

Group Briefing  
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# The decision in *Rehab Group and Rehab Lotteries Limited v Minister for Justice and Equality* and update on the Betting (Amendment) Bill 2013

On 5 June 2014, Rehab Group's and Rehab Lotteries Limited's ("Rehab") judicial review challenge to the decision by the Minister for Justice and Equality (the "Minister") to phase out the Charities Lotteries Scheme (the "Scheme") was dismissed in the High Court. Rehab submitted that the Minister's decision should be declared invalid because Rehab was denied fair procedures when the decision was taken. Rehab unsuccessfully argued that it should have been afforded an opportunity to address the Minister to make representations due to the effect which the phasing out of the scheme would have on Rehab's interests. In her judgment, Ms. Justice O'Malley held the decision related to a non-statutory government policy rather than a compensatory fund, and in the particular circumstances of the case Rehab did not have an entitlement to make representations.

This briefing note will examine some of the key elements discussed in the High Court and the reasoning behind the decision. It will also provide an update on recent developments on the Betting (Amendment) Bill 2013.

## BACKGROUND

Prior to the Gaming and Lotteries Act 1956 (the "1956 Act"), Rehab and other

charitable organisations raised funds by holding lotteries. The 1956 Act prohibited most lotteries, except those run for charitable purposes. However it also introduced a limit of £500 on the prize money that charitable bodies could pay out per week. The National Lottery Act, 1986 exempted the National Lottery from the prize cap. Although the cap was raised to £10,000 and subsequently to €20,000 per week, it continued to apply to Rehab. Rehab launched products aimed at competing with the National Lottery, however it was submitted that it was not possible to attain a profitable market share due to the comparatively unattractive prizes offered.

Following successful lobbying of the government by certain charitable bodies affected by the National Lottery's statutory market dominance, a fund for private charities was set up. Its beneficiaries would be charities whose products were in direct competition with products sold by the National Lottery. The fund was distributed through the Scheme which provided that, subject to the availability of funds, eligible charities would be assisted in proportion to the turnover of products which were comparable to National Lottery products.

The Scheme was administered initially by the Department of Finance until 2011 when it was transferred to the Department

of Justice and Equality. Crucially, the fund was initially financed from the National Lottery surplus, however since 2005 it has been 35% funded by the Central Exchequer. Rehab was the main beneficiary of the Scheme.

Reviews of the Scheme were undertaken and reports in 2001 and 2004 estimated the market share that Rehab would have attained had the prize cap not been introduced. While it was acknowledged that it was difficult to estimate this accurately, the conclusions of these reviews were that the Scheme should remain in place.

When the Scheme was reviewed in 2009 however, there was a concern that lotteries were being run unprofitably in order to continue to receive government funds and that the Scheme should not run indefinitely. An audit of Rehab's use of the funds was undertaken in 2012. While Rehab objected in principle to the audit, it co-operated and furnished the Minister with the information sought. In October 2012 the Minister informed Rehab that, due to the current economic climate and the urgent need to cut government spending, the Scheme would be phased out over a period of three years. The concern that charitable organisations were running lotteries purely in order to leverage public funds was also raised. Rehab sought judicial review of the decision arguing that this decision would adversely affect it and other charitable organisations.

#### SUBMISSIONS

In its submissions, Rehab argued that the decision was one which attracted fair procedures as it had a legitimate expectation that the funding would continue. Rehab relied on the decision in *Dellway Investments v National Assets Management Agency*<sup>1</sup> in which the Supreme Court held that the right to make representations depends on the individual circumstances rather than the classification of the decision as public policy or otherwise. Rehab characterised

the Scheme as providing compensation for the 'continuing damage' caused by the National Lottery's exemption from the prize cap. As a result of the legitimate expectation to the fund, Rehab should have been permitted to make representations before a decision was taken to phase out the Scheme.

Counsel for the Minister argued that the fund was not a compensation fund for a specific loss or damage incurred by Rehab but rather a scheme of financial assistance which was at all times subject to review and audit and that Rehab was aware of the possibility of the Scheme being discontinued. Without criticising Rehab or the other charitable organisations affected, the Minister argued that the fund unintentionally gave rise to inefficient lotteries being run. In circumstances of economic downturn, it was not possible to justify the continuation of public funding of the scheme. If there was a legitimate expectation to the funding, such expectation could be over-ruled by the significant public policy concern. Additionally, it was argued that policy decisions are made in the public interests and are exempt from the requirement to afford fair procedures to affected parties.

#### JUDGMENT

Giving further guidance on the future application of the decision in *Dellway*, O'Malley J. noted Mr. Justice Fennelly comments in that case, suggesting that it was difficult to distinguish between decisions attracting the rules of natural justice and those within the policy exemption. The judges in *Dellway* grappled with the application of the requirement to allow an affected party to make representations on decisions which affect them; however they agreed that the mere fact that an applicant had been affected by a decision does not guarantee a right to make representations, and each case should be considered on its facts. Similarly, in *Treasury Holdings v. NAMA*<sup>2</sup> although Ms. Justice Finlay Geoghegan found that a right to be heard did arise in the circumstances of the case, she rejected the argument that such a finding would result

in every NAMA decision being subject to fair procedures.

In the Rehab case, O'Malley J. found that Rehab did have certain rights in relation to the administration of the Scheme – for example, the right that it be administered fairly and in accordance with set criteria. However she found that this did not equate to a right to consultation if the Minister were to discontinue the Scheme.

As a result O'Malley J. concluded that the decision to establish, retain and ultimately phase out the Scheme was rooted in policy which was influenced by the economic climate and the analytical reports of the market and the Scheme's operation. The opportunity to make representations would not alter this policy decision to end the Scheme. As a result the reliefs sought were dismissed.

#### UPDATE ON THE BETTING (AMENDMENT) BILL 2013

On 8 July 2014, the Oireachtas Finance Sub-Committee debated the Betting (Amendment) Bill 2013 (the "Bill"). The Bill would make it unlawful for a person, other than a licensed operator, to act as a bookmaker in Ireland. Originally, the Minister for Justice and Equality (the "Minister") was tasked with ensuring remote operators complied with these requirements. However, the amendments now provide that this role will be temporarily assigned to the Revenue Commissioners pending the establishment of the gambling regulator under the proposed Gambling Control Bill ("Control Bill").

The Bill also contains proposals to help prevent unlicensed operators carrying on business in the State. For example, internet service providers or advertisers are prohibited from working with unlicensed remote operators. In addition, the Revenue Commissioners will enter into voluntary arrangements with international payment service providers to prevent operators using their systems to carry out illegal betting.

A number of amendments to the Bill were passed and other proposals were the subject of debate. It was suggested

<sup>1</sup> *Dellway Investments v The National Asset Management Agency* [2011] 4 I.R. 1

<sup>2</sup> *Treasury Holdings v. NAMA* [2012] IEHC 66

that the Bill should contain a clause that prohibited bookmakers from taking bets from customers who used their credit card to place the bet. This would represent a measure to tackle gambling addictions but its practical implications for online operators would need to be carefully considered.

It was also suggested that the proposed introduced of a 1% turnover tax on

online and mobile bookmakers was insufficient as it would not catch the most lucrative online activities such as roulette games. It was proposed that the tax should be extended to all online gambling activity, increased to 3% and be imposed on individual winnings. This proposal would be passed to the Minister for consideration although a significant increase in the proposed 1% rate is not

expected. Finally, greater clarification was sought from the Minister on his plans for future funding of the horseracing and greyhound industries.

The Bill will continue to progress along the legislative process and is expected to be passed by both Houses of the Oireachtas later this year.

#### KEY CONTACTS

For further advice please contact:-



**ROB CORBET**  
PARTNER, HEAD OF TECHNOLOGY & INNOVATION  
rob.corbet@arthurcox.com  
+353 1 618 0566



**CHRIS BOLLARD**  
ASSOCIATE  
chris.bollard@arthurcox.com  
+353 1 618 0649



**CLAIRE O'BRIEN**  
ASSOCIATE  
claire.obrien@arthurcox.com  
+353 1 618 1114

**arthurcox.com**

#### Dublin

+353 1 618 0000  
dublin@arthurcox.com

#### Belfast

+44 28 9023 0007  
belfast@arthurcox.com

#### London

+44 207 823 0200  
london@arthurcox.com

#### New York

+1 212 782 3294  
newyork@arthurcox.com

#### Silicon Valley

+1 650 943 2330  
siliconvalley@arthurcox.com