STATE OF VICTORIA v TATTS GROUP LIMITED (M83/2014)

Court appealed from: Supreme Court of Victoria (Court of Appeal) [2014] VSCA 311

Date of judgment: 4 December 2014

Date special leave granted: 15 May 2015

In 1995, the appellant ("the State") entered into an agreement with the respondent ("Tatts") to ensure that Tatts and Tabcorp Holdings Limited ("Tabcorp") would operate on an equal footing in the gambling market. Clause 7 of the agreement provided that a terminal payment would be made to Tatts "if the gaming operator's licence expires without a new gaming licence having issued to Tatts" unless no such licence was issued or such a licence was issued to Tatts. This was subsequently given legislative force. In 2003, Parliament consolidated the State's gaming legislation into the *Gambling Regulation Act* 2003 and the terminal payment continued under that Act (s 3.4.33). In amendments in 2009, the effective monopoly of Tatts / Tabcorp was ended and the Act provided for venues to own and operate gaming machines through "gaming machine entitlements" ("GMEs"). Tatts did not apply for any GMEs. In August 2012, the gaming licences held by Tatts and Tabcorp expired. No terminal payment was paid to Tatts.

Tatts issued proceedings in the Supreme Court of Victoria for damages for, inter alia, breach of the 1995 agreement. The trial judge (Hargrave J) found that the issue of the GMEs constituted the issue of a "new gaming operator's licence" and awarded Tatts damages of $450 million plus interest.

In its appeal to the Court of Appeal the State contended that the phrase 'a new gaming operator's licence' in cl 7 of the 1995 Agreement had a specific limited meaning: a 'gaming operator's licence' issued under the 1991 Act or a gaming operator's licence issued under Division 3 of Part 4 of Chapter 3 of the 2003 Act. The Court rejected that contention and found that the phrase had the broad generic meaning that Tatts contended: 'any licence or authority of substantially the same kind as Tatts' existing gaming operator's licence'. Their conclusion was based on a number of considerations, including the natural meaning of the words.

The Court (Nettle, Osborn and Whelan JJA) noted that cl 7 contemplated that Tatts would receive compensation for the 'investment in infrastructure lost' and that the right to compensation was prima facie the value of the licence, but was conditional upon the grant of a new licence to a third party and limited by the amount of the licence fee paid by that third party. There was nothing in this fundamental scheme to suggest that 'a new gaming operator's licence' must be granted under the 1991 Act.

Also, the context in which the agreement was made supported the view that the purpose of cl 7 was to provide compensation for the loss of the gaming business upon the expiry of the existing licence whilst ensuring that compensation was limited by reference to the premium received by the government (if any) for any new licence authorising the continuation of the gaming previously conducted by

Tatts. This contextual material supported the same conclusion as the structure of cl 7 itself, namely, that there was nothing in this fundamental scheme to support the conclusion that 'a new gaming operator's licence' must be granted under the 1991 Act.

The Court further found that there was no good commercial reason advanced by the State to justify the Court giving the specific meaning to the phrase. Accepting the specific meaning would make commercial nonsense of the State's promise to make the terminal payment in return for Tatts' agreement to pay the substantial fees stipulated in clause 3 of the 1995 Agreement and 'as compensation for the investment in infrastructure lost'. Such a construction of the phrase would lead to an unjust result and should be rejected where a reasonable competing construction, which produced a commercial result consistent with the purpose or object of the 1995 Agreement, was available.

The grounds of appeal include:

- The Court of Appeal erred in finding that the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement meant not a new gaming operator's licence issued under the *Gaming Machine Control Act* 1991 (Vic) (as it might be amended re-enacted or replaced from time to time) but any statutory authority whose effect was to confer on the holder substantially the same rights as were conferred on the respondent by its gaming operator's licence at the time of its expiration.

The respondent has filed a Notice of Contention which contends, inter alia, that the Court of Appeal erred in the construction of s 3.4.33(1) of the *Gambling Regulation Act* 2003 (Vic) by holding that the words "gaming operator's licence" in s 3.4.33(1)(b) referred only to a licence granted under Division 3 of Part 4 of Chapter 3 of the Act.