

NORTHERN TERRITORY RACING COMMISSION

Reasons for Decision

Complainant:	Mr S
Licensee:	Luxbet Pty Ltd
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 Jim McNally
Date of Decision:	19 February 2016

Background

- 1) On 17 July 2015 Mr S (“the Complainant”) sent an email to the Gambling Disputes generic email asking “... *to speak to someone in regards to (an) email*” he had received from Luxbet Pty Ltd (“the Bookmaker”).
- 2) The matter including all correspondence (email) provided by both parties was fully examined by investigating officer Mark Wood.

Facts of the Matter

- 3) The Complainant was seeking repayment of \$300,000 in lost wagers claiming he had self-excluded on or around 25 January 2011.
- 4) In the 2010/2011 years the Complainant had owed the bookmaker money and agreed to pay \$2500 towards that debt and close his account. The \$2500 payment was never made.
- 5) Subsequent to that time the Complainant opened two (2) accounts with the bookmaker being XXXXXX and XXXXXX from which he had losses of \$306,119.32.
- 6) The Complainant subsequently sort to have his losing wagers refunded as he alleges he had notified the bookmaker that he was a problem gambler back in January 2011.
- 7) No evidence has been produced to verify the complaint.

Matters in dispute

- 8) The Bookmaker denies having ever being notified by the Complainant that he was a problem gambler prior to 15 June 2015 and the Bookmaker claims to have acted immediately on 15 June 2015 as a result of a telephone call between the Complainant and Mr Tony Quinn of Luxbet whereupon the Complainant made the claim he was a problem gambler.

Considerations

- 9) 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.”

- 10) Despite this there is provision under the *Racing and Betting Act* (“the Act”) to deal with this complaint.

- 11) 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.”

- 12) The Code of Practice (“the Code”) was gazetted on 7 June 2006.

- 13) 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

- 14) 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.
- 15) 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.
- 16) 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.
- 17) 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.
- 18) 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."

- 19) It is clear in this current matter that the risks were obvious, however on the basis of the submission of the Complainant he suggests he is not capable of refraining from gambling.
- 20) 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

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

- 21) 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

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

² Above n4 at [5].

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].

22) 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

23) It has been submitted by the Complainant that he is unable to control his urges to gamble. 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

24) 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."

25) 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

26) 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.

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].

⁹ Above n4 at [25].

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

27) 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.

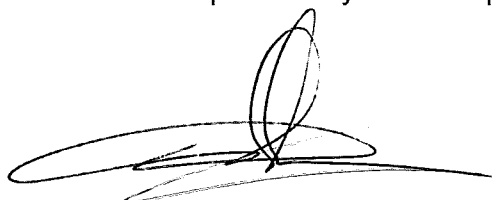
[92] Moreover, I do not consider that Baasland can establish causation. He chose to embark upon and to continue his betting and gambling activities, and did so not only with Centrebet but also others. Had he gambled with someone else instead of Centrebet he may well have suffered the same losses.

DECISION

28) As the claim of self-excluding dates back to 2011 the matter may be considered to be out of time pursuant to Regulation 17 of the Racing and Betting Regulations which prescribes a 14 day limitation period. This appears to be the case however given the nature of the complaint relating to the serious issue of Problem Gamblers the Commission has determined that it is appropriate to review the complaint taking note of the investigation into the evidence presented by both parties

29) No evidence has been provided to confirm that the Complainant applied to be self-excluded back in January 2011 from opening or operating a betting account. The lack of evidence makes it extremely difficult to make a determination as to whether the Bookmaker has breached section 4 of the Code of Practice.

- 30) Accordingly it is the view of the Commission that the Bookmaker has not breached the Act or the code and note that as soon as they became aware that the Complainant considered himself to be a Problem Gambler on 15 June 2015 they took the appropriate action to prevent the Complainant from further betting with them.
- 31) It is not the role of the commission to award damages nor does it have the power to do so and as such it is unable to direct the Bookmaker to refund the losing wagers as requested by the Complainant.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

David Loy (Member)
For Andrew Maloney
Presiding Member

19 February 2016