HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: SKYCITY ADELAIDE PTY LTD
Appellant

and

TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. **This appeal** turns on the meaning of "gross gambling revenue" in a Casino Duty **Agreement** between the appellant and first respondent. In construing that term, the double use of the term "revenue" as the subject of the definition and as a matter bearing on its interpretation has potency in the construction exercise. The Court of Appeal found to the contrary, seemingly on the basis of *Owners of Ship* ***Shin Kobe Maru*** *v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419. However, even in the field of statute, the statement in *Shin Kobe Maru* should be not be (and has not been) taken to be an inflexible rule. That is *a fortiori* in the field of commercial agreements. When the term "revenue" is given due regard in construing "gross gambling revenue", the converted credits when wagered fall outside of that concept.

3. The statement in *Shin Kobe Maru* was said to stem from *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503. That was an unstable basis for the statement to take on the status it now has. But in any event, the statement has been described as the "orthodox" view, most recently by this Court in *ASIC v King* (2020) 270 CLR 1 at [18].

4. However, this Court has opted not to treat the statement in *Shin Kobe Maru* as an inflexible rule: *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [3], [38], [54]; *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1 at [34].

5. In the field of commercial agreements this Court has emphasised the need to have regard to the whole of the agreement and the understanding of a reasonable businessperson: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [121]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 254 CLR 640 at [35]. Treating the choice of the label used by the parties as a matter of significance that is relevant to the construction exercise is consistent with these principles.

6. It is also consistent with the approach taken in the field of statute: *Project Blue Sky Inc v Australian Broadcasting Corporation* (1994) 181 CLR 404 at 419, see also *ASIC v Westpac Securities Administration Ltd* (2019) 272 FCR 170 at [22]. Labels used to distill a concept to be addressed in a definition are part of the context. Such words are not arbitrary or "acontextual" (*R v A2* (2019) 269 CLR 507 at [163]), and should be given work to do.

7. Further, there is a body of intermediate appellate court decisions that: (a) reluctantly have regard to the statement in *Shin Kobe Maru* (*Esso Australia Resources v FCT* (2011) 199 FCR 26); (b) do not treat the statement as an inflexible rule (*Singh v Lynch* (2020) 103 NSWLR 568; *FCT v*

Auctus Resources Pty Ltd (2021) 284 FCR 294); or (c) have no regard to the statement and treat the defined term as colouring the definition (*Streller v Albury City Council* [2013] NSWCA 348; *Heffernan v Comcare* (2014) 218 FCR 1; *Greater Shepparton Council v Clarke* (2017) 56 VR 229).

8. The statement in *Shin Kobe Maru* is inconsistent with the approach adopted in the United Kingdom: *Chartbrook Ltd Persimmon Homes Ltd* [2009] 1 AC 1101 at [17]. It is also inconsistent with the views expressed in leading texts: Herzfeld & Prince, *Interpretation* at [3.50]; Lewison & Hughes, *The Interpretation of Contracts in Australia* at [5.11]; Bailey & Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* at [18.6].

9. Accordingly, regard should be had to "*revenue*" as part of the context from which the meaning of "*gross gaming revenue*" should be drawn: AS [39], [46] cf CA [35], [37], [47]. This is not a case like *Shin Kobe Maru* itself where recourse to the words the subject of the definition would not advance matters, cf AS fn 49. Rather, there is ample scope in the present case for "*revenue*" to inform the meaning of the expression in the light of the particular structure in terms of the definition, including the ellipsis in the expression "*amount*": AS [60]-[63]

10. The appropriateness of having regard to "*revenue*" is buttressed by its ordinary meaning in commerce, business, accounting and taxation. That meaning connotates a focus on the in-flows to a business or the increase in its economic resources: see the authorities at AS fn 21. Such a meaning is consistent with and promotes the operation of the definitional provision as it would be understood by a reasonable businessperson: AS [59], [62]; AR [3]-[4].

11. The application of the correct construction of the clause to the agreed facts is that the direction of the flow of the benefit is all one way from the appellant to the customer, whether the customer takes the benefit in the form of cash or a "*free spin*". In neither case does the appellant receive revenue or an "*amount*" within the definition (AR [6]).

12. It is the appellant's perspective that is relevant (*London Clubs Management Ltd v Revenue and Customs Commissioners* [2020] 1 WLR 5144 at [44]), and nothing "*comes in*" to it: *FCT v* ***Cooke*** (1980) 10 ATR 696 at 703-5.

13. None of the other arguments of construction require any different conclusion:
    a. If the converted points are viewed as a chose in action, the surrender or extinguishment of the debt, whether in the form of payment of cash or the use of the converted credits as a free spin, does not constitute revenue (AS [68]-[71], AR [6(i)]).
    b. *Warner Music Australia Pty Ltd v FCT* (1996) 70 FCR 197 does not assist the respondent: AR [8], *Cooke* at 705.

c. What a customer may do on a *later* occasion by way of a legally distinct transaction is irrelevant to the inquiry: AR fn 1, *Mullens v FCT* (1976) 135 CLR 290 at 301, cf RS [12].

d. Neither the context of a commercial contract constituting the voluntary agreement by which the appellant will pay a fair rent for access to a valuable monopoly nor the harm minimisation purposes of the ***Casino Act*** *1997* (SA) support disregarding the relevance of "*revenue*" or interpreting the clause uncommercially (AS [73]-[75]).

14. **Special leave to appeal** should be refused on the grounds of insufficient prospects and lack of public importance.

15. The context for the Cross-Appeal is important:

a. when s 17 of the *Casino Act* authorises an agreement to deal with interest and penalties, it is contemplating distinct concepts: interest as compensation and penalties as punishment;

b. s 52 of the *Casino Act* has already imposed penalties for evading duty and making knowingly false or misleading statements relevant to the amount of duty (AS fn 23);

c. cl 11 of the Agreement reflects that the parties have reached an agreement on interest but have not reached any agreement on penalties to supplement the work of s 52; and

d. cl 11 sits in the Agreement as a commercial instrument in which interest should be understood as compensatory within general law principles and constraints.

16. The respondents have failed to engage with the conceptually distinct nature of interest and penalties, as reflected in the authorities (CA fn 11, 12, 13, *Madad Pty Ltd v FCT* (1984) 4 FCR 420), and the statutes (JBA items 4, 6-7, 9-10). The authorities and statutes point decisively against blurring interest and penalties.

17. The answer to the respondents' first argument is that it overreads the work of s 51:

a. the provision does no more than create an additional enforcement mechanism for the obligation to pay interest as generated under the agreement;

b. the agreement is not reduced to a "*mere factum*" (RS [66]) upon which s 51 applies; and

c. as a result, general law principles and constraints upon the award of interest remain intact.

18. The respondents' second argument fails to grapple with either CA [101] and [107]-[110] or the language of the parties in cl 11:

a. the parties have agreed upon an interest mechanism, not upon a penalty; and

b. the parties have not used the language that is typical in those cases where default and payment of tax is to lead to interest which is to operate as a penalty.

12 September 2024

Justin Gleeson

Justin Gleeson SC