Trinity Term
[2018] UKPC 16
Privy Council Appeal No 0032 of 2017

JUDGMENT

Jacpot Ltd (Appellant) *v* Gambling Regulatory Authority (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Sumption
Lord Hughes
Lord Hodge
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

12 July 2018

Heard on 14 May 2018

Appellant	*Respondent*
P Maxime Sauzier SC S Dabee (Instructed by Axiom Stone)	James Guthrie QC Yvan Jean-Louis (Instructed by Royds Withy King)

LORD SUMPTION:

1. This is an application by Jacpot Ltd for special leave to appeal from the dismissal by the Supreme Court of Mauritius of an application for judicial review. The decision challenged was a decision of the Gambling Regulatory Authority to revoke a number of licences previously issued to Jacpot, authorising them to provide specified facilities for gambling. The Supreme Court refused leave to appeal to the Judicial Committee on the ground that there was no appeal as of right and (implicitly) that the case was not a proper one for leave to be granted as a matter of discretion. On 19 December 2017 the Judicial Committee directed that that application should be determined at an oral hearing with the substantive appeal to follow if leave was granted. That direction was given on the express basis that the case provided the occasion for resolving a number of questions concerning the availability of an appeal as of right and the principles on which special leave should be granted by the Judicial Committee. The Board announced at the hearing that leave would be refused for reasons to be given later. These reasons now follow.

Background

2. The Gambling Regulatory Authority is a statutory body charged by the Gambling Regulatory Authority Act 2007 with the licensing and regulation of gambling in Mauritius. Licences to provide facilities for gambling are issued by the Authority under section 96 of the Act. Section 96(4) of the Act provides:

> "(4) No licence shall be issued unless the premises to which the licence relates are, in the opinion of the Commissioner of Police, suitable for the purposes for which the application is made."

Under section 7(1)(a), the Board of the Authority has

> "such powers as are necessary to enable it to effectively discharge its functions, and in particular to -
>
> (a) issue, renew, suspend or revoke any licence;"

Section 99 provided for disciplinary action against licensees:

"(1) The Board may, at any time, refuse to renew, or suspend for such period as the Board may determine, or revoke or cancel from such date as the Board may determine, any licence where -

(a) any information furnished by the applicant for the issue or renewal of the licence was, at the time when the information was furnished, false in a material respect or was subject to a material omission;

…

(j) the licensee, or in the case of a company, any director, manager or officer of that company, is no longer a fit and proper person;

(k) the premises to which the licence relates cease, in the opinion of the Commissioner of Police, to be suitable for the purposes for which they were licensed;

…

(9) Notwithstanding subsection (1), the Board may impose a financial penalty not exceeding 50,000 rupees where a licensee does not comply with -

(a) any condition of the licence;

(b) any rule in respect of gambling, lottery game, sweepstake and other lotteries; or

(c) any guideline or direction issued by the Board."

3. In 2011, Jacpot Ltd was the holder of a Gaming House "A" Licence for their premises at Rose Belle and of Gaming Machines Licences for 46 gaming machines at the same premises. On 25 October 2011, the Authority suspended Jacpot's Gaming House Licence with immediate effect on the grounds that it had failed to submit audited accounts as required by the Act and that the premises to which the licences related had ceased "in the opinion of the Commissioner of Police" to be suitable for the purpose for

which they were licensed within section 99(1)(k) of the Act. The letter by which this was notified to Jacpot stated that the Commissioner of Police had reported

> "increasing number of cases of Larceny/Larceny with violence, Assault and other altercations between security Officers and gamblers directly or indirectly resulting from the operations of Royal Game, Rose Belle. ... seriously disrupting public peace and causing much inconvenience to the people residing in the neighbouring area, especially at night."

On Jacpot's application, the Authority held a hearing on 21 November 2011, at which it was represented by Counsel. Counsel argued (i) that audited accounts had by then been submitted, albeit late, and (ii) that the Commissioner of Police should be required to give further particulars of his opinion that the premises were unsuitable. On the latter point, the Authority asked the Commissioner for clarification, and received a response by letter confirming the facts stated in his original opinion. On 15 December 2011, the Authority notified Jacpot of its decision to revoke the licences for the same reasons as those for which Jacpot had previously been suspended.

4. Jacpot then applied to the Supreme Court for judicial review. The application was heard on 30 June 2016. The transcript records that the grounds advanced were (i) that the late submission of accounts had by then been corrected; (ii) that Jacpot had not had the opportunity at the hearing before the Authority to challenge the Commissioner's opinion; and (iii) that the decision to revoke the licence, as opposed (for example) to imposing a civil penalty under section 99(9), was disproportionate. The Court dismissed the application on 27 July 2016 on the ground that the terms of the Act "left the Board with no other option than to accept and act on the opinion of the Commissioner of Police" as to the suitability of the premises, and that while the late submission of accounts might have been met with a penalty, this could make no difference in the light of the problem about the premises.

Appeals as of right

5. Article 81 of the Constitution of Mauritius provides, so far as relevant:

> **Article 81. Appeals to the Judicial Committee**
>
> "(1) An appeal shall lie from decision of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases

…

> (b) where the matter in dispute on the appeal to the Judicial Committee is of the value of 10,000 rupees or upward or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 10,000 rupees or upwards, final decisions in any civil proceedings;
>
> (2) An appeal shall lie from decision of the Court of Appeal or of the Supreme Court to the Judicial Committee with the leave of the Court in the following cases
>
> (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee, final decisions in any civil proceedings;
>
> …
>
> (5) Nothing in this section shall affect any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter."

6. Where an appeal is available as of right, an application for leave to appeal must nevertheless be made to the local court, so that it can verify that there is a right of appeal and deal with certain procedural matters. In the ordinary course, where leave has been wrongly refused by the local court in a non-criminal case, the Judicial Committee will grant special leave unless the substantive appeal is abusive or bound to fail: *Crawford v Financial Services Institutions Ltd* [2003] 1 WLR 2147, para 23.

7. Accordingly, the first question to be resolved on this application is whether an appeal is available as of right. The only basis proposed for such an appeal is article 81(1)(b) of the Constitution. Its application depends on (i) whether the present proceedings are "civil proceedings"; (ii) whether the decision is a "final decision"; and (iii) whether the matter in dispute is of the value of 10,000 rupees or more, or "involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 10,000 rupees or upwards." In relation to all three points, it is important to bear in mind that the absence of an appeal as of right is not the end of the road. It simply means that discretionary leave to appeal must be sought from the court in Mauritius and, failing

that, special leave must be sought from the Judicial Committee. The right to apply for special leave is specifically reserved by section 81(5) of the Constitution. For this reason, the provisions governing appeals as of right are normally to be strictly construed.

"Civil proceedings"

8. Although parts of the substantive law of Mauritius are based on French law, its procedural law is generally grounded on English law and uses English law's basic legal taxonomies. As Lord Goff of Chieveley observed in *In re State of Norway's Application (No 2)* [1990] 1 AC 723, 795, in English law and other systems based on it, "civil matters embrace all matters which are not criminal". This dichotomy is reflected throughout the Constitution of Mauritius, which repeatedly refers to civil or criminal matters in a context where these are clearly intended to exhaust the field: see articles 16(8), 30(8), 30A(1), 76(1), 78(4)(a), 80(2), 82(1), (2), 85(2), 92(4)(a), 102A(11). It contrasts with the principle common in civil law jurisdictions, which treats civil proceedings as limited to proceedings in respect of private law claims, excluding public law. Judicial review proceedings in Mauritius, as in England, are not a *sui generis* category of litigation, neither civil nor criminal. They may be one or the other, depending on their subject-matter and on the nature and purpose for which they are being classified. But as a general rule, and subject to any special context pointing to a different result, judicial review proceedings are criminal proceedings only "if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine": *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, 162 (Lord Wright); *Belhaj v Director of Public Prosecutions* [2018] UKSC 33. Judicial review proceedings which are not criminal are civil. The decision impugned in Jacpot's application for judicial review was plainly not made in or in relation to any criminal proceedings. It follows that they were civil proceedings for the purpose of article 81 of the Constitution.

"Final decision"

9. Constitutional and statutory provisions dealing with appeals commonly distinguish between appeals from interlocutory and final orders. In England, the distinction has given rise to a substantial body of case law which, although not entirely consistent, generally favours what has been called the "applications approach": see *White v Brunton* [1984] 1 QB 570 (CA), where the authorities are reviewed. The applications approach is based on the nature of the decision. It treats it as final if (subject to appeal) it will determine the outcome of the litigation either way. Thus a judgment in default of defence or a striking out order finally disposes of the litigation but is treated as interlocutory because it would have been interlocutory if it had gone the other way.

The alternative approach, which can be called the "order approach", is that a decision is final if the order actually made disposes of the litigation.

10. The question which of them applies to provisions governing appeals to the Judicial Committee has never been resolved by the Committee itself, and different views have been expressed in the various jurisdictions for which Her Majesty in Council or the Privy Council itself is the final court of appeal. The Board does not regard the present case as a suitable occasion for resolving the issue, because it appears to them that the order of the Supreme Court in this case was a final decision on either approach. The relevant proceedings for this purpose are not the proceedings before the Gambling Regulatory Authority but the proceedings before the Supreme Court. The question at issue in those proceedings was whether the decision of the Authority was lawful. Under the order approach, the decision of the Supreme Court was final, because it finally determined that the decision of the Authority was lawful. The result was that it stood. Under the applications approach it was also final, because if it had gone the other way it would have finally determined that the decision of the Authority was unlawful. The result would have been that it would be quashed. The fact that in the latter case the Authority would have had had to make a fresh decision is irrelevant, because the Authority's proceedings are distinct from those of the Supreme Court on review: see *Becker v Marion City Corpn* [1977] AC 271 (PC), at 282-283.

The value threshold

11. Section 81(1)(b) of the Constitution applies the value threshold to any of (i) the "matter in dispute", (ii) a "claim to or question respecting property", or (iii) a "right" of any kind. Provisions in substantially this form commonly appear in constitutional provisions or Orders in Council governing appeals as of right to the Judicial Committee. Probably no other condition has given rise to as much difficulty.

12. The application of the value threshold is straightforward when there is a money claim or a claim to property exceeding the prescribed value. More difficult are cases in which the issue involves property or rights exceeding the threshold value in the broader sense that more than the prescribed sum turns on the outcome, as it almost always will if civil proceedings are to be worth litigating at all.

13. In *Meghji Lakhamshi & Brothers v Furniture Workshop* [1954] AC 80, the Judicial Committee held that an order for possession of tenanted property made in favour of the landlord exceeded the threshold value if the property was worth more. Lord Tucker, delivering the advice of the Board, said at p 88 that in such a claim

> "… it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word 'indirectly' seems to require this construction."

In *Becker v Marion City Corpn*, *supra*, the Judicial Committee was concerned with a decision of the Full Court of [the Supreme Court] of South Australia on a statutory appeal from the decision of a planning authority to authorise subdivision of the appellant's land into plots for sale. The issue was whether the authority had accepted Mrs Becker's plans, in which case it was clear that she was entitled to permission to subdivide. The advice of the Board was delivered by Lord Diplock. He directed himself in accordance with the statement of principle of Lord Tucker in *Meghji Lakhamshi*, and concluded, at p 284:

> "… it is clear that the first question raised in the originating summons directly affected the plaintiff's chances of being permitted to subdivide for the purpose of sale her 67 acres of land in the Hills Face Zone … [I]n the opinion of their Lordships the judgment sought to be appealed from involves the plaintiff's proprietary rights in her 67 acres and is therefore one 'respecting property' of the designated value."

These decisions are authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and (ii) that where an appeal will determine the existence of a proprietary right or a proprietor's right of disposal over the property, there is an appeal as of right if the property's value exceeds the threshold.

14. These principles cannot readily be applied to cases where no property is in issue, and it is necessary to value the "matter" or "right" at stake on the appeal. The fullest statement of principle in such a case is to be found in the decision of the Appeal Panel of the Judicial Committee in *Royal Hong Kong Jockey Club v Miers* [1983] 1 WLR 1049. This is also the decision which presents the closest analogy to the present case. It was an application for special leave to appeal in an action by a jockey against the Hong Kong Jockey Club impugning the decision of its stewards not to renew his licence. The Order in Council governing appeals from Hong Kong contained a provision in substantially same terms as section 81(1)(b) of the Constitution of Mauritius. The plaintiff's licence generated earnings greatly exceeding the value threshold. But the Board held that there was no appeal as of right. Lord Scarman, delivering its advice, held that it was necessary first to identify the nature of the specific civil right involved in the appeal, and then to determine the value of that right. The rules of the Jockey Club, to which the plaintiff submitted himself when he applied for a licence, took effect as a matter of contract. But, the grant of licences being discretionary, there was no civil right to a licence, only a civil right to a fairly made decision. At p 1054, Lord Scarman said:

> "Their Lordships have had their attention drawn to a considerable body of authority on the question of value. They find it, however, unnecessary to review the many interesting cases on the value of a right to a fair hearing where a licence has been denied because they have reached the conclusion that the proposition that the value of the licence lost is the measure of the value of the right to a fair hearing cannot be said to be raised in these proceedings. The difficulty in the way of the plaintiff is the same as that which has defeated his submission that the appeal involves the right to a licence. The proceedings as constituted do not involve directly or directly or indirectly the right to a licence."

15. For some purposes, for example the First Protocol to the European Human Rights Convention, a very wide meaning may be given to the concept of property, embracing many kinds of personal legal right. But for the purpose of the value thresholds governing appeals as of right to the Judicial Committee, "property" has always been given its ordinary legal meaning, namely an interest by way of ownership (legal or beneficial) or right to possession in land or personalty, including intangible property such as trademarks or copyrights. That was not, however, the nature of the right asserted by Jacpot in these proceedings. Their gaming licences were not property in any relevant sense, but simply an authority to provide facilities for gaming, which would otherwise have been unlawful. Nor did they have any civil right to receive or retain a gaming licence. Their only relevant right was the right to a fair and lawful decision of the Authority. That right, important as it is, is a public law right which is no different in kind from the right which any person with a relevant interest has to see the law applied. It is incapable of valuation in monetary terms. It follows that the present appeal does not pass the value threshold and is not therefore available as of right.

16. Before parting with this question, the Board would wish to emphasise that this does not mean that an appeal as of right is never available in proceedings by way of judicial review. Some such proceedings may, at least indirectly, involve property rights of the requisite value, in accordance with the principles considered above. Moreover, beyond the domain of property rights, the decision challenged on an application for judicial review may sometimes have a monetary value, for example where it imposes a civil financial penalty.

Special leave

17. It remains to consider whether special leave should be granted as a matter of discretion. The relevant principles are contained in Practice Direction 3.3.3(a) of the Rules and Practice Directions of the Judicial Committee, which is the following terms:

"Permission to appeal is granted

> (a) in civil cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal; an application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground."

18. In the Board's opinion, the present application does not raise an arguable point of law of general public importance and must be refused. It is not the Board's practice to give detailed reasons for refusing leave to appeal but, the matter having been argued orally, they will give a brief summary.

19. Section 99(1)(k) of the Gambling Regulation Authority Act provides that the Authority "may" suspend or revoke any licence where (inter alia) the premises "cease, in the opinion of the Commissioner of Police, to be suitable". The word "may" sometimes imports a general discretion and sometimes does no more than confer a power whose exercise is more or less circumscribed by the statutory context. The Board considers it to be clear that this provision confers a power on the Authority which is discretionary in the sense that they may respond to the opinion of the Commissioner by refusing to renew a licence or by suspending it for a period determined by them, or by revoking or cancelling it or by deciding in the circumstances of the case to do none of these things. It may, for example, decide to impose a civil penalty instead under subsection (9). But in applying sub-paragraph (k) the Authority is not empowered to decide for itself whether the premises are suitable, because under that sub-paragraph the relevant opinion is the Commissioner's and not theirs. The Commissioner's opinion is not above challenge. The Authority would have been entitled to ignore an opinion of the Commissioner which was legally irrelevant because it did not address the question of suitability of the premises; or an opinion which although ostensibly addressed to the relevant matter was formed in bad faith. But none of these things was alleged. Like any other decision of a public authority, the Commissioner's opinion was itself subject to judicial review, but no application for judicial review has been brought against the Commissioner. Jacpot's main argument before the Supreme Court was that the Commissioner's opinion was not necessarily justified, and that was not a point which it was open to the Authority to accept. In those circumstances, it appears to the Board that the only basis on which its suspension or subsequent revocation of the licences could have been challenged was that it acted irrationally in concluding that the Commissioner's concerns were serious enough to warrant action as severe as suspension or revocation of the licences. It was indeed submitted to the Supreme Court that revocation was a disproportionate sanction, and the same submission was made to the Board on the present application. But the Supreme Court appears to have regarded

that as a tenable proposition only in relation to the late submission of accounts and not to the decisive question of the suitability of the premises. The Board takes the same view. It should be noted that the Authority would have had no power to grant the licences in the first place if the Commissioner had considered the premises unsuitable at the time. The Board also considers that even if the point were arguable, it would turn on essentially factual questions which are more satisfactorily determined by the local court and are in any event of no general public importance.

20. For these reasons, leave to appeal will be refused. The applicant must pay the respondent's costs of the application.