



[2020] JMSC Civ 79

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU 2020 CV 01183**

<b>BETWEEN</b>	<b>PRIME SPORTS (JAMAICA) LIMITED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>BETTING GAMING &amp; LOTTERIES COMMISSION</b>	<b>RESPONDENT</b>

**IN CHAMBERS**

Mrs. Henlin Gibson Q.C. and Ms Stephanie Williams instructed by Henlin Gibson Henlin for Applicant

Mr. Ransford Braham Q.C. and Ms. Carissa Mears instructed by Braham Legal for Respondent

Mr. John Vassell and Mrs. Julianne Mais-Coy instructed by Dunn Cox for Interested Party

Judicial Review Application - Notice of Application filed for Court Orders for Permission to be joined as an interested party – Rules 56.4 and 54.13 of the Civil Procedure Rules – whether at Leave stage of Proceedings Interested party can intervene.

Heard on 27.04.2020

**CORUM: MORRISON, J**

**BACKGROUND**

[1] The matter before the Bar of the Court is whether, at the leave stage of Judicial Review Proceedings, a litigant can be permitted to intervene pursuant to Part 56 of the Civil Procedure Rules (CPR). The Interested party says it can. The Applicant for Judicial Review says he cannot. The Interested Party says that there are no arguable grounds for Judicial Review having any realistic prospects

of success and that therefore the threshold for leave is not met. Further, that there are discretionary bars to the grant of the ruling sought indicating that the Applicant is guilty of delay in bringing its application for leave. In the submissions made by the interested party the Respondent agrees.

**[2]** On April 22, 2020 the Applicant filed an Amended Notice of Application for Court Orders dated April 14, 2020. The Application was supported by the Affidavit of Ian Levy sworn to on April 3, 2020. The Application sought the following orders: -

1. Leave to Apply for Judicial Review by way of an Order of Prohibition to prevent the Respondent from granting any new lottery licence including to Mahoe Gaming Limited pending the conduct of a feasibility study on the operation of lotteries in Jamaica.
2. Leave to apply for Judicial Review by way of an Order of Prohibition to prevent the Respondent from granting any new lottery licence including the Mahoe Gaming Limited for the same games that are being offered by the Applicant.
3. An order of Mandamus to compel the Respondent to commission a feasibility study into the viability of granting a new lottery licence in Jamaica and/or to observe its policies that licences will not be granted for the same games being offered by an existing licensee.
4. An injunction to restrain the Respondent from granting, issuing, considering or continuing consideration of the grant of a lottery licence to Mahoe Gaming & Entertainment Limited or any new lottery licence pending the outcome of the Application for Judicial Review.
5. In the alternative, a stay of the consideration of the grant by the said or any new lottery licence pending the outcome of the Application for Judicial Review.
6. Such further and/or other ruling as this Honourable Court deems fit.

The grounds on which the Applicant sought the orders are as follows: -

1. Pursuant to Part 56.3 of the Civil Procedure Rules 2002.
2. Pursuant to Practice Directions 72, 73, 77, 80 and 83 of the Supreme Court of Judicature of Jamaica COVID-19 Emergency Directions.
3. The COVID-19 restrictions have affected the ability of the Applicant to proceed expeditiously.
4. No alternative form of redress exists.
5. The Applicant has a right to be heard or consulted in relation to any change in the policy or conditions for the grant of lottery licences.
6. By section 5(1) (a) of the Betting Gaming & Lotteries Act, the Respondent is required to or tasked with the duty to examine, in consultation with such organisations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island.
7. By section 5(1) (c) of the Betting Gaming & Lotteries Act, the Respondent is required to or tasked with the duty to examine, in consultation with such organisations as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island.
8. There are problems and/or issues associated with the operation of the lotteries market in Jamaica which affect the legitimate expectations, rights and interests of the Applicant.
9. The Respondent has or had a policy that new applicants to the market cannot offer the same game types as existing licensees.

10. This policy was strictly applied to the Applicant when it applied for and was granted its lottery licence in early 2000.
11. Specifically, the Respondent directed and advised the Applicant that it could not offer the same game types as Jamaica Lottery Company (JLC), the then existing lottery provider. The Applicant abided and was in any event required to abide by this directive from the Respondent.
12. The Applicant was forced to acquire Jamaica Lottery Company in order to expand its game types.
13. The Applicant has been trying to engage the Respondent on the problems since 2011 when it granted a licence to Goodwill Gaming to operate lottery games in Jamaica. Goodwill Gaming is not now offering lottery games in Jamaica,
14. Notwithstanding the Respondent is now considering a third application from Mahoe Gaming & Entertainment Limited and intends unless restrained to grant that licence without reference to the legitimate expectations and the concerns of the Applicant.
15. The intended licence to Mahoe Gaming & Entertainment Limited will be for the same game types as are being offered by the Applicant.
16. This does not exist anywhere else in the world. It will lead to market confusion n and market cannibalisation and significant and inestimable losses to the Applicant.
17. The Applicant has a legitimate expectation that the Respondent would abide by its policy and in the event of an intention to change, that the issue would be examined and investigated in consultation with the Applicant. This expectation is based on their experience and the practice of the Respondent.

18. The Applicant's legitimate expectations, rights and interests are directly impacted by this approach and the intended decision.
19. The Applicant has a right to be heard on the matter. The Respondent has refused to hear the Applicant. This refusal is a breach of natural justice and the rules of procedural fairness.
20. The existing policy for Game Types was strictly maintained in relation to the Applicant and should be observed and/or not be departed from without the Applicant's input.
21. The Applicant has failed to indicate whether it has abided or will abide by its stringent multi-jurisdictional due diligence in relation to Mahoe Gaming & Entertainment Limited. The maintenance of the due diligence process is critical to the country maintaining a credible Anti-Money Laundering and regulatory environment for gaming. This is of great benefit to existing stakeholders such as the Applicant insofar as its risk profile will also be adjudged by that of the country.
22. The Applicant wrote to the Respondent for confirmation that it is adhering to the policies and that it will be fair and transparent on the 6<sup>th</sup> November and the 4<sup>th</sup> December 2020. The answers are unsatisfactory, lacking in transparency and do not treat with the issues.
23. The time limit for making the application is not exceeded. The licence has not yet been granted but it is being considered and is imminent.
24. The Respondent is a public body, person or authority that is amenable to judicial review and the relief sought is in the realm of public law, judicial review is the most appropriate method of redress.

25. The Applicant wrote several letters to the Respondent including in 2018 and 2019.
26. Time is of the essence as the Respondent unless restrained intends to proceed with the grant of the licence to Mahoe Gaming & Entertainment Limited on the 3<sup>rd</sup> April 2020 or at its next monthly Board meeting in May of 2020.
27. The **Applicant** is directly affected by the decision.
28. The Applicant has made this application promptly.
29. If a stay of proceedings or an interim injunction is not granted the Respondent will likely proceed to grant or issue the new licence without regard for the Applicant's expectations, rights and interests.

### **The Applicant's Arguments**

- [3] First, they argue that Part 56 of the Civil Procedure Rules (CPR) makes a distinction between parties with a "sufficient interest" and those who are "directly affected". The Applicant goes on to say that the terms "sufficient interest" and "directly affected" relate to different stages of the proceedings under Part 56.
- [4] The Interested Party, Mahoe Gaming Enterprises Limited (Mahoe), submits that, it would plainly be directly affected by the orders sought by the Applicant and that they should be permitted to be joined as a party to the proceedings at the leave stage.
- [5] Part 56.2 sets out who may apply for Judicial Review and includes among others, any group from body which has sufficient interest in the subject matter of the application.
- [6] Rule 56.3 deals with the Application for Leave. Among other things, subparagraph (1) says that, the Applicant must first obtain leave and that the Application must state the grounds on which the relief is being sought by the

Applicant and whether the Applicant is personally or directly affected by the decision about which complaint is made.

- [7] Rule 56.4 relates to the “hearing of the application for leave”. This rule directs that the matter is to be dealt with expeditiously by the use of the word “forthwith” in sub-paragraph (1) in conjunction with the words “must be considered” immediately preceding forthwith.
- [8] Should the Judge decide that the matter be heard then subject to Rule 56.5, where the Application for leave can be refused, the Judge must direct that the hearing date be fixed. At sub-paragraphs (10) and onwards, the Judge may grant such interim relief as appears just; in granting leave the Judge must direct when the first hearing or, in case of urgency, the full hearing of the judicial review should take place; and, leave is conditional on the Applicant making a claim for judicial review within fourteen (14) days of receipt of the order granting leave.
- [9] Part 56.13 deals with the First Hearing. It reads at sub-paragraph (1): At the first hearing the Judge must give any directions that may be required to ensure that expeditious and just trial of the Claim and the provision of Parts 23 to 27 of these rules. Part 25 deals with Case Management, in particular, the Courts duty lie actively in managing cases. Part 26 deals with the Court’s powers and Case Management and Part 27 deals with the Procedure and Case Management Conferences.
- [10] Continuing with the First Hearing, the second stage of the bifurcated hearing under the scheme of the Rule, at paragraph (2) (c) of Rule 56.13, the Judge may allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard. (*My emphasis*). As for sub-paragraph (2) (d) it directs that any person or body having such interest is to make submission by way of written brief or to make oral submission at the hearing.

**The interested party's arguments**

[11] It is Mahoe's application to be joined as party in these proceedings and to be heard at the Applicant's Application for Leave stage to apply for Judicial Review and on any and all subsequent proceedings herein.

[12] As far as is relevant Mahoe relies on the facts that:

[13] First, it applied to the Respondent for a licence to promote a lottery in Jamaica. That the Respondent is the statutory body which by section 5(1) of Betting, Gaming and Lotteries Act is exclusively invested with the power "*to regulate and control the operation of betting and gaming and the conduct of lotteries in the island*", and by section 49(1) of the Act with the power to "*grant a licence to any persons to promote any lottery*".

[14] Second, that Mahoe's application is under active consideration by the Respondent.

[15] Third, that the Applicant which operates (apparently by transfer from another licence holder in the Supreme Ventures Group) a licence to promote a lottery has filed an application for leave to seek by way of judicial review certain orders for prohibition to prohibit the Respondent from granting to Mahoe any licence for a lottery game that is similar to a game the Applicant herein has licence to offer. An order for prohibition is further sought prohibiting the grant of licence to Mahoe until, what the Applicant calls "a feasibility study" is conducted by the Respondent. A stay of the Respondent's consideration of Mahoe's lottery licence application is also sought pending the hearing of the judicial review application.

[16] Fourth, that Mahoe seeks leave to be joined as a party in the proceedings with liberty in the first instance to oppose the grant of leave to apply for judicial review and the orders sought by the Applicant for immediate interim relief.

[17] It is submitted by Mahoe that it would plainly be directly affected by the orders sought by the Applicant and should be permitted to be joined as a party to the

proceedings at the Leave stage. Mahoe's application is covered by the principles, analyses and decisions in **R v Industrial Disputes Tribunal (ex parte J. Wray & Nephew Limited)** Claim No. 2009 HCV 04798, a judgment delivered on the 23<sup>rd</sup> October, 2009, and **Petrojam Limited v The Industrial Disputes Tribunal and the Minister of Labour & Social Security** [2018] JMSC Civ. 166, judgment delivered on the 14<sup>th</sup> December 2018, which are fully reasoned reserved judgment of this Court in judicial review proceedings and which the Court is respectfully invited to follow.

- [18] Mahoe submits that in **J. Wray & Nephew**, the IDT had made an award for reinstatement of some of the claimant's workers which award the claimant sought to challenge in judicial review proceedings. The parties to those proceedings were the claimant and the IDT. The Court permitted the Union, which represented the workers, to intervene and be heard on the application for leave to apply for judicial review on the ground that given the workers' and the Union's obvious interest in the matter the interests of justice and the overriding objective justify their being allowed in at the leave stage.
- [19] Further, Mahoe argues that in Petrojam the Minister of Labour & Social Security had made a reference to the IDT of a dispute regarding the termination by the claimant of the employment of Mr. Mollison. The claimant filed an application for leave to bring judicial review to challenge the reference to the IDT and a consent order was filed granting the leave sought and, as well, the judicial review orders quashing the reference – all of this without hearing Mr. Mollison. The Court granted Mr. Mollison's application for leave to intervene to challenge the grant of leave and the judicial review orders on the ground of his clear interest in these matters and the interests of justice generally.
- [20] In the instant case argues Mahoe, in addition to leave to apply for judicial review, interim relief is being sought, namely, an injunction or an immediate stay of all further consideration of Mahoe's application to the Respondent for a lottery licence pending the determination of the judicial review proceedings. This plainly

underscores the justice of Mahoe being joined at this leave stage and being heard on this and the other reliefs sought.

[21] Finally, Mahoe argues, if it is permitted to come in at the leave stage, that there are no arguable grounds for judicial review having any realistic prospect of success and that therefore the threshold for leave is not met. Further, that there are applicable discretionary bars to the grant of the relief sought including that the Applicant is guilty of delay in bringing the application for leave.

[22] Clearly, should Mahoe be allowed in at the Leave stage of the proceedings, full-fledged arguments would have to be entertained.

### **DECISION**

[23] I am inclined to accept the submissions of the Applicant's attorneys-at-law that at the first stage "sufficient interest" relates to parties who can apply for judicial review and to parties who may be permitted to join the proceedings. Whereas, at the second stage, "sufficient interest" relates to a party who may be allowed to join the proceedings and to make submissions. It does not appear that the Rule confers any jurisdiction to permit a third party to join the proceedings at the leave stage. For reasons already adverted to, separate to the expeditious hearing required at the first stage, a hearing might well be refused by the Court in spite of the decisions in **R v Industrial Disputes Tribunal ex parte J. Wray & Nephew Limited and PETROJAM Limited v The Industrial Disputes Tribunal and The Minister of Labour & Social Security**, cases on which the Respondent rely.

[24] As to the latter case, Rattray, J considered the expressions "sufficient interest" and "directly affected". However, he did not consider their place in connection to Judicial Review proceedings. It appears that this is so as based on Rule 56.2 a sufficient interest relates only to those who can apply for Judicial Review and other persons with a sufficient interest after leave is granted.

- [25] In the **J. Wray and Nephew** case, supra, the IDT had made an award for reinstatement of some of the claimant's workers which award the claimant sought to challenge in Judicial Review proceedings. The Court permitted the Union which represented the workers to intervene and be heard on the application for leave for Judicial Review on the ground that given the workers' and the Union's obvious interest in the matter the interests of justice and the overriding objective justify their being allowed in at the leave stage.
- [26] As for the authority of **R v Industrial Disputes Tribunal (Ex Parte J Wray & Nephew Limited)**, supra, the question of whether the Applicant was directly affected by the proceedings arose. In the course of his analysis Sykes, J (as he then was) relied on the decision in **R v Rent Officer & Another Ex Parte Muldoon** for the determination of the meaning of "directly affected". In the course of his judgment Sykes, J said at paragraph 17 that "the notion that an application for leave is always ex parte or cannot be inter parties is left to the good sense and judgment of the leave judge. This is in keeping with the idea of giving the judge full scope to deal with cases and applications justly". At paragraph 21 Sykes, J said, "Also the application for leave may be made without advice, obviously implying that the applicant may serve the respondent. It is therefore true to say that at the leave stage the respondent need not be heard but there is nothing to say that he cannot be heard".
- [27] According to Baroness Hale in "Who guards the Guardians?" Public Law Project Conference on Judicial Review, 'Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer ... provided they stick to the rules, interventions are enormously helpful.'
- [28] In respect of the interpretation of the overriding objectives and its application here, I remind myself that, where there are no express words in the CPR dealing with a situation, the court is bound to consider which interpretation best reflects

the overriding objectives when construing the rules: **Totty v Snowden [2001]** EWCA Civ. 1415, [2002] 1 WLR 1384.

- [29] Consequently, the old 'quasi-statutory' approach to interpretation, based upon a close analysis of the language used in an attempt to find the true intention of the rules, might be thought to be a thing of the past. According to Lord Woolf in the Final Report of paragraphs 10-11 of chapter 20 on the overriding objective., "Ultimately their purpose is to guide the court and the litigants towards the just resolution of the case". Although the rules can offer detailed directions for the technical steps to be taken the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure, interpretation is to be purposive rather than a matter of close analysis of the meaning of individual words without taking into account their context.
- [30] Thus brought to this juncture I was minded to agree with my brother. Regrettably, in the light of Lord Woolf's observation and his guidance to interpretation, I am to adopt the rendering of Counsel for the Applicant that there is no jurisdiction to permit a third party to join the proceedings at the leave stage; that the PETROJAM case confirms that the scheme of the rules contemplates a two-stage process. There is no rolled-up application. That, the case management provisions of the CPR do not apply to the application for leave to apply for Judicial Review stage. That the case management provisions apply after the leave stage has been passed.
- [31] Further, that parties are to be added after leave has been granted and this is in respect of a person who is directly affected. Furthermore, at this stage, a party with a sufficient interest may be allowed to join the proceedings pursuant to Rule 56.13(2)(c) and Rule 56 (2)(d). The reason behind all this is so as not to risk lengthening the proceedings, convert applications into a mini-trial and to increase costs. The upshot of my take on this point is that I hesitate to follow the decision in **R v Industrial Dispute Tribunal (Ex parte) J. Wray & Nephew**, supra. Also,

see comments by Sykes, J (as he then was) in *The Northern Jamaica Conservation Association v J.E.T & Others* in Claim No. HCV 3022 of 200, at paragraph 8.

- [32]** In any event, as per Lord Keith, in the *R v Rent Officer Service ex parte Muldoon* [1996] 3 ALL ER 398 the applicant in the instant case, is not directly affected by the proceedings where “directly affected” means that, by connotation, “he is affected without the intervention of any immediate agency”. Should the present Interested Party be allowed in at this stage as a directly affected party then it may be permitted to do something that it is not entitled to do even after leave is granted or to do so, would delay the just and expeditious disposal of the application.
- [33]** For the reasons advanced I am not so persuaded that the interested party should be allowed to enter the proceedings at the Application for leave stage and I so rule.