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Case No: CO/3102/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/08/2012

Before :

LORD JUSTICE STANLEY BURNTON
MR JUSTICE KENNETH PARKER

Between :

THE QUEEN
on the application of
CAMELOT UK LOTTERIES LIMITED **Claimant**
- and -
THE GAMBLING COMMISSION **Defendant**
- and -
(1) THE HEALTH LOTTERY ELM LIMITED
(2) – (52) THE COMMUNITY INTEREST COMPANIES
LISTED AT APPENDIX 1 **Interested parties**
-and-
THE PEOPLE'S HEALTH TRUST **Intervener**

David Pannick QC and Kate Gallafent (instructed by **Baker & McKenzie**) for the **Claimant**
James Goudie QC and Christopher Knight (instructed by **Field Fisher Waterhouse**) for the
Defendant

Thomas Sharpe QC and James Dingemans QC (instructed by **Rosenblatt Solicitors**) for the
Health Lottery ELM Ltd

Susanna Fitzgerald QC and Alexander Brown (instructed by **Salans**) for the **Community
Interest Companies**

Hearing dates: 11, 12, 13 July 2012

Approved Judgment

Lord Justice Stanley Burnton:

Introduction

1. This is my judgment following the rolled-up hearing of the Claimant's application under CPR 54.4 for permission to proceed with its claim for judicial review, with the substantive hearing to follow if permission was granted. As is usual, we heard full submissions on the basis that we would in due course decide whether or not to grant permission and, if so, whether the claim succeeded and what if any relief should be granted. We would consider whether Camelot should be refused permission on the ground of its delay in bringing its claim. We also heard the Claimant's application for permission to amend its claim, and we similarly said that we would consider in due course the application and the objections to it, and if we gave permission what if any relief the Claimant was entitled to on the basis of the amended claim.

The parties

2. The Claimant ("Camelot") is a commercial (i.e. private profit-making) company and is the licensed operator of the UK National Lottery. Its regulator is the National Lottery Commission.
3. The Defendant ("the Commission") is the statutory regulator of all areas of gambling within the United Kingdom, other than the National Lottery and spread betting. The Commission performs its functions under the Gambling Act 2005 ("the Act"). In particular, the Commission has the function of licensing society lotteries.
4. The Second to Fifty-second Interested Parties ("the CICs") are Community Interest Companies, which have been licensed by the Commission to conduct lotteries.
5. The First Interested Party ("THL") is licensed to act as an external lottery manager ("ELM"). The CICs have outsourced the management and day-to-day conduct of their lotteries to THL. THL is a wholly-owned subsidiary of The Health Lottery Limited ("THL Ltd"), which is in turn a subsidiary of Northern & Shell Health Ltd. The Northern & Shell group of companies is ultimately controlled by Richard Desmond.

The applicable legislation

6. In order to understand Camelot's claim, it is necessary to refer to the legislation.
7. The Commission was created pursuant to section 20 of the Act. Section 22 imposes on it the duty to promote the licensing objectives, which by section 1 include "ensuring that gambling is conducted in a fair and open way". Participating in a lottery (defined in section 14) is gambling unless the lottery is the National Lottery. Remote gambling is by section 4 gambling in which persons participate by the use of remote communication, such as using the internet or by telephone.
8. It is an offence to promote a lottery without a licence issued by the Commission, and promoting a lottery is widely defined by section 252. It is clear and common ground that THL acts as an *external lottery manager* and as such *promotes a lottery or lotteries* (to be as neutral as possible for the present), commonly referred to as The Health Lottery, within the meanings of the italicised expressions in the Act. Section

(2) In this Act a reference to the profits of a lottery is a reference to—

(a) the proceeds of the lottery, minus

(b) amounts deducted by the promoters of the lottery in respect of—

(i) the provision of prizes,

(ii) sums to be made available for allocation in another lottery in accordance with a rollover, or

(iii) other costs reasonably incurred in organising the lottery.”

12. Section 260 is of some importance:

“260. Misusing profits of lottery

(1) This section applies to a lottery in respect of which the promoter has stated (in whatever terms) a fund-raising purpose for the promotion of the lottery.

(2) A person commits an offence if he uses any part of the profits of a lottery to which this section applies for a purpose other than that stated.

(3) The reference in subsection (2) to using profits includes a reference to permitting profits to be used.”

13. Section 99 is central to the issues raised by Camelot. It effectively limits the sums that may be raised as the proceeds of a lottery, and the prizes that may be offered, by imposing mandatory conditions of lottery operating licences:

“99 Mandatory conditions of lottery operating licence

(1) In issuing a lottery operating licence to a non-commercial society or to a local authority the Commission shall attach conditions under section 75 or 77 for the purpose of achieving the requirements specified in this section.

(2) The first requirement is that at least 20% of the proceeds of any lottery promoted in reliance on the licence are applied—

(a) in the case of a licence issued to a non-commercial society, to a purpose for which the promoting society is conducted, and

(b) in the case of a licence issued to a local authority, for a purpose for which the authority has power to incur expenditure.

(a) the manner in which licensees carry on licensed activities, and

(b) in particular, arrangements made by licensees to ensure compliance with conditions attached under section 75, 77 or 78.

(2) The Commission may review any matter connected with the provision of facilities for gambling as authorised by an operating licence if the Commission—

(a) has reason to suspect that activities may have been carried on in purported reliance on the licence but not in accordance with a condition of the licence,

(b) believes that the licensee, or a person who exercises a function in connection with or is interested in the licensed activities, has acquired a conviction of a kind mentioned in section 71(1), or

(c) for any reason—

(i) suspects that the licensee may be unsuitable to carry on the licensed activities, or

(ii) thinks that a review would be appropriate.

(3) For the purposes of subsection (2)(c) a reason—

(a) may, in particular, relate to the receipt of a complaint about the licensee's activities;

(b) need not relate to any suspicion or belief about the licensee's activities.

(4) Before commencing a review of an operating licence under subsection (2) the Commission shall—

(a) notify the licensee, and

(b) inform him of the procedure to be followed in the conduct of the review.

(5) In conducting a review of an operating licence under subsection (2) the Commission—

(a) shall give the licensee an opportunity to make representations, and

(b) may give other persons an opportunity to make representations.”

otherwise used to benefit the community. The main elements of the asset lock are as follows:

- CICs may not transfer assets at less than full market value unless the transfer falls within a narrow range of permitted transfers such as to another asset-locked body or for the benefit of the community.
- If its constitution allows a CIC to pay dividends (other than to another asset locked body – essentially another CIC or a charity) these will be subject to a cap that limits the amount of dividend payable. A similar cap applies to interest payments on loans where the rate of interest is linked to the CAC's performance ...
- On dissolution of a CIC any surplus assets must be transferred to another asset locked body.”

The facts in outline

17. Donald Macrae is a solicitor and former civil servant. His final position within the Government was as Solicitor and Director General for Law and Regulation in the Department for Environment, Food and Rural Affairs. In December 2007 he was approached by Fiona Driscoll, the Executive Chair of the Altala Group Ltd, who asked him whether he was interested in setting up a charity focused on raising money for local health causes through a multiple society lottery scheme. He was so interested. In December 2009 Altala went into administration, and its business and assets were sold to THL Ltd., which was then owned and controlled by Sarah Jane Moore.
18. On 8 February 2010 Hammonds, the then solicitors for THL Ltd, wrote to the Commission setting out the proposed Health Lottery scheme. Their letter stated that THL Ltd was wholly owned by Ms Moore, and had two subsidiaries, one of which was THL Ltd and the other, Health Lottery Finance Ltd, would arrange money flows from ticket sales. It described the “good cause” structure as follows:

“[THL] will provide services to a number of societies. The structure of this arrangement is almost identical to that which was previously proposed in the Altala application. Specifically, we are in the process of incorporating a number of Community Interest Companies (“CICs”) which will be limited by guarantee. Each of these companies will have, as its objective, the raising of money for health projects, and of investing appropriate areas for the spending of that money on projects in a specific region of the UK. It is currently anticipated that each of the CICs will have an independent board and will also have a relationship with a separate company known as the People's Health Trust (“PHT”) which will be a registered charity and which will be responsible for receiving lottery funds collected by each of the societies and channelling those funds to the specific projects which have been highlighted by individual

Moore and Mr Macrae. The Commission's transcript of the hearing is in evidence. Mr Gunn, the chairman of the Panel, asked:

... is this a scheme, the lottery scheme, a device or arrangement which falls the right side of section 99 or the wrong side of section 99?

He later asked:

Just in respect of the relationship between the People's Health Trust, the CICs and [THL], how can you explain, how can you satisfy us that, I will choose my words carefully, thought that's not just a device to get round section 99 or the tax, or what?

22. There ensued a long discussion. After a break, the Panel announced their decision:

... we have carefully considered everything we have been told today and we have regard to the licensing objectives, forming an opinion about the Applicant and suitability to carry on the licensed activities, we are satisfied that the Applicant is suitable to hold a non remote ELM and a remote ELM licence and we've also decided to grant the applications for personal management licences to Mr Hall and Mr Matthews. In [the] course of the hearing we have asked a number of questions about the potential conflicts of interests and the extent of which the CICs will be genuinely promoting lotteries as and when the licences are determined. We're grateful for the clarifications that have been provided in terms of managing the risks of conflict that we've identified. We have also given careful consideration to whether the proposed scheme complies with the requirements of the Gambling Act 2005, on balance we are satisfied that it is capable of being compliant, however, we should point that it seems to us that the point is finally balanced and is actually a matter of fact and degree. You should therefore ensure that in actual fact that the scheme represents 31 or more separate lotteries rather than operating as a de facto single lottery which will of course, be unlicensed and operating in breach of the limits imposed by the Act. That's the decision with the Panel.

23. On 21 September 2010 the Commission granted remote and non-remote lottery manager's licences to THL. It also granted Personal Management Licences to Mr Martin Hall and Mr Phillip Matthews. Shortly afterwards, the Commission granted operating licences to the then 31 CICs the lotteries of which it was then envisaged would be managed by THL. Additional licences were subsequently issued to the additional 20 CICs.

24. According to Mr Macrae, the decision to establish 51 CICs was made seeking "to mirror the infrastructure used by Health and Well Being Boards". He says that he is not concerned with the profitability of THL or of Northern & Shell: his motivation

with an appropriate broadcaster and production company

- iii) Making all necessary arrangements for a customer services facility for customers of the Lottery;
- iv) Marketing the Lottery (to include printing, distribution and publication of promotional material relating to the Lottery and any other arrangements for the advertising of the Lottery)."

26. A further set of agreements has been concluded between each of the CICs and People's Health Trust AS Charity ("PHT"), which is, as its name indicates, a registered charity. The agreements provide for the donation of 20.34 per cent of the proceeds of the lotteries operated under the Health Lottery Scheme to PHT, which undertakes to use the funds so donated for the purposes of advancing "the Good Causes", defined as "the promotion of health for the public benefit by increasing and supporting sustainable health equality in and for disadvantaged communities and groups across England, Scotland and Wales, consistently with the strategy agreed between the CIC and PHT". Clause 4.2 is an undertaking by PHT "to restrict the donations it receives to Good Causes within the geographical area represented by that CIC".
27. On 28 February 2011 Mr Desmond announced the launch of the Health Lottery, stating that it would be made up of 31 society lotteries each operated by one of the then existing CICs, each representing a different region. He said that the charitable donations would be administered by an independent charitable trust (i.e. PHT).
28. On 16 March 2011 the Commission wrote to Susan Whitehouse, the compliance manager of THL Ltd. The letter reminded her that at the hearing of the application for licences, Mr Gunn had said that "the Health Lottery should ensure that the arrangements for the lottery scheme involve the promotion of 31 separate society lotteries and that it must not be promoted as a 'de facto' single lottery". The letter contained a number of questions directed to that requirement. Mrs Whitehouse replied to these questions in detail in a letter dated 30 March 2011. I do not propose to set out her replies in this judgment. It is sufficient to note that Jenny Williams, the CEO of the Commission, commented in an internal email: "... they seem to have addressed most of the points about the CICs and identifying which lottery is in the frame each week."
29. In an email to the Department of Culture, Media and Sport of 19 June 2011, Ms Williams stated:

"As Philip [Graf, the Chairman of the Commission] makes clear in his letter, the Health Lottery scheme is essentially a clever device to get round the proceeds limits for individual lotteries while enabling the commercial External Lottery Manager (ELM) to benefit from the more generous rules on payment of expenses in the 2005 Gambling Act. The Department needs to decide whether to block the loophole or allow the limits to be breached and accept the possible damage

Present position

The Health Lottery was clear when it sought an ELM licence about its approach and the rationale for setting up the community interest companies i.e. to avoid the limit of £10m on lotteries promoted by a society per year. We put the Healthcare Lottery on notice when licensing it as an ELM that if they managed to devise a scheme that was technically compliant but nonetheless in reality breached the proceeds limits the Department might take steps to block the loophole.

As Philip's letter points out, we expect the Health Lottery scheme when the final version arrives to be on the borders of technical legality – but nevertheless clearly designed to circumvent the proceeds limits – the gambling equivalent of a tax avoidance scheme that exploits loopholes in the legislation. It is also clear that it will be hard to predict how the courts would interpret the Act in relation to the sort of scheme likely to be proposed.

Preserving the National Lottery's monopoly is not, however, one of the Commission's licensing objectives, so taking enforcement action in circumstances where there is considerable legal uncertainty would be a low priority for the Commission as would introducing new conditions to try to block the loophole or reduce the risk of successful avoidance of the proceeds limits. As we have discussed with the Department such moves would be costly and uncertain; if the proceeds limits matter in policy terms, decisive action by the Department would be more effective and deter future attempts to avoid the limits. We are therefore likely to advise the Department that if the government wants to preserve the lottery proceeds limits and protect the National Lottery it will need to impose mandatory conditions or take other action to reinforce the proceeds limits and reduce the risk that Health Lottery establishes a successful precedent for avoiding the proceeds limits.

It was perhaps unfortunate therefore that, when John Penrose saw the Health Lottery recently and before he had had the chance to consider the policy issue that is for him not the Commission, he wished them well and indicated he would not interfere in the actions of the regulator. Depending on whether he does wish to reinforce the proceeds limits to protect the National Lottery and / or smaller lotteries (not able to access the marketing resources available to Desmond), or even just to preserve his room for manoeuvre he may need to move quickly to put up a marker and avoid subsequent claims of reasonable expectations."

30. Mr Graf wrote to the Minister for Tourism and Heritage on 20 June 2011:

"Thank you very much for a very enjoyable and helpful meeting last week. ...

We discussed briefly one imminent issue and that is the Health Lottery, where you very properly are leaving to the Commission

the statutory boundary when the risks to the licensing objectives are minimal is not an attractive proposition. It would be extremely costly for something of low priority to the Commission.

Equally the new arrangements for expenses introduced in the 2005 Act were intended, we assume, to enable societies to benefit from the economies of scale that use of an ELM can provide. There is no objection per se in an ELM developing a market brand which all can use to promote their individual schemes i.e. an umbrella scheme. The unintended consequence is however that it has introduced a systematic economic bias in favour of large ELMs with access to major marketing resources and an incentive to create tame societies which minimise the administration costs. This may make traditional societies uncompetitive, even those using ELMs. In the worse case scenario it may encourage ELMs to enter the market with created societies designed to 'farm' this sector for the turn on proceeds they are allowed to take. Once again this does not affect the licensing objectives but may flout the intentions of the Act.

We are therefore writing to advise the Department that if the government wants to preserve the lottery proceeds limits and/or avoid the unintended consequences outlined above it may need to impose mandatory conditions or take other action to reinforce the proceeds limits and reduce the risk that these lotteries establish a successful precedent for avoiding the proceeds limits. The Commission warned the Health Lottery, when licensing it as an ELM, that if they managed to devise a scheme that was technically compliant but nonetheless in reality, breached the proceeds limits, the Department might take steps to block the loophole, so any action on your part should not come as a surprise to them.

The Commission recently sought legal advice from leading counsel on these issues, both in our role regulating society lotteries but also in our role as adviser to the Secretary of State on gambling regulation. Our advice is that the Commission's position as a regulator is circumscribed by the licensing objectives but the Secretary of State has wider powers under sections 78 and 79 of the Act to impose additional mandatory licence conditions on operating licenses without that constraint."

32. The Health Lottery was formally launched on 29 September 2011. On 13 October 2011, Camelot wrote to Ms Williams requesting that "the Commission consider immediately whether or not in its view the [Health Lottery] scheme is legally valid". It stated that it was continuing to keep the issues under review. In the letter, Camelot set out the basic facts concerning the CICs and THL. It referred to Mr Desmond

Heath Lottery, and in reality has no independent existence, far less any control of management strategic decision-making over their own lotteries. The absence of any independent control on the part of individual CICs is clear from the fact that the Terms and Conditions, and every aspect of the marketing to date, are identical for every lottery. Assessment of the Health Lottery against this indicator clearly tends to show that the Health Lottery is in reality a single lottery.”

34. The letter concluded:

“Camelot is concerned that, on an objective assessment of the Health Lottery against the indicators set out in the Commission’s Advice Note, and the statutory provisions, the Health Lottery is unlawful.

Camelot therefore requests that the Commission undertakes an immediate review of the Health Lottery, and considers whether the lottery operating licences of the 51 CICs involved, and that of THL, and of Mr Macrae, should be revoked; and whether or not Mr Macrae is promoting the Health Lottery without an appropriate licence. In the event that the Commission were to decline to undertake a review, we should be grateful for a full explanation of its reasons for refusing.”

35. On 19 October 2011, Matthew Hill, a Director of the Commission, wrote to Martin Hall, the Chief Executive of THL Ltd, summarising points made in a meeting between the Commission and representatives of the Health Lottery scheme earlier that day:

“I said that during the licensing process the Commission had made clear that although it had considered the scheme before it to have been capable of being made compliant, it was not as presented compliant. It appeared to the Commission at the time that the arrangements being put in front of it amounted to a single large lottery and not, as was represented, many small ones marketed under a single brand.

I explained that the Commission received then and over a period of time reassurances from you and representatives of the relevant CICs indicating that you understood the Commission’s concerns and would take action to resolve them.

I explained that the arrival of the first draw had served to crystallise many of the concerns that the Commission had raised during and since the licensing process. As a result our initial view was that:

- The scheme amounted to a single large lottery, promoted by the Health Lottery ELM on behalf of the

We concluded the meeting by stating that although the meeting had been helpful, the prospect of regulatory action may not have receded. You asked what notice would be given by the Commission should it decide to pursue formal regulatory action. We explained that we would do our best to provide suitable notice.”

36. Mr Macrae had participated at an earlier meeting with the Commission that same day and Mr Hill wrote to him too, on the same date, in similar but not identical terms. The penultimate paragraph of Mr Hill’s letter was as follows:

“The Commission expanded further on its concerns, stating that the extent to which the individual CICs could be said to have their own existence would have a bearing on the question of whether what was being promoted was in fact a single large unlicensed lottery. We noted that your legal adviser disagreed with our legal analysis but we stated, nevertheless, that this was the Commission’s position.”

37. On 20 October 2011, Ms Williams of the Commission replied to Camelot’s letter of 13 October “regarding your concerns about the legality of ‘the Health Lottery’”. Ms Williams did not comment on any plans that the Commission might have had to review the operation of the Health Lottery. For present purposes, the most important part of the letter was the penultimate paragraph:

“While writing I should perhaps note that we do not agree with your particular interpretation of section 19. It is quite clear from the Gambling Act 2005 that Parliament envisaged societies using commercial ELMs to conduct lotteries on their behalf i.e. that societies while not aiming to make profits themselves were not precluded from contributing to ELM’s profits by paying them for their services. We see the prohibition on private gain in section 19 as applying solely to the society’s objectives.”

On 28 October 2011, Squire Sanders Hammonds wrote to the Commission enclosing copies of marketing materials that had been developed and were proposed as a result of the meeting of 19 October. The Commission replied to the letter from Squire Sanders Hammonds on the following day. On 2 November 2011 the Commission responded to a letter from Mr Muller on behalf of the CICs dated 21 October 2011 stating:

“Following our meeting on the 19 October you submitted a package of information providing further details of the operations of the CICs and the relationships and agreements between the CICs, the Health Lottery ELM Ltd (the ELM) and the Peoples Health Trust (PHT).

The Commission has now considered the content of the submission and we remain concerned about the genuine separateness of the CICs, especially given the marketing of

regulatory action, or decided not to do so, and of the reasons for its decision. Camelot took issue with the Commission's interpretation of section 19:

“... the difficulty arises where the [CIC] is established and conducted for the very purpose of generating profits for an ELM. ... In this situation, one of the society's purposes is not to maximise its *own* income but to maximise the income of its associated ELM. Thus one of the society's purposes is a commercial one, and therefore unlawful under section 19, albeit that it is not the society itself that receives the commercial benefit.

For the reasons set out in my letter of 13 October 2011, we believe the CICs are merely paper vehicles designed to seek to get around the provisions of the Gambling Act. The very structure and business model of The Health Lottery depends upon each of the CICs having as one of its purposes the object of creating profits for The Health Lottery ELM Ltd. This situation is plainly inimical to the policy underlying the Gambling Act, and results in the societies breaching the requirement under section 19 that they be established and conducted for a non-commercial purpose.”

39. A further meeting between representatives of the Commission and the Health Lottery scheme was held on 8 November 2011. Mr Hill wrote to Mr Macrae on 22 November 2011 summarising the position reached and identifying further information required by the Commission. He stated:

“As you know, the Commission has been concerned that the CICs and their corresponding society lotteries may not carry the degree of genuine separation required to fall on the right side of the boundary of compliance. However, we consider that the additional action already taken by the CICs, coupled with the undertakings you have given both at the Regulatory Panel and in subsequent discussion, have brought us to the point where we are prepared to accept for the time being that the scheme should continue to be permitted to operate. In this respect we note your explanation of the reason the scheme is constructed in the way it has been (that addressing health inequalities needs to be addressed “from the ground up”); and in connection with this point, the Commission notes the undertakings that the CICs will continue to develop local presence, including through local advisory boards – and, through such development, that each CIC will provide some direction to the PHT about the issues to be addressed in its local area.

As I indicated at our meeting on 8 November, the Commission accepts your arguments on the reasonableness of expenses at this point; but I should repeat the Commission's concerns that an “open-ended” arrangement may well cause us to alter our

successful lottery scheme is, in the Commission's view, permissible."

Ms Williams' reference to "ELM costs reasonably incurred" reflected the restriction imposed by section 254(2) of the Act.

42. On 28 November questions were asked in the House of Lords about the legality of the Health Lottery and its legally minimum contribution to good causes. Lord Faulkner of Worcester asked:

"... notwithstanding what the Gambling Commission may have decided initially about the Health Lottery's legality, how can it be legal to have 51 community interest companies linked to the Health Lottery which have no independent existence, but which have the same three directors and all operate out of the same virtual office? How is that legal?"

The Minister, Baroness Garden of Frognal, replied:

"... the Gambling Commission ... was working with the operator to ensure that what is delivered is actually compliant. We expect initial findings from that monitoring to be with us by next March."

43. On 7 December 2011, Camelot again wrote to the Commission. In that letter, Dianne Thompson, the Group Chief Executive, referred to the statement made in the House of Lords to the effect that the Commission would publish interim findings of its monitoring of the Health Lottery, but added that "this is a logically and legally distinct issue which should not preclude immediate determination on the lawfulness or otherwise of the Health Lottery in its current format". She added:

"It seems to us inevitable that the Commission must now (if it has not already) reach a formal determination as to whether it considers that the Health Lottery is lawful or not. I should therefore be grateful if you would confirm whether the Commission has already formally concluded that the Health Lottery is lawful and, if so, the reasons for that conclusion. In the event that it has not yet reached a decision, please confirm by when it is expected to do so."

44. On 9 December 2011, Mr Muller responded on behalf of the CICs to Mr Hill's letter of 22 November 2011. With regard to THL's fees, he stated that in the future, when the costs incurred by THL had been recouped, the CICs would seek to review the level of those fees. On the independence of the CICs from each other, he said that Local Advisory Groups (LAGs) were being formed, and:

"The individual CIC websites are currently being re-written as each CIC commences its funding programme, both to demonstrate the application of funds to date and to invite members of each CIC community (both Individuals and Incorporated Interest groups) to participate within their LAG.

the Claim Form promptly and within three months of the date upon which the Scheme began operating (8 October 2011).

- (b) Having failed to act promptly or within time, the Claimant is unable to establish a clear cut case of illegality on the merits.

In the alternative, and in any event, the application for judicial review should be dismissed because:

- (a) The Scheme is a series of lawfully constructed and licensed multiple society lotteries, capable of operating in a manner which is compatible with the Act. The Commission is entitled to a considerable margin of appreciation in which to operate as the expert statutory regulator. Its decision to grant an operating licence, the compliance activities it undertakes and its use or non-use of enforcement action is a matter which is subject to challenge only on the grounds of manifest irrationality. The Claimant is unable to establish this standard.
- (b) The Scheme does not inherently constitute one single lottery, either on control and accountability or marketing grounds. Each society holds an operating licence. The Commission has had regard to all relevant considerations and its regulatory decision-making has been rational at all times.
- (c) The CICs are non-commercial societies within the meaning of the Act. The Commission rationally rejects the characterisation of the CICs as anything other than community interest companies established to support good causes in particular localities.
- (d) The Claimant's claim is, in truth, a political complaint that the Act permits multiple society lotteries such as The Health Lottery to lawfully exist. This is a matter best addressed to Parliament and not to the Courts."

50. THL's Detailed Grounds are similarly clear:

"... Camelot's first challenge is manifestly out of time. If the scheme was "reverse engineered" by ELM in the manner alleged, or if the CICs had been established to generate a profit for ELM, (neither of which allegation is in fact sustainable) these matters were apparent at the time and ELM should never have been granted a licence. However ELM was granted a licence on 20 September 2010 following a hearing before the Regulatory Panel, before Northern & Shell's involvement. That is over 18 months ago. The time to have challenged these matters was then not now. Not only is the application well out of time, it is moreover unfair to allow the challenge to proceed. Since that date the shareholding of ELM has been acquired by Northern & Shell Limited (on 17 February 2011, see paragraph 7 of the witness statement of Martin Dawson Hall), and very substantial funds have been invested in infrastructure, set up

was inconsistent with the licensing objective that gambling should be conducted in a fair and open manner.”

54. The Commission’s findings were largely based on research it had carried out. Its findings included the following:

“In addition, we asked the authorised staff involved in the exercise to record their observations against the following questions:

- **Did any of the marketing material on display or available at the premises of the retailer include the key message: ‘The Health Lottery scheme manages 51 society lotteries that operate in rotation and each represents a different geographical location of Great Britain’?**
- Commission staff observed that only 60% of retailers had any marketing material (which consisted mainly of posters and players guides) that included the key message.

Test purchasing

Commission staff asked the following questions of retailers, with the corresponding responses:

- **Can you tell me which society lottery is being promoted today (this week)?**
- 89.1% of retailers were unable to advise correctly.
- **Q10. Can you tell me how I can find out which society lottery is being promoted this week? (for those who were not able to advise correctly in respect of the previous question)**
- 70.5% of retailers were unable to advise correctly
- This and the previous question demonstrate that 63% of retailers were neither able to say which lottery was being promoted nor advise where the information could be found.
- **Q12. Have you [the retailer] ever received training from Health Lottery ELM Ltd (the ELM) about how the lottery works?**
- 40.2% of retailers confirmed that they had received training from Health Lottery ELM Ltd

56. Understandably, the Commission, THL and the CICs objected to this late amendment, and to the amended claim being heard by the Court on the dates set aside for the hearing of Camelot's original claim.
57. Mr Macrae and Mr Hume have filed witness statements describing the functioning of the CICs and PHT. For present purposes, it is important to note that there is no suggestion that their statements are incorrect, or that any of the CICs has acted in breach of any restrictions arising from their Articles of Association (and in particular as to the allocation of its funds within the community specified in its Articles) or that the directors of any of the CICs has acted in breach of the fiduciary duties he owes to each of the CICs individually.
58. Similarly, it is not suggested that PHT uses its funds, derived from the CICs, other than for charitable purposes in accordance with the directions of the CIC from which the funds derive. Clause 4.2 of the agreements between PHT and each of the CICs is an undertaking on the part of PHT that the funds it receives from each CIC "will be restricted to Good Causes within the geographical area represented by that CIC".
59. As to the question of which CIC lottery takes place, Mr Macrae's evidence is as follows:

"The schedule as to when a particular CIC has its lottery is decided by the directors of the CICs, specifically, Mr Vick. In order to offer a prize of £100,000, the relevant lottery must raise £1million. Two CICs normally participate per week. The first is closed when it reaches a little over £1m (to allow for errors by the retailers) and the second is then opened. When it, in turn, reaches £1million, both CICs have met the requirement for each lottery to offer the £100,000 prize. If there are sales in excess of £2m (£1m per CIC) then any additional sales are allocated between the two lotteries."

The parties' contentions in summary

60. For Camelot, Lord Pannick QC submitted:
- (1) The CICs were established and they are conducted at least in part for the purpose of the private gain of THL, in breach of section 19 of the Act. It follows that no licences should have been granted in relation to the Health Lottery and that their licences should be revoked. At the very least, the Commission should conduct a review into this issue.
 - (2) In reality, there is a single Health Lottery, and it breaches the restrictions on lotteries imposed by section 99.
 - (3) The Commission unlawfully restricted its statutory review to questions of marketing and presentation.
 - (4) Camelot had not been guilty of any delay disentitling it to relief.
 - (5) Permission to amend should be given to enable all issues to be resolved.

Health Lottery, and could and should have been asserted to the Commission shortly after that announcement, and if the Commission did not accept that the scheme was unlawful should immediately have been the subject of legal proceedings. The need for speed was all the more important and clear since Camelot must have been aware that substantial expenditure was being made in order to launch the Health Lottery. However, Camelot did not complain to the Commission until after that launch, some 7 months after the announcement.

65. Given this chronology, Camelot cannot be excused for the delay in commencing proceedings by the fact that, as a result of the Minister's statement in the House of Lords on 28 November 2011, it was expecting a report of the Commission on the working of the Health Lottery. Camelot should by that date already have issued proceedings.
66. Moreover, once there is an issue as to the claimant's delay, as in the present case, in my judgment it is for the claimant seeking the exercise by the Court of its discretion to extend time to be candid to the Court as to when it first appreciated that it had grounds for judicial review. Camelot has not been candid. It did not put before the Court the fact of its discussions with the National Lottery Commission, of which the only evidence is the unchallenged reference in the Commission's letter of 25 July 2011 to which I have referred.
67. Reluctant as I would be to grant permission to Camelot to proceed with its original claim, I would be even more reluctant to refuse permission if it had satisfied me that the Health Lottery/Lotteries is/are unlawful and conducted in breach of the restrictions imposed by the Act. The Court should be very slow indeed to countenance continuing illegality. I should similarly be reluctant to refuse all relief if I had concluded that the Commission had incorrectly construed the applicable provisions of the Act and was or might be countenancing such illegality. I shall therefore address the following questions:
 - (1) Has Camelot shown that the Health Lottery is unlawful:
 - (a) by reason of sections 98 and 19, and the prohibition on personal gain?
 - (b) in relation to section 99 and the restrictions on proceeds and prizes?
 - (2) If the answers to (1)(a) and (b) are negative:
 - (a) is the evidence of unlawfulness such that the Commission could not lawfully refuse to review the question of unlawfulness?
 - (b) has the Commission acted unlawfully in excluding from its statutory review questions of accountability and control?
68. On question (1)(a), in my judgment the Commission has correctly construed sections 98 and 19. Section 19 focuses on the non-commercial society, and not on those who work for it or who are employed by it or contracted by it to provide services of any kind. Thus it may pay its officers and employees, and their private gain is not private gain for the purposes of section 19(1): subsection (3). It is common ground, and clear, that the Act does not require an ELM to be non-profit making. It follows that the fact

different CIC, with the profits from the sale of the tickets then going to that CIC, does not of itself justify treating the two lotteries that week as if they are one.

75. In the present connection, I should also mention the criticism of the Commission's decision in September 2010 to grant the Health Lottery licences on the basis that the proposed scheme was "capable of being compliant". The suggestion is that the Commission should not have granted the licences unless it was satisfied that the scheme would be compliant. However, on reflection I have concluded that this criticism is misplaced. The scheme was at an early stage. Those involved could not be expected to invest the considerable sums to proceed without the assurance of the necessary licences. Conversely, at that stage the Commission could not have the detail of the operation of the proposed lotteries that would enable it to conclude whether or not the lotteries were lawful in their operation: at that early date, such information simply did not exist. The Commission made the position clear:

"The Applicants were advised that they would have to ensure that the scheme represented 31 (or more) separate lotteries, rather than operating as a de facto single lottery, which would of course be unlicensed and/or operating in breach of the limits imposed by the Act."

It does not follow from the fact that each lottery is operated for a different CIC as a matter of legal form and substance that the CICs and THL lotteries are conducted fairly and openly. But that is very much a question for the regulator. I consider that the Commission is entitled to take the view that fairness and openness require purchasers of tickets sold for community benefit to know and to intend that at least 20 per cent of the sale proceeds are going to the good cause to which they will in fact be applied. Whether the Commission should have included appropriate conditions in the licences when they were granted in order to ensure that the various lotteries were presented as and perceived to be individual lotteries is a question that was not raised by Camelot, and in any event if raised would have had to surmount the difficulty of the wide discretion allowed to the regulator.

76. I would answer my questions (1)(a) and (b) above in the negative.
77. Before addressing questions (2)(a) and (b), it is necessary to address Camelot's application to amend.
78. In judicial review proceedings, it is by no means unusual for the Court to have to consider developments subsequent to the commencement of proceedings. That is particularly so where the duty of the public authority is of a continuing nature, as in the present case. It would be absurd for the Court to consider the original claim for judicial review as if the Commission had never made its review decision. It follows that provided I was otherwise minded to grant permission to proceed under CPR 54.4, the fact that the Commission decision challenged by the amendment post-dates the commencement of proceedings is of itself of little importance. Furthermore, since the Commission's decision is so recent, there can be no objection to the claim based on the amendment on the ground of delay.
79. To my mind, apart from the question whether the amendment raises an arguable case, the most important question on the application to amend is whether the resulting

86. In view of the question raised as to the effect of section 19, if Mr Justice Kenneth Parker agrees with my conclusion, I would authorise citation of this judgment, notwithstanding the refusal of permission.

Mr Justice Kenneth Parker:

87. I agree.