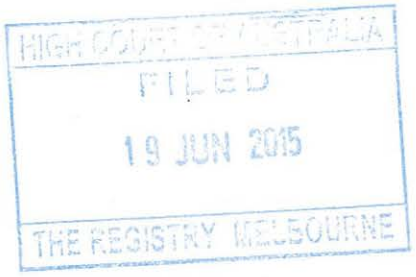
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M83 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN:



STATE OF VICTORIA

Appellant

and

TATTS GROUP LIMITED

Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. What is the proper construction of the words "new gaming operator's licence" in cl 7.1 of the agreement entered into between the Appellant (the **State**) and the Trustees of the Estate of the Will and the Estate of the Late George Adams (**Trustees**) on 17 November 1995 (**1995 Agreement**)?

3. When construing a contractual promise in an agreement which expressly requires the subsequent enactment of that promise in legislation, does the contractual promise survive the agreed enactment of legislation embodying the same?

4. Where legislation is passed to create a statutory right concerning the same subject matter as a pre-existing contractual right:

   (a) Is the contractual right impliedly abrogated by the enactment of the statutory right?

   (b) If the answer to (a) is yes, and the contractual right to payment ceases to have any operation, can the contractual right again become operative by virtue solely of the legislative nullification of triggers to that parallel statutory right?

5. Can legislative amendments which had the object and effect of nullifying a conditional statutory right to payment have left the parallel contractual right intact?

6. If the State's contentions on the foregoing issues are rejected, were the "gaming machine entitlements" (**GMEs**) issued to multiple licensed venue operators "equivalent in substance" to the Trustees' gaming operator's licence such that their issue triggered a payment under cl 7.1?

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Part III: *Judiciary Act 1903* (Cth)

7. The Appellant does not consider that notice is required to be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth) as no constitutional issues are raised by any party.

Part IV: Citations

8. The judgments below are not, as yet, reported. The medium neutral citation of the decision below is *State of Victoria v Tatts Group Limited* [2014] VSCA 311 (**Reasons**). The medium neutral citation of the decision at first instance before Hargrave J is *Tatts Group Limited v The State of Victoria* [2014] VSC 302 (**Trial Reasons**).

Part V: Facts

9. Prior to the introduction of the *Gaming Machine Control Act* 1991 (Vic) (**the 1991 Act**) gambling on gaming machines was unlawful in Victoria.[1]

10. On 14 April 1992, under s 33 of the 1991 Act, the State issued each of the Trustees and the Totalisator Agency Board of Victoria (**TAB**) with a gaming operator's licence for a term of 20 years.[2] Those licences authorised the Trustees and the TAB to conduct gaming by operating gaming machines in licensed venues.[3] To this end, the 1991 Act provided for the grant of venue operator's licences which authorised the operators of approved venues to obtain approved gaming machines from gaming operators and to possess gaming equipment. Under s 19A of the 1991 Act, which was introduced in 1994, a gaming operator was (subject to an irrelevant exception) prohibited from holding a venue operator's licence. The Trustees never held a venue operator's licence but, instead, entered into contractual arrangements with the holders of venue operator's licences.[4]

11. On 6 August 1992, the Trustees commenced gaming operations in Victoria. Although authorised to do so by their licence, the Trustees did not, as the State was aware, themselves manufacture, service, repair, maintain or install gaming machines (they outsourced this work, save for manufacture, to licensed technicians) and did not conduct any business of buying and selling gaming machines.[5]

12. In 1994 the TAB was privatised, which involved the transfer of its business and assets to, and the public floatation of, Tabcorp Holdings Limited (**Tabcorp**).[6] The *Gaming and Betting Act* 1994 (Vic) (**the 1994 Act**) provided for the grant to Tabcorp of two conjoined licences, being a wagering licence and a gaming licence. Tabcorp's gaming licence conferred upon it the same authorities bestowed on the Trustees (and previously bestowed upon the TAB) by their gaming operator's licence.[7] As consideration for its wagering licence and gaming licence, Tabcorp paid the net float proceeds of $597.2 million to the State.

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[1] Reasons at [8].
[2] Trial Reasons at [8] – [9]; Reasons at [12] – [13].
[3] Reasons at [8]. The licences held by the Trustees and the TAB did not specify the number or proportion of gaming machines that each gaming operator was permitted to operate. This was a matter dealt with by Ministerial directions under the 1991 Act which, amongst other things, mandated that the Trustees and the TAB were each permitted to operate 50% of the gaming machines available for gaming.
[4] Reasons at [124].
[5] Reasons at [123].
[6] Reasons at [1].
[7] Reasons at [24]. See: s 7 of the 1994 Act.

13. The 1994 Act contained a terminal payment provision which provided that "on the grant of new licences", Tabcorp, as holder of the licences just referred to, was entitled to be paid the lesser of the licence value of the former licences or the premium payment paid by the new licensee (s 21 of the 1994 Act, subsequently re-enacted as s 4.3.12 of the *Gambling Regulation Act* 2003 (Vic) (**the Act**)).

14. Following the Tabcorp float, the State entered into negotiations with the Trustees for the purpose of ensuring that the two gaming operators would compete with each other on an equal basis, which included the Trustees:[8]

    (a) paying a licence fee equivalent to the amount paid by Tabcorp for its gaming licence; and

    (b) receiving a terminal payment on expiry of their licence in certain circumstances, calculated on a similar basis to the Tabcorp terminal payment provision.

15. The negotiations culminated in the 1995 Agreement, which provided (*inter alia*):[9]

    (a) by cl 3, for the payment by the Trustees of an annual licence fee;[10]

    (b) by cl 7, for a terminal payment to be paid to the Trustees "if the Gaming Operator's Licence expires without a new gaming operator's licence having issued to the Trustees" (cl 7.1) save that no payment would be made "if a new gaming operator's licence is not issued to any person, or is issued to the Trustees or a related entity" (cl 7.2);[11]

    (c) by cl 8, that the Minister would cause to be drafted and use his best endeavours to have enacted legislation including (relevantly) the respective obligations of the Trustees and the State set out in cll 3 and 7.[12]

16. As contemplated by cl 8, in 1996, the 1991 Act was amended by the *Gaming Acts (Amendment) Act* 1996 (**the 1996 Amendments**) to introduce the statutory licence fees[13] and terminal payment provision[14] provided for in cll 3 and 7 of the 1995 Agreement. Thereafter, in December 2003, the Parliament of Victoria consolidated its gambling legislation into the Act. The terminal payment provision initially provided for in s 35A of the 1991 Act was re-enacted in s 3.4.33 of the Act.[15]

17. In the meantime, on 28 June 1999, the parties entered into an agreement purporting to amend the 1995 Agreement to reflect a change in payment arrangements occasioned by an Australian Taxation Office ruling (**1999 Agreement**).[16] Then, in 2005, upon the public float of the Respondent (**Tatts**), the parties entered into an agreement by which all of the Trustees' (then existing) rights and obligations under the 1995 Agreement were novated to Tatts (**Transfer Deed**).[17]

18. On 10 April 2008, the then Premier of Victoria announced that "the State had decided to move to a new structure for the gaming industry, which removes the need for separate gaming machine operators, Tattersalls and Tabcorp, with venues set to own,

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[8] Reasons at [24] and [68].
[9] Reasons at [25] and [68].
[10] Reasons at [27] and [69].
[11] Reasons at [30] and [70].
[12] Reasons at [31] and [107].
[13] Reasons at [32]. See ss 135A-135C inclusive of the 1996 Amendments.
[14] Reasons at [33]. See s 35A of the 1996 Amendments.
[15] Reasons at [34(5)].
[16] Trial Reasons at [111].
[17] Trial Reasons at [113] – [116].

operate and maintain gaming machines".[18] These changes were effected through amendments to the Act passed in 2008 and 2009 (**the 2009 Amendments**).[19] The 2009 Amendments provided for, *inter alia*:

(a) by new Part 4A of Chapter 3 of the Act, the creation and allocation to operators of approved venues of GMEs; and

(b) by amendments to s 3.4.1 of the Act, the expansion of the authority conferred by a venue operator's licence so as to include the acquisition and transfer of GMEs; the conduct of gaming on approved gaming machines in an approved venue operated by the licensee while holding GMEs; selling or disposing of gaming equipment; and servicing, repairing or maintaining gaming equipment through the services of a licensed technician.[20]

19. On 7 June 2010, the Minister for Gaming created 27,500 GMEs with an effective date of 16 August 2012, 27,300 of which were subsequently allocated to holders of venue operator's licences. Tatts did not apply for or receive any GMEs. Recipients of the GMEs were required to pay premiums totalling approximately $981 million to the State.[21]

20. On 15 August 2012, the gaming licences held by Tatts and Tabcorp expired.[22] No terminal payment was made to either gaming operator. On 16 August 2012, Tatts issued proceedings seeking, *inter alia*, a payment in excess of $450 million plus interest pursuant to cl 7 of the 1995 Agreement and/or s 3.4.33 of the Act.

Part VI: Argument

A. Proper construction of cl 7.1 of the 1995 Agreement

21. The foundational error in the Court of Appeal's construction of cl 7.1 is exposed in paragraph 146 of the Reasons:

> "Had [honest and reasonable business people in the position of the parties] been asked at the point of entry into the 1995 Agreement whether a 'new gaming operator's licence' meant not only a new gaming operator's licence issued under the 1991 Act (as it might be amended, re-enacted or replaced from time to time) but also any form of authority which conferred rights to carry on gaming operations in substance the same as the rights which were conferred on the Trustees by the Gaming Operator's Licence, they would have undoubtedly answered, yes."

22. This affirmative answer – which led to the Court equating the rights enjoyed by a gaming operator with those of venue operators holding one or more GMEs[23] – cannot be maintained in the face of the terms of the 1995 Agreement and the facts mutually known to the parties at the time of its formation.

23. The 1995 Agreement deploys both the capitalised "Gaming Operator's Licence", defined in cl 1.1 as "the gaming operator's licence issued to the Trustees pursuant to the [1991 Act]", and the lower case "gaming operator's licence", to which the general definitional provision in cl 1.3 applied, providing that "[w]ords and phrases appearing in this Agreement shall, unless the contrary intention appears, have the same meaning as in the [1991] Act".

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[18] Reasons at [35].
[19] Reasons at [38]. See *Gambling Regulation Amendment (Licensing) Act* 2009.
[20] Reasons at [38].
[21] Reasons at [39].
[22] The term of Tatts' licence had been extended via the 2009 Amendments so that it would be co-terminous with Tabcorp's gaming and wagering licences: see s 3.4.32.
[23] Reasons at [188].

24. The Court of Appeal "accepted, as the State submits, that the phrase 'gaming operator's licence' had a clear meaning under the 1991 Act".[24] This conclusion was, with respect, doubtlessly correct: in November 1995, the term "gaming operator's licence" was used liberally throughout the 1991 Act[25] (and other then operative legislation[26]) such that, at that time, the words bore an unambiguous and singular "meaning" in that Act: a gaming operator's licence issued under Pt 3 of the 1991 Act.[27] It ought to have followed from the Court of Appeal's finding that, by reason of cl 1.3, the words "gaming operator's licence" in cl 7.1 also possessed this "clear meaning".

10 25. The Court of Appeal apparently took the view that the words "gaming operator's licence" were removed from cl 1.3's sphere of operation by the addition in cll 7.1 and 7.2 of the word "new",[28] a word which thereby transformed the meaning of the term "gaming operator's licence" from the specific to a "broad generic meaning".[29] Axiomatically, where a word or phrase is used in one part of a contract with a definite meaning, "there is a presumption that it is so used elsewhere, where, by itself, its meaning is not clear".[30] In other words, when discerning the presumed objective intent of the parties when deploying the phrase "new gaming operator's licence", one starts with the presumption that the parties were employing the phrase "gaming operator's licence" consistently.[31] This presumption is not displaced; there is nothing to show
20 that the parties intended the composite phrase "new gaming operator's licence" in cl 7 to have a different core meaning to the term "gaming operator's licence".

26. On the contrary, when used elsewhere in the 1995 Agreement – most particularly cl 5.2 – the composite phrase "new gaming operator's licence" is used inescapably to connote a new gaming operator's licence of the same kind as the Trustees' Gaming Operator's Licence.[32] This demonstrates the alignment of meanings between "gaming operator's licence" and "new gaming operator's licence", and the Court's error in ascribing the adjective "new" with a transformational character.[33]

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[24] Reasons at [151].

[25] Leaving aside headings to sections (cf s 36(2A) of the *Interpretation of Legislation Act* 1984 (Vic), the term "gaming operator's licence" is used no less than 27 times in the body of sections of the 1991 Act as it was in force at the time of the execution of the 1995 Agreement: see ss 3, 14(1), 32(1A), 33, 34(1), 34(4), 35, 36(1), 36(6), 37, 38(1), 131(1), 132, 133(1), 133(2), 134(1), 134(3)(a), 134(3)(b), 134(4), 134(5), 134(6), 134(7), 136(6), 143(2)(b), 153(4), 160(3) and 162(1).

[26] See, eg, ss 7(c), 27(1)(c), 31(1)(b), 31(1)(h) and 222 of the 1994 Act; s 6FZA *Lotteries and Betting Act* 1966 (Vic).

[27] For example:

(a) Part 3, Division 3, of the 1991 Act was headed "Gaming Operator's Licence" and provided for the grant of a "gaming operator's licence" to the TAB or the Trustees;

(b) s 14 of the 1991 Act set out the authority conferred on the licensee by a "gaming operator's licence"; and

(c) "gaming operator" was defined in s 3 of the 1991 Act as the "holder of a gaming operator's licence under Part 3".

[28] Reasons at [151], [149].

[29] Reasons at [133].

[30] *Walsh v Alexander* (1913) 16 CLR 293 at 312; see further *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [29] per French CJ, Kiefel, Bell and Keane JJ, referring to the "well-settled rules of construction" in relation to ascribing consistent meaning (in that case, to the word "claim" wherever appearing in subsections 1041L(1) and (2) of the *Corporations Act* 2001 (Cth)).

[31] "Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another": *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

[32] That "new gaming operator's licence" bears the specific meaning when deployed in cl 5.2 is evident from cl 5.1; the clause deals with a situation where the Trustees wish to transfer their Gaming Operator's Licence to a related entity, in which case the Minister is to "use his best endeavours to cause the Gaming Operator's Licence to be transferred to the related entity or to have issued to that entity a new licence on the same terms and conditions…".

[33] See Reasons at [136] – [138].

27. The Court of Appeal was satisfied that the word "new" could perform transformative work on the phrase "gaming operator's licence" because the composite phrase fell to be applied: (a) in 17 years' time; and (b) in circumstances where no new gaming operator's licence could be issued under the 1991 Act at the date of the Agreement as the licence issued under s 33 had already been issued to the Trustees and was not transferrable.[34] But neither of these facts warrant the disregarding of the clear meaning of "gaming operator's licence":

(a) The meaning of cl 7 was not relevant (or relevant only) 17 years' hence. By only looking at cl 7 as a provision which would have effect upon the ultimate expiry of the Trustees' licence, the Court overlooked the importance of cl 8. Clause 7 was relevant for the purpose of complying with the promise in cl 8 to enact the conditional payment entitlement in statutory form. Clause 7 therefore spoke in the short term; its role in the 1995 Agreement was to set out agreed rights and obligations pending their enactment in legislation. At the point at which cl 7 was, pursuant to cl 8, given statutory effect, the words "gaming operator's licence" (and therefore "new gaming operator's licence") had a clear and unambiguous meaning: a gaming operator's licence issued under Pt 3 of that Act. So it was that, as the Court of Appeal held,[35] s 35A of the 1991 Act[36] – being the statutory manifestation of cl 7 – utilised this specific meaning.

(b) The fact that the Trustees' licence had been issued under s 33 of the 1991 Act and was not transferrable does not support a generic meaning of "new gaming operator's licence". If anything, it supports the contrary construction. Given the clarity of the then statutory meaning of "gaming operator's licence", a reasonable business person asked at the time of execution of the 1995 Agreement what a "*new* gaming operator's licence" was would inevitably have answered: 'a fresh gaming operator's licence issued under Pt 3 of the Act'.[37]

(c) Further, while the 1991 Act might not, in November 1995, have made express provision for a further gaming operator's licence to be issued upon the expiry of the Trustee's licence, the *1995 Agreement* explicitly contemplated that the legislation would be amended to provide for a new gaming operator's licence to issue at that time: see cl 8.1.6.[38] So it was that the 1996 Amendments amended the 1991 Act to provide for the future issue of gaming operator's licences.[39]

28. The Court of Appeal held that the definition of "gaming operator's licence" introduced when the Act was passed in 2003 – *viz*, "a licence granted under Division 3 of Part 4 of Chapter 3"[40] – was not picked up by cl 1.3 of the 1995 Agreement,[41]

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[34] Reasons at [151].
[35] Reasons at [51]-[53].
[36] And, correspondingly, its successor, s 3.4.33 of the Act.
[37] Cf Reasons at [148]. Indeed, the Court of Appeal held that the adjective 'new' "connotes a licence that is freshly issued". The State embraces that proposition; the role of the adjective is not to transform the meaning of what follows but to connote a fresh one of the same thing.
[38] See also numbered paragraph 5 of the Treasurer's Letter appearing as Schedule 2 to the 1995 Agreement. The terms of this letter directly contradict the reasons proffered by the Court (at [151]) for ascribing a generic meaning to "new gaming operator's licence": the letter specifically warned that future governments would not be bound by the statement of principles set out in the letter, including with respect to the terminal payment.
[39] See, eg, new ss 33, 33A, 35A.
[40] Section 1.3 of the Act.
[41] Reasons at [164].

finding that "it is inherently improbable that the parties intended that their rights would be governed by the variable terms of definitions in future legislation".[42] This conclusion, however, only assists in defeating Tatts' claim given the Court's conclusion that "gaming operator's licence" had a "clear meaning under the 1991 Act":[43] if this meaning were picked up in cl 7 by force of cl 1.3 then, on the Court's reasoning, the repeal of the 1991 Act[44] would forever have deprived cl 7.1 of its trigger.

29. The State respectfully submits that the better view is that the parties' objective intention was that the word "Act" should include successor legislation to the 1991 Act,[45] at least of a kind which (like the Act) consolidated the existing provisions regulating gambling in one enactment rather than effecting substantive change to the regime.[46] If one accepts this construction, then it follows that the specific meaning ought to be applied to the phrase "new gaming operator's licence" in cl 7.1, since, by reason of cl 1.3 of the 1995 Agreement and s 1.3 of the Act, a "gaming operator's licence" was defined to be "a licence granted under Division 3 of Part 4 of Chapter 3". No new licence was granted under that Part,[47] and so no "new gaming operator's licence" was granted within the meaning of cl 7.1. The Act did not afford some separate and distinct meaning to "new gaming operator's licence".

30. As to mutually known context, the Court, with respect, appreciated that the meaning of the 1995 Agreement fell to be determined by reference to what a "reasonable businessperson", having background knowledge of the "surrounding circumstances and the commercial purpose or objects to be secured by the contract" would have understood.[48] However, it then failed to take account of those matters in arriving at its construction of cl 7.

31. The Court rehearsed the trial judge's findings, about which there is no dispute, that the 1995 Agreement arose out of the Tabcorp float and Tabcorp's payment of a licence fee which was the subject of a terminal payment provision in the 1994 Act, and the desire to ensure equivalent treatment of the two gaming operators so that they could compete effectively.[49] This context supports a construction of the entitlement in cl 7 and, specifically, the words "new gaming operator's licence" in that clause which would afford the Trustees, so far as possible, equivalent treatment to that provided to Tabcorp under the corresponding provision in the 1994 Act, *viz*, s 21. At the time the 1995 Agreement was entered into, the payment entitlement in s 21 of the 1994 Act was triggered by the grant of "new licences", a term which had a specific meaning,

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[42] Reasons at [164].
[43] Reasons at [151].
[44] By force of s 12.1.1 of the Act.
[45] Whether a reference in a contract to an Act of Parliament is a reference to the Act in its amended form depends entirely on the context: *Brett v Brett Essex Golf Club* (1986) 52 P & CR 330 at 339. As noted, if the reference in the 1995 Agreement to the 1991 Act does not include successor legislation, then the payment entitlement in cl 7.1 was spent immediately upon the passage of the Act. The alternative construction, that the reference to the 1991 Act included successor legislation, was contended for by the State at trial on the basis that it was necessary to give business efficacy to the contract (see also ss 16 and 17 of the *Interpretation of Legislation Act* 1984 (Vic)).
[46] Cf: Reasons at [164].
[47] The granting of a further or 'new' gaming operator's licence was made impossible by the introduction of s 3.4.3 into the Act through the 2009 amendments.
[48] *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan and Kiefel JJ (referring also to the fact that "[a]ppreciation of the commercial purpose or objects is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating"); *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98] per Heydon and Crennan JJ.
[49] Reasons at [66]-[68], [129]. Trial Reasons at [82].

limited to the wagering and gaming licences then held by Tabcorp under the 1994 Act, courtesy of the definitions of "licence" and "licensee" in s 3 of the 1994 Act.[50]

32. Thus, the finding that the composite phrase "new gaming operator's licence" in cl 7.1 had a generic meaning which was far more expansive than the cognate phrase in s 21, which defined Tabcorp's statutory entitlement, is antithetical to the uncontested primary purpose of the 1995 Agreement, namely to establish *parity* for the two gaming operators. This is the "good commercial reason" for reasonable business people in the position of the parties to the 1995 Agreement to have agreed that the payment entitlement would be triggered by the issue of a licence of the same kind as then enjoyed by the Trustees; Tabcorp's equivalent entitlement in s 21 of the 1994 Act depended upon the issue of the *only* kind of licences then available under that Act.[51]

33. The Court of Appeal erroneously relied on the words "as compensation for [the Trustees'] investment in infrastructure lost" in cl 7.1 as indicative of a commercial purpose that would not be served by affording the specific meaning to "new gaming operator's licence".[52] In so doing, the Court of Appeal did have proper regard to[53] the significance of cl 7.2, which provides:

> No amount will be payable pursuant to sub-clause 7.1 if a new gaming operator's licence is not issued to any person, or is issued to the Trustees or a related entity of the Trustees.

34. The Trustees had been issued their gaming operator's licence, and made their investment in the corresponding infrastructure, in 1992; that investment was not occasioned by entry into the 1995 Agreement. Moreover, if no new gaming operator's licence was issued upon its expiry, then the Trustees' infrastructure investment would plainly be 'lost'; yet, by operation of cl 7.2, no payment entitlement would arise. Manifestly, then, the words relied upon do not support the proposition apparently favoured below that the terminal payment was the simple *quid pro quo* for the payment of licences fees;[54] if it were, the entitlement would have been expressed to arise if the Trustees' received no new licence, regardless of whether a licence was issued to someone else. The role of the words "as compensation for investment in

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[50] The specific meaning of that provision was confirmed in *Tabcorp Holdings Limited v State of Victoria* [2014] VSCA 312 at [28].

[51] There were other good commercial reasons for the adoption of the specific meaning of "new gaming operator's licence", which emerged from the evidence of surrounding circumstances. Contemporaneous documents, including a request by the Trustees for a private binding ruling from the Commissioner of Taxation which was copied to the State, and was the subject of the condition precedent in cl 2 of the 1995 Agreement, indicated that the Trustees were concerned to secure CGT rollover relief if their gaming operator's licence was renewed. According to s 160ZZPE of the *Income Tax Assessment Act* 1936 (Cth), the only circumstance in which rollover relief would be available was where the the Trustees' licence was *renewed* and such renewal was "wholly or principally attributable to the taxpayer's ownership of the original licence". Accordingly, unless the "gaming operator's licence" which was issued upon the expiry of the Trustees' licence was a licence of fundamentally the same character – ie, a further "gaming operator's licence" of the kind then held by the Trustees and contemplated by the legislation – then, if the Trustees were the recipients of that licence, they would not receive CGT rollover relief (and would *also* forego the termination payment by reason of cl 7.1). To the knowledge of the State, then, the Trustees had a commercial imperative to ensure any renewal was of a licence of the same character; and, securing a private binding ruling confirming the Trustees' tax position was a condition precedent to their agreement coming into effect at all. These considerations point to the words "a new gaming operator's licence" in cl 7.2 constituting a reference to *the fresh* issue of a licence with the *same character* as the Trustees' licence; and, the equivalent words in cl 7.1 would bear the same meaning. The Court of Appeal appeared (Reasons, [139]-[140]) to accept the State's characterisation of the "commercial imperative" but relied on this consideration to support the *generic* meaning it favoured without explaining how it could do so, given that – on that generic meaning – a "gaming operator's licence" could constitute something which would not constitute a "renewal" of the licence then held by the Trustees.

[52] Reasons at [157] citing the Trial Reasons at [101].

[53] Cf Reasons at [141] – [144].

[54] Reasons at [135], [141] – [144] and [157]. Trial Reasons at [101].

infrastructure lost" in cl 7.1 is evidently to effect a *characterisation* of the terminal payment *if it is made*.[55] They do not transform the promise in cl 7.1 into one which is effectively unconditioned by cl 7.2.

35. Cl 7.2 offers textual and contextual support for the specific meaning of the words "new gaming operator's licence". The specific meaning contended for by the State creates no difficulty in the application of the clause: if a further ("new") gaming operator's licence under Division 3 of Part 4 of Chapter 3 of the Act is issued to someone other than the Trustees, the payment entitlement is triggered. If no such licence is issued, or it is issued to the Trustees, no entitlement arises. However, the irreconcilability of cl 7.2 with the generic meaning adopted by the Court of Appeal can be revealed in its application: if Tatts had been allocated just 1 of the 27,300 GMEs issued by the State it would have been deprived of its contractual entitlement under cl 7.1 by operation of cl 7.2.[56] It is the generic construction, not the specific one, which produces the commercially absurd result.[57]

36. In this regard, the Court of Appeal gave insufficient weight to the careful use in the 1995 Agreement of the singular terms "new gaming operator's licence", "new licensee", "premium payment" and cognate terms in cll 7.1 and 7.2, in extending the application of those clauses to the issue of an indeterminate number of authorities of a different character (namely, the GMEs). The Court relied on cl 1.1's provision that the singular is to be read as including the plural,[58] however failed to refer to the qualification to those words: "unless the contrary intention" appears. Nevertheless, the Court of Appeal accepted that the 1995 Agreement *"implies an assumption that there would be a single new gaming operator's licence issued ... as opposed to a multiplicity of new licences issued to a plurality of new participants"*.[59] And yet the Court held that, to accept this proposition did not mean the parties must be taken *not* to have provided for the possibility that, upon expiration of the Trustees' licence, there might be a multiplicity of gaming operators' licences or equivalent authorities issued to a plurality of third parties.[60] The Court erred in so reasoning. For the reasons set out above, the language of the 1995 Agreement is not *"wide enough to embrace the possibility of multiple authorities"*;[61] on the contrary, all textual and contextual signifiers point to the parties deploying the words "new gaming operator's licence" as a reference to the fresh issue of the licence which the Trustees had been granted under Pt 3 of the 1991 Act.[62]

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[55] Specifically, the words are apt to ensure that the terminal payment is received by Tatts on capital account rather than revenue account: see Reasons at [142]. Accordingly, the specific construction does not make "commercial nonsense" of the State's promise to make the terminal payment in return for the Trustees' agreement to pay the substantial fees stipulated in cl 3 of the 1995 Agreement and "as compensation for the investment in infrastructure lost": cf Reasons at [157]; Trial Reasons at [101].

[56] The average value of each allocated GME was $35,934 (being the average payment received by the State for each GME allocated: 27,300 GMEs were allocated and $981 million in payments were received: Reasons at [39]).

[57] Cf Reasons at [157]-[158] citing with approval the Trial Reasons at [101]-[102]. Moreover, adoption of the statutory meaning ensured that the contractual and statutory entitlements of the Trustees (assuming the former survived enactment of the latter) remained consistent. There are obvious reasons why "reasonable businessmen in the position of the parties" – and, in particular, a reasonable government in the position of the State – would have considered that desirable: cf Reasons at [158], citing with approval the Trial Reasons at [102].

[58] Reasons at [174].

[59] Reasons at [175].

[60] Reasons at [177].

[61] Reasons at [177].

[62] The correctness of this construction is further apparent when one appreciates that cl 7.1 does not readily apply to the (potentially progressive) issue of numerous authorities to conduct some aspects of gaming by reference to individual gaming machines. How would the "premium payment" in cl 7.1 have been calculated if, for example, a small number of GMEs were issued following the expiry of Tatts' gaming operator's licence, thereafter followed by further batches of GMEs on subsequent dates? Would the "premium payment" be calculated by reference to the first batch of GMEs,

B. From 1996 the Trustees' terminal payment entitlement was found only in legislation

37. The State's conditional obligation to make a payment under cl 7 was extinguished by the 1996 Amendments in one of two ways, both of which were dealt with, and erroneously dismissed, by the Court of Appeal.[63] The *first* is as a matter of construction of the 1995 Agreement. The *second* is as a matter of the necessary effect of the 1996 Amendments in replacing cl 7 with its statutory equivalent.

B.1 Construction

38. Four errors of principle led the Court to find that, on the proper construction of the 1995 Agreement, cl 7 survived the passage of the 1996 Amendments.

39. *First*, the Court relied upon the fact that the 1995 Agreement imposed continuing obligations over the term of the gaming operator's licence, concluding that this indicated that the agreement was intended to survive the enactment of the 1996 Amendments.[64] So much may be accepted; the State has never contended that the 1996 amendments brought *the Agreement* to an end. Plainly, the agreement continued beyond the enactment of the legislation, as it contained a number of terms with ongoing work to do, which were *not* the subject of the obligation in cl 8 regarding embodiment in legislation. The issue is not whether the 1995 Agreement continued to exist; the issue is whether the objectively discerned intention of the parties was that the obligations in cll 3 and 7 would exist in parallel with the equivalent statutory obligations, once enacted.[65] In this regard, "it would be commercially improbable"[66] to attribute to the parties an intention that they would, upon enactment of the legislation, be visited with concurrent obligations to pay *two* licence fees (in the case of the Trustees) and *two* terminal payments (in the case of the State).

40. The better construction and the stronger textual indication is that the purpose and effect of cll 3 and 7 was to establish contractual obligations pending the enactment of the legislation contemplated by cl 8.1.[67] Following the 1996 Amendments and the introduction of s 35A into the 1991 Act,[68] cll 3 and 7 were no longer enforceable independently of the legislation.

41. At the moment the 1996 Amendments became law, cll 3 and 7 were therefore discharged by agreement. This characterisation is illustrated by assuming that, instead of legislation, cl 8 contemplated that cll 3 and 7 would be embodied in a subsequent, more formal contract. If that second contract did not come into existence, cll 3 and 7 would remain in place and govern the parties' rights.[69] However, if the subsequent agreement contemplated by cl 8 did eventuate, a novation would occur, and cll 3 and 7

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or any and all subsequent batches? Properly construed, "gaming operator's licence" means a single licence – the words cannot be understood as accommodating one or more of the 27,500 GMEs which have been created (and 27,300 GMEs which have been allocated). As with the rebuttable presumption the subject of s 37(c) of the *Interpretation of Legislation Act* 1984, a 'singular/plural' clause of the nature contained in cl 1.1 of the 1995 Agreement cannot be relied upon to subvert the objective construction of the contract (see, for example, *Variety Video v Jones* [2001] NSWSC 5; *Pfeiffer v Stevens* (2001) 209 CLR 57).

[63] Reasons at [211] – [214].

[64] Reasons at [211].

[65] See, eg, *Masters v Cameron* (1954) 91 CLR 353 at 362 per Dixon CJ, McTiernan and Kitto JJ: *"The question depends upon the intention disclosed by the language the parties have employed"*.

[66] Adopting the words of the Court of Appeal in its Reasons at [212].

[67] If it was intended that cll 3 and 7 should have ongoing contractual effect, there was no utility in the cl 8.1 promise to enact that obligation in legislation.

[68] Which subsequently became s 3.4.33 of the Act.

[69] *Godecke v Kirwan* (1973) 129 CLR 629 at 640 per Walsh J; 646 per Gibbs J; *G R Securities v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, 635 – 636 per McHugh JA (Kirby P and Glass JA concurring).

of the 1995 Agreement would be discharged and replaced by the fresh agreement.[70] That is, cll 3 and 7 would, by agreement, be rescinded and substituted with the parties' subsequent compact containing the obligations for the Trustees to pay licence fees and for the State to make a terminal payment.[71]

42. The agreement in cl 8.1 was, in this regard, of a similar kind to the first class of contract identified by this Court in *Masters v Cameron*,[72] save that the parties contemplated that their bargain in cll 3 and 7 would be embodied, not in a further contract, but in legislation. As provided by cl 8.2 of the 1995 Agreement, the evidence demonstrated that legislation was prepared in consultation with the Trustees and was consistent with the parties considering that the 1996 Amendments were apposite to embody their contractual obligations in cll 3 and 7;[73] conversely, there was no evidence that either party regarding the 1996 Amendments as somehow not embodying their cll 3 and 7 obligations.[74]

43. There is no reason to treat the effect of the parties' agreement any differently simply because the subsequent restatement of their obligations occurred via legislation rather than contract. The decisive issue in the contractual context is ascertaining the objective intention of the parties; this applies to both the status of the earlier provisions and whether they are contractually binding before their subsequent restatement,[75] and whether that subsequent restatement is sufficient to "'*abrogate*', '*rescind*', '*supersede*' *or extinguish the old contracts by a* '*substitution*' *of a* '*completely new*' *and* '*self-contained*' *or* '*self-subsisting*' *agreement*".[76] Here, the same considerations apply.[77] What did the parties intend would become of cll 3 and 7 upon their enactment in legislation? Or, put another way, following that enactment did the parties intend for their obligations under cll 3 and 7 to have a dual, and separately enforceable, existence in both contract and statute, or did they intend for the supervening statute to become the sole repository of those obligations? The answer must be that the parties intended for the statute, once passed,[78] to prevail, to the exclusion of those clauses of the original agreement. This would be the answer of the reasonable businessperson; the alternative construction – whereby the State had two concurrent obligations to make a terminal payment and Tatts had two concurrent

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[70] *Scarf v Jardine* (1882) 7 App Cas 345 at 351 per Lord Selborne LC: *"...there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract"*, cited by French CJ, Crennan, Kiefel and Bell JJ (Hayne J agreeing) in *ALH Group v Commission of State Revenue* (2012) 245 CLR 338 at 350 [28] (***ALH Group***). In *ALH Group*, the High Court recognised that an agreement to extinguish existing obligations did not have to be express but could be implied, and could also be inferred from conduct: see (2012) 245 CLR at 350-351 [31]-[32].

[71] There could be no suggestion, absent explicit contrary indication, of the original clauses conferring rights and obligations in parallel to the new ones embodied in the subsequent agreement. See, eg, *Olsson v Dyson* (1969) 120 CLR 365 at 372 per Barwick CJ; 388-389 per Windeyer J.

[72] (1954) 91 CLR 353 at 360 per Dixon CJ, McTiernan and Kitto JJ: *"the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect."*.

[73] See the witness statement evidence of Peter Gillooly at paras 258-260 and, in particular, the letter from the Treasurer to the Trustees dated 25 January 1996, referred to by him at paras 259-260.

[74] Accordingly, there can be no suggestion that, at the time the 1996 Amendments were passed, either party had sought to resile from the agreement in cl 8.1 to substitute the contractual obligations in cll 3 and 7 with statutory obligations.

[75] *Godecke v Kirwan* (1973) 129 CLR 629 at 638 per Walsh J; 646 per Gibbs J; *G R Securities v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634 per McHugh JA (Kirby P and Glass JA concurring).

[76] *British & Benningtons Ltd v N.W. Cachar Tea Co Ltd* [1923] AC 48 at 67.

[77] *Byrnes v Kendle* (2011) 243 CLR 253 at 284 per Heydon and Crennan JJ. Endorsed in *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640 at 656 – 657 per French CJ, Hayne, Crennan and Kiefel JJ.

[78] If the legislation had not been passed, clauses 3 and 7 of the 1995 Agreement would have continued to apply and govern the parties' relationship: see, eg, *Rossiter v Miller* (1878) 3 App.Cas. 1124, 1151 per Lord Blackburn; *Godecke v Kirwan* (1973) 129 CLR 629 at 640 per Walsh J; 646 per Gibbs J.

obligations to pay licence fees – makes no commercial sense. Further, this intention conforms with the overarching object of the 1995 Agreement to place Tatts and Tabcorp on an equal footing, that is, for each gaming operator to pay licence fees, and for each to have a conditional statutory entitlement to an end-of-licence payment. Once it is accepted that this is the intention to be objectively attributed to the parties, the legal framework that would apply if the restatement was in the form of a contract applies *mutatis mutandis* to the enactment of cll 3 and 7 through the 1996 Amendments.

44. *Secondly*, the Court of Appeal found that sovereign risk was an important consideration in the negotiations, such that it "*would be commercially improbable to attribute an intention to the parties that their rights and obligations under the 1995 Agreement should be spent upon the passage of the legislation provided for by clause 8*".[79] But the existence of sovereign risk cannot justify a conclusion that the parties intended the rights to continue to exist in parallel. If the statutory right was vulnerable to future changes of policy, then *a fortiori* so was the contractual right.[80] The Treasurer's letter, appended to the 1995 Agreement, recorded specifically that future governments might adopt a different position on the terminal payment;[81] its presence in the contract positively speaks *against* a construction which attributes to the parties some belief that the contractual right was a better shield against the realisation of sovereign risk than the statute and therefore intended to continue in parallel with the statute.

45. *Thirdly*, in rejecting the State's submission that, on the proper construction of cl 8 of the 1995 Agreement, cl 7 was no longer enforceable independently of the legislation, the Court relied upon the decision of the New South Wales Court of Appeal in *Bromley v Forestry Commission of New South Wales*[82] for the proposition that contractual rights and statutory rights are capable of concurrent existence.[83] However, that decision is of no assistance to this case. In *Bromley*, the statutory rights *pre-dated* the contractual rights, so there could be no suggestion that enactment of the statute was intended by the contracting parties to bring the contractual rights to an end. Further, as appears further below, the contractual and statutory rights in *Bromley* were (unlike cl 7 and s 35A) not equivalents but, rather, of a substantively different character.

46. *Fourthly*, the Court of Appeal appeared to accept[84] Tatts' submission that the parties' entry into the 1999 Agreement and the 2005 Transfer Deed were inconsistent with the 1995 Agreement having been discharged by the 1996 Amendments. As before, the

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[79] Reasons at [212].

[80] Based on the doctrine of executive necessity, future governments could walk away from the contractual obligation without the need for legislation: see the discussion in Seddon, N, *Government Contracts*, 5th ed (2013), 249.

[81] The conditional entitlement of the Trustees to a terminal payment was the fifth in a suite of six principles set out in the letter in respect of which the Treasurer stated: *"I must, however, make it clear that the statement of principles in this letter does not bind this Government or future Governments and, of course, that the Victorian Parliament has the power at any time to amend existing legislation or pass new legislation affecting your operations or the terms on which those operations are conducted."* The evidence of Peter Gillooly was that a letter of comfort of this kind "provided no comfort at all" (T 608.21-23).

[82] (2001) 51 NSWLR 378, 393 [52] – [57] (***Bromley***).

[83] Reasons at [213].

[84] Reasons at [214] (see also: Trial Reasons at [106] – [119]). It is, however, not clear whether the Court took the view that these subsequent agreements negated a conclusion that the parties intended that the 1996 Amendments should overtake cl 7 of the 1995 agreement *or* a conclusion that the 1996 Amendments had an abrogatory effect *regardless* of the parties' intention. In context, the better view appears to be that the Court was making the latter point, however it is logically unsustainable: if the 1996 Amendments abrogated cll 3 and 7, entry by the Executive into the 1999 and 2005 agreements can shed no light on the intended effect of the statutory amendments passed by the legislature years earlier.

Court erred in its characterisation of the State's submission; there was no contention that the 1995 Agreement was discharged *in toto* by the enactment of the 1996 Amendments. In any event, these subsequent agreements cannot assist the enquiry as to whether, on the proper construction of the 1995 Agreement, cll 3 and 7 were discharged by agreement upon that enactment, for the following reasons:

(a) Tatts' reliance on the 1999 and 2005 agreements called in aid subsequent conduct of the parties for the purpose of construing their 1995 bargain; this is impermissible, it now being well-established that evidence of such subsequent conduct cannot be used to construe the parties' agreement.[85]

(b) Even if evidence of subsequent conduct were admissible to construe the 1995 Agreement, then it is significant that Tatts paid only one licence fee throughout the period of its licence (as opposed to one under the contract and one under the statute). This implies that the parties understood and intended that the obligation under cl 3 would come to an end upon the embodiment of that obligation in legislation rather than the latter event adding a further burden; and, if that was their intention with regard to cl 3, their intention with regard to cl 7 must be taken to have been the same. Moreover, neither the 1999 Agreement nor the Transfer Deed refer explicitly to cl 7. The former deals with cl 3 (only), for reasons mentioned below, while the latter simply effects a transfer of "the rights and obligations of the Trustees" under the 1995 Agreement, as amended by the 1999 Agreement: if cl 7 was discharged or spent before that time, it could not have been a right or obligation transferred to Tatts pursuant to the Deed.

(c) That the parties did not intend for cl 3 to continue in parallel to the statutory obligation is reinforced by the genesis, object and purpose of the 1999 Agreement. That context was set out in the evidence adduced by Tatts through its former Chief General Manager, Peter Gillooly, whose evidence was in summary that:[86]

(i) the ATO changed its tax treatment of the licence fee: having earlier allowed the Trustees to deduct the fees, it determined in mid-1998 that,

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[85] In *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 163-164. Mason P and Ipp AJA agreeing. Heydon JA (as he then was), held that post-contractual conduct is not admissible on the question of what a contract means as distinct from the question of whether it was formed. Thereafter, in *Agricultural & Rural Finance Pty Limited v Gardiner* (2008) 238 CLR 570, Gummow, Hayne and Kiefel JJ recognised a "general principle that 'it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made" (at 582, [35]), citing *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603; *Administration of PNG v Daera Guba* (1973) 130 CLR 353 at 446 per Gibbs J). Since this Court's decision in *Agricultural & Rural Finance*, appellate courts have rejected the relevance of post-contractual conduct in construing the parties' agreement: see *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [56]-[58] per Beazley JA (Gleeson JA agreeing), [120]-[121] per Basten J; *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107 at [358] per Campbell JA (Barrett JA and Sackville AJA agreeing); *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216 at [10] per McClure P (Newnes JA and Le Miere J agreeing). In *Lederberger v Mediterranean Olives Financial Pty Ltd* [2012] VSCA 262, the Victorian Court of Appeal said (at [26]-[28]) that the inadmissibility of subsequent conduct evidence for the purpose of construing an anterior agreement had "been put beyond doubt by the High Court", citing *Pacific Carriers Ltd v BNP Paribas* (2004) CLR 451 at 461-462 [22], *Equuscorp Pty Ltd v Glengallan Investments* (2004) 218 CLR 471 at 483 [34], and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]. These cases confirm the 'objective' approach to construction of contracts, a necessary corollary of which is that subsequent evidence of what the parties intended or thought they had agreed is irrelevant to the task of construction.

[86] Witness statement evidence of Peter Gillooly at paragraphs 271-285.

after 30 June 1999, it would treat the fees, which were based on a percentage of profit, as being non-deductible;[87]

(ii) the Trustees approached the Treasurer to see if the licence fee could be re-structured;[88] and

(iii) negotiations ensued[89] which culminated in an apparent agreement that the profit-based licence fee would be replaced with one based on gaming machine revenue.

This then led to the repeal of ss 135A, 135B and 135C of the 1991 Act, and the insertion of a new subsection (3A) in s 136 of that Act.[90] Following this new section receiving Royal Asset,[91] the State and the Trustees entered into the 1999 Agreement.[92] Gillooly's evidence did not explain why the 1999 Agreement was required, having regard to the antecedent changes in the legislation. Nevertheless, the 1999 Agreement *removed cl 3* from the 1995 Agreement altogether, giving it no conceivable work to do after execution of the 1999 Agreement. This is because it deleted – but did not replace – all those parts of the clause which had effect after 30 June 1999. Seen in this light, the amendments made by the 1999 Agreement actually assume cl 3 had no work to do in parallel to the statute; if it did, the amendments would have had to include a clause making provision for what was to occur post-30 June 1999.[93] So even if subsequent conduct is relevant to construction of the 1995 Agreement, the 1999 Agreement does not assist to demonstrate a mutual understanding or intention that cll 3 and 7 would continue in parallel with their statutory equivalents.

B.2 Abrogation by force of the statute

47. The Court below considered and rejected the proposition that the 1996 Amendments impliedly abrogated Tatts' contractual right to compensation (ie, that the contractual obligations came to an end as a matter of the intended effect of the statute).[94] Three errors of principle attend this conclusion.

48. *First*, the Court relied on *Bromley*[95] to conclude that the 1996 Amendments did not abrogate cl 7, saying the legislative amendments *"did not impliedly abrogate the contractual right to compensation ... because they were capable of concurrent existence."*[96] However, in applying *Bromley*, the Court overlooked a critical fact

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[87] Letter from the Australian Taxation Office to M Poole of Price Waterhouse dated 30 June 1998 (TAT.0017.0001.0160); Letter from the Deputy Commissioner of Taxation to Tattersall's Gaming Pty Ltd (with enclosures) dated 2 July 1998 (TAT.0006.0006.0045).

[88] Letter from D Jones to Victorian Treasurer (A Stockdale) dated 29 October 1998 (TAT.0002.0007.0003).

[89] Letter from A Stockdale and Victorian Minister for Finance and Minister for Gaming (R Hallam) to D Jones dated 28 December 1998 (TAT.0008.0020.0008); File note of P Gillooly of telephone conversation with A Stockdale dated 11 January 1999 (TAT.0002.0009.0007); Letter from D Jones to A Stockdale dated 29 January 1999 (TAT.0002.0009.0010).

[90] The section provided as follows: *"(3A) A gaming operator must ensure that, in addition to amounts payable under subsection (3), there is paid, in respect of such periods as the Authority determines, to the Authority to be paid into the Consolidated Fund, 7 per centum of the daily net cash balances during that period of all gaming machines of the gaming operator at approved venues."*

[91] On 8 June 1999. See section 2 of the *State Taxation Acts (Amendment) Act* 1999 (Vic)

[92] The 1999 Agreement is dated 28 June 1999.

[93] If the parties understood and intended that cl 3 survived in parallel with the statute, the amendments would have incorporated the equivalent of new subsection 136(3A).

[94] Reasons at [213] – [214].

[95] (2001) 51 NSWLR 378, 393.

[96] Reasons at [213].

which distinguishes that case from this one. In *Bromley* the contractual and statutory rights were fundamentally different so that the repeal of the latter did not abrogate the former. The contractual right dealt with compensation payable to a landowner for damage done to its land when trees were removed; the statutory right dealt with royalties payable to the landowner as consideration for the trees so removed.[97] The discussion by the NSW Court of Appeal in *Bromley* in fact accepts that, if the statutory and contractual rights had dealt with the same subject matter, repeal of the former could have resulted in abrogation of the latter.[98] There is no doubt that, as contemplated by cl 8, cl 7 and s 35A respectively dealt with *precisely* the same subject matter. Accordingly, if *Bromley* has any direct relevance to this case it stands for the proposition that, where the enactment of a statutory right leaves the contractual right without "any work to do", the contractual right may be impliedly abrogated.

49. *Secondly*, the Court held that the statutory term was not expressed in terms which unequivocally made clear that the contractual right was abrogated. But, one might ask rhetorically, what construction can one sensibly ascribe to the statute other than bringing the antecedent contractual right to an end? Three possibilities have been identified as to the effect of s 35A upon its enactment in 1996:

(a) The *first possibility* – for which Tatts contended below – is that the Trustees thereafter had two concurrent rights to payment. Attributing this intention to Parliament would be wholly irrational. Why would Parliament seek to confer a windfall on the Trustees? This is not only commercially nonsensical, it is also inconsistent with the context in which the statute was passed – namely, an agreement to put the Trustees on a level playing field with Tabcorp, and a specific term in that agreement which contemplated that *the obligation* to make a terminal payment (not some different or additional obligation) would be embodied in legislation. The language used in s 35A suggests Parliament was doing just that, picking up the contractual right and translating into a right with legislative status. The Court of Appeal apparently accepted the absurdity of concluding that the contractual right was unaffected by the 1996 Amendments, with its enigmatic acknowledgement (considered further below) that "[p]ossibly, the right to compensation provided for in cl 7 of the 1995 Agreement could not have co-existed with the right to compensation for which the Act provided until the 2009 amendments ...".[99]

(b) The *second possibility* – for which the State contended below – is that one right was replaced with another right, and the earlier in time – the contractual right - came to an end. This construction of the legislation would promote the object of the antecedent agreement as it would afford the Trustees parity with Tabcorp (both having conditional statutory rights to a terminal payment, with no additional contractual right on the Trustees' part), and would not lead to the position where both the Trustees and the State were visited with two imposts (licence fees and terminal payment, respectively).

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[97] *Bromley* at 392 [46] per Mason P, Heydon JA and Ipp AJA agreeing. Mason P held that the statutory compensation scheme had not abrogated the right to compensation under contract because: with respect to the 1989 amendments, the right to royalty under the *Forestry Act* and to compensation under the lease were different in character and vindicated different interests of the landholder (at 391, 397, 398); and with respect to the 1984 amendments, the legislative scheme went beyond the scope of the compensation provision in the lease, thus the statutory and contractual rights were capable of concurrent exercise, notwithstanding that a windfall might ensue to the lessee (at 393, 397 and 398).

[98] In *Bromley* Mason P at 392 [45] referred to the compensation clause in the contract being left "plenty of work to do" by the statute, concluding (391 [43]) that, as such, it could not be held to have been impliedly abrogated by the statute.

[99] Reasons at [214].

(c) The *third possibility* is that the amendments abrogated the contractual rights for as long as there remained a possibility of payment under the statutory provision. Neither party contended for this construction, however this appears to be the conclusion reached by the Court of Appeal at paragraph 214 of the Reasons.[100] On this reasoning, the contractual right 'sprang up' again once s 3.4.3 was passed, negating the possibility of any further gaming operator's licences issuing. There is no textual or contextual signifier which could possibly justify giving the statute such a meaning; nor is there any authority which would support affording it such an operation. If the statute had the effect that the contractual right "could not co-exist" with it, then how did the contractual right become revived? The words used in the penultimate sentence of paragraph 214 of the Reasons imply that cl 7 was "repealed" for "some of the time" but not for the "rest of time" (ie, the possibility of payment under s 3.4.33 was nullified). This conclusion, with respect, wants for a legal and conceptual foundation.[101]

The Court's conclusion in this regard is anomalous for a further reason: if s 3.4.3 had not been passed, the cl 7 right would (on the Court's reasoning) not have been resuscitated. However Tatts would not have been entitled to payment under the statute because *as a matter of fact* the government had determined not to issue any further gaming operator's licences but, rather, to adopt a new, venue operator-based gaming regime.[102] The Court therefore ascribes to s 3.4.3 the very *opposite* effect to that which it was evidently intended to secure.

50. The second construction above must prevail. The Court of Appeal correctly acknowledged (albeit it only as a possibility) that the right under cl 7 could not co-exist with the right to statutory compensation. However, the mechanism deployed by the Court to overcome this result was misconceived. As a matter of law, the only conceptually sound conclusion is that the Trustees' contractual right to payment in cl 7 was simply replaced with its statutory right to payment in s 35A.

51. The abrogation of Tatts' contractual right following its enactment in statute finds support in the cases dealing with State agreements. The enactment of the contractual right to compensation in statutory form is closest to that category of statutory agreements that are *"given the force of law as if enacted in the ratifying legislation"*.[103] Upon the enactment of such agreements, the contractual clause is

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[100] "Possibly, the right to compensation provided for in cl 7 of the 1995 Agreement *could not have co-existed* with the right to compensation for which the Act provided *until* the 2009 Amendments prohibited the issue of a new gaming operator's licence under Division 3 of Part 4 of Chapter 3. But, even if this is so, it does not follow that the right to payment under cl 7 of the 1995 Agreement was *forever eliminated* by the introduction of the 1996 amendments ... The clause was always capable of applying in circumstances where the statute did not provide for compensation, and thus the fact that the Act may have provided for a right of compensation for some of the time *does not imply the repeal of the clause in relation to the rest of time*" (emphasis added.)

[101] Further, if the contractual right did not "co-exist" with the statutory right, then the 1995 Agreement which was novated to Tatts in 2005 via the Transfer Deed did not contain an enforceable cl 7.

[102] See, eg, the Premier's media release of 10 April 2008.

[103] See: Warnick, L, "State Agreements" (1988) 62 *ALJ* 878, p.882&ff cited in Seddon, N, *op cit*, p.123. Warnick classifies statutory agreements into four categories: (1) agreements given force of law as if enacted in the ratifying legislation; (2) agreements that are approved in the legislation, coupled with a specific grant of authority and a direction to perform; (3) agreements that are approved in the legislation, coupled with a specific grant of authority only; (4) agreements that are simply approved by the legislation.

"converted" into a statutory provision, thereby losing its contractual character.[104] This conversion of the right from contract to statute is a logical corollary of the supremacy of Parliament, and may be seen as a species of merger.[105] Whether or not this is so, it is beyond question that Parliament has the power to abrogate contractual obligations;[106] accordingly, once a contractual provision is picked up and afforded statutory force, the primacy of legislation entails that the parties' rights and obligations under the contract are extinguished and replaced by the statute.

52. *Thirdly,* the Court found that the State's entry into the 1999 Agreement and the 2005 Transfer Deed "*confirmed the existence of the 1995 Agreement*" and thereby negatived its abrogation by force of the 1996 Amendments.[107] However, in terms of abrogation, it is plain that the Executive's entry into the 1999 Agreement and the Transfer Deed is incapable of casting any light on the effect of the statutory provisions enacted years earlier by the Parliament. Further, and in any event, the fact that these agreements purportedly "confirmed the existence of the 1995 Agreement" is of no assistance in answering the question whether *cl 7* survived the passage of the 1996 Amendments; for the reasons identified above, it did not.

C. <u>If cl 7.1 survived the 1996 amendments, it was abrogated by the 2009 amendments</u>

53. The differential approach taken by the Court below to the impact of the 2009 Amendments upon the statutory right on one hand, and the contractual on the other (presuming that both were extant), gives rise to a remarkable result: Tatts' right to payment subsists notwithstanding deliberate action taken by Parliament to deprive the statutory right of its operation.

54. Accepting that clear words are required to abrogate a contingent contractual right, the Court of Appeal's scant reasons[108] on this subject want for an explanation as to how one reconciles the "legislative resolve"[109] manifest in Parliament's enactment of s 3.4.3 to eliminate the possibility of the conditional trigger of the statutory right occurring – thereby "emasculating" it[110] – with the proposition that this same deliberate action left the parallel contractual right untouched. Although raised by the

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[104] See, eg, *Sankey v Whitlam* (1978) 142 CLR 1 at 77 per Stephen J; Mason J at 89-90; 106 per Aickin J; *Wik Peoples v State of Queensland* (1996) 187 CLR 1 at 99-100 per Brennan J (Dawson J agreeing) and 256 per Kirby J; Campbell, E, "Legislative Approval of Government Contracts" (1972) 46 *ALJ* 217, 217 and 218.

[105] According to the doctrine of merger, a debt or security by simple contract will be extinguished by ("merged in") a speciality security given for the same, if the remedy on each is coextensive and the later security is of a "higher efficacy" than that which it is sought to replace: see, eg, *Chitty on Contracts*, 25th ed (1983) p 902&ff. The doctrine is based upon a policy that there shall not be two subsisting remedies, one upon a covenant and another upon a contract by the same person for the same amount: *Skinner v M'Kenzie* (1884) 6 ALT 165 per Higinbotham J; see further *Deane v City Bank of Sydney* (1918) 25 CLR 215. It applies by operation of law, so is not dependent upon the intention of the parties to the underlying contract (*Skinner v M'Kenzie* (1884) 6 ALT 165), although if the parties expressly seek in their contract to exclude the operation of the doctrine, effect may be given to that intention (*Commissioner of Stamps v Hope* [1891] AC 476 at 483-484). The State is not aware of any examples of the doctrine applying in the case of a contractual right which is the subject of a supervening statutory right; that may be because (as next discussed), where the enactment of legislation is expressly or impliedly inconsistent with the continued existence of a contractual right, the statute will necessarily put an end to that contractual right.

[106] See, eg, the discussion in *Perpetual Executors and Trustees Association of Australia Limited v Federal Commissioner of Taxation* (1948) 77 CLR 1 (***Thomson's case***) at 17-18 per Latham CJ (McTiernan J agreeing); 25, 28, 30, 31-32 per Dixon J; 37 per Williams J (Parliament can repudiate the exemption ... by putting an end to the contract by legislation which is expressly or impliedly inconsistent with its further existence"); *Magrath v Commonwealth* (1944) 69 CLR 156 (***Magrath***) at 170 per Rich J; 175 per McTiernan J; 183 per William J; Seddon, *op cit*, pp 271-274 (and cases there cited).

[107] Reasons at [214].

[108] Reasons at [216]-[217].

[109] Reasons at [59].

[110] Reasons at [65].

State in submissions, the Court's judgment contains no reference to *Thomson's case*[111] and *Magrath*[112] which stand for the proposition that "[a] statute destroys all contracts which stand in the way of its operation".[113] Contrary to the Court's Reasons,[114] the State's argument was not premised upon the 'specific; construction of "new gaming operator's licence" in cl 7; if the clause bore that meaning, there would be no need to resort to any argument that the entitlement was abrogated by passage of the 2009 Amendments.[115]

55. The proposition is simply this: if the contractual right under cl 7.1 is engaged, as the Court found, then that engagement is in direct conflict with – "stands in the way"[116] of – the operation of s 3.4.3, which was, as the Court also found, intended to deprive the payment entitlement of its trigger, *viz*, the issue of a "new gaming operator's licence".

56. It is illogical that Parliament would have intended to negate Tatts' statutory payment entitlement while leaving its parallel contractual entitlement intact. According to the Court of Appeal's decision, Parliament's emasculation of the conditional entitlement in s 3.4.33[117] was inutile. Parliament cannot be taken to have intended that s 3.4.3 would be ineffective to achieve the object of eliminating the entitlement to compensation by leaving the contractual right on foot. Once it is accepted that s 3.4.3 manifests a legislative intention to nullify Tatts' right to a terminal payment, it cannot be concluded that any parallel right under the 1995 Agreement survived; it is impossible to give concurrent effect to both s 3.4.3 and cl 7.1. That being so, the principles identified in *Thomson's case* and *Magrath* apply to require the conclusion that, even if cl 7.1 survived the enactment of the 1996 Amendments (which for the reasons set out in section B, it did not), it could not be taken to survive the enactment of s 3.4.3.

D. The GMEs do not satisfy the generic meaning of 'new gaming operator's licence'

57. Even if the specific construction of "new gaming operator's licence" contended for the State is rejected (along with the aforementioned arguments regarding the 1996 and 2009 legislative amendments), the appeal ought still succeed on the final ground of appeal, namely, that the Court of Appeal erred in finding that the GMEs issued to multiple licensed venue operators were "equivalent in substance" [118] to Tatts' gaming operator's licence such that their issue triggered a payment under cl 7.1.

58. As the Court of Appeal found, whether the GMEs satisfied the generic construction of "new gaming operator's licence" turned on whether the differences between the old and new forms of authorisations result in rights which cannot be regarded as equivalent in substance. The State embraces the test, but quarrels with the conclusion. The differences between the two regimes are sufficiently material that, even on the generic construction applied by the Court of Appeal, the condition in cl 7.1 was not satisfied by the issue of GMEs. The Court of Appeal repeated the learned trial judge's

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[111] (1948) 77 CLR 1.
[112] (1944) 69 CLR 156.
[113] *Thomson's case* at 28 per Dixon J; see also at 17-18 per Latham CJ (McTiernan J agreeing) 37 per Williams J; *Magrath* at 169-170 per Rich J, 175 per McTiernan J; 183 per Williams J.
[114] At [217].
[115] Of course, at no time prior to the 2009 Amendments being passed – indeed, at no time prior to Hargrave J's decision at trial–was there any indication that the rights under the contract differed from those under the statute enacted in pursuant of cl 8, or were perceived by the parties to differ.
[116] Cf Reasons at [217].
[117] Preceded as it was by the Premier's statement that the gaming operators would not be entitled to compensation (see Trial Reasons at [222]).
[118] Reasons at [180].

error of dismissing the relevance of those aspects of the authority conferred by the gaming operator's licence[119] that are absent from the authority conferred by the GMEs[120] (which – unsurprisingly given the limited nature of that authority – are not even styled as 'licences'[121]). This was even though some elements of the "conduct of gaming" as defined in the 1991 Act and again in the Act – *viz*, the service, repair and maintenance of gaming equipment – are expressly excluded from the authority conferred by GMEs.[122]

59. Moreover, there is a real and substantial difference between the duopoly rights previously conferred upon Tatts and Tabcorp when compared with those now conferred upon the holders of GMEs. The differences cannot be overcome by aggregating the rights conferred by GMEs and venue operator's licences.[123] *First*, there is no contractual foundation for construing the term "new gaming operator's licence" as the product of marshalling together the rights conferred by two distinct types of authorities.[124] *Secondly*, this construction of the 1995 Agreement ignores the fact that at the time of execution of the 1995 Agreement and during its currency, holders of gaming operator's licences were prohibited from holding venue operator's licences.[125] The Court of Appeal sidestepped this by pointing out that, as first enacted in 1991, the 1991 Act did not contain this prohibition and reasoning it therefore ought be "*taken as within the contemplation of the parties, that the Act might again be changed ... so as to enable or require gaming operators to be also venue operators.*"[126] But this permits a *possibility* of what may happen in the future to triumph over the facts in existence at the time the parties struck their agreement.

60. Finally, the Court of Appeal purports to demonstrate the correctness of its conclusion on the substantial similarity of the regimes by reference to two hypotheticals. Neither is apt to make the point the court intends. *First*, the Court stated that if all venue operator's licences were put up for tender and all were issued, along with the GMEs, to Tatts, Tatts would undoubtedly not be entitled to claim payment as the totality of rights conferred on Tatts would amount to a new gaming operator's licence.[127] This conclusion does not follow, but the hypothetical is in any event so improbable as to be of no utility. It presupposes that the State would conduct wholesale licensing reform of the gaming industry by moving from a dual licence structure to one with thousands of individual entitlements, only to revert to the duopolistic structure in practical effect. *Secondly*, the Court hypothesised that, instead of GMEs, the State had issued as many new gaming operator's licences to as many new licensees as there are venues in which Tatts previously carried on gaming operations. The Court suggests it could not be doubted that Tatts would be entitled to a payment in those circumstances.[128] But this not only assumes a critical change in the legislation – the repeal of the prohibition on venue operators from being gaming operators – but presupposes that individual venue operators would be given the authority to service, repair and maintain gaming machines that were not their own, as well as (critically) *supply* gaming machines to

[119] See s 14 of the 1991 Act and s 3.4.2 of the Act.
[120] See s 3.4A.2 of the Act.
[121] This is also the reason why it was presumably considered unnecessary to include a specific provision in the legislation negativing the possibility of GMEs being treated as "gaming operator's licences" – cf s 3.4.1A, in its reference to venue operator's licences.
[122] See s 3.4A.2(2)(c) of the Act (re GMEs); cf s 3.1.4 of the Act and s 3(2) of the 1991 Act ("conduct of gaming").
[123] Cf Reasons at [193]
[124] Cf Trial Reasons at [164]. Endorsed by Court of Appeal: Reasons at [193].
[125] Section 91A of the 1991 Act.
[126] Reasons at [190].
[127] Reasons at [189].
[128] Reasons at [194].

other venues. Again, this state of affairs is, with respect, so improbable as to render the example meaningless and unhelpful.

Part VII: Legislation

61. As directed by the Court on the grant of special leave, the statutory provisions relevant to the appeal and relied on by the parties will be provided in an agreed book at the time of filing the Appellant's Reply.

Part VIII: Orders

62. The Appellant seeks the following orders:

(1) The appeal be allowed.

(2) That the orders of the Court of Appeal of the Supreme Court of Victoria dated 4 December 2014 and paragraphs 1 and 2 of the orders of the Honourable Justice Hargrave dated 27 June 2014 be set side and in their place order that:

a. The proceeding be dismissed.

b. The Respondent (plaintiff) pay the Appellant's costs of the appeal and the Appellant's costs of proceedings numbered SCI 2012 4689 and S APCI 2014 0075, to be taxed on a standard basis in default of agreement and payable forthwith.

i. the appeal;

ii. Supreme Court of Victoria Court of Appeal proceeding number; and

iii. Supreme Court of Victoria proceeding number.

(3) The Respondent forthwith pay the Appellant the sum of $540,467,887.92 paid to it pursuant to the orders dated 27 June 2014 plus interest from 27 June 2014 until the date of repayment.

(4) Liberty to apply in connection with the rate or quantum of interest.

Part IX: Estimate

63. The appellant estimates it will require three hours for presentation of its oral argument.

Dated: 19 June 2015

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