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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	<u>Claimant</u>
- and -	
THE GAMBLING COMMISSION	<u>Defendant</u>
- and -	
(1) THE HEALTH LOTTERY ELM LIMITED	
(2) – (52) THE COMMUNITY INTEREST COMPANIES	
LISTED AT APPENDIX 1	<u>Interested parties</u>
-and-	
THE PEOPLE'S HEALTH TRUST	<u>Intervener</u>

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

252(4) provides that, where arrangements for a lottery are made by an external lottery manager on behalf of a society or authority, both the external lottery manager and the society or authority promote the lottery.

9. Section 65 authorises the Commission to issue (among other licences) licences to promote a lottery, known as lottery operating licences, but section 98 restricts the issue of a lottery operating licence to non-commercial societies and local authorities and persons acting on their behalf. Subsection (2) provides:

“(2) A lottery operating licence may authorise–

- (a) promotion generally or only specified promoting activities;
- (b) the promotion of lotteries generally or only the promotion of lotteries of a specified kind or in specified circumstances;
- (c) action as an external lottery manager (in which case it is known as a ‘lottery manager’s operating licence’).”

10. “Non-commercial societies” are defined in section 19:

“19. (1) For the purposes of this Act a society is non-commercial if it is established and conducted–

- (a) for charitable purposes,
- (b) for the purpose of enabling participation in, or of supporting, sport, athletics or a cultural activity, or
- (c) for any other non-commercial purpose other than that of private gain.

(2) ...

(3) The provision of a benefit to one or more individuals is not a provision for the purpose of private gain for the purposes of this Act if made in the course of the activities of a society that is a non-commercial society by virtue of subsection (1)(a) or (b).”

Much of the present case turns on the effect of this definition.

11. Section 254 of the Act defines the proceeds and profits of a lottery:

“254. *Proceeds and profits*

(1) In this Act a reference to the proceeds of a lottery is a reference to the aggregate of amounts paid in respect of the purchase of lottery tickets.

(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.

(3) The second requirement is that—

(a) the proceeds of any lottery promoted in reliance on the licence may not exceed £4,000,000, and

(b) the aggregate of the proceeds of lotteries promoted wholly or partly in a calendar year in reliance on the licence may not exceed £10,000,000.

(4) The third requirement is that it must not be possible for the purchaser of a ticket in a lottery promoted in reliance on the licence to win by virtue of that ticket (whether in money, money's worth, or partly the one and partly the other) more than—

(a) £25,000, or

(b) if more, 10% of the proceeds of the lottery;

and any rollover must comply with this subsection.

(5) The fourth requirement is that where a person purchases a lottery ticket in a lottery promoted by a non-commercial society in reliance on the licence he receives a document which—

(a) identifies the promoting society,

(b) states the name and address of a member of the society who is designated, by persons acting on behalf of the society, as having responsibility within the society for the promotion of the lottery, and

(c) either—

(i) states the date of the draw (or each draw) in the lottery, or

(ii) enables the date of the draw (or each draw) in the lottery to be determined.

...”

The National Lottery is not subject to the restrictions imposed by section 99.

14. Section 116 confers power on the Commission to carry out a statutory review of the conduct of licensees:

“116. *Review*

(1) The Commission may in relation to operating licences of a particular description review—

(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.”

15. Section 117 confers significant regulatory powers on the Commission:

“117 *Regulatory powers*

(1) Following a review under section 116(1) or (2) the Commission may–

- (a) give the holder of an operating licence a warning;
- (b) attach an additional condition to a licence under section 77;
- (c) remove or amend a condition attached to a licence under section 77;
- (d) make, amend or remove an exclusion under section 89(3);
- (e) exercise the power under section 118 to suspend a licence;
- (f) exercise the power under section 119 to revoke a licence;
- (g) exercise the power under section 121 to impose a penalty.

(2) Where the Commission determines to take action under subsection (1) in respect of a licence it shall as soon as is reasonably practicable notify the licensee of–

- (a) the action, and
- (b) the Commission’s reasons.

(3) In determining what action to take under subsection (1) following a review the Commission may have regard to a warning under that subsection given to the licensee following an earlier review (whether or not of that licence).”

16. Community Interest Companies are a relatively new form of limited liability company established by the Companies (Audit, Investigations and Community Enterprise) Act 2004. They are regulated by the Regulator of Community Interest Companies. There is a convenient summary, which is sufficient for present purposes, in the guidance issued by the Department for Business, Innovation and Skills:

“As CICs are intended to use their assets, income and profits for the benefit of the community they are formed to serve, they must embrace some special additional features to achieve this:

They are subject to an ‘asset lock’ ... which ensures that assets are retained within the company to support its activities or

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

CICs for their respective areas. The structure which has been adopted is efficient from a tax point of view and also has certain advantages in terms of minimising the administrative costs which will be incurred by the CICs.”

Hammonds’ letter included substantial information about the proposed scheme and those involved in it, and expressed the hope that it would serve as a basis for discussion when there was a meeting with the Commission.

19. 31 of the CICs were incorporated on 3 March 2010. Each related to a different area of the country. An additional 20 CICs were incorporated in May 2011. Each CIC is a company limited by guarantee, and each of them has the same three directors, namely Donald Macrae, Anthony Vick and Jeremy Muller. Mr Macrae and John Hume drafted the original community interest statements of each of the CICs.
20. In August 2010, the Commission’s officials produced a Case Summary for THL’s application for an operating licence and for personal management licences. It described the proposed lottery scheme as follows:

Each lottery draw is promoted by a CIC, who will possess a remote and non-remote society lottery operating licence. Each CIC funds grants and projects that address health inequalities in a particular region of Great Britain. Each week at least one CIC will promote the scheme, with additional CICs joining in as more tickets are sold. This prevents any CIC from exceeding the £4 million threshold for a single lottery. When a CIC has sold at least £1 million tickets, the system evaluates whether sales can support a second CIC joining, and whether this second CIC can sell £1 million tickets. If the calculations suggest that this is possible, the first CIC will freeze any further ticket sales, and the second CIC will take over the promotion. The tickets produced by the Paypoint/Epap machines will indicate which CIC is the promoting society for that ticket. Once the second CIC reaches £1 million in ticket sales, the same evaluation is repeated and either the first CIC continues its sales, or a third CIC comes on board. A copy of the CIC schedule has been provided. This will be available on the website, or players can call to find out who the current promoters are. Retailers will be encouraged to keep in touch with updates on ticket sales, and a weekly message will be sent to all retailers through the payment machines on Sundays, saying which CIC regions are being funded from ticket sales that week. However, as the promoting CIC may change quickly depending on ticket sales, there is no way a player can know in advance of the ticket purchase which CIC will receive the proceeds of their ticket prices.

21. On 2 September 2010 the Regulatory Panel of the Commission held a hearing to consider the various licence applications made for the purposes of the Health Lottery scheme. It was attended by representatives of the applicants for licences, including Ms

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

and that of the other directors of the CICs is to use the proceeds of their lotteries to tackle health inequalities.

25. THL Ltd, and with it its subsidiary THL, were acquired by Northern & Shell Plc, the chairman of which is Richard Desmond, on 17 February 2011. On the same date, the then 31 CICs entered into a written agreement with THL under which it agreed with them to render the external lottery management services specified in the agreement for the fees set out in it. That agreement was replaced by 51 agreements in identical terms between the 51 CICs and THL. Clause 9 of the later agreements, in which THL is referred to as ELM, is as follows:

“ELM shall be entitled to determine in its absolute discretion:

- (a) the order and number of Lotteries drawn in each week (the “Lottery Order”); and
- (b) the approach to Prize Insurance employed in relation to each Lottery Draw,

provided always that ELM shall exercise such discretion in good faith and in order to achieve the following ends:

- a) to ensure that at all times the operation of the Lotteries is legal under the Applicable Legislation (including, without limitation complying with the Proceeds Limit and the Cumulative Proceeds Limit); and
- b) to ensure so far as possible that all CICs participating in the Health Lottery Scheme are treated equitably inter se with regard to the generation of Lottery Proceeds.”

The services to be provided by THL were set out in schedule 1:

“1. ELM shall provide to the CIC the Services in its role as an external lottery manager, under the Operating Licences which license it to manage the operation of lotteries on behalf of the CIC.

2. All of the Services are to be provided in strict accordance with the Operating Licences granted to The Health Lottery ELM and the Society Licences granted to the CIC, as applicable.

3. The Services will include, inter alia:

- i) Making all necessary arrangements for the online and offline sale of Lottery Tickets (to include the printing of the Lottery Tickets);
- ii) Making all necessary arrangements for the conduct of the Lottery Draw including procuring the equipment required to make the draw and by means of agreements

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

to the National Lottery – and impact on other smaller society lotteries. If it wishes to do the former it may need to put up a marker with the Health Lottery urgently.

Background

It is one of the general principles underpinning the regulation of lotteries that a lottery should not be conducted for private gain and that the proceeds of a lottery will be divided among (i) the prizes to winning participants, (ii) the actual expenses incurred in organising the lottery and (iii) the ‘good cause’ for which the lottery was operated. However, as the Gambling Act 2005 recognises, many societies lack the organisational wherewithal to operate lotteries effectively. The Gambling Act 2005 therefore permits External Lottery Managers (ELMs) to operate lotteries on behalf of such societies.

The concept of ELMs first arose at the time of the National Lottery etc Act 1993, which amended the Lotteries and Amusements Act 1976 Act by providing for a class of persons, licensed by the Gaming Board, who were entitled to manage society lotteries and local authority lotteries. Under that regime, the maximum figure of expenses that could be deducted from the proceeds of the lottery was capped at 35 per cent for lotteries with proceeds of £20,000 or under and 15 per cent in all other cases. The balance of the proceeds fell to be divided between sums used for prizes and sums to the society in question for its purposes.

Under the Gambling Act 2005, the minimum amount that has to be provided to the ‘good cause’ element has been set at 20 per cent, by virtue of the mandatory conditions attached to lottery operating licences under section 99 of the Act. It follows that the balance of the proceeds are divided up between the society and ELM, on terms which those two parties decide. This means that there is the potential for the ELM to receive far greater remuneration than was previously the case depending upon the commercial negotiations between the ELM and the society. The policy seems to be based on the assumption that societies that already exist will seek out ELMs who may be able to assist them. The 2005 Act did not envisage that there might be circumstances, such as the Health Lottery, where it is the ELM that establishes the societies with the express intention of providing services to them for financial gain and creating enough societies to stay below the proceeds limit whatever the overall total raised by the common marketing.

There have been previous attempts to brigade charities/societies under a single marketing umbrella but most have failed because they have not been able to get the critical mass of national marketing – and none have set up societies specifically to act as the sponsor for different draws. Desmond’s purchase of the Health Lottery gives it access to considerable marketing resources so it might well succeed where others have failed.

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

decisions on the legality of the scheme that is being developed. It is however likely that the Commission will advise you soon that the Healthcare Lottery scheme (even if modified) is designed to circumvent the proceeds limits. I expect that the scheme that will be put forward will be on the borders of technical legality - the gambling equivalent of a tax avoidance scheme that exploits loopholes in the legislation. Camelot will press for action and other External Lottery Managers (ELMs) will be watching carefully to see if the Health Lottery has established a new precedent which they could follow.

As we have discussed with your officials 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 the Health Lottery establishes a successful precedent for avoiding the proceeds limits. We 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 the Department might take steps to block the loophole.”

31. Ms Williams wrote to the Head of Gambling in the Department on 22 July 2011 on the subject of the Health Lottery:

“Although we take the view that the arrangements for the lottery are likely to be on the borders of technically lawful (and not entirely clear which side) we are concerned that the arrangements have been designed to circumvent the legislative intentions of the Act in respect of the monetary limits for society lotteries. It may be the case that the Act did not envisage circumstances where an External Lottery Manager (ELM) creates a number of non commercial societies to be promoted under the banner of one lottery scheme where that scheme as a whole breaches the annual proceeds limit of £10 million set out in the Act.

In the case of the Health Lottery, the operator has set up 31 separate society lotteries, all of which are licensed by the Commission, and has recently submitted applications for a further twenty society lotteries to be licensed. They are predicting ticket sales of £248 million 2012. This may be an ambitious target but with the significant resources of Northern and Shell plc available to support and promote the lottery it probably has a better chance of success than previous attempts to create a large nationally promoted lottery.

As you know the proceeds limits in the Act are designed to preserve major nationally marketed lotteries for the National Lottery. Preserving those for the National lottery is not one of the Commission’s licensing objectives and taking legal action to test whether the Health Lottery scheme is the right side of

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

having said that it was “a for-profit project” and to the chief executive of THL having said that it was in the long term a commercial venture, and continued:

“It is therefore clear that one of the purposes for which the 51 societies are established and to be conducted is to generate profits for THL (and in turn its parent company N&S), which will presumably be achieved via the payment of management fees by the CIEs to THL. For the reasons set out above, in the former case the fact that one of the purposes for which the CIC is established and conducted is to create profit for THL, albeit not for itself, nevertheless means that the CIC is established and conducted for commercial purposes. Accordingly, it follows that none of the CICs are established and operated for a non-commercial purpose within the meaning of section 19.

As a distinct point, the nature and extent of the remuneration which THL is to be paid for managing the Health Lottery is not known. Camelot would be grateful for your confirmation that the Commission has satisfied itself that the level of remuneration, and other expenses incurred in connection with the operation of the Health Lottery, are reasonable, particularly given that (1) the return that is claimed to be given by the Health Lottery to charitable causes has been set to all intents and purposes at the minimum level required by law, and (2) it appears that the average prize payout of the Health Lottery’s current game is only 33.4 per cent.

Single lottery

Having regard to the indicators set out in the Commission’s Advice Note, it is also clear that the Health Lottery is in reality one single lottery, and therefore a breach of the requirements of the Act and regulations.”

33. Camelot also asserted that the individual CICs had no effective independent existence:

“It appears that the individual CICs do not have any effective, independent existence. Each of the CICs has the same three directors. Each of them has the same registered (virtual) office (Lower Ground Floor, 145-157 St. John Street, London EC1V 4PW). There is nothing to indicate that any of the CICs has played any part in the management or strategic decision-making relating to the promotion of the lottery. Indeed, 20 of the CICs were not even incorporated at the time the Health Lottery was announced in February 2011 and therefore could not have played any part in any decisions prior to May 2011. A single individual (Mr Macrae) holds a single personal management licence, presumably in respect of all of the CICs. In short, each of the 51 CICs was incorporated for the purpose of obtaining a lottery operating licence within the scheme of the

Health 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

People's Health Trust – which is not itself licensed by the Commission

- The prominence of the Health Lottery as an entity overwhelmed that of the individual CICs to such an extent that it could not be reasonably said that the CICs had sufficient real identity or existence of their own.

I explained that the Commission was considering what regulatory or enforcement options were currently available to address our very serious concerns. I said that the Commission was considering a wide range of options, although the most proximal of those options is likely to include the attachment of conditions, with or without a review of the various licences in play.

I said that the discussion represented an opportunity for you to demonstrate why the Commission may not be justified in taking such a view. In the case of the ELM represented, the Commission was particularly, but not exclusively, interested in the physical manifestation of the scheme in the public space, and how it might be viewed by players. We explained that this would, in our view, have a bearing on the question of what was being promoted, as well as potentially having an impact on the second licensing objective, which relates to fairness and openness.

...

The Commission expanded further on its concerns, stating that the imbalance between the prominence of the umbrella brand and the identity of the individual CICs was so great as to make it extremely difficult for any reasonable person to take a view that he or she was doing anything other than participating in a single lottery. We stated that, although we held serious concerns about several aspects of the overall scheme, we considered it a priority to remedy the physical manifestation aspect as this had the most immediate interface with the public and with players.

We noted that while you may not have agreed with our analysis, the Commission had the power to put the matter beyond doubt through the attachment of appropriate licence conditions. However, you undertook to provide, by Friday 28 October, a plan for addressing such an imbalance and to do so with reference to the indicators previously published by the Commission. You explained that the delivery of necessary changes may take longer, we accepted that point but for our part we considered the matter a high priority and expected you to want to move quickly.

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

what are said to be their individual, separate, lotteries under the single lottery brand, the lack of profile of the individual CICs, and their contractual relationships with each other and the ELM.

Specifically we have concerns about the level of control that the CICs have; and the arrangements in place with regard to the handling of funds generated by the weekly draws. We also have concerns (detailed below) about the way in which, and extent to which, the ELM is reimbursed bearing in mind the section 254 Gambling Act definitions of the proceeds and profits of a lottery and the section 260 offence of misusing any part of the profits of a lottery and the section 19 requirement that societies such as the CICs are not to be conducted for private gain.

We require further information in particular regarding arrangements between:

- the CICs and the ELM – the current agreements define the ELM’s fees as the money remaining from the proceeds after deduction of certain external costs, prizes and the good causes funds. These fees do not appear to be calculated solely on the basis of recovery of the costs actually incurred by the ELM. We would like to clarify the terms of this agreement and in particular the basis on which the fees as described by the documentation are considered to represent no more than the costs reasonably incurred in organising the lotteries or lottery. Also, we note that provision is made for ‘unclaimed’ prizes to be retained by the ELM as an additional fee. We are not persuaded the Gambling Act permits this. (Given that there is no precise prize pool for each draw – prizes are won at fixed odds – can you please clarify whether ‘unclaimed’ prizes here is intended to include sums earmarked for, but not in the event required to be used in, the payment of prizes.)
- the CIC and PHT – it appears that all good causes funds are directly transferred to the PHT for disposal; and no additional guidance is provided in the Memorandum and Articles of the PHT as to how the allocation will take place. The documentation provided makes it appear that an individual CIC has no control over how the good causes funds from the lottery draw are actually spent, or which projects addressing health inequality in its chosen locality they are spent on. We would like to clarify precisely how the allocation of funds is working.”

38. On 31 October 2011, Camelot replied to the Commission’s letter of 20 October. It asked to be informed in the event that the Commission decided to take formal

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

view in the future. In this context we note your expectation and public statement at the time the scheme was launched that if the scheme becomes more successful the CICs would wish to renegotiate the balance of return to the CIC causes.

Whether the Commission maintains its view – that the scheme should continue to be permitted to operate – will now depend on the delivery and demonstration of the undertakings you have given, particularly around establishing a distinct community identity (which in this case relates to the geographical focus of the individual CICs), but also around demonstrating independence from the ELM, notably in the area of reasonable expenses. In this respect we welcome your confirmation that if and when the scheme became more commercially successful the CICs would seek to renegotiate the terms of their contracts with the ELM with a view to increasing the proportion of proceeds returned to the causes of the individual CICs. I would also repeat the Commission’s view that there may be value, in terms of credibility, in building review points into the agreement between the CICs and the ELM.”

40. On 9 November, the Commission replied to Camelot’s letter of 31 October. It refused to give an assurance that it would inform Camelot of any decision other than the imposition of a formal regulatory sanction. Ms Williams stated:

“As I explained in my earlier letter, our approach to a new licensee is to work with them to ensure compliance. We only take formal action, such as licence revocation or the imposition of additional licence conditions, if in our judgement there is sufficient evidence of non compliance and taking action is proportionate in the circumstances.”

41. On the issue of the legality of the Health Lottery, the letter stated:

“On Section 19 we are agreed that a non-commercial society can use a commercial External Lottery Manager (ELM) to make the arrangements for operating its lotteries, that is, that the society may in fact contribute to the commercial success of an ELM as a by-product of paying the ELM costs reasonably incurred in organising its lotteries. You suggest, however, that the very structure of a business model such as that involved in the Health Lottery scheme inevitably depends upon each of the CICs having as its purpose (or one of its purposes) the object of maximising the income of and creating profits for the ELM.

While not commenting on the merits of the Health Lottery case, I would agree that if a society’s purpose were the creation of a commercial profit for investors in an ELM that would take it outside section 19. But commercial success of an ELM as a by product (even an inevitable one) of the operation of a

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.

We are becoming aware of the needs in many CIC areas, but wish to allow the LAG to assist in determining the priority to be attached to each need so as to maximise the effectiveness of the funds granted.”

Mr Muller’s letter also contained information as to the involvement of the CICs in funding decisions made by PHT.

45. Ms Williams wrote to Camelot on 16 December 2011. She stated:

“If [the Commission] did not consider that a multiple lottery scheme such as the Health Lottery was capable of operating within the law, the Commission would not have granted [THL] and the CICs whose lotteries are promoted under the Health Lottery brand operating licences.”

She added:

“On the specific question of whether the pursuit of profit for investors in an ELM can be a legitimate purpose, let alone the sole purpose, of a non-commercial society promoting a lottery we are agreed – it cannot. But as I explained previously, the fact that the commercial success of an ELM is one of the consequences of the actions of a lottery promoting society does not of itself place the society outside the Gambling Act’s definition of a non-commercial society.”

46. On 23 January 2012, Camelot received a copy of the Minister’s clarification in a letter to Lord Falconer, stating that the Commission would not be producing a review of its monitoring of the Health Lottery.

47. On 21 February 2012 Camelot sent to the Commission its Pre-Action Protocol letter. It stated that it proposed to challenge “the ongoing failure by the Commission to take regulatory action to suspend or revoke the THL licences”. The Commission responded substantively on 6 March 2012, denying the contentions made by Camelot.

48. Camelot issued these proceedings on 22 March 2012, seeking an order quashing the Commission’s decision not to conduct a section 116 review of the Health Lottery licences and a mandatory order requiring it to conduct such a review. It is clear that the review sought was primarily of the legality of the Health Lottery. It also sought a rolled-up hearing and expedition.

49. The Commission’s Detailed Grounds helpfully summarise its position:

“The Commission submits that permission to apply for judicial review should be refused because;

(a) In breach of CPR r.54.5(1), the Claim Form was filed neither promptly, nor within three months after the date when licences were awarded in September 2010. No compelling grounds have been advanced by the Claimant for its delay. In particular, the Claimant has even failed to file

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

costs, operating costs, employing persons and advertising and marketing. Indeed ELM's accounts for 31 December 2011 (which consolidates the financial statements) show that it has effectively invested about £29 million in establishing and operating ELM, and that there were also acquisition costs of £3 million (paragraph 53 of the witness statement of Martin Dawson Hall). ELM has entered into contracts with third parties, and it is simply not possible to unravel these without substantial loss (see page 3 of the pre action protocol response letter dated 14 March 2012 on behalf of ELM (Vol B5/tab51/pp 1709-1714) and paragraph 84 of Martin Hall's statement).

The second element of Camelot's complaint, that the actual operation of the scheme is not compliant, shows that Camelot is attempting to persuade the Court to assume the responsibilities of the Regulator and revisit issues of fact which had already been considered by the Regulator."

51. The CIC's Detailed Grounds make similar points.
52. Despite this litigation, the Commission's consideration of the Health Lottery continued. On 31 May 2012 there was an internal meeting to consider whether a section 116 review was appropriate. The Commission had considered evidence it had obtained and to which it referred in its letter to THL and the CICs of 12 June 2012, to which I refer below. Those at the meeting agreed that the information they had obtained tended to indicate that :

- “▪ The operators had failed adequately to convey the nature of the scheme to those purchasing a ticket.
- The operators had failed adequately to implement arrangements that enable participants to establish the identity of the lottery in which they were participating before they purchased a ticket.”

In consequence, it was decided to commence the review identified in the letter of 12 June 2012, to which I now refer.

53. By its letter of 12 June 2012 the Commission informed THL and the CICs that it was commencing the review of their licences under section 116(2)(c)(ii) of the Act, “because the Commission considers that a review would be appropriate to consider whether additional conditions should be attached to the ... operating licences pursuant to section 117(1)(b) of the Act in order to ensure that the facilities for gambling undertaken in reliance on the licences are conducted in a fair and open manner”. The letter set out the Commission's preliminary findings:

“In the Commission's view the work the Commission has already undertaken means that no further investigations are required at this stage. Our preliminary findings are that the license has conducted the licensed activities in a manner which

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

- **Have you [the retailer] ever received information from Health Lottery ELM Limited to explain how the lottery works?**
- 56% of retailers confirmed they had received information from the Health Lottery ELM Ltd to explain how the lottery works. 34.2% of retailers said they had not received information and 9.8% said they did not know whether they had received information
- **Q14. Have you [the retailer] received a visit from a representative of the Health Lottery ELM Limited and/or new marketing material this year (2012)?**
- 48.9% of retailers had received the new marketing material; of this group about half also had a visit from a representative of the Health Lottery ELM Ltd.”

In addition, the Commission had commissioned market research which indicated the level of awareness by purchasers of lottery tickets of the fact that the Health Lottery was operated on behalf of a different CIC, with a different geographical object, each week, and concluded:

“The Commission has concluded from these exercises that the licensee has not been sufficiently effective in its marketing and point of sale activities to provide the Commission with confidence that the scheme is consistent with the second licensing objective. The combination of the heavy umbrella brand marketing and the apparently ineffective promotion of the individual lotteries at the point of sale appears to the Commission to run the serious risk of the potential player not realising that they are participating in the particular society lottery rather than a single health related lottery.”

The letter set out the conditions that the Commission was minded to attach to the licences in the light of its preliminary findings.

55. The Commission’s decision led to a late application by Camelot to amend its claim so as to include a claim that the Commission had unlawfully decided to restrict its statutory review to the marketing and point of sale activities of the Health Lottery and should have included in its review:
- (1) the question whether the Health Lottery was in reality a single unlawful lottery;
 - (2) questions as to the control and accountability of the CICs; and
 - (3) the question whether one of the purposes for which the CICs were established appeared to be a commercial purpose.

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.

61. The legal contentions of the Commission and the Interested Parties were essentially identical. In summary:
- (1) Camelot had been guilty of undue delay in bringing these proceedings, which were not commenced within 3 months of the grounds for the claim arising or promptly. For this reason alone, permission to proceed should be refused.
 - (2) None of the CICs was established or conducted for private gain, even in part. Section 19 is concerned only with the purposes of the non-commercial society in question, and not with the private gains that may be made by its external lottery manager, which, it is common ground, may be a commercial company the object of which is to make private gain.
 - (3) The Commission had not acted unreasonably or otherwise unlawfully in carrying out its regulatory duties.
 - (4) Permission to amend at the late stage it had been sought should be refused.

Discussion

62. Despite the proliferation of witness statements, documents and statements of case, comprising 24 large ring binders plus lengthy skeleton arguments, the legal issues raised by Camelot, the Commission and the Interested Parties are relatively straightforward. The principal legal issues are whether the Health Lottery has been granted licences in contravention of sections 98 and 19 of the Act and whether the Health Lottery contravenes the restrictions in section 99. It is in relation to these issues that the question of Camelot's delay is most important.
63. In my judgment, the relevant facts as to the Health Lottery were available and must have been known to Camelot when Mr Desmond made his announcement in February 2011. On 25 July 2011 the Chair of the National Lottery Commission wrote to the Permanent Secretary of the Department for Culture, Media and Sport expressing that Commission's concerns about the Health Lottery and the threat it might pose to the National Lottery. The letter stated:

“Clearly we have also discussed this issue with Camelot's senior team who are equally concerned, given the scale of the risk. Since the Health Lottery has been publicised Camelot has consistently raised its concerns with us at Board and Chair level. ...”

The only publicity of the Health Lottery that is in evidence is Mr Desmond's announcement of February 2011.

64. I fully accept that, as Lord Pannick submits, judicial review is to be regarded as a last resort, and judicial review proceedings are not to be instituted precipitately. However, in the present case, I consider that there was considerable undue delay on the part of Camelot in bringing these proceedings. The facts on which it relies as showing that the Health Lottery scheme infringes the prohibition on societal personal gain were sufficiently known at the latest when Mr Desmond made his announcement. Camelot's contentions as to the effect of sections 98 and 19 went to the legality of the

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

that an ELM will make profits that will involve private gain on the part of its shareholders or officers or staff does not of itself result in an infringement of section 19(1) on the part of a non-commercial society that contracts with it.

69. I do not think that Parliament can be taken sensibly to have provided that if an ELM approaches a society proposing that the society holds a lottery to be managed by the ELM, and the society adopts that proposal, the society would be conducted thereafter partly for private gain for the purposes of section 19 because the lottery was proposed by the ELM with view to its making a profit, whereas if the proposal had been made by the society to the ELM, precisely the same activities carried out thereafter are conducted only for non-commercial purposes and comply with section 19. However, this would be the consequence of Camelot's submissions. Moreover, I do not think that Parliament could have intended the legality of a lottery, or the decisions of the Commission, to depend on what was in the mind of those conceiving of a scheme rather than the provisions of the scheme and the facts as to its operation in practice.
70. Furthermore, Parliament has enacted a control on the profits of an ELM, in section 254. If a non-commercial society pays to an ELM an excessive sum in respect of its services, i.e. more than the reasonable costs to the society of the services of the ELM, it will contravene section 260. Section 254 permits only the reasonable costs incurred by the society to be deducted from the proceeds of the lottery before payment of the net proceeds ("the profits of the lottery") for a purpose other than that of the fund-raising purpose it has stated for the promotion of the lottery. The Health Lottery advertises and states that its lotteries are for the purpose of addressing health inequality. Contravention of section 260 is a criminal offence: section 260(2).
71. It follows that even if the Health Lottery scheme was initially proposed with a view in part for private gain on the part of THL, provided its charges for its services are reasonable, the CICs were not ineligible for the grant of operating lottery licences. Similarly, the fact that THL may profit from the Health Lottery scheme is not a bar to the CICs retaining their licences.
72. I turn to consider question (1)(b). It is true that the CICs are under common control. They are however separate legal entities. To treat them as one involves piercing their corporate veils. It is not suggested that they are operated for fraud or in a fraudulent manner; nor could it be. It is not suggested that their assets are applied otherwise than for the purposes permitted by their individual Articles of Association, which require their activities to be carried on for the benefit of the community identified in their Articles. The fact that they have common directors does not of itself justify their being treated as if they were a single corporate entity.
73. Unless sales of lottery tickets in any week exceed the sum specified by THL and the CICs, each week's lottery is a separate lottery, and if each week's lottery is that of a different CIC there is no legal basis for aggregating the proceeds of each of them with the others. The fact that all of the CICs employ the same ELM does not of itself allow their separate proceeds to be amalgamated for the purpose of ascertaining whether there has been a breach of the £10 million limitation in annual proceeds imposed by section 99(3).
74. Similarly, the fact that if the weekly limit for the sales of a particular CIC lottery is reached, the fact that thereafter that week lottery tickets are sold identifying a

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

claim be considered and determined fairly. On this issue, the principal question is whether to proceed without an adjournment would render it impossible for the Commission and the Interested Parties to put relevant evidence before the Court.

80. On this question, Mr Goudie did not suggest that there was any further evidence on which the Commission would seek to rely if the hearing of the claim for judicial review were to be adjourned. THL and the CICs objected to the amendment, but were unable to identify any relevant evidence that they could adduce. Since the amended claim concerns the decision of the Commission based on its knowledge, it is difficult to see what relevant evidence they could adduce. Thus I see no injustice in considering the amended claim.
81. Whether the amended claim is a good claim is a very different question. For the reasons I have already given, I see no basis for any review of the decision of the Commission not to include in the present statutory review the questions raised by Camelot as to whether the CICs are non-commercial societies for the purpose of section 19.
82. Similarly, I see no arguable basis for impugning the failure of the Commission to include in the present review “issues of control and accountability”. In the first place, there is no evidence of any real doubt as to the facts of control. THL is controlled, ultimately, by Mr Desmond. The CICs are controlled by their directors. There is no evidence that Mr Desmond, or Northern & Shell, have any control over the CICs or their directors beyond that arising from the ELM agreements between CICs and THL. In relation to accountability, the CICs are regulated by the Regulator of Community Interest Companies. PHT is dependent on the CICs for its funding, which it works to ensure is distributed in furtherance of the objects of each of them, but it is not suggested that PHT is controlled by the CICs or their directors, or that it controls the CICs, or that it is controlled by Mr Desmond. PHT is regulated by the Charity Commission and, in Scotland, by the Office of the Scottish Charity Regulator.
83. It is trite law that the Courts do not seek to exercise or to control the powers and discretions conferred by Parliament on a regulator such as the Commission. It is I think sufficient for me to say that I see no basis for an argument that in deciding on its present review, the Commission exceeded the wide scope of its discretion or otherwise acted unlawfully.

Conclusion

84. For the reasons I have given, I would refuse Camelot permission to proceed with its claim for judicial review, on the grounds of its delay and its failure to establish a claim with a real prospect of success. I would refuse it permission to amend its claim on the ground that its amended claim has no real prospect of success.
85. I agree with the Commission that the question whether multiple society lotteries should be permitted is a political question, to be determined by the Government or Parliament. Multiple society lotteries are not prohibited by the Act. The Commission has correctly determined that the real question relating to the Health Lottery is whether it in practice satisfies the licensing objective of fairness and openness, given the misleading widespread public perception of a single lottery benefiting a single society. That is the question addressed in the current statutory review.

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.