[2022] EWCA Civ 1020 Case No: CA-2022-001320 & CA-2022-1325

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2022

Before :

LORD JUSTICE COULSON
and
LORD JUSTICE SNOWDEN

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Between :

(1) Camelot UK Lotteries Limited **(2) Camelot Global Lottery Solutions Limited**	**Appellants**
- and -	
(1) The Gambling Commission; International Game Technology PLC & Ors **(2) The Gambling Commission**	**Respondents**

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Jason Coppel QC, Ligia Osepciu & Daniel Cashman (instructed by **Linklaters LLP**) for the **1st Appellant**
Philip Moser QC, Ewan West & Jen Coyne (instructed by **Osborne Clarke) for the 2nd Appellant**
Sarah Hannaford QC, Anneli Howard QC, Rose Grogan & Will Perry (instructed by **Hogan Lovells International LLP**) for the **1st Respondent**
Helen Davies QC, Joseph Barrett & Malcolm Birdling (instructed by **Quinn Emanuel)** for the **2nd Respondent**

Hearing dates : 14 July 2022

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Approved Judgment

LORD JUSTICE COULSON (giving the judgment of the Court) :

1. We are extremely grateful to leading counsel for all parties for the clarity of their written and oral submissions. We have spent this morning dealing with the application for permission to appeal and we have spent this afternoon dealing with the question of the cross-undertakings, the absence of which we raised at the start of the morning. We will deal with the issues in that order, but we make clear at the outset that we have not forgotten, and by no means underplay, the importance of the cross-undertakings.

2. We start with the applications made by the Camelot companies and by IGT for permission to appeal.

3. The principal test is whether the grounds of appeal have a real prospect of success. That is CPR 52(6)(i)(a). That is a relatively low threshold.

4. Having considered the documents, and having heard the arguments, we have concluded that the applications for permission to appeal made by the Camelot companies have met that threshold in this case, and therefore, subject to the other points which we shall come on to, we grant them permission to appeal.

5. On the face of the material, we are less persuaded by IGT's submissions. However we have concluded that they too should be granted permission to appeal. There are two specific reasons for that. One is that we do not consider that it is appropriate at this stage to grant permission to one group of claimants and to deny it to another, when some at least of the challenges overlap.

6. The second point is that we are persuaded that there is here what CPR 52(6)(i)(b) calls "some other compelling reason for the appeal to be heard". Why do we say that? First, there is a dearth of appellate guidance on the correct approach to applications to lift the suspension (or to maintain the suspension) relating to the award of contracts, where the procurement process has been challenged. There are often two conflicting interests: the need to do justice, and the need for speed. In our view, the arguments, both this morning and indeed this afternoon, demonstrated the potential importance of such guidance.

7. We acknowledge Ms Hannaford's point that the Procurement Bill sets out provisions on this issue which use different words and terminology from those currently used by the courts, but – as a number of commentators have pointed out - it by no means follows that, even assuming that the Bill stays in this form, the test that will be applied by the courts will be very different to that which is currently applied. So we do not consider that the opportunity to give guidance is an academic exercise.

8. In addition, on the "some other compelling reason" point, it is important to be realistic. It is impossible not to acknowledge the significance of the Fourth Licence to run the National Lottery, which lies at the heart of the case, and the millions of pounds which the Lottery provides each week for good causes. That also suggests that these issues should be tried at a full hearing.

9. In consequence of the importance of this procurement exercise, this will become a flagged appeal. That means that it will be heard by the Master of the Rolls, possibly sitting with one or both of us. The appeal cannot be got ready and heard before the end of term and of course that then means the start of the vacation. We have liaised with the

Master of the Rolls. He is conscious of the urgency of any appeal in this case. He is therefore prepared to sit on the appeal in the vacation during the week of 12th September. The appeal will therefore be listed provisionally for two days that week, starting on Tuesday 13th September. That will have the added advantage that it will allow at least most of the work on the judgments to be concluded before the start of the new term.

10. We are conscious that, in making that ruling and identifying that date, we have not enquired about matters that would normally be important, such as the availability of counsel. We know that a warning about the possibility of a listing in September was sent out last week, but we would have obviously preferred to go through the usual courtesies. I hope that everyone will understand that, in this case, that has simply not been possible. The urgency is such that the listing has to be dictated, in this instance, by the availability of the court.

11. Consequential directions, therefore, to lead to that point, will be as follows:

i) The respondent and the interested parties must serve their own skeleton arguments, in answer to the full skeleton arguments from the appellants, by 4 pm on Friday, 29 July. (That is so that those can be interleaved into the existing bundles and those bundles possibly taken away on holiday by those judges lucky enough to be hearing the appeal);

ii) It may also be, when we come on to say what we have to say about the cross-undertakings, that both the respondents will wish to put in short respondents' notices dealing with two of the points that arise in relation to those cross-undertakings. If they do then, again, Friday, 29 July is the date by which that should be done;

iii) As I have also indicated, the existing bundles which we presently have should be used for the appeal hearing and any new documents, such as the respondents' skeletons, should be interleaved and numbered accordingly.

12. We then come on to the applications to continue the suspension that prevents the Commission from entering into the fourth licence with Allwyn. As we made plain first thing this morning, those applications have been fundamentally flawed as a result of the failure by the Camelot companies and by IGT to provide the usual written cross-undertakings as to damages, and we have, during the course of this hearing, expressed our surprise and disappointment both at the absence of those undertakings, and then the failure to address points of detail prior to this hearing, which consequently we have been asked to consider for the first time this afternoon.

13. A draft of the proposed cross-undertaking was eventually provided this afternoon. We accept the wording of the undertaking: that is the undertaking that needs to be provided by Camelot, by Camelot Global and by the IGT companies, by 4 pm tomorrow. As noted above, and clarified during argument, our grant of permission to appeal is conditional on the provision of those undertakings.

14. Two points have been raised as to the inadequacy or potential inadequacy of those undertakings.

15. First, on behalf of the Commission, Ms Hannaford points out that the proposed cross-undertaking does not cover the losses to good causes that would be caused if this challenge to the procurement ultimately fails. It was clear from Mr Coppell's response that it was deliberately not intended to cover that potential loss. The argument is that such undertakings would not normally cover such third party losses, and that, on the existing evidence, the figures are so high that it would not be reasonable to expect the cross-undertakings to cover them. We express no view about the former point; beyond acknowledging the possible size of the losses under this head, we express no view on the latter argument, either.

16. It seems to us that, given the lack of time, and despite the unsatisfactory way that the issue as to the cross-undertakings has been dealt with by the applicants, we should not require the wording of the cross-undertaking that has been offered today to be amended so as to include coverage of the potential loss to good causes. That is a matter for those giving the undertaking; that is to say Camelot, Camelot Global and the IGT companies. They can chose to give such an undertaking if they wish.

17. If they do not, then both the Commission and Allwyn are fully entitled to rely on that omission in support of their submissions at the hearing in September that the undertakings are inadequate and that therefore, on the balance of convenience, the suspension should not be maintained. We consider that that is a point plainly open to both the Commission and Allwyn at the hearing of the appeal in September and should not be removed from their armoury at this stage.

18. Secondly, on behalf of the interested party, Ms Davies complains that the undertaking, although unlimited on the face of the undertaking, may be insufficient in practice to meet Allwyn's own losses. This argument relies on the evidence that there may be about £100 million available to Camelot to pay Allwyn if the challenge fails; that the addition of an undertaking from Camelot Global does not make much difference to the total available; and that the direct losses to Allwyn as a result of a failed challenge may be a much larger figure. We understand that argument but, on the face of the evidence, the much larger figure would appear to relate to a delay of a year, and it is not clear that a delay of that length is going to be the result of our granting permission to appeal with a hearing of the appeal in September. In other words, the delay may not be anything like a year, so therefore it is not obvious that the amount available will not be enough.

19. The related point is this. It does seem to us that it would be unreasonable to expect the trustees of the Ontario Teachers' Pension Fund to enter into a parent company guarantee without knowing the relevant figures. At the moment it appears that they do not. It is not for this court to get into the rights and wrongs about the separate arguments about the confidentiality ring. That is something that Mrs Justice O'Farrell will consider in a week or two weeks' time.

20. So, again, the parent company guarantee is not something that this court can require to be provided today. The parent company may wish to provide it before the appeal; again, that is a matter for them. If they do not, then again, at the hearing of the appeal, it is open to Allwyn and the Commission to argue that the cross-undertakings are inadequate and that therefore, as with the good causes point, the appeal should be dismissed on the basis that there is inadequate covering of the potential losses to Allwyn.

21. So that is how we propose to deal with those two points. In the circumstances, it is not possible for us to take them any further today.

22. However, I should make this clear. It follows that these undertakings in this form must be given by the applicants by 4 pm tomorrow because that is the time when the suspension runs out. The suspension will not be extended further if those undertakings are not provided. If the undertakings are given by 4 o'clock, the suspension is continued and will be continued to the conclusion of the appeal.