

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ

SKYCITY ADELAIDE PTY LTD

APPELLANT

AND

TREASURER OF SOUTH AUSTRALIA & ANOR

RESPONDENTS

SkyCity Adelaide Pty Ltd v Treasurer of South Australia
[2024] HCA 37

Date of Hearing: 12 September 2024

Date of Judgment: 16 October 2024

A10/2024

ORDER

1. *Appeal dismissed with costs.*
2. *Special leave to cross-appeal granted.*
3. *Cross-appeal allowed with costs.*
4. *Vary the judgment of the Court of Appeal of the Supreme Court of South Australia dated 22 February 2024 by:*
 - (a) *deleting the answer "Yes" to Question 3 of the questions of law referred for its consideration and substituting the answer "No"; and*
 - (b) *replacing Order 1 of the order for costs with an order that "The appellant is to pay the respondent's costs".*

On appeal from the Supreme Court of South Australia

Representation

J T Gleeson SC with A C Roe for the appellant (instructed by Johnson Winter Slattery)

T N Golding KC with M E Boisseau for the respondents (instructed by Crown Solicitor's Office (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

SkyCity Adelaide Pty Ltd v Treasurer of South Australia

Contract – Interpretation – Relief against penalties – Where appellant operated electronic gaming machines ("EGMs") and automated table games ("ATGs") – Where appellant had "Rewards Program" by which Members received loyalty points – Where Member could "convert" points into electronic gaming credits – Where Member could redeem converted credits for cash under specified circumstances or use converted credits to bet on EGM or ATG – Where Casino Duty Agreement ("CDA") between appellant and Treasurer provides that appellant must pay casino duty in respect of net gambling revenue for financial year – Where CDA defines "net gambling revenue" for period to refer to "gross gambling revenue" – Where CDA defines "gross gambling revenue" to mean "amount received ... for or in respect of consideration for gambling" – Where s 51(1) of *Casino Act 1997* (SA) ("Casino Act") provides appellant must pay interest and penalties for late payment or non-payment of casino duty in accordance with CDA – Where s 17(4) of Casino Act provides for operation of CDA as deed – Whether converted credits used to place bet constituted "amount received" by appellant "for or in respect of consideration for gambling" – Whether obligation of appellant under CDA to pay 20% per annum interest for late payment could be subject of relief against enforcement if properly characterised as penalty at common law or in equity.

Words and phrases – "amount received", "automated table games", "cashless gaming system", "consideration", "converted credits", "electronic gaming machines", "for or in respect of consideration", "gross gambling revenue", "interest", "late payment", "loyalty points", "monetary value", "net gambling revenue", "ordinary meaning", "orthodox interpretative principle", "penalty".

Casino Act 1997 (SA), ss 17, 51.

- 1 GAGELER CJ, GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ. This is an appeal and an application for special leave to cross-appeal from a judgment of the Court of Appeal of the Supreme Court of South Australia (Livesey P, Lovell and Bleby JJA)¹ answering questions of law referred for the consideration of the Court of Appeal under r 214.6 of the *Uniform Civil Rules 2020* (SA) in a proceeding brought in the Supreme Court of South Australia by SkyCity Adelaide Pty Ltd ("SkyCity") against the Treasurer and State of South Australia (together "the State"). The proceeding arises out of a dispute between SkyCity and the State concerning the liability of SkyCity to pay casino duty and interest for late payment of casino duty under the *Casino Act 1997* (SA) ("the Casino Act") in accordance with the Casino Duty Agreement entered into between SkyCity and the Treasurer on 27 October 1999 and most recently varied on 23 June 2020 ("the CDA").
- 2 By the appeal, SkyCity challenges the conclusion of the Court of Appeal, expressed in an answer to one of the referred questions of law, that electronic gaming credits arising from conversion by its customers of loyalty points accumulated by them under its loyalty program ("converted credits"), when used by a customer to place a bet, constitute an "amount received" by SkyCity "for or in respect of consideration for gambling" within the meaning of the definition of "gross gambling revenue" in cl 1.1 of the CDA.
- 3 By the application for special leave to cross-appeal, the State challenges the separate conclusion of the Court of Appeal, reflected in an answer to another of the referred questions of law, that the obligation of SkyCity under cl 11 of the CDA to pay interest for late payment of casino duty could be the subject of relief against enforcement if that obligation to pay interest could be characterised as a penalty at common law or in equity.
- 4 The appeal and the proposed cross-appeal ultimately turn on the proper construction of bespoke provisions of the CDA and the Casino Act, respectively, in a peculiar commercial, regulatory, and fiscal context. Resolution of each nevertheless involves a discrete question of interpretative principle not inappropriate to be addressed by this Court. Special leave to appeal having been granted and the proposed cross-appeal having been fully argued contemporaneously with the appeal, special leave to cross-appeal should now also be granted.

1 *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

2.

5 For the reasons which follow, the appeal is to be dismissed and the cross-appeal is to be allowed. The answers to the referred questions of law in the judgment of the Court of Appeal are to be varied accordingly.

The Casino Act

6 The Casino Act has as its express object "to provide for the licensing, supervision and control of the Adelaide Casino and, in particular, to ensure", amongst other things, "that the Adelaide Casino is properly managed and operated" and "that the interest of the State in the taxation of gambling revenue arising from the operation of the Adelaide Casino is properly protected".² The "Adelaide Casino" is referred to in the operative provisions of the Casino Act simply as "the casino". The expression "gambling revenue" is not defined but "gambling" is defined to mean "the playing of a game for monetary or other stakes" and to include "making or accepting a wager".³

7 Central to the scheme of the Casino Act is the grant by the Governor of an exclusive casino licence the effect of which is to entitle the licensee to operate the casino for the fixed term of the licence at designated premises in accordance with the conditions of the licence. The entitlement of the licensee so to operate the casino is expressed to be "[d]espite any other law of the State" but "subject to" the Casino Act, which is to be read with and taken to include the *Gambling Administration Act 2019* (SA) ("the Gambling Administration Act").⁴

8 Conditions imposed on the casino licence by the Casino Act include that specified systems and procedures, including "systems and procedures for conducting authorised games" and "systems and procedures for handling, dealing with and accounting for money and gambling chips", must be approved by the Liquor and Gambling Commissioner ("the Commissioner") appointed under the *Liquor Licensing Act 1997* (SA) and that the licensee must ensure that its operations under the licence conform with the approved systems and procedures.⁵

2 Section 2A(a) and (d) of the Casino Act.

3 Section 3(1) of the Casino Act.

4 Sections 3A, 5, 6, 7, 8 and 9 of the Casino Act.

5 Section 38(1)(a) and (d) and (2) of the Casino Act. See the definition of "Commissioner" in s 3(1) of the Casino Act and s 5 of the Gambling Administration Act.

3.

An "authorised game" is "a game of chance, or a game combined of chance and skill, authorised or approved under [the Casino Act] or the conditions of the casino licence".⁶

9 Conditions imposed on the casino licence by the Casino Act also include that the licensee must not permit the installation or use of equipment for gambling unless it is approved by the Commissioner and that the licensee must comply with any instructions of the Commissioner about the use of any such equipment.⁷ The Commissioner is empowered under the Casino Act to approve, amongst other things, "particular automated table game equipment" and "particular gaming machines" (as defined in the *Gaming Machines Act 1992* (SA)),⁸ as well as "account based cashless gaming systems" to be operated in connection with approved automated table game equipment or approved gaming machines.⁹ A "cashless gaming system" encompasses "a system that enables the storage of monetary value for use in operating a gaming machine".¹⁰

10 As well as mandating the existence of the CDA, the Casino Act mandates the existence of an Approved Licensing Agreement ("ALA"). The ALA is an agreement between the licensee and the Minister administering the Casino Act about the operation of the casino, the term of the licence, the conditions of the licence, and the performance of the licensee's responsibilities under the licence or the Casino Act.¹¹

11 The ALA in its original form was entered into between SkyCity and the Treasurer contemporaneously with the CDA on 27 October 1999. It was most recently varied on 20 October 2020 to take the form of an agreement between SkyCity and the Attorney-General of South Australia. The ALA as varied confirms the agreement of its original parties that the casino licence and the ALA itself are to operate for a term commencing on the date of the grant of the casino licence by

6 Section 3(1) of the Casino Act.

7 Section 40(1)(a) and (2) of the Casino Act.

8 Section 40A(1) and the definition of "gaming machine" in s 3(1) of the Casino Act.

9 Section 40B(1)(a) of the Casino Act.

10 Section 3(1) of the Casino Act.

11 Section 16(1) of the Casino Act.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

4.

the Governor and ending (absent an earlier occurrence of a specified circumstance) on 30 June 2085. The casino licence was in fact granted by the Governor on 25 November 1999, entitling SkyCity to operate the casino, known as SkyCity Adelaide Casino, at premises on North Terrace, Adelaide.

12 In relation to the CDA, s 17 of the Casino Act relevantly provides:

- "(1) There is to be an agreement (the *casino duty agreement*) between the licensee and the Treasurer—
- (a) fixing the amount, or basis of calculation, of casino duty; and
 - (b) providing for the payment of casino duty; and
 - (c) dealing with interest and penalties to be paid for late payment or non-payment of casino duty.
- (2) The agreement is to be entered into with a prospective licensee before the licence is granted or with a licensee before renewal of the licence.
- (3) The agreement may be varied by a later agreement between the parties.
- (4) The casino duty agreement or an agreement for variation of the casino duty agreement operates as a deed—despite the absence of the formalities of execution and delivery.
- (5) The casino duty agreement does not attract stamp duty."

13 Section 51 of the Casino Act provides:

- "(1) The licensee must pay casino duty (and interest and penalties for late payment or non-payment of casino duty) in accordance with the casino duty agreement.
- (2) In the absence of an agreement between the licensee and the Treasurer, the licensee must pay casino duty (and interest and penalties for late payment or non-payment of casino duty) on a basis fixed under the regulations.

5.

- (3) The Treasurer must pay duty (and interest and penalties) received from the licensee into the Consolidated Account.
- (4) Casino duty (and interest and penalties) may be recovered as a debt due to the State."

14 In referring to "interest and penalties" for "late payment or non-payment of casino duty", s 17(1)(c) and s 51(1) and (2) echo language in Pt 5 of the *Taxation Administration Act 1996* (SA) ("the Taxation Administration Act"). Part 5 provides in Div 1 for the imposition of interest on unpaid tax until it is paid and provides separately in Div 2 for the imposition of penalty tax in addition to interest.

15 Section 72 of the Casino Act confers power on the Governor to make regulations for the purposes of the Act, including for the purposes of s 51(2) of the Act. No regulations have been made for the purposes of that sub-section.

The CDA

16 The CDA is expressed to operate for a period commencing on the date on which the casino licence was granted and ending (absent an earlier occurrence of a specified circumstance) on 30 June 2035. SkyCity is referred to in the CDA as "the Licensee".

17 Clause 5 of the CDA provides that "[t]he Licensee must pay casino duty in respect of net gambling revenue for a financial year". The amount of that casino duty is expressed as the sum of amounts specified in terms of specified percentages of "net gambling revenue for the financial year that is attributable" to specified forms of gambling.

18 Clause 1.1 of the CDA defines "net gambling revenue" in respect of gambling for a period to mean "the gross gambling revenue for the relevant period that is attributable" to specified forms of gambling less the value of monetary prizes and, in respect of one form of gambling, less also the value of certain "[a]pproved [d]eductions". The same clause defines "gross gambling revenue" as follows:

"'gross gambling revenue' for a period means:

- (a) the gross amount received by the Licensee during the period for or in respect of consideration for gambling in the casino premises; and

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

6.

- (b) any bad debt to the extent recovered by the Licensee during the period".

19 Clause 6 of the CDA provides for the Licensee to pay casino duty to the Treasurer by monthly instalments. Clause 7 provides for the making of annual adjustments by way of further payment or refund at the end of each financial year. Clause 11 provides:

"If the Licensee fails to pay casino duty in accordance with this agreement, the Treasurer may by written notice require the Licensee:

- (a) to make good the default; and
- (b) in addition, to pay interest at 20% per annum of the outstanding amount calculated from the due date of payment daily on a cumulative basis."

20 Clause 12 of the CDA provides that the Licensee must ensure that the business of operating the casino pursuant to the casino licence is "carried on in accordance with the systems and procedures for the time being approved by the Treasurer" in respect of both "calculation and recording of gross gambling revenue and net gambling revenue in respect of gambling" and "payment of money required for the payment of casino duty or interest for late payment or non-payment of casino duty".

21 Reference was made by the State in the course of argument to an instrument described as "Control Standards for Accounting for Money and Gambling Chips", governing systems and procedures for handling, dealing with and accounting for money and gambling chips, which was approved by the Commissioner under a condition of the casino licence on 21 March 2014. However, the State did not seek to demonstrate how that subordinate instrument might legitimately bear on any issue of construction in the appeal or the cross-appeal. The instrument can therefore be put to one side. Nothing before this Court indicates that the Treasurer had approved any other systems or procedures in accordance with cl 12 of the CDA.

Electronic gambling

22 On 14 February 2014, with the approval of the Commissioner, SkyCity commenced operating electronic gaming machines ("EGMs") and automated table games ("ATGs"). EGMs and ATGs have allowed for customers to place bets by wagering electronic gaming credits recognised by machines.

7.

23 In connection with those electronic forms of gambling, and again with the approval of the Commissioner, SkyCity on 5 May 2014 introduced a cashless gaming system. Under that approved cashless gaming system, eligible customers have been able to hold cashless gaming accounts (into which customers have been able to deposit cash and receive winnings) linked to cashless gaming cards which have stored information about the funds in the accounts. Customers have been able to insert their cards into EGMs and ATGs and to choose to convert funds in their accounts into electronic gaming credits so as to enable them to bet.

The Rewards Program, points, and converted credits

24 SkyCity has operated its loyalty program known as the "Rewards Program" in which customers over the age of 18, referred to as Members, have been able to participate without charge since it commenced operating EGMs and ATGs. And since it introduced the cashless gaming system, SkyCity's Rewards Program has been linked to its cashless gaming system.

25 SkyCity has reserved to itself the right to amend the terms and conditions of its Rewards Program at any time and has from time to time exercised that right. But the essential features of the Rewards Program have remained unchanged.

26 Members have received membership cards which have doubled as cashless gaming cards. They have also received loyalty points ("points") by reference to their gambling and other expenditure as well as on a discretionary basis – for example, to mark birthdays or for promotional purposes. Points have expired after six months of receipt, have not been transferable and have not been able to be redeemed for cash except on rare occasions at SkyCity's discretion.

27 By inserting the Member's membership card into an EGM or an ATG, however, a Member has been able to "convert" accumulated points into electronic gaming credits on the machine, provided that the Member has passed through the "gate" of wagering electronic gaming credits to an amount equal in value to the accumulated points to be converted on the day of conversion. These are the converted credits. Once converted, converted credits are indistinguishable from credits purchased by customers from their own funds.

28 Having converted accumulated points into converted credits, a Member has then had a choice between two options. The Member could choose to redeem the converted credits for cash (up to a specified monetary threshold and subject to a three-year forfeiture period) by taking their membership card to SkyCity's cashier – an option referred to in argument as "turning left". Alternatively, the Member could choose to use the converted credits to bet on an EGM or an ATG –

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

8.

an option referred to in argument as "turning right". The appeal concerns the consequence for the calculation of casino duty under the CDA of the Member choosing to "turn right".

The appeal

29 The ultimate issue in the appeal is whether the Court of Appeal was correct to conclude that converted credits, when used by a Member of SkyCity's Rewards Program to bet on an EGM or an ATG, constituted an "amount received" by SkyCity "for or in respect of consideration for gambling" within the meaning of the definition of "gross gambling revenue" in cl 1.1 of the CDA.

30 SkyCity argues that, in reaching that conclusion, the Court of Appeal erred in interpretative principle by declining to take the ordinary meaning of "revenue" in the defined expression "gross gambling revenue" into account in construing "amount received ... for or in respect of consideration for gambling" in the definition of that expression. The error of principle is said to have been attributable to the Court of Appeal implicitly treating as an inflexible rule the "orthodox view"¹² that "[i]t would be quite circular to construe the words of a definition by reference to the term defined".¹³

31 Taking the ordinary meaning of the word "revenue" into account, SkyCity argues, "amount received" in the definition can be seen to refer to a flow of money into the business constituted by the operation of the casino. SkyCity argues that converted credits, when used by a Member to bet on an EGM or an ATG, cannot constitute such an "amount received" because that use of converted credits does not result in anything of monetary value coming into the business. Had the Member chosen to "turn left" and redeemed the converted credits for cash, there would have been an outflow of money from the business. By choosing to "turn right" and placing a bet on an EGM or an ATG, the Member takes that same value in the form of a bet, which SkyCity argues is equivalent to a free bet. Both options available to the Member involve a flow of money from SkyCity to the Member. Neither option involves SkyCity receiving any amount of money.

12 *Australian Securities and Investments Commission v King* (2020) 270 CLR 1 at 13 [18].

13 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419, citing *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503.

32 SkyCity is right to say that there is no rule against construing words of a definition by reference to the term that those words define. The orthodox interpretative principle, properly understood, is more nuanced, as has been recognised in this Court¹⁴ and in intermediate courts of appeal.¹⁵ A definition "shortens, but is part of, the text of the substantive [provision] to which it applies".¹⁶ The defined term itself forms part of the context within which the definition so applying must be construed. The point of the orthodox interpretative principle is not to deny that the defined term itself forms part of the context but to emphasise that the purpose of a definition is to fix or to clarify the meaning of the defined term. Fidelity to that purpose makes it of "fundamental importance" that a definition is construed in the context of the substantive provision to which it applies according to its "natural and ordinary meaning unless some other course is clearly required" and that "limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context".¹⁷

33 However, SkyCity is wrong to say that the reasons for judgment of the Court of Appeal disclose its adoption of a more rigid approach. The response of the Court of Appeal to SkyCity's reliance on the ordinary meaning of "revenue" was to express well-founded scepticism as to whether the word "revenue" is of sufficiently definite import to convey the meaning for which SkyCity contended.¹⁸

14 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 10 [3], 27-28 [54], 32-33 [77]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 135 [121].

15 eg *Singh v Lynch* (2020) 103 NSWLR 568 at 598-599 [129]-[130]; *Federal Commissioner of Taxation v Auctus Resources Pty Ltd* (2021) 284 FCR 294 at 310-311 [68].

16 *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 at 718 [32], 725 [80]; 412 ALR 134 at 142, 152, quoting *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103].

17 *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310.

18 Compare *London, Midland & Scottish Railway Co v Anglo-Scottish Railways Assessment Authority* (1933) 150 LT 361 at 367.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

10.

to note that the argument "risks circularity", and to point out that the meaning of "revenue" must itself be "subject to the ordinary constructional exercise".¹⁹

34 The more complete answer given by the Court of Appeal to SkyCity's argument concerning the construction of the definition of "gross gambling revenue" in cl 1.1 of the CDA is to be found in the Court of Appeal's parsing of the language of the definition mindful of the place of the CDA within the scheme of the Casino Act. Against the background of "gambling" being defined in the Casino Act to mean "the playing of a game for monetary or other stakes" and to include "making or accepting a wager",²⁰ the Court of Appeal pointed out, the focus of the definition of "gross gambling revenue" can be seen to be not on the business constituted by the operation of the casino but much more precisely on amounts received as consideration for the playing of a game. An "amount received by the Licensee ... for or in respect of consideration for gambling" is money or monetary value that is received by the Licensee as consideration for the Licensee's acceptance of a bet.

35 The Court of Appeal pointed out that SkyCity's approved cashless gaming system has always operated, in the language of the Casino Act, as "a system that enables the storage of monetary value for use in operating a gaming machine". Each time a customer has used SkyCity's cashless gaming system to bet on an EGM or an ATG, monetary value has been received by SkyCity as consideration for its acceptance of that bet. The monetary value received by SkyCity has been in the form of a reduction in SkyCity's indebtedness to the customer in an amount represented by the monetary value of the electronic gaming credits which the customer could then have redeemed for cash yet then chose to wager. The position has not been relevantly different between a customer who has been a Member of SkyCity's Rewards Program and who has bet converted credits and a customer who has bet credits purchased from their own funds. Given their exchangeability for cash at the time of betting, the origin of the electronic gaming credits the Member has then chosen to wager is irrelevant.²¹ The only relevant transaction is the exchange of monetary value for the bet, not the exchange of points for converted credits.

19 *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14 at [35].

20 Section 3(1) of the Casino Act.

21 *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14 at [44]-[48].

11.

36 This reasoning is both sound and dispositive. Put in the language used in argument on the appeal, the entitlement of a Member of SkyCity's Rewards Program who has converted points into electronic gaming credits to "turn left" and redeem those converted credits for cash has given those converted credits monetary value. When the Member has chosen instead to "turn right" and use the converted credits to bet on an EGM or an ATG, SkyCity has received an amount, being the monetary value of those converted credits, for or in respect of consideration for gambling.

37 SkyCity argues that this reasoning is contradicted by reasoning of the plurality in the Supreme Court of the United Kingdom's decision in *London Clubs Management Ltd v Revenue and Customs Commissioners*.²² To the contrary, it is entirely consistent with that reasoning. The analogous issue in *London Clubs* was whether certain "non-negotiable chips" and "free bet vouchers" – referred to collectively as "Non-Negs" – given by London Clubs to selected customers for use in its casinos were required to be brought to account in assessing, for revenue purposes, "the value, in money or money's worth, of the stakes staked with [it] in ... gaming".²³ The resolution of that issue was that they were not required to be brought to account on the basis that, unlike "cash chips", they did not have a "real world value" from the perspective of London Clubs in that they did not "represent money to which the gambler [was] entitled" and could not be "encashed or exchanged for goods or services" but rather amounted to a "free bet".²⁴ Having regard to their exchangeability for cash at the time of betting, converted credits are not appropriately analogised to the Non-Negs. Instead, they are appropriately analogised to the cash chips.

The cross-appeal

38 The ultimate issue in the cross-appeal is whether the Court of Appeal was correct to conclude that the obligation of SkyCity under cl 11 of the CDA to pay interest for late payment of casino duty at the rate of 20% per annum could be the subject of relief against enforcement if that obligation to pay interest could properly be characterised as a penalty at common law or in equity. The Court of

22 [2020] 1 WLR 5144; [2021] 2 All ER 333.

23 [2020] 1 WLR 5144 at 5147 [3]-[5]; [2021] 2 All ER 333 at 336.

24 [2020] 1 WLR 5144 at 5155-5156 [42]-[44]; [2021] 2 All ER 333 at 344-345.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

12.

Appeal was not asked, and did not decide, whether the obligation should properly be so characterised.

39 The reasoning by which the Court of Appeal reached that conclusion essentially involved three steps. The first was to accept that, by providing in s 17(4) of the Casino Act that the CDA operates as a deed, the South Australian Parliament indicated that the general law of contract will apply to the CDA except to the extent modified by statute. The second was to invoke the "general proposition" that a statute "is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably",²⁵ in order to postulate that a clear and unmistakeable manifestation of legislative intention needed to be found in the Casino Act in order to oust the common law and equitable jurisdiction of the Supreme Court to declare a provision of the CDA unenforceable as a penalty. The third was to postulate that, although such a clear and unmistakeable intention is manifested in the specific references in ss 17(1)(c) and 51 of the Casino Act to "penalties", it cannot be found in the references in those same provisions to "interest".²⁶

40 This reasoning inverts the scheme of the Casino Act. The CDA is an agreement that is authorised and required by statute to govern the imposition of a tax – a compulsory exaction of money by a public authority for public purposes. The imposition of a tax is a topic that is inherently and exclusively statutory,²⁷ and so that topic is treated within the scheme of the Casino Act. The agreement that can be entered into between the licensee and the Treasurer in the CDA is limited to an agreement that deals with specific matters in s 17(1)(a), (b) and (c) purposively construed within the context of the Casino Act. The enforceability of the agreement in fact entered into by the licensee and the Treasurer in the CDA within the scope of one or more of those obligations is governed by other provisions of the Casino Act.

41 Section 51(1) operates in combination with s 51(4) to permit an agreement to pay casino duty, within the scope of the description in s 17(1)(b), or to pay interest or penalties for late payment or non-payment of casino duty, within the

25 *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34].

26 *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14 at [93], [95], [101], [104], [107]-[109].

27 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 579.

13.

scope of the description in s 17(1)(c), to be enforced by the Treasurer against the licensee as a statutory debt. That mechanism of enforcement is not qualified by s 17(4) of the Casino Act.

42 By providing that the CDA operates as a deed, s 17(4) permits an agreement to pay casino duty and interest and penalties for late payment or non-payment of casino duty, and any other agreement in the CDA that deals with a matter within s 17(1)(a), (b) or (c), also to be enforced at common law or in equity. By so providing, s 17(4) does not imply that such an agreement must be independently capable of enforcement at common law or in equity if the agreement is to be enforceable at all. Quite the opposite: it takes an agreement that would not be enforceable at common law or in equity and makes it enforceable. Section 17(4) does not imply that a covenant on the part of the licensee to pay casino duty and interest and penalties for late payment or non-payment of casino duty is to be treated as unenforceable if properly characterised as a penalty at common law or in equity, any more than it implies that a covenant on the part of the Treasurer to act or refrain from acting in relation to the calculation or payment of casino duty or interest or penalties for late payment or non-payment of casino duty is to be treated as unenforceable if properly characterised as the fettering of a duty or discretion to be performed or exercised in the public interest.²⁸

43 Sections 17 and 51 of the Casino Act are both concerned with substantive rights and obligations. Neither section affects the authority of the Supreme Court to determine any justiciable controversy as to those rights and obligations. That is to say, neither is concerned with jurisdiction. The interpretative principle invoked by the Court of Appeal against interpreting a statute to withdraw or limit a conferral of jurisdiction has no application to their interpretation.

44 The description of the CDA in s 17(1)(c) "dealing with interest and penalties to be paid for late payment or non-payment of casino duty" distinguishes between interest and penalties in a way that allows for the CDA to impose an obligation to pay interest for late payment or non-payment of casino duty without also imposing an obligation to pay penalties for late payment or non-payment of casino duty. That is what has been done in cl 11 of the CDA, which is expressed to deal with "interest" alone.

45 The distinction between "interest" and "penalties" in s 17(1)(c) of the Casino Act nevertheless provides no basis for limiting the rate of interest able to

28 See *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 77.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

14.

be agreed between the licensee and the Treasurer to a rate that cannot be characterised as penal. The circumstance that interest is dealt with separately from penalties in Pt 5 of the Taxation Administration Act does not suggest that interest ceases to be interest if it is imposed at a rate that can be characterised as a penalty by reference to common law or equitable principles applicable to a contract between private parties. The default position established by s 51(2) of the Casino Act that an obligation to pay interest for late payment or non-payment of casino duty, along with casino duty and penalties for late payment or non-payment of casino duty, can be imposed by regulation in the absence of a CDA tells against importing any such limitation into the relevantly unqualified language of s 17(1)(c).

Orders

46

The orders to be made are:

- (1) Appeal dismissed with costs.
- (2) Special leave to cross-appeal granted.
- (3) Cross-appeal allowed with costs.
- (4) Vary the judgment of the Court of Appeal of the Supreme Court of South Australia dated 22 February 2024 by:
 - (a) deleting the answer "Yes" to Question 3 of the questions of law referred for its consideration and substituting the answer "No"; and
 - (b) replacing Order 1 of the order for costs with an order that "The appellant is to pay the respondent's costs".

