IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M83 of 2015

**ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA**

BETWEEN:

**STATE OF VICTORIA**

Appellant

and

**TATTS GROUP LIMITED**

Respondent

# APPELLANT'S REPLY

## Part I: Publication

1. The Appellant[1] certifies that these reply submissions are in a form suitable for publication on the internet.

## Part II: Submissions in reply on appeal

Construction of clause 7.1

2. *Re Respondent's Submissions (**RS**) [32].* "Transformative" is entirely apt to describe the work done by the adjective "new" in the Court's construction of the composite phrase "new gaming operator's licence" in cl 7.1. Once it is accepted that the words "gaming operator's licence" had a clear and unambiguous meaning at the time cl 7 was agreed (a licence issued under Part 3 of the 1991 Act), it must also be accepted that if one ascribes a generic meaning to the composite phrase "new gaming operator's licence", that clear and unambiguous meaning is being disregarded. The only textual justification for the divergence between the specific and generic meanings (as found by the Court) must arise from the inclusion of the word "new" in the composite phrase. For the reasons set out in the State's primary submissions,[2] giving such a transformative effect to the inclusion of the adjectival "new" was erroneous.[3]

3. *Re RS [37].* Contrary to Tatts' submission, clause 8 is relevant to the construction of "new gaming operator's licence" in cl 7. That is so because cl 8 demonstrates the parties' clear intention that the payment provision in cl 7 would be enacted in legislation in the *short* term, at a time when the words "gaming operator's licence"

[1] The State adopts the definitions used in its Primary Submissions.
[2] Primary Submissions at [24]-[27].
[3] Further, contrary to RS [31] and Reasons [80], the State did not concede and does not accept that a right which was "in substance" the same as a gaming operator's licence issued under the 1991 Act would be caught by the phrase 'a new gaming operator's licence"; this is the very point of its first ground of appeal.

**Date:** 24 July 2015
Filed for the Appellant by:
**Johnson Winter & Slattery**
Lawyers
Level 34
55 Collins Street
Melbourne Vic 3000



Solicitor's Code: 40411
Tel: (03) 8611 1333
Fax: (03) 8611 1300
Ref: Chris Connor
chris.connor@jws.com.au

had a clear and unambiguous meaning (namely, a licence issued under Part 3 of the 1991 Act). Consequently, contrary to the Court of Appeal's reasoning, cl 7 ought not have been construed upon the premise that it was only to have operative effect 17 years' hence.

4. *Re RS [38].* The Court found that "*the negotiations proceeded on the basis that the Trustees would receive a terminal payment ... equivalent to that which had been the subject of provision for a conditional terminal payout to Tabcorp*".[4] This fact was uncontested. Furthermore, Tabcorp's payment was doubtlessly conditional on the grant of the specific licences it held.[5] Thus, in circumstances where parity with Tabcorp was a key mutually known object of the negotiations, it is entirely appropriate (and indeed necessary) to construe cl 7 as making the terminal payment conditional on the fresh grant of the specific licence then held by the Trustees.[6]

From 1996 the Trustees' (and Tatts') terminal payment entitlement found only in legislation

5. *Re RS [40] – [49].* Tatts misapprehends the State's argument that, on the proper construction of the 1995 Agreement, cl 7 was extinguished upon the enactment of the 1996 Amendments. *First*, the State does not contend, as Tatts' submits, that the contractual and statutory rights were the "same" and "existed in parallel".[7] On the contrary, it is to avoid this very circumstance that the State says the Court ought to find that the parties' objective intention was that, *in the event* that legislation contemplated by cl 8.1 was passed, the statute would become the sole repository of the terminal payment entitlement. *Secondly*, the State embraces the proposition that "*there could be no guarantee that any such legislation would be enacted*".[8] This underpins the analogy between cl 8.1 and the first class of contract identified in *Masters v Cameron*. It is the State's case that had the 1996 Amendments not been passed, cll 3 and 7 would have continued to apply and govern the parties' relationship.[9] *Thirdly*, it is unclear on what basis Tatts submits that the applicability of *Bromley* on this question of construction is unaffected by the fact that, in that case, the statutory right pre-dated the contractual right.[10] *Fourthly*, it does not follow by reason of cl 3.1.4(a) and (c) having operation for the balance of the 1999 financial year that the parties intended "*that cl 7 should continue to apply*" following the 1999 Amendments.[11] Rather, the alteration of the terms of cl 3 in no way detracts from the State's submission that the amendments made by the 1999 Agreement actually assume cl 3 had no work to do in parallel to the statute;[12] if it did, the amendments would have had to include a clause making provision for what was to occur post-30 June 1999.

6. *Re RS [50] – [59].* The State's contention that the enactment of s 35A abrogated cl 7 was plainly dealt with by the Court of Appeal: the language used in [213] and [214] of the Reasons speaks in terms of abrogation ("impliedly abrogate", "eliminated" and

---

[4] Reasons at [68].
[5] See: State's submissions in Tabcorp appeal at [16].
[6] The State does not "suggest" that s 21 and cl 7 are identical (cf, RS [38]). Rather, the State submits that the parties intended to agree a payment provision which accorded the Trustees substantively the same rights on expiry of their licence as those bestowed on Tabcorp. In its submissions, Tatts appears to contend that the "Trustees separately negotiated" cl 7 to be different to, and broader than, the terms of s 21. This submission is antithetical to the uncontested primary purpose of the 1995 Agreement, positively relied upon by Tatts and reflected in the express terms of the contract.
[7] RS at [47].
[8] RS at [41].
[9] See: Primary Submissions at [43], footnote 78.
[10] RS at [48].
[11] RS at [49].
[12] Primary submissions at [46(c)], footnote 93.

"destruction") rather than construction.[13] While Tatts submits that the contractual and statutory rights are "not identical",[14] it does not go so far as to contend that cl 7 and s 35A embodied *fundamentally* different rights or concerned different subject matter. The fact that the same fundamental right to a terminal payment exists in both statute and contract distinguishes the present facts from those in *Bromley*,[15] where Mason P found the contractual clause was left plenty of independent work to do by the statute. Tatts is silent on what work cl 7 continued to do *independently* of s 35A following the latter's enactment; which is understandable given that it elsewhere contends that the State could perform both obligations by the satisfaction of either one.[16] Where the subsequent enactment deals with a right of precisely the *same character* as the right previously secured by contract, as occurred here, the contractual right may be impliedly abrogated. While in *Bromley* Mason P referred to valuable contractual rights not being destroyed without compensation unless "the legislation is expressed in unequivocal terms",[17] his Honour also drew attention to the distinction between extinguishment of subsisting rights by necessary statutory implication and by express legislative provision, quoting Gummow J in *Wik Peoples v Queensland*:[18]

> "[Implied abrogation] requires a comparison between the legal nature and incidents of the existing right and of the statutory right. The question is whether the respective incidents are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the right."

7. The genesis, text and context of the antecedent contractual right (cl 7) and the thereafter-enacted statutory version of the same substantive entitlement (s 35A) irresistibly point to the conclusion that the former was discharged by agreement of the parties upon the happening of the latter event as contemplated by cl 8 of their contract, or, necessarily, that it was impliedly abrogated by its statutory replacement.

**Part III: Submissions on notice of contention**

8. The Court of Appeal's finding that the phrase "gaming operator's licence" in s 3.4.33(1)(b) must be construed in accordance with the definition of that phrase in s 1.3 (*viz*, a licence granted under Division 3 of Part 4 of Chapter 3 of the Act) is, with respect, correct. There is no justification for construing the phrase other than in accordance with this defined meaning and the Court of Appeal properly rejected Tatts' contention that, despite the definition, "gaming operator's licence" in s 3.4.33(1)(b) bore a generic meaning.[19]

9. The premise of Tatts' argument is that the words "gaming operator's licence" bore a generic meaning when s 35A (the predecessor to s 3.4.33) was introduced into the 1991 Act in 1996, and that that generic meaning was not lost upon the enactment of the Act in 2003.[20] However, the premise is wrong and the argument cannot, therefore, clear the first hurdle. In this regard, immediately prior to the introduction of s 35A, s 3(1) of the 1991 Act provided, relevantly:

---

[13] Cf: Reasons at [210] – [212].
[14] The rights are only different in substance if one accepts the erroneous conclusion of the Court of Appeal (which is also contested by Tatts' notice of contention) that one entitlement (s 3.4.33) was specific, while the other entitlement (cl 7) was generic.
[15] Where the rights were fundamentally different. See Primary Submissions at [48].
[16] RS at [46] and [55].
[17] Reasons at [214]; *Bromley* at 391 [44], citing *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563.
[18] (1996) 187 CLR 1 at 185.
[19] Cf RS at [83].
[20] RS at [72] and [73].

> **'gaming operator'** means –
> (a) the holder of a gaming operator's licence *under Part 3*...[21]

10. At this time, as the Court of Appeal held,[22] "gaming operator's licence" had a clear and specific meaning under the 1991 Act; it was a gaming operator's licence issued under Part 3 of the Act.[23] Specifically, it was the licence issued under ss 33 and 34, in Division 3 of Part 3 of the 1991 Act (headed "Gaming Operator's Licence"[24]), which conferred the authority set out in s 14 ("... a gaming operator's licence authorises the licensee ..."). When s 35A was introduced into the legislation in 1996,[25] providing for a terminal payment where "a gaming operator's licence ... expires" and "the Authority grants a gaming operator's licence to a person other than the former licensee", it was this clear, specific meaning which was picked up.

11. Thereafter, in 2003, the Act was passed which, as Tatts points out, was merely consolidating legislation.[26] Section 35A was re-enacted as s 3.4.33 of the Act, in Division 3 of Part 4 of Chapter 3 (headed "Gaming Operator's Licence"). No material change was made to its terms. Only one licence styled as a "gaming operator's licence" was provided for by, or referenced in, the legislation. Text and context still, therefore, required the term "gaming operator's licence" to be given its specific meaning, rather than a 'generic' one. This was put beyond doubt by the inclusion, in the Act, of the following definition in s 1.3:

> **"gaming operator's licence"** means a licence granted under Division 3 of Part 4 of Chapter 3.[27]

12. This definition made it impossible to give the term "gaming operator's licence" in s 3.4.33 a meaning other than "a licence granted under Division 3 of Part 4 of Chapter 3" – the same, singular meaning it bore when deployed in other sections of Division 3[28] and, indeed, all other provisions of Chapter 3 and the Act generally.[29] None of the arguments advanced by Tatts for ignoring the plain meaning and effect of the definition in s 1.3 have any substance. For example, the submission that s 3.4.33 was superfluous *by reason of* the definition in s 1.3 is misconceived: the provision stood, prior to the 2009 amendments, to be engaged by the grant of a licence under Division 3 of Part 4 of Chapter 3. In the event a licence did not issue under that Division, s 3.4.33 would not be "superfluous" or "void".[30] Similarly, Tatts' assertion that applying the definition in s 1.3 means that s 3.4.33 does "not appropriately work" confuses 'inefficacy' with a result other than one desired by Tatts.[31]

---

[21] Emphasis added.
[22] Reasons at [151].
[23] See, further, the State's primary submissions at [24], regarding the extent to which "gaming operator's licence" was deployed throughout the 1991 Act and other legislation with its specific meaning of a licence granted to a gaming operator under Part 3 of the 1991 Act.
[24] According to s 36(1) of the *Interpretation of Legislation Act* 1984 (Vic) as in force in 1995 and 1996, headings to Parts, Divisions or Subdivisions into which an Act is divided form part of the Act.
[25] Via the *Gaming Acts (Amendment) Act* 1996, which also amended s 33 so that it provided that "the Trustees or any other person may apply to the Authority for a gaming operator's licence".
[26] RS at [73].
[27] The complementary definition of "gaming operator" (meaning "the holder of a gaming operator's licence", as defined) was also retained in s 1.3.
[28] *Viz*, ss 3.4.3, 3.4.29, 3.4.31, 3.4.32. See Reasons at [51].
[29] Tatts has not pointed to any other provision of the legislation where the term "gaming operator's licence" could or should be accorded a 'generic' meaning.
[30] Cf RS at [80].
[31] Section 3.4.33 always contained a *conditional* payment entitlement. The State's construction of ss 1.3 and 3.4.3 (next discussed), which was accepted by the Court of Appeal, involves no redundancy or superfluity of the kind referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 (cf RS [80]).

13. The Court of Appeal held that s 3.4.3, in conjunction with s 1.3, deprived the entitlement to payment under s 3.4.33 of any ongoing utility.[32] Section 3.4.3 provided:

> This Part applies only with respect to the gaming operator's licence that was issued on 14 April 1992 and does not authorise the grant of any further gaming operator's licence.

14. The evident purpose and effect of this provision was – like its counterpart in Chapter 4[33] – to deprive certain sections in Part 4 of Chapter 3 of any further operation, with immediate effect,[34] and to establish a 'sunset' date on the operation of others, corresponding with the expiry of Tatts' gaming operator's licence.[35] Relevantly for present purposes, it had the effect of eliminating the possibility of any further gaming operator's licences being issued, thereby ensuring that the pre-condition to the payment entitlement under s 3.4.33 (the issue of a licence under Division 3 of Part 4 of Chapter 3) could not be satisfied.

15. Tatts' attempt to differentiate the use of "gaming operator's licence" in s 3.4.3 (its defined, specific sense) from its use in s 3.4.33 (its purported 'generic' sense) cannot be accepted.[36] The Court of Appeal's finding that the expression "inescapably" has the same meaning in s 3.4.33(1)(b) as it does in ss 3.4.29, 3.4.31, 3.4.32, 3.4.33(1)(a) and, in s 3.4.3 itself (*viz*, as defined in s 1.3) is, with respect, undoubtedly correct.[37] Tatts' submissions about the so-called different functions of ss 3.4.3 and 3.4.33 do not offer any cogent basis for applying the definition in s 1.3 to s 3.4.3 but not to s 3.4.33.[38]

16. Finally, Tatts' submission that "*s 3.4.33 was deliberately retained by Parliament*"[39] ignores the full context and effect of the 2009 Amendments. There are a number of provisions in the Part which became inoperative on the introduction of the new regime[40] and Parliament elected not to repeal *any* of them expressly via a piecemeal repeal process as particular sections exhausted their potential operation but, rather, to use the legislative technique embodied in s 3.4.3 and the introduction of a wholly separate Part in Chapter 3 in order to ring-fence the expiring provisions.

**Dated:** 24 July 2015


Wendy Harris
Tel: (03) 9225 7719
Fax: (03) 9225 8808
Email:
harriswa@vicbar.com.au

Robert Craig
Tel: (03) 9225 8410
Fax: (03) 9225 7728
Email:
rcraig@vicbar.com.au

Kane Loxley
Tel: (03) 9640 3217
Fax: (03) 9640 3103
Email:
kane.loxley@vicbar.com.au

**Counsel for the Appellant**


---

Section 3.4.33 is, following the 2009 amendments, no more redundant or superfluous than those other provisions of Part 4 which are undeniably deprived of practical operation by s 3.4.3.

[32] Reasons at [52].

[33] Section 4.3.4A, addressed in the State's submissions in *Tabcorp Holdings Limited v State of Victoria* at [25]&ff.

[34] For example, ss 3.4.29, 3.4.30, 3.4.31.

[35] For example, ss 3.4.32, 3.4.34, 3.4.35, 3.4.36, 3.4.37.

[36] RS at [75] – [78].

[37] Reasons at [51].

[38] RS at [75] – [78].

[39] RS at [81].

[40] See ss 3.4.29, 3.4.30 and 3.4.31, as well as s 3.4.33. Cf ss 3.4.31A, 3.4.31B, 3.4.32, 3.4.34-3.37, which had a continuing operation until expiry of Tatts' gaming operator's licence.