IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 01496

BETWEEN	UNITED BOOKMAKERS ASSOCIATION	CLAIMANT
AND	CAYMANAS TRACK LIMITED	DEFENDANT

Lord Anthony Gifford, Q.C., Conrad George and Kimone Tennant instructed by Hart Muirhead Fatta for the Claimant.

David Batts instructed by Livingston Alexander Levy for the Defendant.

April 11 and 29, 2011

Application for leave to apply for Juducial Review — Whether section 26 (2) of the Betting Gaming and Lotteries Act creates a public power or vests a private right — Appropriate tests for determining whether public power or private right exercised

FRASER J.

THE APPLICATIONS

1. On March 31, 2011 the Claimant/Applicant, United Bookmakers Association (UBA), an unincorporated association with offices at Unit #14, 29 Molynes Road, Kingston 10 in the parish of St. Andrew brought before the Court without notice applications. These applications sought relief against the Defendant/Respondent Caymanas Track Limited, a limited liability company duly incorporated under the laws of Jamaica, whose address is Gregory Park, P.O. Box 8 in the parish of St. Catherine.
2. The first application sought an order that the UBA be appointed representative claimant in these proceedings. The second application sought leave to apply for judicial review to seek the following orders and relief, including:
    a. a declaration that the defendant's decision to issue authority purportedly pursuant to section 26(2) of the Betting Gaming and Lotteries Act (BGLA) on the terms contained in the letter dated March 17, 2011 sent to the claimant's members and those it represents (copy of which is annexed hereto) is ultra vires the BGLA;

b. a declaration that the defendant by not hearing the claimant before making the said decision, breached the principles of natural justice;

c. an order of prohibition preventing the defendant from issuing any authority on terms outlined in the said letter;

d. an order of mandamus requiring the defendant to grant a lawful authority to each of the bookmakers represented by the claimant ("the Bookmakers") pursuant to section 26(2) of the BGLA; and

e. an injunction preventing the defendant from imposing on the Bookmakers any terms other than terms of the authority in force at the date of the commencement of the proceedings, as set out in the Agreement for Authority to Receive or Negotiate Bets Pursuant to section 26 of the Betting, Gaming & Lotteries Act dated January 1, 2011, until the hearing of the application herein or further order.

3. At the hearing on March 31, 2011 counsel for the claimant submitted that, as the hearing was without notice, only an injunction maintaining the status quo was being sought at that first hearing. The full application was therefore reserved for an adjourned *inter partes* hearing. After hearing detailed submissions from counsel for the claimant and after certain undertakings being given by the claimant and Track Price Plus Limited (a member of the claimant) this court made the following orders:

a. The United Bookmakers Association is appointed the representative claimant in these proceedings.

b. An injunction is granted until 11th April 2011 or until further order, preventing the defendant from imposing on the Bookmakers (as defined in the Notices of Application for Court Orders filed herein) any terms other than the terms of the authority in force at the date of the commencement of the proceedings, as set out in the respective Agreements for Authority to Receive or Negotiate Bets Pursuant to section 26 of the Betting, Gaming & Lotteries Act, dated 30th December 2010 which took effect on 1st January 2011 and expired on 31st March 2011.

c. A mandatory injunction is granted, until 11th April 2011 or until further order, requiring the defendant to grant a lawful authority to each of the Bookmakers in the same terms, (excepting necessary date changes), of the respective Agreements for Authority to Receive or Negotiate Bets Pursuant to section 26 of the Betting, Gaming & Lotteries Act,

dated 30th December 2010 which took effect on 1st January 2011 and expired on 31st March 2011.

d. The Application for leave to apply for Judicial Review is adjourned to 11th April 2011.

e. Costs are reserved.

4. On April 11, 2011 after the *inter partes* hearing I reserved judgment and also extended the interim injunctions until the 29th day of April 2011.

THE ISSUES

5. The main issues in this case are twofold. *Firstly*, whether or not the power exercised by the defendant to negotiate Agreements for Authority to Receive or Negotiate Bets Pursuant to section 26 of the Betting, Gaming & Lotteries Act (Rights Fee Agreements) with the members of the claimant is a public one thereby making its exercise subject to judicial review. *Secondly*, and this only arises if the answer to the first issue is in the affirmative, whether or not the claimant has an arguable ground for judicial review having a realistic prospect of success and is not subject to a discretionary bar such as delay, non-disclosure or the existence of an appropriate alternative remedy.

THE CONTEXT

6. To place the issues in context, it is important to outline some salient facts concerning the nature of the horseracing industry in which both the claimant and defendant are heavily invested and their respective interests, prior to examining the course of dealings which has led to this action.

7. Betting on horseracing in Jamaica is regulated by the BGLA. There are two systems of betting; pool betting and betting at declared odds. In the BGLA both are defined in section 2 as having meanings as set out in the section. While there are a number of subtleties, qualifications and details in the definitions of the two systems, in summary the main differences between the two are as follows:

a. In pool betting the dividends paid on winning bets are calculated as (i) a proportion of the total sum realised from all bets placed or (ii) a proportion of an amount determined other than by reference to the stake money paid or agreed to be paid by those who placed winning bets or (iii) are calculated at the discretion of the betting operator or

some other person. In pool betting therefore it is not possible to know the dividends that will be paid on winning bets before all the bets are in.

b. In betting at declared odds each of the persons making a bet knows or can know, at the time he makes it, the amount he will win subject to a number of factors. These factors include:

   i. the results of a race, or

   ii. the numbers taking part in the race betted on, or

   iii. the time the bet was received by any person with or through whom it is made, or

   iv. subject to section 26, the "starting prices" (the odds ruling at the scene of the race immediately before the start), or the "totalisator odds" (odds paid on bets made by means of a totalisator at the scene of the race), or on there being totalisator odds for any such race. (In the interpretation section of the BGLA, section 2, "totalisator" means the contrivance for betting known as the totalisator or pari mutuel, or any other machine or instrument of like nature, whether mechanically operated or not.)

c. It is specifically noted in section 3(3) however that "[a] bet made with or through a person carrying on a business of receiving or negotiating bets, being a bet made in the course of that business, shall be deemed not to be a bet at declared odds within the meaning of this section if the winnings of the person by whom it is so made consist or may consist in whole or in part of something other than money."

8. The regulation of betting, gaming and lotteries is achieved under the BGLA primarily through the establishment at section 4 of the Betting Gaming and Lotteries Commission (BGLC).

9. Section 5 of the BGLA sets out the functions of the BGLC as follows:

> **5. Functions of the Commission.**
>
> 5. (1) The functions of the Commission shall be to regulate and control the operation of betting and gaming and the conduct of lotteries in the Island; and to carry out such other functions as are assigned to it by or in pursuance of the provisions of this Act or any other enactment, and, in particular, but without prejudice to the generality of the foregoing -
>
> (a) to examine, in consultation with such organisations and persons as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island;

(b) to furnish information and advice and to make recommendations to the Minister with respect to the exercise by him of his functions under Part IV, Part V and Part VI;

(c) to make investigations and surveys for the purpose of obtaining information of use to it in the exercise of its functions.

(2) The Commission shall, subject to the provisions of this Act, have power to do all such things as are in its opinion necessary for, or conducive to, the proper discharge of its functions.

10. In carrying out its functions one of the powers of the BGLC under section 8 of the BGLA is to grant licences, permits, approval or authority as required by the BGLA for persons to lawfully engage in particular betting, gaming or lottery activities.

11. The representative claimant, the UBA has as its members the following companies: Track Price Plus, Markham Betting Company Limited and Champion Betting Limited. By the first affidavit of its president Xavier Chin who is also the Chief Executive Officer of Track Price Plus, sworn to and filed on the 31st day of March 2011, the evidence is, these three members comprise approximately 80% of the market share of bookmakers in the horseracing industry. Mr. Chin also averred in his first affidavit that, in addition to the three companies members of the claimant UBA, Capital Betting and Wagering Limited, Summit Betting Company Limited, Post to Post Betting Company Limited and Ideal Betting Co. Ltd., also supported the action. Together they represent close to, if not 100% of the market share of legal bookmaking in the horseracing industry.

12. Section 2 of the BGLA defines a bookmaker as follows:

"bookmaker" means any person who -

(a) whether on his own account or as servant or agent of any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets at declared odds; or

(b) by way of business in any manner holds himself out, or permits himself to be held out, as a person who receives or negotiates bets at declared odds,

so however, that a person shall not be deemed to be a bookmaker by reason only of the fact that he operates, or is employed in operating, a totalisator;

The representative claimant brings the application on behalf of the named bookmakers who are all licensed by the BGLC to operate.

13. The defendant Caymanas Track Limited (CTL) is a racing promoter licensed by the Jamaica Racing Commission (JRC) established under the Jamaica Racing Commission Act and operates a pool betting system by means of a totalisator under licence from the BGLC. The defendant is also the occupier of Caymanas Park Race Track, the sole race track in Jamaica. The defendant therefore has a monopoly on local racing promotion. The defendant conducts pool betting at Caymanas Park Race Track as well as at its off track betting outlets (OTBs) in different locations throughout Jamaica. The defendant acknowledges that it is the hub around which the entire horse racing industry revolves and conservatively estimates that some 30,000 persons are directly or indirectly involved in the industry.

14. By virtue of being the occupier of the race track the defendant is vested with certain special rights pursuant to section 26 of the BGLA. Key among these rights is the ability as an occupier to enter into Rights Fee Agreements.

THE COURSE OF DEALINGS BETWEEN THE PARTIES

15. In the second affidavit of Xavier Chin sworn to and filed on behalf of the claimant, on the 31st day of March 2011 it is averred that the conclusion of Rights Fee Agreements has become an established part of the betting on horse racing industry for the past 45 years. It is customary for those Rights Fee Agreements to have a standard form and to run from 1st January to 31st December in each year.

16. In the affidavit of Raphael Gordon, Deputy Chairman of the board of CTL, sworn to on the 8th day of April and filed on the 11th day of April 2011, it is explained that these Rights Fee Agreements concluded between bookmakers, members of the claimant association and the defendant, permit bookmakers to use the dividends declared on the defendant's tote (the total pool of bets generated through the totalisator) as the basis for the payment of winnings on bets placed with bookmakers on horse races promoted by the defendant.

17. The defendant maintains that it has solely had to make a very large investment in racing promotion, ranging from expensive infrastructure to payments to various professionals associated with the conduct of racing, and the payment of significant purse money. The declared odds constitute a product belonging exclusively to it and that over the years the Rights Fees have been heavily discounted relative to the cost to the defendant of providing the product.

18. The decision complained of stems from the fact that the defendant alleges it is suffering financial hardship due *inter alia* to low rights fees and increased competition from bookmakers who since June 1, 2010 have been permitted to sell bets from 7:00 a.m. to 11:00 p.m. Mondays to Saturdays. Consequently the defendant has stipulated in the new Rights Fee Agreement it offered to the bookmakers by letter dated March 17, 2011, which was to take effect April 1, 2011 that:

> All Bookmakers are to pay a fee of ten percent (10%) on the throughput of their shops with a minimum monthly payment of 2.5 times of the average payment for the last six months.

19. The stipulated fee of 10% would reflect an increase from 3.5% of sales in 2010. This 2010 figure was the result of an increase from 1% of sales in 2009. Even at the new figure of 10% the defendant maintains the contribution the bookmakers would be making to the cost of providing the service to them would be reasonable. Further the defendant has pointed out that the bookmakers do not have to use the defendant's totalisator dividends if they find the terms proposed unreasonable. They can create their own odds. The defendant also highlighted the fact that bookmakers can earn on several different types of betting products while the defendant is limited to horse racing.

20. The claimant on the other hand contends that the defendant has failed to negotiate in good faith and has in effect "put a gun to the Bookmaker's collective head". In the view of the claimant the defendant is abusing its monopoly position and seeking to put the bookmakers out of business. The proposed increase would threaten the viability of the bookmakers in a context where the defendant was not offering any increased services for the increased fee. Further, as the fees paid help to fund the defendant's operations of which the OTB's are a part, the defendant was seeking to force the claimant's members to fund and increase the profitability of their competitors.

21. The concerns of the claimant in relation to this fee increase are succinctly captured in paragraphs 21, 40 and 46 of the second affidavit of Xavier Chin. Paragraph 21 falls under the affidavit heading *"Breaches of the Fair Competition Act"*; paragraph 40 falls under the affidavit heading *"Effect of increase in Rights Fee"*; and paragraph 46 falls under the affidavit heading *"Procedural Unfairness"*. These three paragraphs are set out below:

21. CTL, which has the statutory power under section 26(2) of the BGLA to grant rights fee arrangements to Bookmakers (without which Bookmakers cannot trade) has made a decision, set out in the said letter of March 17, 2011, non-negotiable terms of agreement that amount to:

    i. an abuse of the Defendant's dominant position in the market; and
    ii. an exercise of power under section 26(2) of the BGLA which is not in accordance with the Fair Competition Act ("FCA"), and is therefore unlawful.

40. The Bookmakers find it difficult to accept any increase in the rights fees, not only because it threatens the viability of their operations, but also because CTL has not provided any explanation of how the amount of rights fee is determined and what factors are taken into consideration. Even more questionable is the appropriateness of CTL as Bookmakers' competitor to determine the amount of the rights fee, without genuine, transparent, consultation.

46. Bookmakers have not been given any time to consider the new terms, nor have they been given any genuine opportunity to be heard in this regard.

22. The sum of the affidavit evidence put before the court by both parties reveal that the letter of March 17, 2011 marked the culmination of a series of correspondence and meetings. It also sparked further meetings and negotiations and ultimately this court action. I will briefly outline the sequence of events:

    a. In July 2010 at a meeting held between the Ministry of Finance, Bookmakers, representatives of the BGLC and the JRC the defendant signaled its intention to seek to introduce tote monopoly;
    b. By letter dated November 18, 2010 from the defendant to the BGLC, copied to other persons including the bookmakers, the defendant indicated it was experiencing declining financial viability, planned to enter into new Rights Fee Agreements with bookmakers and requested that the BGLC make an order pursuant to section 26 (5) of the BGLA, prohibiting any bookmaker from receiving or negotiating bets at declared odds on local races;
    c. By letter dated December 5, 2010 the BGLC Chairman Mr. George Soutar responded to the defendant citing "the long held practice of the Commission not to intervene in commercial arrangements between the racing promoter and bookmakers so long as such arrangements do not breach the Betting, Gaming and Lotteries Act". Accordingly

the BGLC saw neither the necessity nor any value in making the order sought pursuant to section 26 (5). The significance of section 26 (5) will be addressed later in the judgment. Mr. Soutar also assured the defendant that in the absence of a Rights Fee Agreement between the defendant and any bookmaker that bookmaker would be prohibited from accepting wagers on local races. This position concerning the need for a Rights Fee Agreement to permit bookmakers to accept wagers on local races was reiterated in another letter from the BGLC to the defendant dated December 23, 2010.

d. By letter dated December 15, 2010 the defendant wrote to Markham Betting Co. Ltd one of the three members of the claimant proposing terms including a Rights Fee Agreement whereby a fee of 5% would be due to the defendant on all bets.

e. In the absence of consensus between the defendant and bookmakers on the new Rights Fee Agreement due to commence January 1, 2011, interim agreements covering the period January 1 – March 31, 2011 on the same terms as those existing in 2010 were concluded on December 30, 2011.

f. Mr. Danville Walker was appointed by the Board of the defendant to enter into negotiations with the bookmakers to resolve issues prior to the end of the interim period. However despite a number of meetings, (before and after the letter of March 17, 2011), which led to proposals and counter proposals between the parties, as well as suggestions that the matter be referred to arbitration, no resolution was achieved. On March 31, 2011, the day the interim agreements were due to expire, the claimant brought this action.

THE SUBMISSIONS

23. The fundamental question which the court first has to address is — was the defendant exercising a public power or merely a private right when it issued the letter of March 17, 2011 to the bookmakers stipulating that the rights fee it required was 10% of sales? I propose to deal with this question first. If the court concludes the power that was being exercised is private rather than public then that is the end of the matter.

24. Counsel for the claimant submitted that the source of the power being statutory, it was a public power and not purely a private business matter. Further that the test for the grant of leave to apply for judicial review had been satisfied as it was at least arguable with a realistic prospect of success, that a court would find that the defendant in the exercise of the function entrusted to it

had unlawfully used the power for an improper purpose, namely, to take over the entire business of pool betting on races at Caymanas Park. This purpose was not deduced by inference but was by express statement in the letter of March 17, 2011 and confirmed at paragraph 12 of the affidavit of Raphael Gordon filed on behalf of the defendant.

25. In response, Counsel for the defendant maintained that what was granted in section 26 (2) was a right as opposed to a duty being imposed. It was a right therefore it did not have to exercise, i.e. the occupier did not have to enter into Rights Fee Agreements. However if the right was exercised, the statute did not prescribe the manner in which it should be exercised. The section expressly said the right was to be exercised "on such terms as the occupier might think fit." Counsel for the defendant conceded the possibility that there might be a case for some redress where an occupier in seeking to exercise its right imposed extreme terms in bad faith in circumstances where no reasonable racetrack occupier could have put forward such terms. However he maintained that that was far from the situation in the present case and in any event the remedy in a case of imposition of extreme terms would sound in the regular civil courts and not in judicial review.

THE LAW AND ANALYSIS — PUBLIC POWER OR PRIVATE RIGHT?

26. It has been long and fundamentally established that a claim for judicial review may only be brought against a person or body performing public duties or functions. It is however no simple matter to determine when that criteria has been met. One indicator which has historically been utilised is whether or not the power or duty is derived from statute. Actions done and omissions in the course of the exercise of statutory functions have often been held to be subject to judicial review. (See for example ***Padfield and Others v. Ministry of Agriculture, Fisheries and Food and Others*** [1968] 1 All E.R. 694).

27. The fact that an action or omission has statutory underpinning is, however, not conclusive that it is public and will be subject to judicial review. In the words of Sir Thomas Bingham MR in ***R v. Disciplinary Committee of the Jockey Club, ex p Aga Khan*** [1993] 1 W.L.R. 909 at 921B, the power exercised in carrying out or declining to carry out an action will only be public if the body exercising that power is underpinned by statutory provisions in such a way that the body has essentially been "woven into the fabric of public regulation…".

28. It has also been observed by Colin D. Campbell in his article, "The Nature of Power as Public in English Judicial Review" C.L.J. 2009, 68(1): 90 -117 at page 97 that:

> A reluctance on behalf of the courts to subject to judicial review all bodies whose activities are underpinned by statute is understandable. Most commercial concerns, for instance, are regulated by statute at least to some extent. Accordingly, if all bodies that are underpinned by statute were subject to judicial review, the province of judicial review would be expanded enormously.

29. The other indicator which has often been used to determine whether or not a power is public or private is the "but for test". Under this test, power will be public if exercised to carry out a function which, in the absence of a non-governmental body to perform that function, the government itself would almost invariably carry out the function. (See for e.g. the ***Aga Khan*** case at page 930 per Farquharson L.J. and at page 932 per Hoffman L.J.; and ***R v. Chief Rabbi, ex p Wachmann*** [1992] 1 W.L.R. 1036, at pages 1041-42 per Simon Brown J.).

30. It is against that background that the power exercised in this case should be assessed. The terms of section 26 (2) (b) – (7) are set out below.

> (2) The occupier of the racecourse or track as the case may be shall, subject to subsection (3), have the exclusive right to authorize any person -
>
> (a) ...;
>
> (b) by way of business to receive or negotiate bets on any such race on terms that the winnings or any part thereof shall be calculated or regulated directly or indirectly by reference to the amounts or rates of any payments or distributions in respect of winning bets on that race made by way of sanctioned pool betting,
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> and no person shall have the right to carry on any form of pool betting business on any such race or, subject to subsection (3), by way of business to receive or negotiate bets on any such race on such terms as aforesaid except with the authority of the occupier of the racecourse or track, as the case may be, and in giving any authority under this subsection the occupier may do so on such terms, including terms as to payments to the occupier, as the occupier may think fit.
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> (3) The Commission may in accordance with Part II authorize a bookmaker by way of business at any place other than an approved racecourse or licensed track to receive or negotiate bets on any such race on such terms as are mentioned in paragraph (b) of subsection (2); and in giving any authority under this subsection the Commission may do so on such conditions, including conditions as to such payments to the occupier of the racecourse or track, as the Commission may think fit.

(4) If the conditions specified by the Commission pursuant to subsection (3) require payments to be made to the occupier, the occupier shall thereupon have a right to receive the payments.

(5) Notwithstanding subsections (2), (3) and (4) the Commission, pursuant to the written application of a racing promoter conducting horse-races at an approved racecourse, may, by order, prohibit any bookmaker by way of business at any place from receiving or negotiating bets at declared odds on any of such races.

(6) Any breach or infringement of any right conferred on the occupier of a racecourse or track, as the case may be, by or pursuant to this section shall be actionable at the suit of the occupier, and in any action for such breach or infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the occupier as is available to the plaintiff in any corresponding proceedings in respect of infringements of proprietary rights and, notwithstanding anything to the contrary in any enactment or rule of law relating to the jurisdiction of Resident Magistrates' Courts, a Resident Magistrate's Court may, on the application of the occupier, grant an injunction restraining a breach or infringement or apprehended breach or infringement of any such right as aforesaid whether or not any other relief is claimed; and for the purposes of this subsection a right of the occupier is infringed by any person who, without the authority of the occupier or, as the case may be, the Commission, or otherwise than in conformity with such authority-

(a) carries on any form of pool betting business on any such race as aforesaid or by way of business holds himself out as willing to enter into any pool betting transaction on any such race; or

(b) by way of business, receives or negotiates, or holds himself out as willing to receive or negotiate, any bet on any such race on such terms as are mentioned in paragraph (b) of subsection (2).

(7) Every person who, being authorized pursuant to subsection (3) to receive or negotiate bets on any such race, fails to observe any condition on which such authority is given, shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand dollars and in default of payment thereof to imprisonment with or without hard labour for a term not exceeding six months.

31. A close examination of the terms of section 26 (2)(b) – (7) reveals the following scheme:

a. The power granted in section 26 (2) is expressly stated to be an “exclusive right”. While this by itself is not determinative of whether or not this right is a public or private power it is significant that the term used is that of a “right” as opposed to a “function” or a “duty”. The entire scheme of section 26 (2() (b) – (7) however needs to be read together to determine the effect of section (2) (b).

b. The exclusive right given in sub-section (2) (b) is for an occupier of an approved racecourse or licensed track such as the defendant, to authorize persons to carry out bookmaking activities using the totalisator dividends of the defendant to calculate payments on winning bets.

c. This exclusive right to authorize such bookmaking activities permits the defendant as occupier to give the authority "on such terms, **including terms as to payments to the occupier**, as the occupier may think fit" [my emphasis].

d. Of significance the exclusive right given in sub-section (2) (b) is **subject to the provisions of subsection 3** whereby the BGLC is empowered under Part II of the BGLA, (which includes the sections dealing with the grant of a licence, permit, approval or authority), to authorize bookmaking activities on terms as are mentioned in subsection (2)(b). Further by subsection (4) the BGLC may require payments to be made to an occupier such as the defendant. Therefore in addition to the general power the BGLC has as the regulatory body to grant and revoke licences, including licences to operate approved racecourses, the BGLA reserves to the BGLC the right to intervene and set Rights Fee arrangements between bookmakers and an occupier of an approved racecourse such as the defendant.

e. Subsection 5 empowers the BGLC, on the written application of a racing promoter such as the defendant, to intervene and prohibit any bookmaker from receiving or negotiating bets at declared odds on races promoted by the racing promoter. The BGLC can therefore intervene on behalf of either a bookmaker (subsection 3) or a promoter (subsection 5). It should here be recalled that by letter to the defendant signed by its Chairman George Soutar, the BGLC declined to invoke its powers under subsection 5 at the request of the defendant citing its practice of refraining from intervening in commercial arrangements.

f. By this action the claimant has sought the intervention of the court. Counsel for the claimant however has been careful to submit that the court is not being invited to determine appropriate commercial rates or fees, but to pronounce on the propriety or otherwise of the decision making process.

g. Subsection 6 establishes that the occupier of a racecourse or track may sue for civil remedies for any infringement or breach of rights conferred which are akin to proprietary rights.

h. Subsection 7 imposes criminal liability for any breach of an authorization given by the BGLC pursuant to subsection 3. The stipulation of a criminal as opposed to a civil sanction for breaches of authorization given by the BGLC is consistent with the BGLC being an agency of the state.

32. Counsel for the claimant in support of his submissions that the defendant was exercising a public power and had done so in bad faith for an improper motive, relied on the case of ***Padfield***. Counsel submitted that as in section 26(2) of the BGLA the discretion granted in ***Padfield's*** case was a public power and very wide.

It is sufficient to rely on the headnote*:*

> The Agricultural Marketing Act, 1958, contained (inter alia) provisions relating to the milk marketing scheme. By section 19:
>
> (3) A committee of investigation shall - ... (b) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on ... any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee. ... (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated products, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit to do so after considering the report - (a) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (b) may by order revoke the scheme; (c) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order. ..."
>
> Under the scheme, producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in each of the eleven regions into which England and Wales were divided. The differentials reflected the varying costs of transporting the milk from the producers to the consumers, but they had been fixed several years ago, since when transport costs had altered. The South-Eastern Region producers contended that the differential between it and the Far-Western Region should be altered in a way which would incidentally have affected other regions. Since the constitution of the board, which consisted largely of members elected by the individual regions, made it impossible for the South-Eastern producers to obtain a majority for their proposals, they asked the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation and when he refused applied to the court for an order of mandamus.

> In reversing the decision of the Court of Appeal the House of Lords *held*, (Lord Morris of Borth-y-Gest dissenting), that the order should be made, directing the Minister to consider the complaint according to law. Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act, this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.

33. The court is not persuaded that the case of ***Padfield*** advances the position of the claimant. It is true that the discretion given to the Minister in ***Padfield*** was wide. However the statute imposed a duty on the Minister, an agent of the state, to exercise his discretion in accordance with the policy of the Act. In this case the defendant is not an agent of the state. The BGLC which is the state agency has pursuant to the BGLA, granted to the defendant which is a private entity, (albeit wholly government owned), a licence to operate an approved racecourse. By virtue of that licence, pursuant to section 26 (2) (b) of the BGLA, the defendant obtained the benefit of an exclusive commercial right not the burden of a regulatory duty or discretion. That right is however exclusive only against third parties other than the state. The right is circumscribed by the power reserved to the state agency, the BGLC, to itself set Rights Fee arrangements between the defendant and bookmakers.

34. The other method utilised by courts to determine whether or not a public power is being exercised, the "but for" test is not applicable in this case. The defendant is not vested with regulatory powers; a state agency, the BGLC has been given those. Further it is not self evident that the government *qua* government would necessarily assume the functions of being a racing promoter if the defendant were not carrying out that role. On the contrary there is every indication it would not, as the defendant though wholly government owned has been established as a private company.

35. It follows that the court accepts the submission of counsel for the defendant that based on the proper construction of the statute, what was being exercised by the defendant is a private right and not a public power.

36. I should indicate that in arriving at this conclusion I considered the case of ***R v Football Association Limited, ex parte Football League Ltd; Football Association Ltd v Football League Ltd*** [1993] 2 ALL ER 833 cited by counsel for the defendant as well as the case of ***Aga Khan*** mentioned earlier in this judgment. In neither case was a statute involved. On the basis that

there was no statute involved counsel for the claimant submitted that the ***Football Association*** case could be distinguished on that ground. In light of the conclusion I have reached in analyzing the BGLA however, the issue is not exclusively the presence or absence of a statute but the nature and scope of the power being exercised. It is useful to review both cases as they highlight other important considerations which are also evident in this action under contemplation. Those considerations are that the enjoyment of a monopoly position and the carrying out of functions which impact large sections of the public do not *ipso facto* clothe those functions with the character of public powers.

37. In the ***Football Association*** case the Football Association (FA) was the governing body and rule making authority of association football in England. It sanctioned various leagues including the Football League (FL) which was organized into four divisions. The FL entered into contractual relations with the FA by virtue of its annual application in accordance with the FA's rules for the FA's sanction to run the four divisions. The FA had a regulation that any club which intended to resign from a league had to give notice of that intention at the end of the current season. In 1988 the FL adopted a regulation requiring any club intending to resign to give three seasons' notice or to indemnify the FL if it terminated earlier. The FA had notice of this regulation. In 1991 to facilitate the development of a new Premier League run by the FA the FA amended its regulations to provide that any rule of the league requiring a club to give a longer notice of termination than required by the FA's regulations was void. The FL brought proceedings for judicial review of the FA's decisions. It was *held*, dismissing the application for judicial review, that the FA was not a body susceptible to judicial review either in general or, more particularly, at the instance of the FL with whom it was contractually bound. Despite its virtually monopolistic powers and the importance of its decisions to many members of the public, the FA was a domestic body whose powers arose from and duties existed in private law only. It was not underpinned directly or indirectly by any organ or agency of the state or any potential government interest, nor was there any evidence that if the FA did not exist the state would intervene to create a public body to perform its functions. It would be inappropriate to apply to the governing body of football, on the basis that it was a public body, principles designed for the control of abuse of power by government.

38. In the ***Aga Khan*** case the Jockey Club, incorporated by Royal Charter, exercised responsibility for the organisation and control of racing and training activities in Great Britain. The club's powers and duties did not derive from primary or secondary legislation. Its dominance was principally

maintained through the issue of licences and permits by which the club's stewards entered into contracts with racecourse managers, owners, trainers and jockeys. These different stakeholders were required to submit to a comprehensive regulatory code, the Rules of Racing, published by the stewards for the conduct of the sport. It was common ground that the applicant, a racehorse owner registered with the club, had agreed to be bound by such rules. In 1989 the applicant's filly was routinely examined after she had won a major race and a sample of her urine was said to contain a substance prohibited by the rules. At a subsequent inquiry the club's disciplinary committee concluded that such a substance was present in her urine and in consequence, as prescribed by the rules, disqualified the filly and fined her trainer. The applicant sought leave to move for judicial review by way of an order of certiorari to quash the committee's decision. On the grant of leave, trial was directed of a preliminary question whether the decision was amenable to judicial review. The Divisional Court determined that question against the applicant and dismissed his application. On the applicant's appeal it was *held,* dismissing the appeal, that although the Jockey Club exercised dominant control over racing activities in Great Britain its powers and duties were in no sense governmental. These were derived from the contractual relationship between the club and those agreeing to be bound by the Rules of Racing. The powers of the Jockey Club gave rise to private rights enforceable by private action in which effective relief by way of declaration, injunction and damages was available; and that, accordingly, the club's decision was not amenable to judicial review.

39. Even though there was no statutory underpinning of the roles of the defendant Football Association and the defendant Jockey Club in the ***Football Association*** and ***Aga Khan*** cases, it is clear that both defendants had regulatory and rule making roles which the defendant CTL, in the instant case, does not have. Therefore given that it was held in those cases that there was no exercise of a public power, even more so should that conclusion be evident in respect of this action brought against the defendant CTL. As in the ***Football Association*** and the ***Aga Khan*** cases, this present case concerns a contractual dispute and raises no issue of public law susceptible to judicial review.

OTHER CONSIDERATIONS

40. The decision which the court has arrived at in answer to issue 1 obviates the need to move on to consider the evidence, submissions and law in relation to issue 2.

41. Before parting with this matter however, I make two observations. Firstly it appears to this court that the BGLC rather than the defendant, is a body which may be said to exercise public powers. I express no view however on whether any actions or failure to act by the BGLC in relation to section 26 of the BGLA would make that body amenable to judicial review in relation to this or any other matter. Secondly, the submissions of counsel for the claimant placed significance on the allegation that the defendant was in breach of the Fair Competition Act by virtue of abusing its dominant market position. This contention was previously advanced before the hearing of this matter, by Hart Muirhead Fatta instructing counsel for the claimant, in a letter to the defendant dated 29th November 2010, exhibited to the second affidavit of Xavier Chin. In light of the finding of this court the claimant will need to consider what alternate remedies may lie in contract or competition law to address the grievance perceived.

CONCLUSION

42. Having concluded that the power exercised by the defendant pursuant to section 26(2) (b) of the BGLA is a private right and not a public power it follows the impugned decision of the defendant is not amenable to judicial review. Accordingly:

a. the application for leave to apply for judicial review is refused;
b. the injunctions extended on the 11th day of April 2011 to the 29th day of April 2011 are discharged;
c. Costs of and occasioned by the application to the defendant to be taxed if not agreed;
d. Leave to appeal refused.