HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

HARRY KAKAVAS APPELLANT

AND

CROWN MELBOURNE LIMITED & ORS RESPONDENTS

Kakavas v Crown Melbourne Limited
[2013] HCA 25
5 June 2013
M117/2012

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

A J Myers QC with P Zappia and R A Heath for the appellant (instructed by Strongman & Crouch)

N J Young QC with N D Hopkins SC for the respondents (instructed by Minter Ellison)

CATCHWORDS

Kakavas v Crown Melbourne Limited

Equity – Unconscionable conduct – Where appellant gambled at first respondent's casino and lost $20.5 million – Where appellant diagnosed as suffering from condition known as "pathological gambling" – Where appellant subject to "interstate exclusion order" under *Casino Control Act* 1991 (Vic) – Whether gambling transactions affected by unconscionable dealing – Whether appellant suffered from special disadvantage making him susceptible to exploitation – Whether first respondent had sufficient knowledge of any special disadvantage.

Words and phrases – "actual knowledge", "constructive notice", "interstate exclusion order", "special disadvantage", "unconscionable conduct".

Casino Control Act 1991 (Vic), ss 76, 77(2), 78B.
Trade Practices Act 1974 (Cth), s 51AA.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. Between June 2005 and August 2006, the appellant lost $20.5 million playing baccarat at the casino in Melbourne operated by Crown Melbourne Limited ("Crown").

2 On 6 March 2007, the appellant issued proceedings against Crown and its employees, Mr John Williams and Mr Rowen Craigie (the second and third respondents), claiming that Crown engaged in unconscionable conduct contrary to s 51AA of the *Trade Practices Act* 1974 (Cth) ("the TPA") and that Mr Williams and Mr Craigie were involved in that contravention. He also claimed compensation for losses suffered by him as a result of Crown's unconscionable conduct under the general law which informs s 51AA[1]. The appellant made other claims as well, but it is not necessary to refer to them here.

3 In the forefront of the appellant's case at trial was the proposition that Crown had incited the appellant, a known problem gambler, to gamble at its casino by incentives such as rebates on losses and the offer of transport on Crown's corporate jet.

4 After a lengthy trial, the primary judge dismissed the appellant's claims and gave judgment for Crown on its counterclaim for $1 million in unpaid debts[2]. On 21 May 2012, the Court of Appeal of Victoria dismissed the appellant's appeal[3].

The issues in this Court

5 In this Court the focus of the appellant's forensic strategy shifted away from the proposition that Crown lured or enticed him into its casino. The emphasis of the case advanced here, by the appellant, was upon the exploitation of the appellant's inability, by reason of his pathological urge to gamble, to make worthwhile decisions in his own interests while actually engaged in gambling.

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1 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 62-63 [5]-[8], 71-72 [40], 74 [46]; [2003] HCA 18.

2 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559.

3 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95.

The appellant submitted that Crown exploited his condition by allowing him to gamble at its casino.

6 The appellant submitted that, on the findings of fact made by the primary judge, he had made good his claim to relief in accordance with the statement by Mason J in *Commercial Bank of Australia Ltd v Amadio*[4] of the "principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created", to relieve the innocent party of the consequences of that conduct. In stating the principle, Mason J went on "to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."[5]

7 The appellant argued that the primary judge and the Court of Appeal erred by giving insufficient attention to the finding by the primary judge that the appellant is a problem gambler, and by addressing instead the question whether the appellant enjoyed equality of bargaining power with Crown. The primary judge and the members of the Court of Appeal erred, so it is said, in failing to have regard to Crown's exploitation of the appellant's special disadvantage when he was actually at the gaming table, that being the time when his pathological urge to gamble adversely affected his ability to make rational decisions in his own interests about the amount and frequency of his wagers.

8 The appellant also claimed to suffer another special disadvantage in that, at the time of his losses, he was subject to an interstate exclusion order (IEO) made in New South Wales by the Commissioner of Police. Because of the IEO, under the *Casino Control Act* 1991 (Vic) ("the Casino Control Act") any winnings payable to the appellant by Crown as a result of his gambling activities were forfeited to the State of Victoria[6]. If he had known that this was the effect of the IEO, he would not have gambled at Crown's casino at all.

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4 (1983) 151 CLR 447 at 462; [1983] HCA 14.

5 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462.

6 *Casino Control Act* 1991 (Vic), s 78B.

9 The appellant submitted that because Crown knew of, or ought to have been aware of, the appellant's special disadvantages, or was sufficiently on notice of them to have been obliged, in accordance with notions of constructive notice, to make further inquiries concerning the appellant's circumstances, Crown ought now be made to disgorge its takings to the appellant.

10 The respondents submitted that, notwithstanding the primary judge's finding that the appellant was affected by a pathologically strong predisposition to gamble, he was not in a situation of special disadvantage, much less a disadvantage which Crown sought knowingly to exploit.

11 The respondents contended that the primary judge's findings of fact support two crucial propositions: first, that the appellant's abnormally strong urge to gamble was not a compulsion which deprived him of the ability to make a worthwhile choice whether or not to gamble, or to continue to gamble, with Crown or anyone else; and, secondly, that Crown's employees did not knowingly exploit the appellant's abnormal interest in gambling. In this regard, the respondents submitted that the appellant presented as a successful businessman able to afford to indulge himself in the high stakes gambling in which he chose to engage. Crown's employees accepted him as he sought to present himself.

12 The respondents also submitted that the appellant's claim to recover his gambling losses should fail on the ground that his gambling was prohibited by statute. Further, the respondents submitted that the appellant would have continued to gamble at other casinos had he not gambled at Crown's casino. Accordingly, he suffered no compensable loss by reason of the circumstance that he happened to be gambling with Crown at the time he suffered his losses. As will become apparent, it is not necessary to address the respondents' submissions in relation to illegality and causation.

13 For the reasons that follow, the appeal should be dismissed. The reasons commence with an overview of the appellant's case and proceed to a summary of the important findings of fact in relation to the dealings between the appellant and Crown. That summary will be followed by a discussion of the appellant's arguments.

Overview

14 The decisions of this Court, in which claims for relief from unconscionable conduct have been litigated, illustrate the necessity for close

consideration of the facts of each case in order to determine whether a claim to relief has been established[7]. The appellant's counsel disavowed any challenge to the primary judge's findings of fact. In due course we will summarise the findings in relation to the salient dealings between the appellant and Crown; but before doing that we should make some general observations by way of an overview of the appellant's case.

15 In advancing a claim based on the principle expounded by Mason J in *Amadio*, the appellant relies upon the standards of personal conduct compendiously described as the conscience of equity. According to Pomeroy's *Treatise on Equity Jurisprudence*[8]:

> "the 'conscience' which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors, – a juridical and not a personal conscience."

16 The conscience spoken of here is a construct of values and standards against which the conduct of "suitors" – not only defendants – is to be judged[9].

17 The principle which the appellant invokes is concerned with a species of equitable fraud. In *Earl of Chesterfield v Janssen*[10] Lord Hardwicke LC

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7 *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61; *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

8 *A Treatise on Equity Jurisprudence*, 5th ed (1941), vol 1 at 74.

9 Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 44-51.

10 (1751) 2 Ves Sen 125 at 155-156 [28 ER 82 at 100], approved in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 491 and in *Blomley v Ryan* (1956) 99 CLR 362 at 385.

explained that it is a "kind of fraud ... which may be presumed from the circumstances and condition of the parties contracting: ... it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other."

18 The invocation of the conscience of equity requires "a scrutiny of the exact relations established between the parties" to determine "the real justice of the case"[11]. Where an appeal is made by a plaintiff to the standards of equity embodied in the *Amadio* principle, the task of the courts is to determine whether the whole course of dealing between the parties has been such that, as between the parties, responsibility for the plaintiff's loss should be ascribed to unconscientious conduct on the part of the defendant[12]. In *Louth v Diprose*[13], Deane J explained the basis on which the conscience of equity is engaged to apply the *Amadio* principle:

> "The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization".

19 In proceeding to consider whether equitable intervention is warranted in this case, a number of points may be made at the outset. First, the principle which the appellant invokes is not engaged by the circumstance that a plaintiff's transaction with a defendant has resulted in loss to the plaintiff, even loss amounting to hardship. In *Tanwar Enterprises Pty Ltd v Cauchi*, Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ said that it is wrong "to speak of 'unconscionable conduct' [as suggesting] that sufficient foundation for the existence of the necessary 'equity' to interfere in relationships established by ... the law of contract, is supplied by an element of hardship or unfairness in the terms of the transaction in question, or in the manner of its performance."[14]

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11 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; [1953] HCA 2.

12 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325 [23]; [2003] HCA 57.

13 (1992) 175 CLR 621 at 638.

14 (2003) 217 CLR 315 at 325 [26].

20 Secondly, equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business. The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position.

21 At the trial of this action the appellant sought to accomplish this task by arguing that Crown and the other respondents should be required to accept responsibility for the appellant's loss because they deliberately preyed upon his personality flaws to entice him to gamble in Crown's casino. That case having failed, the appellant now focuses upon Crown's acceptance of the benefit of the appellant's improvident activities at the gaming tables. That shift in focus is a bold strategy; bold strategies do not always succeed. The particular flaw in the appellant's new strategy is that it reveals a case which consists essentially of a complaint about the outcome of risk-laden activity between the parties conducted in the ordinary course of Crown's business. The appellant seeks to distinguish his dealings with Crown from the ordinary course of its business, but it is difficult to see the special factual foundation required to shift responsibility for his own conduct onto the party whose conduct did not go beyond accommodating the appellant's wish to engage in risky business.

22 It is telling that the parties referred to no decided case in which the doctrine articulated by Mason J in *Amadio*[15] has been successfully invoked by a plaintiff complaining of the net loss suffered on account of multiple transactions conducted over many months with a putative "predator". This circumstance does not mean that the *Amadio* principle cannot apply to multiple transactions, but it does highlight the practical difficulty which confronts the appellant in his claim that the transactions in which he engaged are fairly described as a case of victimisation.

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15 cf *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

23 To focus, as the appellant's case now does, on his state of excitement while he was actually at the gaming table is to lose sight of the reality that he was present at the gaming table on each of these occasions because of decisions voluntarily made by him when he was not in the grip of his abnormal enthusiasm. Importantly in this regard, the appellant does not have the benefit of a finding of fact that he suffered from a continuously operating compulsion which disabled him from choosing to stay away from the gaming tables. It was the appellant's choice – exercised many times over a period of many weeks when he was indisputably not at the tables in the casino in the grip of any gambling frenzy – to put himself in the position in which he might lose money at Crown's tables.

24 Again, it is telling that none of the authorities cited by the parties affords an example of a successful claim by a party who has voluntarily chosen to indulge his or her "special disadvantage" by a decision made when not in the grip of that disadvantage. The observations of Spigelman CJ in *Reynolds v Katoomba RSL All Services Club Ltd*[16], albeit made in the context of a claim in negligence, are apposite here:

> "It may well be that the appellant found it difficult, even impossible, to control his urge to continue gambling beyond the point of prudence. However, there was nothing which prevented him staying away from the club."

25 It is also a circumstance relevant to the justice of the appellant's appeal to the conscience of equity that the activities in question took place in a commercial context in which the unmistakable purpose of each party was to inflict loss upon the other party to the transaction. Gambling transactions are a rare, if not unique, species of economic activity in a civilised community, in that each party sets out openly to inflict harm on the counterparty. In the language of Lord Hardwicke, there was nothing "surreptitious" about Crown's conduct.

26 Generally speaking, it would be an odd use of language to describe the outcome of such voluntary, and avowedly rivalrous, behaviour as the victimisation of one side by the other. This is especially so once the focus of the appellant's case shifts away from his complaint of being lured or enticed into Crown's casino. To describe the business of a casino as the victimisation of the

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16 (2001) 53 NSWLR 43 at 53 [48].

gamblers who choose to frequent it might well make sense in moral or social terms depending on one's moral or social philosophy; but it does not make a lot of sense so far as the law is concerned, given that the conduct of the business is lawful. And the courts of equity have never taken it upon themselves to stigmatise the ordinary conduct of a lawful activity as a form of victimisation in relation to which the proceeds of that activity must be disgorged[17]. As the primary judge observed, "[i]n the absence of a relevant legislative provision, there is no general duty upon a casino to protect gamblers from themselves."[18]

27 A prominent feature of the relationship between the appellant and Crown was that the appellant was a high roller[19]. At times, he made a lot of money at Crown's expense: between 24 June 2005 and 13 March 2006, he had made profits of over $2.69 million on a turnover of around $480.5 million. By August 2006, his gambling with Crown had generated a turnover of $1.479 billion and he had lost $20.5 million to Crown[20]. During and after this period he continued to gamble in other casinos around the world.

28 High rollers typically exhibit an abnormal interest in gambling. That abnormality might be described as pathological; it might also be that it is difficult for an observer to distinguish between a pathological high roller and one who is not. That a high roller may incur substantial losses is always, and obviously (and quite literally) on the cards. Motives other than the profit motive may explain the high roller's behaviour; but whether or not that is so in the case of a particular individual is a question which each high roller is entitled, invoking values of privacy and autonomy, to say is no one else's business. Whatever a high roller's motivation may be, members of that class of gambler present themselves to the casino, and are welcomed by it in the ordinary course of its business, as persons who can afford to lose and to lose heavily. It is for that reason that operators of

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17 The position at common law is discussed in *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at 53 [49], 82 [125]-[126], 85 [141], 88 [152].

18 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [436].

19 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [31], [523].

20 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [32]-[33]. The full details of the appellant's gambling with Crown during this time are set out at [259]-[422] of the primary judgment.

casinos are prepared to incur heavy expenses to attract their patronage away from other casinos. In return for lavish complimentary benefits, high rollers deliberately put at risk, and regularly lose, vast sums of money. Even if it were open to the courts to second guess the legislature's judgment to permit this sort of activity, it would be to descend into incoherence for the courts to require the return of losses suffered by high rollers so as to oblige operators of casinos to close their doors to high rollers while leaving them open to ordinary punters who, while less extravagant in their gambling habits, are also less able to absorb their losses.

29 The purpose of these preliminary observations is to make the point that there is little scope for the intervention of equity to undo the result of transactions undertaken on the unmistakable footing that no quarter is asked and none is given by either party to the transaction, at least so long as the transaction has been conducted honestly in accordance with the rules of the game. It was not suggested that Crown ran a dishonest game.

30 It is necessary to be clear that one is not concerned here with a casino operator preying upon a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds. One might sensibly describe that scenario as a case of victimisation. One could also speak sensibly of a gambler, who presents at a casino with the cash necessary to play the game, as a victim of the casino, if there are factors in play other than the occurrence of the outcome that was always on the cards. For example, the gambler may be evidently intoxicated, or adolescent, or senescent, or simply incompetent[21]. But absent additional factors of this nature, it is difficult sensibly to describe the accommodation by an operator of a casino of a patron's desire to gamble as a case of victimisation. That is especially so in the case of the high roller who has the means, should he or she enjoy a run of luck, to hurt the casino.

31 In the present case, there was no finding that the appellant could not afford to indulge himself as he did, much less that Crown knew that he could not do so.

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21 See *GNOC Corporation v Aboud* 715 F Supp 644 (1989); *Greate Bay Hotel & Casino v Tose* 34 F 3d 1227 (1994); *Hakimoglu v Trump Taj Mahal Associates* 70 F 3d 291 (1995); see also Hallam, "Rolling The Dice: Should Intoxicated Gamblers Recover Their Losses?", (1990) 85 *Northwestern University Law Review* 240.

Nor was there any suggestion that the appellant gambled while intoxicated, or that he was, and was regarded by Crown as, an incompetent card player. He usually[22], though not always[23], gambled at Crown's casino with "front money", that is to say, funds which he brought with him to deposit with the casino for the purpose of gambling as part of the "programs" in which he engaged with Crown. The source of the appellant's funds was not made clear to Crown or for that matter to the Supreme Court at trial; but it is clear that the appellant had access to large sums of money and that he presented himself to Crown as a successful businessman whose pleasure it was to gamble and who could afford to sustain heavy losses. As will be seen, there was no suggestion that Crown was made aware that the appellant had any financial difficulty until the last occasion on which he gambled at Crown's casino, in August 2006.

32 It is in this context that one must consider the appellant's claim that he was victimised by Crown by virtue of his abnormal desire to gamble and his ignorance of the effect of the IEO. These are the features on which the appellant relies to distinguish the dealings between himself and Crown from the general run of the business of a casino.

33 As is apparent from the summary of the appellant's dealings with Crown set out below, he could and did choose to refrain from gambling. He chose to stay away from Crown's casino when it suited him to do so. The appellant knew that he could self-exclude if he chose: he had done so in the past in relation to Crown's casino and others. The primary judge found nothing in the appellant's dealings with Crown which would have suggested to Crown that the appellant could not self-exclude if he decided that it was in his interests to do so.

34 To accept the appellant's claim that, on the occasions he turned up to gamble at Crown's casino, Crown's employees should have singled him out from the other high rollers and refused to accommodate him, would be to cast a burden of responsibility on Crown which goes well beyond refraining from exploitation.

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22 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [259], [270], [285], [293], [302], [312], [326], [328], [340], [344], [347], [350]-[351], [355]-[356], [374], [376], [379], [387], [388], [392], [397].

23 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [274], [306], [383], [386], [404], [411], [414]-[415].

And in any event, having regard to the primary judge's findings, the appellant's likely response would have been to take his business elsewhere.

35 The appellant does not have the benefit of a finding that he would have avoided his gambling losses by staying away from Crown's casino. Indeed, the learned primary judge found that "Harry Kakavas had chosen to gamble. The only remaining choice was where."[24] That the appellant singles out Crown as the target of his attempt to recover losses is not merely relevant to the causation argument raised by Crown, it also causes one to regard with some circumspection the basis of his claim upon the conscience of equity.

36 One basis advanced by the appellant for fixing upon Crown as the "predator" who victimised him is that Crown knew or ought to have known of his pathological enthusiasm for gambling and that his gambling had been associated with his troubled past. But the appellant went to considerable lengths to assure Crown that his troubles with gambling were now behind him when he sought to be re-admitted to Crown's casino. That he did so is a circumstance to be borne in mind in considering his claim upon the conscience of equity.

37 The other basis advanced for fixing upon Crown as the party responsible for the appellant's losses is the effect of the IEO and the alleged knowledge of Crown's employees of its effect upon the appellant's entitlement to retain his winnings. But the appellant does not have the benefit of a finding that Crown's employees adverted to the effect of the IEO or knew that the appellant did not appreciate its effect; indeed, the primary judge's findings are to the contrary.

38 Finally, by way of preliminary observation, once attention is directed to the effect of the appellant's gambling enthusiasm while at the tables, as the occasion on which his special disadvantage was in play, it becomes difficult to see a good reason to single the appellant out as a person suffering from a "special" disadvantage by reason of his "relationship" with Crown. The observations of Mandie JA are apposite[25]:

> "[T]he special disability or disadvantage must be one that exists 'in dealing with the other party' and that puts the person at a disadvantage in dealing

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24 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [427].

25 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 at [33].

> with that other party. Here, the wagers were standard gambling transactions and Crown had no greater advantage over the appellant than it had over any other gambler. The house had an edge as the appellant well knew. If the appellant had gambled less frequently, he may have won less or he may have lost less. If the appellant's wagers had been of smaller amounts, he may have won less or he may have lost less. No doubt there was some limit on what the appellant could afford to lose (although it is not clear on the evidence what that limit was) and if the appellant had gambled less frequently or in smaller amounts, that limit may have taken longer to reach (assuming that he was 'unlucky'). In the long run, the appellant was neither more likely nor less likely to win than any other gambler. These considerations also show that the wagering transactions were in any event not unfair, unjust or unreasonable as required by the *Amadio* doctrine."

The dealings between the appellant and Crown

39 We turn to summarise the salient dealings between the appellant and Crown. The following summary is drawn from the findings of the primary judge.

40 For many years before the end of 2004, the appellant was not welcome at Crown's casino. When he was invited back at the end of 2004, he did not return to the casino until June 2005. The invitation, when it came, was prompted by Crown's understanding that the appellant was gambling large sums of money, which he could evidently afford to lose, with other casinos. At that stage, it was evident that, as the primary judge said: "Harry Kakavas had chosen to gamble. The only remaining choice was where."[26]

41 Ten years previously, the appellant had commenced gambling at Crown's casino in July 1994[27]. He was then aged 27. In the course of 1994 he lost $110,000 of his father's money[28]. He also defrauded Esanda Finance Corporation Ltd ("Esanda") of approximately $286,000[29]. In seeking to mitigate his offence

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26 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [427].

27 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [81].

28 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [82].

29 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [82].

in the ensuing criminal proceedings, the appellant asserted that his fraud was committed to support an addiction to gambling[30]. Crown was sceptical of that assertion[31], believing that it "was a mere pitch, calculated to gain the sympathy of the judge who sentenced him for the Esanda fraud."[32] Nevertheless, in 1995, the appellant was referred by Crown to Dr Jack Darmody, who ran a program for problem gamblers, the Crown Assistance Program[33]. The appellant, to Crown's knowledge, was treated by Dr Darmody for ongoing gambling issues[34].

42 On 8 November 1995, while the criminal proceedings were pending, the appellant applied for and was granted a self-exclusion order by Crown. This order prevented him from gambling at the casino[35]. The primary judge found that no Crown employee knew or believed the appellant's self-exclusion "was to address genuine gambling problems."[36]

43 In 1996, Dr Darmody referred the appellant to Mr Bernard Healey, a clinical psychologist who specialised in gambling related diseases[37]. Mr Healey diagnosed the appellant as a "classic pathological gambler"[38]. Mr Healey, to Crown's knowledge[39], treated the appellant for his problem.

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30 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [1].

31 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [2].

32 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [2].

33 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [94], [467].

34 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [467].

35 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [2].

36 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [471]-[473].

37 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [103].

38 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [104].

39 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [110].

44 In early 1998 the appellant was sentenced to serve four months in gaol for the Esanda fraud.

45 After his release from gaol, the appellant sought revocation of his self-exclusion order[40].

46 The appellant's revocation application included an acknowledgment that the appellant had given careful consideration to the matter and would contact Crown immediately if he had any concerns about his decision[41]. The application was accompanied by a report dated 3 June 1998[42] from Mr Tim Watson-Munro, a psychologist. The report stated that Mr Watson-Munro's treatment of the appellant had been "very successful" and that the appellant "no longer [felt] the pathological compulsion to gamble which had plagued him in earlier times."[43]

47 Crown accepted Mr Watson-Munro's report as true[44] although Mr Bill Horman, one of Crown's employees, regarded it as unsatisfactory, in the sense that he did not believe that the appellant had ever felt a pathological compulsion to gamble[45].

48 On or about 18 June 1998 the appellant's self-exclusion order was revoked, but was replaced by a withdrawal of licence (WOL) to enter or remain in the casino or on Crown premises[46]. The WOL was related to pending armed robbery charges against the appellant[47]. The primary judge found that the WOL

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40 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [113].

41 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [113].

42 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [114].

43 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [114].

44 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [5].

45 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [121].

46 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [122].

47 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [112], [124].

was warranted by the pending charges and was not connected to a concern on Crown's part about the appellant's gambling[48].

49 Between 1998 and 2001 the appellant repeatedly, but unsuccessfully, sought re-entry to Crown's casino and revocation of the WOL. His requests were denied[49].

50 After 2001, the appellant ceased his attempts to return to Crown's casino[50]. In the meantime, on 28 September 2000, the New South Wales Police Commissioner directed that he be excluded from the Star City Casino in Sydney[51] ("the NSW exclusion order").

51 Two employees of Crown, Mr Horman and Mr Craigie, became aware of the NSW exclusion order by early November 2000[52]. The primary judge accepted that their knowledge was Crown's knowledge[53]; further, the existence of the order was recorded in several Crown documents[54].

52 The appellant moved to the Gold Coast in Queensland in about 2000. He held himself out to the world as a very successful Gold Coast businessman who made a lot of money out of property development and managed to combine the roles of real estate salesman and recreational gambler[55].

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48 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [6].

49 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [8], [130], [153]-[154], [157].

50 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [157], [172].

51 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [138].

52 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [144]-[146], [559].

53 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [86].

54 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [144], [150], [166], [559].

55 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [7].

53 In 2000, the appellant chose to exclude himself from Jupiters Casino on the Gold Coast[56]. Crown, through Mr Horman, became aware of this self-exclusion. In July 2002, the appellant told Mr Horman that it was still in place[57].

54 By April 2001, the appellant had also chosen to exclude himself from Burswood Casino[58]. Crown, through its employees, Mr Horman and Mr Peter Fleming, knew of this self-exclusion[59]. In January 2003, Mr Horman referred to the NSW exclusion order in an email to Mr Fleming for the purposes of passing information on to Burswood Casino[60].

55 In July 2003, the appellant met with Mr Ishan Ratnam, the Manager at that time of VIP Services for Crown[61]. During this meeting they spoke about how well the appellant was doing and his trips to gamble in Las Vegas[62]. The appellant asked Mr Ratnam if he could talk to Mr Horman about allowing him to return to Crown's casino. Mr Ratnam mentioned this meeting to other employees of Crown, Mr Williams and Mr Howard Aldridge[63]. The fact that the appellant was said to be gambling in Las Vegas[64] prompted discussion within Crown about

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56 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [137].

57 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [478].

58 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [159].

59 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [479].

60 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [166].

61 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [173].

62 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [175].

63 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [176].

64 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [177].

allowing the appellant back to its casino; but Crown did not respond to the appellant's approach at this time[65].

56 On 27 October 2004, Mr Williams sent an email to Mr Aldridge and Mr Horman as to the steps which would be required for the appellant to return to Crown's casino[66]. Mr Horman initiated some internal checks in relation to the appellant's position and discovered that the appellant had been very successful in business[67].

57 By October 2004, Crown's senior executives, including Mr Williams and Mr Craigie, learned that the appellant was "travelling well" financially, while he was losing money gambling in Las Vegas[68]. Between May and October 2004, Crown's senior executives, including Mr Williams, Mr Craigie and Mr Horman, gave consideration to the appellant's return to the casino[69].

58 On 29 October 2004, there was a meeting of a committee described variously as the "Persons of Interest Committee"[70] or the "WOL Committee"[71]. The meeting considered the question of the appellant's return to Crown's casino. Minutes of the meeting recorded that he was then gambling at Star City Casino[72] in Sydney. The committee concluded that the appellant should be allowed to return to Crown's casino[73].

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65 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [179].

66 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [181].

67 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [188].

68 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [178], [181]-[182], [186].

69 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [177]-[191].

70 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [192]-[193].

71 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [198].

72 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [478].

73 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [195].

59 Although Mr Horman did not himself believe that the appellant had a gambling problem, he thought the appellant should obtain a report from a psychologist or psychiatrist[74]. That was because he wished to protect Crown against an allegation that it had breached a duty of care to the appellant by allowing him to gamble, even though he regarded the appellant's history since 1998 as giving him, in relevant aspects, a clean bill of health[75].

60 Mr Horman brought the IEO to mind in late 2004[76].

61 Crown initiated contact with the appellant in November[77]. On 12 November 2004 Mr Ratnam telephoned the appellant and said that Mr Williams had asked for his number[78]. The appellant was happy for Mr Ratnam to pass this on[79] and said that he was happy to recommence gambling at Crown's casino. Mr Ratnam gave the appellant's number to Mr Williams[80]. Mr Williams did not immediately call the appellant[81], however, and a week later, on 19 November 2004, the appellant called Mr Williams, leaving three voicemail messages[82]. Mr Williams returned the calls, and eventually made contact with the appellant[83]. At that time, some of Crown's officers still had some residual concern about his standing as a "some-time" problem gambler[84]. Crown

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74 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [197].

75 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [493].

76 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [166], [197].

77 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [204]-[205], [212], [214].

78 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [204]-[206].

79 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [204].

80 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [204].

81 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [212], [218].

82 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [218].

83 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [212].

84 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [25], [493].

subsequently informed the appellant that his WOL would be revoked upon the appellant making a written application accompanied by an opinion from a psychiatrist or psychologist stating that he no longer had any gambling problems[85].

62 On or about 8 or 9 December 2004 Mr Richard Doggett, a senior Crown officer, had a telephone conversation with the appellant. Mr Doggett explained that Crown was "being very pedantic with your application ... because you've been excluded from other casinos and you were excluded by the Chief Commissioner of Police in New South Wales"[86].

63 In December 2004, Mr Healey declined to provide the appellant with a report clearing him of gambling problems. The appellant informed Mr Doggett of this fact and Mr Doggett urged the appellant to "try any psychologist"[87].

64 On 9 or 10 December 2004, Mr Doggett met the appellant at Coolangatta Airport to have him sign a letter in respect of his return to gaming with Crown[88]. The letter stated that it enclosed a letter from a psychiatrist or psychologist who had made a current assessment of the appellant. In fact, the appellant had not then been assessed[89].

65 Subsequently, Ms Janine Brooks, a psychologist, prepared a report dated 23 December 2004 to support the appellant's return to Crown's casino[90]. She reported that she was "unable to do an assessment of his suitability for re-admission to [the casino]", but that the appellant had told her that between 1990 and 1998 he was a compulsive gambler but had turned his life around[91].

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85 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [219]-[220], [224].

86 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [222].

87 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [213], [494], [583]-[584].

88 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [223].

89 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [223].

90 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [12].

91 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [225].

She reported that he said "he had conquered his past demons, but if he had a relapse he would again self-exclude."[92] Ms Brooks noted that the appellant was "an intelligent, highly motivated, and goal driven individual who [had] in the past shown himself able to self regulate his behaviour as evidenced by his 'self-exclusion' from Crown"[93]. She referred to the appellant's "relapse plan", which the appellant said he "would not hesitate to implement."[94]

66 The primary judge found that the appellant was perfectly capable of disclosing to Ms Brooks any vulnerability about which he was concerned, but that he did not do so[95]. Further, his Honour found that Crown was entitled to accept the appellant's representations made through Ms Brooks[96].

67 As Crown saw it, the central question in late 2004 was not whether the appellant's gambling was a problem, but whether there remained any of the behavioural issues which had led to the WOL[97].

68 In January 2005, Crown decided to revoke the WOL. Mr Fleming issued a notice to that effect on 9 February 2005. On the same day, Mr Horman noted in an email that "there is no rush to progress this matter."[98]

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92 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [225].

93 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [225].

94 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [225].

95 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [584].

96 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [500].

97 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [471].

98 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [582].

69 Before the appellant recommenced gambling at Crown's casino, he did not suggest to any Crown employee that he had any gambling problems[99]. The primary judge found that[100]:

> "Crown accepted what Mr Kakavas wanted Crown to believe: that, by November 2004, he had become a highly respected Gold Coast businessman whose liking for the gaming tables had caused problems in the past, but who had since conquered those problems to the extent that he had been able to amass wealth from his business activity."

70 In late January 2005, the appellant was invited to be Crown's guest at the Australian Open tennis tournament[101]. The appellant did not gamble at Crown's casino during this visit[102]. However, he met with Mr Williams and, among other things, sought to negotiate the privileges he would receive from Crown upon his return including: the use of Crown's private jet, gambling rebates, accommodation for the appellant and guests, and applicable table limits for bets. These discussions continued after the appellant returned to the Gold Coast.

71 The appellant negotiated vigorously with Mr Williams in relation to the privileges offered to high roller gamblers in Las Vegas, including travel by private jet[103]. Mr Williams said Crown would not be willing to provide its jet until he had made a number of visits[104].

72 The appellant stayed at the Crown Hotel for an evening on 5 March 2005 but did not gamble during this visit[105]. Significantly, the appellant did not

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99 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [8].

100 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [441].

101 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [232].

102 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [238].

103 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [241].

104 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [241].

105 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [243].

gamble on this occasion because Crown would not agree to the hand limit he was seeking[106].

73 We pause to observe that these negotiations reveal that the appellant was capable of making rational decisions in his own interests, and of bargaining in pursuit of those interests. It may also be noted that the WOL was revoked in January 2005; but the appellant did not recommence gambling at Crown's casino until 24 June 2005[107].

74 Between 24 June 2005 and 17 August 2006, the appellant visited Crown's casino on numerous occasions. He entered into premium player agreements[108]. He was provided with lavish inducements to gamble at the casino including the use of a private jet, lucky money[109], special rebates and commissions, cheque cashing facilities, and free food, beverages and accommodation.

75 Between 24 June 2005 and 17 August 2006, the appellant visited Crown's casino to gamble on 28 occasions and entered into 30 separate gambling programs. In that period he "never suggested to Crown that he was other than financially capable of maintaining his high roller status, and keen to do so."[110] Nor did he attempt to employ the self-exclusion mechanism[111]. It is to be noted that he did not gamble at Crown's casino between October 2005 and March 2006.

76 The appellant's "patterns of play between June 2005 and August 2006 were generally consistent with the picture of himself which he sought to present to the world: that of a successful businessman who enjoyed gambling, but with an appropriate awareness of the need for balance."[112] The appellant entertained

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106 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [243].

107 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [259].

108 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [266].

109 "Lucky money" is the payment of a complimentary allowance in cash.

110 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [18].

111 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [18].

112 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [521].

friends at the casino and enjoyed outside entertainment and meal breaks. He also promoted his financial capacity to Crown consistently throughout this period. This self-promotion included a boast that he had a gaming bank of many millions of dollars[113].

77 On his visit on 24 June 2005 (Program 1) the appellant deposited $1 million by way of front money[114]. When he stopped gambling to have dinner with his guests, he was ahead by $1 million[115].

78 On his visits between 1 and 3 July 2005 (Programs 2 and 3) the appellant, again, deposited $1 million front money[116]. On this trip, he ran out of money, at which point Crown agreed to match him dollar for dollar up to $350,000 if he could secure further funds. Crown transported the appellant to a branch of his bank where he withdrew $345,000, which he provided to Crown. The casino matched it by providing credit in a like amount[117]. The appellant used the $690,000 to gamble and lost it all[118].

79 On his visit on 1 September 2005 (Program 4) the appellant deposited front money in the sum of $5 million[119]. Although he lost all of his money, he ended the visit with a previously agreed 20 per cent rebate which amounted to $1,010,000. He transferred this amount directly to his bank for use on his next gambling trip[120].

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113 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [548], [557].

114 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [259]-[260].

115 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [268].

116 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [270].

117 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [274].

118 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [277].

119 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [285].

120 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [291].

80 On his visit on 8 September 2005 (Program 5) the appellant negotiated an agreement with Crown that, if he brought $4 million as front money, Crown would provide him with $1 million credit[121]. Crown records show that the appellant won $2.5 million and returned to the Gold Coast taking with him his winnings and his front money[122].

81 On his 9 September 2005 visit (Program 6) the appellant deposited front money in the sum of $3.5 million[123]. On this occasion, Mr Aldridge authorised the issue to the appellant of various vouchers totalling $17,500[124]. The appellant won $4,550,000[125]. The appellant then repurchased his $3.5 million bank cheque and received a Crown cheque for $4.5 million together with cash of $50,000[126].

82 On his visit of 12 September 2005 (Program 7) the appellant was advised he did not have to bring any front money, as a "special deal" by Mr Williams[127]. On this visit he was granted a non-transferable restricted cheque cashing facility of $4.5 million[128]. The appellant won $2,040,000 on this visit[129].

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121 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [293].

122 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [301].

123 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [302].

124 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [303].

125 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [304].

126 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [304].

127 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [305].

128 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [306].

129 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [311].

83 On 16 September 2005 (Program 8) the appellant brought $2.3 million front money[130]. He lost the $2.3 million, and he did not gamble again on that visit[131].

84 On 4 and 5 October 2005 (Program 9) the appellant brought $1.1 million as front money[132]. On this visit he signed a premium player program agreement which gave him a 0.65 per cent commission on a minimum $4 million turnover[133]. On 4 October, he lost the $1.1 million, but received a commission of $326,362[134]. The following day, the appellant deposited a further $1.1 million, which he lost, but received $200,000 and $38,465 as commission on turnover. The appellant then deposited a third cheque for $1.5 million, and received $87,897 by way of this day's turnover[135].

85 The appellant did not gamble at Crown's casino between October 2005 and March 2006[136].

86 On 6, 7 and 10 March 2006 the appellant returned to Crown's casino (Program 10). He brought $1.5 million front money[137]. At the end of the session on the 6th, he had a balance of $10,000, which he cashed in[138]. The appellant was given a gaming chip voucher for $100,000[139] and he received $200,000 in

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130 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [312].

131 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [314].

132 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [326].

133 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [326].

134 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [327].

135 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [328], [330].

136 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [333].

137 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [340].

138 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [341].

139 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [342].

commission for the turnover on the 6th[140]. He gambled again on the 7th and lost $1.1 million, but was paid $45,242 in commission at the end of this session[141]. The appellant went home to the Gold Coast, but returned on 10 March with a further $4 million front money[142]. At the end of this session he repurchased his bank cheque for $4 million and was given a Crown cheque for $2.4 million together with a further cheque for $200,161 being his turnover commission[143].

87 On 11 March 2006 (Program 11) the appellant used the $2.4 million cheque as front money[144]. The primary judge outlined the appellant's activities as follows[145]:

> "The electronic Crown turnover records … show he gambled on 11 March 2006 from 2.13pm until 3.42pm and lost $446,925, then from 3.44pm to 4.14pm when he lost a further $493,000, and then from 4.10pm to 5.43pm when he won $1,490,000. The plaintiff was entitled to commission of $202,698 on his turnover of $31,184,300. At 5.46pm the plaintiff withdrew $12,698 in cash and received two Crown cheques, one for $3m and the other for $190,000. He then redeposited his $3m cheque at 6.46pm and returned to gamble at 6.48pm until 7.49pm when he won $1,000,000, again from 9.16pm to 9.26pm when he lost $570,000, then from 9.28pm to 10.53pm when he lost $519,950 and then from 9.26pm to 12.21am when he won $2.1m. Following this second bout of gambling the plaintiff was entitled to commission of $255,598 on turnover of $39,322,700. At 12.48am he withdrew $5,598 in cash and received two Crown cheques, one for $250,000 and the other for $5,050,000."

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140 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [343].

141 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [343].

142 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [344].

143 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [345].

144 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [347].

145 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [348].

88 We pause here in the narrative to note that the appellant's conduct on various occasions referred to above affords a practical demonstration of his ability to stop gambling when it suited him to do so. This ability was very much on display in mid-March 2006.

89 On 12 March 2006 (Programs 12 and 13) the appellant deposited front money of $640,161 with Crown[146]. He also deposited a bank cheque for a further $4 million, apparently because he was playing at two different tables simultaneously[147]. He redeemed his $4 million bank cheque and received in addition two Crown cheques for $1 million and $997,374[148]. He deposited his $4 million bank cheque into his Crown account[149]. After further gambling, he again redeemed this cheque along with Crown cheques for $1 million and $126,822 (commission)[150].

90 On 13 March 2006 (Programs 14 and 15) the appellant deposited $4 million as front money[151]. At the end of that day's gambling he withdrew the balance of his winnings and commission as a Crown cheque for $10 million, and redeemed his $4 million front money[152].

91 On 17 to 19 March 2006 (Program 16) the appellant deposited a $4 million bank cheque as front money[153]. On the 17th he gambled for a while, then redeemed his $4 million cheque and received a Crown cheque for

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146 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [350].

147 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [351]-[352].

148 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [352].

149 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [354].

150 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [354].

151 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [355].

152 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [355]-[356].

153 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [360].

$2.2 million, $547 in cash and commission of $196,547[154]. Later that day he resumed playing and finished ahead by $54,500[155]. On 18 March, he redeemed his $4 million cheque and received two Crown cheques for $1.5 million and $350,000 together with $7,474 cash[156]. At the end of 19 March, the appellant was paid a Crown cheque for $150,000 and $149 in cash[157].

92 For the period between 30 March and 3 April 2006 (Program 17) the appellant brought a $1.8 million cheque by way of front money[158]. On 31 March he further deposited a cheque for commission that he had received of $200,000[159]. On 3 April, the appellant deposited a cheque for $1.5 million[160]. He then lost $1,456,000[161]. He was entitled to $91,811 commission, of which he took $90,000 in chips and $1,811 in cash[162]. He then lost again. He was entitled to a commission of $2,490, which was deposited into his Crown account[163].

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154 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [362].

155 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [364].

156 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [366].

157 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [367].

158 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [370].

159 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [371].

160 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [373].

161 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [373].

162 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [373].

163 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [373].

93 On 13 April 2006 (Program 18) the appellant brought a $1.5 million cheque by way of front money[164]. He lost, leaving the casino with $2,912 (including commissions received)[165].

94 On 27 April 2006 (Program 19) the appellant brought a cheque for $1.7 million by way of front money[166]. At one point he received commission of $125,000, which he withdrew as chips[167]. He deposited a further two bank cheques (which appear to have amounted to $500,000)[168]. It appears that he lost it all, but he received another $31,206 commission, which he drew as cash[169].

95 For the period between 3 and 5 May 2006 (Program 20) the appellant brought a $2 million cheque by way of front money[170]. On 3 May he applied for, and was granted, a $500,000 cheque cashing facility[171]. He lost all of his front money, but received commission of $114,335, which he withdrew as $14,335 cash and a $100,000 chip purchase voucher[172]. He lost all of the $100,000[173]. He then drew on the $500,000 cheque cashing facility to purchase an equivalent amount in chips[174]. The next day he deposited another cheque for $1 million, which he withdrew as chips. Of this, it appears that he lost $635,000, but

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164 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [374].

165 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [375].

166 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [376].

167 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [377].

168 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [377].

169 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [377].

170 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [379].

171 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [380].

172 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [383].

173 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [383].

174 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [383].

received commission of $114,900, $14,900 of which he took in cash[175]. He applied for, and was granted, a second cheque cashing facility for $500,000 to purchase chips[176]. He then won $5,194,000 ($4 million and $1.2 million in chips were deposited into his Crown account)[177]. He then lost around $2 million and received $105,000 commission (a $100,000 chip purchase voucher and $5,000 cash)[178].

96 In the early morning of the next day, the appellant deposited $3 million worth of chips into his Crown account and had $1.5 million transferred out[179]. During 5 May he withdrew $2 million from his account as a chip purchase voucher[180]. He received $1,068,000 commission, which he drew as a chip purchase voucher. He deposited a further bank cheque for $2 million and used those funds to draw a chip purchase voucher[181]. He received further commission of $200,000, which he drew as a chip purchase voucher[182]. He later took $5,000 as cash[183]. The appellant was granted a further $500,000 cheque cashing facility, upon which he drew that night[184]. He later deposited a further $94,000 and drew

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175 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [384].

176 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [385].

177 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [385].

178 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [385].

179 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [385].

180 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

181 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

182 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

183 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

184 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

it as a chip purchase voucher[185]. He took his final commission of $42,619 as cash at the end of the night[186].

97 On 11 and 12 May 2006 (Program 21) the appellant produced a bank cheque for $2.5 million, which he drew as a chip purchase voucher on the 12th[187]. He was winning, but drew upon another $500,000 cheque cashing facility to obtain that amount as a chip purchase voucher[188]. He later drew $400,000 as a chip purchase voucher from commissions he had received[189]. He then drew again on the $500,000 cheque cashing facility. He gambled and lost the entire amount[190]; but he received $15,350 by way of commission, which he then took as cash[191].

98 On 18 May 2006 (Program 22) the appellant brought with him $2.5 million as front money. He also used commission of $90,000 in the form of a chip purchase voucher and drew $500,000 on a cheque cashing facility[192]. At the end of this play he received $20,803, which he took as cash[193].

99 For the period between 24 and 26 May 2006 (Program 23) the appellant was given $30,000 in gaming chip vouchers by Crown[194]. He had two bank

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185 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

186 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [386].

187 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [387].

188 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [387].

189 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [387].

190 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [387].

191 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [387].

192 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [388].

193 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [388].

194 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [391].

cheques each for $2 million available to him[195]. He deposited one cheque into his Crown account and drew a chip purchase voucher. It also appears that the appellant drew $500,000 from a cheque cashing facility[196]. On 25 May he paid the second $2 million cheque into his Crown account, and he also used a $500,000 cheque cashing facility[197]. After his gambling on that day, he deposited, in chips, two tranches of $2 million and seems to have redeemed both $2 million cheques[198]. He then lost it all[199]. He drew down the $500,000 cheque cashing facility and lost that too[200]. The appellant continued gambling on 26 May. At the end of this day, the appellant took only his commission of $192,441[201].

100 On 31 May 2006 (Program 24) the appellant brought with him a $2 million cheque by way of front money[202]. He drew $500,000 on the cheque cashing facility[203]. He received $234,000 commission and drew a chip purchase voucher in that amount[204]. The final position at the end of this session was that the appellant had lost $2,230,750; but he received $270,386 commission[205].

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195 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [392].

196 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [392].

197 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [393].

198 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [393].

199 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [393].

200 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [393].

201 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [395].

202 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [397].

203 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [397].

204 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [397].

205 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [398].

101 On 6 July 2006 (Program 25) the appellant had insufficient funds. As the appellant told Mr Williams he was to receive $1.5 million on 7 July through a property settlement, Mr Williams arranged a special $1.5 million credit on the basis that the appellant would repay Crown once settlement had taken place[206]. The appellant lost the entire amount but received $29,624 by way of commission, which he took as cash[207].

102 On 11 and 12 July 2006 (Program 26) the appellant drew from a $500,000 cheque cashing facility[208]. After gambling for a time on 11 July, he was ahead by $1,728,465 and deposited $1,650,000 into his Crown account[209]. On 12 July the appellant won a further $2,084,250 and received $179,274 commission[210]. He withdrew $30,000 from his Crown account and took a Crown cheque for $3.65 million when he left the casino on this visit[211].

103 On 19 July 2006 (Program 27) the appellant brought $390,000 front money and used a $500,000 cheque cashing facility. He lost $932,150 and received $29,239 in commission[212].

104 On 5 August 2006 (Program 28) the appellant called upon a $500,000 cheque cashing facility. He redeemed two cheques for $100,000 and $400,000 respectively[213].

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206 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [404].

207 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [406].

208 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [408].

209 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [408].

210 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [409].

211 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [409].

212 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [411]-[412].

213 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [413].

105 On 11 August 2006 (Program 29) the appellant deposited a bank cheque for $500,000 by way of front money and drew upon a $1 million cheque cashing facility[214]. After losing his front money and the $1 million cheque cashing facility, the appellant signed a counter cheque to Crown for $1 million[215]. This cheque was subsequently dishonoured[216]. It was the basis for Crown's counterclaim.

106 On 17 August 2006 (Program 30), the appellant's final visit to Crown's casino, he deposited a bank cheque in the sum of $298,000, and another for $76,106, then later, another for $2 million[217]. He lost it all[218]; but he received commission of $51,575, of which he used $50,000 to purchase a chip purchase voucher[219]. He received another $2,195 commission, which he took as cash[220].

107 Not surprisingly given these dealings, Crown regarded the appellant as a person of considerable means[221]. Mr Craigie gave evidence that the appellant would have been one of Crown's largest Australian players but not in the same league as Crown's top international players.

108 While the appellant was gambling at Crown's casino, he had the capacity to self-exclude[222]; he had a demonstrated capacity to participate in negotiations

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214 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [414].

215 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [415].

216 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [415].

217 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [420].

218 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [421].

219 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [421].

220 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [421].

221 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [557].

222 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [11].

with Crown involving the cut and thrust of offer and counter-offer[223]; he regularly completed programs with funds to his credit[224]; and he was quite capable of declining to visit Crown's casino – not for a week or even a fortnight, but for considerable periods (eg, January 2005 to June 2005, and October 2005 to March 2006)[225].

109 When the appellant last gambled at Crown's casino, on 17 August 2006, he had a conversation with Mr Williams. Mr Williams gave evidence that this conversation was the first time that the appellant had expressed concern about his losses with him[226]. Mr Williams told the appellant to "have a rest for a while"[227]. The appellant had not, until that day, discussed with any Crown employee the losses he had sustained[228].

110 After 17 August 2006, the appellant repeatedly pressed Crown to allow him to gamble at the casino[229]. On at least three occasions the appellant asked to be allowed to deposit front money into his Crown account, but Crown declined his request[230].

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223 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [18].

224 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [522], [527]-[530].

225 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [18].

226 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [417].

227 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [417].

228 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [418].

229 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [423].

230 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [423].

111 Between August and November 2006, the appellant gambled, and lost money, at casinos in Las Vegas, the Bahamas and New Zealand[231]. According to the appellant, at the time of the trial, he had not gambled since.

112 One should also note that, on a number of occasions between June 1998 and November 2000, the appellant made threats to sue Crown if it did not revoke the WOL[232].

Discussion of the appellant's arguments

113 We turn now to discuss the arguments advanced in this Court on behalf of the appellant. We will deal in turn with the contentions that the courts below erred in failing to appreciate the significance of the primary judge's findings of fact in relation to the appellant's special disadvantages, and in failing to conclude that Crown's employees were sufficiently aware of the appellant's special disadvantages to engage the *Amadio* principle. In regard to this latter issue we will also discuss the appellant's reliance on constructive notice.

The primary judge's approach

114 The first argument advanced on behalf of the appellant is that the primary judge and the Court of Appeal erred in not applying the principle enunciated by Mason J in *Amadio*. It is said that they erred in approaching the matter as if the relevant question was whether the parties enjoyed equal bargaining power rather than addressing the circumstances of the appellant's special disadvantages and their effects upon him when he was at the gaming tables.

115 The primary judge concluded[233]:

> "Crown certainly wanted his custom. People like him fed its business. Crown executives, including the individual defendants, were involved in planning for his return as a high-rolling patron. But Crown had no

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231 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [425].

232 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [115], [117], [132], [141]-[142], [144].

233 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [21].

conception of Mr Kakavas as suffering from any kind of relevant disadvantage. There was, indeed, no inequality of bargaining power, and no exploitation of, or any plan to exploit, any special disability from which Mr Kakavas might have been suffering."

116 In this regard, the primary judge drew upon the reasons of Deane J in *Amadio* rather than the enunciation of principle by Mason J[234]. In the Court of Appeal Mandie JA did not "discern there to be any real difference between the formulations of Mason J and Deane J."[235]

117 The absence of a reasonable equality of bargaining power by reason of the special disability of one party to a transaction, while not decisive, is important given that the concern which engages the principle is to prevent victimisation of the weaker party by the stronger. That this is so can be seen from the following passage from the reasons of Deane J in *Amadio*[236]:

> "The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty (see *O'Rorke v Bolingbroke*[237]). The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the

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234 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [428], [434]-[435], [439].

235 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 at [32].

236 (1983) 151 CLR 447 at 474-475.

237 (1877) 2 App Cas 814 at 822.

burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract' (see per Lord Hatherley, *O'Rorke v Bolingbroke*[238]; *Fry v Lane*[239]; *Blomley v Ryan*[240]).

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (see *Union Bank of Australia Ltd v Whitelaw*[241]; *Watkins v Combes*[242]; *Morrison v Coast Finance Ltd*[243]). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. In *Blomley v Ryan*[244], Fullagar J listed some examples of such disability: 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'. As Fullagar J remarked, the common characteristic of such adverse circumstances 'seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other'."

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238 (1877) 2 App Cas 814 at 823.

239 (1888) 40 Ch D 312 at 322.

240 (1956) 99 CLR 362 at 428-429.

241 [1906] VLR 711 at 720.

242 (1922) 30 CLR 180 at 193-194; [1922] HCA 3.

243 (1965) 55 DLR (2d) 710 at 713.

244 (1956) 99 CLR 362 at 405.

118 Essential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be an unconscientious taking advantage by one party of some disabling condition or circumstance that seriously affects the ability of the other party to make a rational judgment as to his or her own best interests. It may well be that an unconscientious taking of advantage will not always be manifest in a demonstrated inequality of bargaining power or in a demonstrated inadequacy in the consideration moving from the stronger party to the weaker; but the abiding rationale of the principle is to ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction.

119 That having been said, Mandie JA did not accept the appellant's contention that the primary judge had "rejected established law"[245]. Mandie JA concluded that the appellant[246]:

> "has failed to demonstrate that the judge's conclusion that the appellant was not in a position of special disadvantage was erroneous. The appellant's argument was that he was in a situation of special disability or disadvantage because he lacked the ability to control the frequency with which he gambled and the amount of money that he wagered or to make rational decisions about those matters. The judge rejected that argument and in my view was entitled on the evidence to do so."

120 If this conclusion is correct, it is unnecessary to come to a final view on the question agitated by the appellant as to the orthodoxy of the approach of the primary judge and his Honour's ultimate conclusion.

121 That is because the shift in the appellant's forensic strategy, away from his enticement case to a focus on his impaired ability actually to leave the gaming tables, directs this Court's attention away from the ultimate conclusions of the courts below. It is the case, however, that the findings of fact of the primary judge address, in detail, the nature of the appellant's abnormality and its bearing on the dealings between the appellant and Crown. The issue tendered to this Court by the appellant is whether those findings are sufficient to sustain the case of serial victimisation presented on behalf of the appellant in this Court.

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245 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 at [32].

246 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 at [33].

122 In *Jenyns v Public Curator (Q)*[247] Dixon CJ, McTiernan and Kitto JJ explained that the invocation of equitable doctrines, such as those concerned with the conscience of a party to a transaction, in order to impugn that transaction[248]:

> "calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [other party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord *Stowell's* generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case': *The Juliana*[249]."

123 That the approach adumbrated in *Jenyns* remains the orthodox approach to the determination of cases of unconscionable conduct was confirmed by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in *Tanwar*[250].

124 It does not accord with that approach to consider the appellant's "special disadvantage" separately, in isolation from the other circumstances of the impugned transactions which bear upon the principle invoked by the appellant. The issue as to special disadvantage must be considered as part of the broader question, which is whether the impugned transactions were procured by Crown's taking advantage of an inability on the appellant's part to make worthwhile decisions in his own interests, which inability was sufficiently evident to Crown's

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247 (1953) 90 CLR 113.

248 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119.

249 (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567].

250 (2003) 217 CLR 315 at 325 [23].

employees to render their conduct exploitative[251]. We will return to this point in discussing the appellant's arguments about constructive notice.

125 We turn now to discuss the appellant's arguments in the light of the findings of the primary judge.

The appellant's special disadvantages: pathological gambling

126 It is convenient here to set out the factual findings of the primary judge on which the appellant seeks to build his case in this Court. Because there was much debate as to the significance of these findings, it is desirable to set them out in full. His Honour said[252]:

> "In my opinion it is clear that Mr Kakavas was a problem, and indeed very possibly a pathological, gambler. His judgment, as could be seen when set against the judgment of the generality of members of the community, was overly influenced by a desire to gamble. Even making allowances for the truth that we all have different priorities, and that the objects of one person's desire are the subjects of his neighbour's derision, nevertheless the extent to which the urge to gamble influenced the thinking and the actions of Harry Kakavas far exceeded its influence on the vast majority of his fellows.
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> ...
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> It is generally accepted by psychiatrists and psychologists of repute that there exists a condition known as pathological gambling. It is described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, now in its fourth (revised) edition and referred to as DSM IV (2000). The *International Classification of Diseases* (ICD-10, 2000) similarly recognises pathological gambling as a psychiatric disorder, while acknowledging that some people gamble to excess in the absence of any psychopathology. Indeed, there is continuing debate among the experts about whether pathological gambling is a psychiatric condition or a behavioural disorder. There remains no doubt, and I accept,

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251 *Louth v Diprose* (1992) 175 CLR 621 at 632.

252 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [440]-[445].

> that some people suffer from a persistent and recurrent maladaptive pattern of gambling behaviour characterised by their failure to control the urge to gamble, leading to significant deleterious psychosocial consequences in the domains of personal, familial, financial, vocational and legal functioning.
>
> I find that Harry Kakavas was one such person. Expert witnesses have been called, and have said so. I accept their evidence. But in late 2004 and early 2005, he did not present as such. And on the evidence before me, his level of functioning in each of the personal, familial, financial, vocational and legal levels was at that time unremarkable. He was in a steady relationship with the woman who was to become, and remains, his wife. He was on excellent terms with his parents, and when in September 2005 his father fell gravely ill with heart disease, Mr Kakavas devoted much of his time in caring for the patient. His finances were, at least to outward appearances and perhaps in fact, in sound, perhaps excellent, shape. His business appeared to be flourishing. And he was respected generally on the Gold Coast, then his home territory, as a successful and law-abiding citizen.
>
> One of the problems of diagnosis in this area is that persistent gamblers who nevertheless have great wealth – the high rollers – can exhibit many of the criteria of problem or pathological gambler. The signs are often ambiguous. Yet misdiagnosis might cause very serious and unnecessary offence."

127 His Honour did not find that the appellant's unusual interest in gambling robbed him of the capacity to make worthwhile decisions in his own self-interest. That was not inconsistent with his Honour's acceptance of the diagnosis of a pathological gambling condition in terms of the DSM-IV. The DSM-IV itself stated (at xxxiii) that:

> "the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviours that may be associated with the disorder. Even when diminished control over one's behaviour is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behaviour at a particular time."

128 Four expert witnesses gave evidence in relation to whether the appellant should be given a DSM-IV diagnosis of pathological gambling; but it is sufficient, in order to understand his Honour's findings, to refer to the evidence of Dr Alex Blaszczynski, a clinical psychologist called by the appellant, and Dr Clive Allcock, a psychiatrist called by the respondents.

129 Dr Blaszczynski expressed the following opinions in relation to the appellant's gambling:

> "Mr Kakavas' capacity to control his behaviour appeared to be impaired. Factors contributing to this can be classified into two components. The first being the intense reinforcing effects produced by the excitement and physical and subjective levels of arousal associated with gambling …
>
> The second component is inexorably linked with, and exacerbates the effects of the first component ... This is his personality trait. Individuals like Harry Kakavas who have strong narcissistic traits have an over-inflated view of their skills and abilities and a strong sensitivity to reward that affects their decision-making processes. Such individuals are more likely to take larger risks and to persist in chasing losses as a result of a false belief/over-confidence in their capacity to perform better than others. In this sense, Mr Kakavas can be considered to suffer an impaired capacity to control the amount of money gambled.
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> ...
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> Mr Kakavas suffered from a condition of pathological gambling ... characterized by the failure to control gambling behaviour as evidenced by repeated unsuccessful attempts to cease gambling and his excessive preoccupation and urge to gamble. The pathological gambling condition (urges and preoccupation) in conjunction with his narcissistic personality traits characterised with an over-inflated confidence, propensity to take risks, and sensitivity to rewards and need for status, can be construed as important factors influencing his capacity to make rational decisions regarding all aspects of his behaviours: frequency, intensity and sources of funding.
>
> ...

> The nature of Mr Kakavas' pathological gambling condition and his narcissistic personality traits are such that his capacity to resist positive inducements to gamble would be seriously diminished. Mr Kakavas self-excluded from Australian casinos in an attempt to reduce his gambling behaviour which he saw as excessive and out of control. Yet his urge to gamble persisted. Under these circumstances, it would be extremely difficult for Mr Kakavas to resist any efforts on the part of a casino or its representatives to offer the opportunity to lift a self-exclusion order or to accept complementary [sic] gifts or privileges designed to attract him back to gambling.
>
> Should a situation prevail where a casino offered an inducement for Mr Kakavas to visit a venue for purposes of gambling, it is my opinion that Mr Kakavas' ability to make a judgment as to own best interest and to accordingly [sic] would be severely and seriously impaired. This opinion is based on Mr Kakavas' impaired capacity to control his urges and behaviours in the absence of external inducements as shown by his repeated decisions to gamble despite taking steps to cease (through voluntary exclusion orders). The presence of external inducements catering to his narcissistic needs would act to make it virtually impossible to resist his urges to resume gambling." (footnotes omitted)

130 Dr Allcock did not dispute Dr Blaszczynski's diagnosis of pathological gambling, but differed markedly on the appellant's ability to control his urge to gamble. He said:

> "The issue of control of gambling is much debated.
>
> Some would argue the individual once into the 'swing' of gambling is blind to their [sic] behaviour and its consequences, merely functioning as an automaton until the money runs out or the venue closes the action or some event stops the 'machine'.
>
> Others would counter and say the individual is choosing 'not to control'. While being under enormous pressure it may appear they are out of control but when the behaviour is closely examined and questioned the many trips to the ATM or the cashing of cheques reflects each time a decision to keep gambling. The commonest reason advanced is the chasing of losses. Losing is both emotionally and financially an unpleasant experience for which the only solution is to try and [sic] win.

> Other beliefs can be significant in making the decision to continue gambling – the cognitive distortion that the machine is due to pay, the cards will change, big wins have occurred in the past when continuing to gamble and so they will again are features that can interplay with the need to recover losses and so gambling persists or recommences on other occasions. I am of the choice 'not to control' view. The phrase 'impaired control' may cover this as well as such a phrase implies some control remains but is reduced/affected by the pressure to keep playing for any of the reasons given.
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> ...
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> [A]t certain times decisions not to gamble can be made. The condition does not in most cases lock one into a permanent pattern. Likewise even those with a current diagnosis do not gamble all the time ... People leave the gambling arena some days with money still in the account, but other days none.
>
> Ultimately though decisions not to gamble at certain times, under certain circumstances, after certain events (eg a partner leaving) show that these decisions are reviewed and can be resisted. It is harder for a person with pathological gambling to make that decision because of the severe habit, the chasing and the faulty cognitions referred to but these decisions are still possible.
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> ...
>
> Self-exclusion is part of the decision to stop. Clearly control has occurred or is intended to be used when such a decision is made.
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> ...
>
> As people contemplate away from the venue, and usually after a losing session, that they may have a problem then gradually the consideration of giving up the chase, with or without help, can grow. Action to change may happen soon or take some time."

131 In light of the differences in the opinions of Dr Blaszczynski and Dr Allcock as to the extent of the appellant's ability to choose to refrain from, or to cease, gambling, it is evident that, when the primary judge expressed his acceptance of all the experts without adverting to these differences, he was

referring only to the diagnosis of the appellant as a man who suffered from a "maladaptive pattern of gambling behaviour characterised by [a] failure to control the urge to gamble". His Honour did not find that the appellant suffered from incapacity to control the urge to gamble; he may be taken to have accepted the evidence of Dr Allcock on this point[253]. That this is so is confirmed by the circumstance that the primary judge specifically rejected the view (expressed by Dr Blaszczynski) that the appellant found it "virtually impossible to resist his urges to resume gambling." In this regard, the primary judge said[254]:

> "I accept that the inducements proffered by Crown had a part to play in the plaintiff's decision to gamble at the Crown facility. Any high roller player, having experienced the privileges offered by casinos around the world, would be astute to ensure that comparable benefits would be granted by any casino seeking his or her patronage. But the evidence was that by the time Crown first approached Mr Kakavas in 2004 he had already resumed gambling; this was not the case of a man who, having gambled in the past to the point where he was diagnosed as a pathological gambler, had valiantly abstained from all such activity and was, in accordance with the warning given him by Judge Wodak, leading a life of vigilance and discipline. I am satisfied that in offering standard VIP complimentary benefits, Crown was not engaging in any nefarious activity designed to ensnare a man who had eschewed gambling. It was, rather, legitimately seeking to compete for the business of a man who was already enmeshed in the high roller world. Moreover, I am not satisfied that Mr Kakavas found it 'virtually impossible to resist his urges to resume gambling.' There are a number of telling instances where he was perfectly capable of resisting the urge to lay one more bet, and where he demonstrated an ability to play in a controlled manner consonant with the behaviour of a recreational gambler."

132 It is also tolerably clear that, whether one is focused upon the "enticement case" or the theory of exploitation of the appellant's "special disabilities" advanced in this Court, the primary judge found that the appellant did not

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253 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179; [1990] HCA 47; *Fox v Percy* (2003) 214 CLR 118 at 127 [26]; [2003] HCA 22.

254 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [592].

"present" to Crown as a man incapable of making worthwhile decisions in his own interests so far as gambling with Crown was concerned.

133 Importantly, his Honour found that the appellant's "level of functioning in each of the personal, familial, financial, vocational and legal levels was ... unremarkable."[255] Further, his Honour found that the appellant's "finances were, at least to outward appearances and perhaps in fact, in sound, perhaps excellent, shape."[256] These findings are quite inconsistent with a view of the appellant as a person unable to make a responsible decision as to whether he could afford to indulge himself as a high roller, and should or should not do so, much less that Crown knew, or should have known, that he could not.

134 The findings of fact summarised above, understood in the light of the preference of the primary judge for the evidence of Dr Allcock, support the conclusion of Mandie JA, with whom Almond AJA agreed, that[257]:

> "His Honour's finding about the plaintiff's pathological gambling condition (taking it at its highest) did not necessitate a finding that the plaintiff was in a position of special disability when dealing with Crown or, more precisely, when entering his various gambling transactions (ie making his wagers)."

135 In the light of the primary judge's findings, we do not accept that the appellant's pathological interest in gambling was a special disadvantage which made him susceptible to exploitation by Crown. He was able to make rational decisions to refrain from gambling altogether had he chosen to do so. He was certainly able to choose to refrain from gambling with Crown.

The appellant's special disadvantages: the IEO

136 From 19 June 2002, the *Gaming Legislation (Amendment) Act* 2002 (Vic) effected amendments to the Casino Control Act, the result of which was that any person subject to an "interstate exclusion order" (as defined in s 3(1) of the

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255 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [444].

256 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [444].

257 *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95 at [27].

Casino Control Act) became excluded from all casinos in Victoria[258]. Further, the amendment imposed a duty upon Crown to include the name of any person the subject of an IEO of which it is or was aware in a daily list of excluded persons to be provided to regulatory personnel[259].

137 The *Gambling Regulation Act* 2003 (Vic) was assented to on 16 December 2003. Section 12.1.2 of that Act inserted s 78B into the Casino Control Act. The new section, headed "Forfeiture of winnings", took effect on 1 July 2004. It provided that all winnings paid or payable to a person the subject of an IEO are forfeited to the State of Victoria.

138 We do not accept that the IEO can itself be described as a special disability or disadvantage of the kind discussed in the authorities. To the extent that the existence of the IEO adversely affected the appellant in terms of his ability to retain his winnings, that cannot sensibly be described as a personal disability. Rather, it was a legal constraint upon the appellant imposed, as the primary judge found, by the Commissioner of Police in light of security concerns[260].

139 The effect of the IEO can sensibly be described as a special disadvantage only because the appellant was ignorant of its effect. There is no finding that Crown's employees adverted to the effect of the IEO when the appellant returned to Crown's casino in mid-2005. Furthermore, there is no finding, and indeed no evidence, that any of Crown's employees were aware that the appellant did not appreciate the effect of the IEO under the Casino Control Act.

Exploitation of the appellant's special disadvantages: Crown's knowledge

140 The appellant argues that Crown's employees knew of, or were put on inquiry as to, his pathological urge to gamble in a number of ways: the Esanda fraud, the WOL, the IEO, the refusal by Mr Healey to provide a report on the appellant's condition at the end of 2004 and the absence of a full psychological assessment by Ms Brooks.

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258 *Casino Control Act* 1991 (Vic), s 77(2).

259 *Casino Control Act* 1991 (Vic), s 76.

260 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [559]-[560].

141 On the appellant's behalf it is said that when Crown initiated contact with the appellant in late 2004, it was sufficiently concerned about the appellant as a problem gambler to require him to undergo an assessment and to provide it with a report clearing him of any gambling problems. The appellant points to the finding by the primary judge that Crown "knew of a problem [and] might have acknowledged, if asked in 2004 whether the problem would re-surface when Mr Kakavas returned to the Casino, that that was a possibility."[261] Further, in that regard, Crown knew that he had a history of gambling problems for which he had been medically treated, and that he was, in 2004, gambling and losing millions of dollars in Las Vegas. It also knew that Mr Healey had declined to provide the appellant with a clearance, and that Ms Brooks' report stated that she was "unable to do an assessment of his suitability for re-admission"[262] to the casino.

142 None of these circumstances required the primary judge to find that Crown's employees came to an appreciation that the appellant was labouring under a special disability which adversely affected his capacity to make worthwhile decisions in his own interests as to whether or not to avail himself of Crown's gambling facilities. It needs to be borne in mind that there is no suggestion that Ms Brooks' report did not accurately reflect the view which the appellant wished to convey to Crown, viz, that he "had conquered his past demons" and that he had a "relapse plan" which he "would not hesitate to implement". It is not possible to say that Crown's employees did not accept Ms Brooks' report at face value.

143 Nor is it possible to accept the attempt on the appellant's behalf to characterise the evidence given by Crown's employees in this regard as a cynical attempt to conceal their predatory attitude towards the appellant. To accept that view of their evidence would not be consistent with either the primary judge's findings of fact, or the appellant's disclaimer of any challenge to those findings. Further, one cannot accept the invitation on behalf of the appellant to infer that the concern of some of Crown's employees that the appellant should obtain a report from a psychologist concerning the appellant's suitability for re-admittance to its casino itself revealed an appreciation of his disability. The concern of

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261 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [661].

262 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [225].

Crown's employees is readily understood as self-protective prudence. Given the appellant's criminal past and his threats to sue Crown, it is readily understandable that some of Crown's employees would be astute to ensure that there should be an accurate record of the basis of the appellant's re-admittance to its casino. The primary judge was well placed to make a sound assessment of the character of the witnesses and the dynamics of the relationship between the appellant and Crown's employees.

144 It is pertinent to note here the observations by Dawson, Gaudron and McHugh JJ in *Louth v Diprose*[263] that proof of the interplay of a dominant and subordinate position in a personal relationship depends, "in large part, on inferences drawn from other facts and on an assessment of the character of each of the parties." Their Honours observed that findings by a trial judge[264], "which were substantially dependent on the trial judge's assessment of character and credit and which were reached having regard to the demeanour of the parties in the witness box ... are findings which, unless some error is to be discerned, an appeal court must respect."

145 In this regard, the primary judge said[265]:

> "[I]t is opportune at this point to set out my observations generally about Mr Kakavas' demeanour. In the witness box the plaintiff struck me as someone who was a natural salesman and negotiator. I could well imagine that he thrived in his chosen profession. He was determined, eloquent and ready with a quick riposte. He was robust and confident – perhaps too confident – during prolonged and rigorous cross examination. He demonstrated an ability to be focussed and clear in conveying what he wanted to say, and would not be swayed from that position, even where at times it became apparent that his answers were not responsive. Of course, it may be said that the man who gave evidence in this Court in 2009 was not the man struggling under the burden of a disability in 2005 and 2006.

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263 (1992) 175 CLR 621 at 639-641. See also *Wilton v Farnworth* (1948) 76 CLR 646 at 654-655; [1948] HCA 20; *Blomley v Ryan* (1956) 99 CLR 362 at 409; *Fox v Percy* (2003) 214 CLR 118 at 126-129 [25]-[30].

264 (1992) 175 CLR 621 at 641.

265 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [593].

> But I do not think so. Whatever the configuration of his inner landscape in 2005 and 2006, in my view Mr Kakavas presented the world with a charming and confident façade."

146 This assessment by the primary judge of how the appellant "presents" must be accorded significant weight, given his Honour's finding that the appellant did not present to Crown as a man whose ability to make worthwhile decisions to conserve his own interests was adversely affected by his unusually strong interest in gambling. The appellant did not present as a target for victimisation by Crown, any more than the other high rollers feted by Crown at its casino while they chose to gamble there. Furthermore, and importantly in relation to the issue of constructive notice, the primary judge's assessment of the appellant as a man "who was a natural salesman and negotiator ... determined, eloquent and ready with a quick riposte ... robust and confident – perhaps too confident" suggests a practical problem in now relying on notions of constructive knowledge to fix Crown with the full appreciation of the full nature and extent of the appellant's abnormality which might have been derived from active inquiry into the appellant's personality. The practical success of any such inquiry would depend in large measure on the willingness of the appellant to cooperate with those conducting the inquiry. Having regard to the primary judge's assessment of the appellant, there must be a question as to whether his cooperation would have been forthcoming. It is not necessary to resolve that question here, given that, as we will explain directly, the appellant's attempt to rely upon constructive notice must fail in point of principle.

147 As to the IEO, to the extent that the appellant was obliged by the Casino Control Act to forfeit his winnings by reason of the operation of the IEO, there is no finding that Crown's employees adverted to that circumstance, much less that they decided to exploit that circumstance: Crown paid the appellant his winnings.

148 As the primary judge found[266], Crown's officers "did not appreciate the significance" of the IEO. On that basis, the IEO "did not form part of any unconscientious decision to welcome Mr Kakavas as a patron." That Crown's employees were inadvertent as to the consequences of the IEO, requiring the appellant to forfeit his winnings, may be said to reflect poorly on them, as the

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266 *Kakavas v Crown Melbourne Ltd* [2009] VSC 559 at [570].

individuals responsible for ensuring that Crown complied with the Casino Control Act, but it does not suggest that they were seeking to victimise the appellant. On the primary judge's findings, they were as ignorant of the consequences of the IEO as he was.

149 It may also be said that it was the appellant's responsibility, as the subject of the IEO, to ascertain the effects of an order made against him. There is no reason why, as between them, Crown should be responsible for his ignorance: there was no suggestion that the relationship between Crown and the appellant was one in which the appellant looked to Crown for advice on such matters.

Exploitation of the appellant's special disadvantages: constructive notice

150 The appellant submits that the primary judge erred in failing to apply the principles of constructive notice[267]. In particular, it is said that Crown was "aware of the possibility that [a] situation [of special disadvantage] may exist or [was] aware of facts that would raise that possibility in the mind of any reasonable person"[268].

151 In *Amadio*, Mason J said[269]:

> "As we have seen, if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same."

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267 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462. See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 76-77 [55].

268 cf *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 467.

269 (1983) 151 CLR 447 at 467.

152 The appellant relies upon this passage as authority for importing, into the application of the principle against unconscionable dealing, which is a species of equitable fraud, notions of constructive notice. Constructive notice applies to the resolution of disputes as to priority of interests as between a legal interest and a prior competing equitable interest[270]. The rules of constructive notice were developed for the purpose of deciding whether the holder of a later legal estate should prevail over the holder of a prior equitable estate as a bona fide purchaser of the legal estate without notice. As to what is notice for the purpose of this rule, the purchaser is deemed to have constructive notice of all matters of which he or she would have received notice if he or she had made the investigations usually made in similar transactions, and of which he or she would have received notice had he or she investigated a relevant fact which has come to his or her notice and into which a reasonable person ought to have inquired. Of the concept of constructive notice, in *Manchester Trust v Furness*[271], Lindley LJ said:

> "[A]s regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines".

153 Consistently with that approach, in *Oxley v James*[272], Jordan CJ observed that "in commercial transactions ... means of knowledge are not actual knowledge".

154 More recently, in *Garcia v National Australia Bank Ltd*, Gaudron, McHugh, Gummow and Hayne JJ did not welcome the use of constructive notice

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270 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 410-411 [39]; [1998] HCA 48.

271 [1895] 2 QB 539 at 545. See also *Barnes v Addy* (1874) LR 9 Ch App 244 at 251, 255; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 at 703-704.

272 (1938) 38 SR (NSW) 362 at 375. See also *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661 at 674-675 [22].

to establish that a transaction is impeachable for equitable fraud. Their Honours said[273]:

> "Such an analysis may be required in ordering the priority of competing interests in property but in the present context it may well distract attention from the underlying principle: that the enforcement of the legal rights of the creditor would, in all the circumstances, be unconscionable."

155 In our respectful opinion, Mason J cannot be taken to have supported the importation of the concept of constructive notice into the operation of the principle he enunciated in *Amadio*. In this regard, the passage from the reasons of Mason J on which the appellant relies followed, and was evidently intended to paraphrase, the statement of Lord Cranworth LC in *Owen and Gutch v Homan*[274]. There his Lordship said[275]:

> "it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain [the advantage], he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge."

156 It is apparent from what Mason J said in relation to the transaction under consideration in *Amadio* that his Honour was speaking of wilful ignorance, which, for the purposes of relieving against equitable fraud, is not different from actual knowledge. In this regard, Mason J observed that it must have been obvious to the appellant bank's officer that the transaction was an improvident one from the respondents' point of view. On that basis, it was "inconceivable" that the possibility did not occur to him that the respondents' entry into the transaction was due to their misplaced reliance on their son and that the

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273 (1998) 194 CLR 395 at 410-411 [39]. See also Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 15.

274 (1853) 4 HLC 997 [10 ER 752].

275 (1853) 4 HLC 997 at 1035 [10 ER 752 at 767].

respondents' lack of understanding of the extent of their exposure was manifest from their questions of the bank's officer[276].

157 Similarly, Deane J, with whom Wilson J agreed, said that the bank's officer "simply closed his eyes to the vulnerability" of the respondents "and the disability which adversely affected them."[277] His Honour concluded[278]:

> "The case is one in which 'wilful ignorance is not to be distinguished in its equitable consequences from knowledge' (per Lord Cranworth LC, *Owen and Gutch v Homan*[279])."

158 In *Louth v Diprose*[280] Deane J made it clear that the extent of the knowledge of the disability of the plaintiff which must be possessed by the defendant is an aspect of the question whether the plaintiff has been victimised by the defendant. In this regard, Deane J said that the special disability must be[281]:

> "sufficiently evident to the other party to make it prima facie unfair or 'unconscionable' that that other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it."

159 This approach of Deane J accords with that explained by Dixon CJ, McTiernan and Kitto JJ in *Jenyns* in the passage cited above.

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276 (1983) 151 CLR 447 at 466-468.

277 (1983) 151 CLR 447 at 478.

278 (1983) 151 CLR 447 at 479.

279 (1853) 4 HLC 997 at 1035 [10 ER 752 at 767].

280 (1992) 175 CLR 621 at 637. See also *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292 at 298 [21].

281 (1992) 175 CLR 621 at 637.

160 Even if, contrary to the findings of the primary judge, the appellant did suffer from a psychological impairment, the issue here is whether, in all the circumstances of the relationship between the appellant and Crown, it was sufficiently evident to Crown that the appellant was so beset by that difficulty that he was unable to make worthwhile decisions in his own interests while gambling at Crown's casino. On the findings of fact made by the primary judge as to the course of dealings between the parties, the appellant did not show that his gambling losses were the product of the exploitation of a disability, special to the appellant, which was evident to Crown.

161 Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.

162 The appellant's attempt to rely upon constructive notice to supply the want of findings of awareness on the part of Crown's employees of any personal disability which affected the appellant should be rejected.

Conclusion and orders

163 The appellant's challenges to the decision of the Court of Appeal fail.

164 The appeal should be dismissed with costs.