

NORTHERN TERRITORY RACING COMMISSION

Reasons for Decision

Complainant:	MR Z
Licensee:	Sportsbet
Proceedings:	Pursuant to Section 85(4) of the <i>Racing and Betting Act</i> – Referral of Dispute to Racing Commission for Determination
Heard Before:	Mr Andrew Maloney (Presiding Member) Mr David Loy Mr John Boneham
Date of Decision:	11 January 2016

Background

1. On 4 June 2015 Dr Ying Zhang (Ph.D.) of Ren Zhou Lawyers, Sydney (RZL) lodged a dispute through the Racing Commission's online form purporting to be on behalf of her client Mr Z.
2. Accompanying the dispute was a single page titled "Standard Costs Agreement" between RZL and Mr Z.
3. The dispute alleged the bookmaker "Sportsbetting.com.au" had failed;
"...to comply with applicable Responsible Gaming codes of practice and regulatory requirement, breach of duty care (sic) owed to the account holder resulting in losses suffered by the account holder".
4. The dispute further particularised the wagers as having been struck with the bookmaker "Sportsbet".
5. The matter including all correspondence (email) provided by both parties was fully examined by investigating officer Mark Wood.

Facts of the Matter

6. As listed in the response from RZL on 25 June 2015, RZL submitted in support of the complaint a letter detailing the provision of supporting materials, a copy of the Costs Agreement and also various screen shots from the bookmaker's website.
7. As particularised in the letter RZL alleges the bookmaker has breached Clauses 44, 52(1), 52(3) and 53(6) of the *South Australian Responsible Gambling Code of Practice* (SA Code).
8. It is further alleged that Mr Z displayed "*...indicia of a problem gambler*" which was ignored or not acted upon by the bookmaker. Also, "*...any reasonable person would have been able to infer that Mr Z is one such person who demonstrates difficulty in controlling his...personal expenditure. Particularly given that Sportsbet knew that Mr Z was only 22 years-old, no steps at all were taken by Sportsbet to*

draw Mr Z's attention to the availability or the contact details of any gambling help services".

9. Despite requests for further and better particulars there has been no specific breach alleged of the NT Code. It should also be noted that it would appear Mr Z has at no material time acknowledged a gambling problem, sought to self-exclude or otherwise refrain from wagering with the bookmaker.
10. Again, requests were made as to whether Mr Z had sought to self-exclude prior to or subsequent to this claim. A copy of a Self-Exclusion Form was sent to Dr Zhang without any response.
11. The dispute does also refer to the *Northern Territory Code of Practice for Responsible Gambling* (NT Code). Although no specific Clause is alleged to have been breached RZL;

"...note that the (NT Code) clearly states 'the...community expects gambling services to be provided in a responsible manner and in harmony with community expectations...so as to minimise the harm to consumers that may be adversely affected by gambling'".
12. It was then submitted the alleged failure of Sportsbet to adhere to the Codes and breach of its duty to consumers resulted in their client's significant financial losses and the negative impact on himself, his family and their relationship.
13. Central to the dispute is the allegation the bookmaker has not complied with the SA Code, specifically Clauses 44, 52(1), 52(3) and 53(6) which read:

44 Direct customer communications

A gambling provider must include in or with a direct customer communication—

- (a) in the case of a direct customer communication which is not a text message—information about how the customer could obtain help for a gambling problem;

52 Virtual gambling areas and account holder information and signage

(1) A gambling provider must in each virtual gambling area—

- (a) display prominently a message indicating that its gambling operations are governed by a code of practice; and
- (b) ensure that a copy of this code is available from the webpage or screen that constitutes the virtual gambling area.

...

- (3) A gambling provider must ensure the prominent display of the condensed warning message at every point of sale in its virtual gambling areas.

...

- (6) A gambling provider must take all reasonable steps to ensure that an account holder who demonstrates difficulty in controlling his or her personal expenditure on gambling products has his or her attention drawn to the name and telephone number of a widely available gambling help service.

Cross-jurisdictional issue

14. It is well established the Northern Territory Racing Commission (NTRC) is unable to make determinations that a bookmaker has breached South Australian statutes or the like. This would of course be *ultra vires*. Dr Zhang on behalf of her client has however asked the Commission to make such findings but also consider the NT Code although not further particularised.
15. The jurisdictional issue was raised with Dr Zhang in the correspondence of Inspector Wood on 26 June in which he invited "...your submissions in relation to the obvious jurisdictional issues arising". It was also asked if the matter had been referred to the Independent Gambling Authority of South Australia (IGA).

Matters in dispute

16. There appears to be no dispute per se nor for any remedial action to be considered and as such the considerations will be confined to whether the Bookmaker has breached the said Code of Practices.

Considerations

17. The dispute is not a betting dispute as provided for in the *Racing and Betting Regulations*.

"17 Settlement of betting disputes and claims in relation to bookmakers

- (1) *Subject to subregulation (2), a person making a claim to the Commission in respect of a winning bet that has not been paid to him by a bookmaker who accepted the bet shall submit particulars of his claim in writing to the Commission not later than 14 days after the completion of the sporting event in respect of which the bet was accepted."*

18. Despite this there is provision under the *Racing and Betting Act* (the Act) to deal with this complaint.
19. The Act does provide offences for failure to comply with a code of practice which is in place currently. There is no delegation of this section and therefore it remains a matter for the Racing Commission itself.

"148A Codes of practices

- (1) *For the purpose of providing practical guidance to bookmakers on any matter relating to this Act, the Commission may, by notice in the Gazette, approve a code of practice.*
- (2) *A code of practice may consist of a code, standard, rule, specification or provision relating to matters in this Act formulated, prepared or adopted by the Commission and may apply, incorporate or refer to a*

document formulated or published by a body or authority as in force at the time the code of practice is approved or as amended, formulated or published from time to time.

(3) A notice under subsection (1) must indicate where a copy of the code of practice to which it relates, and all documents incorporated or referred to in the code, may be inspected by members of the public and the times during which it may be inspected.

(4) A bookmaker must not contravene or fail to comply with a code of practice approved under this section."

20. The Code of Practice (the Code) was gazetted on 7 June 2006.

21. Section 4 of the Code provides the following:

"4. Exclusion of Problem Gamblers.

Gambling providers are to provide patrons who feel they are developing a problem with gambling, with the option of excluding themselves from the gambling venue or site.

4.1 Patron Responsibility. *Gambling patrons will be encouraged to take responsibility for their gambling activity. Gambling providers are to provide patrons who feel they are developing a problem with gambling with the option of excluding themselves from the gambling venue or site.*

4.2 Self-Exclusion Procedures. *A generic form of self-exclusion has been developed for use by Northern Territory gambling providers, (Note: casinos have specific provisions in place). Procedures with clear, supporting documentation are to be implemented and application forms for self-exclusion must be available at Reception, within the gambling area, adjacent to the gambling products or/and on the website.*

For Internet/Telephone Sports Bookmakers and Online Gaming Licensees: Appropriate self-exclusion facilities and procedures are to be developed and implemented. (emphasis added)

4.3 Completed Self-Exclusion Forms. *Management and/or security staff of the gambling provider to be supplied with the completed self-exclusion forms together with, where appropriate, a photo of the relevant person. These forms will include the stated wish of the patron to be reminded of their desire to be excluded from the specified gambling provider. Details will also be entered in the Responsible Gambling Incident Register.*

For Internet/Telephone Sports Bookmakers and Online Gaming Licensees: The website is to operate such that the submission of a completed self-exclusion triggers technical responses that block access by the player to the site, and this action is written to the audit log for the system. (emphasis added)"

Duty of care v individual autonomy and responsibility

22. As this case involves heavy losses by the complainant it is beholden upon the Commission to consider if the bookmaker owes a duty of care to a punter who is betting beyond their means.

23. The Commission is aware that for the bookmaker to be able to make that assessment he would need access to a considerable amount of personal financial information from the punter to which they have no right to request.
24. Whether a bookmaker owes a client a duty of care to prevent them gambling has been examined by the Courts and the position is clear. The bookmaker owes no such duty, the onus remains upon the client to refrain from accessing the site and placing wagers.
25. The well-known authorities in relation to duty of care in relation to gambling being *Reynolds v Katoomba RSL All Services Club Limited* [2001] NSWCA 234 (20 September 2001) and *Agar v Hyde* (2000) 201 CLR 552 are of particular relevance in this consideration. Also of use is *C.A.L. No 14 Pty Ltd v Scott* [2009] HCA 47 which is the Tasmanian liquor matter considered by the High Court in relation to duty of care of a licensee.
26. The cases all provide no general duty of care is owed by the licensee (in this case a bookmaker) towards the client unless exceptional circumstances exist. Of relevance is the statement of Spigelman CJ in the *Reynolds* matter:
- "In my opinion this combination of circumstances is such that no duty of care was owed of the character for which the Appellant contended. The risks were obvious. As Gleeson CJ said with respect to the analogous situation of a participant in sport: "The only way to avoid risk of injury is not to play" (Agar v Hyde at [18]). The Appellant must accept responsibility for his own actions. There was no duty of care. There was no unconscionable conduct."*
27. It is clear in this current matter that the risks were obvious, however on the basis of the submission of RZL it was suggested that Mr Z is not capable of refraining from gambling.
28. The current leading authority in matters such as this is *Kakavas v Crown Melbourne Limited*¹ which dismissed an appeal by a client of Crown Casino, Mr Kakavas for a return of losses as a result of gambling. It was argued the client had been diagnosed with an illness "pathological gambling" and the casino was aware of the special disadvantage and sought to benefit from it through unconscionable dealing.

Kakavas v Crown

The appellant, Mr Kakavas sought to change the approach in the High Court Appeal away from the original argument that he had been lured or enticed to gamble. The approach in the High Court was:

"...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. The appellant submitted that Crown exploited his condition by allowing him to gamble at its casino."²

¹ *Kakavas v Crown Melbourne Limited & Ors*, [2013] HCA 25, (5 June 2013) M117/2012.

² Above n4 at [5].

29. Mr Kakavas sought to rely on the principles outlined in another often quoted authority, *Commercial Bank of Australia v Amadio*³:

*"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".*⁴

30. In another matter Deane J explained his application of the *Amadio* principle as being:

*"The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization".*⁵

31. In an overview of the *Kakavas* matter the Court stated:

*"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."*⁶

32. It has been submitted by RZL that Mr Z is unable to control his urges to gamble.

33. In the *Reynolds* matter Spigelman CJ made reference to a similar situation:

*"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."*⁷

34. It was held by Deane J in *Louth v Diprose*⁸ the clear requirement was the establishment of the extent of the knowledge of the disability and whether victimisation resulted from it. His Honour stated the special disability must be:

"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."

³ *Commercial Bank of Australia Ltd v Amadio*, (1983) 151 CLR 447 at 462; [1983] HCA 14.

⁴ Above n6 at [462].

⁵ *Louth v Diprose*, (1992) 175 CLR 621 at [638].

⁶ Above n4 at [30].

⁷ *Reynolds v Katoomba RSL All Services Club Ltd*, (2001) 53 NSWLR 43 at 53.

⁸ Above n8, at [637].

35. In *Kakavas* the Court highlighted the unusual circumstances which surround wagering activities where competing parties enter with the intention of inflicting loss on the other party.

*"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."*⁹

36. The most recent local consideration of the duty of care was in *Centrebet v Baasland*¹⁰ in which the Northern Territory Supreme Court upheld the previously established principles.

In his decision Hiley J held:

Negligence, duty of care and causation

[88] *As with the United Kingdom, the position in Australia is that, prima facie, gamblers are not owed fiduciary type duties or duties of care by the companies with which they choose to place their bets, to prevent them from continuing to bet or otherwise to protect their interests.*

[89] *This was emphatically affirmed by the High Court of Australia in Kakavas v Crown Melbourne Ltd and Others in June this year. That matter concerned a "high roller" who lost a large amount of money gambling at a casino. He too had been encouraged to continue gambling, including by being provided with incentives such as rebates on losses and offers of transport on Crown's corporate jet. He too asserted that he suffered from a pathological addiction to gambling. Moreover, he was already known by Crown and others to be a problem gambler. Although the cause of action considered by the High Court was one based upon unconscionable conduct, their Honours' reasoning also leads to the conclusion that there would not have been a duty of care owed to the gambler that could have led to a successful negligence claim.*

[90] *Their Honours also noted the potential difficulty in establishing legal causation for Kakavas' losses, which arose from the fact that he had chosen to gamble and he did not have the benefit of a finding that he would have avoided his gambling losses by not gambling with Crown.*

[91] *There is nothing in the evidence or other materials before me, in particular in the emails and other correspondence leading up to the commencement of the Norway District Court Proceedings, in the Norway Writ, or in Baasland's written responses to the NT Writ that could form the basis of any relevant duty of care owed by Centrebet to Baasland.*

[92] *Moreover, I do not consider that Baasland can establish causation. He chose to embark upon and to continue his betting and gambling activities,*

⁹ Above n4 at [25].

¹⁰ *Centrebet Pty Ltd v Baasland* [2013] NTSC 59

and did so not only with Centrebet but also others. Had he gambled with someone else instead of Centrebet he may well have suffered the same losses.

37. An analysis of the betting demonstrates it was not uncommon for Mr Z to bet in the thousands of dollars and up to \$10,000.00 at a time whilst it is accepted the betting on 25 May 2015 was considerably larger. It is submitted by RZL that in placing the wagers by telephone it was clear Mr Z was in difficulty and was suffering.
38. The calls referred to by RZL have been supplied and it is clear English is not Mr Z's first language; accordingly there are great language difficulties in placing the wagers. It is also clear from the recordings that when requesting to place a \$60,000.00 tennis wager the operator was very surprised at the amount when he eventually understood Mr Z accent. He is heard exclaiming words to the effect "...\$60,000, Jesus Christ".
39. An RSG staff member later called Mr Z to speak with him about his wellbeing and gambling and he was not interested in talking. He did not wish to discuss the matter and eventually advised words to the effect "...I am OK". Whilst there are obvious language issues involved in this matter it may be accepted during this call it would appear that Mr Z is not entirely honest in his statement that he is "OK".
40. A call from the RSG staff member on 26 May 2015 was as a result of the bookmaker's observations about Mr Z's dramatically increased betting pattern on 25 May 2015. The staff member asked if he was OK and attempted to engage with Mr Z about his issues, Mr Z states "...you don't want to worry me (sic), thank you". The account was subsequently closed.

DECISION

41. On the basis of the above considerations and being fully confident that the matter was investigated thoroughly and expertly by our Investigating Officer Mark Wood we find no case for the bookmaker to answer in relation to the breaching of the NT Code of Practices.
42. As alluded to above we have no jurisdiction in relation to making any finding in regard to any purported breach of the *South Australian Responsible Gambling Code of Practice* (SA Code).



Andrew Maloney

PRESIDING MEMBER

11 January 2016