IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M117 of 2012

BETWEEN

HARRY KAKAVAS
Appellant

and

CROWN MELBOURNE LIMITED (ACN 006 973 262) & ORS
Respondents

APPELLANT'S SUBMISSIONS IN REPLY

PART I: PUBLICATION

1. The Appellant certifies that these submissions in reply are in a form suitable for publication on the internet.

PART II: REPLY

2. **Factual matters:** The Appellant does not challenge any findings of the primary judge. The Respondents provide no support for their counter-assertion (R[8], R[9]). The Respondents' submissions impugn the Appellant's character. Imputations are made which are irrelevant and not supported by primary findings. For example,[1] the Respondents assert that the IEO arose from a NSW Police decision that the Appellant was "*an undesirable member of the public*" ([R63]). The primary judge made no such finding.

3. **Pathological Gambling:** The primary judge found that the Appellant suffered from a pathological gambling condition: (J[1],[443],[444]). That finding was not challenged on appeal. The Respondents now dispute that finding, asserting that the diagnosis was made retrospectively (R[39]). The experts accepted that a retrospective assessment could reliably be made.[2] The primary judge accepted their evidence and diagnosis (J[444]). Further, Mr Healey examined the Appellant in 1996 and 1997 and diagnosed him as a pathological gambler (J[103], [104]).

4. The Respondents submit (R[38]) that DSM-IV contains "*important qualifications*" upon which the primary judge relied, citing (J[443]) of his reasons. The submission is wrong. The primary judge did not refer to any qualifications at (J[443]). He accepted the expert evidence: (J[444]). That evidence was that the Appellant suffered from a pathological gambling condition which was operative when he gambled at

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1 There are two other examples. The Respondents refer in several places to armed robbery charges against the Appellant. Those charges were dismissed at the committal hearing (J[112]). Second, the Respondents refer to so-called evidence that the Appellant's finances were "*entirely opaque*" (R[45]). The primary judge found that, following background checks, Mr Horman was comfortable as to the way the Appellant had obtained his money. See also Mr Horman's evidence at T 1625.

2 See the reports of Dr Alcock at [19] and Dr Coman at [53]; and see Mr Healey's evidence at T 1096.7.

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Crown.[3] The primary judge did not, as submitted by the Respondents (R[49]), *"directly"* address and *"repeatedly"* find that the Appellant was able to conserve his own interests when "*dealing*" with Crown. He rejected the principles in *Blomley* and *Amadio* (J[432]). The paragraphs cited by the Respondents do not support their contention. None of the matters referred to at (R[47]) establish that the Appellant's condition was such that it did not *"affect his ability to conserve his own interests"* when entering wagering transactions.

5. For the reasons set out below and in the Appellant's primary submissions,[4] the Respondents self exclusion argument (R[50]) is misplaced. The capacity to self-exclude provides no answer to the claim. The ability to self exclude does not affect the condition of the Appellant when he entered into wagering transactions. At that time the disabling condition was operative.[5] It also ignores Crown's conduct in offering inducements to the Appellant in circumstances where it knew about an existing exclusion order (the IEO). These inducements influenced his decision to gamble (J[592],[643]) and, according to one expert, fuelled his pathological gambling condition.[6] Professor Blaszczynski opined that the Appellant's pathological gambling condition and narcissistic personality traits seriously diminished his capacity to resist positive inducements to gamble and seriously impaired his judgment in deciding whether to gamble. He also opined that such inducements would have made it difficult for the Appellant to resist any offer to lift a self exclusion order.[7]

6. The Respondents correctly state that "*on its face every gambling transaction is not in the best financial interests of the gambler because the risk of losing outweighs the chance of winning*" (R[44]). The obvious corollary is that wagering is especially improvident for pathological gamblers. The Respondents also submit (R[44]) that the potential for a "win" represents the "*quid pro quo*" for a wagering transaction (R[44]). By operation of statute,[8] the Appellant could never win when gambling at the casino. Any winnings "*paid*" or "*payable*" to the Appellant were forfeited by virtue of s.78B of the *Casino Control Act 1991*(CCA). This meant there was never a "*quid pro quo*". A wager in respect of which one party can lose but not win is no wager at all (CA[230]). Accordingly, the Respondents' references (R[55],[79]) to the Appellant's "*healthy dividends*" and favourable terms are not accurate. The fact Crown purported to pay him winnings could not cure his lack of entitlement to winnings under the statute. Nor did such payments exonerate Crown from its unconscionable conduct. Those payments served to induce the Appellant to keep gambling at the casino until he lost all his money. The primary judge found that had the Appellant known that he could not win, he would have declined to have anything to do with Crown (J[26] and CA[230]).

7. The Respondents assert (R[13]) that Crown accepted the report of Mr Tim Watson Munro (dated 3 June 1998) stating that the Appellant "*no longer felt the pathological compulsion to gamble*". The primary judge found to the contrary (J[118-121]).

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3 The evidence is addressed at [21]-[23] of the Appellant's primary submissions.
4 See the Appellants primary submissions at [26].
5 See *Tzefrios v Polites* (1994) ANZ ConvR 32, at 35-36, per Brooking J.
6 See Mr Healey's evidence at T.1021.16.-1022.6. The inducements are summarised at [39] of the Appellant's primary submissions. There was no evidence that when the Appellant self excluded from other Australian casinos he was offered inducements.
7 See Professor Blaszczynski's report dated 4 November 2008 at [56]-[57].
8 Section 78B of the CCA.

8. The Respondents appear to challenge the sufficiency of the principles of constructive knowledge in *Amadio* (R[75],[85]). Those principles are well established and have been accepted by this Court.9 In relation to unconscionable conduct, the knowledge principles in *Barnes v Addy* have been rejected at both first instance and on appeal.10 The divergent observations of Kirby J in *Garcia* were obiter and have not been adopted.

9. Contrary to the Respondents submission (R[21]), Crown sought a medical report from the Appellant because it had a residual concern about his standing as a sometime problem gambler, (J[220],[228],[493]). The primary judge rejected Crown's contention that the Appellant did not have a genuine gambling problem and had used the self exclusion process as a defence-ploy (J[463],[471],[472]). The primary judge accepted that the Appellant's history revealed that he had a genuine gambling problem (J[472]) and that Crown knew there was an issue (J[1],[463],[661]).11

10. The Appellant's pleadings permitted a finding that passive acceptance of a benefit established the cause of action and the primary judge addressed that case (J[438]).

11. **IEO:** The Respondents contend that the Appellant's IEO case was neither pleaded nor advanced at trial (R[56],[62],[63],[79],[88]). This is wrong. The claim was fully pleaded,[12] opened, conducted and contested.[13] The Appellant characterised the IEO as a "*disability*" in opening address (CA[13]). The primary judge determined the case on that basis (J[22]-[27]). The Court of Appeal also dealt with the case on that basis.[14] Furthermore, in late 2007, the primary judge, having struck out other causes of action based on the IEO, said the allegations in respect of it sat more happily with unconscionable conduct.[15]

12. The Respondents assert (R[64]) that the Appellant "*concealed*" the IEO from Crown. That assertion is incorrect. The primary judge found that the existence of the IEO was confirmed by the Appellant in a conversation he had with Mr Horman on 14 November 2000 (J[559]).[16] The assertion is also contrary to the Appellant's conversation with Mr Doggett on 8 or 9 December 2004 (J[222],[583],[584]) which the primary judge accepted. Mr Doggett was not called by Crown.

13. The Respondents incorrectly contend that, in late 2004, the Appellant "*alone knew that he was subject to a current IEO*" (R[62]). The primary judge and the Court of Appeal found that Mr Horman knew of the existence of the IEO (J[569]) and (CA[188],[189],[228]). Neither the primary judge nor the Court of Appeal qualified Crown's knowledge in the manner advanced by the Respondents. The primary judge dismissed the IEO case because Crown did not "*bring the NSW position to mind*" (J[27],[570]). The two records relied upon by the Respondents (R[82]) do not support the case now advanced. Mr Horman's comment to the POI Committee

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9 See the authorities cited in the Appellant's primary submissions at [29] and *Mackintosh v Johnson* [2013] VSCA 10 at [8].

10 *Bell Group (In liq) v Westpac* [2008] WASC 239 at [4934]; *Lopwell Pty Ltd v Clarke* (2009) 3 BFRA 807 at [52]-[55].

11 The history of gambling problems of which Crown was found to be aware is set out in the factual summary of the Appellant's primary submissions at [6(a),(b),(c),(i)].

12 See the *2nd Further Amended Statement of Claim* at [8]-[10], [15]-[16], [18]-[21], [25] & [27]-[31].

13 [T 2.18] & [T 117.28].

14 Bongiorno JA dealt with the IEO at (CA[38],[76],[184]-[189],[227]-[234]).

15 *Kakavas v Crown Limited & Anor* [2007] VSC 526 at [55]-[60].

16 See also the evidence of Mr Horman at T 1564.22. The primary judge also found that Mr Horman's knowledge of the IEO was based on his own enquiries with his police and casino contacts J[559].

(J[194]), that the Appellant continued to gamble at Star City, was directed to his belief in 1998.[17] The document referred to at (J[381]) says nothing about the Appellant's gambling at Star City in 2004. It also post-dates the Appellant's readmission to Crown.[18] Further, the contention provides no answer to the claim. Crown was on notice of the IEO within the meaning of the principles in *Amadio*. The primary judge found that Crown should have made appropriate enquiries and that had those enquiries been made the IEO would have been *"rediscovered"* (J[25]). He found Crown was *"seriously careless"* in failing to do so (J[26]).

14. The Respondents contend (R[84]) that corporate knowledge can be lost or forgotten and that the IEO *"information was simply not of sufficient importance to register, and then be retained, despite the* passing *of time*". This submission should be rejected. First, the information was not lost. It was recorded in various Crown records.[19] Second, the information was not forgotten. The IEO was referred to by Mr Horman in an email sent to Mr Fleming on 30 January 2003 (J[166]),[20] resonated in his mind in late 2004 (J[166]), and was referred to by Mr Doggett in his conversation with the Appellant in December 2004 (J[222],[583],[584]). The suggestion that the IEO was *"meaningless"* (R[57]) to Crown because the Appellant was not gambling is contradicted by Crown's own conduct in specifically dealing with it in several internal confidential communications (J[559]).

15. **Discretionary Considerations and Illegality:** The Respondents contend (R[90]) that the Appellant's *"claims for relief in equity"* should fail because the Appellant was *"legally disentitled from gambling at Crown."* No such contention is made in respect of relief under the *Trade Practices Act 1974* (TPA). The contention is wrong. The statute does not render the gambling transactions illegal. CCA s.6(1) of the CCA provides that, subject to the CCA, the conduct and playing of a game in the casino is lawful. Section 78B explicitly contemplates lawful gambling transactions between the casino and a person subject to an IEO. This is to be contrasted with s.79 of the CCA which prohibits gambling in the casino by certain persons.

16. The scope and purpose of ss.77(2) and 78B is not as contended by the Respondents (R[92]). Those provisions must be read in the light of the surrounding provisions including ss.76 and 78. In the light of such provisions, the scope and purpose may be seen as one which precludes casino operators from profiting by inviting, encouraging or permitting persons the subject of an exclusion order (including an IEO) from gambling in the casino.

17. The assertion (R[92]) that the Appellant's equitable rights *"would be extinguished by virtue of the doctrine of illegality"* is contrary to authority which eschews any broad proposition that equity will not grant relief to a party where there has been a contravention of the policy of a statutory provision. The statutory provision, issues of proportionality, and the specific circumstances of the case must be considered.[21]

18. Here, ss.77(2) and 78B of the CCA provide their own sanctions. Those sanctions mark the limit of the encroachment intended by Parliament on the rights of a person subject to an IEO who enters the casino and gambles.[22] The sanction prescribed in

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17 The evidence referred to by the primary judge at (J[194]) is at T 1622.24.

18 See T 1288-1294, and in particular T.1292.25-1293.2.

19 The records are referred to in the Appellant's primary submissions at [45].

20 See Mr Horman's evidence at T 1564.21-31.

21 *Nelson v Nelson* (1995) 184 CLR 538 at 561, per Deane and Gummow JJ and 612-613 per McHugh J; and *Equuscorp Pty Ltd v Haxton* (2012) 286 ALR 12 at [25].

22 *Yango v First Chicago Australia Ltd* (1978) 139 CLR 410 at 428-429 per Mason J.

s.78B (i.e., forfeiture of winnings "*paid or payable*") was made explicitly with reference to s.77(2) of the CCA. Further, to deny the Appellant relief (in the light of those sanctions) would be wholly disproportionate to a contravention of s.77(2). Finally, the specific circumstances militate against the contention advanced by the Respondents and answer any "*clean hands*" (R[91]) argument. Crown contravened ss.76(1) and (2) of the CCA. But for that contravention, the Appellant would not have gambled at Crown in 2005 and 2006. Crown initiated contact with the Appellant (J[214]), revoked his WOL (J[198]), induced him to gamble (J[592],[643]) and paid him winnings in contravention of s.78B of the CCA. It did so when it knew or ought to have known (J[25],[26]) that he was unable to receive or retain winnings. The Appellant did not appreciate that he was caught by the relevant provisions of the CCA (J[24]) and would "*have declined to have anything to do with the Casino*" had he known the true position (J[26] and CA[230]). To deny the Appellant equitable relief would permit the Respondents to use the CCA as an instrument of fraud. The Respondents' contentions on illegality are anomalous given their counterclaim to recover gambling debts from the Appellant. The procedural history in relation to illegality is that the primary judge allowed that defence as a late amendment after the Appellant had closed his case.

19. **Causation and Damage:** The primary judge's observation (J[369]) that the Appellant would have gambled elsewhere ("*in the absence of the influence of Crown*") is no answer to the Appellant's claim. First, the Respondents did not plead or pursue a case that they were not liable on this basis.[23] Second, the primary judge did not conclude, and on the evidence could not have concluded, that the Appellant would have suffered the losses elsewhere. Third, the relief granted under the equitable doctrine "*is one which denies to those who act unconscientiously the fruits of their wrongdoing.*"[24] Fourth, causation under the TPA must be considered in a manner that conforms to the remedial purpose of the statute. The result should not reward unconscientious conduct. Fifth, the equitable remedy would be stultified if a defendant is excused from its conduct by reason of the special disability it exploited. Sixth, the court does not speculate about what might have happened if the Respondent had not acted unconscionably.[25] In the prayer for relief the Appellant claims such further or other relief as to the Court seems appropriate. No *"election"* (R[93]) has been made.

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23 In 2005 and 2006, according to the evidence, the Appellant was excluded from gambling at all major casinos in Australia.

24 *Blomley v Ryan* (1954) 99 CLR 362 at 429 per Kitto J.

25 *Bridgewater v Leahy* (1998) 194 CLR 457 at [99]-[100].