orders it seeks, is one that will affect it by depriving it of a benefit or advantage (a protected market) which it had in the past been

permitted by the BGLC to enjoy and which it legitimately expected to be permitted to continue until there has been some rational ground for withdrawing it on which it which it has been given an opportunity to comment. Hence, the Applicant's insistence upon a study as part of the licensing process.

[181] The initial burden of establishing the legitimacy of its expectations is the Applicant's. Where the expectation is said to have arisen from a promise, it must prove the promise and that it was clear and unambiguous and devoid of relevant qualifications. Once that burden is discharged, the onus shifts to the Respondent to justify the frustration of the legitimate expectation. Where there is a failure to justify the frustration of the legitimate expectation, the authority runs the risk of a conclusion of abuse of power: ***Paponnette and others v Attorney General of Trinidad and Tobago*** 78 WIR 474, at page 489 (***Paponnette v A-G***). This was the standard adopted by McDonald Bishop J in ***LOSA v AG***, *supra*, at paras [47] to [49].

[182] In this case, the Applicant is not contending that any promise was made to it. I am not therefore concerned with the clarity of a promise. ***Paponnette v A-G,*** is therefore distinguishable on its facts from the case at Bar, although it is one of the cases relied on by the Applicant. I will, however, adopt and adapt the learning on the burden of proof to the instant case. The initial burden is on the Applicant to show the existence of a regular practice which the Applicant reasonably expected to continue. Once the Applicant establishes the contours and longevity of the practice and the threatened departure, the burden shifts to the Respondent to justify the change in course.

[183] I accept as a correct statement of the law, Mr Braham's submission that for a practice to amount to a legitimate expectation it must be settled, unambiguous, widespread and well-recognized. The authority for that submission is ***R (on the application of Davies and another) v The Commissioner for Her Majesty's Revenue and Customs*** [2011] UKSC 47 (***Davies v CHMRC***). That was Lord Wilson's prelude to saying the practice must carry within it a commitment to treatment in accordance with it. That statement of the law was predicated on the following passage from the judgment of

Laws LJ in ***R (Bhatt Murphy) v The Independent Assessor*** [2008] EWCA Civ 755, at paragraph [43]:

> *"Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in Preston referred (866-867) to "conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representation".*

Although the instant case falls under the rubric of procedural legitimate expectation, in my view the learning concerning the continuance of the practice is applicable.

[184] This line of reasoning is consonant with the findings in ***LOSA v AG***, *supra*. In that case the challenged policy was the de-linking of the salaries of the legal officers from that of the judiciary, for the purpose of determining the level of remuneration of the legal officers. That policy existed for 15 years and was abolished without either notice to, or consultation with, the legal officers. The court found that the government had induced in the claimants a procedural as well as a substantive legitimate expectation (see para [56]).

[185] Coming now to the case before me, there are two aspects to the claim for legitimate expectation: restriction of game types and a precedent study combined with transparency. I will discuss game types first. The Applicant alleges that it was restricted from offering the same game types as the existing licensee, the JLC. I find that the BGLC had a practice or policy of restricting new entrants to the lottery market from offering the same game types as existing lottery providers. The evidence from the Applicant, which was not disputed, and amply supported by a perusal of the licences issued to it and the JLC, was that that restriction applied to it.

[186] The factual dispute concerned the permitted activities in the other lottery licences issued between 2001 and 2008. This I resolved in favour of the Applicant for the following reasons. Firstly, although Vitus Evans asserted that the licences issued to Telefun in 2001, Best Promotions in 2006 and Bingo Investments in 2008 were void of the restriction

imposed on the Applicant, that was roundly contradicted by Ian Levy. Levy's rejoinder was not limited to a bald assertion to the contrary; he listed the lottery game types. Insofar as these allowed for comparison, none was the same permitted activity as those allowed the Applicant. That was where the matter was left. Although the burden is on the Applicant to establish the legitimacy of its expectation, in the discharge of its evidential burden, this called for a reply from the Respondent. Indeed, as the repository of the licences, it was well within its gift to supply documentary proof of its assertion concerning similarity of game types.

[187] Secondly, I infer from the solitary complaint made to the BGLC in 2011 about the gaming activities of Goodwill Gaming that the Applicant had no reason to complain heretofore. This inference is fortified by my finding in the preceding paragraph. From the evidence the Applicant appears to be a most vigilant licensee. Consequently, it seems fair and reasonable to conclude that prior to 2011 there was no other lottery provider in the market who offered the same game types as the Applicant.

[188] Having accepted that the BGLC had a practice of restricting new applicants from offering the same game types as existing lottery providers, the next question for consideration is the ubiquity of this practice. In other words, was the practice so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment (and here I tweak the formulation) to existing lottery providers including the Applicant of like treatment in accordance with it? (See ***Davies v CHRC***, *supra*)

[189] There is no direct evidence capable of returning either an affirmative or negative answer to this question. In ***Davies v CHRC***, which was a judicial review matter, at least there was evidence that Lord Wilson characterized as "generalised, anecdotal understanding of their witnesses" (see para [51]). Other evidence tendered was equally unhelpful. At least there was an attempt to lay before the court some evidence. Although the Applicant was not expected to deploy its full case at the *inter partes* hearing, a modicum of evidence is to be preferred to no evidence. Can the required answer be inferred from the fact of the practice?

[190] If the chronological roots of the practice are the issuance of the licence to the Applicant's parent company, the practice existed for approximately ten (10) years. Ten (10) years is a reasonably sufficient time to say that practice was well-established. Equally, I am inclined to conclude that the practice of restricting game types was unambiguous. I hesitate, however, to infer that it was widespread and well-recognized. It would be a matter of speculation to say the inbiquitousness of the practice extended beyond the licensees and to what extent. I am therefore constrained to find that the Applicant has failed at the bar required by ***Davies v CHRC***, *supra*.

[191] Since there was no established policy within the meaning of ***Davies v CHRC***, it means the Applicant could not have 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. A necessary corollary of this is that the Respondent was free to exercise its statutory discretion to abandon the policy without reference to the Applicant. In short, without a policy or practice that had ripened to the point where it could be properly characterized as unambiguous, widespread, well-established and well-recognised, the Respondent had no duty to give the Applicant an opportunity to comment or otherwise consult with the Applicant before changing the policy.

[192] Even if I am wrong concerning the failure of the Applicant to establish that the practice of restricting game types for new entrants foundered at bar of ubiquity, that policy was discarded in 2011. The grant of the lottery licence to Goodwill Gaming Enterprise Ltd in 2011 represents a marked policy shift in the grant of lottery licences. There was agreement that the licence issued to Goodwill Gaming permitted the new entrant to offer the same game types as the Applicant. Whether Goodwill Gaming is not now operating does nothing to erode the significance of the policy shift evidenced in the grant of its licence.

[193] Two consequences arise from the grant of the licence to Goodwill Gaming. First, the Applicant's claim to a legitimate expectation based on the practice of restricting game types, would have evaporated contemporaneously with the abandonment of the policy,

barring a proximate successful challenge. Secondly, much water from the Rio Cobre has flowed beneath the Flat Fridge since 2011 and the filing of this application on 3 April 2020. The BGLC granted one licence under the new policy which has gone unchallenged for nine (9) years. The BGLC now seeks to grant another lottery licence under a policy which has been in place for an equal length of time. The new policy has had almost as much time as the old to be considered settled. It would, I think, not be reasonable to conclude that, at the filing of the application for leave, the practice which forms the basis of the legitimate expectation was extant.

The practice of requiring a study and transparency

[194] I turn my attention now to the other part of the alleged policy or practice of the Respondent. I will first address the study. Grounds 8, 13, 14, 15, and 16 seek to address the need for a study. The position of the Applicant, succinctly stated and hopefully without oversimplification, is this. Any decision to permit another lottery provider into the Jamaican lottery marketplace must await the results of a feasibility study. The efficacy of such a study lay in the provision of information to justify the viability of multiplayers in the market and the feasibility of open competition in game types.

[195] There was no dispute that the Applicant submitted such a study with its application for the licence. The reason for the study and at whose instance it was done were the points of dispute. Those are not factual questions, however, that I need to resolve for present purposes. I will, however, assume in the favour of the Applicant that the Respondent required the study to be done.

[196] However, to use an English idiom, one swallow does not make a summer. In the same way the idiom cautions against making general laws from one phenomenon, the court is enjoined not to declare a practice from an instantial conduct of a study by a licensee. The only evidence presented by the Applicant that a study was done as a condition precedent to the grant of a licence was in relation to its application. There was a paucity of evidence that this was a requirement of any of the applicants who entered the gaming sector subsequent to the Applicant. Against this background, I attach

considerable weight to the evidence of Vitus Evans that any suggestion that the BGLC routinely requires a formal study is false. I therefore conclude, that any claim to a legitimate expectation by the Applicant that a formal study would have been done as part of the consideration of the licence application is without foundation.

[197] That said, I am compelled to address the issue of the study raised in correspondence between the Applicant's Mrs Katherine Francis and Vitus Evans. In his response (letter dated 28 February 2020), Vitus Evans all but assured the Applicant that the BGLC would conduct the study the Applicant desired. The study was not done. I have reviewed the evidence contending for the study, both the economic and the moral contentions as well as the opposing evidence and the submissions. I am content to say that a precedent study is not a statutory requirement to be fulfilled before a lottery licence is granted. Therefore, the BGLC's apparent volte-face, is within its discretion whether to exercise the power to investigate or conduct surveys. Crucially, there was no practice to require a formal study and neither is there a statutory mandate to do so in advance of the consideration and grant of a lottery, or other licence.

[198] I will now address the question of a lack of transparency. I will focus on the evidence of Walter Scott, for the simple reason that it is perhaps more authoritative, on the subject generally. This, however, is not to the disregard of other evidence on the point. I accept Mr Scott's evidence that as the then Chairman of the Respondent he instituted a policy and practice of public hearings for the application for all licences. However, he instantiated public hearings for only bookmaker's licences. In point of fact, there is no evidence that any lottery licence was issued during his tenure, save for the acquisition of the JLC by the Applicant.

[199] In any event, there is no evidence that those public hearings survived Mr Scott's departure from the BGLC. The Applicant's averments are to the contrary and, naturally, the Respondent did not rise in contradiction, except to say it has never been its policy to hold public hearings or facilitate other formal involvement of the public. I acknowledge something of a contradiction between Messrs Scott and Evans. However, the burden of the Applicant is to show, that it was a policy or practice of the BGLC, and not that its

application was the subject of publicity. I accept that the grant of lottery licences, to Telefun through to Goodwill Gaming, was not heralded by public hearings. In the final analysis, as a body corporate the BGLC is vested with the right to regulate its own procedure and business. Therefore, as it fell within Mr Scott's remit to introduce policy and practice while he was the Respondent's Chairman, his successors were no less competent in that regard. They therefore had the authority to discard old polices and institute new ones.

[200] And so I come back to the claim for legitimate expectation which is said to arise from the Respondent's statutory mandate. As I understand the claim to a legitimate expectation to be heard or consulted under the BGLC, it is a contention that there are problems affecting the lotteries market which call for action on the part of the BGLC. 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. As a major, at the time of the hearing the only, promoter of lotteries in Jamaica, it is inconceivable that such an examination could take place without the active involvement of the Applicant. Therefore, 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**.

[201] The difficulty with the Applicant's position is the conflation of that legitimate expectation with the licensing procedure under the Act. The major premise of the claimed legitimate expectation of consultation in this regard appears to be the conclusion that resolving whatever perceived problems there are in the lotteries market is part and parcel of the licencing process under the ***BGLA***. The reliance on section 5 (1) (a) and 5 (1) (c) makes this clear.

[202] The problem identifiable in the lotteries market from all the material the Applicant has placed before me, is the impact of another active lottery promoter on the market. The Applicant's evidence and submissions have been marshalled in one direction, and one direction only. That is, the deleterious impact or, to use its word, "cannibalisation" of the market where there is more than one lottery promoter. The contention that no other

[202] Caribbean territory operates a multiplayer lottery market was debunked even as it was being withdrawn. Equally, the Applicant's attempt to show a devaluing of the market is unsupported by the data provided by the BGLC, which I find more persuasive.

[203] The Applicant's insistence that it remains the only lottery provider is best exemplified by evidence from the Levy affidavit of 3 April 2020. I quote:

> *"SVL is a publicly listed company currently owned by thousands of Jamaican shareholders. The JSE is the mechanism by which potential investors may, if they wish, invest in the lottery sector".*

Against this background, I cannot help but express sympathy with the Respondent's view that the Applicant's motivation is the protection of its monopoly.

[204] That appears to be the driving force behind the conflation of the Applicant's legitimate expectation under the statute to be consulted in the examination of problems of gaming with the consideration for the issue of a lottery licence. However, as I endeavoured to show when discussing the policy of the ***BGLA***, the general power or discretion to examine problems in the sector is not a part of the licensing procedure under the Act. Since that is so, it could not properly be said that the Applicant has a legitimate expectation to be consulted in relation to the anticipated grant of a licence to Mahoe Gaming, which the BGLC is unjustifiably frustrating. Likewise, the BGLC's general power to make investigations and surveys under section 5 (1) (c), falling outside of the licensing regime of the Act as it does, could not create in the Applicant any legitimate expectation concerning the consideration and grant of a lottery licence.

Conclusion

[205] The evidence disclosed that since 2001, the BGLC considered and granted lottery licenses under two different policies. One policy was applied to the Applicant in 2001 when its' parent company was first granted a licence. That policy did not subsist for long in its' entirety. There were subtle shifts which eventually crystallized into an entirely new policy, delinated by the grant and issue of a lottery licence to Goodwill Gaming Enterprises Ltd in 2011. It is this policy, which has stood without challenge for nine (9) that the

Respondent seeks to apply to Mahoe Gaming & Entertainment Limited. Consequently, time started to run against the Applicant from 2011. No, or no sufficient, reasons are present on the evidence to justify the court abridging or extending the outer allowable band within which to make the application.

[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. That is, the Applicant failed to sustain its claim to legitimate expectation, whether under the **BGLA** or the policy of the Respondent.

Orders

[207] I therefore make the following orders.

1. Leave to apply for judicial review is refused.
2. The interim injunction granted on 27 May 2020 pending the hearing of the application for judicial review is discharged.
3. Costs to the Respondent, to be taxed if not agreed.
4. Permission to appeal is granted.
5. Application for injunction pending appeal is refused.

12 June 2020