Neutral Citation Number: [2007] EWHC 1312 (Admin)

Case No: CO/1863/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2007

Before :

THE HON MR JUSTICE LANGSTAFF

- -

Between :

THE QUEEN ON THE APPLICATION OF THE BRITISH CASINO ASSOCIATION LIMITED AND OTHERS	**Claimants**
- and -	
SECRETARY OF STATE FOR CULTURE MEDIA & SPORT	**Defendant**
(1) THE BRITISH AMUSMENT CATERING TRADES **(2 TALARIUS LIMITED** **(3) THE NOBLE ORGANISATION** **(4) SHIPLEY LEISURE LIMITED**	**Interested Parties**

- -

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Hon. Michael Beloff Q.C. and Mr Tim Ward (instructed by **Messrs Lovells LLP**) for the **Claimants**
Mr Mark Hoskins and Ms Maya Lester (instructed by the **Treasury Solicitor**) for the **Defendant**
Miss Dinah Rose Q.C. (instructed by **Messrs Baker & McKenzie LLP)** for the **Interested Parties.**

Hearing dates: 17th & 18th May 2007

- -

Judgment

Mr Justice Langstaff :

1. The Gambling Act 2005 represented the culmination in Parliament of discussions and debates about the liberalisation of gambling, following the seminal report of Sir Alan Budd earlier in the millennium. It concerned the control of all forms of gambling, which had previously been subject to the restrictions of (inter alia) the Gaming Act 1968. It provided for a system of licensing casino premises, but restricted the number of licences that might be granted. It did so by Section 7(5) which divided casino premises into four categories, providing as it did for the Secretary of State to make regulations by reference to which any casino might be classified as (a) a regional casino, (b) a large casino, (c) a small casino, or (d) below the minimum size for a licensed casino. This was not necessarily to be based upon physical size as the description might suggest (Section 7(6)) though in draft regulations (The Gambling (Categories of Casinos) Regulations 2006) it is the amount of floor space available for gambling which is definitive in separating one category from another. Thus, a regional casino is to be three thousand five hundred square metres or more; a large casino at least one thousand five hundred square metres, but less than three thousand five hundred square metres, and a small casino at least five hundred square metres, but less than one thousand five hundred square metres.

2. Section 175 of the 2005 Act imposes numerical limits on the numbers of casinos in each category. There is an overall limit of one in respect of regional casinos (Section 175 (1)). No more than eight casino premises licences may have effect at any time in respect of large casinos (Section 175(2)), and no more than eight casino premises licences may have effect at any time in respect of small casinos (Section 175(3)). These numerical limits were first proposed late in the legislative history prior to enactment of the Bill, and it is in part the consequences of the application of those limits with which this case is concerned.

3. The importance for present purposes of the distinction between the categories of casino is that there is a substantial difference in the number and nature of the gaming machines each may make available for use on its premises. Gaming machines are categorised into one of four classes, denominated alphabetically. Category B is divided into four sub-categories. The alphabetical categories are determined by the nature of the facilities the machine provides for gambling, in particular by reference to the stake paid, and the value and nature of the prizes to be obtained. Under draft regulations (the Categories of Gaming Machine Regulations 2006) Category A consists of gaming machines with unlimited stakes and prizes; Category B has four sub-categories (B1 to B4) with a maximum charge for use ranging from £1 to £100, and a maximum prize ranging from £250 to £4,000; Category C has a maximum charge of 50p, and a maximum prize of £35; and Category D a charge of 30p where a non-money prize is offered (with a maximum value of £8) or a charge of 10p with a maximum prize of £5. Section 172 of the Act provides that a regional casino (provided it uses at least 40 gaming tables) may have gaming machines of any category, in a maximum ratio of 25 machines to each gaming table and a maximum of 1,250 gaming machines. A large casino may provide gaming machines of category B, C, or D, in a maximum ratio of 5 machines to each gaming table and a limit of 150 machines, and a small casino may offer similar categories of machine in a maximum ratio of 2 machines per gaming table and a total limit of 80 machines.

4. There are currently 138 casinos operating under the Gaming Act 1968 (“existing casinos”). They are restricted to 53 permitted locations (main centres of population,

and some seaside resorts). Prior to the Act receiving the Royal Assent, those casinos were restricted in the number of gaming machines they could make available to 10 machines which were, broadly, equivalent to category B1 machines. In 2003, casino operators began treating the provisions of Section 21 of the 1968 Act, which permits "gaming for small prizes" in casinos, as authorising an unlimited number of machines which for a stake of up to 50p would provide a maximum prize of £25 in cash. These machines (known as "Section 21 machines") became numerous in 2004.

5. By the 2005 Act (Section 174(3),(4)) a regional or large casino is also permitted to host bingo, betting or both. A small casino is not permitted to provide facilities for bingo. Existing casinos may not provide betting or bingo.

6. The evidence establishes that gaming machines are both highly profitable, and are generally more attractive to those of the general public who might be attracted into casinos than is traditional table gaming. Typically, a gaming machine currently in use produces a net profit of £30,000, and a Section 21 machine a net profit of £11,500 per annum. In simple terms, gaming machines are big business.

7. The 2005 Act does not provide for casinos smaller than "small casinos" (i.e. less that 500 square metres of gaming area) to be licensed at all. Since a very large number of existing casinos are smaller than that they would be unable to operate unless the 2005 Act made specific provision for them.

8. To increase the number of licences permitted by Section 175 to include provision for those existing casinos which, as operated, currently do meet the minimum size requirements to be classed as large or small casinos (none is big enough to be equivalent in size to a regional casino) would be inconsistent with the clear intention of Parliament to impose a maximum of 17 upon the total number of such licences to be granted. This point was implicitly accepted by Mr Beloff Q.C., who presented the case for the applicants together with Mr Ward of counsel, in that he accepted that existing casinos could not expect to be granted under the 2005 Act the same privileges in terms of the numbers and classes of gaming machines permitted them, nor in their ability to provide for betting and bingo, as were the "new" casinos. An argument that they should be permitted to do so was very much a part of the original grounds of challenge to the decisions of the Secretary of State which are central in this litigation, but he was in my view entirely right to accept this. Whatever the purposes of the Act, it is plain on the face of the Statute that there is to be a limited number of "new" casinos, with differences in entitlement between the three classes of such casinos as to the number of gaming machines each could operate, their nature, and the concentration of those gaming machines in the available space, and that the 2 larger classes of casino should be able to provide bingo, but the smaller not.

9. The important point is thus that there is no parity between existing casinos and the categories to be licensed under the 2005 Act. The Act provides effectively for disparity.

10. Were it not for saving or transitional provisions within the Act, existing casinos would not be licensed to operate once the 2005 Act comes into effect as it does on the 1st September 2007. Section 355 permits the Secretary of State to make provision by regulations or rules under the Act; and Section 358(3) provides for Schedule 18, containing transitional provisions, to have effect. Paragraph 2 of Schedule 18

provides for a licence or other document issued under an enactment repealed by this Act (as is the 1968 Act)

> "…to have such an effect as the order may specify after the commencement of the repeal until specified by or determined in accordance with the Order".

It may:-

> "(b) provide for the application of this Act, with any specified modifications, in relation to a licence or document to which paragraph (a) applies;
>
> (c) disapply, or modify the application of, a provision of this Act in relation to specified things done in reliance on a licence or document to which paragraph (a) applies. "

11. Paragraph 9 of Schedule 18 enables the Secretary of State to make provision by Order for the conversion of a licence under the 1968 Act into a licence under the 2005 Act.

12. The Secretary of State has, pursuant to her powers under Sections 355 and 358, and paragraphs 2 to 11 of Schedule 18 to the 2005 Act, made an Order making such transitional provisions. The Order was made on the 6th December 2006, laid before Parliament on 8th December and came into force on the 1st of January 2007.

13. By Article 6, the Order provides for transitional provisions in Schedule 4 to have effect.

14. Part 7 of that Schedule deals with the conversion of licences, which were issued under enactments to be repealed by the 2005 Act when it comes into force, into premises licences under the Gambling Act 2005. To operate a casino under the 2005 Act, three types of licence are required – a casino operating licence, which authorises the licensee to operate a casino (Section 65(2)(a)), a casino premises licence, which authorises premises to be used for any casino (Section 150 (1)(a)), and a personal licence for those individuals who perform certain specified functions (Section 127). Where the existing operator of premises (owned by him) used as a casino holds a casino licence in respect of those premises, then by application in advance of the 2005 Act coming into effect he is to be entitled to use those premises as a casino under what is termed a "converted casino premises licence". Thus, broadly put, existing casinos will be permitted to continue to operate.

15. Out of a large number of provisions effecting gambling entitlements of different types, it is to paragraph 65 in Part 7 of Schedule 4 to which alone objection is taken in this litigation. Paragraph 65 provides as follows:-

> "**Application of the Gambling Act 2005 to casino premises licences granted on a conversion application**
>
> **65.** — (1) This paragraph applies to—
>
> (a) a conversion application for a casino premises licence, and

(b) a casino premises licence issued on the grant of such an application in pursuance of paragraph 54(4).

(2) This paragraph is without prejudice to paragraphs 54 to 61.

(3) Part 8 of the 2005 Act is to have effect subject to the modifications specified in the following provisions of this paragraph.

(4) Section 150(2)(which describes the kinds of casino premises licences) is not to apply to a casino premises licence to which this paragraph applies and instead such a licence is to be referred to as a converted casino premises licence.

(5) A converted casino premises licence is a licence which states that it authorises premises to be used for the operation of a casino or for providing other facilities for gaming (apart from bingo); and section 150(1)(a) is to be modified accordingly.

(6) Section 172 (which makes provision as to the effect of a premises licence in authorising the making available of gaming machines) is to be modified so as to provide for a converted casino premises licence to authorise the holder of the licence either—

(a) to make 20 gaming machines available for use on the premises where at least one of the machines is of Category B and provided that each machine is of Category B, C or D; or

(b) to make available for use on the premises any number of Category C or D gaming machines.

(7) Section 174(1)(which makes provision as to the kinds of premises in respect of which a casino premises licence may be granted) is not to apply where the application is for a converted casino premises licence.

(8) Section 174(2)(which provides for casino premises licences to authorise the holder to make available any number of games of chance other than casino games)—

(a) is not to have effect to authorise the playing of bingo in premises in respect of which a converted casino premises licence has effect;

(b) is to have effect to authorise the holder of a converted casino premises licence to make available other games of chance which are not casino games, irrespective of whether or not casino games are also made available on the premises.

(9) Section 174(3)(which provides for casino premises licences to authorise the holder to use the premises for the provision of bingo, betting or both) is not to apply to a converted casino premises licence to which this paragraph applies.

(10) A converted casino premises licence is not to count for the purposes of any of the limits in section 175(1) to (3)(which

limit the overall numbers of specified kinds of casino premises licences).

(11) Subsections (5) and (7) of section 175 and Schedule 9 (which make provision about applications for casino premises licences) are not to apply to an application for a converted casino premises licence.

(12) The licence holder may apply under section 187 to vary a converted casino premises licence so that it relates to premises which are different from those to which it previously related, and subsection (2) of that section (which prohibits a premises licence from being varied so as to relate to premises to which it did not previously relate) is accordingly not to have effect in relation to a converted casino premises licence.

(13) Where a converted casino premises licence is varied to relate to premises to which it did not previously relate, those premises must be wholly or partly situated in the area of the licensing authority which issued the licence."

16. Sub-paragraph (6)(a) thus entitles an existing casino either to make 20 gaming machines of category B,C and D available (provided at least one machine is of category B) or alternatively to provide an unlimited number of category C or D machines Although the number of category B machines is double that permitted prior to the enactment of the 2005 Act, two facts are notable: (a) the number was increased from 10 to 20 with effect from 1st October 2005 by the Act itself (in paragraph 3(5)(a) of Schedule 16); and (b) Section 21 machines had not been subject to the limit of 10, which was increased to 20, but were previously unlimited in number. Under paragraph 65, whatever the number of such machines operated prior to 1st September 2007, on and after that date they are to fall within the limit of 20.

17. Existing casino premises are not subject to the size restrictions which (for instance) prevent a small casino becoming a large casino. The statutory limit on the number of licences does not apply to converted casino premises licences, and such a licence is effectively transferable from one set of premises to another within (broadly) the same licensing authority area.

The Challenge

18. The first claimant is a trade association which represents the interests of over 90% of British casinos (i.e. around 125 of the 138 existing casinos). The second to fifth claimants are member companies of the Association, and between them operate 116 of those casinos. They take the view that the regime established by the combination of the 2005 Act, the two draft regulations to which I have referred, and the Order of 2006 is such as to subject them to considerable competitive disadvantage. They complain that a small casino will be entitled to have 4 times the maximum number of gaming machines open to an existing casino; that, proportionately, a large casino and a regional casino are even better favoured; that those latter two can provide bingo, and even a small casino betting, which they cannot; and that the market is such that it may not easily sustain rival casinos of both existing and new types in the same locality. They complain about the removal of the entitlement to operate Section 21 machines.

19. Much of the debate before me spoke of new and existing casinos as if they were separate legal entities with rights of their own. This is convenient shorthand, but may conceal a truth, that the entitlements in issue are not those of casinos themselves, but accorded by the law to the operators of those casinos, whether corporate or individual. Accordingly, if it were the case that opening a new casino in the near vicinity of an existing casino operated to the latter's disadvantage, it is not obvious that this would unfairly affect the ability of the operator of the existing casino to compete, providing he were able to compete upon a "level playing field" for the grant of a licence to operate the new casino. The evidence as to whether he could do so was equivocal. Though there is no statutory prohibition against doing so, in paragraph 11 of their Skeleton argument, counsel for the claimants submitted that in practice the new licences would be unavailable to the majority of those operators. Five reasons are set out, which in my view are overstated. First, it is said that there are 138 existing casinos, but only 17 new licences. However, given that 116 of those 138 are operated by only 4 operators between them, this point is not as attractive as it might arithmetically first seem. Second, it is said that many existing casinos are not located in areas in which a new licence is available. If so, then it seems to me there is no competitive disadvantage within that area (given that I am told that the vast majority of casinos draw their customer base from within a 15 mile radius, and that 29 (therefore less than a quarter) of the existing casinos of a size commensurate with small or large new casinos are in the catchment areas of those in which new licences are to be offered). These same factual points answer the third argument, that existing casino operators will not only have to compete with each other for the licences but also with new applicants. The fourth point is that the process by which new licences are to be awarded looks for a regenerative benefit to the local area. It is said that this is likely in many cases to tilt the playing field substantially in favour of new applicants, since they may be better placed to offer such benefits. It is linked with the fact that operators' investment in and commitments to their existing casinos may diminish their financial capacity to bid for new licences within the same geographical area.

20. There are rival considerations, leading to the opposite conclusion, which are set out at paragraph 233 of the first witness of David Fitzgerald, the Head of the Gaming and Lotteries Branch at the Department for Culture, Media and Sport. He suggests that existing operators may well have advantages in the reputation for propriety, profitability and good standing in the community which they have built up over years, that they would be well placed to demonstrate to the Gambling Commission they are fit and proper companies to run a new casino, have the ability to expand their existing casinos (which ability may deter the local licensing authority from granting a new licence at all), and that new entrants to the market might face start-up costs which existing casinos would not face.

21. I do not need to resolve whether, though overstated, the claimants' view is nonetheless correct. It is, however, undoubtedly the case that for a combination of the reasons which I have set out existing casino operators think either that the regime will subject them to significant commercial disadvantage, or will unfairly deny them an opportunity of commercial benefit, or both.

22. Though this is the background to the claim, it does not provide any justification in law for it, since in so far as the regime is established by Statute, it is not (save in very limited circumstances which do not apply here) open to challenge. Similarly, under the existing law (subject to an issue in respect of consultation to which I shall return

below) the fairness or unfairness of the effect of a Statutory Instrument is also immune from such challenge, irrationality aside. No challenge can be brought against the government simply for adopting a particular policy in respect of the control of gambling, although inevitably any such policy will advantage some, and disadvantage others. Policy on gambling is for the executive, subject to Parliament, and is not intrinsically open to legal challenge.

23. The challenges set out in the Judicial Review Claim Form were against the decision of 6 December 2006 to make the Transitional Order, and the Secretary of State's refusal to reconsider the provisions of that Order, which she communicated by a letter of 25th January 2007. Both obviously stand or fall together. The grounds for this challenge have changed. They were originally that paragraph 65 established new casinos as a privileged class thus preventing fair competition between existing and new casinos, which was entirely at odds with the government's stated policy and lacked rational justification; that the Secretary of State failed to have regard to material considerations, proceeded on the basis of errors of fact of fundamental importance, and breached the public law principles of administrative consistency and equality. In addition, it was said that there will be a breach of Article 1 of Protocol 1 of the European Convention on Human Rights, existing licences being property in hands of the claimants and those they represent, which have effectively been diminished in value by the administrative action taken. The material considerations which it is said the Secretary of State did not have regard to were the impact of the Order on fair competition, the fact that a substantial number of existing casinos are of a sufficient size to qualify as new casinos and are qualitatively indistinguishable from them, and that existing casinos will be worse off in certain material respects under the order than under the 1968 Act, thereby undermining the Secretary of State's rationale for a difference in treatment of the existing and new casinos. The grounds argued that the 58 or so existing casinos large enough potentially to qualify as small or large casinos under the 2005 Act should be permitted to compete on equal footing with the 17 new casinos to be licensed.

24. I have already noted that in argument the claimants recognised the futility of arguing that existing casinos should have the same gambling entitlements as new casinos. It was thus only a truncated form of the original grounds that was advanced before me. At the conclusion of his opening submission, Mr Beloff Q.C. summarized his challenges. Effectively, they were three. First was that the Secretary of State was constrained by her view of the effect of the 2005 Act to believe that she had no scope when making the order to improve the position of existing casinos. Second, it was said that there was no prior consultation on the relative gambling entitlements of existing and new casinos. A policy statement on the 16th December 2004 introduced such a distinction, out of the blue, and there was no proper consultation thereafter. Third, the Secretary of State was in material error of fact in thinking that very few existing casinos were of sufficient size to qualify under the new licensing regime as small or large casinos, being misled by the regulatory impact assessment, and thereby exercised her powers upon a false basis. The original grounds did not otherwise feature, although the claimants' submissions were infected by a lingering sense of the unfairness caused by the practical effects of the new regime upon the ability of the operators of existing casinos to compete with operators of the new.

25. The defendant's detailed grounds for contesting the claim argued that consultation had taken place prior to February 2006 and in particular prior to the Act obtaining Royal Assent, and that the whole of the legislative process should be looked at in

order to assess whether there had been proper consultation, if that was required. She submitted that regard had been had to the relative competitive positions of new and existing casino owners, but nonetheless Government and Parliament had chosen to adopt the 2005 Act so as to give effect to differing entitlements; and that there had been no material misunderstanding of fact.

26. I have not dealt with the defendant's answer to the principal thrust of the original grounds, in the light of the disavowal by Mr Beloff Q.C. of reliance upon any suggestion that existing casinos should be entitled to precisely the same gambling entitlements as new casinos of a commensurate size.

27. In order to evaluate these rival contentions, it is necessary to say more about the underlying facts, and the development of government policy in relation to casinos.

28. The Gambling Review Body chaired by Sir Alan Budd reported in July 2001. Public consultations followed, and in turn a White Paper in March 2002. There was to be a liberalisation of gaming, with no set upper limit on the number of gaming machines in the special environment of casinos. In July 2002, the House of Commons Culture Media and Sport Committee ("the select committee") argued that a few bigger casinos would be preferable to a large number of smaller ones. It sought to strike a balance between the number of gaming machines and tables. It was fearful that a set proportion of one to the other might lead to casinos simply increasing the number of gaming tables in order to accommodate more of the (lucrative) machines.

29. In August 2003, a Position Paper envisaged two categories of larger casinos: small (5,000-10,000 square feet) and large casinos (over 10,000 square feet). (The figure of 500 square metres eventually adopted in respect of small casinos broadly corresponds to 5,000 square feet). The statement envisaged that existing casinos with less than 5,000 square feet in use would continue to operate under a new licensing framework, but no new development of such a smaller size would be licensed. It also proposed that small casinos would be able to operate up to 3 machines for each gaming table. No distinction as to gambling entitlement was drawn as between the new small casinos, of over 5,000 square feet, and existing casinos of any size.

30. These Position Paper proposals were echoed in a draft Bill published in November 2003. A policy document accompanying the Bill stated that existing casinos would be treated in the same manner as small casinos. However, the policy document recognised the public interest in avoiding the dangers of considerably extended opportunities for gambling, and argued that it was prudent to proceed with caution, to take liberalisation at a controlled pace, rather than free up controls too rapidly only to have to rein them back later.

31. The first claimant commented on the draft Bill. It attacked the distinction between smaller and larger casinos as giving rise to a significant and unfair competitive advantage to the latter. This arose out of the vastly increased number of gaming machines which a new larger casino could utilize.

32. The recommendation that there should be three categories of casino arose from a Joint Committee of both Houses of Parliament ("The Joint Committee") which scrutinized the draft Bill and reported in March 2004. It suggested a cap on the number of gaming machines permissible in the largest ("resort") casinos. It also criticized the Government's then proposal to give existing casinos the same rights as small new

casinos, in particular those existing casinos (the majority) which were below the minimum size for a new casino.

33. In June 2004, the government responded to the Joint Committee's report. To ensure effective precautions, it proposed that unlimited prize gaming machines should be permitted in only the largest, regional, casinos, and that small new casinos should be limited to two gaming machines per gaming table, rather than the three which the Joint Committee had suggested.

34. A second report of the Joint Committee in July 2004 concluded that category A machines could be used by existing casinos, and not limited to resort casinos. In September 2004, the Government in response did not accept this. The same response said that the Government would await the results of at least two studies after the implementation of the new regime before considering any significant alteration to the gaming machine entitlements of all types of casinos. This was in keeping with the precautionary principle it was adopting.

35. The Gambling Bill was introduced to the House in October 2004. Concerns about the perceived risks that might arise from a proliferation of regional casinos expressed during debate led to the Government proposing that there should be no more than eight such regional casinos as a first phase. An announcement to that effect was made on the 16th November 2004.

36. Economic models suggested that limiting the number of regional casinos to eight would significantly increase the number of large and small casinos which were opened. This risked an increase in problem gambling. Thus, for reasons set out in Mr Fitzgerald's witness statement at paragraphs 84 to 86, it was decided to limit large and small casinos to eight in each case, in the first phase. The Government wished to test the impact of higher concentrations of gaming machines in single premises. This could not be achieved if the gaming machine entitlements of those large and small new casinos were to be reduced from the high concentrations then anticipated. Yet the precautionary principle which had been adopted sought to ensure that only a few casinos should have such concentrations of gaming machines available for use.

37. The statement, by the Minister, of 16th November 2004 included the promise that the government would set out "in detail" its proposed arrangements for "... any consequential changes relating to other categories of casino to avoid the proliferation of small or large casinos …" which resulted from the cap on the number of regional casinos.

38. On 7th December 2004 the first claimant responded in a letter to the Under Secretary of State, Lord McIntosh of Haringey, to express alarm at the suggestion that large and small casinos might now also be subject to a limit in numbers.

39. On 16th December the promised policy statement was made. It recited three broad objectives which the Government's policy sought to achieve, upon which the detailed policies were based. These (to protect children and other vulnerable people from harm, to prevent gambling being a source of crime or disorder, and to ensure that gambling is conducted in a fair and open way) ultimately found statutory expression as the three licensing objectives identified as a principal concept of the Gambling Act 2005 at section 1, and have thus been retrospectively endorsed by Parliament. At paragraph 4 of the Statement the government expressed its decision to set an initial

limit of eight each on the numbers of regional, large and small casinos. It continued, in paragraph 5, to express the belief that "…in order properly to assess the impact of these new casinos, there needs to be a sufficient number of casinos in each category to allow the impacts to be assessed in a range of areas and types of location that might be suitable…a limit on regional, large and small casinos of eight each is consistent with this aim while at the same time ensuring that any risk of problem gambling is minimised …".

40. At paragraph 6 the statement read:

> "Once an assessment has been made of the impact on problem gambling of the limited number of new casinos, it will be easier to judge the continuing need for a limit. No earlier than three years after the award of the first premises licence, the Government will ask the Gambling Commission to advise on whether the introduction of the new types of casinos has led to an increase in problem gambling or is increasing that risk. We believe such a period is necessary to ensure a full assessment can be made of the impact of the new casinos. If the Government, on the basis of the Gambling Commission's advice decides to propose that more casinos may be licensed then the Order providing for this will need to be approved by Parliament…"

41. It is apparent, at least from an historical perspective, that the need to limit the number of new casino licences was linked to the considerably expanded entitlement that each was to have to provide gaming machines, bingo and betting, and the logic of restricting the number was in order to take a careful and cautious look to see if there was any adverse effects from this marked expansion within individual premises. In the light of the policy (and later statutory) objectives this implied that it was unlikely that existing casinos would be permitted to expand to the same extent. To permit this in the case of any casino which otherwise met the requirements to be a "small" casino would be to license an eightfold increase in the number of permitted gaming machines, section 21 machines apart, in addition to betting and possibly bingo. From such a perspective it could not have been surprising, therefore, that in paragraphs 23 to 25 of the statement expression was given to that very implication. Under the heading "Casinos which already have a licence under the Gaming Act 1968" the following was provided:

> "23. The arrangements described above for Regional, Large and Small casinos are aimed at minimising the risk of problem gambling from an increase in the number of casinos, particularly from a proliferation of high stake and high prize gaming machines. Existing casinos will be allowed to continue to operate, and to have the opportunity to compete for the new licences. But the Government does not believe it will be appropriate to allow them to have all the new casino entitlements in circumstances where a limit is imposed on the establishment of new casinos.

> 24. Accordingly, we propose that there will be no size requirements on existing casinos and they will not be subject to the ban on advertising and the 24-hour rule. They will, however, be restricted to their current gaming machine entitlement of 10 gaming machines of up to Category B and they will not be allowed to provide bingo or betting on real or virtual events.
>
> 25. Arrangements will be made to ensure that existing casino businesses can in the future be transferred to new owners and to new premises if the current premises for some reason become unavailable (such as end of lease or fire), so long as it is within the existing licensing area. A company operating a casino which already had a licence under the 1968 Act may apply for a Regional, Large or Small casino premises licence. If it is awarded one of them for an existing casino, then it will be able to operate it with all the new entitlements authorised by the new licence".

42. The defendant asserts that the claimants' case as to absence of proper consultation omits the period from December 2004 until the adoption of the Transitional Order in December 2006, and maintains that the critical period is that from October 2004 until the passing of the 2005 Act. Certain it is that during that period the First Claimant expressed outrage at there being any proposed cap on small and large casinos. In a letter of 20th December 2004 Penelope, Viscountess Cobham, Chairman of the First Claimant, urged a return to the policy statement of June 2004, and complained that the Government had not consulted with the industry. It did not deal in terms with the implication which was implicit in the cap that existing casinos would not have new casino entitlements, nor with the express statement to that effect in paragraph 23, though on 23rd December the General Secretary of the Casino Operators' Association, Brian Lemon, wrote seeking a "level playing field" in which all new and existing casinos would have the same gambling entitlements to betting and machines, according to size. In a policy statement issued on the same day it complained, again, that the industry was not consulted prior to the publishing of the new statement, and argued that the policy relating to existing casinos appeared to be "increasingly anti-competitive and destructive". Paragraph 5 of that statement argued powerfully against restricting existing casinos to the then current entitlement of 10 gaming machines, under a general heading "Destroying the existing industry".

43. Further letters followed, from Gala Group (the Second Claimant) on 18th January to the Under Secretary of State, and on 19th January 2005 from the First Claimant to the Prime Minister. Each complained about a failure to consult with the industry. Mr Beloff Q.C. points out, correctly, that no contemporaneous letter controverts the assertion that there was no consultation prior to the statement of 16th December 2004. He submits that, although these letters thereafter argued the position, this was consultation after the event, since it was on 16th December that the die was cast.

44. On 16th February 2005 there was a meeting between the First Claimant, the Casino Operators' Association, and the Secretary of State herself. The file note subsequently prepared of that meeting shows that the Secretary of State was invited to treat existing casinos in the same way as small or large casinos were treated in the new legislation;

but the Minister said that, although she was prepared to explore the possibilities, it would need to be compatible with the existing policy. "It would be 'shavings at the edge' not a policy change." An official said that there needed to be "clear water" between the small and large casinos and existing casinos, in order to test the new combination of gambling provisions.

45. In a letter written to the Casino Operators' Association after the meeting, Lord McIntosh set out the reasoning for imposing a limit on small and large casinos, which was the potential social risk they posed, and the need to take a cautious approach. Such could not be achieved by testing the market with as many as 150 casinos, which would be the number of new style small and large casinos which would in effect exist if an initial cap were not imposed. Impliedly, he was indicating that without such a limit the same licensing regime would have to apply to each casino, and hence provide the same gambling entitlements in each.

46. A memo from Roy Ramm, Compliance and Security Director of the Fourth Claimant, although arguing for alterations in the current proposals, began by saying:

> "Ministers have indicated they are receptive to ideas but are committed to preserving the fundamental policy pillars of the Bill. We accept that position."

Mr Beloff Q.C. rightly points out that there is a distinction between consulting, in advance of proposals being formulated, and defensive action being taken after a policy has been formulated, in order to preserve oneself from its worst effects. He asks me to see Mr. Ramm's opening words (and other attempts by the Claimants to ameliorate the effects of the policy statement of December 2004) in that light.

47. On 10th March 2005, two matters of significance happened during the Committee stage in the House of Lords. First, Baroness Buscombe, Opposition Spokesperson on gambling, moved an amendment which, if accepted, would have given existing casinos the same rights and opportunities as were to apply to new small and large casinos under the then Bill. The purpose was to provide fairness of competition between old and new. The Government opposed that, adopting the approach which they had taken during the period coming up to the debate. The amendments were withdrawn following a debate. Secondly, Lord McIntosh offered to allow existing casinos ten additional Category B machines (raising the cap from ten to 20) and expressed the intention of exempting wholly automated gaming tables from the definition of gaming machine. In the course of his speech, Lord McIntosh said (Hansard, column 982, 10th March 2005) that the limits on numbers of casinos "… will not affect the entitlements of existing casinos. They will continue to be able to trade as now." I accept Mr Hoskins' submission on behalf of the Secretary of State that the words "as now" did not in context mean that existing casinos would be able to maintain the unlimited number of section 21 machines which they had up until then enjoyed (see column 924, in which the same speaker on the same occasion made it clear that the Government regarded such machines as an anomaly which should be eliminated). Nor does it mean that the existing casinos would be able to trade on an equal footing with the new ones. He emphasised the limits upon the numbers of gaming machines permitted to existing casinos when compared to new ones.

48. The Casino Operators' Association, and the First Claimant, wrote to Lord McIntosh to make points which arose out of the discussion at Committee stage in the House of

Lords. Lord McIntosh responded in March, in a letter which is undated but undoubtedly post-dates 16th March, stating that he had considered the amendments intended to ensure that existing casinos enjoyed the same privileges as new casinos, but concluded that they conflicted with policy priorities. Permitting all 137 existing casinos to become small casinos would undermine both the limited nature of the pilot scheme and the cautious approach to reform which the Government was bent on taking.

49. On 6th April 2005, the Government accepted that a limit of one, rather than eight, in respect of regional casinos was consistent with the precautionary principle, and adopted it. In a statement made by Lord McIntosh (Hansard, 6th April 2005, column 837) he claimed that the Government had reflected on the mood of the House in Committee and had considered very carefully whether existing casinos could be permitted some additional commercial rights without jeopardising the essential priority of ensuring a cautious and gradual approach to the process of change. The Government felt able to come forward with new proposals - increasing the maximum stake and prize for gaming machines, allowing casinos to provide a new form of gaming machine with stakes and prizes the same as presently offered by fixed-odds betting terminals in betting offices (within an overall enhanced limit of 20 rather than ten machines), and entitling existing casinos to install 40 automatic terminals for casino table games. The removal of the statutory delay of 24 hours between joining a casino and first being permitted to play was to be brought forward by 2 years.

50. The next day, the Act was given Royal Assent.

51. Documentary material suggests that discussions as to the gaming machine entitlements of casinos continued. Thus a letter of 6th November 2005 from the Secretary of State to Penelope, Viscountess Cobham, makes reference to a meeting of 6th September at which it is plain, from the text, that Viscountess Cobham had urged reconsideration of the gaming machine allowances to be given to casinos. In the light of the suggestion made in argument by Mr Beloff Q.C. that the Secretary of State regarded herself as having no discretion to alter the gambling entitlements of existing casinos once the Gambling Act had been enacted, this letter is of some importance. It does not say that the Secretary of State regarded the matter as determined. She plainly contemplated altering the gaming machine entitlements of existing casinos. She declined to do so for policy reasons, not because Parliament had already effectively determined otherwise (in her view). The penultimate paragraph is capable of being read as conveying her understanding that, although she had a discretion in the matter, the Government had done enough for existing casinos, and would do no more.

52. Proposals for the transitional arrangements to be introduced in respect of existing casinos under the Gambling Act 2005 were published in February 2006. As the introductory paragraphs make plain, this paper dealt purely with the mechanics of ensuring that those who were permitted under the Gaming Act 1968 to operate casinos could obtain the requisite licences to continue to do so. There is no suggestion in the paper that any of the gambling entitlements of existing casinos was for debate. Notwithstanding that, there was correspondence between Mr Ramm and Lord McIntosh as to the removal of the entitlement of existing casinos to operate section 21 machines.

53. A draft Order was published, which drew a response by the First Claimant to the Office of Fair Trading (letter 7th September 2006). That met a negative response.

54. In March 2006, the Defendant published a draft Transitional Provisions Order. In June 2006, the First Claimant made written submissions to the Defendant about it. It complained that the Defendant proposed to treat existing casino operators differently, and less favourably, from new casino operators, in breach of the principle of administrative consistency. It drew attention to the limited number and nature of the machines which existing casinos would have in their armoury with which to compete with the new casinos. The submission proposed that existing casinos should have the rights of new casinos.

55. There was no response to those submissions. The Order was simply laid before Parliament on Friday 8th December.

56. This drew a letter before action from the solicitors then acting for the First Claimant on 11th December 2006. The main focus was upon the absence of a level playing field in that new casinos had advantages denied to existing casinos, which would distort competition. As already noted, these arguments have been entirely superceded by new arguments, which were not raised in terms in the letter before action.

57. The response from the Treasury Solicitor made the point, at paragraph 6.5, that to permit existing casinos the same gambling entitlements as new casinos would be to undermine the operation of the 2005 Act (a point, the force of which is not now subject to challenge). However, it added (a matter I shall have to come back to) at paragraph 6.6.1:

> "…there are very few existing 1968 casinos which are large enough to fall within the definition of a small casino for the purpose of the 2005 Act. Your arguments therefore are not comparing like with like."

This was, however, subject to the opening two words "In addition …".

58. Against this background, I can now turn to the submissions, which I shall consider under the three heads identified by Mr. Beloff Q.C.: a closing of mind; a failure to consult; and error of material fact.

<u>Closing of Mind</u>

59. Mr Beloff Q.C. submits (correctly in my view) that the consultation paper in respect of the transitional order made no reference to the question of the substantive gambling rights of existing casinos. The proposals were said by David Fitzgerald in his witness statement (paragraph 128) to concern the administrative arrangements for transition to the new licensing regime, and did not raise the issue of a difference in treatment in gaming entitlements. They were administrative, rather than substantive.

60. Mr Fitzgerald in the same paragraph said that the issue of differential treatment had been "fully consulted on and considered prior to the adoption of the 2005 Act". This, however, ignored the fact that the 2005 Act did not itself determine the gambling entitlements of existing casinos. It was open to the Secretary of State to adjust those entitlements, even if she did not equate them in every respect to small or large casinos licensed as such under the 2005 Act. At paragraph 27 of her second witness

statement, Penelope, Viscountess Cobham, suggested that the Secretary of State could, for instance, have provided for a modest increase, whether immediately or phased, in the gaming machine entitlements of existing casinos; and/or an additional entitlement to use Category B3 machines or an appropriate exemption to allow existing casinos to operate section 21 machines as before, but within the gaming machine regime; and/or provisions providing clarity as to when and against what criteria the entitlements of existing casinos would be reconsidered following the so-called pilot scheme "…which would give to existing casinos some comfort that the differential treatment would not be prolonged for an unreasonably long period…". Mr Fitzgerald took the view (paragraphs 128, 182) that the issue of the gambling entitlements "…had been fully consulted on and considered prior to the adoption of the 2005 Act." The response to the letter before action, and paragraph 9 of the Defendant's grounds indicated an erroneous view that alteration to the gambling entitlements, or any of the adjustments to which Viscountess Cobham referred, were precluded because this would constitute a challenge to the 2005 Act.

61. In response, Mr Hoskins submitted that this argument, now at the forefront of the Claimants' submissions, was not one which had surfaced in the (detailed) grounds of challenge submitted in the claim form. He asserted that the Secretary of State had not closed her mind. The making of paragraph 65 of Schedule 4 to the Transitional Order could not be looked at in isolation from the legislative process of which it was a part. Viewing that process as a whole, the government had increased existing casinos' entitlement to offer category B gaming machines from ten to 20 (this being specifically enacted by paragraph 3(5)(a) of Schedule 16 to the 2005 Act, with effect from 1st October 2005), had increased the maximum stake for jackpot gaming machines in existing casinos, increased the maximum prize for jackpot gaming machines in existing casinos by doubling it, allowed existing casinos to provide a new form of gaming machine with stakes and prizes the same as those offered by fixed-odds betting terminals in betting offices, allowed existing casinos to install 40 wholly automatic terminals for casino table games, had brought forward by two years an intended repeal of the statutory delay of 24 hours between joining a casino and first being permitted to play, and permitted existing casinos to apply to move to new premises within the area of their licensing authority so as to be able to exploit their new commercial entitlements, if the size or other characteristics of their existing premises prevented such exploitation. Only one of these (this last) was effected by the Transitional Order itself, but they were all responses to expressions of concern by the operators of existing casinos. When, in her third witness statement, Penelope, Viscountess Cobham, had responded to these factual points (at paragraph 5) Mr Hoskins argued that what she said ignored the fact that under the draft Gambling Bill it had been proposed to include automated gaming tables as gaming machines, but there had been a change of mind; that the evidence of Mr Fitzgerald, which the Claimants were not in a position to go behind, testified that increasing the stakes and prize limits had been a result of representations, and not as part of a triennial review process which had, in any event, been suspended pending the Act, and that the relocation of existing casinos could not be said to be a maintenance of the status quo since the ability to do so was a specific exemption from the provisions of the 2005 Act.

62. Mr Hoskins drew attention to the chronology, traced through the documents (many of which I have mentioned already) and the evidence of Mr Fitzgerald at paragraph 223 that the government had taken the views expressed into account, it being plain in that

paragraph that views expressed after the passing of the Act were included in this portmanteau statement.

(2) Consultation

63. The Claimants submitted that there had been no proper consultation. The statement in December 2004 had surprised everyone, in Mr.Beloff Q.C.'s graphic phrase, "like Venus rising from the waves". Consultation before then there had been: but it focused upon whether there should be a difference in entitlement between small and large casinos, and not upon the question whether existing casinos would have the same entitlement as small casinos -that had been assumed on both sides. Mr Fitzgerald's assertion in his first witness statement at paragraphs 43 and 44 that the difference in treatment between existing and new casinos had been raised in an early stage of the legislative process misunderstood what the discussion was then about. It was about competition between large (new or existing) casinos and small (new or existing) casinos, and not about a distinction between a limited number of new casinos, and those existing, which had simply not been proposed. Once the policy statement was made in December 2004, Government's mind was made up. Nor could the Secretary of State rely upon the detailed consultation paper of February 2006, since this was concerned entirely with the machinery of transition, and not with the entitlements to which existing casinos might lay claim. Consultation which omitted to deal with the central concern of the operators of existing casinos (competitive disadvantage with new casinos) was not proper consultation. When Mr Lemon, and the First and Second Claimants had separately written to protest about the effects of the policy statement, each complained that there had been no advance consultation, and this point was not gainsaid in contemporaneous correspondence. Points made in the papers of May and June 2006, in response to the consultation paper of February 2006, had simply gone unanswered. The view that the transitional provisions were of administrative significance only, and the substance was not open to change, inhibited the Secretary of State from considering how her powers – more extensive than she had realised – might be exercised, and thus prevented there being proper consultation.

64. In response, Mr Hoskins argued that a failure to consult was not an argument that appeared in the Claimants' grounds. He maintained that there is no duty to consult in relation to subordinate legislation any more than there is in relation to primary legislation. If there was an obligation to consult "properly", arising because the Secretary of State had chosen to consult ***at all*** on that issue, the duty extended to the issue alone, and not to every matter that might conceivably be consulted upon. It had to be remembered that casinos were only part of a very much wider gambling landscape, the topography of which was addressed in all its respects by the Gambling Act 2005. If, contrary to the first two submissions, there was an obligation upon the Secretary of State to consult about the gambling entitlements to be given to existing casinos, on the facts she did just that. The absence of a response to the paper of June 2006 was irrelevant: consultation does not require a dialogue. The evidence of David Fitzgerald (second witness statement, paragraph 12) was that the representations had been considered. The Claimants could not demand more than proper consideration – but, in any event, proof that there had been consideration of their position was demonstrated by the fact that some steps (see paragraph [61] above) had been taken to ameliorate the position of existing casinos. In any event, the Transitional Order formed one of a raft of legislative measures and proposals addressing the same topic, such that it would be artificial to attempt to isolate consultation in respect of one

Statutory Instrument from that in respect of the other measures. In relation to the Act, in particular, the very points which it is said the Secretary of State did not take into account because of her failure to consult were raised by Baroness Buscombe in Committee stage in the House of Lords. Her proposed amendment sought parity of treatment between existing and new small casinos. It received a reasoned response from Lord McIntosh at the time, and the amendment was withdrawn. The points of substance which the Claimants wished to convey had been dealt with at a meeting on 16th February 2005 which involved the Secretary of State herself.

(3) Material Mistake of Fact

65. In the letter from the Treasury Solicitor in response to the letter before action, at paragraph 6.6.1 it was said on behalf of the Secretary of State that:

> "There are very few existing 1968 casinos which are large enough to fall within the definition of a small casino for the purpose of the 2005 Act."

66. Mr Beloff QC observed that although Mr Fitzgerald at paragraph 11 of his second witness statement sought to disavow reliance upon the point (describing it as a legal response to the allegation in the letter before claim) nonetheless the letter was carefully considered, was plainly part of the thinking of the Secretary of State, and it was wrong, as Viscountess Cobham pointed out at paragraphs 84 to 86 in her first statement. Mr Ramm's evidence is that the Fourth and Fifth Claimants between them currently operate 27 existing casinos which have gambling areas in excess of 500 square metres. That is sufficient to cross the minimum threshold for a small casino in the 2005 Act. 49 of the 116 existing casinos operated by members of the First Claimant have the capacity, if they utilise unused space, to become equivalent to small or large casinos (paragraph 93 Viscountess Cobham, first witness statement).

67. The Treasury Solicitor's letter repeated assertions earlier made by the Department (e.g. "only a handful of the existing 126 casinos licensed in Great Britain meet the minimum size requirements for new casinos": Government response to the Scrutiny Committee's first report, at paragraph 15). The truth is that existing casinos had plans in the pipeline for expansion, are growing, and have unused space, quite apart from the error of scale as to existing gaming areas. In their written submissions, the Claimants also took issue with comments Lord McIntosh had made suggesting that the new casinos would be "very different operations from established casinos", and that the "scale of the small category of casinos constitutes something new in this country".

68. In response, Mr Hoskins contended that what was relevant was not the size of existing casinos, but their number. Mr Fitzgerald in his second witness statement indicated, as the documents confirmed, that one of the objectives behind the 2005 Act was to set a minimum threshold size for new casinos, in order to avoid the proliferation of small "corner shop" casinos. Once it was decided to limit the number of new casinos, with the enhanced gambling entitlements they had, the size of existing casinos fell away as an issue and was no longer part of the decision-making process. Accordingly, Mr Hoskins said that the point identified as a material mistake of fact was simply not relevant. He pointed out that the only basis for challenge was the one sentence in the Treasury Solicitor's response, in which the reference was made in the context of attempting to rebut an argument made in the letter before action that the Secretary of

State had not been treating like with like. On the basis advanced by the Claimants, it could not be said that there should truly have been a like for like comparison, since most existing casinos were smaller than the minimum for small casinos – but the point was raised not as a material consideration in the exercise of any discretion by the Secretary of State, but rather to rebut an argument advanced by the Claimants and now no longer persisted in.

Submissions of the Interested Parties

69. The British Amusement Catering Trades Association, Talarius Limited, the Noble Organisation, and Shipley Leisure Limited, who are major operators in the adult gaming centre sector and the trade association which represents the pay-to-play leisure industry were made Interested Parties in the litigation by Order of Mr Justice Collins. I heard Miss Rose QC on their behalf.

70. She submitted that I should not grant any relief to the Claimants because to do so would create uncertainty in an industry which wished the opposite. (It seemed to me that this point was relevant, if it was relevant at all, only to relief, and although it was emphasised, I have not taken it into consideration in determining the merits of the case). She submitted that the competitive disadvantage which the Claimants averred was overstated; that the existing industry had no doubt that the control of section 21 machines, or the removal of any entitlement to operate them, was an intention of government policy even prior to the 2005 Act. Finally, she reminded me that the Gambling Act 2005 was a balance, often delicately reached, between several different and many competing interests in the gambling area. In that context, she supported the Government response to the Claimants' challenge.

Discussion

71. The exercise of an administrative discretion is subject to well-settled law. In the words of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1064h to 1065b:

> "It is not for any court of law to substitute its own opinion for (that of the Secretary of State); but it is for a court of law to determine whether it has been established that in reaching his decision .. he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, *per* Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

72. In the context of the present case this means asking whether in making paragraph 65 of Schedule 4 to the 2006 Order the Secretary of State wrongly concluded that she had no discretion to alter the gambling entitlements of existing casinos, and whether she had consulted (if obliged to do so) or taken reasonable steps so as to have the

relevant information to enable her to exercise her discretion, without making an error of material fact.

73. In my view, the Act did not determine definitively the gambling entitlements of existing casinos. It implied that they could not equate to those of the new casinos, for this would deprive the restriction on the number of licensed casinos of much of its point. I accept, however, that her choice in promoting or making the relevant legislation was not determined fully and finally by the 2005 Act.

74. However, I reject the submissions that she regarded herself as having no discretion in the matter.

75. First, so to hold is contrary to the evidence which Mr Fitzgerald gave, which was that the submissions made by the Claimants had been considered. His evidence was not that they had been rejected because they came too late.

76. Second, on 29th April 2005 a memorandum was made of a meeting of 16th February 2005. The Secretary of State herself participated in that meeting. The minutes make it plain that she did not regard her hands as tied by the policy statement of 16th December 2004.

77. Similarly, the letter she wrote on 6th November 2005 to Viscountess Cobham shows that she was actively considering the points made to her about the gambling entitlements of existing casinos. There is nothing in that letter to suggest that she thought any such consideration was otiose.

78. Fourth, measures were in fact taken to ameliorate the position of those existing casinos. To some extent, some of those measures might have been anticipated anyway – but the fact is that they were taken, and the evidence is that they were taken in response to the expressed concerns of the Claimants. One such measure was taken in the Transitional Order itself, which demonstrates that the Secretary of State could not have regarded her hands as completely tied by the 2005 Act. Her very act belies the claim.

79. Fifth, I accept Mr Hoskins' point that it is wrong to view the Transitional Order in isolation. It was part and parcel of a range of measures to effect the same legislative policy. There is nothing irrational about that policy. Sound policy aims are identified in section 1 of the Act itself. The measures are certainly not inconsistent with those aims. Legislation to effect the changes necessary, in the light of that policy, across the gaming industry as a whole was to be made by a process which did not begin and end with the Transitional Order. It began with the process leading up to, and included the making of, the Gambling Act 2005, and the propounding of a range of secondary legislative measures thereunder. Finality in various respects will be reached progressively through such a process.

80. Finally, the comments of Mr Fitzgerald which are relied upon by the Claimants, to seek to show that the Secretary of State did not understand the scope of her powers are, in my view, explained (if, in the light of what I have already said, explanation is needed) firstly by the fact that certain matters had been determined by the time the Transitional Order fell for consideration and, secondly, that his statement was addressing a case made by the Claimants in their grounds for review, whereas it is a very different case that is now advanced. (I should add that no formal point was taken

by Mr Hoskins to deny the claimants' entitlement to advance the arguments they did. I have therefore determined them on their merits).

81. As to consultation, Mr Beloff Q.C. relied upon R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, a decision of the Court of Appeal. At paragraph 108 of the judgment, which was a judgment of the court, it is said:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

82. It is axiomatic, and neither counsel suggested otherwise, that primary legislation may not be set aside upon the basis that there has been any full or partial failure of consultation. Coughlan concerned an administrative act – the closure of a National Health Service facility for the long term disabled, some of the residents of which had been assured that it would be their home for life. As to acts which are legislative, not administrative, Bates v Lord Hailsham of St Marylebone [1972] 1WLR 1373, upon which the defendant relied, contains a general principle which Mr Hoskins asserted had never been gainsaid since. Megarry J. said (1378C – F):-

> "Let me accept that in the sphere of the so called quasi judicial rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a common place; but although a few Statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections…I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suite of those that contend that insufficient time for consultation and consideration has been given"

83. Commenting upon that passage as recently as February this year Stanley Burnton J. said in Bapio Action Ltd v the Secretary of State for the Home Department and another [2007] EWHC 199 at paragraph 47:-

> "In the field of Administrative Law, the nearly 35 years since that judgment are a very long time indeed. It appears that the judgment has not been expressly followed. However, no case

> has been cited to me in which delegated legislation or any other Statutory measure subject to Parliamentary scrutiny which was not the subject of an express statutory duty to consult has been struck down or otherwise successfully impugned on the ground of a failure to consult. It is not clear to me that the principle enunciated by Megarry J. is still not good law…it is obvious that any change in the Immigration Rules that makes the condition of entry into the U.K. more restrictive will affect individuals. Yet Parliament has not required the Home Secretary to consult either individuals or associations that represent those affected by such changes. Moreover, even if there has been no consultation, or the representations of consultees have been rejected by the Minister, those affected may present representations to Parliament which at least in theory may reject the Minister's decision. In other words, the remedy is political rather than judicial."

84. If these words are to be taken to indicate that the approach is appropriate only to the administrative sphere, it is to be noted that it has not been regarded universally as so restricted. In R (on the application of British Waterways Board) v The First Secretary of State [2006] EWHC 1019 (Admin), a case to which my attention was drawn by Miss Rose Q.C., Collins J. considered a challenge to the lawfulness of a rating demand. It arose from a Regulation which had gone through the affirmative resolution procedure. It affected the claimant. There was no evidence that it affected anybody else. Without expressly adverting to the Coughlan decision, at paragraph 23 Collins J. said:-

> "There is no statutory obligation to consult, but, having chosen to do so, I think the defendant ought to let the claimants know what was proposed and enable them to comment on those proposals…it was not fair, if consultation was decided to be needed, to exclude them in relation to a proposal which would have such a dramatic effect upon them."

85. Mr Hoskins argued that Coughlan concerned an administrative decision, and the view expressed in the passage cited from Coughlan was obiter. I would hesitate long and hard before declining to follow a statement of general principle expressed by the Court of Appeal in a judgment of the court, but I do accept that it was dealing with an administrative action (as indeed was the Tameside decision). I accept, too, that no Act of Parliament here imposes a duty to consult: if a duty arises it must arise only by operation of administrative common law. Like Stanley Burnton J. before me, I am reluctant to think that consultation is required. Mr Beloff Q.C. suggested that Stanley Burnton J's approach was somewhat hesitant. It may be that in the future the Court of Appeal in an appropriate case considers that consultation is necessary before a Statutory Instrument of general public application is made: but it is not obvious why that should be the case when any such Instrument is open to Parliamentary scrutiny, and the political, rather than the consultative route, is therefore open to any of the several who will be affected by the provisions to argue that they are so particularly affected that their views should be heard.

86. If there is no general duty to consult, then there can be no duty to consult in respect of every particular. Mr Hoskins' point that application of the Coughlan approach might require proper consultation in respect of those matters about which there was consultation, but did not identify which specific matters there should be consultation about, is, as a general point, well taken. However, though I have sympathy with it, here the relative entitlements of different classes of casinos were under active discussion prior to December 2004. There was thus consultation about those matters. If, as Collins J. assumed (apparently without detailed, if any, argument) in British Waterways Board the Coughlan approach is to be adopted in respect of legislative measures, such that if there has been consultation about a particular issue it is only fair that it should be proper and adequate consultation, then in the present context I would have expected some advance notice to have been given of the proposal to limit the number of new casinos, if only to provide an opportunity to those potentially affected by the proposal to make a contributive comment about it. It is unnecessary, however, for me to determine whether fairness, even in the context of setting out Government policy, might require prior consultation on this point. This is because the history indicates that some notice in advance of the decision of 16th December 2004 was in fact given as to a proposed restriction on the number of licensed casinos and, as I have observed, the logical consequence of that was a sharp distinction between the gambling entitlements of those, and of existing casinos.

87. Consultation is an aspect of the duty to act fairly, in so far as it entitles a person to be heard in his own defence. The substance of the right is to enable the party consulted to give voice to his case, and thereby to influence a decision (or, as it may be policy or, arguably, in the present case the content of secondary legislation) which may affect him adversely so that he has at least an opportunity of influencing the outcome. It may additionally have the advantage of providing a sense of being included in a decision-making process which affects him, although this is illusory unless the substantial matters he advances are given due consideration by the decision or policy maker. The duty to act fairly does not require a dialogue or debate if it provides a fair opportunity to a party to put his case. However, an opportunity to put a case in respect of a decision that has already been made is no true opportunity at all, hence the need for consultation to precede the decision to which it relates.

88. Here, taking this law and this approach into account, I have concluded that – assuming, without determining it though contrary to my inclination, that consultation entered into prior to the primary and secondary legislation giving effect to the Government's policy on gambling required an opportunity to be given to the claimants to state their position so that it might be considered – the facts amply demonstrate that this has happened.

89. First, the process is to be seen as a whole. The position of existing casinos was made plain by the claimants, and considered by the defendant. The policy statement of 2004 should not have been such a complete bolt from the blue as it seems to have been, but even so the entitlements of existing casinos remained under discussion. This occurred at a meeting of 16th February to which the memorandum of 29 April 2005 refers.

90. Moreover, the views of the claimants, in tandem with those of the Casino Operators' Association, were expressed forcefully on more than that one occasion. This was before the Transitional Order was made. Some modification to what had originally been proposed was effected in response (as I have noted above). Thus there is

evidence from what actually happened, as well as from that which Mr Fitzgerald says, to show that the points made were considered, and that the representations were not made to a closed mind.

91. At one point in his argument Mr Beloff Q.C. observed that the fact of an adjustment having been made to the position of existing casinos did no violence to his argument that the Secretary of State had not fully understood her powers, nor had she consulted. He observed that she did not say in terms “I have a discretion, but I have done enough” and that, if she had done so, he could not challenge her decision as he did. Yet it seems to me that in her letter of 6th November 2005 this was effectively what the Secretary of State was saying. Although this occurred before there was formal consultation on the terms of the Transitional Order as such, it would be artificial to isolate the making of that Order from the whole of the process of giving effect to the Government’s policy on gambling. In short, however much there may be arguments about the desirability of the outcome, I see nothing unfair in the process by which the Secretary of State came to make the transitional provisions she did in paragraph 65 of Schedule 4 to the 2006 order.

92. The argument as to the mistake of fact relies heavily upon a textual approach to the letter in response to the letter before action. I accept the defendant’s point that that letter focused upon a need for consistency and equal treatment throughout. It was asserting that it was not only fair, but the only fair conclusion, that existing casinos as a class should have no different treatment from that accorded to new casinos. It relied on administrative consistency, an approach which requires that persons in like situations should be treated alike, and those in unlike situations should not be treated the same. Textually, the words used by the Treasury Solicitor at 6.6.1 of the letter of response to this letter before action, on which the claimants rely, are preceded by the words “in addition”. Those words relate back to what has gone before, which expresses the view that the 2005 Act required a distinction to be made between existing and new casinos. Although this may be a product of the Act itself, there can be no dispute but that the Secretary of State was bound by it. If (as I consider she was, and is not contested before me) she was entitled to think that it was implicit in that Act that existing casinos were not to have the same gambling entitlements as new casinos, the argument for administrative consistency was bound to fail. If this is, as I think it is, the sense of the Treasury Solicitor’s letter in response, the words “in addition” simply make a further point to the same effect. The first point in itself would be sufficient: the casinos could not be treated alike. The second adds comfort.

93. It is, in any event, right to say that the majority of existing casinos are too small in terms of size to fall within the definition of a small casino – but even if they were not, for the purpose of the policy and the reasons expressed in paragraph 6 of the same letter for giving effect to that policy, the physical size is largely irrelevant. The concentration of gambling machines to a level not encountered before was a characteristic of the nature of new casinos, not of their number. What is in error in paragraph 6.6.1 is saying, as bold fact, that there are “very few” existing 1968 casinos large enough. Had the words “a minority of 1968 casinos” been used in substitution, no violence would be done either to the sense, or to the point. I do not regard the difference of degree as material. I do not regard the language as suggesting that it was. It is reading too much into the Treasury Solicitor’s response so to conclude. Even if the Secretary of State were mistaken as to fact, the mistake was not material since there was (on the language of the letter of response, and in fact) no other

approach open to her. She was bound to recognise, given the 2005 Act, that existing and new casinos were not in a like position.

Conclusions

94. I have focused in this judgment upon the matters which were elaborated upon in oral argument before me. Three central points have been advanced, two of which did not feature in the original grounds, and the third of which did not feature in the letter before action. My conclusion is that each point, whether taken separately or together, fails. No basis has been made out before me for challenging the propriety of paragraph 65 of Schedule 4 to the Transitional Provisions Order of 2006. It was properly made, whatever the merits of arguments about its consequences. The claim must fail.