

In the Name of the Queen
First authenticated copy

2 September 2003
First Civil Section
Case/docket numbers 2003/319 KG and 2003/325 KG

COURT OF APPEALS OF ARNHEM

Ruling

in the matter under case/docket number 2003/319 KG between:

Stichting De Nationale Sporttotalisator, a foundation,
having its registered office in The Hague, the Netherlands,
Appellant
hereinafter referred to as '**De Lotto**',
attorney-at-record: *mr. J.M. Bosnak*

and

- 1 **Ladbrokes Ltd.**, a company under foreign law, having its registered office in
Watford, United Kingdom,
 - 2 **Ladbrokes International Ltd.**, a company under foreign law, having its registered
office in Gibraltar, United Kingdom,
- Respondents,
hereinafter collectively referred to as '**Ladbrokes**',
attorney-at-record: *mr. J.C.N.B. Kaal*,

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and in the matter joined thereto under case/docket number 2003/325 KG between:

- 1 **Ladbrokes Ltd.**, a company under foreign law, having its registered office in
Watford, United Kingdom,
- 2 **Ladbrokes International Ltd.**, a company under foreign law, having its registered
office in Gibraltar, United Kingdom,

Appellants,

hereinafter collectively referred to as 'Ladbrokes',

attorney-at-record: *mr. J.C.N.B. Kaal*,

and

Stichting De Nationale Sporttotalisator, a foundation,
having its registered office in The Hague, the Netherlands,

Appellant

hereinafter referred to as 'De Lotto',

attorney-at-record: *mr. J.M. Bosnak*.

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1 The proceedings in the first instance

For the proceedings in the first instance, reference is made to the judgment of preliminary relief of 27 January 2003 handed down by the preliminary relief judge of the District Court of Arnhem, the Netherlands, in the matter between De Lotto as Claimant and Ladbrokes as the Respondent. A photocopy of that judgment is attached to this ruling.

2 The proceedings on appeal

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2.1 By writ dated 18 February 2003, De Lotto instituted appellate proceedings against the aforementioned judgment of 27 January 2003 and summonsed Ladbrokes before this Court. In this writ, De Lotto asserted two grounds for appealing the disputed judgment and gave notice that it would move that the Court of Appeal issue a ruling having immediate effect to the extent possible by law:

I partially setting aside the disputed judgment to the extent that it conflicts with the grounds asserted and issuing a new judgment granting De Lotto's claims as follows:

ordering Ladbrokes, within three days after the service of this ruling, to make it impossible for residents of the Netherlands to participate in the Netherlands in any of the lotteries, instant lotteries and sports betting games Ladbrokes offers, via the Internet, telephone and other media, in some way, either directly or by means of person or legal entity somehow connected with Ladbrokes, without a licence in the Netherlands, in the same manner as was done with regard to residents of the United States of America, on penalty of the forfeiture of a fine of EUR 10,000 for every day (a part of a day counts as a whole day) that Ladbrokes, or a person or legal entity somehow connected with Ladbrokes, violates this order or any part thereof, up to a maximum of EUR 200,000, subject to the condition that the fine can be mitigated by the court hearing the main action to the extent that imposing the aforementioned fine would contravene the standards of reasonableness and fairness, taking into consideration the degree to which the order has been complied with, the gravity of the violation and the degree to which the blame for the violation can be attributed;

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- II ordering Ladbrokes to pay the costs of the appeal.
- 2.2 On the first date of the hearing, De Lotto made motions in accord with the claim set forth in the aforementioned writ and submitted by document the exhibits mentioned in the appellate summons.
- 2.3 Ladbrokes asserted a defence in its memorandum of reply, submitted exhibits and moved that the Court of Appeals issues an immediately enforceable ruling denying De Lotto's appeal and order De Lotto to pay the costs of the proceedings in both instances.

in the matter under case/docket number 2003/325 KG

- 2.4 By writ dated 24 February 2003, Ladbrokes instituted appellate proceedings against the aforementioned judgment of 27 January 2003 and summoned De Lotto before this Court. In this writ, Ladbrokes asserted eight grounds for appealing the disputed judgment, requested that the issue be joined to the matter under case/docket number 2003/319 KG and gave notice that it would move that the Court of Appeals issues an immediately enforceable ruling again denying De Lotto's claims, and ordering De Lotto to pay the costs of the proceedings in both instances.
- 2.5 On the first date of the hearing, Ladbrokes made motions in accord with the claim set forth in the aforementioned writ.
- 2.6 De Lotto asserted a defence in its memorandum of reply, and moved that the Court of Appeals issues a ruling having immediate effect to the extent possible by law holding that Ladbrokes has no cause of action, or at least finding its claims to be without foundation, and upholding the judgment on the matter between the parties dated 27 January 2003, whether or not correcting or supplementing the grounds for appeal, and ordering Ladbrokes to pay the costs of the appeal.

in the consolidated cases under case/docket numbers 2003/319 KG and 2003/325 KG

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2.7 The Court of Appeal heard the parties' oral arguments at the session of 28 July 2003, at which session Ladbrokes was represented by *mr.* K.A.J. Bisschop, an attorney in Amsterdam, the Netherlands and *mr.* M.O. Meulenbelt, an attorney in Amsterdam and Brussels, Belgium, and De Lotto was represented by *mr.* J.C.H. Manen and *mr.* E.M. van Gelderen, attorneys in Amsterdam; the oral arguments accorded with the pleadings submitted by the parties. The new exhibits submitted by both parties were entered into the record.

2.8 A judgment was then rendered.

3 The established facts

None of the grounds for appeal were directed at the preliminary relief judge's findings of fact, thus those facts are considered to be established on appeal.

4 Judgment of the dispute on appeal

4.1 De Lotto's claims are based on the assertion that Ladbrokes conducts itself wrongfully towards De Lotto because Ladbrokes offers games of chance in the Netherlands, via the Internet on its website www.Ladbrokes.com, without having a Dutch licence pursuant to the Act on Games of Chance (hereinafter referred to as 'the AGC'), which gives Ladbrokes an unlawful advantage over De Lotto.

4.2 In this respect, the court will first address the question of whether Ladbrokes, which has its registered office in the United Kingdom, from whence it operates a website offering its games of chance, also offers people in the Netherlands the opportunity to play games of chance as meant in the preamble and paragraph a of Section 1 AGC.

4.3 The Court of Appeals preliminarily answers this question in the affirmative. Important in that respect is that the Netherlands is one of the countries Ladbrokes specifically addresses via its website, as evidenced by the fact that the Netherlands is included in the list of countries on the website www.Ladbrokes.com and Ladbrokes offers the opportunity to bet on Dutch sporting events. These do not merely involve football matches between the top Dutch clubs, such as Ajax and PSV, which excite

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international interest, but also those between clubs that are not, or are barely, internationally known, such as Helmond Sport, Go Ahead Eagles and RBC Roosendaal. The fact that, in doing so, Ladbrokes does not use the Dutch language, but the English language, does not mean that the website is not partially directed specifically to the Netherlands.

In addition to the foregoing, it follows that a Dutch resident that accesses the Ladbrokes website to participate in games of chance generally does so from his computer in the Netherlands and is therefore able to play – in the Netherlands – the games of chance offered by Ladbrokes. The procedure is as follows: the participant who accesses the Ladbrokes website receives a participation form on his own computer (screen) in the Netherlands, which he fills in on his own computer (screen) in the Netherlands and sends, from his computer in the Netherlands, to Ladbrokes (Ladbrokes' server). The participant can pay in euro instead of British pounds, for which he can use his Dutch credit card. Finally, amounts won can be received via his Dutch bank account. Therefore, the preliminary conclusion must be that Ladbrokes provides the opportunity to participate in games of chance in the Netherlands without having been granted a licence to do so pursuant to the AGC and, thus, Ladbrokes is violating the prohibition contained in Section 1, preamble and paragraph a, AGC.

The Court of Appeals rejects Ladbrokes' defence that the offering of games of chance differs from 'provides the opportunity' as meant in the aforementioned section of the AGC. Indeed, the words 'provides the opportunity' involve the organisation of games of chance, but – contrary to Ladbrokes' argument – they are not limited to the place from which the games of chance are organised, but also include the place where they are offered to the public. Therefore, Ladbrokes' defence – that because its registered office is in the United Kingdom, from whence it offers the games of chance, it does not provide the opportunity to play games of chance in the Netherlands – fails. The Court also rejects Ladbrokes' argument that, because the agreement for playing games of chance is only created after Ladbrokes receives and confirms the bet, the transaction takes place in the United Kingdom. Where or when the contract is created is not particularly relevant. What is determinative is that Ladbrokes also offers Dutch residents the opportunity to place bets via their computers in the Netherlands. Thus far, there is no foreign game of chance.

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- 4.4 The following issue regards the question asserted by Ladbrokes as its primary defence, that is, whether the application of the AGC to the current case would contravene (Article 49 of) the EC Treaty.
- 4.5 At the outset, the Court of Appeal holds that there is no European legislation that harmonises national legislation regarding offering games of chance. Gambling activities (games of chance, lotteries and betting transactions) via the Internet are expressly excluded from the E-commerce Directive (see preamble 16 and Article 1(5)(d) of Directive 2000/31/EC, Pb EC 2000, L 178/1). Within the limits of the EC Treaty, every Member State can determine what rules it establishes regarding the permissibility of offering games of chance. This means that application of the national legislation may not result in illegitimate limitations of the principle of free movement of services set forth in Article 49 of the EC Treaty. A restriction is permitted if it is applied non-discriminatorily, is justified based on the compelling demands of general interest, is appropriate for achieving the intended objective and is no broader than necessary. The Court of Appeals preliminarily holds that these conditions have been met. In connection with the offering of games of chance, the EU Court of Justice has accepted social policy, the counteraction of fraud and the suppression of compulsive gambling as compelling demands of general interest (see, *inter alia*, the judgment of 21 September 1999, case no. C-124/97, Läärä, Case Law 1999, p. I-6067). Such general interests also underlie the AGC, specifically the protection of the public interest by curtailing the susceptibility to fraud and excessive compulsive gambling. Because Section 1, preamble and paragraph a, AGC prohibits anyone from providing the opportunity to participate in games of chance unless they have a licence, it does not create an issue of discrimination. Moreover, it is not impossible for foreign companies to obtain a licence pursuant to the AGC. In the past, Ladbrokes had a Dutch licence to offer bets on horse races and a Canadian company, Autotote, currently has a Dutch Licence to offer bets on horse races. Considering the objectives of fraud counteraction and channelling compulsive gambling, the AGC's licence system aims to limit the number of parties offering games of chance, as well as to combat an unbridled increase in the offers of games of chance. For that reason, there are many conditions imposed on the licence holders, such as De Lotto.

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In connection with this, the Court of Appeals rejects Ladbrokes' assertion that, considering that new games of chance are regularly permitted and the fact that licence holders are permitted to engage in large-scale advertising for the games of chance they offer, it can be deduced that the Dutch government does not wish to implement any cohesive policy to curb compulsive gambling. What is determinative is that the Dutch government continues to carry out a restrictive policy in respect of games of chance which allows it broad discretion in determining to what extent it will licence games of chance. The prohibition on running games of chance without a licence is an appropriate means of achieving the objectives of the AGC. It is not plausible that less restrictive measures are possible and would prove to be effective in practice. Permitting the offering of games of chance without a licence would undermine the policy that is aimed at control via the licence system.

The fact that Ladbrokes has a licence in the United Kingdom does not detract from this, because its possession of that licence does not help to achieve the goal being striven for, particularly the protection against compulsive gambling in the Netherlands. The mere fact that one Member State has chosen a different system of protection than another Member State cannot influence the judgment on the necessity and proportionality of the regulations concerned in that respect. These can only be tested against the objectives striven for by the national authorities and the level of protection that they wish to ensure (Läärä judgment, point 36).

The preliminary conclusion, therefore, is that the application of the AGC does not contravene (Article 49 of) the EC Treaty. Given the direct effect of that Article 49, De Lotto, as a licence holder, may appeal to the legitimacy of the national legislation underlying its permit.

In this expedited appeal for preliminary relief, there is no reason to submit preliminary questions concerning the EC Treaty to the EU Court of Justice as Ladbrokes requests.

- 4.6 The question of whether Ladbrokes' violation of the prohibition stipulated in Section 1(a) of the AGC is wrongful towards De Lotto must also be answered. It is undisputed between the parties that the purport of the AGC was not to protect licensees against competition by non-licensees. This does not imply, however, that, under certain

circumstances, De Lotto cannot derive a claim against Ladbrokes by virtue of the latter's violation of the AGC. The fact is that Ladbrokes' violation of the law is wrongful towards De Lotto if this violation gives Ladbrokes an unlawful advantage over a direct competitor such as De Lotto. It is the Court of Appeal's provisional opinion that the case at hand concerns an unlawful advantage, since the requirements set by the AGC and the licence granted to De Lotto go far beyond the requirements set by British law and Ladbrokes' British licence. This causes such substantial differences that Ladbrokes' activities in the Netherlands without a Dutch licence cause or threaten to cause damage to De Lotto, also in view of the approximately 2,000 participants who are now playing through Ladbrokes' website (it is expected that the number of participants will increase rapidly if Ladbrokes is allowed to continue its activities aimed at the Netherlands).

The following differences are at issue here.

- The entire net proceeds of all gaming and betting games set up by De Lotto must go to charity, while the British Betting, Gaming and Lotteries Act 1963 (hereinafter to be referred to as 'the BGLA') imposes no such obligation. The fact that Ladbrokes alleges that it voluntarily donates some part of its proceeds to charity is transitory, if only because Ladbrokes is not obliged to do so and failed to give any specific information on this subject. In addition, Ladbrokes can decide at any moment to reduce or cease its contributions, if any, while De Lotto may not. Ladbrokes does pay a 15% tax on the proceeds from its betting activities (without deducting its expenses), as well as corporate income tax. Ladbrokes is also subject to a 10% levy on the turnover from bets on horse races, for the improvement of horse-breeding.
- De Lotto must allocate 47.5% to 50% of its gross turnover to the payment of winnings, while this is not required by the BGLA; thus, Ladbrokes is not subject to such a restriction. De Lotto is obliged to pay 25% tax on games of chance on every prize of EUR 454 or over, while the duty on games of chance (9% of the amount of the bets) has been rescinded in the United Kingdom. Ladbrokes therefore offers tax-free betting. The fact that Ladbrokes is obliged to pay 15% taxes on the proceeds of the bets does not change this, since this does not concern a duty on games of chance to be paid by the gamblers. This enables Ladbrokes to make more attractive offers to the gamblers.

- De Lotto is subject to a maximum stake of EUR 22.69 for each sports betting game, while Ladbrokes allows a much higher maximum stake, depending on the sporting event.
- The number of the sports betting games to be organised by De Lotto is subject to a maximum, while the BGLA does not impose any restrictions, thus enabling Ladbrokes to offer an unlimited number of bets (sports betting games). In addition, De Lotto is only allowed to offer sports betting games with regard to the final score, while Ladbrokes is entitled to offer every conceivable game in respect of a sporting event, such as a football match: the half-time score, the first or last player to score, the total number of goals, etcetera.
- In the Netherlands, interactive games of chance may not be offered via the Internet, which is what Ladbrokes does with 'Balls', an interactive lottery in which the participant can immediately win money any minute through 'live' lottery drawings.

4.7 Ladbrokes argues that the ordered blocking of its website www.Ladbrokes.com for residents of the Netherlands prejudices its interests disproportionately, since that would bar those with a Dutch IP address from visiting, entirely legally, Ladbrokes' website from abroad.

It is the Court of Appeals' preliminary position that there is no disproportionate disadvantage, since Ladbrokes failed to convincingly demonstrate that the number of persons with a Dutch IP address who will visit Ladbrokes' website from abroad is substantial.

- 4.8 The Court of Appeals also rejects Ladbrokes' ground for appeal the award of the injunction in respect of the website www.Ladbrokes.nl. Ladbrokes did not want to promise that, in future, it will refrain from using this .nl website for offering games of chance. In addition, the use of an .nl website would concern use in the Netherlands, since it concerns a website registered in the Dutch domain.
- 4.9 Ladbrokes' ground for appeal asserting that the operative part would not be specific enough, is also rejected. The injunction is limited to the lotteries, instant lotteries and

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sports betting games offered by Ladbrokes through the Internet and therefore does not relate to other games of chance offered by Ladbrokes. Therefore, as was also stated by De Lotto (defence on appeal in the case with case/docket number 2003/325 KG under 93), Ladbrokes need not remove the Netherlands from its list of countries, and it goes without saying that allowance must be made for this in the passage 'in the same manner as was done with regard to residents of the United States of America'. It is obvious that the injunction also covers any person or legal entity in any way connected with Ladbrokes, in view of the fact that Ladbrokes is part of a group comprising a substantial number of group companies. In addition, the injunction must be interpreted in a reasonable manner and there are no indications that De Lotto would do otherwise.

- 4.10 De Lotto's ground for appeal of the Preliminary Relief Judge's holding that it is insufficiently clear whether the 0800- phone number used by Ladbrokes to offer its games of chance is a Dutch or an English number, was rightly submitted, since, in appellate proceedings, De Lotto has undisputedly demonstrated that the 0800- telephone number (0800-0224199) used by Ladbrokes is a (toll-free) Dutch telephone number that can be dialled from the Netherlands. Since, through this Dutch toll-free telephone number, which redirects calls to Ladbrokes' call centre outside the Netherlands, Ladbrokes offers Dutch residents the opportunity to participate in its games of chance, the injunction claimed by De Lotto should also be applicable to the lotteries, instant lotteries and sports betting games Ladbrokes offers by telephone.
- 4.11 De Lotto's ground for appeal of the rejection of its claim with regard to making it 'otherwise' impossible for Ladbrokes to have Dutch residents participate in its games of chance in the Netherlands, succeeds. Since Ladbrokes has already facilitated participation in the Netherlands by Dutch residents in its games of chance via the Internet and by telephone, there is a considerable risk that Ladbrokes will facilitate participation in its games of chance (by Dutch residents, in the Netherlands) in other forms as well.
- 4.12 The Court of Appeals holds that the appeal instituted by Ladbrokes in the case with case/docket number 2003/325 KG is unfounded and that the appeal instituted by De Lotto in the case with case/docket number 2003/319 KG succeeds. This results in the disputed decision being upheld, except with regard to the order pronounced by the

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preliminary relief judge under 1, and this will be awarded as claimed by De Lotto in appellate proceedings. Ladbrokes, being the party ruled against, will be ordered to pay the costs of the appellate proceedings in both cases.

5. The decision

The Court of Appeals, adjudicating an appeal for preliminary relief:

upholds the judgment rendered in the matter between the parties by the preliminary relief judge of the District Court of Arnhem on 27 January 2003, except with regard to the injunction given under 1;

quashes the judgment in respect of this part and, to that extent, issues a new judgment:

orders Ladbrokes, within three days after the service of this ruling, to make it impossible for residents of the Netherlands to participate in the Netherlands in any of the lotteries, instant lotteries and sports betting games Ladbrokes offers, via the Internet, telephone and other media, in some way, either directly or by means of person or legal entity somehow connected with Ladbrokes, without a licence in the Netherlands, in the same manner as was done with regard to residents of the United States of America, on penalty of the forfeiture of a fine of EUR 10,000 for every day (a part of a day counts as a whole day) that Ladbrokes, or a person or legal entity somehow connected with Ladbrokes, violates this order or any part thereof, up to a maximum of EUR 200,000, subject to the condition that the fine can be mitigated by the court hearing the main action to the extent that imposing the aforementioned fine would contravene the standards of reasonableness and fairness, taking into consideration the degree to which the order has been complied with, the gravity of the violation and the degree to which the blame for the violation can be attributed;

orders Ladbrokes to pay the costs of the appellate proceedings, until this judgment on De Lotto's side being estimated at:

- in the matter under case/docket number 2003/319 KG: EUR 326.16 in disbursements and EUR 1,542 in fees;

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- in the matter under case/docket number 2003/325 KG: EUR 245 in disbursements and EUR 1,542 in fees; and

declares this ruling to have immediate effect.

This judgment was rendered by *mr. Houtman*, *mr. Steeg* and *mr. Drijber* and pronounced in the presence of the Clerk of Court in the public session of 2 September 2003.

<2 signatures>

<stamp:> Court of Appeals of Arnhem

Issued as first authenticated copy
to *mr. J.M. Bosnak*
attorney-at-record for Stichting de Nationale Sporttotalisator

The Clerk of the Court of Appeals of Arnhem
<signature>