



Neutral Citation Number: [2022] EWHC 1664 (TCC)

HT-2022-000106

HT-2022-000113

HT-2022-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 29/06/2022

Before:
MRS JUSTICE O'FARRELL DBE

Between:

Claim HT-2022-000106

CAMELOT UK LOTTERIES LIMITED

Claimant

- and -

THE GAMBLING COMMISSION

Defendant

- and -

**(1) ALLWYN ENTERTAINMENT
LIMITED**

**Interested
Parties**

(2) SAZKA GROUP AS

Claim HT-2022-000113

(1) INTERNATIONAL GAME TECHNOLOGY PLC

(2) IGT GLOBAL SERVICES LIMITED

(3) IGT GLOBAL SOLUTIONS CORPORATION

(4) IGT (UK 3) LIMITED

(5) IGT UK INTERACTIVE LIMITED

(6) IGT UK LIMITED

Claimants

- and -

THE GAMBLING COMMISSION

Defendant

- and -

(1) ALLWYN ENTERTAINMENT LIMITED
(2) SAZKA GROUP AS

Interested
Parties

Claim HT-2022-000154

CAMELOT GLOBAL LOTTERY SOLUTIONS
LIMITED

Claimant

- and -

THE GAMBLING COMMISSION

Defendant

- and -

(1) ALLWYN ENTERTAINMENT LIMITED
(2) SAZKA GROUP AS

Interested
Parties

Lord Pannick QC, Jason Coppel QC, Ligia Osepciu and Daniel Cashman (instructed by **Linklaters LLP**) for the **Claimants** in HT-2022-000106 & HT-2022-000154
Philip Moser QC, Ewan West and Jen Coyne (instructed by **Osborne Clarke LLP**) for the **Claimants** in HT-2022-000113
Sarah Hannaford QC, Anneli Howard QC and Will Perry (instructed by **Hogan Lovells International LLP**) for the **Defendant**
Helen Davies QC, Joseph Barrett and Malcolm Birdling (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Interested Parties**

Hearing dates: 11th & 12th May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 29th June 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. These proceedings arise out of a competitive tender for the award of a statutory licence for operation of the National Lottery (“the Fourth Licence”) for the purpose of generating funds for distribution to good causes.
2. There are two matters before the Court for immediate determination. The defendant in each claim (“the Commission”) applies for an order to lift the automatic suspension which arose on issue of a procurement challenge by the claimants in claims HT-2022-000106 (“Camelot UK”) and HT-2022-000154 (“Camelot Global”), collectively referred to as “Camelot”, and the claimants in claim HT-2022-000113 (“IGT”), pursuant to regulation 57(1)(a) of the Concession Contracts Regulations 2016 (“the CCR”).
3. Camelot and IGT oppose the applications and seek to maintain the suspension, preventing the Commission from awarding the Fourth Licence to the successful applicant in the competition, Allwyn Entertainment Limited (“Allwyn”), pending the outcome of the trial.
4. There is also an application by Camelot and IGT for an expedited trial in October 2022, so that the claims may be resolved by the end of the year, minimising any delay to implementation of the Fourth Licence.
5. The Commission does not oppose the application for expedition but considers that a trial in October 2022 would be challenging and would not avoid the detriment suffered by the Commission by continuation of the suspension in the meantime. Its position is that a timetable leading to a trial in January 2023 would be more realistic.
6. The interested parties, Allwyn and SAZKA Group a.s (“the Allwyn Parties”), support the Commission’s application to lift the suspension. Their position is that the trial of the claims should take place as quickly as is achievable but they do not consider that a final resolution could be achieved without a significant and material delay to implementation of the Fourth Licence without lifting the suspension.
7. There are further applications concerning joinder of claims, case management of the claims and amendments to the common confidentiality ring order (“the CCRO”). They will be considered by the Court to the extent that they have any impact on the applications to lift the suspension and for expedition but will be determined at a later hearing following this judgment, if not resolved by agreement.

Background

8. Camelot UK is a special purpose vehicle which is a wholly-owned subsidiary of the Ontario Teachers’ Pension Plan (“OTPP”).
9. Camelot Global is a member of the same corporate group as Camelot UK. It licenses or supplies digital lottery platforms and provides retailer technology solutions to companies including Camelot UK.
10. The IGT Claimants are part of the IGT Group, which provides lottery and gaming technology products and services to operators across the world.

11. Allwyn is a lottery operator with market positions across various countries in Europe. Sazka Group AS is Allwyn's parent company.
12. The Commission is an independent statutory body responsible for awarding the licence to run the National Lottery and regulating the licensee. Both of these functions are governed by the National Lottery etc. Act 1993 ("the NLA").
13. The overriding duties of the Commission are set out in section 4 of the NLA:

“(1) The Secretary of State [for the Department of Digital, Culture, Media and Sport] and (subject to any directions he may be given by the Secretary of State under section 11) the Commission shall each exercise their functions under this Part in the manner they consider the most likely to secure –

 - (a) that the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety, and
 - (b) that the interests of every participant in a lottery that forms part of the National Lottery are protected.

(2) Subject to subsection (1), the Secretary of State and the Commission shall each in exercising those functions do their best to secure that the net proceeds of the National Lottery are as great as possible.”
14. Section 5 of the NLA empowers the Commission to authorise by licence one person at any one time to run the National Lottery, provided that the Commission is satisfied that such person is a fit and proper person to run the National Lottery.
15. Section 7 of the NLA states:

“(1) A licence granted under section 5 or 6 shall be in writing and shall specify the period for which (subject to being revoked or suspended) it is to have effect.

(1A) The period specified under subsection (1) must–

 - (a) begin with the date of grant of the licence, and
 - (b) not exceed 15 years.

(1B) A licence granted under section 5 or 6 may (subject to the restriction in subsection (1A)(b)) include–

 - (a) provision enabling the period specified under subsection (1) to be extended by the Commission;
 - (b) provision enabling the period specified under subsection (1) to be extended by agreement between the Commission and the licensee.”

16. Funds generated by the National Lottery are paid into a distribution fund and apportioned to causes connected with the arts, sport, national heritage, charities, health, education and the environment. Since the National Lottery was launched in 1994, it has raised more than £45 billion for good causes. It currently raises around £1.7 billion a year, funding a wide range of public interest activities, from large scale projects, such as the 2012 Olympic and Paralympic Games, to local community projects such as foodbanks and children's centres. In addition, 12% of the price of all lottery tickets is paid to the Treasury in the form of lottery duty.
17. The first licence for the National Lottery was awarded to Camelot UK in 1994. The second licence was also awarded to Camelot UK. On 1 February 2009 Camelot UK was granted the third licence for an initial 10-year period. The third licence was extended on three occasions and will expire on 31 January 2024. As a result of those extensions and the statutory longstop of 15 years, no further extension of the third licence is permitted under the NLA.

The Competition

18. By publication of Concession Notice Reference Number 2020/S 168-408296 dated 31 August 2020, in the Official Journal of the European Union, the Commission invited expressions of interest in a licence, to be issued pursuant to section 5 of the NLA, for operation of the National Lottery for a period of 10 years, with an estimated total value of £6,473,100,000.
19. On 26 October 2020, following the initial selection questionnaire stage, Camelot UK was one of the applicants who received an invitation to apply for the Fourth Licence ("the ITA"). The executive summary of the ITA stated:

"The Commission seeks to award the Fourth Licence to the Proposed Licensee identified in the Phase Two Application which proposes the highest credible and deliverable Good Causes Contribution for the Fourth Licence whilst first ensuring support for the Commission's Statutory Duties of propriety and protecting Participants' interests."
20. The ITA stated that the successful applicant would be awarded the Fourth Licence, to operate the National Lottery for a period of ten years. The proposed licensee had to be a special purpose entity established in the UK.
21. Each applicant was required to submit a detailed incoming transition plan, setting out how it would manage the transition from the third licence to the Fourth Licence, meet the requirements for operating the Fourth Licence and implement its business plan. The transition plan was required to be fully costed, including details for all resources to be used in the transition, subjected to a risk assessment and demonstrably executable.
22. The ITA stated that the successful applicant would be required to enter into additional agreements, including:
 - i) a Deed of Commitment, under which the Preferred Applicant would procure that the incoming licensee would execute the Enabling Agreement and the Deed of Adherence (if the successful applicant were not Camelot UK);

- ii) an Enabling Agreement with the Commission, pursuant to which the incoming licensee would agree to implement its transition plan in accordance with its application; and
 - iii) a Deed of Adherence pursuant to which the incoming licensee would become a party to the Cooperation Agreement between the Commission and Camelot UK (in its capacity as the incumbent operator of the National Lottery under the existing third licence), to facilitate the transition.
23. The ITA stage of the competition was divided into two phases. Phase One took place between October 2020 and July 2021, during which the applicants submitted initial applications and, following review, received feedback. Phase Two took place between August 2021 and March 2022, during which the tender submissions were evaluated. The ITA allowed for an implementation period of 21 months between award notification and the start date for the Fourth Licence. The Commission increased the implementation period to 22 months in the final applicant note as explained by Mr Tanner in his first witness statement.
24. The main criteria against which the Commission evaluated the applications at Phase Two were set out in sections 7 and 8 of the ITA:
- i) the criteria 'Propriety', 'Protecting Participants' Interests' and 'Financial Strength' were marked on a "Pass/Fail" basis;
 - ii) the 'Licensee's Proportion of Surplus' was marked on a relative basis to the applicant proposing the lowest percentage share of surplus that would cover its costs and was weighted at 15% of the total score available;
 - iii) the 'Good Causes Contribution' was evaluated using a relative scoring mechanism against the applicant proposing the highest contribution;
 - iv) the 'Business Plan' was evaluated by marking specific 'Business Plan Areas', namely, 'Transition', 'Branding', 'Portfolio', 'Channels' and 'Operations', based on the credibility and deliverability of the application in that area; a Solution Risk Factor score ("the SRF") was applied across the five Business Plan Areas to capture risks arising from combinations and interactions between different aspects of the Business Plan Areas; and the overall Business Plan was scored relative to the highest scoring applicant;
 - v) the combined score for the Good Causes Contribution and the Business Plan was given a weighted total of 85%.
25. The competition timetable and third licence held by Camelot UK were extended twice during the course of the competition, each time by 6 months. In May 2020 the first extension to the competition was made in response to market feedback regarding unforeseen challenges posed by the Covid-19 pandemic. At the same time, the Commission granted an extension of six months to the third licence. In August 2021 the second extension was made, at the end of the Phase One process, in response to representations from applicants that they needed further time to consider and address feedback received from the Commission at Phase One before they submitted their final Phase Two applications. To facilitate this additional delay, the Commission granted a

further extension of six months to the third licence, giving a revised expiry date of 31 January 2024.

26. Initially, the fourth IGT claimant participated in the competition for the Fourth Licence in its own right but withdrew before the Phase One stage. Following withdrawal, the third and fifth IGT claimants supported Camelot UK's tender as nominated key subcontractors.
27. On 15 October 2021 Camelot UK submitted its application for the Fourth Licence.
28. By letter dated 15 March 2022 the Commission notified Camelot UK and the other applicants that Allwyn had been awarded the highest score and was the 'Preferred Applicant'; Camelot UK had been awarded the next highest score and was the 'Reserve Applicant'.
29. The standstill period of ten days was extended by agreement and expired at midnight on 1 April 2022.

Proceedings

30. On 31 March 2022 Camelot UK issued proceedings (HT-2022-000106) seeking to challenge the decision to award the Fourth Licence to Allwyn. The grounds of challenge are centred on the Commission's consideration and assessment of Allwyn's application. They include allegations that the Commission failed correctly and lawfully to apply the published evaluation methodology and/or applied an unpublished evaluation methodology and/or there was manifest error in the evaluation in respect of: (i) the SRF risks in Allwyn's application; (ii) Allwyn's Portfolio and Transition Business Plan Areas; and (iii) Allwyn's Branding Business Plan Area.
31. The remedies claimed by Camelot UK include:
 - i) a declaration that the Commission was in breach of its obligations under the CCR in its conduct of the process for the award of the Licence, in particular in its evaluation of the Allwyn bid;
 - ii) an order setting aside the decision to appoint Allwyn as the Preferred Applicant for the Fourth Licence;
 - iii) an order that the Commission should appoint Camelot UK as the Preferred Applicant for the Fourth Licence; alternatively, that it should re-evaluate the bids or run a fresh competition;
 - iv) alternatively, damages to compensate for loss of anticipated profits under the Fourth Licence and/or wasted costs of participation in the bidding process.
32. On 6 April 2022 the IGT claimants issued proceedings (HT-2022-000113), seeking to challenge the decision to award the Fourth Licence to Allwyn, in their capacity as economic operators and/or key subcontractors in Camelot UK's application. The Particulars of Claim in HT-2022-000113 refer to and rely on the breaches pleaded by Camelot UK in HT-2022-000106, together with additional specified errors alleged in the evaluation of the SRF.

33. The IGT claimants plead that, had the Commission conducted a lawful evaluation of Allwyn's tender, it would have awarded the Fourth Licence to Camelot UK; in those circumstances, Camelot UK would have entered into the necessary arrangements with the Third and Fifth IGT Claimants in accordance with their roles as nominated key subcontractors. They seek essentially the same declaratory relief and setting aside order as claimed by Camelot UK. In addition, they claim damages for loss of reputation, goodwill and the ability to win and earn profits on other similar contracts, based on allegations that there was disproportionate interference with their business, in breach of Article 1 of the First Protocol of the European Convention on Human Rights, and unlawful subsidy for Allwyn, in breach of the EU-UK Trade and Co-operation Agreement on Government Procurement Agreement.
34. On 13 April 2022 The New Lottery Company Limited (“TNLC”), another unsuccessful applicant, issued proceedings against the Commission in respect of the competition for the Fourth Licence (HT-2022-000132). TNLC does not seek to set aside the decision to award the Fourth Licence to Allwyn; its claim is limited to damages.
35. On 29 April 2022 Camelot Global issued proceedings (HT-2022-000154), seeking to challenge the decision to award the Fourth Licence to Allwyn, as the provider of a digital platform, software and technology to Camelot UK. Camelot Global has indicated that it is likely to adopt the same grounds of challenge advanced by Camelot UK.
36. On 29 April 2022 the Commission served its Defence in claim HT-2022-000106, denying the allegations, setting out its justification of the evaluation exercise carried out and the scores awarded, and disputing any entitlement to the relief claimed.
37. Parallel Judicial Review proceedings were issued by Camelot UK in the Administrative Court (Claim CO/1162/2022). Following agreement by the parties that the CCR applied to the competition, by order dated 28 April 2022 Waksman J ordered by consent that those proceedings should be stayed, pending withdrawal, settlement or further order.

The applications

38. On 31 March 2022 Camelot UK issued its application for an expedited trial. The application is supported by IGT. By order of Waksman J dated 28 April 2022 the application for expedition was adjourned to be heard with the applications to lift the suspension.
39. On 14 April 2022 the Commission issued its applications to lift the automatic suspension in the Camelot proceedings and in the IGT proceedings. The applications are supported by Allwyn. The application in each case is opposed by Camelot and IGT.
40. By order dated 28 April 2022, Waksman J ordered that the Allwyn Parties should be joined as interested parties, for the purposes of protecting their interests in confidential information disclosed in the proceedings and making written and oral submissions in support of the Commission’s application to lift the suspension.
41. On 5 May 2022, Camelot Global issued an application, seeking to add Camelot Global as a claimant to the Camelot UK proceedings in claim HT-2022-000106; alternatively for an order that the claims be jointly case managed. This has now been resolved by

consent order, whereby Camelot Global has been added as a claimant to the Camelot UK proceedings and has undertaken to discontinue claim HT-2022-000154.

42. On 5 May 2022 the Allwyn Parties issued applications in claims HT-2022-000106 and HT-2022-000113, seeking to amend the common confidentiality ring orders made by Waksman J dated 28 April 2022.
43. On 9 May 2022 the Commission issued an application in claim HT-2022-000132, seeking to have the TNLC claim jointly case managed with the claims by Camelot and IGT.
44. The following witness statements have been served for the purpose of the applications and have been considered by the court:
 - i) John Tanner, Executive Director of the Commission and Senior Responsible Officer for delivery of the competition for the award of the Fourth Licence – first statement dated 14 April 2022, second statement dated 25 April 2022 and third statement dated 6 May 2022;
 - ii) Rupert Sydenham, partner in the firm of Hogan Lovells International LLP, solicitors for the Commission – first statement dated 14 April 2022 and second statement dated 6 May 2022;
 - iii) Thomas Cassels, partner in the firm of Linklaters LLP, solicitors for Camelot – second statement dated 3 May 2022;
 - iv) Timothy Haldenby, Chief of Staff of Camelot UK – first statement dated 3 May 2022 and second statement dated 10 May 2022;
 - v) Declan Harkin, former Senior Vice President and Lottery Chief Operations Officer of IGT – statement dated 3 May 2022;
 - vi) Craig McCarthy, partner in the firm of Osborne Clarke LLP, solicitors acting for the IGT Claimants – statement dated 3 May 2022;
 - vii) Justin King, Chairman of the Board of Directors of Allwyn Entertainment Ltd, a subsidiary of SAZKA Group a.s. (the Allwyn Parties) – first statement dated 26 April 2022 and second statement dated 6 May 2022.

Applicable legal principles

45. The commencement of proceedings by Camelot, seeking to challenge the Commission's decision to award the Fourth Licence to Allwyn, brought into effect the automatic suspension under regulation 56 of the CCR, preventing the Commission from entering into the Enabling Agreement with Allwyn or granting it the Fourth Licence:

“(1) Where –

- (a) a claim form has been issued in respect of a contracting authority or utility's decision to award the concession contract;

- (b) the contracting authority or utility has become aware that the claim form has been issued and that it relates to that decision; and
 - (c) the concession contract has not been entered into,
 - the contracting authority or utility is required to refrain from entering into the concession contract.
 - (2) The requirement continues until any of the following occurs –
 - (a) the Court brings the requirement to an end by interim order under regulation 57(1)(a);
 - (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal) ...”
46. The automatic suspension may be lifted by the Court as provided by regulation 57(1) of the CCR:
- “(1) In proceedings, the Court may, where relevant, make an interim order -
- (a) bringing to an end the requirement imposed by regulation 56(1);
 - (b) restoring or modifying that requirement;
 - (c) suspending the procedure leading to the award of the concession contract in relation to which the breach of the duty owed in accordance with regulation 50 or 51 is alleged;
 - (d) suspending the implementation of any decision or action taken by the contracting authority or utility in the course of following such a procedure.
- (2) When deciding whether to make an order under paragraph (1)(a)—
- (a) the Court must consider whether, if regulation 56(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority or utility to refrain from entering into the concession contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 56(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.”

47. The applicable principles for determining such an application are set out in *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at pp.407G-408H; *National Commercial Bank Jamaica Limited v Olint Corporation Limited* [2009] UKPC 16 per Lord Hoffmann at [17]-[18]; *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J (as he then was) at [34] and [48]; and summarised in *Alstom v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC) at [29].
48. The relevant questions for the court, when determining an application to lift the automatic suspension in a procurement challenge case, are as follows:
- i) Is there a serious issue to be tried?
 - ii) If so, would damages be an adequate remedy for the claimant(s) if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant(s) should be confined to a remedy of damages?
 - iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
 - iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong; that is, where does the balance of convenience lie?

Serious issue to be tried

49. It is common ground that there is a serious issue to be tried in respect of the claim by Camelot UK in HT-2022-000106.
50. However, the Commission’s position is that there is no serious issue to be tried in respect of (i) the claim by Camelot Global in HT-2022-000154, or (ii) the claim by the IGT Claimants in HT-2022-000113, save for claims by the third and fifth IGT claimants.

The claim by Camelot Global

51. Regulation 53 of the CCR limits the time within which proceedings may be started (subject to exceptions that do not apply in this case):
- “(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- ...
- (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation... where the Court considers that there is a good reason for doing so.
- (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”
52. Ms Hannaford QC, leading counsel for the Commission, submits that the claim brought by Camelot Global is time-barred. The letter notifying Camelot UK that Allwyn was the Preferred Applicant was sent on 15 March 2022. At that time, the decision was made public and there was widespread news coverage about the result of the competition. Camelot Global is part of the same corporate group as Camelot UK, with the same legal representation, and was a key subcontractor for the purpose of Camelot UK’s bid. Camelot UK instituted proceedings on 31 March 2022, well within the limitation period. Camelot Global relies on the same allegations of breach as Camelot UK but did not issue proceedings until 29 April 2022, more than 30 days after the standstill letter. In those circumstances, it is submitted that there is no serious issue in relation to the Camelot Global claim.
53. Lord Pannick QC, leading counsel for Camelot, submits that the claim brought by Camelot Global was within time. The standstill letter dated 15 March 2022 was sent to the bidders but not to the subcontractors. There was disclosure of relevant information concerning the evaluation of the bids and scoring details but such information was provided to Camelot UK on a confidential basis and therefore not shared with Camelot Global. Camelot UK commenced proceedings on 31 March 2022, at which point the basis of its claim became public. Camelot Global issued proceedings on 29 April 2022, within 30 days of its relevant knowledge. Although IGT issued an earlier claim, that was done subject to, and before it had access to, the confidential information needed to set out the grounds of challenge.
54. There is no application to strike out the claim by Camelot Global (although Mr Sydenham has indicated that such an application is under consideration) and the court has not been asked to determine the issue of limitation as a preliminary issue. However, if there were a clear case or strong argument that the claim must be statute-barred, that would be a material indicator that there was no serious issue to be tried: *Alstom v Eurostar International Limited* [2010] EWHC 2747 (Ch) per Vos J (as he then was) at [91].

55. The test to ascertain the date when an economic operator first had actual or constructive knowledge of grounds for starting the proceedings for the purpose of regulation 53(2) of the CCR was considered in *Sita UK Limited v. Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 per Elias LJ:

“[19] ... what degree of knowledge or constructive knowledge is required before time begins to run? The knowledge must relate to, and be sufficient to identify, the “grounds” for bringing proceedings ... So the question becomes: when is the information known or constructively known to the appellant sufficient to justify taking proceedings for an infringement of the public procurement requirements?”

56. Elias LJ approved and adopted the test formulated by Mann J in the first instance judgment (see [26] and [31]), namely:

“the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement.”

57. It is common ground that, on an application to lift the automatic suspension, there is a low hurdle for a claimant to establish a serious issue to be tried and the court should not embark on a mini trial to assess the relative strengths of each side’s case - see *Sysmex UK Limited v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) per Coulson J (as he then was) at [18]-[21].

58. The court is satisfied that Camelot Global’s claim raises a serious issue to be tried. Publicity surrounding the outcome of the competition did not necessarily disclose facts from which grounds of challenge could be identified. Camelot Global’s position is that the claim by Camelot UK was founded on confidential information that was not shared with Camelot Global. Until Camelot UK issued proceedings in HT-2022-000106 on 31 March 2022, Camelot Global maintains that it did not have actual or constructive knowledge of grounds for bringing proceedings as a key subcontractor to Camelot UK. Mr Haldenby’s evidence is that information requested by Camelot UK was subject to confidentiality undertakings and limited to its external legal advisers. Although the external legal advisers now acting are common to Camelot UK and Camelot Global, it is not clear whether the initial basis on which they acted in this matter was limited to instructions on behalf of Camelot UK. Without having before it all relevant evidence from the parties and the contemporaneous documents, the court is not in a position to determine what was known, and what should have been known, by Camelot Global prior to the end of March 2022.

59. In those circumstances, it would not be appropriate for the court at this stage to speculate as to the merits and weaknesses of the arguments. The issue whether the claim was brought in time raises a serious issue for the purposes of the application to lift the suspension.

The claim by IGT

60. The Commission’s primary case is that the CCR does not give a remedy to anyone other than the applicants who submitted bids at Phase Two of the competition. In the context

of the competition under challenge, that would limit the claims to those by Camelot UK and TNLC. Claims by Camelot Global and IGT would not fall within the scope of relief available under the CCR. For the purpose of the application to lift the suspension, Ms Howard QC, leading counsel for the Commission, accepts that those claimants who identify as key subcontractors, namely, Camelot Global, the third IGT claimant and the fifth IGT claimant, reach the threshold of serious issue for the purpose of establishing a right to seek a remedy under the CCR. However, she submits that the first, second, fourth and sixth IGT claimants were not owed any duty under the CCR and have no standing to sue.

61. Mr Moser QC, leading counsel for IGT, submits that the IGT claimants all have standing to bring their claims, as economic operators who have suffered loss as a result of the Commission's breaches of the CCR. It is unnecessary for the court to decide the question of standing as part of these applications, given that the Commission accepts that there is a serious issue to be tried in respect of the third and fifth IGT claimants. In any event, this is not an appropriate issue for the court to determine at this stage in the proceedings, particularly where the relevant documents have not yet been disclosed.
62. There is no application to strike out the claims made by the first, second, fourth and sixth IGT claimants before the court, and the court has not been asked to determine the issue of standing as a preliminary issue. However, as set out above in respect of limitation, if there were a clear case or strong argument that those IGT claimants did not have standing to bring the claim, that would be a material indicator as to the absence of any serious issue to be tried.
63. The interests of the IGT claimants in the competition are set out in paragraph 5 of the Amended Particulars of Claim in HT-2022-000113 and in the witness statement of Mr Harkin. The first IGT claimant, International Game Technology plc, is the parent company of the IGT Group, a current supplier of technology and associated services to Camelot UK through its subsidiaries. The second IGT claimant, IGT Global Services Limited, currently provides services to Camelot UK for its operation of the third licence but would not have any involvement in the provision of any services to Camelot UK for operation of the Fourth Licence. The third IGT claimant, IGT Global Solutions Corporation, currently provides services to Camelot UK for its operation of the third licence and would continue to provide services to Camelot UK for operation of the Fourth Licence. The fourth IGT claimant, IGT (UK 3) Limited, was formed as a special purpose vehicle for the purpose of bidding as an independent applicant in the competition for the Fourth Licence; it withdrew from the competition and would not be involved in the provision of services to Camelot UK for operation of the Fourth Licence. The fifth IGT claimant, IGT UK Interactive Limited, does not currently provide any products or services to Camelot UK but would do so for operation of the Fourth Licence. The sixth IGT claimant, IGT UK Limited, currently provides services to Camelot UK for its operation of the third licence and would continue to provide services to Camelot UK for operation of the Fourth Licence.
64. The first, second, fourth and sixth IGT claimants are not said to be key subcontractors and did not form any part of the Phase One or Phase Two bidding process for the purpose of the competition the subject of the procurement challenges. Nonetheless, it is pleaded that the duties under regulations 50, 51 and 51A of the CCR were owed by the Commission to those IGT claimants as economic operators and they are entitled to bring proceedings for breach of the CCR in their own right.

65. Article 1(3) of the Remedies Directive provides that:

“Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.”

66. Regulation 50(2) and 51A of the CCR provide that the obligations under the regulations are duties owed by contracting authorities to economic operators. Regulation 52(1) provides that:

“A breach of the duty owed in accordance with regulation 50 or 51 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.”

67. In Case C-230/02 *Grossman Air Service v Republik Österreich*, the CJEU ruled that Article 1(3) did not preclude a person from being regarded, once a public contract has been awarded, as losing his right of access to the review procedures if he did not participate in the award procedure for the relevant contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded. The court stated:

“[26] ... Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges ...

[27]... participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.

[28] However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.”

68. Case C-129/04 *Espace Trianon SA v FOREM* was concerned with a case in which the claim for relief was brought by some, but not all, members of the consortium that

tendered for the contract. The court ruled that Article 1(3) did not preclude national law from providing that the members of the consortium could only bring an action collectively and not individually. The court stated:

“[19] ... it must be noted that Article 1(3), in referring to any person having an interest in obtaining a public contract, alludes, in a situation such as that in the main proceedings, to a person who, in tendering for the public contract at issue, has demonstrated his interest in obtaining it.”

69. In *Payzone v National Transport Authority* [2021] IEHC 212, the Irish High Court decided that, although Payzone had provided assistance to another tenderer, it did not apply to be shortlisted in the competition and did not submit a tender; therefore, it had no interest in being awarded the reviewable contract and did not qualify as an eligible person. The court distinguished between a financial interest in a contract and an interest in winning the contract. It was not sufficient that the claimant suffered loss as a result of the way in which the competition was run; it must also have an interest in being awarded the contract. Having referred to *Grossman* (above), Brian O'Moore J stated:

“[41] ... while it may be difficult for a party who has not submitted a tender to establish an interest in obtaining the contract at issue, it is possible to do so. A party does not have to submit a doomed tender in order to prove its interest in obtaining the relevant contract. However, the basic requirement (endorsed by Community law) of having an interest in obtaining the contract (or a version of the contract which is not skewed in favour of a rival) remains.”

70. In *Word Perfect v The Minister for Public Expenditure and Reform* [2022] IEHC 54 the Irish High Court held that the claimant did not have standing to bring a procurement challenge where it had not submitted a tender for the contract in question. Referring to the decision in *Grossman*, Twomey J stated:

“[71] The Court of Justice held that the Directive does not preclude a person from being an eligible person where he has not submitted a tender in these circumstances.

[72] Accordingly, the Directive means that such an applicant may be regarded (as distinct from ‘must be regarded’) as an eligible person and so this is a permitted exception to the requirement that a person, to be eligible to challenge a tender, must submit a tender.

[73] ... for a supplier to be eligible to challenge the procedures for awarding a public procurement contract, it must have an ‘interest in obtaining’ the contract ...

...

[75] ... it is clear that the way to show that a party has an interest in a contract is primarily and almost exclusively by tendering for that contract...

[78] Regulation 4 is not talking about persons, who have a general interest in tenders that might be established by the State, being able to challenge those tenders. Rather it is quite clear from the wording that it is concerned with persons who have an interest in a specific contract. What better way is there, to establish that a person has an interest in a specific contract, than by tendering for that contract? Unless, of course, it is pointless in her doing so since she will not be awarded the contract because of the allegedly unlawful terms (which is not alleged in this case). Indeed, in support of this interpretation is the fact that the wording of Article 1(3) of the Remedies Directive states that the applicant has to have 'an interest in obtaining a particular contract'. Similarly as regards the wording of Regulation 4, it refers to an interest in 'obtaining' the reviewable contract. Once again logic dictates that a person who claims that they have an interest in 'obtaining' a contract prove that fact in one way only (subject to rare exceptions), namely by putting in a bid for that contract in order to obtain it. If you do not put in a bid, then you are guaranteed not to 'obtain' it, in which case it is almost impossible to claim that you nonetheless have an interest in obtaining it (save in exceptional cases)."

71. There is no direct authority on this issue in England and Wales. In *Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC), Akenhead J identified at [35]-[36] the apparent difficulty for a tenderer in relying on causes of action or breaches of duty which arose after it had dropped out of the tendering process:

"If an economic operator drops out of the tendering process for good or bad reason, it is difficult to see that it suffers or risks suffering loss or damage as a result of any breach of duty occurring after it dropped out. It may of course have a perfectly good cause of action if breaches of duty occurred before it dropped out, whether it knew about them or not."

By deduction, it may be assumed that a person who did not submit any tender would have even greater difficulty in showing any loss or damage as a result of any breach.

72. In *Systemex* (above), there was no suggestion that the subcontractor claimant did not have sufficient standing to bring the claim, although the point was not raised and therefore was not argued or decided.
73. Article 1(3) of the Remedies Directive requires Member States to establish a procedure for procurement review *at least* to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. It identifies a minimum class of persons to whom the possibility of a

procurement challenge should be available but does not preclude Member States from extending procurement review to a wider class.

74. In *Grossman* and *Espace* the CJEU ruled that national courts could impose restrictions on other classes of person seeking to bring a procurement challenge but did not delineate the characteristics of persons who would, and would not, be covered by Article 1(3). In *Payzone* and *Word Perfect* the Irish High Court determined that the persons seeking to challenge the procurements in question did not have sufficient interest to give them standing. However, those decisions concerned the Irish procurement regulations, the wording of which differs from the CCR. Further, although the Judges indicated that in most cases the clearest way of establishing sufficient interest would be by submitting a tender for the contract in question, they did not exclude the possibility of doing so by reliance on other factors. Likewise, in *Exel*, the court did not state that a tenderer who dropped out of the procurement exercise, or someone who was not a tenderer, could never have a basis on which to raise a challenge.
75. Thus, although the cases provide guidance as to some of the circumstances in which a procurement review is likely to be permitted or refused, they do not identify a clear bright line which could be used to ascertain each person with, or without, standing to bring such a claim.
76. The test for the purpose of regulation 52(1) of the CCR is that each IGT claimant must show that it is an economic operator which, as a consequence of the Commission's breach of its obligations under the CCR, suffers, or risks suffering, loss or damage. That issue is not determined necessarily simply by reference to whether the claimant is a tenderer, although an unsuccessful tenderer is likely to be able to demonstrate standing. It may be relevant for the court to consider other circumstances that indicate the claimant's interest, or lack of it, in the outcome of the competition. It is a fact-sensitive exercise.
77. Although, at first blush, the interests of some of the IGT claimants appear to be stronger than others, it would not be appropriate for the court to speculate as to the picture that might emerge when pleadings have been completed and there is further documentary and witness evidence on the issue. At this early stage, the court is not in a position to evaluate the competing arguments of the parties on the standing of each IGT claimant.
78. In summary, for the purposes of the current applications, the court is satisfied that there is a serious issue to be tried in each case.

Adequacy of damages for Camelot

79. The position of Camelot is that damages would not be an adequate remedy if the suspension were to be lifted and it succeeded at trial. Lord Pannick submits that allowing the Commission to award the Fourth Licence to Allwyn would cause the irreversible destruction of Camelot UK's business, leading it to cease to trade and to lose its highly trained and specialised workforce. An award of damages could not compensate for the loss of an entire business. Further, the licence to run the National Lottery is unique and highly prestigious, and awarding the Fourth Licence to Allwyn would result in consequential reputational harm to Camelot's wider operations, which represent losses that are non-compensable.

80. Ms Hannaford submits that damages would be an adequate remedy for Camelot. Camelot UK tendered for the Fourth Licence in order to make a profit. If the award proves to be wrongfully awarded, its potential damages are readily quantifiable since it set out its anticipated earnings over the 10 year term of the Fourth Licence in its application. The categories of loss identified by Camelot, namely transfer or attrition of staff and assets, loss of the opportunity to develop other valuable ancillary business activities, and the winding up of Camelot UK, result from the expiry of the third licence and not the award of the Fourth Licence to Allwyn. Camelot has failed to identify any specific ancillary business activity opportunities that would be lost. The losses identified that would be suffered by Camelot Global are quantifiable, or speculative and too remote, or simply part of the normal commercial risks taken by a business that bids in competitions of this kind. Ms Hannaford submits that the adequacy of damages test is concerned with the harm that would be suffered by Camelot UK; other third parties and subcontractors suffering indirect loss would not be entitled to claim damages.
81. Camelot relies on the evidence of Mr Haldenby on this issue. He explains that if the suspension were lifted and the Commission proceeded to award the Fourth Licence to Allwyn, it is highly likely that Camelot UK would be irreversibly stripped of its staff and assets and would be wound up once it fulfilled its obligations under the third licence. Under the current, third licence, the only permitted activity in which Camelot UK may engage is the operation of the National Lottery. Camelot UK therefore has no immediately available alternative business if it is not awarded the Fourth Licence. As part of the transition to the Fourth Licence, all of Camelot UK's current employees, its assets, such as lottery terminals, permanent point of sale equipment, scratch cards stock, business premises and equipment and supply contracts would be transferred to Allwyn. Camelot UK would thereby lose the significant resources, goodwill and unique knowledge that it has built up over the last twenty-eight years, which would effectively prevent it from seeking further business opportunities. Camelot UK would also lose its prospects of bidding for and winning the fifth licence. Given the 10 year duration of the Fourth Licence, there would be no commercial sense or utility in seeking to retain any skeletal staff or a team for a potential bid for the fifth licence. In addition, Camelot UK would lose the opportunity to leverage its position as National Lottery operator to pursue, and profit from, ancillary business activities.
82. The position is summarised at paragraph 73 of Mr Haldenby's first statement:
- “CUKL has no business other than operating the Third Licence and pursuing its application for the Fourth Licence, and, if its application for the Fourth Licence is unsuccessful, it will be divested of some or all of its assets and most if not all of its staff, together with their significant expertise and know how. In short, if the Commission proceeds to award the Licence to Allwyn, CUKL will in all probability be put out of business. This cannot be reflected in quantifiable damages.”
83. Mr Haldenby states that the Fourth Licence is a particularly prestigious contract with a global reputation. The National Lottery is the fifth largest lottery in the world by sales and one of the largest digital lotteries in the world. The Camelot Group's potential and ability to leverage its brand outside of the operation of the National Lottery are reliant on the prestige of the UK National Lottery licence, together with the knowhow and experience of its staff. Given the scale of the National Lottery, its unique position in the

UK and the fact it is one of the few large-scale lotteries operated by a private operator as opposed to by government, it is very difficult to buy or obtain this expertise elsewhere. Experience of operating lotteries is an important criterion in international competitions for the provision of lottery services. Camelot has historically drawn on its brand reputation, established through its operation of the National Lottery, in obtaining further work, including the Irish National Lottery in 2013 and the Illinois State Lottery in 2017.

84. It is said by Mr Haldenby that this would also affect Camelot Global, which would lose its valuable supply contract with Camelot UK, agreed on arm's length terms. This would cause Camelot Global to become a significantly less attractive employee proposition, leading to the departure of Camelot Global staff. Camelot Global would have a diminished ability to win new business and re-bid for existing work, through the loss of the National Lottery as a current and cutting-edge reference site and the loss of staff with the requisite knowledge and experience. Further, Camelot Global would lose the benefit of using innovations and technology developed for the National Lottery in other markets.
85. The starting point for the court is that Camelot UK was incorporated as a special purpose entity for the operation of the National Lottery. Under the terms of the third licence, it is precluded from undertaking other revenue-generating activities, save for ancillary activities, which it has to date pursued on a very limited basis. On expiry of the third licence, its staff and assets will be transferred to the new licensee and it will have no business. That is inherent in the terms on which Camelot UK accepted the third licence and the purpose for which it was formed. It is a normal incident of losing a tender competition for a new licence.
86. Lord Pannick draws attention to the case of *J Lyons & Sons v Wilkins* [1896] 1 Ch.811 (CA), in which Kay LJ stated at p.827:
- “In all these cases of interlocutory injunctions where a man's trade is affected one sees the enormous importance that there may be in interfering at once before the action can be brought on for trial; because during the interval, which may be long or short according to the state of business in the courts, a man's trade might be absolutely destroyed or ruined by a course of proceedings which, when the action comes to be tried, maybe determined to be utterly illegal; and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval.”
87. There is no issue as to the principle stated in the above case, or indeed, the additional cases referred to by Camelot UK; if the grant of, or refusal of, an interim injunction would put a party out of business, it is likely that no damages would compensate adequately for that. But it is important to consider such principle against the factual context of each case. In the *Lyons* case, the facts were not in dispute. It concerned industrial picketing that was found to amount to deliberate unlawful interference in a family business, affecting the plaintiff's home and livelihood. Having determined that there was unlawful activity, the issue for the Court of Appeal was whether it was open to the judge at first instance to grant an interim remedy, pending disposal of the case in the magistrates court. It is far removed from the facts of this case, where there is a

dispute as to whether the procurement was conducted lawfully. The question as to whether damages would be an adequate remedy turns on the facts of each specific case.

88. In this case, the evidence does not indicate that if the automatic suspension were to be lifted, Camelot UK's business would be destroyed; its business is limited to operation of the third licence, which would be unaffected. On expiry of the third licence, Camelot UK has no ongoing business that could be said to be impacted by any unlawful failure to award it the new, Fourth Licence.
89. Contrary to Mr Haldenby's assertion, its staff will not be lost or lose their livelihoods; as recognised by him in his first witness statement, under the terms of the third licence, the Cooperation Agreement and TUPE regulations, almost all of Camelot UK's employees will be transferred to Allwyn. Of course, some may choose not to continue working on that basis but that is a personal matter for those employees. It would not affect Camelot UK's position; if anything, it would cause a loss to Allwyn as the incoming licensee. It is recognised that some of the employees have acquired valuable skills, which have been applied to specialised technology systems, accounting, information security and data management in the field of lottery operations. However, such skills can be found in other industries; they are not so unique that they could not be replicated from the wider market, with appropriate training.
90. Camelot UK's assets are the result of investments made during the term of the third licence, under the terms of which, Camelot UK agreed such assets would fall to be transferred to the incoming licensee.
91. Camelot UK's complaint that it would suffer loss of the opportunity to exploit ancillary activities is speculative and not supported by any concrete evidence. It has operated the National Lottery for decades and has not identified any specific alternative source of income that it would pursue under the Fourth Licence.
92. Having carefully considered all the evidence on this issue, it is clear that the loss of Camelot UK's business can be quantified. Its sole purpose as a corporate entity is to operate the National Lottery under the third licence. It provided its projected revenue and profit over the term of the Fourth Licence in its application. Therefore, any losses flowing from the loss of the Fourth Licence, and the business as a whole, are readily quantifiable.
93. As to the position of Camelot Global, it is accepted by Mr Haldenby that Camelot Global's loss of the anticipated supply contract in respect of the Fourth Licence would be quantifiable for the purposes of damages.
94. It is said on behalf of Camelot that there would be reputational harm to its wider operations that would not be compensatable. As a matter of principle, loss of reputation and market position may be relied on to establish that damages would not provide adequate compensation for a party seeking to maintain the automatic suspension in a procurement challenge; for example, where there is evidence that loss of a unique prestigious contract is likely to impact adversely upon a party's reputation so as to reduce its prospects of future profitable work: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [52]; *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 per Vos J (as he then was) at [129]; *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133

(TCC) per Ramsey J at [84]-[85]; *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J (as he then was) at [33]-[40].

95. However, I repeat what this court stated in *Bombardier Transportation UK Limited v London Underground Limited* [2018] EWHC 2926 TCC at [58]:

“In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly.”

96. Mr Haldenby’s evidence is that if Camelot lost the Fourth Licence, it would have a diminished ability to win new business and rebid for existing work. No doubt, the Camelot Group has benefitted from the leverage available from association with the National Lottery, experience of operation of the licences to date, and the innovations and technologies devised for the same. That is evidenced by the other lottery and consulting business that the group has obtained around the world, such as Illinois and Ireland, but also South Africa, Switzerland, California and Canada, at least in part by reference to the National Lottery. However, the Camelot Group can now use those other lottery and consulting contracts, as evidence of relevant experience and past performance, to obtain future projects. Camelot is an established operator in the lottery business, with a proven track record over decades. It can continue to leverage its experience in order to demonstrate its expertise and technical and professional ability. Further, the evidence indicates that it has already been able to use its National Lottery investments in innovations and technology in other markets.

97. Camelot’s strong position in the global lottery market is demonstrated by its annual report and financial statements for the year ended 31 March 2021. The accounts for that period show that although substantial revenue, some £32 million, was derived from the European market, that was dwarfed by the revenue derived from the US market, some £107 million. In terms of recent strategic development, the significant milestones identified in the report were:

“Camelot Lottery Solutions built and deployed a new React Native App for the Irish National Lottery. Launched in August 2020, the app has innovative new features like biometric logins through Face or Touch ID, photo ID verification, single basket for multiple draw-based game purchases, and an exciting 'shake' feature that allows players to shake their phone to get a random line of numbers for their favourite game.

The two major US multi-state lottery games, MegaMillions and Powerball, enjoyed large jackpot roll series during the summer and autumn of 2020 before finally being won in January 2021. With both games featuring large jackpots, sales activity in North America was extremely strong for the Illinois State Lottery.

These jackpots, coupled with the COVID-19 pandemic and various restrictions in place to limit the physical movement of players, saw the digital share of sales increase significantly.”

98. It is not sufficient for Camelot simply to argue that it would benefit from adding the Fourth Licence to its global operations to enhance its reputation. As observed by Stuart-Smith J (as he then was) in *Open View* at [37], loss of reputation as such does not affect the question of damages as a remedy. In its submissions, Camelot recognises that there is a global lottery marketplace with a relatively small number of players. Camelot is, and will remain, one of those players regardless of whether it obtains the Fourth Licence. Critically, there is no compelling evidence before the court that the reputation or business of the Camelot Group would suffer harm as a result of loss of Fourth Licence so as to reduce its prospects of obtaining future contracts.
99. In conclusion, the court considers that damages would be an adequate remedy for Camelot and it is just that it should be confined to such remedy.

Adequacy of damages for IGT

100. Mr Moser submits that were the automatic suspension to be lifted but IGT succeeded at trial, it could not be adequately compensated in damages. The UK lottery is critical for IGT's international branding, standing and business development. If it were shut out of the UK market for over a decade, its international standing and goodwill would reduce, it would lose the ability to rely on its proven experience in the UK, affecting its ability to secure other future bids, and it would lose the UK lottery as an advertising showcase for IGT's services globally. Further, IGT would suffer lost investment, staffing reductions and the opportunity to develop new intellectual property, technologies and products, losses which would not be reasonably quantifiable.
101. Ms Hannaford submits that the IGT claim for damages would be limited to the third and fifth IGT claimants. They tendered as sub-contractors to Camelot UK, intending to make a profit, and the value of their loss is known and quantifiable. The loss of the Fourth Licence will not impede Camelot or IGT from operating, or bidding for, other lottery contracts in future. Loss of reputation from losing a prestigious contract does not normally sound in damages; the loss is speculative and legally too remote. The adequacy of damages test is concerned with the harm that would be suffered by the third and fifth IGT claimants; other third parties and sub-contractors suffering indirect loss would not be entitled to claim damages.
102. Having determined that there is a serious issue to be tried in respect of the claim by all the IGT claimants, the court must proceed on the basis that the adequacy of damages question applies to all those claimants. Of course, it is open to the Commission to argue that, even if they have standing to bring the challenge, they have not suffered any recoverable damage but, for the purpose of this part of the test on an application to lift the suspension, it must be assumed that the IGT claimants could succeed in their challenge; the issue is whether they should be confined to a remedy of damages in those circumstances.
103. Mr Harkin's evidence is that the lottery business represents approximately 69% of its total revenue and the UK is recorded as a significant contributor within its 2021 financial statement as the third largest contributor to IGT revenues. The UK provides a

particularly special and unique opportunity to showcase its products and services because it is the fifth largest lottery in the world based on ticket sales, Camelot has a reputation as an early adopter of IGT's technology and the UK allows for easier travel connections for clients to visit from all over the world. Without involvement in the Fourth Licence, IGT's international standing and goodwill would reduce, it would lose its ability to rely on its track record and proven experience in the UK, damaging its prospects of success in securing other lottery contracts, and it would lose the opportunity to develop future new intellectual property, technologies and solutions under the Fourth Licence.

104. Mr Harkin's evidence as to IGT's experience and share of the global lottery market is as follows:

"IGT has more than forty years' experience in operating lotteries globally and serves more than 80 Government and private lottery operators in, Europe, USA, Asia-Pacific, Africa and Latin America.

This experience includes consumer-facing lottery operations in Italy, several states within the USA, and the Caribbean, where IGT itself is the lottery licence-holder or operator/manager (that is to say, it holds a similar role to the one Camelot currently holds in the UK). Separately, IGT also has significant 'business to business' operations and experience in supplying products and services to lottery operators globally...

The UK is the third largest contributor to IGT revenues outside of Italy and the US. The UK Lottery is one of IGT's top 10 customers outside of its consumer facing business in Italy...

The UK is the 5th largest lottery in the world based on ticket sales. Whilst we work with 8 of the top 10 lotteries in the world (based on ticket sales), the UK is a leading operator that is watched by all those top lotteries across the world. Our standing as a supplier to those other top lotteries is heavily influenced by our continuing established presence in the UK. By losing the UK Lottery business, our standing with those other lotteries will be damaged."

105. It is accepted that IGT would rely on the Fourth Licence, if awarded to Camelot UK, to enhance future bids for other contracts. However, beyond mere assertion, there is no cogent evidence that IGT would lose future contracts without its subcontract to Camelot UK. Although the National Lottery is the fifth largest lottery in the world, based on ticket sales, the UK is only the third largest contributor to IGT revenues, behind Italy and the United States. Mr Harkin states that IGT's annual revenue from the UK in 2021 was \$72 million, the largest portion of which was generated from its lottery business, but that must be considered in the context of IGT's annual report and accounts for 2021, which identifies global annual revenue of more than \$4 billion.
106. IGT has a wealth of experience of delivering lottery services worldwide. Mr Harkin states that IGT has delivered more successful transition and conversion projects

globally than all its competitors combined. IGT can draw on its four decades of experience in operating lotteries globally, serving more than eighty government and private lottery operations in Europe, the USA, Asia-Pacific, Africa and Latin America, to continue its position as a global leader in the lottery industry.

107. Mr Moser contends that IGT would suffer potential unquantifiable losses, such as targeted investment into preparing services for Camelot under the Fourth Licence, new technologies and staffing restructuring. However, such losses fall within the normal risk of losing a competitive tender, it is likely that much investment could be used by IGT in its other global ventures, and any specific losses could be quantified.
108. In conclusion, the court is satisfied that damages would be an adequate remedy for IGT and it is just that it should be confined to such remedy.

Further issues raised

109. I have considered the additional argument raised by Camelot, namely, that it would not be just for Camelot to be confined to a remedy in damages because it would be inconsistent with the Commission's overriding statutory duties for it to contemplate the Fourth Licence being operated by a licensee which the court has held to have been unlawfully appointed.
110. That argument is rejected for the following reasons. First, the court is concerned with the adequacy of damages for a particular claimant; not the wider public interest, which is relevant at the balance of convenience stage. Secondly, the adequacy of damages under consideration is predicated on an assumed finding by the court that the procurement was conducted unlawfully. If potential unlawfulness of the procurement amounted to a ground for determining that damages would not be adequate as a remedy, once the serious issue threshold had been crossed, that would be the conclusion reached in every application to lift the suspension. Thirdly, that this is not the case is evident from the CCR which provides a range of remedies for breaches of the CCR, where the contract in question has, and has not, been entered into, including damages, indicating that damages, as opposed to setting aside, may be an appropriate remedy. Fourthly, the CCR expressly provides for the suspension to be lifted in circumstances where the court is not in a position to determine whether the procurement was lawful, by reference to the test set out in the authorities and articulated above.
111. The Commission has confirmed that it has capacity and authority to satisfy an order in respect of any damages suffered by Camelot and IGT. Doubts have been raised by Camelot as to whether the Commission has obtained the requisite authorisation to meet a substantial damages award. By Hogan Lovells' letter dated 29 April 2022 it responded as follows:

“The Gambling Commission is a non-departmental public body, and is funded as such. Its sponsoring department is the Department for Digital, Culture, Media and Sport.

Our client is aware of the contingent liability for damages that would arise from its Application to Lift being granted, and its Accounting Officer has taken the appropriate steps in order to be able to bring that Application. The making of the Application

was duly authorised in that light, as should be self-evident from the fact that the Application was made.”

112. Further, through further exchanges in correspondence between Camelot and the Secretary of State, the Secretary of State has clarified that all appropriate processes were followed so as to provide for the necessary authorisation. In my judgment, those clarifications demonstrate that the Commission has authority to give the relevant undertaking in damages.
113. In conclusion, the court is satisfied that damages would be an adequate remedy for the claimants and that it would be just to confine them to such remedy. That would be sufficient to dispose of the applications to lift the suspension but, for completeness, the court considers the further limbs of the test.

Adequacy of damages for the Commission

114. The position of the Commission is that damages would not be an adequate remedy if the suspension were to be maintained and it succeeded at trial. Ms Hannaford submits that the Commission, as the responsible regulator, is at risk of being in breach of its statutory duties under the NLA. Harm to propriety and/or participants’ interests is, by its very nature, impossible to quantify or recompense in monetary terms. Damage to the brand, and public confidence in the National Lottery, is also impossible to quantify in monetary terms. Maintaining the suspension would result in a risk of a gap in the operation of the National Lottery, causing a significant reduction to the contributions to good causes. This would produce a loss to the twelve lottery distributor funds, and to the charity, sporting and community projects, which benefit from lottery funding. Such loss cannot be estimated with accuracy. The Commission's losses could not be addressed by an expedited trial as a hearing in October 2022 would not make any material difference to the detriment suffered by the Commission through delay to the implementation period.
115. Camelot’s position is that damages would be adequate for the Commission if it transpired that the suspension had been wrongly maintained. It is common ground that the Commission as regulator would not itself suffer any or any significant harm as a result of delay in the commencement of the Fourth Licence. Lord Pannick submits that there is no risk to the continued operation of the National Lottery, as the Commission could manage and mitigate the delay to transition. Further, the suggestion of risks to the good causes is unfounded; a much greater risk arises out of any award of the Fourth Licence to the wrong applicant.
116. IGT’s position is that damages would be an adequate remedy for the Commission if the suspension were maintained. Mr Moser submits that, even if there were a delay to the introduction of the Fourth Licence, the improved contribution to good causes would not be lost; it would simply materialise later than it would otherwise have done. That would also be true for any other improvement in performance anticipated under the Fourth Licence. There would be no inevitable damage to the brand or reputation of the National Lottery caused by any delay to the Fourth Licence, in particular, because prizes are protected under the third licence trust. Finally, the infrastructure which supports the third licence is not at the end of its life; IGT has reinvested in lottery infrastructure even towards the end of the licence, and the operation is equipped to function until 2026.

117. Mr Tanner states that the Commission's position cannot be regarded as the same as an ordinary commercial party because it is intrinsically linked to the wider public interest due to its statutory objectives. Delay to the Fourth Licence will result in a reduction in amounts generated for good causes. Such loss will impact parties other than the Commission because those contributions are paid directly to the National Lottery Distribution Fund, with the distributors being responsible for making payments to the various projects and charities they fund. Any reduction, or interruption, in the contribution of the National Lottery to good causes would be inconsistent with the statutory objective of maximising returns to good causes, and would jeopardise the funding of a large number of arts, sports, heritage and community projects.
118. The court accepts the Commission's case that damages would not be an adequate remedy if the suspension were to be maintained pending resolution of the dispute. The key benefits of the Fourth Licence can be summarised as, firstly, greater contributions to good causes, through improved financial terms in the licence, by requiring the licensee to pay a fixed annual sum together with a share of the profits; secondly, investment in a new games portfolio, with improvements to branding and distribution to generate additional revenues whilst maintaining adequate protection for participants; thirdly, investment in the assets needed for operation of the lottery, including IT infrastructure that is approaching the end of its operational life.
119. I am not persuaded that there would be a great risk of damage to the reputation of the lottery, as suggested by Mr Tanner. Any trial, with or without an appeal, could be completed in advance of the expiry of the third licence, and the assumption for this part of the test is that the Commission would be vindicated in its conduct of the competition. Likewise, there is no evidence that, in principle, the basic functioning of the lottery could not be continued on an interim basis under the Fourth Licence using some of the existing technology and infrastructure until later implementation of some of the innovations.
120. However, if the suspension were to be maintained until after the trial, there would be inevitable delay to the start of the Fourth Licence. As a result, introduction of the above benefits would be delayed. Contrary to IGT's argument, delayed funding to social programmes and other good causes is likely to give rise to real loss; late support for a food bank risks families going hungry in the meantime; delayed funding for a children's centre deprives those who currently need it from any benefit; funding for the 2012 Olympic hopefuls after the games would have been of little assistance. Timing of support matters. These are real losses that would be very difficult to quantify and could not be readily compensated by damages.
121. Camelot and IGT correctly point out that these losses would not be suffered directly by the Commission but that fails to take account of the Commission's purpose, which is not to make a profit but to exercise its functions under the NLA in accordance with the overriding duties, including a requirement to do its best to secure that the returns to good causes are as great as possible. As set out above, there would be real losses in the event of any delay to the Fourth Licence that would not be compensable.
122. For those reasons, the court is satisfied that damages would not be an adequate remedy for the Commission.

123. Allwyn's position is that the process of successful transition from the third licence to the Fourth Licence is a very complex and significant undertaking, requiring, not only considerable effort and resource to complete it, but also a very considerable period of time. Allwyn's application for the Fourth Licence was submitted on the basis of a minimum implementation period of 22 months, including a 3 month contingency. That implementation period has already been reduced to 18-19 months. If the suspension were to remain in place pending final resolution of Camelot and IGT's claims, it is likely that transition to the Fourth Licence would not be completed by 31 January 2024. That would result in a reduction in the increased contribution to the good causes, the basis on which Allwyn's bid was accepted. Further, it would result in Allwyn suffering very significant financial losses.
124. Ms Davies QC, leading counsel for Allwyn, accepts that Allwyn's losses could be quantified but is concerned that Camelot and IGT have not offered an adequate cross undertaking in damages, seeking to limit their exposure pending provision of further details of anticipated losses. On that basis, she submits that damages would not be an adequate remedy for Allwyn because of the unquantifiable risk and prejudice.
125. If the court were otherwise inclined to maintain the suspension pending trial, this issue could be addressed through the imposition of a condition in the order, that Camelot and IGT provide an unlimited undertaking in damages, to the Commission and to Allwyn, in the usual terms required. It would then be a matter for the claimants to decide whether they were prepared to take the commercial risk of such undertaking in order to keep the suspension in place.

Balance of convenience

126. There is no dispute as to the applicable principles. The balance of convenience test requires the court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. When determining where the balance of convenience lies:
- i) the court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [50];
 - ii) the court may have regard to the public interest: *Alstom Transport v Eurostar* (above) at [80];
 - iii) the court should consider the interests of the successful bidder, alongside the interests of the other parties: *Openview* (above) at [14];
 - iv) if the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the status quo (or, perhaps more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into: *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [16].

127. Lord Pannick argues that there is a strong public interest in ensuring that the Commission appoints the operator of the National Lottery pursuant to a lawful competition. He submits that it is in the public interest, and in accordance with the Commission's overriding statutory duties, that the Fourth Licence is lawfully awarded and contributions to good causes are thereby protected. The competition has been designed to facilitate challenges being resolved before the contract is awarded and the Commission's attempt to deviate from its own approach ought not to be facilitated. The extent and consequences of delay to the award of the Fourth Licence in the event that the suspension is maintained have been exaggerated by the Commission and Allwyn.
128. It is not in dispute that it is in the public interest, and in accordance with the Commission's overriding statutory duties, that the Fourth Licence is lawfully awarded and contributions to good causes are thereby protected. However, the question of lawfulness of the competition is the very issue that the court will be required to determine at trial. The claimants' position is that a lawful competition would have required the Commission to award the licence to Camelot. The Commission's position is that it has carried out a lawful competition which requires it to award the Fourth Licence to Allwyn. The parties agree that this raises a serious issue to be tried. The dispute can only be resolved at trial and therefore it does not assist in determining where the balance of convenience lies.
129. Camelot correctly draws attention to the fact that the original timetable made provision for the Preferred Applicant to be named by September 2021, which would have allowed time for a challenge to be made through the courts without causing any delay to the implementation period. Unfortunately, delays during the competition have eroded that window of opportunity. The Commission cannot be held responsible for the difficulties caused by the Covid-19 pandemic or for the additional time required by bidders to assimilate feedback during the process. The court must consider the balance of convenience test by reference to the circumstances as they have unfolded.
130. Camelot relies on the Deed of Commitment as providing mechanisms in the design of the competition to ensure that any legal challenge could be resolved before the award notification was issued.
131. Section 5.6 of the ITA states:
- “As further described in the Deed of Commitment, following the voluntary standstill period, the Commission will issue an Award Notification to the Preferred Applicant and may issue a Reserve Applicant Notice to the Reserve Applicant.”
132. The Award Notification is defined in the Deed of Commitment at clause 1.1:
- “‘Award Notification’ means a written notification from the Commission to the Applicant that:
- (a) the Application has been successful and as a result the Proposed Licensee under the Application has been chosen as the Selected New Licensee; and
 - (b) the Standstill Period has ended and either:

- (i) there has been no challenge during the Standstill Period to the Commission's decision to name the Proposed Licensee as the Selected New Licensee; or
- ii) there has been a challenge during the Standstill Period to the Commission's decision to name the Proposed Licensee as the Selected New Licensee but that challenge has been resolved to the satisfaction of the Commission.”

133. Clause 2 of the Deed of Commitment provides that the terms of the application are as follows:

“The Applicant irrevocably undertakes to the Commission that, unless and until this Deed lapses ...

- (a) the Application and the proposals contained in the Application will remain valid and open for acceptance by the Commission for a period of 12 months from the date of this Deed;
- (b) if it receives an Award Notification, the Applicant shall procure that within 5 Business Days of receipt of that Award Notification ...
 - (i) the Proposed Licensee will provide a Resource Availability Assurance Statement to the Commission ...
 - (ii) immediately having done so, the Proposed Licensee will execute the Cooperation Agreement and the Proposed Licensee Enabling Agreement.”

134. Clause 3 states:

“Before entering into the Proposed Licensee Enabling Agreement, the Commission shall, in consultation with the Applicant, consider modifying the Proposed Licensee Enabling Agreement to reflect:

- (a) any fact, matter, or circumstance arising between the date of the Application and the date upon which the Proposed Licensee enters into the Proposed Licensee Enabling Agreement;
- (b) if the date upon which the Proposed Licensee Enabling Agreement is entered into is less than 18 months before the expiry date of the Third National Lottery Licence, the fact of such period being less than 18 months,

and shall make any modifications that, after consultation with the Applicant and having given the Applicant reasonable prior notice of any proposed modifications and an opportunity to make representations to the Commission in that regard, it concludes are appropriate.”

135. Clause 6.2 states:

“Without prejudice to the Commission's legal responsibilities at law, this Deed shall not give rise to any obligations on the Commission or any rights or remedies of the Applicant or the Proposed Licensee against the Commission.”

136. Camelot’s initial position was that the Commission is prohibited under the competition rules, and regardless of the CCR, from proceeding to award the Fourth Licence to Allwyn. That position is wrong, having regard to the terms of the Deed of Commitment, in particular, clause 6.2, and the express provisions of the CCR, providing for circumstances in which the court may lift the automatic suspension. Camelot accepted during the hearing that there was no strict prohibition on the Commission proceeding to issue the award notification before the conclusion of a legal challenge but relied on the above provisions as a material circumstance that the court should take into account when considering the balance of convenience test.

137. In the absence of any contractual prohibition on proceeding prior to the conclusion of a legal challenge, this argument does not advance Camelot’s case. As set out above, the original timetable for the competition envisaged a gap between the outcome of the competition and the start of the implementation period, which would have allowed time for any legal challenge. Unfortunately, delays during the competition have eliminated that gap and there is no longer the luxury of time for the court to determine the disputes without any adverse impact on the planned implementation period.

Period of suspension – expedited trial

138. In considering how long the suspension might have to be kept in force, the court must consider when disposal of the claims could take place, including the possibility of an expedited trial.

139. The position of Camelot and IGT is that the proceedings can be ready for a trial to be heard in September/October 2022, subject to the court’s availability. There is significant overlap between the grounds of challenge pleaded by Camelot and by IGT, albeit IGT has included additional legal bases for its case. The nature of the challenge in each case is in respect of the assessment of particular scores, including the SRF, and therefore is limited in scope. The estimated duration of the hearing is 4-6 days plus judicial reading time. The TNLC claim is not part of these proceedings before the court and there is no similar urgency, given that TNLC’s claim is limited to damages. They submit that an expedited trial would involve a relatively short delay to the procurement, which would favour maintenance of the suspension.

140. The Commission is more circumspect as to the speed with which these proceedings can be resolved. Mr Sydenham states that a timetable leading to trial starting in early October 2022 for Camelot and IGT’s claims would be challenging and leave little

contingency, but would be potentially achievable, subject to a limited scope of disclosure. The disclosure burden on the Commission could be reduced significantly, and so the time required for the timetable, by adopting the Disclosure Pilot PD51U, Model B, providing for disclosure of key documents on which the Commission relies, key documents that are necessary for the claimants to understand the defences advanced and known adverse documents. The Commission anticipates calling 8-10 witnesses and its estimate for the hearing duration is 2-3 weeks. If TNLC and Camelot Global were included in the trial, a more realistic timeframe for an expedited trial would be January 2023.

141. On the basis of the pleadings and documents before the court, I consider that the parties could be ready for an expedited trial in October 2022, with or without the participation of TNLC (who has not yet had an opportunity to make any representations to the court). There would need to be a sensible approach to disclosure to reduce the extent of the exercise so as to be manageable within the timetable. It would be sensible to adopt an estimate of three weeks, in particular, to allow for the Commission's witnesses as to the various evaluation exercises, SRF assessment and oversight, and the possible inclusion of TNLC's claim. The claim by Camelot Global does not add to the time estimate, particularly given the consent order that it should be joined as a claimant in the Camelot UK claim.
142. The difficulty in this case is that, even if the hearing could be concluded by the end of October 2022, and a swift judgment produced thereafter, that would still entail a significant delay to the commencement of the transition period, and there would remain the possibility of an appeal. The contingency in the implementation period has already been eroded and Camelot, the incumbent under the existing licence, provided for a minimum transition period of 18 months. Therefore, it is inevitable that there would be delay to the start of the Fourth Licence.
143. Camelot and IGT contend that there is no good reason that there should be any gap in the provision of lottery services, even if the suspension were maintained until conclusion of the proceedings. The Commission could grant an interim licence to Camelot pending resolution of the claims, modified or partial implementation could mitigate against delay, or the court could order partial lifting of the suspension, to allow the Enabling Agreement to be entered into, but not the Fourth Licence.

Interim licence

144. The proposal is that the Commission could grant an interim licence to Camelot pending resolution of the legal challenges. Assuming that an expedited hearing could take place in October 2022 and proceedings concluded towards the end of the year, there would then be delay and disruption to the start of the transition programme because it would have to be subject to a revised plan. The parties' estimates vary but it is likely that the proposed interim licence would be required for at least 10-12 months.
145. Such proposal does not provide a solution in this case. Firstly, it would be necessary for Camelot and the Commission to agree the terms of an interim licence; the court could not impose the terms of the licence on them if they failed to reach agreement. Secondly, under the NLA, the Commission does not have power to extend the third licence for a further period. As Ms Hannaford and Ms Davies submit, there is a risk that the direct award of an interim licence to Camelot would be found to be unlawful, as an

effective extension to the existing licence without any public procurement exercise, which would be in breach of the 15 year longstop and potentially in breach of the CCR and/or State aid rules. Camelot relies on the precedent of an interim licence granted by the Commission to Camelot between October 2001 and January 2002 but, at that time, there was no longstop period in the NLA. It would not be reasonable for Camelot to require the Commission to take that risk. Therefore, the court must assume that the delay in implementation could not be addressed by the grant of an interim licence.

Partial implementation

146. Camelot and IGT propose an alternative solution would be for the Commission to permit Allwyn to postpone some of its implementation obligations until after it has commenced operations under the Fourth Licence. The Deed of Commitment contains provision for changes to be made to the incoming licensee's obligations where the implementation period is reduced to less than 18 months.
147. Mr Tanner accepts that partial implementation is a possibility, although it would require Allwyn to make adjustments to its implementation plan.
148. Mr King of Allwyn is very strongly opposed to this proposal, as set out in his witness statement:

“A partial implementation is the worst of all options. Rather than alleviating the delay, a partial implementation will create a great deal of uncertainty over the National Lottery, with an unclear allocation of responsibility between the Incoming and Outgoing Licensee, significantly increased operational risk and at additional cost to Good Causes. A partial implementation could not seriously be said to be in the interests of the National Lottery or Contributions to Good Causes.

Amongst other things, it will require us and Camelot and IGT and SGI to work up a partial implementation transition plan; this is not a quick process and will take a number of months. It will then require us to renegotiate our agreements with our suppliers which will affect delivery lead times and cost. It will also create great uncertainty with protection of players funds and prizes. Ultimately, a partial implementation would result in a hybrid of Camelot's aging 3rd Licence systems and technology being run in parallel with our new 4th Licence systems and technology. Running the National Lottery on this basis is full of risk and in our view is likely to lead to significant disruption in the operation of the National Lottery.”

149. I accept Mr King's evidence that this alternative proposal is not realistic or acceptable from Allwyn's perspective. It would entail a significant change to the transition plan, financial projections and risk assessment on which Allwyn's bid was made and accepted.

Partial lifting of the suspension

150. Camelot has proposed a further alternative, namely, that the suspension could be lifted in part to allow the Commission and Allwyn to enter into the Enabling Agreement, but the Commission's ability to grant the Fourth Licence would remain suspended. This would require an amendment to the Enabling Agreement to modify clause 29, which provides for the Fourth Licence to be granted following successful completion of the enabling period; alternatively a court order continuing the suspension pending resolution of the proceedings. Mr Haldenby explains that this would enable the transition to occur in full and to progress whilst the proceedings continued, which could avoid the need for any interim licence or otherwise significantly reduce the duration of such interim licence.
151. For understandable reasons, Mr King does not agree that this proposal would be in the interest of Allwyn. It would have to incur the time, cost and risks of the transition phase without any guarantee that it would be awarded the Fourth Licence; indeed, that is the intention behind the proposal so as to preserve the possibility that Camelot could be awarded the Fourth Licence. The practical difficulties of the proposal might be overcome but it does not address the material change in risk that Allwyn would be required to accept.
152. In conclusion, the alternative proposals by Camelot and IGT create serious risks for the Commission and Allwyn. When considered as part of the balance of convenience test, they carry a very high risk of irremediable injustice to the Commission and Allwyn. For that reason, they are rejected.

The public interest

153. The public interest in this case is a strong factor in favour of lifting the suspension. For the reasons set out above, maintaining the suspension until resolution of the dispute will cause delay to the Fourth Licence. In turn, this will cause delay to the benefits of the Fourth Licence, giving rise to reduced contributions to the good causes and delayed introduction of the enhanced game portfolio and new technologies.
154. Balanced against the commercial losses that might be suffered by Camelot and IGT, for which damages would be an adequate remedy, in this case, allowing the Commission and Allwyn to proceed with the Fourth Licence is the course that will produce the least risk of injustice if ultimately it proves to be wrong.

Conclusion

155. For the reasons set out above, the balance of convenience lies in lifting the automatic suspension so that the Commission is permitted to enter into the Enabling Agreement with Allwyn and, subsequently, to award the Fourth Licence.
156. In the light of the court's decision to lift the suspension, the court will hear from the parties as to whether they wish to proceed with an expedited hearing, or any alternative timetable for trial.
157. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of further directions and any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.

