HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A10/2024
File Title:	SkyCity Adelaide Pty Ltd v. Treasurer of South Australia & Ai
Registry:	Adelaide
Document filed:	Form 27F - Respondents' Outline of oral argument
Filing party:	Respondents
Date filed:	12 Sep 2024

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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

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF PROPOSITIONS

The Appeal **- the contractual text is paramount**

2. The definition of "gross gambling revenue" does not include the word 'revenue'. The operative terms that must be construed are "gross amount received by the Licensee … for or in respect of consideration for gambling". This composite phrase, words selected by the parties, should be given its natural and ordinary meaning unless some other course is "clearly required" by the contractual context or purpose: **RS [21]-[22]**; *PMT Partners v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310 (**JBA pg 498**); *ICAC v Cuneen* (2015) 256 CLR 1, [77] (**JBA pg 319-320**)

Context, Purpose and the Use of the Term *Revenue*

3. The use of the word 'revenue' in the label as a piece of context does not clearly require a different meaning of the actual statutory text. It is itself susceptible of multiple meanings and may have been selected simply for convenience: **RS [35]-[36], [41]**.
4. The broader situation of the CDA in a hierarchy of statutory and regulatory instruments themselves referring to 'revenue' and 'monetary value' is also relevant context:
   4.1. *Gambling and Administration Act 2019* (SA) ss 5, 4, 15, 16, 61;
   4.2. *Casino Act 1997* (SA) ss 2A, 3A, 3, 5, 16, 17, 42B (**JBA pg 12 – 15, 21 – 22, 36**)
   4.3. Approved Licensing Agreement (**Casino Act s 16, JBA pg 21**);
   4.4. Casino Duty Agreement (**Casino Act s 17, JBA pg 22**) – cl 1.1 (Definitions), cl 5 (Liability for Casino Duty), cl 6 (Payment of Casino Duty) and cl 12 (Systems for Payment of Casino Duty) (**CAB pg 93**);
   4.5. Control Standards (Casino Act s 38) – GM02 – cl 1 (Objectives) and cl 2 (Minimum Standards / Controls) (**CAB pg 139**); IC03 – cl 2 (Minimum Standards / Controls) and cl 3 (Standard Operating Procedures) (**CAB pg 145 – 147**).
   4.6. Code of Practice (**Casino Act s 41B, JBA pg 36**)
5. As to purpose, the *Casino Act* has purposes of, *first,* extraction of value (tax) by the State from gambling revenue arising from the operation of the casino, and *second,* harm minimization (s 2A of the *Casino Act*): **RS [46].**
6. The statutory concept of Casino Duty and the methodology in the Control Standards is a *sui generis* mechanism by which the extraction of value by the State is measured and determined. It is idiosyncratic. Principles derived from income tax or accounting have no obvious bearing on the meaning of words used in this contractual context.

7. The process of measurement is the clip of the ticket, the spin of the wheel – it does not matter what the source is; that is, how the ticket was come by or the spin of the wheel authorised. That which is measured is the total value wagered less the prizes paid.

The composite phrase – "… for … consideration for gambling"

8. The term *gambling* is defined in s 3 of the *Casino Act* as "the playing of a game for monetary or other stakes and includes making or accepting a wager" (**JBA pg 13**).
9. Consideration is not defined in the Casino Duty Agreement. It is a term of legal art and must have its well-established common law meaning. The foregoing of a debt can be valid consideration at law.
10. The 'turns left' (takes cash), 'turns right' (wagers) dichotomy is oversimplified, pays too little attention to the contractual text, and focuses solely on the relationship between Casino and customer: **Reply [6]**
11. If the customer 'turns right', which they can do at any time (including well after earning the credits, on a wholly separate 'wagering occasion'), they do not take a 'free spin' (**RS [51]; cf Reply [6][d], (e)**). A 'free spin' voucher, like a non-negotiable chip, is "very different from" a chip or credit that "represent[s] money deposited by the gambler, or money which he has won or been given to encourage him to bet": ***London Clubs Management Ltd v HMRC*** [2020] 1 WLR 5144, 5155 [43] (**JBA pg 1255**). The customer wagers the credits as consideration. The face value of the debt becomes the amount wagered on gambling (**Case Stated, CAB pg 30, [48](h), (i), (j);** *London Clubs,* [41] (**JBA pg 1255**)). Benefit flows to the Casino in the reduction of its liabilities because an enforceable debt against the Casino has been extinguished (**cf Reply [6](h)**). An "amount" is "received" "in respect of consideration for gambling".
12. Further, if:
    12.1. the customer loses he or she has had their chance and associated entertainment.
    12.2. the customer wins he or she has had their chance and associated entertainment plus the benefit of the 'monetary prize' accruing on the win. The Casino deducts the value of the 'monetary prize' from its Casino Duty liability.
13. The precise arrangements as between the Casino and the customer in relation to the generation of points, their conversion to credits, and the flow of benefit to the customer are not to the point. Whether turning left or right, the customer is still facing the Casino. The outcome for the *Casino*, not for the *customer*, is the focus, and that outcome has consequences for a third party, namely the State and the complex scheme of regulation by which it licenses the Casino.

Cross-Appeal **– the CDA authorises penalties, or creates a freestanding liability to pay**

14. The express statutory authorisation in ss 17 and 51 authorising the imposition of "interest *and penalties*" is sufficiently clear to create a source of power inconsistent with operation of the common law and equitable doctrines against penalties in contract: **RS [75]ff**.

15. The characterisation of the State's construction as an insufficiently explicit diminishment of the court's jurisdiction asks the wrong question (**J [104] (CAB pg 185**)). The starting point is divining parliamentary intention as manifest in the words of the statute, read as a whole, with respect to 'interest and penalties' referable to 'late or non-payment of casino duty'. Textually, this is a single authorisation which covers the field with respect to payments agreed in addition to the duty itself, *not* two separate authorisations.

16. A number of matters of context confirm this. First, there can only be one licenced casino in South Australia – a monopoly (***Casino Act,*** **s 7, JBA, pg 15**). Second, the entities involved are the Crown and a corporate entity which fits the description of 'suitable' to hold that licence and the financial undertaking that entails (***Casino Act,*** **s 21, JBA, pg 23**). The contract (CDA) authorised by the statute cannot be understood separately from the licence to operate the casino (***Casino Act,*** **s 17, JBA, pg 22**).

17. Third, s 51(2) unambiguously demonstrates a parliamentary intention to exclude the operation of the doctrine. The regulation making power, when the statute is read as a whole, is a gap filler to deal with the exigencies of an expired or terminated CDA and should, in light of s 17(2), be read as complimentary with s 51(1) and not as additional standalone power to it (**RS [83], J [109] (CAB pg 186)**). The word "penalties" must have the same meaning in s 51(1) and (2) in light of the almost identical text (**RS [78]**).

18. The penalties doctrine is not in the category of basic rights, freedoms or entitlements to which the threshold of 'clear', 'unmistakable', 'abrogation', 'abolition' etc would normally apply, and even if it were, the express words used ("interest and penalties") and these matters of context more than suffice.

19. Alternatively, the creation of an enforceable debt which is statutory in origin and self-sufficient in enforceability without reference to the contract provides an independent, standalone right in the hands of the creditor which does not depend on the contract. Section 51 is not procedural, it is substantive, creating both the liability and providing for its enforcement, regardless of whether s 17 and/or the CDA created under it might also provide other mechanisms. The contract in this scenario only provides quantum, not the basis for liability or 'heads' of recovery (**RS [73]**).

Dated: 12 September 2024

T N Golding KC

M E Boisseau