TABCORP HOLDINGS LIMITED v STATE OF VICTORIA (M81/2015)

Court appealed from: Supreme Court of Victoria, Court of Appeal [2014] VSCA 312

Date of judgment: 4 December 2014

Date special leave granted: 15 May 2015

Following the float of the Totalisator Agency Board in Victoria in 1994, the *Gaming and Betting Act* 1994 (Vic) provided for the grant to the appellant ("Tabcorp") of an 18-year gaming and waging licence. Section 21(1) of the Act provided for a terminal payment to be made to Tabcorp, in the following terms: "on the grant of new licences … the person who was the holder of the licence last in force … is entitled to be paid an amount equal to the licence value of the former licences or the premium paid by the new licensee, whichever is the lesser". In 2003, Parliament consolidated the State's gaming legislation into the *Gambling Regulation Act* 2003 and s 21(1) was maintained in the same terms in the new s 4.3.12(1). A new "wagering and betting licence" was created under Chapter 4, Part 3A and a new provision, s 4.3.4A(1) was inserted into Part 3 of Chapter 4 which provided that "this Part applies only with respect to the wagering licence and gaming licence that were issued on 15 August 1994 and does not authorise the grant of any further wagering licence or gaming licence".

In amendments in 2009, the effective monopoly of Tabcorp was ended and the Act provided for venues to own and operate gaming machines through "gaming machine entitlements" ("GMEs"). In August 2012, the gaming licences held by Tabcorp expired. Tabcorp issued proceedings in the Supreme Court of Victoria, claiming an entitlement to the terminal payment provided for in s 4.3.12 of the 2003 Act. The issue was whether the allotment of the GMEs amounted to the 'grant of new licences' within the meaning of s 4.3.12. This turned largely on whether the expression '[o]n the grant of new licences' in s 4.3.12(1) meant new licences issued under Part 3 of Chapter 4 of the Act, as the respondent ("the State") contended, or had a broader generic meaning of a licence or other entitlement which authorised gaming in Victoria, as Tabcorp contended.

The trial judge (Hargrave J) concluded that 'new licences' in s 4.3.12 had the specific meaning for which the State contended and, therefore, that the issue of GMEs, although authorising the carrying on of gaming operations, did not amount to the grant of new licences within the meaning of the section.

Tabcorp's appeal to the Court of Appeal (Nettle, Osborn and Whelan JJA) was unsuccessful. The Court noted that s 4.3.4A provided that Part 3 of Chapter 4 applied only with respect to the wagering and gaming licences that were issued to Tabcorp on 15 August 1994 and did not authorise the grant of any further wagering licence or gaming licence. After considering ss 4.3.4A, 4.3.5, 4.3.8, 4.3.9(1) and 4.3.9(2), the Court concluded the only way of reconciling s 4.3.4A and s 4.3.12 was to read s 4.3.12 as providing in effect that, if new licences could still be and were granted under s 4.3.8, the person holding the former licences

would be entitled to be paid the terminal payment. To give it the broader generic meaning for which Tabcorp contended would require a significant departure from the plain and ordinary meaning of the words of s 4.3.12 in the context in which it appeared and thus in effect run counter to what the Court perceived to be the statutory purpose of Part 3 of Chapter 4 of the 2003 Act. This statutory purpose was to preclude the occurrence of the circumstance which could entitle Tabcorp to the specified payment whilst preserving the continued existence of the statutory entitlement. The Court found that Parliament determined not to alter the right to payment in s 4.3.12, and indeed expressly preserved it. But at the same time Parliament determined to deprive that right of any practical content by providing that the pre-condition to the payment could not occur.

The grounds of appeal include:

- The Court of Appeal ought to have held that the words "new licences" in s 4.3.12(1) of the *Gambling Regulation Act* 2003 (Vic) had their ordinary meaning, so that the phrase "on the grant of new licences" in that section referred to the grant of fresh licences which authorised the conduct of wagering and gaming businesses of the same nature as the businesses conducted under the wagering and gaming licence.

The respondent has filed a Notice of Contention which contends that even if the term "new licences" in s 4.3.12(1) had the generic meaning for which the appellant contends, none of (a) the gaming machine entitlements issued to licensed venue operators under Part 4A of Chapter 3 of the Act; (b) the wagering and betting licence granted to Tabcorp Wagering (Vic) Pty Ltd under Part 3A of Chapter 4 of the Act: or (c) the keno licence granted to Tabcorp Investments No 5 Pty Ltd under Chapter 6A of the Act, constituted "new licences" within that generic meaning.