HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Aug 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A10/2024
File Title:	SkyCity Adelaide Pty Ltd v. Treasurer of South Australia & Ai
Registry:	Adelaide
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	15 Aug 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A10 of 2024**

BETWEEN: **SKYCITY ADELAIDE PTY LTD**
Appellant

and

TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

APPELLANT'S REPLY

I PUBLICATION

1. This submission is suitable for publication on the internet.

II REPLY

Reply to respondents' essential contentions on the appeal

2. The parties are *ad idem* on most of the underlying facts, but depart on some important questions of characterisation and approach to those facts when set against the critical language of the clause in dispute.

3. **Relevance of 'revenue':** The first main difference is that the respondents urge that the double use of the critical term 'revenue' within the definitions, even if relevant (RS [16]-[19]), is ultimately of little assistance because of the 'indefinite import' of that term (RS [35]-[39]). In framing the submission this way, the respondents seek to downplay the significance of the appellant's submissions in chief concerning the limits of the *Shin Kobe Maru* principle (AS [42]-[63]). By contrast, the appellant maintains that the Court should hold that the present disputed contractual provision does not attract the *Shin Kobe Maru* strictures, with the result that the ordinary conception of 'revenue', as derived from commerce and business transactions, and evidenced in more detailed accounting and taxation principles, is of central if not determinative significance in resolving the constructional dispute.

4. The critical point which the appellant then draws from the ordinary conceptions of revenue is that what is required to be identified is something, by way of money or its equivalent, *coming into* a business; something which could sensibly be recorded *on a revenue account*; something where the *flow of benefit* is in the direction of the business. That conception of 'revenue' is reflected in the very definition of 'gross gambling revenue' – in the 'gross amount received by the [appellant] during the period for or in respect of…'. To fall within this definition, and swell the tax base upon which the duty will be levied, there must be the steady focus on what might be seen to have *flowed in benefit* to the appellant.

5. **One or two 'legally distinct transactions'?** The next critical difference, which flows from the previous point, is whether the respondents are correct to assert (RS [50]) that the appellant has wrongly conflated, for the purpose of the clause, 'two legally distinct transactions'. The appellant says no, particularly when the *direction of the flow of benefit* is carefully examined.

6. Recall the critical, sequential, nature of the transaction as it unfolds:

   (a) the customer has a card recording *funds* (built up by the customer's cash contributions) and *points* (granted by the appellant);

   (b) on a wagering occasion, the customer enters the card into a machine to receive *credits*;

   (c) there are two types of credits: credits sourced in the customer's *funds* as recorded on the card; and credits sourced in the customer's *points* which have been *converted* into credits provided the customer has wagered enough of its *funds* to pass the 'gate';

   (d) once the customer converts points into credits, the *benefit*, inherent in the original grant of the points, is now ripe to be realised. The customer has a binary choice: the customer can take the cash now reflected in the converted credits, by ending the wagering occasion. Or the customer can use those converted credits to make a wager;

   (e) at this point in the sequential transaction, the *direction of the flow of benefit* is all one way: from the appellant to the customer. The customer takes that benefit either in the form of cash or in the form of what is aptly described as a '*free spin*';

   (f) if the customer 'turns left' and takes cash, the respondents (correctly) do not suggest that the appellant has earned any 'revenue', or, to use the language of the disputed clause has 'received' any 'amount' 'for or in respect of consideration for gambling…';

   (g) the appellant's case, at its simplest, is that equally, if the customer 'turns right' and takes the free spin, the appellant has not earned any 'revenue', or, 'received' any 'amount' 'for or in respect of consideration for gambling…';

   (h) rather, whether the customer turns left or right, there is a straightforward flow of benefit in one direction: *from* the appellant *to* the customer.

   (i) it follows that to argue that, on the wagering of converted points, the appellant has 'forgone' or 'surrendered' a debt or chose in action (RS [37], [48], [52]) misses the point. To the extent that the converted points generate a debt or chose in action (which must be regarded as subject to substantial contingencies), that debt is 'forgone' or

'surrendered' *whether the customer turns left or right*[1].

7. **A missing 'the'?** Thirdly, the respondents reject the appellant's argument that the words 'gross amount received … for or in respect of consideration for gambling' invite analysis of whether an amount of money or its equivalent was received for or in respect of the Converted Credits (and thus negate an exclusive focus on the ultimate consideration) because the word '**the**' does not appear before 'consideration' (RS [32]-[34]). Respectfully, that is not a persuasive textual consideration, and the respondents' construction is open to the criticism that it reduces the words 'for or in respect of' to 'as'.

8. ***Warner Music:*** The respondents rely upon *Warner Music Australia Pty Ltd v Commissioner of Taxation*[2]. However, *Warner Music* was not concerned with the meaning of 'revenue', but rather with the question of whether the release, in a subsequent tax year, of a sales tax liability incurred and claimed as a deduction in a previous tax year (albeit not recognised other than contingently in the taxpayer's financial accounts) resulted in a gain, and, if so, whether the gain should be characterised as 'income in ordinary concepts' in that year and not, as the taxpayer contended by way of alternative, on capital account, because it involved the release of indebtedness[3].

Application for special leave to cross-appeal

9. Section 17(1)(c) of the Casino Act contemplates that a casino duty agreement may deal with 'interest' and 'penalties'. As ordinarily understood those concepts are distinct (and are frequently dealt with distinctly in taxation legislation: CA [100]): 'interest' is a form of *compensation* for the State being kept out of money to which it was entitled; 'penalties' operate as a form of punishment and deterrent against non-compliance with an obligation. Clause 11 of the CDA provided that on failure to pay duty in accordance with the CDA the Treasurer may require the appellant 'to pay **interest**' at 20% per annum of the outstanding amount calculated from the due date of payment daily on a cumulative basis.

10. In answering question 3 in the affirmative, the Court of Appeal correctly observed that the concept of 'interest' is well understood, as are the general law principles limiting

---

1 It also follows that the appellant's concession as to what follows if the customer *on a later occasion* choses to wager the cash from converted credits does not destroy its case (cf RS [12]-[13]). That situation, which does not arise in this appeal, might fairly be said to give rise to a 'legally distinct transaction'. At that point, the cash is the customer's cash, unencumbered by any obligations to the appellant. If the customer wishes to wager that cash with the appellant on the later occasion, the appellant *does* receive an *'amount'* which satisfies the definition and swells the tax base, just like any other contribution from the customer's funds.

2 (1996) 70 FCR 197, RS [37].

3 The recognition that the earlier notice of assessment gave rise to a liability which reduced the actual assets of Warner from the moment of its issue, such that the subsequent release resulted in a 'gain' (irrespective of the taxpayer's accounting treatment) was a necessary but not sufficient step in Hill J's consideration of whether there was 'income in ordinary concepts'. The further consideration was the nature of the 'gain'. In that context, the fact that the sales tax when assessed was an ordinary incident of income-producing activities, and deductible for that reason, bore upon the character of the 'gain' produced by the release: see at 210-211.

contractual terms imposing interest in an agreement, and that there was no sufficient reason to consider that Parliament overlaid a different understanding of interest that could extend to an interest provision that would be unenforceable at general law as a penalty (CA [101]).

11. The respondents appear to acknowledge that 'interest' means a rate of interest that is compensatory (RS [77]), however they seek special leave to appeal with a view to advancing two arguments: *first*, that on its proper construction s 51 'takes the matters recorded in the CDA as a *factum* that triggers the imposition of a separate statutory liability to pay duty, interest and penalties', irrespective of the intrinsic validity or enforceability of the obligations under the agreement (RS [64]-[74]); and, *alternatively*, that since s 17(1)(c) authorises the inclusion in a casino duty agreement of interest *and* penalties, the Casino Act authorised the imposition of a penalty including a penalty *by way of interest*, with the result that the validity or enforceability of the payment obligation arising under cl 11 does not depend on whether the clause would be valid or enforceable as an agreement for interest in a private agreement (RS [75]-[83]).

12. The special leave question purportedly identified by the respondents ('the correct approach to interpretation of a statute in determining whether Parliament has excluded a common law principle from a statutory contract': RS [63]) is identified at a high level of abstraction. But the circumstances in which a statute may contemplate, authorise, adopt or make enforceable a part or the whole of an agreement are so multifarious that there is no substantial likelihood that, in resolving the correctness of the respondents' two arguments in this case, assistance would be provided on the approach to be taken in other contexts[4].

13. As to the first argument, the respondents must show that it was wrong to conclude that s 51 did no more than supplement any contractual basis for enforcement of the duty, interest and penalty obligations under the CDA (cf. CA [105]). The overarching structure of the Act, as well as the provision in s 17(4) that a casino duty agreement is to *operate as a deed*, suggests that save where express provision is otherwise made[5], the Act contemplates that a casino duty agreement will retain its essential character as an agreement, and that rights and obligations under it will be determined by the body of law that governs agreements. Considering the scheme of the legislation as a whole, the Court of Appeal was correct to conclude that whilst sub-ss 51(1) and (4) supplemented the enforcement rights arising

---

4 Respectfully, the respondents attribute too much to the proposition made by Edelman J in *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [124] (RS [74]). The extent to which a statute (which is not within the category of cases where all the provisions of the agreement are constituted as part of the statute law) removes what might be thought to be obstacles to enforceability must be context specific. It will be a question of construction whether the obstacles removed relate to the capacity of the contracting party, or whether in some way the principles governing the construction or validity of a provision in an agreement are intended to be removed.

5 See, eg, s 11, which modifies the privity rules that would otherwise apply.

under or in connection with the deed, the content of the obligation in s 51(1) rose no higher than an obligation to pay duty, interest and penalties "in accordance with the casino duty agreement", meaning, in context, in accordance with the body of law that would otherwise govern the construction and enforceability of the provisions of the agreement[6]. Given that the CDA was also intended to operate (and be enforceable) as a deed, it was proper to bring to bear the consideration that, if s 51 were to be construed as making enforceable a provision about interest that would be unenforceable in a suit on the deed, there would be an *effective* ouster of both the general law principles and the jurisdiction of the Court in respect of the rights and obligations of the parties under the deed.

14. As to the second argument, even accepting that a statutorily imposed penalty might conceivably take a form which is calculated in a manner akin to interest, there remained a question whether, given the distinction drawn in s 17(1)(c) between 'interest' and 'penalties'[7], it could be said that the CDA contained a provision that imposed 'penalties'. Clause 11 in terms imposed an obligation 'to pay interest'. *Ex facie,* it did not answer the description of an agreement for or with respect to 'penalties'. Whether a provision that purported to impose a penalty in the same or a similar form would have been effective does not arise.

15. The Casino Act is a bespoke and hybrid form of regulation. Question 3 does not give rise to a question of general principle the answer to which is likely to assist in any controversy arising under any similar regime, whether in South Australia, or elsewhere. Special leave should be refused for that reason. If granted, the appeal should be dismissed with costs.

15 August 2024

Justin Gleeson SC
Banco Chambers
P: (02) 8239 0200
clerk@banco.net.au

Ben Doyle KC
Hanson Chambers
P: (08) 8212 6022
bdoyle@hansonchambers.com.au

Counsel for the appellant

---

6 In determining the interest payable 'in accordance with the casino duty agreement', it is also legitimate to have regard to cl 13.4, which provided that the agreement was governed by the law for the time being in force in South Australia and that, subject to the Casino Act, the courts having jurisdiction in South Australia have jurisdiction in respect of any dispute arising between the parties out of or in respect of the agreement.

7 In the appellant's submission, s 17 contemplates that a casino duty agreement may include interest and penalties but it need not impose both.

IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No. A10 of 2024**

BETWEEN: **SKYCITY ADELAIDE PTY LTD**

Appellant

and

TREASURER OF SOUTH AUSTRALIA

First Respondent

STATE OF SOUTH AUSTRALIA

Second Respondent

ANNEXURE

LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S REPLY

1. *Casino Act 1997* (SA)