Neutral Citation Number: [2023] EWHC 2226 (TCC)

Case No: HT-2022-000113 HT-2022-000420

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/09/2023

Before :

Lord Justice Coulson

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Between :

(1) International Game Technology PLC	**Claimants**
~~**(2) IGT Global Services Limited**~~	
(3) IGT Global Solutions Corporation	
(4) IGT (UK 3) Limited	
(5) IGT UK Interactive Limited	
(6) IGT UK Limited	
- and -	
The Gambling Commission	**Defendant**
-and-	
(1) Allwyn Entertainment Ltd	**Interested**
(2) Allwyn International A.S.	**Parties**

- - - - - - - - - - -Judgment No. 2 (Consequentials) - - - - - - - - -

Philip Moser KC, Ewan West, and Jen Coyne (instructed by Osborne Clarke LLP) for the **Claimants**
Sarah Hannaford KC, Rose Grogan and Barney McCay (instructed by Hogan Lovells International LLP) for the **Defendant**
Charles Hollander KC and Joseph Barrett (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the **Interested Parties**

Hearing date: 30 August 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 September by circulation to the parties or their representatives by e-mail and by release to the National Archives

LORD JUSTICE COULSON :

1 INTRODUCTION

1. In my judgment dated 28 July 2023 ([2023] EWHC 1961 (TCC); [2023] 7 WLR 464), I decided the Preliminary Issue in favour of the defendant ("the Commission"), and concluded that the claimants (collectively referred to as "IGT") had no standing to challenge the award by the Commission to the interested party ("Allwyn") of the Licence to run the Fourth National Lottery. There was a further hearing on 30 August 2023 to address consequential matters.

2 THE RESOLUTION OF THE PROCEEDINGS

2. There was no dispute between the parties that, in consequence, judgment should be entered for the Commission on the Preliminary Issue, and that claims HT-2022-000113 and HT-2022-000420 ("the claims") should be dismissed.

3. That left three outstanding matters:

   i) the Commission's claim for an order against IGT for their costs of the claims (including the Preliminary Issue) and for a payment on account of those costs;

   ii) Allwyn's claim for an order against IGT for their costs of the claims (including the Preliminary Issue); and

   iii) IGT's application for permission to appeal.

   At the hearing, I briefly stated my decision on each of those issues, and said I would provide my detailed reasons in a short written judgment.

3 THE COMMISSION'S COSTS

4. There was no dispute that IGT must pay the Commission's costs of the claims (to include the costs of the Preliminary Issue), such costs to be assessed on the standard basis if not agreed. As explained in greater detail below, those costs will include IGT's share of what have been called "the common costs", namely those costs which were incurred by the Commission prior to the discontinuance of the separate claim by Camelot at HT-2022-000106, and in respect of which the Commission say that it is impossible to distinguish or allocate costs as between the separate claims with any greater precision.

5. The Commission sought a payment on account of their costs. Their solicitors summarised that claim in a letter dated 17 August 2023, with attachments. The Commission's costs total £4,166,797.95, including an allowance of 50% of the common costs. An interim payment is sought in the sum of £2.5 million.

6. In response, on behalf of IGT, Mr Moser KC accepted in principle that a payment on account should be made, but took various points about the nature of the costs information which had been provided. In particular, he challenged the assumption that IGT were responsible for 50% of the common costs, pointing out that, during the period when Camelot were involved, it was they who were in the forefront of the proceedings, not IGT. He also had some points about the in-house costs claimed by reference to

Capital Law, although they were a very modest part of the £4.16 million total. When asked by the court to suggest an alternative figure for the payment on account, Mr Moser suggested that an appropriate figure was £1 million.

7. The law is summarised in the notes in the White Book 2023 at paragraph 44.2.12. The reasonable sum which must form the basis of any payment on account of costs will usually be an estimate of the likely level of recovery, subject to an appropriate margin to allow for error in the estimation: see *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm). The process is necessarily rough and ready because there has been no detailed assessment, but justice requires an amount to be identified and paid on account, rather than making the successful party wait for the completion of the potentially lengthy assessment process.

8. Relevant factors to be taken into account can include the likelihood of the recovery of the total costs or the likely proportion to be recovered; the difficulty, if any, that may be faced in recovering the costs; the likelihood of a successful appeal; and the means of the parties. However, it was not suggested that any of those matters were of relevance here. Accordingly, I am obliged to endeavour to identify an amount which, on any view, the Commission will recover by way of costs.

9. I am in no doubt that the sum of £1 million suggested by Mr Moser would be a significant underestimate of the amount the Commission will recover. Even assuming that he is right, and IGT will not be obliged to pay 50% of the common costs, I note that the IGT-only costs are estimated to come to a total in excess of £1.8 million on their own. Furthermore, it is inevitable that IGT will have to pay at least some of the common costs, which separately amount to almost £1.5 million.

10. Taking the necessary broad-brush approach, I have concluded that the appropriate amount by way of an interim payment is £2.1 million. That is essentially 50% of the total costs incurred by the Commission. I am in no doubt that they will recover at least that sum on assessment. That interim payment must be paid by 4pm on 13 September 2023.

4 ALLWYN'S COSTS

11. Allwyn also seek an order that IGT should pay their costs, and are content with an order in the same terms as the order in respect of the Commission's costs. They do not seek an interim payment.

12. On behalf of Allwyn, Mr Hollander KC accepted that the recovery of an Interested Party's costs is far from automatic. However, he said that, by reference to the authorities, Allwyn have demonstrated specific features of this case which justified their separate representation, and they have fully participated in the resolution of these claims with the express permission of the case managing judge, O'Farrell J. In response, Mr Moser objected to an order making IGT liable for Allwyn's costs. His focus was on the costs of the Preliminary Issue, in respect of which, he said, with all proper politeness, that Allwyn's contribution was nugatory.

13. I start with the law. The underlying principles were set out in the speech of Lord Lloyd of Berwick in *Bolton Metropolitan District Council & Ors v SoS for the Environment* [1995] 1 WLR 1176. That was a case concerned with planning, where the developer

successfully sought its costs (in the House of Lords and below) of defending the Secretary of State's original planning decision. Lord Lloyd said at 1178H:

> "The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which it was entitled to be heard, that is to say an issue not covered by Counsel for the Secretary of State; or unless he had an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case."

14. The House of Lords concluded that the developer had made out its claim for costs. This was because: (i) "the case raised difficult questions of principle"; (ii) "the scale of the development, and the importance of the outcome for the developers, were both of exceptional size and weight"; (iii) it was an unusual case because the opposition came, not from the local authority, but from a neighbouring authority supported financially by a consortium of major commercial interests.

15. There are a number of subsequent decisions at first instance in which this approach has been followed, including *R (Smeaton) v SoS for Health* [2002] 2 FLR 146 and *Group M (UK) Limited v Cabinet Office* [2014] EWHC 3863 (TCC). Recently, the relevant principles have been helpfully summarised by Fraser J in *Bechtel Limited High Speed Two (HS2) Limited v Balfour Beatty Group Limited & Ors* [2021] EWHC 640 (TCC) at paragraph 25:

> "25. I draw the following principles from the court's power to order costs, and the decision in *Bolton*, which I consider are of general application to costs applications by interested parties in procurement challenges. They are as follows:
>
> 1. The court evidently has power to order costs under the statute, and such costs are discretionary. The power must however be exercised in accordance with the Civil Procedure Rules, and in particular CPR Part 44 which deals with costs (and Part 44.2 dealing with the court's discretion as to costs).
>
> 2. Ordinarily, an interested party (who for these purposes will usually be the winning bidder) must be able to show that there is a separate issue on which he was entitled to be heard, that is to say an issue not covered by the contracting authority; or that he has an interest which requires separate representation, in order to recover costs.
>
> 3. The mere fact that a party has won the bid does not automatically entitle him either to become an interested party in the litigation, or indeed, to recovery of his costs if the challenge by the claimant fails.
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> 4. The court will, for procurement proceedings under the Regulations, when granting a winning bidder the status of interested party, have made an order in this respect. That order will clearly state the extent to which that interested party is entitled to participate. The order formalises the involvement of the interested party in the proceedings. This is a matter of active case-management. Simply because an interested party is involved at one stage of the proceedings does not entitle that party to participate in later stages of the same proceedings.

> 5. Simply having been made an interested party by way of such an order does not automatically, of itself, entitle the interested party to its costs.
>
> 6. There may be specific and unusual features of any particular case upon which an interested party may rely when it seeks an order for its costs in these circumstances. There can be no exhaustive list of these prescribed in advance. The court will, when exercising its discretion, take all the relevant factors into account, but the presence of one or more of these unusual features will make it more likely that an interested party can obtain a costs order in its favour."

16. I respectfully agree with and adopt those principles.

17. On the facts in *Bechtel*, the interested party was awarded its costs of complying with the confidentiality ring provisions and protecting its own confidential information, but not awarded any other costs, primarily because they had played no real part in the unfolding litigation. At paragraph 24 of his judgment, Fraser J compared that limited role with that of the interested party in the *Group M* case, who had been given permission to participate, had submitted its own evidence, and had attended and made submissions on the substantive application to lift the automatic suspension.

18. I consider that Mr Hollander was right to say that the first question to be considered here was whether or not an order should be made entitling Allwyn to their costs of the claims generally, before going on to see whether a different order should be made in respect of the specific costs incurred in connection with the Preliminary Issue.

19. As to the costs of the claims generally, I am in no doubt that Allwyn have demonstrated a clear entitlement to their costs. There are a number of reasons for that, which can be explained by reference to some of the earlier judgments and orders made by O'Farrell J, who has managed these claims with such diligence and efficiency.

20. First, at the hearing on 27 July 2022, Allwyn made an application to participate in the claims as an interested party. That application was opposed. Junior Counsel then appearing for Allwyn, Mr Barrett, made detailed submission as to how and why he said that Allwyn's interests were different to that of the Commission. When stripped to their essentials, his submissions were that: i) the Commission had not always understood Allwyn's bid, so that some of the potential criticisms made by the evaluators relied on by Camelot/IGT were in fact misplaced; ii) the attack on the viability of Allwyn's bid generally was something which only they could address in the required detail; iii) even if, which was denied, Camelot/IGT could demonstrate that there had been manifest errors in the marking, those matters would not have given rise to any reduction in the score because (amongst other things) the detailed arrangements for feedback and clarification, as set out in the tender documentation, would have ensured that the issues would have been resolved before the final evaluation of the bids.

21. In her *extempore* judgment on Allwyn's application ([2022] EWHC 2139 (TCC)), at paragraphs 8-14, O'Farrell J broadly accepted those submissions. She recognised that Allwyn had different interests from the Commission and were entitled to protect them by way of separate representation. She therefore granted Allwyn permission to participate in the claims, by producing witness evidence, calling witnesses and making written and oral submissions at the trial. In my judgment, O'Farrell's judgment and

order demonstrate that, even at that early stage, it was clear that Allwyn had discrete and specific interests to protect and separate points to make.

22. Secondly, I note that the principal subject matter of the hearing on 27 July 2022 concerned the consequences of the application made by the Commission and Allwyn to lift the suspension which would otherwise have prevented the Commission from entering into the Fourth Licence with Allwyn. That application had been successful. Allwyn then sought its costs of the application. Accordingly, in her judgment, also given *extempore* on the same day at [2022] EWHC 2140 (TCC), O'Farrell J had to consider precisely the same issue that I am now considering, namely whether Allwyn could demonstrate that it had a separate interest in the application that required it to have separate representation. She was satisfied that it did, for the reasons that she set out. She therefore awarded Allwyn its costs of that application.

23. Thirdly, when the application was made in May 2023 for the hearing of the Preliminary Issue, made by the Commission and supported by Allwyn, IGT resisted it. That resistance was, of course, unsuccessful. The judge then had to deal with the question of the costs of that application in her judgment at [2023] EWHC 1420 (TCC). She decided that the costs incurred by the Commission and Allwyn in relation to that application would be costs in the Preliminary Issue itself. She explained at [68] that that meant that, if IGT were successful on the Preliminary Issue, they would have been justified in opposing the application and so recover their costs. If, on the other hand, the Commission and Allwyn were successful ,"then they will have strong grounds on which to recover their costs".

24. Accordingly, by reference to these three sets of orders and judgments, I conclude that: Allwyn were properly made an interested party in these proceedings at the outset because they had specific interests to protect and separate points to make; that they have been expected to play, and have played, a full part in the resolution of the claims; and that they have been regarded by everyone as a party who could, in the appropriate circumstances, recover its own costs or pay the costs of others.[1]

25. Thus, by reference to the principles summarised in *Bechtel*, I conclude that the specific features of this case justify an order that IGT pay Allwyn's costs of the claims. To that extent, I consider that, on the facts, this case is similar to *Group M* (for the reasons explained by Fraser J in his judgment in *Bechtel*) and not at all like the *Bechtel* case itself, where the interested party's involvement was almost non-existent.

26. There is a separate reason why I have concluded that Allwyn are entitled to its costs. That goes back to the decision in *Bolton*. There, two of the reasons why the developer's application for costs was successful in the House of Lords was because of the difficult questions of principle said to arise in the case, and because of the scale of the development and the importance of the outcome being of exceptional size and weight. In my view, both those factors apply here. This was an extremely important public procurement challenge, which has attracted much press coverage, because of the significance of the National Lottery in our daily lives, and the money it raises for good

[1] At the hearing on 27 July 2022, Mr Moser sought IGT's costs against Allwyn as a result of Allwyn's unsuccessful application to amend the CCRO. O'Farrell J ordered that Allwyn must pay their own costs of that application and made them potentially liable, depending on the outcome of the claims, to pay IGT's costs of that application. As Mr Moser put it, "when we win, we shall recover the costs of today".

causes. The financial value of the claims for damages advanced by Camelot and IGT was astronomic, so one must assume that the value of the Fourth Licence to Allwyn was similarly high. The claims raised a raft of points of principle, only one of which – the issue of standing – has needed to be resolved. It would be absurd to say that, despite such unusual circumstances, Allwyn were not entitled to defend the award to them of the Fourth Licence by the Commission, and to recover their costs of so doing if - as has happened - that defence has proved successful.

27. Accordingly, for those reasons, I conclude that IGT must pay Allwyn's costs of the claims.

28. That leaves the separate issue as to whether there should be some sort of carve-out in relation to the costs of the Preliminary Issue. Mr Moser's submission was that, in contrast to *Smeaton*, where the case without the interested party's involvement was colourfully described at [438] as like 'Hamlet without the Prince', Allwyn's lack of involvement in the Preliminary Issue would have amounted to no more than 'Hamlet without the gravediggers'.

29. In my view, the answer to this point goes back to the order made by O'Farrell J dated 25 May 2023, which permitted Allwyn to participate in the hearing of the Preliminary Issue. Amongst other things, paragraph 7 of that order provided that:

> "The defendant and the Allwyn parties shall liaise over the respective allocation between them of time that would otherwise be allotted to the Defendant for his oral submissions at the Preliminary Issue Hearing. The Allwyn party shall in any event avoid duplication in their written and oral submissions of the written and oral submission of the Defendant."

30. Accordingly, it seems to me that, unless it can be shown that Allwyn failed to comply with paragraph 7 of the order, they are entitled to their costs of the Preliminary Issue, for the reasons previously set out. As I have already noted, it was O'Farrell J's view that if Allwyn were successful on the Preliminary Issue, they would have a strong claim for their costs.

31. There can be no doubt that Allwyn's oral submissions and active participation in the hearing before me did not duplicate any part of the submissions made on behalf of the Commission by Ms Hannaford KC. During the hearing, Mr Hollander conspicuously complied with paragraph 7 of the order, a point I noted in my primary judgment.

32. That leaves the skeleton arguments. Whilst I accept there was a certain amount of duplication between the skeleton arguments produced by Allwyn, on the one hand, and the Commission on the other, it seems to me that that was inevitable in circumstances where two separate parties were preparing two separate skeletons to be produced at the same time (indeed, my recollection is that Allwyn's skeleton argument arrived before that of the Commission). In practical terms, there was no scope for avoiding at least some duplication. Moreover, in a case in which the quality of the skeleton arguments produced by all three parties was of the highest standard, during my pre-reading I derived particular assistance from the skeleton argument prepared by Mr Hollander and his juniors.

33. In all those circumstances, it would be grossly unfair to carve out from the general order awarding Allwyn their costs of the claims, any element of their costs of the Preliminary Issue, simply on the basis that there was some duplication in the written arguments. On the contrary, I consider that it would be reasonable and proportionate for such costs to be included in the general order in Allwyn's favour, without deduction.

5 PERMISSION TO APPEAL

34. Finally, IGT sought permission to appeal against my primary judgment. They sought to raise five separate grounds. They also raised an additional argument that, because the question of standing in public procurement claims was so important, there was "some other compelling" reason to warrant granting permission to appeal pursuant to CPR 52.6(1)(b), even if the grounds were otherwise thought to have no real prospect of success. For the reasons set out below, I refuse the application for permission to appeal.

35. First, before turning to the individual grounds, I should point out that I sought to approach the question of standing from every possible angle. Although the Commission and Allwyn argued that this was a simple matter of EU law and the UK's implementation of that law, a submission with which I agreed, I also went on to consider carefully the words themselves, untrammelled by any reference to those matters. That alternative approach led to the same result. So whichever way the cards were cut, the result was the same.

36. I turn to the individual grounds themselves. Grounds 1 and 2 are concerned with the suggestion that the position under EU law was irrelevant and that all that mattered was the position under the UK legislation. In my judgment, that argument has no real prospect of success, for the reasons explained in the first part of my principal judgment. The limited category of those who have standing under EU law is clear and not disputed. The UK implementation legislation did not go beyond it. IGT wished to argue that, although it had always been the case that the only people who could challenge a procurement decision were the unsuccessful bidders, this somehow radically changed in the UK in 2016, without anybody realising it or even intending it to happen. Such a case was, in my judgment, wholly untenable for the reasons that I have given. Moreover, contrary to the impression created by Grounds 1 and 2, I went on to consider the wording of CCR16, in respect of the requirements of the EU Directives and the notion of gold-plating, and came to precisely the same conclusion.

37. Ground 3 is concerned with my separate interpretation of the term "economic operator". The difficulty with which Mr Moser struggled manfully throughout was that, on any view, his interpretation was far too wide: it had to be, so as to include all the different IGT claimants. I note that Ground 3 identifies a potential row-back, in that it suggests that the definition "included *at least* key sub-contractors". But the difficulty with that is there is nothing in the definition of "economic operator" that distinguishes between different kinds of contractors or sub-contractors, let alone "key" sub-contractors. It was, of course, for that reason that Mr Moser submitted at the original hearing that companies far, far down the contractual chain could challenge the procurement.

38. In his oral submissions, Mr Moser suggested that I had not had sufficient regard to the qualification in the definition ("risks suffering loss or damage"). I do not accept that: I had particular regard to that qualification at [133], [137] and [142]. But in any event,

since on Mr Moser's case, the potential sub-sub-sub-sub-contractor will suffer loss or damage, and therefore be entitled to claim, the qualification is immaterial.

39. Ground 4 is concerned with the reference to C4 and the fact that they were not economically active. That was an additional point, arising out of Mr Moser's own definition of "economic operator". C4 would have to get round all the other hurdles as to standing before their lack of economic activity became even a potential obstacle. Moreover, contrary to Ground 4, at no stage have I suggested that an SPV could never make a procurement claim. If an SPV has made an unsuccessful bid, then prima facie it has standing to bring a claim.

40. Ground 5 concerns C1. The difficulty once again is that C5 never made a bid, so had no standing to make a claim.

41. That leaves the issue as to whether there is "some other compelling reason" to grant permission to appeal. In my view, for three separate reasons, this submission cannot assist IGT.

42. The first is that, as the notes in the White Book 2023 point out at 52.6.2, there is a philosophical difficulty in allowing permission to appeal in a case when it has already been concluded that that appeal has no real prospect of success. At the very least, such an application would require unusual circumstances for permission to appeal to be granted, despite its inherent lack of merit. Those unusual circumstances are not demonstrated here.

43. Secondly, I am not persuaded by the submission that this is in some way a point of law of critical importance. I acknowledged at the outset of my primary judgment that the outcome may affect more cases than just this one but, as presently advised, I consider its significance to have been somewhat over-stated. I am certainly of the view that the issue is not so important that it should permit an untenable appeal to take up the time, costs and court resources that would be involved.

44. The third and final point is this. Mr Moser's written skeleton suggested that, until now, it had always been assumed that sub-contractors could bring procurement challenges. I disagree: I consider that the evidence is all the other way. Public procurement has been a lively field of endeavour for lawyers for the last 15 years or so. During that time there have been hundreds, if not thousands, of procurement challenges brought by unsuccessful bidders. By contrast, the number of challenges in the UK that involved sub-contractors in any role can be counted on the fingers of one hand. In my view, that gross imbalance supports the proposition that, in general terms, it was assumed that sub-contractors did *not* have the standing to bring procurement challenges.

45. For those reasons, I am not persuaded that there is some other compelling reason to grant permission to appeal, where the appeal itself has no real prospect of success. For these reasons, therefore, I refuse permission to appeal.

46. I would again wish to express my sincere thanks to Leading Counsel for all parties for the efficient disposition of business at the consequentials hearing on 30 August 2023.