

KAKAVAS v CROWN MELBOURNE LIMITED & ORS (M53/2012)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2012] VSCA 95

Date of judgment: 21 May 2012

Date special leave granted: 14 December 2012

The appellant sued the first respondent ("Crown") and two of its employees in the Supreme Court of Victoria for damages of \$20.5 million for losses incurred by him in gambling at their casino between June 2005 and August 2006. The appellant's claim was based on his having a 'special disability': a pathological gambling condition which allegedly impaired his ability to control, or make rational decisions about, his gambling. He claimed that the respondents knew of that disability and took unconscionable advantage of it, to their financial advantage, by encouraging him to gamble at Crown Casino over the period in question. The appellant further alleged that he suffered a disability in that, over the whole of the relevant period, he was the subject of an 'interstate exclusion order' ('IEO'), made in NSW. Under amendments to the Victorian legislation in 2002, this IEO meant that he was legally prohibited from entering a Victorian casino and (following amendments in 2004) that, if he did, any winnings paid, or payable, to him were forfeited to the State. He claimed that Crown took unconscionable advantage of this 'situational disability' by encouraging him or permitting him to gamble when he could not win, only lose.

Harper J dismissed the appellant's claim (and gave judgment for Crown on its counterclaim for \$1 million). His Honour reviewed the entirety of the appellant's gambling over the period in respect of which his claim was made and concluded that nothing which occurred during the relevant gambling period provided clear indicia of a person not able to conserve his own best interests. Crown was therefore not placed on notice that the appellant was burdened by a special disability.

The appellant's appeal to the Court of Appeal (Mandie and Bongiorno JJA and Almond AJA) was dismissed. The Court held that the appellant had failed to demonstrate that the trial judge's conclusion that he was not in a position of special disadvantage was erroneous. The judge was entitled on the evidence to reject the appellant's argument regarding his alleged special disadvantage. The 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 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. In the long run, the appellant was neither more likely nor less likely to win than any other gambler. These considerations showed that the wagering transactions were not unfair, unjust or unreasonable as required by the doctrine in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

The Court further held the principle of constructive knowledge had no application in this case. The trial judge's findings were that, in all the circumstances, Crown was entitled to accept the appellant as he sought to be

accepted. A conclusion that it should have embarked upon further investigations was precluded by those findings and, in any event, was specifically rejected as being necessary by the trial judge. This was entirely consistent with his findings generally.

The Court concluded that none of the appellant's submissions, with respect to his case of unconscionable conduct against Crown, based on his being under a special disability by reason of his being unable to control a propensity to gamble excessively, should be accepted.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that the gambling transactions of the First Respondent with the Appellant, who was a pathological gambler and a person subject to an Interstate Exclusion Order within the meaning of s 78B of the *Casino Control Act 1991* (Vic), were unconscionable within the meaning of s 51 of the *Trade Practices Act 1974* (Cth) and under the general law.
- The Court of Appeal erred in finding that the gambling transactions of the First Respondent with the Appellant were not unconscionable because they were standard gambling transactions.
- The Court of Appeal erred in failing to find that the First Respondent knew, or ought to have known, that the Appellant was subject to special disadvantage in gambling with the First Respondent.
- The Court of Appeal erred in finding that the Appellant suffered no loss by reason of gambling at the First Respondent's casino.